An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-773

Filed: 17 April 2018

Dare County, Nos. 94 CRS 5532–33, 95 CRS 4955–57, 98 CRS 5753–54

STATE OF NORTH CAROLINA

v.

DANIEL WEBSTER HOVIS

Appeal by defendant from order entered 27 January 2017 by Judge Walter H. Godwin, Jr., in Dare County Superior Court. Heard in the Court of Appeals 29 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant.

ELMORE, Judge.

Defendant appeals from the trial court's order imposing lifetime satellite-based monitoring (SBM) on the grounds that defendant is a recidivist and was convicted of an aggravated offense. Because the terms "recidivist" and "aggravated offense" only apply to offenses committed on or after 1 October 2001, the trial court erred in

ordering defendant to submit to lifetime SBM on those grounds. We therefore vacate the order and remand to the trial court for a new SBM hearing.

On 28 May 2003, defendant pled guilty to second-degree rape, second-degree forcible rape, two counts of second-degree sexual offense, and four counts of indecent liberties with a minor. The offense dates for the convictions ranged from May 1984 to June 1991. As part of defendant's plea agreement, the State dismissed four additional counts of indecent liberties with a minor. The trial court consolidated the remaining convictions into one judgment and sentenced defendant to forty years of imprisonment.

Defendant was released on parole on or about 20 October 2016. On 9 January 2017, the trial court held a hearing pursuant to N.C. Gen. Stat. § 14-208.40B to determine whether defendant was subject to SBM. At the conclusion of the hearing, the trial court found that defendant was a recidivist as defined in N.C. Gen. Stat. § 14-208.6(2b) and that defendant had been convicted of at least one aggravated offense as defined in N.C. Gen. Stat. § 14-208.6(1a); thus, the trial court ordered defendant to enroll in SBM for the remainder of his natural life. Defendant timely appealed.

Defendant contends, and the State agrees, that the trial court erred in finding defendant was subject to lifetime SBM. We also agree.

On appeal from a SBM order, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review

the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Robinson*, ___ N.C. App. ___, ___, 791 S.E.2d 862, 868 (2016) (citation and internal quotation marks omitted).

Section 14-208.40(a) of our General Statutes provides:

> The [SBM] program shall be designed to monitor three categories of offenders as follows:
>
> (1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is *a recidivist*, or was convicted of an *aggravated offense* as those terms are defined in G.S. 14-208.6.
>
> (2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Division of Adult Correction's [and Juvenile Justice's] risk assessment program requires the highest possible level of supervision and monitoring.
>
> (3) Any offender who is convicted of G.S. 14-27.23 or G.S. 14-27.28, who shall be enrolled in the satellite-based monitoring program for the offender's natural life upon termination of the offender's active punishment.

N.C. Gen. Stat. § 14-208.40(a) (2017) (emphasis added). If the trial court determines the offender falls under subsections (a)(1) or (a)(3), the trial court shall impose

lifetime SBM. N.C. Gen. Stat. § 14-208.40B(c) (2017); *see also State v. Yow*, 204 N.C. App. 203, 205, 693 S.E.2d 192, 194 (2010) ("N.C. Gen. Stat. § 14-208.40B(c) requires the trial court to enroll defendant in [SBM] for life if he is determined to be a recidivist."). However, if the trial court determines the offender falls under subsection (a)(2), the court shall impose SBM for a period of time determined by the court. *Id.*

Here, the trial court imposed lifetime SBM on defendant pursuant to N.C. Gen. Stat. §§ 14-208.40(a)(1) and 14-208.40B(c). Specifically, the trial court found that defendant was a recidivist and that at least one of his convictions was an aggravated offense. However, the terms "recidivist" and "aggravated offense" in Article 27A, Chapter 14 were not enacted by the General Assembly until 2001, and the terms only apply to offenses committed on or after 1 October 2001. *See* 2001 N.C. Sess. Laws 373. The latest offense for which defendant was convicted occurred on 1 June 1991. Thus, the trial court erred in finding and concluding that defendant was subject to lifetime SBM by virtue of being a "recidivist" and having been convicted of an "aggravated offense." Accordingly, we vacate the order and remand to the trial court for a new hearing to consider whether defendant is subject to SBM pursuant to other provisions in Article 27A, Chapter 14 of our General Statutes.

Defendant contends the trial court's order should be reversed without remand because the State failed to meet its burden of showing that lifetime SBM is reasonable

under the Fourth Amendment to the Constitution. However, because we hold that the trial court erred in concluding defendant was subject to lifetime SBM on the basis that he was a recidivist and had committed an aggravated offense, defendant's argument regarding whether the State met its burden of showing that lifetime SBM was reasonable is moot. Should the trial court determine on remand that defendant is subject to SBM on other grounds, either for life or a term of years, the court must hold a new hearing pursuant to *Grady v. North Carolina*, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459, 462 (2015), to determine the reasonableness of the new search. Thus, we need not address defendant's argument.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).