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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-824-2

Filed 1 October 2024

Lenoir County, No. 14 CRS 51201

STATE OF NORTH CAROLINA

v.

WILLIE RAY HINES

Appeal by defendant from order entered 25 May 2022 by Judge Imelda J. Pate in Lenoir County Superior Court. Heard in the Court of Appeals 24 May 2023. By opinion issued 18 July 2023, a unanimous panel of this Court dismissed defendant's appeal. On 18 October 2023, the Supreme Court of North Carolina allowed defendant's petition for discretionary review "for the limited purpose of vacating the decision of the Court of Appeals and remanding the matter to th[is C]ourt for consideration of defendant's arguments based on the existing trial court record."

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele Goldman, for the defendant-appellant.*

TYSON, Judge.

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This Court initially dismissed Willie Ray Hines’s (“Defendant”) appeal without reaching the merits due to Defendant’s failure to include a complete copy of the satellite-based monitoring (“SBM”) order from which he had appealed. *See State v. Hines (“Hines I”),* 289 N.C. App. 720, 888 S.E.2d 724, 2023 WL 4568004 (unpublished), *vacated and remanded,* 385 N.C. 389, 892 S.E.2d 600 (2023).

Defendant petitioned for discretionary review with the Supreme Court of North Carolina. The Supreme Court issued an order allowing Defendant’s petition “for the limited purpose of vacating the decision of the Court of Appeals and remanding the matter” to our Court “for consideration of [D]efendant’s arguments based on the existing trial court record.” *State v. Hines (“Hines II”),* 385 N.C. 389, 892 S.E.2d 600 (2023) (mem.).

**I. Background**

Defendant entered an *Alford* plea to a charge of attempted second-degree rape. *See North Carolina v. Alford,* 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970); *State v. Baskins,* 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018), *disc. review denied,* 372 N.C. 102, 824 S.E.2d 409 (2019). Defendant was sentenced to active incarceration of 58 to 130 months and ordered to register as a sex offender for a period of 30 years. The North Carolina Division of Adult Corrections (“DAC”) was ordered to perform a risk assessment on Defendant, report the results to the court, and return Defendant to the court on 14 September 2015 “for a determination of the need for satellite-based monitoring.” Neither the risk assessment nor the bring-back hearing

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were conducted in 2015.

Defendant was released from his active sentence in March 2019. Defendant's STATIC-99R assessment indicated Defendant had an "[a]verage risk" of recidivism.

Defendant was charged with new offenses including one reportable offense, sexual battery, approximately ten months after he was released from prison, while he remained under post-release supervision. *See* N.C. Gen. Stat. § 14-208.6(4)(a), (5) (2023). Defendant pleaded guilty to these charges, his post-release supervision was revoked, and he was returned to DAC custody.

"DAC contacted probation and parole saying that the sex offender findings were never made properly in" Defendant's case, 14 CRS 51201. Defendant's bring-back hearing was calendared "to determine [sex-offender] registration as well as satellite-based monitoring" for 14 CRS 51201. The State asserted the reason for the delay in holding Defendant's bring-back hearing was neither DAC's nor the relevant probation and parole authorities' fault. Neither DAC nor the relevant probation and parole authorities were aware Defendant was "out in the community being supervised on post-release [supervision] without being enrolled in at least [sex-offender] registration" until Defendant's December 2021 conviction for sexual battery prompted revocation of "his post-release supervision, and he was sent back to DAC."

Defendant's bring-back hearing for 14 CRS 51201 was held on 25 May 2022 to determine Defendant's eligibility for SBM. *See* N.C. Gen. Stat. § 14-208.40B (2023). Defendant's conviction for attempted second-degree rape made Defendant eligible for

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the sexual offender registry and for SBM. Defendant's 2021 guilty plea to sexual battery, which occurred while he was under supervised release, was another reportable conviction.

The State proposed the following findings of fact which track the AOC-CR-615 form for judicial findings for sex offenders:

[THE STATE]: Judge, . . . for findings I would suggest: 1(b) [the defendant has been convicted of a reportable conviction under N.C. Gen. Stat. § 14-208.6—specifically, a sexually violent offense under § 14-208.6(5) or an attempt to commit such offense]; 2(b), is not a recidivist. Because at the time of the 2014 case he did not have another conviction.

THE COURT: Uh-huh.

[THE STATE]: 3(b), is not a re-offender. And the only reason why he doesn't qualify as a re-offender there is because his conviction is sexual battery, which is the misdemeanor; 4, has not been classified as a sexually violent predator; 5, it is not an aggravated offense he was convicted of in this case . . . because it's an attempted rape that he pled to and was convicted of; 6, it did not involve the physical, mental, or sexual abuse of a minor.

Judge, I would not ask that you make the finding that he presents or may present a danger to minors under the age of 18 because I don't think I have a basis for that, his victims in both cases have been grown women.

THE COURT: Yes, ma'am.

[THE STATE]: And Judge, number 8, the victim was 49 years of age at the time of the commission of this event. It was his wife who was the victim in this case.

The State requested for the trial court to order Defendant to register as a sex

offender for a period of 30 years. Defendant's counsel did not want to be heard on sex-offender registration, as previously imposed, but did object to the imposition of SBM on Fourth Amendment grounds. The trial court again ordered Defendant to register as a sex offender for 30 years and to also enroll in SBM for 10 years upon his release from imprisonment. Defendant appealed.

## **II. Jurisdiction**

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

## **III. Issue**

Defendant argues the trial court erred by requiring him to enroll in SBM.

## **IV. Standard of Review**

This Court:

review[s] 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. We [then] review the trial court's order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found.

*State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citations, quotation marks and alterations in original omitted).

## **V. Preservation**

Defendant acknowledges he timely raised Fourth Amendment objections to the imposition of SBM below, but acknowledges he did not raise his statutory argument

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below. “It is well settled that an error, even one of constitutional magnitude, that a defendant does not bring to the trial court’s attention is waived and will not be considered on appeal.” *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004) (quoting *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005)).

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires a party to present a timely request, objection, or motion to the trial court to preserve a question for appellate review. See N.C. R. App. P. 10(a)(1). “[A] defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.” *State v. McDowell*, 301 N.C. 279, 291, 271 S.E.2d 286, 294 (1980) (citing *State v. Gaiten*, 277 N.C. 236, 176 S.E.2d 778 (1970)). Our Supreme Court further held: “in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. In addition, it must affirmatively appear in the record that the issue was passed upon by the trial court.” *Id.* (citations omitted).

Defendant asserts this issue is automatically preserved as an alleged violation of a statutory mandate. In *State v. Ashe*, our Supreme Court held: “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Our Supreme Court has held:

[a] statute contains a statutory mandate when it is clearly mandatory, and its mandate is directed to the trial court. A statutory mandate is directed to the trial court when it, either (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial or at specific courtroom proceedings that the trial judge has authority to direct.

*State v. Chandler*, 376 N.C. 361, 366, 851 S.E.2d 874, 878 (2020) (citations and internal quotations omitted).

“[T]he [trial] court shall determine if the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a)” when conducting a bring-back hearing pursuant to N.C. Gen. Stat. § 14-208.40B. N.C. Gen. Stat. § 14-208.40B(c) (Supp. 2022). “As used in statutes, the word ‘shall’ is generally imperative or mandatory.” *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979).

The statute requires the trial court to determine whether the defendant falls into one of the categories articulated in N.C. Gen. Stat. § 14-208.40(a). This action requires a specific act by the trial judge. N.C. Gen. Stat. § 14-208.40B(c) creates a statutory mandate which preserves Defendant’s objection for appellate review without his specific objection.

## **VI. SBM Determination**

Defendant argues the trial court did not make the statutorily required findings to impose SBM.

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“[T]he SBM determination hearing has no effect whatsoever upon the defendant’s prior criminal convictions or sentencing and is not a part of any ‘criminal proceedings’ or ‘criminal prosecution’ of the defendant.” *State v. Singleton*, 201 N.C. App. 620, 625, 689 S.E.2d 562, 565 (2010). “An order for enrollment in SBM is a civil penalty.” *State v. Blankenship*, 270 N.C. App. 731, 740, 842 S.E.2d 177, 183 (2020) (citation omitted).

Our General Assembly enacted our SBM program to “monitor three categories of offenders”:

(1) Any offender who is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4) and who is required to register [as a sex offender] because the defendant is classified as a sexually violent predator, is a reoffender, or was convicted of an aggravated offense as those terms are defined in [N.C. Gen. Stat. §] 14-208.6 and requires the highest possible level of supervision and monitoring, as determined by a court.

(2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), (ii) is required to register [as a sex offender], (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) requires the highest possible level of supervision and monitoring, as determined by a court.

(3) Any offender who is convicted of [N.C. Gen. Stat. §] 14-27.23 or [N.C. Gen. Stat. §] 14-27.28 and requires the highest possible level of supervision and monitoring, as determined by a court.

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N.C. Gen. Stat. § 14-208.40(a)(1)-(3) (2023).

Where a defendant is convicted of a reportable conviction, but no determination is made at sentencing regarding his eligibility for satellite-based monitoring, bring-back proceedings must be conducted in accordance with the provisions of N.C. Gen. Stat. § 14-208.40B. During a bring-back hearing, such as the hearing in the case before us, the court “shall determine if the offender falls into one of the [three above] categories described in [N.C. Gen. Stat. §] 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to [N.C. Gen. Stat. §] 14-208.40A.” N.C. Gen. Stat. § 14-208.40B(c) (2023).

Section 14-208.40A provides that “the district attorney shall present to the court any evidence” of the following circumstances pertinent to the trial court’s determination of the offender’s qualification for satellite-based monitoring:

- (i) that the offender has been classified as a sexually violent predator pursuant to [N.C. Gen. Stat. §] 14-208.20, (ii) that the offender is a reoffender, (iii) that the conviction offense was an aggravated offense, (iv) that the conviction offense was a violation of [N.C. Gen. Stat. §] 14-27.23 or . . . 14-27.28, or (v) that the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(a) (2023). Additionally, “[t]he district attorney shall have no discretion to withhold any evidence required to be submitted to the court” and “[t]he offender shall be allowed to present to the court any evidence that the district attorney’s evidence is not correct.” *Id.*

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After receiving the parties' evidence, the trial court must then determine whether a defendant's conviction places him in one of the three categories of offenders qualifying for satellite-based monitoring under N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.40A(b). If the trial court makes such a determination, then the trial court:

shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to [N.C. Gen. Stat. §] 14-208.20, (ii) the offender is a reoffender, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of [N.C. Gen. Stat. §] 14-27.23 or . . . 14-27.28, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

*Id.*

At the bring-back hearing, the trial court made the oral and written findings as proposed by the State, which tracked the statutorily-required findings of N.C. Gen. Stat. § 14-208.40A(b), but the court did not determine whether Defendant fell within any of the N.C. Gen. Stat. § 14-208.40(a) categories qualifying an offender for satellite-based monitoring. We vacate that portion of the order requiring SBM, without prejudice to allow the State to refile another SBM application. *See State v. Bursell*, 372 N.C. 196, 201, 872 S.E.2d 302, 306 (2019).

**VII. Conclusion**

The trial court made oral and written findings which tracked N.C. Gen. Stat. § 14-208.40A(b), but it did not determine whether Defendant fell within any of the

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N.C. Gen. Stat. § 14-208.40(a) categories qualifying as an offender for SBM. We vacate the SBM portion of the order and remand to allow the State to file another SBM application. The portion of the order requiring Defendant's sex-offender registration is unchallenged on appeal and is affirmed.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges ZACHARY and STADING concur.

Report per Rule 30(e).