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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO INIGUEZ,

Defendant and Appellant.

A130229

(San Mateo County
Super. Ct. No. CIV403953)

Defendant was committed to an indeterminate term of confinement as a sexually violent predator (SVP). He raises several constitutional challenges to the imposition of an indeterminate term. We affirm the order of commitment on the basis of existing decisions of the Supreme Court and Courts of Appeal in which these challenges have been resolved against him as a matter of law.

I. BACKGROUND

Defendant has spent most of his adult life in and out of prison and mental health confinement. Starting at age 19 with a conviction for indecent exposure, he has committed more than 15 criminal sexual acts, often upon children. At some point in the 1990's he was found to be an SVP, and he appears to have been civilly confined since then.

In February 2006, the District Attorney of San Mateo County filed a petition to extend defendant's SVP confinement for two years, the maximum extension permitted by the law in effect at the time. Prior to a hearing on the petition, in September 2006, the

district attorney filed an amended petition to seek defendant's commitment for an indeterminate term, pursuant to recently passed amendments to the governing statute. Following a jury trial in May 2010, defendant was found to be an SVP, and the trial court, applying the new law, committed him to an indeterminate term.¹

II. DISCUSSION

Defendant contends for several reasons that his commitment for an indeterminate term is unconstitutional. As he acknowledges, with one exception the issues he raises have been decided against him by decisions of our Supreme Court, primarily in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*).

As the court explained in *McKee I*, the SVP statutes, Welfare and Institutions Code section 6600 et seq., originally established sequential two-year terms of confinement for persons found to be SVP's. Upon the expiration of each two-year term, the SVP's confinement ended unless, after a jury trial, he or she was again found beyond a reasonable doubt to satisfy the statutory criteria. (*McKee I, supra*, 47 Cal.4th at p. 1185.) Upon the passage of Proposition 83 in 2006, the term of an SVP's confinement was changed from two years to an indeterminate period. Under Proposition 83, an SVP cannot obtain release from confinement, in the absence of the state's consent, without proving at trial he or she no longer meets the statutory definition. (*McKee I*, at pp. 1186–1187.)

Among other issues, the defendant in *McKee I* argued the imposition of an indeterminate term violated equal protection because it constituted significantly less favorable treatment than that provided to mentally disordered offenders (MDO's) and persons found not guilty by reason of insanity (NGI's). The court agreed with the defendant that NGI's and MDO's were similarly situated with SVP's for purposes of equal protection analysis (*McKee I, supra*, 47 Cal.4th at pp. 1203–1207), but it concluded the state was entitled to an opportunity to prove that, notwithstanding the similarities,

¹ Because defendant raises no procedural or evidentiary errors on appeal, the details of the commitment proceeding are not pertinent.

SVP's as a class constitute a substantially greater risk to society, thereby justifying the less favorable treatment. The court remanded the case to the trial court for a hearing on this issue. (*Id.* at p. 1208.)

Following its decision in *McKee I*, the Supreme Court entered identical minute orders in each of the similar SVP appeals in which the court had issued grant-and-hold orders, remanding the cases and directing a suspension of proceedings pending further proceedings in *McKee*. An example is the following order from *People v. Riffey* (S164711, May 20, 2010):

“The above-entitled matter is transferred to the Court of Appeal, Third Appellate District, with directions to vacate its decision and to reconsider the cause in light of [*McKee I*]. (Cal. Rules of Court, rule 8.528(d).) In order to avoid an unnecessary multiplicity of proceedings, the court is additionally directed to suspend further proceedings pending finality of the proceedings on remand in *McKee* (see *McKee I*), *supra*, 47 Cal.4th at pp. 1208–1210), including any proceeding in the Superior Court of San Diego County in which *McKee* may be consolidated with related matters. ‘Finality of the proceedings’ shall include the finality of any subsequent appeal and any proceedings in this court.”

Defendant's appeal raises the same equal protection argument left unresolved in *McKee I*. In an earlier decision in this matter, filed September 28, 2011, we directed that further appellate proceedings be suspended pending the finality of *McKee*.² (*People v. Iniguez* (Sept. 28, 2011, A130229) [nonpub. opn.])

Upon remand in *McKee I*, the trial court held a 21-day evidentiary hearing on the constitutional justification for the disparate treatment of SVP's and concluded the People had met their burden by presenting evidence to “support a reasonable perception by the electorate that SVP's present a substantially greater danger to society than do MDO's or NGI's.” (See *People v. McKee* (2012) 207 Cal.App.4th 1325, 1330–1331 (*McKee II*).)

² By separate order, we have vacated the September 28, 2011 decision. In so doing, we rendered moot defendant's pending motion to refile or recall that decision, and on that basis we deny defendant's motion.

The evidence demonstrated that SVP's pose a higher risk of reoffending than MDO's or NGI's (*id.* at pp. 1340–1342), victims of sexual offenses suffer greater trauma than victims of other offenses due to the intrusiveness and enduring psychological, physiological, social and neuropsychological impacts of sexual assault or abuse (*id.* at pp. 1342–1344), and SVP's have significantly different diagnoses, treatment plans, motivations, degree or extent of compliance with treatment directives, and success rates than MDO's and NGI's (*id.* at pp. 1344–1347). The court concluded the evidence supported a reasonable inference that an indeterminate, rather than a determinate (e.g., two-year), term of civil commitment improves, rather than detracts from, the success of treatment plans for SVP's. (*Id.* at p. 1347.)

The Fourth District Court of Appeal concluded, “[T]he People on remand met their burden to present substantial evidence, including medical and scientific evidence, justifying the amended [Sexually Violent Predators] Act’s [(SVPA)] disparate treatment of SVP’s (e.g., by imposing indeterminate terms of civil commitment and placing on them the burden to prove they should be released). [Citation.] The People have shown that, ‘notwithstanding the similarities between SVP’s and MDO’s [and NGI’s], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society.’ [Citation.] The People have shown ‘that the inherent nature of the SVP’s mental disorder makes recidivism as a class significantly more likely[;] . . . that SVP’s pose a greater risk [and unique dangers] to a particularly vulnerable class of victims, such as children’; and that SVP’s have diagnostic and treatment differences from MDO’s and NGI’s, thereby supporting a reasonable perception by the electorate that passed Proposition 83 that the disparate treatment of SVP’s under the amended Act is necessary to further the state’s compelling interests in public safety and humanely treating the mentally disordered.” (*McKee II, supra*, 207 Cal.App.4th p. 1347.)

In October 2012, the Supreme Court denied a petition for review in *McKee II* (*McKee II, supra*, 207 Cal.App.4th 1325, review den. Oct. 10, 2012), and for our

purposes the *McKee* proceedings are now final. In December 2012, we requested and received letter briefs from the parties regarding the proper disposition of this appeal.

Defendant severely criticizes the reasoning and result in *McKee II*, but we concur with the court's reasoning and holding. In addition, we conclude the Supreme Court's direction in the orders of remand to "avoid an unnecessary multiplicity of proceedings" indicated the court's intention that the proceedings in *McKee* would resolve the issue as a matter of law for all SVP's, not merely for the defendant in that case alone or for SVP's convicted of crimes against children, like him. In light of the Supreme Court's denial of review in *McKee II*, we conclude that defendant's recommitment under the SVPA does not violate his equal protection rights. (See *People v. McKnight* (Dec. 12, 2012, A123119) ___ Cal.App.4th ___, ___ [2012 Cal.App.Lexis 1325, pp. *2-*3], ordered published Jan. 11, 2013.)

Defendant has also raised, solely for the record, several challenges to his indeterminate sentence that have been resolved against his position in existing Supreme Court decisions. Accordingly, we reject the following arguments on the basis of the decisions cited in parentheses:

(1) the application of Proposition 83 to SVP commitment petitions pending at the time of its passage violates due process as a retroactive criminal sanction (*People v. Castillo* (2010) 49 Cal.4th 145, 162, fn. 18);

(2) requiring defendant to prove he is not an SVP to obtain release violates due process (*McKee I, supra*, 47 Cal.4th at pp. 1188–1193); and

(3) the imposition of an indeterminate term violates the prohibition against ex post facto laws or constitutes double jeopardy (*McKee I, supra*, 47 Cal.4th at pp. 1193–1195).

III. DISPOSITION

Defendant's order of commitment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.