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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re GENNARO GAGLIONE,
on Habeas Corpus.

A132682

(Sonoma County
Super. Ct. No. SCR-19697)

Respondent warden of the Avenal State Prison appeals from the granting of a petition for writ of habeas corpus by petitioner Gennaro Gaglione. Petitioner is serving a sentence of 15 years to life in state prison for child molestation. He was denied parole in 2009 for the fourth time. By habeas petition, petitioner sought an order requiring that he be evaluated for civil commitment as a sexually violent predator (SVP) and, if determined to be an SVP, that he be paroled and transferred to the SVP program. The trial court issued an order to show cause, and granted the petition and the relief sought without an evidentiary hearing. Because we find the petition insufficient on both factual and legal grounds, we reverse the trial court's order and remand the matter for entry of a new order summarily denying it.

I. BACKGROUND

A. Parole Board Proceedings

Petitioner was convicted in 1993 of molesting a child under the age of 14. (Pen. Code, § 288, subd. (a).) Because he had committed two or more prior qualifying sexual offenses, he was sentenced to a term of 15 years to life in state prison pursuant to Penal Code section 667.51, former subdivision (d) (now subd. (c)). Petitioner's minimum

eligible parole date was May 4, 2002. He is currently 71 years old, and is incarcerated at Avenal State Prison.

On July 7, 2009, petitioner appeared before the Board of Parole Hearings (the Board) for his fourth parole suitability hearing. The Board again denied parole for three years, finding petitioner remained an unreasonable risk of danger to society if released from prison. Petitioner concedes the Board decision is supported by “ ‘some evidence.’ ”¹ The Board praised petitioner for the amount of work he had done to rehabilitate himself and to take advantage of all available programs and self-help opportunities in prison. The presiding commissioner stated that petitioner’s closing statement to the Board was “one of the best I’ve ever heard” in terms of petitioner’s insight into himself, and that petitioner had gotten that “nailed down.” However, the Board told petitioner in substance that he had made progress in understanding himself but still had more work to do to complete the process of self-understanding: “[B]ut getting it nailed down, making it a part of you, and being okay with it are two entirely different things, and that’s not a condemnation, it’s just a process, and our hope is that . . . you continue that process . . .” Regarding his history of sex offenses, the commissioner told petitioner: “You can rise above it. You can move forward. You can become as whole an individual as any other criminal here or any individual on the outside. . . . You’ve got to get beyond yourself. You’re working hard at it, and I want to acknowledge you for that. You are working hard on identifying what got you there, who you were, and you’ve got to shed that, and move forward.”

The commissioner also told petitioner that the Board would recommend that he be transferred, if possible, to “a facility that provides you more intensive assistance,” but he stated he was not sure that could be accomplished and he admonished petitioner to keep doing what he had been doing in any event “because that’s what’s going to free you at some point.”

¹ In fact, petitioner maintained it was not even a “ ‘close case’ ” for the Board.

In reaching its decision, the Board considered the most recent psychiatric evaluation of petitioner, prepared for his 2007 parole hearing, as well as four prior evaluations dating back to 1996 that were incorporated into it by reference. Petitioner's pre-2007 psychological evaluations recount that he was initially classified as a mentally disordered sex offender (MDSO) following his first sex offense in 1973, and received sex offender treatment and therapy at two state hospitals at that time. After several months, he was found to be not amenable to treatment. Within six months after being released from his hospital commitment in October 1975, petitioner was re-arrested for his second sex offense and sent this time to state prison. Regarding his 1973–1974 treatment experience, petitioner's 2001 evaluation concluded that (1) it was "clear . . . [petitioner] did not benefit from any treatment he may have received as an MDSO commitment at two State Hospitals," and (2) the fact of the "Treatment Failure . . . in 1973" substantially increased petitioner's probability of reoffending. Petitioner's 1996 evaluation noted he had group therapy of some kind in 1979 while in prison, and the 2007 report noted that petitioner was in outpatient sex offender therapy as a parolee in 1992 when he was arrested for his life crime four months after being paroled. The 2001, 2003, and 2005 evaluations all concluded petitioner would not gain any significant benefit from psychotherapy, and he lacked insight into himself and showed little recognition of the damage he had caused to his victims. The 1996 evaluation found petitioner had a pattern of denying his involvement in the crimes for which he was incarcerated, and opined that his pedophilia was chronic and resistive to change. None of the pre-2007 evaluations recommended further sex offender treatment for petitioner in prison.

Consistent with earlier evaluations, the 2007 evaluation diagnosed petitioner as suffering from a serious mental illness, "Pedophilia, Sexually Attracted to Females, non-exclusive type" and noted he had five separate sexual offenses against underage females. The report also noted petitioner met the Axis II diagnostic criteria for "Personality Disorder, Not Otherwise Specified." The psychologist found petitioner's overall propensity for future violence was "in the high end of the moderate range" and his risk of reconviction for a sexual offense was "in the high range" in comparison to similar

inmates. (Underscoring and bold omitted.) The earlier reports had reached similar conclusions.

According to the 2007 report, petitioner's Board panel specifically requested the 2007 evaluation to include an assessment of petitioner's "need for further therapy programs while incarcerated." Under that heading, the report states: "The inmate does not currently present as a candidate for noteworthy change as a result of psychotherapy, from which he has been precluded by virtue of his general population status. The inmate continues to deny his crime. The inmate[,] however, needs to be continuously involved in [Alcoholics Anonymous (AA)], [Narcotics Anonymous (NA)] and his religion. He needs to be continuously involved in self-help. The inmate needs to be involved in sex offender treatment. The inmate needs to be involved in other areas mentioned above." The "areas mentioned above" apparently refers to the immediately preceding section of the report concerning petitioner's continued denial of the crime for which he is incarcerated which recommends that "the inmate talk to a priest, counselor, or mental health person regarding his controlling case," and that he "be in ongoing sex offender treatment when and if available." The report stresses that petitioner's denial creates unpredictability about his risk of reoffending because it "suggests an inability or unwillingness to accept responsibility for his actions, as well as to present himself as the real victim." The report states that petitioner's past failure to complete sex offender therapy also contributed to his elevated risk factor, and it recommended against releasing petitioner into the community on parole without first requiring him to participate in inpatient sex offender treatment for a significant number of years, including an SVP commitment, if possible. The report made no recommendation that such a conditional parole be granted.

B. *Habeas Petition*

On April 9, 2010, petitioner filed a habeas petition alleging in substance that the July 7, 2009 parole proceeding was "bereft of due process under state or federal standards" because (1) he was found unsuitable for parole due to his failure to participate in sex offender treatment, yet (2) no such treatment has been available to him within the

California Department of Corrections and Rehabilitation (CDCR) since his arrest for the crime for which he is now serving an indeterminate life term.² According to petitioner, he has been placed in a “Catch-22” situation that effectively converts his sentence from life *with* the possibility of parole to life *without* the possibility of parole. The petition alleges that despite petitioner’s recognized constitutional liberty interest in being released on parole,³ the Board will continue to consider his risk of reoffending to be substantial unless and until he participates in sex offender therapy—a requirement he asserts he cannot satisfy while in CDCR custody. Petitioner contends this state of affairs deprives him of his liberty interest in parole without due process of law.

Petitioner further alleged that since “the Court cannot Order the [CDCR] to create sex offender specific therapy programs for petitioner, there appears to be only one proper remedy in this case.” According to petitioner, the only proper remedy was for the court hearing the habeas to initiate a process in which it would (1) order petitioner to be screened for possible inclusion into the SVP program “like any determinately sentenced prisoner about to be released from prison”;⁴ (2) if petitioner was not recommended for inclusion in the SVP program, either deny the habeas petition for lack of a prima facie case for relief or remand the matter to the Board for a new parole hearing; and (3) if petitioner was recommended for inclusion in the SVP program, and if the appropriate court determined pursuant to the SVP statutes that he should be sent to the program,⁵

² Although the petition did not specify the respondent against whom petitioner sought a writ, the proper respondent in habeas petitions concerning parole board decisions is the warden of the prison having custody of the petitioner. (Pen. Code, § 1477; see, e.g., *In re Criscione* (2009) 180 Cal.App.4th 1446, 1450, fn. 1.)

³ See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 654–658 (holding that California inmates serving indeterminate sentences have a liberty interest in parole release that cannot be denied without due process of law).

⁴ A screening procedure for such inmates is described in Welfare and Institutions Code section 6601, subdivisions (b)–(i).

⁵ Welfare and Institutions Code section 6601.5 et seq. spell out procedures for trying the issue of whether an inmate preliminarily identified as an SVP may be civilly

order the Board to find petitioner suitable for parole and transfer him to the SVP program.

The trial court ordered respondent to file an informal response. Respondent contended the SVP law (Welf. & Inst. Code, § 6600 et seq.) and parole proceedings for indeterminately sentenced inmates were entirely separate and unrelated procedures under the law, and there was no mechanism for the court to provide petitioner with relief under the SVP law. Respondent also disputed petitioner's allegation that he could not be paroled by a future Board unless he participated in sex offender treatment. On January 27, 2011, the trial court issued an order to show cause to respondent why the relief petitioner sought should not be granted. Respondent filed a return on March 14, 2011, denying petitioner's rights had been violated, denying the Board would find petitioner unsuitable for parole unless and until he participated in sex offender treatment, and requesting the petition be denied for lack of evidence petitioner was entitled to relief. Petitioner filed a traverse on May 9, 2011, disputing the material allegations of the return.

On June 8, 2011, the trial court issued an order granting the petition for habeas corpus without an evidentiary hearing, and adopting petitioner's proposed remedy. The trial court ordered CDCR to screen petitioner for possible inclusion in the SVP program. If petitioner was not recommended for inclusion, the matter would be remanded back to the Board for a new hearing at which the SVP screening evidence could be taken into account by the Board in determining whether petitioner remained a danger to society. If petitioner was found likely to be an SVP, he was to be referred for a "full evaluation" pursuant to the SVP law and his case would proceed in accordance with that law. If those court proceedings did not result in an SVP commitment, the matter would be remanded to the Board for a new hearing at which the SVP findings could be taken into account by the Board in determining whether petitioner remained a danger to society. However, if the SVP proceedings did result in an order for SVP commitment, the court would order

committed. In this case, petitioner would presumably stipulate to the necessary facts and no trial of fact would be necessary.

petitioner to be found suitable for parole by the Board and transferred to the SVP program. The court was to retain jurisdiction over the habeas proceeding until petitioner was either transferred to the SVP program or remanded back to the Board for a new hearing.

Respondent's ensuing motion for reconsideration was denied by the court, and this timely appeal from the order granting the habeas petition followed.

II. DISCUSSION

“When a superior court grants relief on a petition for habeas corpus without an evidentiary hearing, . . . the question presented on appeal is a question of law, which the appellate court reviews de novo. [Citation.] A reviewing court independently reviews the record if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence.” (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1192.)

In this case, the habeas petition's principal factual premise is that the Board found petitioner unsuitable for parole based in large measure on his failure to participate in nonexistent sex offender therapy. Our review of the petition and supporting documentation fails to support that proposition. In explaining its decision to deny parole, the Board made no mention of sex offender therapy. The Board told petitioner in substance that he was progressing and doing the right things, but he still lacked sufficient insight into himself. (See *In re Shaputis* (2011) 53 Cal.4th 192 [inmate's insight into his criminal behavior is highly relevant in determining parole suitability].) Although the Board expressed the view that the CDCR should consider transferring petitioner to a facility that could offer him more “intensive assistance,” the nature of the assistance was not specified, and the Board did not in any way intimate petitioner would need assistance not available at Avenal State Prison to become eligible for parole in the future. To the contrary, the Board told petitioner it could not guarantee he would get additional assistance, but encouraged him to keep up with what he had been doing “because that's what's going to free you at some point.”

Unable to rely on the Board's own statement of its reasons, petitioner alleges the Board must have relied on the 2007 psychological evaluation to conclude his release would pose a risk to public safety and claims *this report* establishes the essential linkage between his failure to participate in sex offender treatment while in prison and the Board's decision. The petition quotes selected sentences from the 2007 evaluation to establish the Board denied petitioner parole because he had never completed offense-specific therapy in prison. We read the 2007 report differently. As discussed earlier, the references to sex offender treatment in that report, viewed in context, merely state the author's views that (1) petitioner's failure to successfully complete sex offender treatment offered to him in the past elevated his current risk of recidivism; (2) sex offender treatment, *if available*, should be among the programs petitioner pursues while incarcerated, along with AA, NA, his religion, self-help, and counseling with a priest or mental health counselor regarding his life crime; and (3) if petitioner is to be paroled, he should not be released directly into the community without first receiving a significant amount of inpatient sex offender treatment. We find no recommendation or assertion in the 2007 report that petitioner should be paroled, or that he should be released for commitment to the SVP program, or that he must be provided with sex offender treatment in prison, either as a necessary precondition to parole, or for any other reason. While the report's author undoubtedly believed sex offender therapy would be beneficial for petitioner in prison if it was available, and should be mandatory if he was released on parole, the report does not make such therapy the linchpin of petitioner's hope for parole, as petitioner would have it.

We therefore reject as unsupported the trial court's finding that "[a]lthough the Board did not expressly say as much, it is clear from the hearing transcript that the Board's decision was based on the finding that petitioner remains a danger to society because he has not successfully completed any sex offender treatment program."⁶ Since

⁶ The trial court believed respondent had conceded the point. Even assuming that to be true, we are not bound by the Attorney General's improvident concession. (See *People v. Diaz* (1989) 208 Cal.App.3d 338, 347 (dis. opn. of Brauer, J.); *People v.*

the petition presents no basis for habeas relief absent that premise, it should have been denied. There are two additional and equally compelling reasons to reverse the trial court's order. The relief sought by petitioner and ordered by the court is (1) contrary to the SVP law, which by its own terms is limited to inmates serving *determinate* prison sentences; and (2) would exceed the judiciary's power under *In re Prather* (2010) 50 Cal.4th 238 (*Prather*).

Section 6601 of the SVP law describes the sole circumstances in which the CDCR may refer a state prison inmate for evaluation as an SVP: "Whenever the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, *and who is either serving a determinate prison sentence or whose parole has been revoked*, may be a sexually violent predator, the secretary shall, at least six months prior to that individual's scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, if the inmate was received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action, the secretary may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate's scheduled release date." (Welf. & Inst. Code, § 6601, subd. (a)(1), italics added.)

By its own terms, Welfare and Institutions Code section 6601 limits the application of SVP procedures to inmates serving *determinate* sentences and those serving parole revocation terms. Petitioner belongs to neither category. Petitioner argues he comes within the second sentence of section 6601, subdivision (a)(1) in that, if granted the relief sought in his habeas petition, his release date would be "modified by judicial or administrative action." This is wholly unpersuasive. Petitioner would have us read the quoted words entirely out of the context in which they are used, in a fashion that would

Alvarado (1982) 133 Cal.App.3d 1003, 1021.) In any event, respondent did dispute the corollary conclusion drawn by petitioner that no future parole board panel could grant him parole unless and until he participated in offense-specific therapy.

negate the limitation established by the first sentence of section 6601. The first sentence of the subdivision establishes a general time limit—six months before the inmate’s scheduled release date—for the CDCR to initiate an SVP evaluation of inmates serving determinate or parole revocation terms. The second sentence describes two exceptions *to the six-month time limit for making a referral*, one of which is that the inmate’s scheduled release date has been advanced by administrative or judicial action. We find nothing to indicate that by using the phrase “modified by judicial or administrative action,” the Legislature intended to add indeterminately sentenced inmates with parole dates to those eligible for SVP referral. This interpretation would make a nullity of the reference to determinate sentences in the first sentence of the subdivision. Had the Legislature intended to expand the application of the SVP law to indeterminately sentenced inmates, it would not have chosen such a roundabout, self-contradictory, and ambiguous means of doing so. Petitioner cites no case, and we have found none, that construes the SVP law to apply to inmates serving indeterminate life terms.⁷

The remedy sought by petitioner would also transgress the limits of judicial authority established by *Prather, supra*, 50 Cal.4th 238. *Prather* involved habeas petitions by two inmates serving indeterminate life terms who had been found unsuitable for parole. (*Id.* at pp. 245, 247.) In one case, the Court of Appeal had affirmed a trial court decision granting habeas relief and directing the Board to find petitioner Molina suitable for parole and to order his release. (*Id.* at p. 248.) In the other case, a different appellate panel had granted the petition and directed the Board to find petitioner Prather suitable for parole unless it determined new evidence supported a determination the petitioner posed an unreasonable risk of danger to society if released on parole. (*Id.* at p. 246.) The Attorney General contended both appellate decisions violated the constitutional doctrine of separation of powers “by infringing upon the authority of the executive branch to make parole-suitability determinations.” (*Id.* at p. 253.) The Supreme

⁷ Petitioner impliedly conceded the statute has no application to indeterminately sentenced inmates when he requested in his petition that he be screened for SVP placement “like any determinately sentenced prisoner about to be released from prison.”

Court agreed, and held it was “*improper for a reviewing court to direct the Board to reach a particular result* or to consider only a limited category of evidence in making a suitability determination.” (*Ibid.*, italics added.) In Molina’s case, the court further held that ordering Molina’s release prior to review by the Governor “intrudes upon the Governor’s independent constitutional authority to review the Board’s parole decision,” citing article V, section 8, subdivision (b) of the California Constitution and Penal Code section 3041.2. (*Prather*, at p. 257.)

Here, the trial court’s order violates *Prather* by (1) compelling the Board to find petitioner suitable for parole if he is found to be an SVP in accordance with SVP procedures, and (2) eliminating any gubernatorial review of the court-ordered finding that he is suitable for parole. In our view, such relief violates the constitutional separation of powers as well as applicable statutory law as construed in *Prather*, in addition to violating the SVP law, as discussed *ante*.

Petitioner’s failure to request a lawful remedy is not in itself fatal to his petition. If petitioner’s constitutional rights have been violated, this court has broad authority to fashion a remedy, such as ordering the CDCR to make sex offender treatment available. (Pen. Code, § 1484; *In re Crow* (1971) 4 Cal.3d 613, 619.) But even if we assumed for purposes of analysis that (1) petitioner was in fact found unsuitable for parole solely because he had not participated in sex offender therapy, and (2) the unavailability of such therapy in prison would violate petitioner’s right to due process,⁸ the order granting the petition would nevertheless still be subject to reversal due to petitioner’s failure to exhaust administrative remedies. Had petitioner taken the more obvious route of seeking sex offender treatment from the CDCR instead of seeking civil commitment as an SVP, there is no question he would have been required to pursue administrative remedies

⁸ There is substantial case law to the effect that prisoners have no liberty interest in access to rehabilitative programs that improve their chances for parole. (See *Moody v. Daggett* (1976) 429 U.S. 78, 88, fn. 9; *Rizzo v. Dawson* (9th Cir. 1985) 778 F.2d 527, 531; *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1254–1255.) However, we express no opinion in this proceeding whether petitioner has a due process interest in access to sex offender treatment that would be recognized on a properly developed record.

within the CDCR before proceeding with this habeas petition. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293.) Considerations of both judicial efficiency and administrative autonomy strongly militate in favor of giving the CDCR a chance to consider and formulate an administrative solution to the dilemma in which petitioner asserts he has been placed. (See *In re Muszalski* (1975) 52 Cal.App.3d 500, 505–506.) At a minimum, such administrative proceedings would create a factual record—completely lacking in this proceeding—that would assist a future court in formulating a practicable and lawful order regarding sex offender treatment. Our disposition of the present proceeding is therefore without prejudice to petitioner pursuing administrative remedies within CDCR based on the lack of availability of sex offender treatment, or to any future habeas petition based on his exhaustion of such remedy.

III. DISPOSITION

The trial court’s June 8, 2011 order granting the petition for writ of habeas corpus is reversed and the matter is remanded to the trial court to enter a new order summarily denying the petition.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.