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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

NORMAN LEE BELL,

Defendant and Appellant.

A133689

(Napa County
Super. Ct. No. CR134697)

Norman Lee Bell appeals from an order following a jury trial finding him to be a sexually violent predator (SVP) under the Sexually Violent Predators Act (Welf. & Inst. Code,¹ § 6600 et seq. (SVPA)) and committing him to the Department of Mental Health (DMH) for an indeterminate term. On appeal, defendant contends that the commitment should be reversed because the trial court inadequately instructed the jury on volitional control, and that the current version of the SVPA violates due process, ex post facto, double jeopardy, and equal protection principles. We reject each of these contentions except the equal protection claim, which is the subject of pending litigation. (*People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*)). We shall therefore remand this case to the trial court to await final resolution of *McKee* and, when *McKee* is final, to consider defendant's equal protection claim. In all other respects, we shall affirm the judgment.

¹ Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

I. BACKGROUND

Inasmuch as the historical facts are not relevant to the issues raised on appeal, they may be very briefly summarized.

At trial, the parties stipulated that defendant suffered ten convictions for violation of Penal Code section 288, subdivision (b) by committing lewd and lascivious conduct with a child under the age of 14 by force, and these convictions constituted sexually violent predatory offenses. Psychologists Erik Fox and Douglas Korpi testified that defendant currently suffers from diagnosed mental disorders, to wit: pedophilia and a personality disorder not otherwise specified. According to Fox, defendant also suffers from sexual sadism. Fox and Korpi were of the opinion that defendant has significant problems with volitional control, and as a result he is likely to reoffend and commit sexually violent offenses in the community. They both agreed it is necessary to keep defendant in custody to ensure the health and safety of others.

Psychologist Charleen Steen questioned the other experts' diagnosis of defendant as having a personality disorder. Although she diagnosed defendant with pedophilia, she did not believe he was likely to reoffend in a sexually violent and predatory manner; thus, she opined that defendant was safe in the community.

II. DISCUSSION

A. *Jury Instruction on Volitional Control*

Citing *Kansas v. Crane* (2002) 534 U.S. 407 and *In re Howard N.* (2005) 35 Cal.4th 117 (*Howard N.*), defendant posits that, under both state and federal law, a person cannot be subjected to civil commitment unless he suffers from a mental disorder that makes it seriously difficult to control his dangerous behavior. Defendant, thus, contends the trial court committed reversible error by denying his request for a pinpoint instruction that elucidated this legal principle.

1. Background

The trial court instructed the jury with CALCRIM No. 3454, regarding the People's burden of proving that defendant is an SVP. Pursuant to this instruction, the jury was told: "The petition alleges that Norman Lee Bell is a sexually violent predator.

[¶] To prove this allegation, the People must prove beyond a reasonable doubt that:
[¶] 1. He has been convicted of committing sexually violent offenses against one or more victims; [¶] 2. He has a diagnosed mental disorder; [¶] 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior; [¶] AND [¶] 4. It is necessary to keep him in custody in a secure facility to ensure the health and safety of others.”

This instruction also provided the jury with the following additional guidance regarding these elements: “The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person’s ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others. [¶] A person *is likely to engage in sexually violent predatory criminal behavior* if there is a substantial, serious, and well-founded risk that the person will engage in such conduct if released into the community.”

At a hearing on jury instructions, the trial court considered and rejected defendant’s request that CALCRIM No. 3454 be modified to include a requirement that the jury find that defendant has serious difficulty in controlling his behavior.

2. Analysis

Defendant contends that the trial court committed reversible error by refusing to give his proposed pinpoint instruction. Our Supreme Court rejected a substantially similar argument in *People v. Williams* (2003) 31 Cal.4th 757, 774-776 (*Williams*).

The *Williams* petitioner challenged his commitment under the SVPA on the ground that the jury in his case did not receive special, specific instruction regarding the need to find serious difficulty in controlling behavior. (*Williams, supra*, 31 Cal.4th at pp. 759-760.) The *Williams* court held that specific impairment-of-control instructions are not constitutionally required in California. (*Id.* at pp. 776-777.) The court reasoned that the language of the SVPA “inherently encompasses and conveys to a fact finder the

requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior.” (*Id.* at p. 759.)

The *Williams* court also expressly found that “*Kansas v. Crane, supra*, 534 U.S. 407, does not compel us to hold that further lack-of-control instructions or findings are necessary to support a commitment under the SVPA.” (*Williams, supra*, 31 Cal.4th at pp. 774-775.) In reaching this conclusion, the court underscored that “a judicially imposed requirement of special instructions *augmenting* the clear language of the SVPA would contravene the premise of . . . *Kansas v. Crane, supra*, 534 U.S. 407, that, in this nuanced area, the *Legislature* is the primary arbiter of how the necessary mental-disorder component of its civil commitment scheme shall be defined and described.” (*Id.* at p. 774.)

In the present case, defendant acknowledges the *Williams* decision but argues there was a “problem with the Supreme Court’s analysis” in that case. We summarily reject this argument since this court is bound by *Williams, supra*, 31 Cal.4th 757. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Trying a different tack, defendant contends that the Supreme Court changed its view that it expressed in *Williams, supra*, 31 Cal.4th 757 when it decided *Howard N., supra*, 35 Cal.4th 117. According to defendant, the *Howard N.* decision shows that the court now recognizes that, in defendant’s words, “the statutory language, merely by its existence, does not necessarily contain within it the necessary information that a jury needs in order to decide whether the defendant has a serious difficulty in controlling his dangerous behavior.” We are not persuaded.

Howard N., supra, 35 Cal.4th 117 did not involve a commitment under the SVPA. Rather, in that case the defendant challenged his commitment to the California Youth Authority pursuant to section 1800 et seq. (*Id.* at p. 122-123.) The *Howard N.* court held that, although that statute does not expressly require a finding that the person’s mental deficiency, abnormality, or disorder causes serious difficulty controlling behavior, it should be interpreted to contain such a requirement in order to preserve its constitutionality. (*Id.* at pp. 122, 135-136.) In its *Howard N.* decision, the Supreme

Court repeatedly distinguished the statute at issue in that case from the SVPA. (*Howard N.*, *supra*, 35 Cal.4th at pp. 127, 130-131, 136-137.) The court also affirmed its key holdings in *Williams* that (1) a jury instructed in the language of the SVPA “ ‘must necessarily understand the need for serious difficulty in controlling behavior’ ” and (2) “ ‘separate instructions or findings on that issue are not constitutionally required’ ” (*Howard N.* at p. 130.) Thus, contrary to defendant’s contention, our Supreme Court has not modified the opinions it expressed in *Williams*, *supra*, 31 Cal.4th 757.

Finally, defendant attempts to distinguish *Williams* on its facts. The pinpoint instruction that the *Williams* defendant requested stated that “ ‘the diagnosed mental disorder must render the person unable to control his dangerous behavior.’ ” (*Williams*, *supra*, 31 Cal.4th at p. 763, italics omitted.) As defendant points out, this proposed instruction did not accurately reflect the law, which requires only a “serious difficulty in controlling behavior.” (*Kansas v. Crane*, *supra*, 534 U.S. at p. 413.) Therefore, defendant would limit application of *Williams* to cases in which the alleged SVP failed to request an accurate pinpoint instruction regarding the volitional requirement implicit in the mental disorder element of the SVPA. Upon this premise, defendant concludes that his proposed special instruction was an accurate statement of the law and “nothing in *Williams* suggested that it would be error for the trial court to augment the statutory language with the serious difficulty in controlling dangerous behavior language.”

Defendant points out that Justice Kennard filed a concurring opinion in *Williams* in which she suggested that, in future SVPA cases, it “would be prudent” to explain to jurors “that defendants cannot be found to be sexually violent predators unless they have serious difficulty in controlling their behavior.” (*Williams*, *supra*, 31 Cal.4th at p. 780 (conc. opn. of Kennard, J.)) However, defendant ignores the fact that no other justice joined in that recommendation.

Moreover, nothing in *Howard N.*, *supra*, 35 Cal.4th 117 abrogates the holding in *Williams*, *supra*, 31 Cal.4th 757. Because no separate instruction on the issue of control is required where the jury is instructed in the statutory language of the SVPA (*Williams*

at pp. 776-777), and defendant makes no contention that the jury instructions given in his case failed to follow the statutory language of the SVPA, we conclude that no error arose from the trial court's failure to give the special instruction requested by defendant's trial counsel.

B. Due Process, Ex Post Facto, Double Jeopardy, and Equal Protection

Defendant contends the SVPA, as amended by the voters, violates his constitutional rights to due process and equal protection and to be free from double jeopardy and ex post facto laws. Our Supreme Court has explained: "On November 7, 2006, California voters passed Proposition 83, entitled 'The Sexual Predator Punishment and Control Act: Jessica's Law' amending the [SVPA] effective November 8, 2006. Proposition 83 is a wide-ranging initiative that seeks to address the problems posed by sex offenders [Among other provisions, it] changes an SVP commitment from a two-year term to an indefinite commitment." (*McKee, supra*, 47 Cal.4th at p. 1186.) The court went on to explain, "[U]nder Proposition 83, an individual SVP's commitment term is indeterminate, rather than for a two-year term as in the previous version of the [SVPA]. An SVP can only be released conditionally or unconditionally if the DMH authorizes a petition for release and the state does not oppose it or fails to prove beyond a reasonable doubt that the individual still meets the definition of an SVP, or if the individual, petitioning the court on his own, is able to bear the burden of proving by a preponderance of the evidence that he is no longer an SVP." (*Id.* at p. 1187.)

As defendant acknowledges, our Supreme Court in *McKee* concluded the SVPA, as amended by Proposition 83, does not violate his right to due process or the constitutional prohibition against double jeopardy and ex post facto laws. (*McKee, supra*, 47 Cal.4th at pp. 1193, 1195.) We are, of course, bound by the high court's ruling. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

The court in *McKee* reached a different conclusion as to the defendant's equal protection claim. As the court noted, mentally disordered offenders (MDOs) and those found guilty by reason of insanity (NGIs), unlike SVPs, are not subject to indeterminate commitment. (*McKee, supra*, 47 Cal.4th at pp. 1202, 1207.) The court concluded that

SVPs are similarly situated to MDOs and NGIs, and ruled that the state must show that the differential treatment of SVPs is constitutionally justified. (*Id.* at pp. 1207-1209.) In order to avoid a multiplicity of proceedings, the high court has directed the courts of appeal to suspend further proceedings pending finality of *McKee* in a number of cases that, like *McKee*, challenged the SVPA on equal protection grounds. (See, e.g., *People v. Judge*, review granted July 28, 2010, S182384, and ordered transferred to court of appeal with directions to vacate decision and suspend proceedings pending finality of *McKee* .) The People have asked us to stay further proceedings pending finality of the proceedings in *McKee*. Because this appeal raises issues other than the equal protection issue, we have addressed the issues not affected by *McKee* in order to minimize delay in resolution of defendant's claims. On the equal protection claim, we shall direct the trial court to suspend proceedings pending resolution of *McKee*.

III. DISPOSITION

The case is remanded to the trial court with directions to suspend further proceedings pending finality of the proceedings in *McKee*, *supra*, 47 Cal.4th 1172 and, upon finality of *McKee*, to consider defendant's equal protection claim in light of the decision in that case. Finality of the *McKee* proceedings shall include the finality of

proceedings in the San Diego Superior Court, any subsequent appeal, and any review in the California Supreme Court. In all other respects, the judgment is affirmed.

Sepulveda, J.*

We concur:

Ruvolo, P. J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.