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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.

DARALD ALBERT DICKERSON,

Defendant and Appellant.

A135233

(San Mateo County
Super. Ct. No. CIV507112)

The trial court found Darald Albert Dickerson was a sexually violent predator (SVP) and ordered him to be committed indefinitely to Coalinga State Hospital pursuant to the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code¹ section 6600 et seq. On appeal, Dickerson contends the judgment must be reversed because (1) his trial counsel rendered ineffective assistance of counsel by failing to move for dismissal of the petition; and (2) the order for indefinite commitment violates his constitutional rights to equal protection and due process, and the constitutional prohibitions against ex post facto laws, double jeopardy, and cruel and unusual punishment. We find no violation of Dickerson's constitutional rights, and affirm the judgment.

I. BACKGROUND

In 1996, Dickerson received a state prison sentence of 12 years 8 months following his conviction by plea of five counts of lewd and lascivious acts upon a child

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

under 14 years old (Pen. Code, § 288, subd. (a)) and one count of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)). Near the end of his prison term, in early 2008, two Department of Mental Health (DMH) evaluators concluded Dickerson did not meet the statutory definition of an SVP. As a result, Dickerson was released on parole.

Dickerson was arrested for allegedly violating his parole on November 1, 2010, and returned to custody. He was scheduled to be released on June 29, 2011. However, on June 28, 2011, the day before his scheduled release date, the Board of Parole Hearings (BPH) found good cause to place a 45-day hold on Dickerson's release to allow the DMH additional time to conduct full SVP evaluations. (§ 6601.3) In granting the 45-day hold, the BPH made the following finding: "There is good cause pursuant to . . . § 6601.3 to issue this hold based upon the following exigent circumstances as presented by DMH: A significant and unanticipated increase in referrals to DMH, which has precluded timely evaluation of this offender, and which is beyond DMH's control." The DMH subsequently determined Dickerson met SVP commitment criteria, and, on July 12, 2011, the DMH recommended an SVP commitment petition be filed.

On July 19, 2011, the San Mateo County District Attorney filed a petition against Dickerson seeking his indeterminate commitment as a sexually violent predator. Attached to the commitment petition were DMH evaluations prepared by two psychologists, both of whom found Dickerson meets the SVP commitment criteria. On October 4, 2011, the court found probable cause to believe Dickerson met the commitment criteria after Dickerson submitted the question of probable cause on the evaluators' reports.

On March 8, 2012, Dickerson provided the court with a written waiver of his rights to have (and be present for) a contested hearing on the commitment petition and agreed to submit the matter on the evaluators' reports and other documents in the case file. On March 9, 2012, the court announced it had reviewed the entire file, found Dickerson met the SVP commitment criteria, and ordered him committed for an indeterminate term to the custody of the DMH for appropriate treatment and confinement in a secure facility under section 6604.

On March 28, 2012, Dickerson filed a timely notice of appeal from the order adjudging him an SVP and committing him to the state hospital pursuant to section 6604.

II. DISCUSSION

Dickerson contends the order adjudging him an SVP and committing him to the state hospital must be reversed because (1) his trial counsel's failure to move for dismissal of the SVP petition as untimely constituted ineffective assistance of counsel; and because the order violates (2) his state and federal rights to equal protection; (3) his Fourteenth Amendment right to due process; and (4) the constitutional prohibitions against ex post facto laws, double jeopardy, and cruel and unusual punishment.

A. *Ineffective Assistance of Counsel*

The state may only file an SVP commitment petition if the person named in the petition is “in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed.” (§ 6601, subd. (a)(2); *In re Lucas* (2012) 53 Cal.4th 839, 843 (*Lucas*)). The petition in this case was filed while Dickerson was in custody on a hold placed under former section 6601.3. The version of section 6601.3 in effect at the time provided in relevant part as follows: “(a) Upon a showing of good cause, the Board of Prison Terms may order that a person referred to the State Department of Mental Health pursuant to subdivision (b) of Section 6601 remain in custody for no more than 45 days beyond the person’s scheduled release date for full [SVP] evaluation [¶] (b) For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or *equivalent exigent circumstances* which result in there being less than 45 days prior to the person’s scheduled release date for the full evaluation described in subdivisions (c) to (i), inclusive, of Section 6601.”² (Italics added.)

² The statute was amended nonsubstantively in 2012 to update the names of the agencies mentioned. (Stats. 2012, ch. 24, § 140, p. 1034.)

Here, the BPH made a finding of good cause based on the asserted fact there had been a significant, unanticipated increase in referrals to the DMH which was beyond the BPH's control and which precluded timely evaluation of the offender. Dickerson contends this explanation of good cause was not the equivalent of any of the exigent circumstances identified in former section 6601.3, subdivision (b), and was therefore not a permissible basis for granting a 45-day hold. Dickerson further maintains his unlawful custody based on an improper hold was not attributable to any good faith mistake of fact or law under section 6601, subdivision (a)(2).³ According to Dickerson, his trial counsel's failure to move for dismissal of the SVP petition, despite the absence of good cause for the 45-day hold, deprived him of his right to effective assistance of counsel.

To demonstrate ineffective assistance of counsel, Dickerson must show (1) his counsel's failure to make a motion to dismiss on the stated grounds was deficient under prevailing professional norms; and (2) but for counsel's failings, it is reasonably probable the result of the proceeding would have been more favorable to him. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694; *People v. Seaton* (2001) 26 Cal.4th 598, 666.)

In our view, the dispositive question is whether it is reasonably probable a motion to dismiss based on the inadequacy of the BPH's statement of good cause would have succeeded. In analyzing this question, we note Dickerson relies on the face of the 45-day hold order. He does not cite to any evidence in the record contradicting the factual basis for the BPH's "good cause" assertions in that order. For purposes of our analysis, we must therefore assume the DMH *did* experience a significant, unanticipated increase in referrals in the relevant time period, such increase was *not* within the DMH's control, and this factor *did* actually preclude the DMH from conducting a timely SVP evaluation of Dickerson absent a hold.

³ Section 6601, subdivision (a)(2) states in relevant part that "[a] petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law."

To show these facts did not amount to an “equivalent exigent circumstance[.]” for purposes of section 6601.3, subdivision (b), Dickerson relies on *People v. Superior Court (Small)* (2008) 159 Cal.App.4th 301 (*Small*). The petitioner in *Small* was scheduled to be released from prison on a Sunday but the Department of Corrections and Rehabilitation (Department of Corrections) kept him in custody so the district attorney could file an SVP petition the following Monday. (*Id.* at p. 304.) The trial court dismissed the petition, and the People sought a writ. (*Id.* at p. 306.) The Court of Appeal affirmed the dismissal, finding Small was in unlawful custody when the SVP petition was filed, and the People failed to show the delay in filing the petition resulted from a good faith mistake of fact or law. (*Id.* at p. 304.) Specifically, the court in *Small* rejected the good faith mistake defense offered by the DMH that it had been overwhelmed with a more than 10-fold increase in requests for SVP evaluations at the time, due to voter approval of an initiative a few months earlier. (*Id.* at pp. 305–306.) The Court of Appeal responded to this argument in relevant part as follows: “The trial court found that the unlawfulness of Small’s custody resulted from a delay on the part of [the DMH] and not from either a legal or factual mistake. *Notably, the People did not challenge this finding and our review of the record does not show any error in this regard. Rather, the Department of Corrections waited until a month before Small’s release date to refer him to [the DMH] for evaluation and [the DMH] did not begin the evaluation process until near the end of Small’s 45-day hold period.* [¶] Although the People presented evidence showing that the passage of Jessica’s law in 2006 greatly increased the number of referrals to [the DMH] . . . , it did not explain the initial delay in referring Small to [the DMH] for evaluation or the delay in obtaining the evaluations (i.e., the number of inmates with earlier release dates than Small). The increased workload does not amount to a mistake of law or fact and is something that the Department of Corrections and [DMH] could have anticipated and prepared for.” (*Id.* at pp. 309–310, italics added.)

Dickerson maintains “there is no principled basis on which to distinguish *Small* from the instant matter.” He construes *Small* to mean that a backlog of work, *unrelated to exigent circumstances that have the effect of shortening the evaluation period*, does not

come within section 6601.3's definition of good cause. He further argues the BPH's belief that increased workload could constitute good cause under section 6601.3 cannot be considered a good faith mistake of fact or law in light of *Small* which, three years before the hold order was issued in this case, had found such considerations to be insufficient. We do not find *Small* persuasive in either regard.

First, *Small* did not involve an interpretation of the good cause requirement of section 6601.3. *Small*'s custody had already been extended under section 6601.3, but he was held over for two days after that period had expired. (*Small, supra*, 159 Cal.App.4th at p. 305.) *Small* solely involved the question of what constitutes a good faith mistake resulting in a tardy petition under section 6601. In fact, the good cause provision in issue in this case, subdivision (b) of section 6601.3, was not even enacted until two years after *Small* was decided. Second, the Court of Appeal in *Small* based its holding in substantial part on the fact, conceded by the People, that the increased workload in issue in the case *did not explain the delay* in referring *Small* for evaluation *or* the DMH's delay in beginning the evaluation until near the end of the 45-day hold period. (*Small*, at p. 310.) Thus, there was no evidence the delay *resulted* from any asserted mistake of law. In any event, the court found as a factual matter the Department of Corrections and DMH could have anticipated and prepared for the increased workload. As discussed *ante*, there is no basis in the record before us to find the BPH or DMH acted negligently in respect to scheduling Dickerson's evaluation, or could have done anything to avoid the necessity for a 45-day hold. For these reasons, we do not consider *Small* to be persuasive authority for Dickerson's proposition that, as a matter of pure statutory interpretation, unanticipated workload factors can never constitute good cause for a 45-day hold under section 6601.3, subdivision (b).

While Dickerson reads too much into *Small*, he does offer a linguistically plausible interpretation of section 6601.3, subdivision (b). He notes each of the specific instances of good cause mentioned in the paragraph involves a decision not within the control of the corrections system or the DMH either moving up a potential SVP's release date or setting an abbreviated custody term, resulting in the DMH having less than 45

days to complete its evaluation. From this, Dickerson argues the phrase “equivalent exigent circumstances” should be construed narrowly to mean “an exceptional development, outside the control of the DMH and corrections officials, that reduces the time available and makes it impossible to complete the SVP evaluation before the inmate’s scheduled release date.” Chronic staffing shortages, for example, would not meet this definition. (Cf. *People v. Engram* (2010) 50 Cal.4th 1131, 1163–1165 [chronic trial court calendar congestion is not an exceptional circumstance excusing the failure to timely bring a criminal defendant to trial for purposes of Pen. Code, § 1382].)

Dickerson’s proffered construction of “equivalent exigent circumstances” finds support in certain general principles of statutory interpretation. Under the principle of *noscitur a sociis* (it is known by its associates), “ ‘a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.’ ” (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 307, quoting *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012.) The use of the word “equivalent” in the statute arguably reinforces that exigent circumstances qualifying as good cause must not be dissimilar from the listed items. Limiting such circumstances to decisions outside of the control of the corrections authorities or the DMH that unexpectedly compress the inmate’s time in custody to less than 45 days would fit these requirements. Delays in conducting the required evaluations due to lack of resources, without any compression of time in custody, would not be “equivalent” to any of the items on the list.⁴

While Dickerson’s view of statutory intent is plausible, the statute’s meaning is not plain or transparent from its text, and Dickerson points us to no legislative history shedding light on the purpose or scope of the 2010 amendment. Dickerson’s conclusions depend on a relatively sophisticated analysis of the language and context of the

⁴ In *Orey v. Superior Court* (2013) 213 Cal.App.4th 1241 (*Orey*), the Fourth Appellate District adopted a construction of the statute close to that proposed by the defendant in this case. (*Id.* at pp. 1252–1253.)

amendment. He devotes nearly nine pages of his opening brief to performing that analysis and explaining why the BPH’s interpretation of the statute is wrong. But whether right or wrong, the BPH’s interpretation was not an unreasonable one. It is not unreasonable to interpret the language, as the BPH did, to encompass any unanticipated event or condition not within the DMH’s control that precludes the DMH from completing a full SVP evaluation of an inmate before that inmate’s release date—including an unanticipated increase in workload.⁵ Arguably, any such event is “equivalent” to those enumerated in paragraph (b) in the sense that it is unexpected, not within the DMH’s control, and reduces that time available for the evaluation to under 45 days. It must be stressed at the time section 6601.3, subdivision (b)(2) was invoked by the BPH in this case there was no controlling judicial interpretation of the new statutory language. *Small*, as we have explained, did not concern the good cause requirement and predated the definition of good cause adopted by the Legislature in 2012. Contrary to Dickerson’s contention, there was no reason for the BPH to treat *Small* as a relevant, much less controlling, precedent.⁶

In our view, there was no reasonable probability Dickerson would have prevailed on a motion to dismiss the petition. A dismissal was not warranted because the 45-day hold in this case, even if unauthorized by statute, was based on a good faith mistake of law on the part of the DMH and BPH. There was no controlling precedent negating the DMH’s interpretation of the 2010 amendment to section 6601.3, or any other evidence of intentional or negligent wrongdoing on the part of the BPH and DMH in placing the hold. (See *In re Smith* (2008) 42 Cal.4th 1251, 1259–1261 [affirming § 6601, subd. (a)(2) was

⁵ As discussed *ante*, there is no evidence in the record contradicting the DMH’s assertion that the workload increase was significant and unexpected. In particular, the record does not demonstrate the DMH was relying on a condition of *chronic* understaffing as the basis for its claim of good cause in this instance, or was in any sense negligent in its resource and staffing decisions.

⁶ *Orey* also recognized *Small* is distinguishable from other 45-day hold cases for purposes of the good faith mistake of law issue because it arose from keeping an inmate in custody after the hold had expired. (*Orey, supra*, 213 Cal.App.4th at p. 1256.)

intended to apply to mistakes of law causing extended custody where the relevant statute was not explicit and no controlling judicial decision was directly on point]; *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1229 [SVP commitment resulting from unlawful custody was caused by a good faith mistake of law where corrections officials relied on a regulation that was apparently valid, and there was no controlling judicial or administrative decision directly on point]; *Langhorne v. Superior Court* (2009) 179 Cal.App.4th 225, 240–241 [the absence of any published decision construing certain 2006 amendments to the SVPA supported a finding the People had made a good faith mistake of law in misapplying them].)

For these reasons, Dickerson fails to demonstrate he is entitled to a reversal of the judgment based on ineffective assistance of counsel.

B. Equal Protection

In *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*), the California Supreme Court considered a claim that civilly committing an SVP for an indeterminate term and placing the burden on the committed person to obtain release violates the person’s state and federal constitutional right to equal protection. (*Id.* at p. 1184.) The court found “the state ha[d] not yet carried its burden of demonstrating why SVP’s, but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, are subject to indefinite commitment.” (*Ibid.*) It remanded the matter to the trial court to permit the People the opportunity to justify the differential treatment in accord with established equal protection principles. (*Ibid.*) On remand, after an extensive evidentiary hearing, the trial court found the People met their burden under *McKee I* to justify the disparate treatment of SVP’s. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1330, review den. Oct. 10, 2012, S204503 (*McKee II*).) *McKee II* affirmed the trial court’s determination, and the Supreme Court denied review. (*Id.* at p. 1350.) Dickerson contends *McKee II* was wrongly decided, and the indeterminate commitment imposed in this case should be reversed and the matter remanded to the trial court for further proceedings in accordance with *McKee I*.

We note first that when the Supreme Court decided *McKee I*, it had a series of cases involving equal protection challenges to the SVPA on “grant and hold” status. It transferred these cases back to the Courts of Appeal with directions to vacate their prior opinions and reconsider the issue in light of *McKee I*. The transfer orders provided in relevant part: “In order to avoid an unnecessary multiplicity of proceedings, the court is additionally directed to suspend further proceedings pending finality of the proceedings in *McKee [I]* ‘Finality of the proceedings’ shall include the finality of any subsequent appeal and any proceedings in this court.” (See, for example, the Supreme Court transfer orders in *People v. Johnson*, review granted Aug. 13, 2008, S164388; *People v. Riffey*, review granted Aug. 20, 2008, S164711; *People v. Boyle*, review granted Oct. 1, 2008, S166167; and *People v. Rotroff*, review granted Jan. 13, 2010, S178455.)⁷

While we are not bound by the Supreme Court’s transfer orders in these cases or its denial of review in *McKee II*, we also cannot disregard its clear message to the state’s trial and appellate courts that *McKee II*’s factual and legal conclusions on the equal protection claim should be treated as binding unless and until a higher court directs otherwise, and duplicative proceedings addressing those issues were to be avoided. Dickerson invites us to discount the Supreme Court’s guidance, which we decline to do. In any event, we reject Dickerson’s position *McKee II* misapplied the strict scrutiny test and utilized an overly deferential standard for reviewing the evidence presented in the trial court. We find *McKee II* properly adhered to the form of review required by the Supreme Court in *McKee I*. (See *McKee I*, *supra*, 47 Cal.4th at pp. 1206, 1210–1211.) Having reviewed the evidentiary showing set out in *McKee II*, we find it justifies the

⁷ The same order was later issued in *People v. Glenn*, review granted Feb. 10, 2010, S178140; *People v. Barbour*, review granted July 28, 2010, S183450; *People v. McKnight*, review granted July 28, 2010, S183315; *People v. Judge*, review granted July 28, 2010, S182384; *People v. Dannenberg*, review granted Aug. 18, 2010, S184382; *People v. Schuler*, review granted Sept. 1, 2010, S183062; and *People v. Gomberg*, review granted Oct. 20, 2010, S185107.

disparate treatment upon which Dickerson bases his equal protection claim.⁸ It is unnecessary for us to remand this case for an evidentiary hearing to plow the same ground again. (See *People v. McKnight* (2012) 212 Cal.App.4th 860, 862, review den. Mar. 13, 2013 [agreeing with *McKee II*'s equal protection holding and finding it applied to all SVP's].)

C. Other Constitutional Claims

As Dickerson properly concedes, all of his other constitutional challenges to the SVPA—violation of his Fourteenth Amendment right to due process, as well as the constitutional prohibitions against ex post facto laws, double jeopardy, and cruel and unusual punishment—were considered and rejected in *McKee I*. Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, we are bound by those determinations, and must reject his claims.

III. DISPOSITION

The judgment is affirmed.

⁸ The evidence supported the conclusion that (1) released SVP's as a class have higher reoffense rates than other sex offenders and persons subject to civil commitment under other statutes; (2) the emotional and psychological harm suffered by victims of sex offenses is greater than that caused by other types of offenses; (3) SVP's pose an increased risk of harm to children; (4) SVP's have significantly different diagnoses from those of persons subject to civil commitment under other statutes, and differences in treatment plans, rates of compliance and success rates are significantly different for SVP's compared to these persons. (*McKee II, supra*, 207 Cal.App.4th at pp. 1342–1344, 1347.)

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.