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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SPENCER ALAN THOMPSON,

Defendant and Appellant.

A135251

(Sonoma County  
Super. Ct. No. SCR27031)

**I. INTRODUCTION**

Spencer Alan Thompson appeals from an order denying his request for the appointment of an expert pursuant to Welfare and Institutions Code, section 6605, a provision of the Sexually Violent Predator Act (the SVPA).<sup>1</sup> Thompson contends that the superior court abused its discretion by denying him access to an expert to assist him in attempting to secure his release from an indeterminate commitment under the SVPA. Indeed, according to Thompson, the denial of such a request would virtually always constitute an abuse of discretion because the ready assistance of an expert is essential to protect the due process rights of an individual committed as a Sexually Violent Predator (SVP). We reject these contentions and affirm the order.

**II. THE SVPA**

“The SVPA ‘allows for the involuntary commitment of certain convicted sex offenders, whose diagnosed mental disorders make them likely to reoffend if released at

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<sup>1</sup> Unlabeled statutory references are to the Welfare and Institutions Code.

the end of their prison terms.’ [Citation.]” (*People v. Medina* (2009) 171 Cal.App.4th 805, 811-812 (*Medina*)). An SVP is defined as “a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” (§ 6600, subd. (a)(1).)

In November 2006, California voters passed Proposition 83 which led to a modification of the terms governing when an SVP may be released from civil commitment under the SVPA. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1183-1184 (*McKee*)). This modification changed “the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP.” (*Ibid.*)

Under the current version of the SVPA, there are two types of petitions that an SVP can file to seek a conditional release or unconditional discharge from an indefinite commitment. First, with authorization from the Director of the Department of State Hospitals (the Department), the SVP may file a petition under section 6605. Second, even absent the Director’s permission, an SVP may file a petition under section 6608.

Section 6605, subdivision (a) (section 6605(a)) states that an SVP who is committed for an indeterminate term “shall have a current examination of his or her mental condition made at least once every year.” The Department must file a report in conjunction with the annual examination that “shall include consideration of whether the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative or an unconditional release is in the best interest of the person and conditions can be imposed that would adequately protect the community.” (*Ibid.*) A copy of the annual report must be served on the prosecuting agency involved in the initial commitment and on the committed person. Section 6605(a) also provides that “[t]he person may retain, or if he or she is indigent and

so requests, the court may appoint, a qualified expert or professional person to examine him or her, and the expert or professional person shall have access to all records concerning the person.”

If, as a result of the section 6605(a) annual evaluation, the Department determines either that the committed person no longer meets the definition of an SVP or that a “conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community,” the Director of the Department must authorize the committed person to petition the court for conditional release or for an unconditional discharge. (§ 6605, subd. (b); see also *People v. Landau* (2011) 199 Cal.App.4th 31.)

Upon the filing of a section 6605 petition, the court will make a probable cause determination and, if probable cause for the petition exists, a full hearing will be set. (§ 6605, subd (c).) At that hearing, the State carries the burden of proving beyond a reasonable doubt that the committed person is an SVP who cannot be safely discharged. The committed person “shall have the right to be present and shall be entitled to the benefit of all constitutional protections that were afforded to him or her at the initial commitment proceeding.” (§ 6605, subd. (d).) Both the State and the committed person have the right to demand a jury and to have experts evaluate the committed person. Section 6605, subdivision (d) also provides that “[t]he court shall appoint an expert if the person is indigent and requests an appointment.”

In contrast to the section 6605 petition, section 6608, subdivision (a) (section 6608(a)) authorizes an SVP to petition for an unconditional release or a conditional release “without the recommendation or concurrence of the Director of Mental Health.” If certain time requirements are satisfied and the superior court determines that the section 6608 petition is not frivolous, it will set a full hearing on the matter. (§ 6608, subds. (a), (c) & (h).) At any hearing under section 6608, “the petitioner shall have the burden of proof by a preponderance of the evidence.” (§ 6608, subd. (i).)

Upon filing a section 6608 petition, the SVP “shall be entitled to assistance of counsel.” (§ 6608(a).) Furthermore, although section 6608 does not explicitly provide

for the appointment of an expert, our Supreme Court has held that section 6608, read in conjunction with section 6605(a), “mandate[s] appointment of an expert for an indigent SVP who petitions the court for release.” (*McKee, supra*, 47 Cal.4th at pp. 1192-1193.)

### III. STATEMENT OF FACTS

On April 1, 2011, Thompson was committed to the custody of the Department of Mental Health for an indeterminate term pursuant to a jury determination that he is an SVP under section 6600 et seq. On August 14, 2012, this court filed a decision affirming the commitment order but remanding the case so the trial court could re-consider Thompson’s claim that the SVPA violates equal protection. (*People v. Thompson* (Aug. 14, 2012, A131788) [nonpub. opn.] (*Thompson I*).)<sup>2</sup>

On January 30, 2012, while *Thompson I* was pending in this court, Thompson filed a pro per ex parte request for the appointment of an expert pursuant to section 6605(a). The request was supported by a declaration in which Thompson requested an expert to “assist me in conjunction both with the annual review of my status as [an SVP] and with the possible preparation of a [section 6608 petition].” Thompson did not provide the court with any other information about the status of his case or his desire for expert assistance.

On March 16, 2012, the superior court filed an order denying Thompson’s request for an appointed expert. The court reasoned that it had discretion to appoint an expert under section 6605(a) but that Thompson had failed to demonstrate good cause for such an appointment at that stage in his commitment. In this regard, the court underscored that Thompson “fail[ed] to even identify exactly *when* his next annual examination is to take place.”

### IV. DISCUSSION

#### A. *The Trial Court’s Jurisdiction*

Preliminarily, we address the People’s contention that the order should be summarily affirmed because the trial court did not have “jurisdiction” to rule on the

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<sup>2</sup> We take judicial notice of our decision in *Thompson I*.

merits of Thompson’s request for an appointed expert. The People argue that the court lacked jurisdiction over Thompson’s SVPA proceeding at the time the request was made because (1) the appeal in *Thompson I* was pending in this court, and (2) Thompson had not filed a petition for conditional release or unconditional discharge. We hold that neither of these circumstances deprived the trial court of jurisdiction to hear Thompson’s request.

As a general rule, “the perfecting of an appeal stays [the] proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order . . . .” (Code Civ. Proc., § 916, subd. (a).) “The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.” (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938.)

However, “the pendency of an appeal does not divest the trial court of jurisdiction to determine ancillary or collateral matters which do not affect the judgment on appeal. [Citation.]” (*Betz v. Pankow, supra*, 16 Cal.App.4th at p. 938.) In the present case, the People do not even suggest that the order denying Thompson’s request for an appointed expert had anything to do with any issue in *Thompson I*. It appears to us that Thompson’s request for appointment of an expert was collateral to the judgment on appeal in *Thompson I*.

Furthermore, the general rule that an appeal stays proceedings in the trial court does not apply to “special proceedings” unless the governing statute expressly so provides. (*People v. Hedge* (1999) 72 Cal.App.4th 1466, 1477 (*Hedge*).) An SVPA commitment proceeding is a special proceeding and there is no provision in the SVPA which could be construed to stay proceedings in the trial court when an appeal is filed. (*Ibid.*; see also *People v. Yartz* (2005) 37 Cal.4th 529, 536-537.)

The *Hedge* court held that a trial court does have jurisdiction to consider an SVPA petition when there is a pending appeal from an order on a prior petition in the same

proceeding. (*Hedge, supra*, 72 Cal.App.4th at p. 1477.) The court reasoned that “the Legislature intended the trial court to have continuing jurisdiction in such special civil proceedings, as in other civil commitment proceedings [citation], to consider and review new matters involving the same person even when an earlier petition or matter is pending appeal.” (*Ibid.*)

Remarkably, the People fail to address this relevant precedent which also undermines the second prong of its jurisdiction argument, i.e. that a pending petition is a prerequisite for the trial court’s jurisdiction. As the *Hedge* court found, trial courts have continuing jurisdiction in commitment proceedings filed under section 6600 et seq. (*Hedge, supra*, 72 Cal.App.4th at pp. 1476-1477.) Furthermore, the People ignore the fact that the SVPA expressly contemplates trial court involvement in the annual review procedure outlined in section 6605(a), a process that occurs independent of the filing of any petition. They also ignore that, regardless whether a petition is pending, an SVP in Thompson’s position is subject to an indefinite commitment order in an ongoing SVPA proceeding. It is that commitment order which establishes the trial court’s jurisdiction. (See *People v. Superior Court (Rigby)* (2011) 195 Cal.App.4th 857 [current commitment under SVPA essential for court to have jurisdiction].)

The People do not cite any case involving the SVPA, but rely instead on *People v. Sparks* (1952) 112 Cal.App.2d 120, 121 (*Sparks*). The *Sparks* court held that a trial court did not have jurisdiction to entertain a convicted defendant’s motion for records in his criminal case because the time to appeal the judgment in that case had long since expired and there was no pending writ petition or other proceeding before the trial court at that time. (*Id.* at p. 121.) *Sparks* is inapposite because it pertained to a criminal case that had become final rather than an ongoing special proceeding under the SVPA. As discussed above, trial courts have continuing jurisdiction in commitment proceedings filed under section 6600, et. seq. (*Hedge, supra*, 72 Cal.App.4th at p. 1477.) Therefore, we hold that the trial court had jurisdiction to reach the merits of Thompson’s request for an appointed expert.

**B. *Thompson's Request for Appointment of An Expert***

Thompson made his request for an appointed expert under section 6605(a). That provision states that, during the annual review process, the committed person “may retain” an expert and, if the person is indigent and requests appointment of an expert, the court “may appoint” a qualified expert to examine him. By contrast, section 6605(d) states that if the annual review leads to the filing of a section 6605 petition supported by probable cause, the SVP has the right to the assistance of an expert at the section 6605(d) hearing and, if the SVP is indigent, the trial court “shall” appoint an expert upon request. “This difference in language reveals a difference in meaning: though a court has the discretion to appoint an expert to assist the SVP at an earlier point in the annual review proceedings, it is not required to do so unless and until the matter is set for a full hearing under section 6605, subdivision (d).” (*People v. Hardacre* (2001) 90 Cal.App.4th 1392, 1398-1399 (*Hardacre*).)

Therefore, under *Hardacre, supra*, 90 Cal.App.4th at pages 1398-1399, the trial court had discretion to appoint an expert at the stage in the SVPA proceeding when Thompson filed his request. The record before us does not establish any basis for questioning the trial court’s discretionary ruling. Thompson did not provide the court with any concrete information about how or why an expert would have assisted him at that stage in his case. He alleged that he wanted assistance preparing for the annual evaluation but did not disclose when that review would take place. He alleged he was contemplating filing a section 6608 petition but did not provide any information about the basis for such a petition or when he intended to make that filing. Indeed, Thompson did not provide the court with any factual information about his case at all.

On appeal, Thompson does not dispute that the record is void of any particularized showing that he needed or could benefit from expert assistance at the time he filed his request. Furthermore, he acknowledges that, under *Hardacre, supra*, 90 Cal.App.4th 1392, the trial court’s ruling was discretionary. However, Thompson points out that the SVPA was amended to provide for indefinite commitments after *Hardacre* was decided. Thompson takes the position that, while the decision whether to appoint an expert under

section 6605(a) may “technically, still be discretionary,” under the current version of the SVPA, “a trial court would abuse its discretion in virtually all cases by refusing to appoint an expert when requested.” To support this theory, Thompson relies primarily on *McKee*, *supra*, 47 Cal.4th 1172.

As noted earlier in our opinion, the *McKee* court held that an SVP who files a section 6608 petition has the right to the assistance of an expert. (*McKee*, *supra*, 47 Cal.4th at pp. 1192-1193.) The court reasoned that, although section 6608 does not expressly confer that right, “expert testimony is critical in an SVP commitment proceeding, in which the primary issue is not, as in a criminal trial, whether the individual committed certain acts, but rather involves a prediction about the individual’s future behavior.” (*Id.* at p. 1192.) Furthermore, the court was also concerned that “[i]f the state involuntarily commits someone on the basis of expert opinion about future dangerousness, places the burden on that person to disprove future dangerousness, and then makes it difficult for him to access his own expert because of his indigence to challenge his continuing commitment, that schema would indeed raise a serious due process concern.” (*Ibid.*) Ultimately, the court found that “[g]iven that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointment of an expert for an indigent SVP who petitions the court for release.” (*Id.* at p. 1193.)

*McKee* does not directly assist Thompson in this case because he did not file a section 6608 petition either before or in conjunction with his request for appointed counsel. Nevertheless, Thompson argues that “the only way to avoid the potential due process violation identified by the Supreme Court in *McKee* is for the expert to be available prior to the filing of the petition.” By this argument, it appears Thompson is suggesting that *McKee* implicitly undermines the holding in *Hardacre*, *supra*, 90 Cal.App.4th 1392, that trial courts have discretion to appoint an expert prior to the filing of a petition. We disagree. Under Thompson’s interpretation of *McKee*, an indigent SVP

would have an unqualified right to the ongoing assistance of an expert at the state's expense for the entire period of his indefinite commitment. If the *McKee* court thought that necessary, we believe it would have said so. Instead, the court held that an indigent SVP who files a section 6608 petition is entitled to the assistance of an appointed expert. (*McKee*, *supra*, 47 Cal.4th at p. 1193.)

Taking a different tact, Thompson contends that an SVP has a due process right to expert assistance before he files a section 6608 petition because, as a factual matter, it is simply not possible to file a non-frivolous section 6608 petition without expert assistance. As reflected in our summary of the statutory procedure, the trial court will deny a section 6608 petition without a hearing if it makes a determination that the petition is based on "frivolous grounds." (§ 6608(a).) Thompson's theory is that an SVP cannot overcome that hurdle unless he has access to an expert before his petition is filed.

However, the question of what constitutes a non-frivolous section 6608 petition is not properly raised in this appeal. As best we can determine, Thompson has never filed a section 6608 petition. It is simply not our job as a court of review to consider what Thompson would have to allege to support a non-frivolous petition. Furthermore, for the record, Thompson's speculation about the alleged need for an expert before a section 6608 petition is filed rests on a patently unreasonable interpretation of *People v. Reynolds* (2010) 181 Cal.App.4th 1402 (*Reynolds*). *Reynolds* was an appeal from an order dismissing a section 6608 petition. The *Reynolds* court found that appellant waived any opposition to the motion to dismiss by conceding in the lower court that there was no basis for his section 6608 petition. (*Id.* at pp. 1406-1409.) The *Reynolds* court also rejected appellant's contention that his trial counsel rendered ineffective assistance by conceding that there were no changed circumstances to support the petition because the record established that the section 6608 petition was frivolous. (*Id.* at pp. 1409-1410.)

According to Thompson, *Reynolds* is the "only published case addressing a Section 6608 petition filed without a favorable expert opinion," and it establishes that an SVP who is denied the right to an expert before a petition is filed is caught in a "catch-22"

because he cannot secure expert assistance unless he files a non-frivolous petition and he cannot file a non-frivolous petition without expert assistance.<sup>3</sup>

We decline to enumerate all of the problems with this catch-22 theory. We do note however, that the text of the *Reynolds* decision does not support Thompson's assumption that the SVP in that case was denied access to an expert. Indeed, it appears that Thompson's entire theory is based on the false assumption that an appointed expert will always advocate for the SVP's release from a commitment. In any event, since there is no indication that the *Reynolds* appellant ever requested that the court appoint an expert for him, that case is not relevant to the only issue before us in this case.

Thompson's final theory on appeal is that several post-Proposition 83 changes to the SVPA procedure make it necessary for the committed SVP to have access to an expert at any point during the 12-month review cycle. Again, these theories are all speculative on this record. Furthermore, in making these very general arguments, Thompson fails to account for the fact that the trial court does have discretion under section 6605(a) to appoint an expert to assist an SVP before he or she files a petition under sections 6605 or 6608. The problem in this case was that Thompson simply failed to provide the court with any reason why such an appointment was warranted at the time he made his request. Under those circumstances, the court did not abuse its discretion by denying Thompson's section 6605(a) request for appointment of an expert.

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<sup>3</sup> The *Reynolds* appellant was represented by the same attorney who represents Thompson in the present appeal.

**V. DISPOSITION**

The order is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.