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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,	C055649
Plaintiff and Respondent,	(Super. Ct. No. SCV13798)
v.	OPINION ON TRANSFER
ROBERT JAMES RIFFEY,	
Defendant and Appellant.	

Committed to the State Department of Mental Health (now, the State Department of State Hospitals; hereafter, the department) for an indeterminate term as a sexually violent predator (SVP), defendant Robert James Riffey appeals. He contends amendments to the Sexually Violent Predator Act (the Act) (Welf. & Inst. Code,[1] § 6600 et seq.) that provide for indeterminate commitments should not have been applied to him retroactively and are unconstitutional. We conclude the amendments to the Act were not applied to defendant retroactively and his constitutional challenges are without merit. Accordingly, we affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

In August 2002, the Placer County District Attorney filed a petition to commit defendant to the department for two years as an SVP. In December 2002, defendant waived a probable cause hearing and the court bound him over for trial. Over the next four years, the matter was continued numerous times.

"On September 20, 2006, the Governor signed the Sex Offender Punishment, Control, and Containment Act of 2006, Senate Bill No. 1128 (2005-2006 Reg. Sess.) (Senate Bill 1128). (Stats. 2006, ch. 337.) Senate Bill 1128 was urgency legislation that went into effect immediately. (Stats. 2006, ch. 337, § 62.) Among other things, it amended provisions of the Act to provide the initial commitment set forth in Welfare and Institutions Code section 6604 was for an indeterminate term. (Stats. 2006, ch. 337, § 55.)" (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281.)

"At the November 7, 2006 General Election, the voters approved Proposition 83, an initiative measure. (Deering's Ann. Welf. & Inst. Code (2007 supp.) appen. foll. § 6604, p. 43.) Proposition 83 was known as 'The Sexual Predator Punishment and Control Act: Jessica's Law.' (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 127.) Among other things, Proposition 83 'requires that SVPs be committed by the court to a state mental hospital for an undetermined period of time rather than the renewable two-year commitment provided for under existing law.' (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) analysis of Prop. 83 by Legis. Analyst, p. 44.)" (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at p. 1281.)

In March 2007, the district attorney filed an amended petition to commit defendant as an SVP for an indeterminate term. The matter was tried in April 2007. In midtrial, defendant moved to dismiss the proceedings against him on the ground (among others) that "retroactive" application to him of the new provision allowing commitment for an indeterminate term would violate due process. The court denied the motion. The jury

subsequently found defendant was an SVP, and the trial court committed him to the department for an indeterminate term.

Defendant filed a timely notice of appeal. We affirmed the judgment in an earlier opinion, but the Supreme Court granted review and transferred the case back to us with directions to vacate our decision and to reconsider the cause in light of *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*). The Supreme Court also ordered us to suspend further proceedings pending finality of the proceedings on remand in *McKee*, including the finality of any subsequent appeal and any further proceedings in the Supreme Court.

Following further trial court proceedings in *McKee*, Division One of the Fourth Appellate District issued its opinion in the subsequent appeal in the case, and the Supreme Court denied review. (*People v. McKee* (2012) 207 Cal.App.4th 1325, review denied Oct. 10, 2012, S204503 (*McKee II*).) Accordingly, we now reconsider this case in light of the Supreme Court's decision in *McKee I*.

DISCUSSION

I

The Act

The Act "allows for the involuntary commitment of certain convicted sex offenders, whose diagnosed mental disorders make them likely to reoffend if released at the end of their prison terms." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 235.) Under the version of the Act in effect before the enactment of Senate Bill No. 1128 and the passage of Proposition 83, if the government proved beyond a reasonable doubt in an initial commitment proceeding that a person was an SVP, then the court had to commit the person to the department for two years, and the person could not be kept in actual custody for longer than two years unless a new petition to extend the commitment was filed. (Former § 6604; *Albertson v. Superior Court* (2001) 25 Cal.4th 796, 802, fn. 6; *Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at p. 1280.) "The procedures for an initial commitment also appl[ied] to an extended commitment to the extent possible."

(*People v. Ward* (2002) 97 Cal.App.4th 631, 634.) Thus, to extend a person's commitment as an SVP, the government had to prove beyond a reasonable doubt that the person remained an SVP. The term of any extended commitment was two years from the end of the previous commitment. (Former § 6604.1, subd. (a).)

In the wake of Senate Bill No. 1128 and Proposition 83, the Act still provides that in an initial commitment proceeding the government must prove beyond a reasonable doubt that the person whose commitment is sought is an SVP. (See § 6604.) Now, however, if the court or jury makes that finding, the court must commit the person to the department for an indeterminate term, rather than a two-year term. (*Ibid.*)

Because the term of commitment is indeterminate, the government no longer has to prove at regular intervals, beyond a reasonable doubt, that the person remains an SVP. Instead, the department must examine the person's mental condition at least once a year and must report annually on whether the person remains an SVP. (§ 6605, subd. (a).) If the department determines the person is no longer an SVP, the director of the department must authorize the person to petition the court for unconditional discharge. (§ 6605, subd. (b).) If, on consideration of such a petition, the court finds probable cause to believe the person is no longer an SVP, the court must conduct a hearing, at which the government has to prove beyond a reasonable doubt that the person is still an SVP. (*Id.*, subds. (c) & (d).) If the government meets that burden, the person must (once again) be committed for an indeterminate term. (*Id.*, subd. (e).) If the government does not meet its burden, then the person must be discharged. (*Ibid.*)

The only other avenue for release from confinement under the amended Act is a petition under section 6608. This statute remains substantially the same as before the enactment of Senate Bill No. 1128 and the passage of Proposition 83. Under this statute, a person committed as an SVP may petition for conditional release or unconditional discharge without the recommendation or concurrence of the director of the department. (§ 6608, subd. (a).) Such a petition may also be instituted by the director under section

6607. In any hearing under section 6608, however, the petitioner has the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).)

With these aspects of the law in mind, we turn to defendant's arguments on appeal.

II

Retroactive Application Of The Law

Defendant first contends the trial court erred in retroactively applying the amended Act to his case.[2] He contends "[t]he requirements in Proposition 83 and SB 1128 that defendants serve indeterminate terms altered the legal consequences and liabilities for [his] acts and mental condition and thus, cannot be applied retrospectively."

This court rejected a similar argument in *Bourquez v. Superior Court*, and we do so again here. "'In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment."'" (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at pp. 1288-1289.)

"In determining whether someone is an SVP, the last event necessary is the person's mental state at the time of the commitment. For pending petitions, the person's mental state will be determined after the passage of Proposition 83, at the time of

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[2] As with most of his other arguments, defendant did not raise this argument in the trial court. The People do not argue forfeiture, however, instead addressing all of defendant's arguments on their merits. We will do the same. By doing so, we obviate the need to address defendant's alternate argument that his trial counsel was ineffective for failing to raise these arguments.

commitment. While past qualifying sex crimes are used as evidence in determining whether the person is an SVP, a person cannot be so adjudged 'unless he "currently" suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which "makes" him dangerous and "likely" to reoffend.'" (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at p. 1289.)

The *Bourquez* court concluded that "[b]ecause a proceeding to extend commitment under the Act focuses on the person's current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law." (*Bourquez v. Superior Court*, *supra*, 156 Cal.App.4th at p. 1289.) The same conclusion applies with equal force to a proceeding, such as the one here, for an initial commitment under the Act. Here, the determination made at the initial commitment hearing in April 2007 was that defendant was an SVP *at that time*. In light of this fact, the court's application to defendant of the then-current version of the Act, which called for an indeterminate term of commitment, was not a retroactive application of the law. Consequently, defendant's first argument is without merit.[3]

III

Ex Post Facto

Defendant contends the new requirement of commitment for an indeterminate term renders the Act punitive in nature and therefore the application of the amended Act to him violates the constitutional prohibitions against ex post facto laws. The Supreme

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[3] This case is distinguishable from *People v. Whaley* (2008) 160 Cal.App.4th 779, because in *Whaley* the People sought to retroactively convert a two-year commitment under the prior version of the SVPA into a indeterminate commitment under the amended SVPA. The Sixth District Court of Appeal properly concluded that this was an impermissible retroactive application of the amended SVPA. Here, in contrast, the amended SVPA was applied prospectively, at the time the petition for commitment was heard in April 2007.

Court rejected an identical argument in *McKee I*, concluding "that the Proposition 83 amendments do not make the Act punitive and accordingly do not violate the ex post facto clause." (*McKee I*, *supra*, 47 Cal.4th at p. 1195.) Accordingly, we must reject defendant's ex facto argument here as well.[4] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

IV

Due Process

Defendant contends his indeterminate commitment under the amended Act violates the due process clause of the Fourteenth Amendment to the United States Constitution because there is no longer any provision for automatic periodic hearings to determine the propriety of continued commitment and because the Act now improperly places the burden on him to prove he should be released. We disagree.

"Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections. [Citation.] A defendant challenging the statute on due process grounds carries a heavy burden. Courts have a '"duty to uphold a statute unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity."'" (*People v. Otto* (2001) 26 Cal.4th 200, 209-210.)

Defendant contends the lack of automatic periodic commitment hearings to determine if the committed person remains an SVP violates his right to due process because "[a]bsent such proceedings, there is no mechanism in place to insure that a

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[4] The Supreme Court's conclusion that indeterminate commitment under the amended Act is not punitive for purposes of an ex post facto challenge also disposes of defendant's arguments here under the double jeopardy clause of the Fifth Amendment and his arguments based on the prohibitions against cruel or unusual punishment in the United States and California Constitutions, because (as defendant acknowledges) all three types of challenges are viable only if the statute at issue imposes punishment.

person will not continue to be detained beyond the period which is legally justified." As we have noted, however, the department is bound to review a committed person's mental condition at least annually and must authorize that person to file a petition for discharge if the department determines he is no longer an SVP. Moreover, a person can petition for discharge without the concurrence or recommendation of the department.

Defendant contends the first option is inadequate for due process purposes because the department "is not a neutral and disinterested arbiter. . . . The [department] is the State, and simply cannot be entrusted to provide SVP's with the only meaningful opportunity for judicial review of their commitments." There is no basis in the record, however, for speculating that the department will not fairly assess the mental condition of a person committed as an SVP when called on to do so. Moreover, section 6608 provides a safety valve from any potential abuse by allowing a person to petition for discharge without the concurrence or recommendation of the department.

Defendant contends the procedural rights provided by section 6608 "are essentially meaningless" because: (1) that statute "does not provide for the appointment of a defense expert for indigent detainees"; and (2) "the burden of proving fitness for release is allocated to" the committed person.

Addressing the latter issue first, the Supreme Court rejected an identical argument in *McKee I*, concluding that "the requirement that [an SVP], after his initial commitment, must prove by a preponderance of the evidence that he is no longer an SVP does not violate due process." (*McKee I*, *supra*, 47 Cal.4th at p. 1191.)

To the extent defendant relies on *Foucha v. Louisiana* (1992) 504 U.S. 71 [118 L.Ed.2d 437] to support his argument that the due process clause forbids placing the burden of proof on the confined person, that reliance is misplaced. *Foucha* involved the issue of whether "a person acquitted by reason of insanity [could] be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness." (*Id.* at p. 73 [118

L.Ed.2d at p. 444].) In *Foucha*, a review panel at the institution of confinement determined that "there had been no evidence of mental illness since [Foucha's] admission." (*Id.* at p. 74 [118 L.Ed.2d at p. 444].) Nonetheless, the state continued to confine Foucha based on the determination that he was dangerous to himself and others. (*Id.* at p. 75 [118 L.Ed.2d at p. 445].) In concluding that this violated due process, the United States Supreme Court commented that Foucha was "not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous." (*Id.* at pp. 81-82 [118 L.Ed.2d at p. 449].)

This part of *Foucha*, on which defendant relies, does not advance his argument. The foundational problem in *Foucha* was that the state insisted on keeping Foucha confined even though everyone agreed he was not mentally ill. It was in this context that the United States Supreme Court found it objectionable for the state to absolve itself of any burden of proof and to require Foucha to prove he was not dangerous. That situation is in no way comparable to proceedings under section 6608 of the Act. When a confined person petitions for discharge under that statute on the ground he is no longer an SVP, it will necessarily be contrary to the initial adjudication and to the extant determination of the department that he is, and remains, an SVP. Nothing in *Foucha* suggests that due process forbids a state from imposing the burden of proof on the committed person in such circumstances.

As for the fact that section 6608 does not expressly provide for the appointment of a defense expert for indigent detainees, the Supreme Court has concluded that "such appointment may be reasonably inferred." (*McKee I*, *supra*, 47 Cal.4th at p. 1192.)

For the foregoing reasons, we find no merit in defendant's assertion that his indeterminate commitment under the amended Act violates due process.

V

Equal Protection

Defendant contends subjecting SVP's like him to the amended Act violates the equal protection clause of the Fourteenth Amendment because persons committed under the Mentally Disordered Offender (MDO) Act (Pen. Code, § 2960 et seq.) and persons committed because they were found not guilty by reason of insanity (NGI) (*id*, § 1026 et seq.) are not subject to indeterminate commitments and can more readily obtain judicial review of their commitments. We conclude no equal protection violation has been shown.

"The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law. [Citations.] If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.] The question is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

"'Equal protection applies to ensure that persons similarly situated with respect to the legitimate purpose of the law receive like treatment; equal protection does not require identical treatment. [Citation.]' [Citation.] The state 'may adopt more than one procedure for isolating, treating, and restraining dangerous persons; and differences will be upheld if justified. [Citations.] Variation of the length and conditions of confinement, depending on degrees of danger reasonably perceived as to special classes of persons, is a valid exercise of power.'" (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1217.)

"Strict scrutiny is the correct standard of review in California for disparate involuntary civil commitment schemes because liberty is a fundamental interest." (*People v. Buffington*, *supra*, 74 Cal.App.4th at p. 1156.)

The defendant in *McKee I* raised the same equal protection challenge that defendant raises here. The Supreme Court remanded that case to the trial court "to permit the People the opportunity to justify the differential treatment in accord with established equal protection principles." (*McKee I*, *supra*, 47 Cal.4th at p. 1184.) "Following a 21-day evidentiary hearing, the trial court concluded the People met their burden to justify the disparate treatment of SVP's." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1330.) On appeal, Division One of the Fourth Appellate District "conclude[d] the trial court correctly found the People presented substantial 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, and therefore the disparate treatment of SVP's under the Act is necessary to further the People's compelling interests of public safety and humane treatment of the mentally disordered." (*Id.* at pp. 1330-1331.) More specifically, the appellate court determined there was "substantial evidence to support a reasonable perception by the electorate that SVP's have significantly different diagnoses from those of MDO's and NGI's, and that their respective treatment plans, compliance, and success rates are likewise significantly different" and "substantial evidence to support a reasonable inference that an indeterminate, rather than a determinate (e.g., two-year), term of civil commitment supports, rather than detracts from, the treatment plans for SVP's." (*Id.* at p. 1347.) Based on these determinations, the appellate court concluded the Act did not violate McKee's constitutional equal protection rights. (*Id.* at p. 1348.)

Having been offered no reason to diverge from the conclusion of Division One of the Fourth Appellate District in *McKee II*, we conclude defendant's equal protection argument here is without merit for the reasons stated in *McKee II*.

VI

Right Of Access To The Courts

Defendant contends the amended SVPA denies him his First Amendment right to meaningful access to the courts because: (1) an SVP can file a petition for release under

section 6605 only if the department determines the person is no longer an SVP; and (2) a petition under section 6608, which can be filed without the concurrence of the department, does not amount to *meaningful* access to the courts because there is no provision for appointment of a medical expert, the trial court can summarily deny the petition without a hearing if the court determines it is frivolous, and the SVP bears the burden of proof on such a petition.

It is true that "[i]nmates are guaranteed the right to adequate, effective and meaningful access to the courts under the Fourteenth Amendment." (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1182.) "The right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances." (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68.) Defendant, however, has failed to show that the amended SVPA violates that right.

Defendant acknowledges that "[u]nder section 6608, subdivision (a), the SVP detainee has the right to counsel . . . ." With regard to the appointment of a medical expert, the Supreme Court has concluded that the right to "such appointment may be reasonably inferred." (*People v. McKee*, *supra*, 47 Cal.4th at p. 1192.) As for the court's power (indeed obligation) to deny a petition for release or discharge that is based on frivolous grounds, defendant cannot legitimately assert that he has the constitutional right to an evidentiary hearing on a petition for release or discharge that the court has determined is *frivolous*. (See *Church of Scientology v. Wollersheim*, *supra*, 42 Cal.App.4th at p. 648, fn. 4 ["The right to petition is not absolute, providing little or no protection for baseless litigation or sham or fraudulent actions"].) Finally, defendant offers no authority that suggests his constitutional right to meaningful access to the courts includes the right to have the government prove beyond a reasonable doubt at regular intervals that he remains an SVP. In the absence of such authority, defendant's challenge to the amended SVPA based on his right to access to the courts fails.

VII

Single Subject Rule

Finally, defendant contends he is entitled to relief from the indeterminate commitment imposed on him because "Proposition 83 violated the single subject rule governing ballot initiatives and is therefore unenforceable." The People assert that Proposition 83 did not violate the single subject rule, but even if it did, defendant's commitment to an indeterminate term remains lawful under the similar provisions of Senate Bill No. 1128. Defendant's only response to the latter argument is that "SB 1128 . . . should be found unconstitutional" based on his other arguments. We have rejected all of defendant's other arguments, however; thus, even if we were to agree Proposition 83 violated the single subject rule, that conclusion would not provide any basis for granting defendant relief from the judgment from which he has appealed. For that reason, we need not consider this argument further.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

BUTZ, J.