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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD KIMBALL,

Defendant and Appellant.

C067899

(Super. Ct. No. 03F07587)

ORDER MODIFYING OPINION

[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 21, 2012, be modified as follows:

1. On page 2, the last sentence of the first paragraph, which begins with “We shall, however” is deleted in its entirety and replaced with the following:

We reject Kimball’s constitutional and ineffective assistance of counsel claims. We shall affirm the judgment.

2. On page 4, in the third paragraph, the sentence that begins “We will reverse and remand” is deleted in its entirety and replaced with the following:

On remand, *People v. McKee* (2012) 207 Cal.App.4th 1325, review denied October 10, 2012, S204503, rejected an equal protection claim to the SVPA. The evidence adduced in that case applies equally here.

3. On page 4, the text of the disposition is deleted in its entirety and replaced with the following:

The judgment (order of commitment) is affirmed.

This modification changes the judgment.

BY THE COURT:

BLEASE _____, Acting P. J.

ROBIE _____, J.

HOCH _____, J.

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The trial court found that Ronald Mark Kimball was a sexually violent predator (SVP) pursuant to the Sexually Violent Predators Act (Welf. & Inst. Code, § 6600 et seq.; hereafter SVPA) following Kimball’s waiver of his right to a jury trial, and committed him to the Department of Mental Health for an indeterminate term.

For the first time on appeal, Kimball argues the indeterminate commitment violated his right to due process of law, the ex post facto clause, the double jeopardy clause, the prohibition against the imposition of cruel and unusual punishment, and his right to equal protection. He asserts that if we find he forfeited these constitutional claims, he received ineffective assistance of counsel.

With the exception of the equal protection claim, we reject the constitutional and ineffective assistance of counsel claims. We shall, however, reverse and remand for further consideration of Kimball's equal protection claim consistent with *People v. McKee* (2010) 47 Cal.4th 1172.

FACTUAL AND PROCEDURAL BACKGROUND

Kimball does not contest the sufficiency of the evidence, but raises only constitutional claims. Therefore, only a brief summary of the facts will be repeated here.

In 1983, when Kimball was 25, he was arrested but not convicted of contributing to the delinquency of a minor. The victim was an 11-year-old girl. In 1984 Kimball committed a lewd and lascivious act on a child under the age of 14, for which he was later convicted. The victim was an 11-year-old girl. Also in 1984, over the course of three days, Kimball committed a lewd and lascivious act on a developmentally delayed 11-year-old female. This act was a violation of Kimball's probation.

In 1988, after Kimball had been paroled, he spent an evening alone with an 8- to 10-year-old boy, a violation of his parole, and raped a developmentally delayed adult woman. Kimball was sent back to prison. In 1989 Kimball was arrested for another parole violation, annoying or molesting a 10-year-old female. In 1990, when Kimball was again out on parole, he had frequent contact with a 12-year-old girl, a violation of his parole. In 1991, after Kimball had been paroled, he was observed playing with two girls and two boys between the age of six and nine. This was a violation of his parole.

Kimball's next offense was in 1993. He was convicted of annoying or molesting a child and sentenced to two years in prison. The victim was a seven-year-old female. Kimball's next offense was in 2003. The victim was a 15-year-old girl. Kimball orally copulated the girl and had consensual sex with her. She later reported him to the authorities.

The trial court committed Kimball for an indeterminate term to the custody of the Department of Mental Health.

DISCUSSION

Kimball argues his indeterminate commitment pursuant to the SVPA violated his right to due process of law, the ex post facto clause, the double jeopardy clause, and the prohibition against the imposition of cruel and unusual punishment. He further argues that if we conclude he waived these claims by failing to raise them at trial, he received ineffective assistance of trial counsel.

Kimball recognizes that the California Supreme Court rejected the above constitutional challenges in *People v. McKee, supra*, 47 Cal.4th 1172. He raises the issues to preserve his right to seek relief in federal court.

People v. McKee, supra, 47 Cal.4th 1172, expressly rejected due process and ex post facto claims against the SVPA. (*Id.* at pp. 1193, 1195.) The Supreme Court held that the SVPA was not an ex post facto violation because it was non punitive in nature. (*Id.* at p. 1195.) This reasoning served as an implicit rejection of the claims of cruel and unusual punishment and double jeopardy as well.

The punitive nature of a commitment is an essential prerequisite for both double jeopardy and cruel and unusual punishment claims, because both claims target excessive punishment. The cruel and unusual punishment clause “prohibits the imposition of inherently barbaric punishments” or punishment that is disproportionate to the crime. (*Graham v. Florida* (2010) 560 U.S. ____ [176 L.Ed.2d 825, 835].) The double jeopardy clause “protects only against the imposition of multiple *criminal* punishments for the same offense.” (*Hudson v. United States* (1997) 522 U.S. 93, 99 [139 L.Ed.2d 450, 458].) Therefore, the Supreme Court’s ruling on the ex post facto claim implicitly negated both double jeopardy and cruel and unusual punishment claims in an SVPA case.

We deny all of the above constitutional challenges on the authority of *People v. McKee, supra*, 47 Cal.4th 1172, by which we are bound. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because Kimball’s constitutional claims

were not viable under the controlling law, there was also no ineffective assistance of counsel for failing to raise any of these claims.

Kimball also argues the judgment should be reversed and remanded to the trial court to determine whether his indeterminate commitment violated his right to equal protection under the Fourteenth Amendment.

In *People v. McKee, supra*, 47 Cal.4th at p. 1205-1207, the Supreme Court concluded that SVP's are similarly situated with mentally disordered offenders and those who are found not guilty by reason of insanity for purposes of an equal protection analysis. The court stated that the People had not met the burden of showing that the differential treatment was justified because it had not properly understood its burden. (*Id.* at pp. 1207-1208.) Accordingly, the Supreme Court remanded the case to the trial court to determine whether a constitutional justification for imposing a greater burden on SVP's could be demonstrated. (*Id.* at pp. 1208-1209.)

We will reverse and remand for consideration of Kimball's equal protection claim.

DISPOSITION

The order of commitment is reversed and remanded for the limited purpose of considering Kimball's equal protection challenge to his indeterminate SVP commitment in light of *People v. McKee, supra*, 47 Cal.4th 1172.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

HOCH, J.