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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALVARO A. HERNANDEZ,

Defendant and Appellant.

D059431

(Super. Ct. No. MH101244)

APPEAL from an order of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed in part; reversed in part and remanded.

In March 2011 a jury determined defendant Alvaro Hernandez to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.),¹ and the trial court committed him to an indeterminate term with the Department of Mental Health (the Department). On appeal, Hernandez contends the indeterminate sentence violates a number of his constitutional

¹ Further statutory references are also to the Welfare and Institutions Code except when otherwise specified.

rights. Under *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), we reverse the order and remand the matter to the trial court insofar as it pertains to Hernandez's claim under the equal protection clause. In all other respects, we affirm the order.

DISCUSSION

I

SVPA Standards

The SVPA provides for the involuntary civil commitment of an offender immediately upon release from prison for an indeterminate term if the offender is found beyond a reasonable doubt to be an SVP. (§ 6604; *People v. Yartz* (2005) 37 Cal.4th 529, 534.) An SVP is "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).)² An SVP "shall be committed for an indeterminate term to the custody of the . . . Department . . . for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health." (§ 6604.)

In November 2006 voters passed Proposition 83, which modified the commitment under the SVPA from a two-year term, renewable if the prosecution proved beyond a

² In 1988 a jury found Hernandez guilty of six counts of committing lewd and lascivious acts on two children under the age of 14, and he was sentenced to 21 years in prison. In 1967 he was convicted of sexual assault, and he was sentenced to one to five years in prison. Hernandez does not challenge the sufficiency of the evidence to support the finding he is an SVP, and thus a recitation of the medical evidence is not required.

reasonable doubt that the person still met the definition of a sexually violent predator, to an indefinite commitment from which the individual can be released if he proves by a preponderance of evidence that he is no longer a SVP. (*McKee, supra*, 47 Cal.4th at pp. 1184, 1186-1188 & fn. 5.)

II

Constitutional Issues

A

Hernandez contends the indeterminate commitment under section 6604 violates his constitutional rights to due process of law, the prohibition of ex post facto laws, double jeopardy protection, and the prohibition against cruel and unusual punishment. He concedes we are bound by *McKee (Auto Equity Sales v. Superior Court (1952) 57 Cal.2d 450, 455)*, in which our high court expressly rejected the due process and ex post facto claims. (*McKee, supra*, 47 Cal.4th at pp. 1193, 1195.) Hernandez nonetheless raises the issues to preserve his ability to seek further judicial review from our state's Supreme Court or federal courts.

Hernandez also concedes *McKee's* ruling on the ex post facto claim implicitly negates a cruel and unusual punishment claim raised in a SVPA case, and we conclude *McKee* also dooms a double jeopardy claim.³ A function of the ex post facto clause "is

³ Article I, section 10 of the United States Constitutions prohibits ex post facto laws. The double jeopardy clause of the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment (*Benton v. Maryland (1969) 395 U.S. 784, 794*), provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." The Eighth Amendment to the federal

to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." (*Garner v. Jones* (2000) 529 U.S. 244, 249-250, citing *Collins v. Youngblood* (1990) 497 U.S. 37, 42.) The cruel and unusual punishments clause "prohibits the imposition of inherently barbaric punishments under all circumstances." (*Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011, 2021].) The double jeopardy clause protects "against the imposition of multiple *criminal* punishments for the same offense" in successive proceedings. (*Hudson v. United States* (1997) 522 U.S. 93, 99.)

In *McKee*, the court held the SVPA is not punitive in nature. The court explained "civil commitment has historically been imposed nonpunitively on those whose inability to control their behavior poses a danger to the public . . . the amendments to the [SVPA] under consideration here do not alter [its] nonpunitive purpose or treatment and public protection" the "civil commitment has a rational connection with those purposes" and "even with indefinite commitment and alterations in the burden and standard of proof, the commitment . . . is not excessive and is designed to last only as long as that person meets the definition of an SVP." (*McKee, supra*, 47 Cal.4th at p. 1195.) The conclusion that the SVPA is nonpunitive removes an essential prerequisite for the double jeopardy and cruel and unusual punishment claims as well as the ex post facto claim. (See *Kansas v. Hendricks* (1997) 521 U.S. 346, 369 [civil commitment procedure does not constitute second prosecution for purposes of double jeopardy clause].)

Constitution, made applicable to the states by the Fourteenth Amendment (*Roper v. Simmons* (2005) 543 U.S. 551, 560), prohibits the infliction of "cruel and unusual punishments."

B

We agree with Hernandez, however, that reversal and remand is required on his claim that the indeterminate commitment violates his constitutional right to equal protection under the Fourteenth Amendment to the Federal Constitution. " ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' ' ' (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

In *McKee*, the court held that persons committed under the SVPA are similarly situated to persons committed under the Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.), and persons committed under the Lanterman-Petris-Short Act (§ 5000 et seq.) after being found not guilty by reason of insanity (Pen. Code, § 1026 et seq.). (*McKee, supra*, 47 Cal.4th at pp. 1203, 1207.) Mentally disordered offenders may be committed as a condition of parole for renewable one-year periods. (*McKee*, at p. 1202; Pen. Code, §§ 2970, 2972, subds. (a) & (c).) Persons found not guilty by reason of insanity may be committed up to the maximum prison sentence for the underlying crime, with possible two-year extensions. (*McKee*, at p. 1207; Pen. Code, § 1026.5, subds. (a)(1), (b)(1).)

In *McKee*, the court held the defendant's claim of disparate treatment would be reviewed under the strict scrutiny standard. (*McKee, supra*, 47 Cal.4th at pp. 1197-1198.) The court concluded, however, that "[b]ecause neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities

between SVP's and [mentally disordered offenders], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." (*Id.* at pp. 1207-1208.)

Under *McKee, supra*, 47 Cal.4th 1172, further proceedings on Hernandez's equal protection claim are required. To avoid an unnecessary multiplicity of proceedings, however, the trial court "shall suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*. 'Finality of the proceedings' shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court." (*People v. Kisling* (2011) 199 Cal.App.4th 687, 695.)⁴

C

Hernandez's final constitutional challenge is that the SVPA violates his First Amendment right to petition the court for redress. "The First Amendment to the United States Constitution protects the right 'to petition the Government for a redress of grievances.' This includes the right of access to the courts." (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 162.)

⁴ This approach is consistent with cases in which the Supreme Court has accepted review and transferred the matters to the Court of Appeal with directions to vacate their decisions and suspend further proceedings pending finality of proceedings in the *McKee* litigation. (See, e.g., *People v. Nguyen* (Aug. 10, 2011, S193545) 257 P.3d 1129; *People v. Johndrow* (May 20, 2010, S175337) 231 P.3d 907; *People v. Glenn* (May 20, 2010, S178140) 231 P.3d 287; *People v. Rotroff* (May 20, 2010, S178455) 231 P.3d 288.)

Hernandez cites section 6605, subdivision (b), under which he may petition for release only if authorized by the Department on its finding the person is no longer an SVP, or a less restrictive alternative would adequately protect the public. Under section 6608, subdivision (a), however, he has an unfettered right to petition for release without the Department's recommendation or concurrence, and thus his First Amendment right to petition for redress is unimpaired.

Hernandez points out that the SVPA does not expressly provide for a medical expert for a section 6608, subdivision (a) proceeding. In *McKee*, however, the court concluded that while "section 6605, subdivision (a) does not explicitly provide for the appointment of the expert in conjunction with a section 6608 petition, such appointment may be reasonably inferred. As is clear from the context, the annual examination authorized by section 6605, subdivision (a), occurs not solely or even primarily for the purpose of assessing the SVP's treatment needs, but mainly for determining whether involuntary commitment is still required, or whether the SVP has sufficiently changed as a result of treatment to be released. There is no indication that the Legislature that authorized these expert appointments on behalf of an indigent SVP believed that such experts should be disallowed from testifying at an SVP's section 6608 hearing, nor that an SVP's indigence should serve as an obstacle to such testimony. On the contrary, the statute appears to encourage [the appointment of a] state-funded qualified expert . . . for a petitioner's benefit so as to ensure that the commitment lasts no longer than necessary." (*McKee, supra*, 47 Cal.4th at pp. 1192-1193.)

Additionally, Hernandez contends section 6608, subdivision (a) denies him meaningful access to the courts because it allows the court to deny a petition without a hearing if it deems the petition frivolous. We are unpersuaded. He is entitled to the assistance of counsel in petitioning the court. (§ 6608, subd. (a).) Further, a judicial officer decides the issue of frivolity. (*Ibid.*) The First Amendment does not guarantee a specific type of court proceeding, as illustrated by habeas corpus proceedings in which a court may summarily deny a petition when the petitioner fails to prove, by a preponderance of the evidence, facts that establish a basis for relief. (See, e.g., *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) The SVPA facilitates access to the courts.⁵

DISPOSITION

The order finding Hernandez to be an SVP and committing him to the Department's custody is affirmed, except as to the indeterminate nature of the commitment. Pursuant to *McKee, supra*, 47 Cal.4th 1172, the matter is remanded to the trial court for reconsideration of Hernandez's argument that indefinite commitment violates his constitutional right of equal protection. The trial court, however, is directed to suspend further proceedings on the equal protection issue pending finality of the

⁵ Further, an SVP has the right to seek release via a petition for writ of habeas corpus. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.)

proceedings in remand on *McKee*, which shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.⁶

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.

⁶ The suspension of proceedings pertains only to the equal protection issue. It does not pertain to Hernandez's right to petition the court for a conditional or unconditional release based on a change in his condition. (§§ 6605, subd. (b); 6608, subd. (a).)