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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMETT EARL DODD,

Defendant and Appellant.

F062324

(Super. Ct. No. FP003569A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Emmett Earl Dodd was recommitted as a sexually violent predator (SVP) on April 15, 2011, pursuant to the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.).¹ He challenges his recommitment, contending (1) the trial court erred in denying his motion to dismiss because his federal constitutional rights to a speedy trial and due process were violated; (2) he was denied the right to present a defense when the trial court precluded a defense expert from opining that paraphilia not otherwise specified was an invalid SVP diagnosis; and (3) the case must be remanded and proceedings suspended in light of the decision in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). We conclude Dodd's first two contentions fail. In accordance with *McKee*, we will remand the case to the trial court with directions that proceedings be suspended.

FACTUAL AND PROCEDURAL SUMMARY

Dodd was first committed as an SVP in April 2000. He was recommitted on two occasions. On January 8, 2008, the Kern County District Attorney filed a petition in superior court seeking to recommit Dodd as an SVP for an indeterminate term. At the time the petition was filed, Dodd's recommitment was due to expire on April 4, 2008.

On April 11, 2011, a jury trial began. At the time of trial, Dodd was housed in Coalinga State Hospital. Dodd had never participated in any treatment for his sexually deviant behavior. He did not believe he had a problem with sexual impulse control or that he needed treatment, and he declined to participate in the sex offender treatment program.

While subject to civil commitment, Dodd was cited twice for possessing inmate-manufactured alcohol. He had many outbursts and used profanity toward staff. He also

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

was in several physical fights and touched female staff members inappropriately on four occasions.

The prosecution presented testimony from Drs. Wesley B. Maram and Christopher North, psychologists. Maram diagnosed Dodd as having paraphilia not otherwise specified (NOS). He testified Dodd's scores on psychopathy checklists showed an extreme form of antisocial personality disorder and scored as highly psychotic. He opined that individuals with Dodd's scores are likely to be violent in the future, exhibit poor judgment on parole, and are associated with sexual recidivism.

North diagnosed Dodd as having the mental disorders of paraphilia NOS and coercive or rape paraphilia, a personality disorder with antisocial features, and suffers from alcohol abuse. He opined that Dodd's mental disorders, combined with his refusal to accept treatment and his commission of rapes while on parole, made him likely to engage in sexually violent criminal behavior if released.

Drs. Robert L. Halon and Catherine Sanchez, psychologists, testified for the defense. Halon opined that rape is not a diagnosis in the DSM-IV-TR² manual and never has been. He also testified that Dodd did not suffer from paraphilia or antisocial personality disorder. He concluded there was no current evidence Dodd suffered from a mental disorder that predisposed him to acts of criminal sexual violence or that Dodd was unable to control himself.

Sanchez worked at Coalinga State Hospital. She noted in her reports that Dodd had no current overt behaviors of paraphilia.

On April 15, 2011, the jury found that Dodd met the criteria for commitment under the SVPA. That same day the superior court ordered Dodd recommitted; however, the court stayed the imposition of an indeterminate term pursuant to *McKee*.

²Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

DISCUSSION

Dodd raises three challenges to his recommitment order: (1) the trial court erred when it denied his motion to dismiss on the basis of a violation of his constitutional rights to due process and a speedy trial; (2) the trial court erred when it precluded a defense expert from testifying that paraphilia NOS was an invalid SVP diagnosis; and (3) the SVPA violates equal protection.

I. Motion to Dismiss

There are three primary reasons Dodd's motion to dismiss on the basis of a violation of his right to a speedy trial properly was denied by the trial court: (1) the motion to dismiss was procedurally improper; (2) the speedy trial right applies only in criminal, not civil, cases; and (3) the SVPA contains no time limit by which a trial must be held on a civil commitment petition.

Procedural analysis

Commitment proceedings under the SVPA are not criminal trials. Instead, an SVP proceeding is civil and nonpunitive in nature. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1166-1167 (*Hubbart*); *People v. Talhelm* (2000) 85 Cal.App.4th 400, 404 (*Talhelm*); *In re Parker* (1998) 60 Cal.App.4th 1453, 1461 (*Parker*); *People v. Superior Court (Cheek)* (2001) 94 Cal.App.4th 980, 988 (*Cheek*)). "Accordingly, unless otherwise indicated on the face of the statute, rules of civil procedure will operate. [Citations.]" (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1128.) For example, civil discovery rules apply in SVP proceedings. (*Leake v. Superior Court* (2001) 87 Cal.App.4th 675, 679; *Cheek, supra*, at p. 988.)

As a threshold matter, it appears that Dodd's motion to dismiss was procedurally improper. Generally speaking, a motion to dismiss a civil action lies only for grounds specified in the Code of Civil Procedure, such as nonjoinder of necessary parties or failure to serve the summons timely. (Weil & Brown, Cal. Practice Guide: Civil

Procedure Before Trial (The Rutter Group 2012) ¶ 7:370, p. 7(1)-86 (rev. #1, 2011); see also *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 330, fn. 15.)

Further, Dodd's motion to dismiss was not a demurrer, a motion for judgment on the pleadings, or a motion for summary judgment. It has been held that a nonstatutory motion to dismiss can serve the same function as a demurrer. (*Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 299.) Yet, since it was not an attack on the pleadings, it does not seem that Dodd's motion could be regarded as equivalent to a demurrer. As for summary judgment, such a motion does not lie in an SVP proceeding. (*Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1682.)

Speedy trial analysis

The state and federal Constitutions both guarantee *criminal* defendants the right to a speedy trial (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1), and both guarantees operate in state *criminal* prosecutions (see *Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223 [holding that the 6th Amend.'s speedy trial guarantee applies to state criminal prosecutions]), but there are two important differences in the operation of the state and federal constitutional rights as construed by our courts.

The first difference concerns the point at which the speedy trial right attaches. Under the state Constitution, the filing of a felony complaint is sufficient to trigger the protection of the speedy trial right. (*People v. Hill* (1984) 37 Cal.3d 491, 497, fn. 3; *People v. Hannon* (1977) 19 Cal.3d 588, 607-608.) Under the federal Constitution, however, the filing of a felony complaint is by itself insufficient to trigger speedy trial protection. (*Hannon*, at pp. 605-606.) The United States Supreme Court has defined the point at which the federal speedy trial right begins to operate: “[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” (*United States v. Marion* (1971) 404 U.S. 307, 320.)

The second difference is in the showing that a defendant must make to obtain a dismissal for violation of the speedy trial right. For the federal Constitution's speedy trial right, the United States Supreme Court has articulated a balancing test that requires consideration of the length of the delay, the reason for the delay, the defendant's assertion of the right, and prejudice to the defense caused by the delay. (*Barker v. Wingo* (1972) 407 U.S. 514, 530.) Because delay that is "uncommonly long" triggers a presumption of prejudice (*Doggett v. United States* (1992) 505 U.S. 647, 651, 652, 656-657), a defendant can establish a speedy trial claim under the Sixth Amendment without making an affirmative demonstration that the government's want of diligence prejudiced the defendant's ability to defend against the charge. (*Moore v. Arizona* (1973) 414 U.S. 25, 26.)

Under the state Constitution's speedy trial right, however, no presumption of prejudice arises from delay after the filing of a complaint and before arrest or formal accusation by indictment or information (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504, fn. 8); rather, in this situation, a defendant seeking dismissal must demonstrate prejudice affirmatively (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 249).

Dodd cannot surmount even the first hurdle to invoking the right to a speedy trial; namely, that it be invoked in the context of a criminal proceeding. Commitment petitions under the SVPA institute civil, not criminal, proceedings. (*Hubbart, supra*, 19 Cal.4th at pp. 1166-1167; *Talhelm, supra*, 85 Cal.App.4th at p. 404; *Parker, supra*, 60 Cal.App.4th at p. 1461; *Cheek, supra*, 94 Cal.App.4th at p. 988.)

SVPA time limits

The SVPA does not contain a requirement for when trial must be held. Once probable cause is found, the SVPA requires that "the person remain in custody in a secure facility until a trial is completed" (§ 6602.) The person is "entitled to a trial by jury, to the assistance of counsel, to the right to retain experts or professional persons to

perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports.” (§ 6603, subd. (a).)

In *People v. Superior Court (Ramirez)* (1999) 70 Cal.App.4th 1384 (*Ramirez*), a petition to extend the defendant’s commitment was filed four days prior to his release date. The trial court determined it had no jurisdiction to act on the petition it found untimely. The Court of Appeal disagreed. It found the SVPA contained very few time requirements: “Neither section 6604 nor any other section provides a time by which the trial must be commenced or concluded. Indeed, the only reference to time limits appears to envision that trials might end after expiration of the initial commitment. Section 6604.1 provides: ‘(a) The two-year term of commitment provided for in Section 6604 shall commence on the date upon which the court issues the initial order of commitment pursuant to that section. The two-year term shall not be reduced by any time spent in a secure facility prior to the order of commitment. *For subsequent extended commitments, the term of commitment shall be from the date of the termination of the previous commitment.*’” (*Ramirez*, at pp. 1389-1390.)

As explained by the *Ramirez* court, section 6604.1 implicitly recognizes that the extended commitment trial may not finish before expiration of the previous commitment. Otherwise, there would be no need to specify that the term of the extended commitment shall run from the date the previous commitment ended. As such, the appellate court in *Ramirez* concluded that section 6604 did not require the trial court to make a subsequent commitment order before the expiration of the previous term. “[T]he Legislature did not intend to have any greater time limit than the requirement that the person be in custody and the petition be filed before expiration of the current commitment term. [Citation.]” (*Ramirez, supra*, 70 Cal.App.4th at p. 1391.)

Due process violation

Dodd also argues the failure to provide him with a judicial hearing within two years denied him due process. Each of Dodd’s arguments presumes some statutory or

other requirement mandates a judicial hearing prior to the expiration of the initial commitment. We fail to find such legal requirement; indeed, so did the *Ramirez* court. As explained in *Ramirez*, the absence of time provisions in the SVPA is dispositive that the Legislature did not intend to impose any greater time limits than the requirement the person be in custody and the petition be filed before expiration of the current commitment term. Had the Legislature wished to include a time limit for a judicial determination, it would have done so.

One appellate court decision, upon which Dodd relies, has held that a dismissal on the basis an SVP has been denied a due process right to a speedy trial is proper. (*People v. Litmon* (2008) 162 Cal.App.4th 383.) The *Litmon* court opined that “the norm to comport with the demands of procedural due process in the context of involuntary SVP commitments must be a trial in advance of the potential commitment term” (*Id.* at p. 401.) The *Litmon* decision is not binding on this court and has been criticized. (See *Seeboth v. Mayberg* (E.D.Cal., Oct. 7, 2008, No. CIV S-08-0287-JAM-CMK-P) 2008 U.S. Dist. Lexis 78833, pp. *10-*12.) Even under *Litmon*, however, Dodd’s trial occurred in advance of the potential commitment term because the potential commitment term was for an indeterminate term, not a period of two years. In addition, in *Litmon*, unlike in Dodd’s case, the delay was through no fault of the defense and over continuous defense objections. (*Litmon*, at pp. 404-406.)

We acknowledge, however, that involuntary commitment to a mental institution is subject to due process protections. “[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. [Citations.]” (*Addington v. Texas* (1979) 441 U.S. 418, 425; see also *Vitek v. Jones* (1980) 445 U.S. 480, 493-494 [convicted felon is entitled to due process protection before being found to have a mental disease and transferred to a mental hospital].) The California Supreme Court recognizes that “An SVPA commitment unquestionably involves a deprivation of liberty, and a lasting stigma” (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1194.) A

trial court must ensure that an SVP commitment proceeding proceeds to trial within a reasonable time. (*Orozco v. Superior Court* (2004) 117 Cal.App.4th 170, 179 (*Orozco*).

Courts have recognized that a delayed trial does not violate the defendant's due process rights where the defendant or his counsel is responsible for the delay. (See *Barker v. Wingo, supra*, 407 U.S. at p. 529; *Orozco, supra*, 117 Cal.App.4th at p. 179 ["the delay herein did not deprive the trial court of jurisdiction to proceed on either petition"].) In determining if delay violated the due process right, we must consider whether the record reflects the delay in bringing the matter to trial was attributable to Dodd's counsel and/or to Dodd himself.

Here, the record reflects that Dodd and/or his counsel contributed in large part to the delay. Dodd concedes he executed a waiver of time and any right to a speedy trial on August 12, 2010. Dodd also acknowledges he agreed to the matter being continued or trailed numerous times. Dodd and his counsel requested long delays, awaiting a final decision in *McKee*, acquiesced to multiple continuances to accommodate the schedule of the defense's expert witness, and then filed a motion to dismiss based upon a violation of a right to a speedy trial. When the case was set for trial with parties and witnesses present, Dodd filed paperwork to disqualify the only judge available to hear the case.

The record reflects that contrary to Dodd's assertion that delay was "mainly due to the prosecution," the delay was largely due to Dodd's waiver of time and acquiescence in continuances requested by the People, tactical decisions (awaiting a final decision in *McKee* and seeking disqualification of a judge), and assisting in presentation of a defense (by accommodating his expert witness's schedule). Under these circumstances, although the delay was indeed long, we conclude that Dodd's actions belie any violation of due process.

Furthermore, there is no evidence Dodd was prejudiced by the delay. Indeed, some of the delay was to accommodate Dodd's defense witnesses. For these reasons, we conclude Dodd's due process rights were not violated.

Conclusion

Regardless, under the SVPA, Dodd had, and has, the right to petition for conditional release or unconditional discharge and any such petition is subject to dismissal *only* if the trial court finds it is based on frivolous grounds, an extremely narrow and limited basis for dismissal. (§ 6608, subd. (a).) Dodd at all times had, and still has, the right to seek release under the provisions of the SVPA, and a committed person always has the right to seek release by way of a petition for writ of habeas corpus. (*Talhelm, supra*, 85 Cal.App.4th at pp. 404-405.)

II. Preclusion of Defense Evidence

Dodd claims he was denied the right to present a defense. Specifically, he contends the trial court precluded defense expert Halon from opining that paraphilia NOS was an invalid SVP diagnosis, and, consequently, he was deprived of his right to present a defense. Dodd also argues the trial court erred in making comments to the jury about the validity of a diagnosis of paraphilia NOS. Dodd's claim that he was prevented from presenting a defense is mistaken for two reasons, and the contention that the trial court's remarks were error is unsupported legally.

Presentation of a defense

First, Dodd had no Sixth Amendment right to present a defense. The Sixth Amendment right applies in criminal cases, not civil commitment proceedings. (See *People v. Allen* (2008) 44 Cal.4th 843, 861-862.) Dodd, however, did have a right to due process before being subjected to civil commitment. (*People v. Otto* (2001) 26 Cal.4th 200, 209.)

Second, Dodd's contention is factually inaccurate and conveniently overlooks Halon's testimony that paraphilia NOS, rape, was not a diagnosis in the DSM and never has been. Halon explained that rape was not a mental disorder, even though the DSM mentioned it as a form of aggressive sexual sadism or adult abuse. Defense counsel also elicited testimony from North, one of the People's experts, that "the DSM-IV does not

designate paraphilic rape as a mental disorder” and not all rapists are paraphiliacs. Defense counsel referred to this theory and testimony during closing argument. Only evidentiary error that amounts to a complete preclusion of a defense violates a defendant’s constitutional right to present a defense (assuming Dodd had such a right) and, as the record discloses, Dodd was not precluded from presenting his theory of the case. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4.)

Trial court remarks

Dodd contends the trial court also erred when it made comments to the jury characterizing paraphilia NOS as a valid diagnosis on which to support an SVP commitment. We disagree.

Numerous courts have upheld SVP commitments based upon a diagnosis of paraphilia NOS, rape. (See, e.g., *People v. Williams* (2003) 31 Cal.4th 757; *People v. Evans* (2005) 132 Cal.App.4th 950; *People v. Turner* (2000) 78 Cal.App.4th 1131; *People v. Butler* (1998) 68 Cal.App.4th 421.) In *People v. Felix* (2008) 169 Cal.App.4th 607, the appellate court rejected the argument that paraphilia NOS was not a mental disorder and found that it was a valid basis for an SVP commitment. (*Id.* at p. 617.)

The trial court’s comments were consistent with *Felix*, *Williams*, *Evans*, *Turner*, and *Butler*. Clearly, these cases support the trial court’s comments and therefore the comments did not constitute legal error.

III. Indeterminate Term of Commitment

Dodd contends that based upon the decision in *McKee*, *supra*, 47 Cal.4th 1172, this case must be remanded and proceedings suspended awaiting the finality of *McKee*. The People agree and our disposition will so order.³

³ The Fourth Appellate District, Division One, has published a decision after remand in *People v. McKee* (2012) 207 Cal.App.4th 1325. This decision is not yet final. The appellate court in *McKee* upheld the indeterminate commitment, finding that the disparate treatment of SVP’s, as contrasted with mentally disordered offenders (MDO)

DISPOSITION

The order for commitment finding Dodd to be an SVP within the meaning of section 6600 et seq. and committing him to the custody of the State Department of Mental Health is affirmed, except as to the commitment for an indeterminate term, which is reversed. The matter is remanded to the trial court for reconsideration of whether an indefinite commitment violates equal protection. The trial court, however, shall suspend further proceedings pending finality of the proceeding on remand in *McKee*. (*McKee*, *supra*, 47 Cal.4th at pp. 1208-1210.) Finality of the proceedings in *McKee* shall include the finality of any appeal and any proceedings in the California Supreme Court.

CORNELL, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

FRANSON, J.

and those found not guilty by reason of insanity (NGI), was warranted because of the greater trauma suffered by victims of sexually violent offenses, the greater likelihood of recidivism by SVP's, and the diagnostic and treatment differences between SVP's and MDO's/NGI's.