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

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE WILLIAM EMMETT,

Defendant and Appellant.

F064874

(Super. Ct. No. 1419232)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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In 2009, Jesse William Emmett pled no contest to one count of violating Penal Code section 288a, subdivision (c)(1), oral copulation of a person under the age of 14. In 2010, the People filed a petition to have Emmett declared a sexually violent predator pursuant to Welfare and Institutions Code section 6600, et seq. After a jury trial, Emmett

was found to be a sexually violent predator and ordered committed to the State Department of Mental Health for an indeterminate term. (Welf. & Inst. Code, § 6604.) Emmett asserts the commitment must be vacated for three reasons, none of which has merit.

First, Emmett asserts the indeterminate commitment violates his constitutional right to equal protection of the laws. (U.S. Const., 14th Amend.) He preserved his equal protection challenge by raising an objection in the trial court. Emmett begins his argument with *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee I*), wherein the Supreme Court rejected assertions that the indeterminate commitment violated a defendant's right to due process (U.S. Const., 14th Amend.) or the ex post facto clause of the United States Constitution (U.S. Const., art. I, § 10). (*McKee I, supra*, at pp. 1184, 1193, 1195.) However, when addressing the defendant's equal protection argument, the Supreme Court concluded defendants committed under the Sexually Violent Predator Act are similarly situated for equal protection purposes with defendants committed under the Mentally Disordered Offender Act and defendants found to be not guilty by reason of insanity, and sexually violent predators were treated differently because they received an indefinite commitment. However, such disparate treatment would not violate the equal protection clause if the People could demonstrate that sexually violent predators posed a substantially greater risk to society than mentally disordered offenders or defendants found to be not guilty by reason of insanity (*Id.* at pp. 1203, 1207-1208). Accordingly, the Supreme Court remanded the case to the trial court to provide the People with a chance to demonstrate justification for imposing on sexually violent predators a greater burden to obtain release from commitment. (*Id.* at pp. 1208-1209.)

Shortly after the opinion in *McKee I* became final, the Supreme Court remanded to the appellate courts numerous cases in which it had granted review, but deferred consideration until *McKee I* was resolved. This order stated, in part, "In order to avoid an unnecessary multiplicity of proceedings, the court is additionally directed to suspend

further proceedings pending finality of the proceedings on remand in *McKee* ..., including any proceeding in the Superior Court of San Diego County ‘Finality of proceedings’ shall include the finality of any subsequent appeal and any proceedings in this court.” (See, e.g., Supreme Ct. order of May 20, 2010, in case No. S166682.) The clear import of this order was to permit *McKee I* to remain the lead case on the question of whether the indeterminate commitment of sexually violent predators violated the defendant’s constitutional right to equal protection of the laws.

The San Diego Superior Court held a 21-day evidentiary hearing to permit the People the opportunity to demonstrate the disparate treatment of sexually violent predators was necessary. McKee appealed after the trial court concluded there was no equal protection violation. In *People v. McKee* (2012) 207 Cal.App.4th 1325 (*McKee II*), the appellate court affirmed the trial court’s conclusion that the People had met their burden to justify the disparate treatment of sexually violent predators. (*Id.* at 1348.) The appellate court’s opinion became final when the Supreme Court denied McKee’s petition for review on October 10, 2012.

Emmett, in essence, asserts the decision in *McKee II* was wrongly decided, and asks us to “overrule” *McKee II* by issuing an opinion concluding his right to equal protection of the law was violated. Emmett argues the appellate court misunderstood the law and misunderstood the facts.

If the appellate court in *McKee II* reached the wrong result, an issue we are not addressing, the proper venue for evaluating the issue is the California Supreme Court through a petition for review. (2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 329, p. 420.) When the Supreme Court denied review in *McKee II*, the opportunity to challenge the opinion in the state court system ended. This is especially significant in this case where the Supreme Court had, in essence, designated *McKee I* as the lead case to address this issue. Undoubtedly, the decision to deny review was approval of the appellate court’s decision.

Moreover, our jurisdiction is limited to correcting errors in the trial court, not appellate courts. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 666.; see also Cal. Const., art. VI, § 11.) The wisdom of this limitation is apparent from the arguments in this appeal. Emmett discusses at length his version of the facts taken in the proceedings that occurred in San Diego County Superior Court. Since we do not have the record before us, it is impossible for us to evaluate his assertions. We also note that two other courts in the Fourth District, *People v. McDonald* (2013) 214 Cal.App.4th 1367 (*McDonald*), and *People v. Landau* (2013) 214 Cal.App.4th 1 (*Landau*), have agreed with *McKee II*, and concluded there was no violation of the right to equal protection of the laws.¹

Emmett failed to litigate the issue of whether the People can justify the disparate treatment of sexually violent predators, i.e. there are no facts in this record we could evaluate. Accordingly, we reject the assertion that Emmett's right to equal protection was violated.

Emmett's second argument, as he candidly admits, must also be rejected. Emmett asserts his right to due process and protection from ex post facto laws was violated as a result of his indefinite commitment. These claims were rejected by the Supreme Court (*McKee I, supra*, 47 Cal.4th at pp. 1184-1195), and we are bound by this authority (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

Emmett's final argument is similarly lacking in merit. He asserts that his rights will be violated in the future by changes in the Sexually Violent Predator Act that will not take effect until January 2014. We reject this argument because it is not yet ripe. "The

¹ *McDonald* and *Landau* were decided by division 3 of the Fourth District. *McKee II* was decided by division 1 of the Fourth District. Another case *People v. Nguyen*, also upheld the Sexually Violent Predator Act to an equal protection challenge, but the Supreme Court granted review on an unrelated issue. (*People v. Nguyen* (2013) 218 Cal.App.4th 1363, review granted Nov. 26, 2013, S213703.)

ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. However, the ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) Since the law has not yet taken effect, we cannot dispose of an actual controversy, and there is no specific legal dispute to resolve. Instead, Emmett is arguing that something may happen to him in the future that might violate his rights. Until such events take place, there is no dispute to be adjudicated.

DISPOSITION

The judgment is affirmed. The request that we take judicial notice of the entire record from the trial court in *McKee II* is denied; Emmett has failed to provide any authority for the request.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Poochigian, J.