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

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER THOMAS FRANCO,

Defendant and Appellant.

F068786

(Super. Ct. No. FP003788A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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Peter Thomas Franco was found by a jury to be a sexually violent predator (SVP) pursuant to the Sexually Violent Predator Act (Welf. & Inst. Code,¹ § 6600 et seq.)

¹Subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

(SVPA). Based on the jury's finding, the trial court ordered Franco committed to the custody of the Department of State Hospitals (DSH) for an indeterminate term.

Franco, who suffers from developmental disabilities, i.e., Asperger's disorder and mild mental retardation,² argues the trial court committed prejudicial error in denying his motions to dismiss the SVPA commitment petition. He contends the commitment proceedings against him should have been brought pursuant to section 6500, which authorizes the commitment, for a limited term, of developmentally disabled persons who pose a danger to themselves or others. We reject Franco's argument as all the criteria for commitment under the SVPA were satisfied here, and the SVPA establishes no exception for persons with developmental disabilities.

Franco also argues his commitment as an SVP violates due process because he will not receive "appropriate and meaningful" treatment for his developmental disabilities. The SVPA, however, mandates treatment for all persons committed pursuant to the statute, and Franco has not shown the treatment he will receive will be so inadequate as to offend due process.

The judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

On September 29, 2006, Franco was convicted of committing lewd and lascivious acts with a child under the age of 14 (Pen. Code, § 288, subd. (a)) and committing lewd and lascivious acts with a child under the age of 14 by force, duress, or violence (Pen. Code, § 288, subd. (b)(1)). He was sentenced to six years in prison. Prior to his release,

²As noted by expert witnesses during the trial, Asperger's Disorder has been reclassified as an autism spectrum disorder in the current Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5). Similarly, based on the DSM-5, statutes and courts now use the term "intellectual disability" in place of the term "mental retardation." (*People v. Boyce* (2014) 59 Cal.4th 672, 717, fn. 24.) Because the terms "Asperger's Disorder" and "mental retardation" appear throughout the record, we have employed them in our discussion for consistency and clarity.

on July 18, 2011, the Kern County District Attorney filed a petition to commit him as an SVP for an indeterminate term pursuant to the SVPA. On January 15, 2014, a jury found Franco met the criteria for commitment as an SVP. On January 21, 2014, the court ordered Franco committed to the custody of the Department of State Hospitals for an indeterminate term “for appropriate treatment and confinement in a secure facility.” Franco was just under 28 years old at the time.

The jury trial in this case took place from January 10 to 15, 2014. At the start of the trial, the judge told the jury their role was to determine whether Franco was an SVP within the meaning of the SVPA, based on four statutory elements. The judge stated:

“Okay. Let’s talk a little bit about what we’re doing here. I told you a little bit about the case. [¶] There are four elements that the district attorney needs to establish beyond a reasonable doubt. And there has been a petition filed alleging that Mr. Franco is a sexually violent predator. [¶] To prove this allegation, [the district attorney] must prove beyond a reasonable doubt that Mr. Franco has been convicted of committing sexually violent offenses against one or more victims; and that Mr. Franco has a diagnosed mental disorder; and that Mr. Franco, as a result of that diagnosed mental disorder, is a danger to the health and safety of others because it is likely that Mr. Franco will engage in sexually violent predatory criminal behavior; and, Element No. 4, that it is necessary to keep Mr. Franco in custody in a secure facility to ensure the health and safety of others. [¶] That’s what you’re here to determine once you’ve heard all the evidence and the testimony.”

The prosecution called only two witnesses, Dr. Dana Putnam, a clinical forensic psychologist and SVP evaluator, and Dr. Erik Fox, a clinical psychologist and SVP evaluator, both of whom worked for DSH. During Dr. Putnam’s testimony, the parties stipulated that on September 29, 2006, Franco was convicted of committing lewd and lascivious acts with a child under the age of 14 and committing lewd and lascivious acts with a child under the age of 14 with force, duress, or violence, and based on these convictions, the first statutory element, i.e., whether Franco had committed sexually

violent offenses against one or more victims, was proven beyond a reasonable doubt. These predicate offenses were committed when Franco was 19 to 20 years old.

Both Drs. Putnam and Fox described the facts underlying these offenses as gleaned from pertinent documentation. Dr. Putnam testified:

“Okay. So there are two boys. There’s a nine-year-old John Doe [No.] 1 and a [10]-year-old John Doe [No.] 2. They are friends. They had occasion over a period of about one year to have interactions with Mr. Franco, in which he engaged in sexual conduct with them. There was a description of sexual conduct occurring over about five separate days that were spread out across that year period. And in those instances Mr. Franco showed the boys—or the boys saw Mr. Franco looking at pornography on the computer. He undressed in the presence of the boys. He rubbed his penis against them in a way that they described it as being humped. There was no penetration described but there was a description of him rubbing his penis against the outside of the clothing and also against bare skin. And there was also occasion for him to orally copulate one of the boys. And he also ejaculated in their presence or on them.”

Dr. Fox testified that Franco offered money to John Doe No. 1, provided him with marijuana, fondled him, showed him pornography, masturbated in front of him, and told him not to tell anyone what had occurred. In one instance, Franco “took him into the back room and locked the door and forced him onto the bed” and “humped” him. With respect to John Doe No. 2, Dr. Fox testified that Franco took the boy’s clothes off, ejaculated on him, orally copulated him, gave him marijuana, and gave him money.

Franco also had a juvenile history of inappropriate sexual behavior. When he was 14 years old, Franco approached an eight-year-old girl, pushed her to the ground, and lay down on top of her; when she started to cry, he got up and left. In addition, when he was 16 years old, he touched the breasts of several girls at school and was consequently expelled. In light of Franco’s young age at the time, these incidents did not constitute pedophilic conduct but reflected his early preoccupation with sex and poor impulse control.

Drs. Putnam and Fox psychologically evaluated Franco and they testified about the various assessments and tools they used, as well as the conclusions and diagnoses they reached. Dr. Putnam gave Franco a “primary diagnosis” of pedophilia, specifying that he was attracted to both males and females; Dr. Putnam noted that Franco’s pedophilia was nonexclusive in that he was also sexually attracted to adults. Dr. Putnam also diagnosed Franco with depressive disorder, not otherwise specified, noting the depressive disorder was in partial remission. In addition, Dr. Putnam concluded, “it’s clear that there’s some sort of autistic spectrum disorder that has been present since childhood.” Dr. Putnam stated it was possible to have both pedophilia and Asperger’s disorder at the same time.

Dr. Putnam opined he believed Franco’s “pedophilia ... predispose[s] him to future acts of sexual violence.” He explained pedophilia as a “chronic and lifelong condition” that can be managed but not eliminated. He stated Franco’s depressive and Asperger’s-type symptoms heightened the risk that he would act on his pedophilic urges because he used sex to cope with his mood disorder and, at the same time, had difficulty establishing long-term relationships with his peers, which would otherwise “help offset his urges to engage in sexual behavior with children.” Dr. Putnam testified he had used actuarial risk-assessment tests to evaluate whether Franco was likely to engage in sexually violent, predatory, criminal behavior as a result of his pedophilia. Based on the assessment data, Dr. Putnam concluded, “without appropriate treatment in custody,” Franco was “likely to commit future sexually violent predatory offenses due to his diagnosed mental disorder”

Dr. Fox independently evaluated Franco and reached precisely the same conclusions as Dr. Putnam. Specifically, Dr. Fox diagnosed Franco with pedophilia, noting he was sexually attracted to both males and females; he further determined Franco’s pedophilia was nonexclusive in that he also had a sexual interest in adults. Dr. Fox noted pedophiles are generally “recalcitrant,” i.e., “[t]hey don’t remit” or change. In

addition, he diagnosed Franco with depressive disorder not otherwise specified and noted in his reports that Franco possibly also had Asperger's disorder. Subsequently, upon reading the defense expert's reports, he concluded Franco did in fact suffer from Asperger's disorder, more properly termed autism spectrum disorder. Dr. Fox opined that Franco's pedophilia predisposed him to the commission of sexually violent acts. He further opined, based on data from a variety of actuarial tools and assessments, that, in the future, Franco was likely to commit sexually violent, predatory, criminal acts as a result of his pedophilia.

Dr. Fox testified it was possible to have autism spectrum disorder and pedophilia at the same time, noting that, "it's of great concern when somebody has that autism spectrum and pedophilia because his interests become very fixated and very targeted and it's difficult to step away from them." Furthermore, people with autism spectrum disorder "have a lack of empathy" and "don't identify and understand social cues," which means they "lack ... awareness of the harm that they're causing to their victims ... in the moment" and also have a "lack of remorse afterwards." He explained that "the autism spectrum disorder and the pedophilia create, in some ways, a synergistic risk factor that, together, they're of greater risk than the sum of their parts." However, he cautioned as follows:

"What I think is important to recognize in this particular case is that I'm not identifying that Mr. Franco's [autism and cognitive impairment are] the reason[s] that he's reoffending. [¶] I'm saying that he's reoffending because he's a pedophile, because he's sexually interested in children. And that his cognitive impairments add to that. He's a pedophile plus. He's a pedophile that has impulsive problems and is likely to act out in ways that make him a greater risk as a result of the difficulty in establishing and maintaining friendships as well as age appropriate ... sexual relationships."

Dr. Jay Fisher, a clinical psychologist in private practice, testified for the defense. Dr. Fisher had evaluated Franco in 2001 "to determine whether he should continue to receive services from the Kern Regional Center," which facilitates and coordinates a

range of services for developmentally disabled children and adults. At the time, Dr. Fisher diagnosed Franco with Asperger's disorder and dysthymic disorder. He also determined Franco had a developmental disability in terms of intellectual functioning, ranging from "borderline IQ" to "mild mental retardation"

Dr. Fisher also evaluated Franco in 2012 when Dr. Fisher was retained by the defense and reached the same conclusions once again, i.e., that Franco had Asperger's disorder and his intellectual functioning ranged from the "mild range of mental retardation to the borderline range of intelligence." He testified Franco had severe impulse-control problems but noted that, "since he's been in prison, they may now be under control given the structure of the environment." He also stated Franco's Asperger's disorder could be treated with "operant conditioning" and "applied behavior analysis" Finally, although he noted his expertise lay in autism and Asperger's treatment and not in pedophilia and sex-offender treatment, he opined that "Asperger's treatment is a specialized type of treatment that is ... definitely different from sexual offender treatment."

On cross-examination, Dr. Fisher agreed Franco also "qualifies for the diagnosis of pedophilia," noting a person could have Asperger's disorder and pedophilia at the same time. He added pedophilia is ordinarily an "ego-syntonic" disorder, which signifies self-centeredness and manipulateness. Franco's pedophilia, in contrast, was "ego-dystonic," in that it "comes out of his lack of opportunity to learn social skills" Finally, Dr. Fisher testified he did not dispute the diagnoses made by Drs. Putnam and Fox.

DISCUSSION

I. The SVPA applies to Franco

Franco argues the trial court prejudicially erred in denying his pretrial motions to dismiss the petition. He argues the SVPA does not apply to him because he suffers from Asperger's disorder and mild mental retardation, both of which constitute developmental

disabilities. He contends any proceedings to commit him involuntarily to state custody must proceed pursuant to section 6500, as that statute specifically deals with the involuntary commitment of developmentally disabled persons. We reject this argument because all the criteria for commitment pursuant to the SVPA were satisfied here, and the SVPA does not establish an exception for developmentally disabled persons.

A. Procedural background

During pretrial proceedings, Franco's counsel filed a motion to dismiss the petition arguing he was developmentally disabled and, thus, any action to commit him involuntarily was required to be brought exclusively under section 6500. The moving papers included a 1986 evaluation report by Dr. Kimball Hawkins, who concluded that Franco, then 10 years old, qualified for services at Kern Regional Center because he was mildly mentally retarded. The People filed an opposition to Franco's motion noting the motion did not cite any authority for the proposition that the trial court was empowered to dismiss the SVPA petition on grounds that section 6500 applied instead. The trial court denied the motion. Defense counsel subsequently renewed the same motion at the hearing on the motions in limine; the court again denied it.

B. Analysis

The SVPA presupposes a "link between certain diagnosable mental disorders and violent sexual behavior that is criminal in nature." (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1143 (*Hubbart*)). The statute has a narrow goal, i.e., to "hospitalize or otherwise attempt to treat troubled sexual predators apart from any criminal sanctions they might receive, and apart from civil commitment schemes targeting other mental health problems. [Citation.]" (*Ibid.*)

To this end, the SVPA provides for the indefinite commitment of offenders found to be "sexually violent predators," immediately upon their release from prison. (See § 6600 et seq.; *People v. Superior Court (Whitley)* (1999) 68 Cal.App.4th 1383, 1391 [SVPA's purpose "is to assure that potential sexually violent predators are identified,

evaluated, and committed before their release into the community”). To establish that an offender is a “[s]exually violent predator,” the prosecution must prove beyond a reasonable doubt that the person (1) “has been convicted of a sexually violent offense against one or more victims,” and (2) “has a diagnosed mental disorder that makes [him or her] 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), 6604.) A “[d]iagnosed mental disorder” includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.” (§ 6600, subd. (c).)

Here, there is no dispute between the parties over any factual findings made by the court, so the only question is whether the application of the alternative commitment scheme was required as a matter of law. As usual, we review purely legal questions de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799; *Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 694 [“[w]e ... independently review legal questions regarding the construction and application of a statute”].) If there is “no ambiguity” in the statutory language, the “plain meaning of the statute governs.” [Citation.]” (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530.) We are also mindful of the general rule that the word “shall” ordinarily has a mandatory or directory, as opposed to a permissive, meaning when used in a statute. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1143; *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 551.)

Franco’s first argument is precluded by the express terms of the SVPA itself. Section 6601 requires that, “[w]henver the Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation ... may be a sexually violent predator, the secretary *shall*, at least six months prior to that individual’s scheduled date

for release from prison, refer the person for evaluation in accordance with this section.” (§ 6601, subd. (a)(1), italics added.) If, after a screening based on objective factors by the Department of Corrections and Rehabilitation and further evaluation by the Department of State Hospitals, “it is determined that the person is likely to be a sexually violent predator,” “the Director of State Hospitals *shall* forward a request for a petition to be filed for commitment under this article” to the appropriate agency—here, the Kern County District Attorney’s office. (§ 6601, subds. (b), (h), italics added.) If the district attorney “concur[s] with the recommendation, a petition for commitment *shall* be filed in the superior court” (§ 6601, subd. (i), italics added.) Thereafter, “a judge of the superior court *shall* review the petition and determine whether the petition states or contains sufficient facts that, if true, would constitute probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. If the judge determines that the petition, on its face, supports a finding of probable cause, the judge *shall* order that the person be detained” until a probable cause hearing pursuant to section 6602 can be completed. (§ 6601.5, italics added.)

At the section 6602 probable cause hearing, “[a] judge of the superior court *shall* review the petition and *shall* determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.... If the judge determines there is not probable cause, he or she shall dismiss the petition.... If the judge determines that there is probable cause, the judge ... *shall* order that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release from the jurisdiction of the Department of Corrections and Rehabilitation” (§ 6602, subd. (a), italics added.)

The repeated use of the word “shall” in the statute indicates that, if the statutory criteria pertinent to each step of the commitment process are met, the process *must* proceed to the next step. Thus, at the outset, the Department of Corrections and Rehabilitation is required to refer for evaluation any inmate who meets the objective criteria of a sexually violent predator. (§ 6601, subs. (a), (b); *Hubbart, supra*, 19 Cal.4th at p. 1145.) Next, if the Department of State Hospitals determines the person is a sexually violent predator, the Director of State Hospitals is required to ask the district attorney to file an SVP petition. (§ 6601, subd. (h).) Similarly, the district attorney is required to file an SVP petition if he or she “concur[s] with the recommendation” of the Director of State Hospitals.³ (§ 6601, subd. (i).)

Once a petition is filed, a court may dismiss it only if there is no probable cause “to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release.” (§ 6602, subd. (a).) If the court finds that probable cause exists, it is required to order a trial. (§ 6602, subd. (a).) There is no provision for an assessment of the applicability of entirely separate civil commitment schemes. (§ 6602, subd. (a).)

Franco does not challenge the validity of the probable cause finding or any of the other determinations made in the commitment process. Rather, Franco argues, without delineating any basis in the applicable statutes and without citing any legal authority, the court should have dismissed the SVPA proceedings because Franco could have been

³Although the phrase, “[i]f the [district attorney] concurs with the recommendation,” as it appears in section 6601, subdivision (i), conditions the filing of any petition on the district attorney’s determination as to the propriety of doing so, *it does not authorize the court to dismiss a petition once it is filed by the district attorney*. Just as prosecutorial discretion regarding whom to charge with a public offense and what charges to bring is not subject to judicial supervision (*People v. Birks* (1998) 19 Cal.4th 108, 134), there is no basis to assume, absent language to the contrary in the statute, that prosecutorial discretion regarding the filing of an SVPA commitment petition would be subject to judicial approval.

committed under section 6500 instead. We find no merit in this argument because the SVPA does not contain an exception for persons to whom section 6500 would apply were they not committed pursuant to the SVPA.

Finally, even if we thought the trial court had discretion to apply section 6500 instead of the SVPA, we would be unable to find reversible error here, for Franco has not shown that section 6500 applies to *him*. Under the SVPA, a person who is in prison and has the requisite conviction for a sexually violent offense can be subject to continued civil commitment solely on the basis of psychological or psychiatric opinion to the effect he has a mental disorder that makes it likely he will engage in sexually violent criminal behavior.⁴ (§§ 6600-6604; *In re Smith* (2008) 42 Cal.4th 1251, 1269.) In contrast, under section 6500, a petitioner would have to prove, beyond a reasonable doubt, the respondent has a developmental disability, is a danger to himself and others, and his developmental disability is a substantial factor in causing him serious difficulty in controlling his dangerous behavior. (*In re O.P.* (2012) 207 Cal.App.4th 924, 928.) Franco has entirely failed to address these elements of section 6500. Notably, section 6500's element of dangerousness requires a showing the respondent is "actual[ly] and current[ly]" dangerous. (*In re O.P.*, *supra*, at p. 934.) This requirement is usually met by presenting evidence of recent violent acts. (*Id.* at p. 932 ["evidence that [the respondent] stabbed his father, combined with other recent examples of his propensity for violence, may support his need for commitment to a stable and secure environment"]; *People v. Hartshorn* (2012) 202 Cal.App.4th 1145, 1153-1154 ["at a minimum, the

⁴Section 6600, subdivision (d), specifies that the phrase "[d]anger to the health and safety of others" in the definition of an SVP set forth in section 6600, subdivision (a)(1), does not require proof of a recent overt act while the offender is in custody. Although an SVP "constitutes a present and substantial threat to public safety," the danger posed by an SVP stems from "a 'currently diagnosed mental disorder that makes ... it ... likely that he or she will engage in sexually violent criminal behavior.'" (*Hubbart*, *supra*, 19 Cal.4th at p. 1162.)

‘danger’ referenced in section 6500 must involve conduct that presents the likelihood of serious physical injury”].) Here, the record reflects that Franco did not participate in any fights or perpetrate other violent acts while in prison.

Franco has shown us no legal authority for his proposition that the trial court was required to dismiss the SVPA petition and apply section 6500 instead.

II. Franco’s commitment pursuant to the SVPA does not violate due process

Franco argues his involuntary commitment pursuant to the SVPA violates his constitutional right to due process of law because it will result in the “denial of appropriate and meaningful treatment” for his developmental disabilities, namely Asperger’s disorder and mild mental retardation.

Franco provides no support for his assertion that the treatment program mandated by the SVPA constitutes a “denial of appropriate and meaningful treatment” in his case. The SVPA mandates that committed persons receive a program of treatment based on a structured treatment protocol developed by the Department of State Hospitals. (§ 6606, subd. (c).) The protocol is required to “specify how assessment data will be used to determine the course of treatment for each individual offender” and to “specify measures that will be used to assess treatment progress and changes with respect to the individual’s risk of re-offense.” (*Ibid.*) Moreover, the SVPA also requires the Department of State Hospitals to “take into consideration the unique characteristics, individual needs, and choices of persons committed under this article, including whether or not a person needs antipsychotic medication, whether or not a person has physical medical conditions, and whether or not a person chooses to participate in a specified course of offender treatment.” (§ 6606, subd. (d).) The treatment scheme mandated by the SVPA clearly requires some consideration of the specific characteristics and needs of each offender. Franco has not shown, or even attempted to show, that the assessments and structured protocol used by the DSH in formulating treatment programs for SVP’s entirely omits consideration of developmental disabilities such as Asperger’s disorder and impairments

in intellectual functioning. His bare assertion that he would not receive “appropriate and meaningful treatment” for his developmental disabilities is unpersuasive.

Furthermore, our Supreme Court rejected a similar treatment-based due process challenge to the SVPA in *Hubbart, supra*, 19 Cal.4th 1138. The respondent in that case argued that involuntary confinement pursuant to the SVPA violates due process “unless it is coupled with a statutory guarantee of treatment providing ‘a realistic opportunity to be cured.’” (*Hubbart, supra*, at p. 1164.) The court rejected the suggestion that “the Legislature cannot constitutionally provide for the civil confinement of dangerous mentally impaired sexual predators unless the statutory scheme guarantees and provides ‘effective’ treatment.” (*Ibid.*) The court further determined the SVPA’s treatment provisions are not a “sham”; on the contrary, the act is based on the premise that SVP’s suffer from clinically diagnosable mental disorders that require specialized “psychiatric care and treatment, and which are not a proper basis for commitment under other mental health schemes.” (*Hubbart, supra*, at p. 1166.) Accordingly, we conclude that Franco’s due process challenge is without merit.

DISPOSITION

The judgment is affirmed.

Smith, J.

WE CONCUR:

Gomes, Acting P.J.

Detjen, J.