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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT LEFORT,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045204

(Super. Ct. No. M11111)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Richard M. King, Judge. Petition denied.

Deborah A. Kwast and Frank Ospino, Public Defenders, Jean Wilkinson, Chief Deputy Public Defender, Denise Gragg and Mark S. Brown, Assistant Public Defenders, for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney, and Elizabeth Molfetta, Deputy District Attorney, for Real Party in Interest.

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## INTRODUCTION

Robert LeFort is the subject of commitment and recommitment petitions filed pursuant to the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).<sup>1</sup> In our prior opinion, *LeFort v. Superior Court* (Mar. 28, 2012, G045204) (nonpub. opn.), review granted June 27, 2012, S202311, we denied LeFort's petition for writ of mandate/prohibition, which sought a writ directing the respondent court to grant his plea in abatement and dismiss the recommitment petition.

The California Supreme Court granted review of our opinion. After issuing its decision in *Reilly v. Superior Court* (2013) 57 Cal.4th 641 (*Reilly*), the Supreme Court transferred this matter to us for reconsideration in light of that decision. No party filed a supplemental brief pursuant to rule 8.200(b)(1) of the California Rules of Court.

As the Supreme Court directed, we have reconsidered this matter in light of *Reilly* and again deny LeFort's petition for writ of mandate/prohibition. Our decision is without prejudice to LeFort and the People obtaining further examinations and evaluations permitted by the SVPA.

## ALLEGATIONS OF THE PETITION AND THE RETURN

In October 2000, the Orange County District Attorney filed a petition for commitment as a sexually violent predator seeking to recommit LeFort as a sexually violent predator under the SVPA. Subsequent recommitment petitions were filed in 2002, 2004, and 2006. The 2006 SVPA recommitment petition appears to have been based on evaluation reports of LeFort, prepared by Jeffrey Davis, Ph.D., and Mary Jane Alumbaugh, Ph.D., in July 2006. Those evaluation reports are not part of the record in these proceedings. No probable cause hearing has been held on any of these petitions.

In November 2006, Judge Kazuharu Makino reviewed the 2006 SVPA recommitment petition and found it stated sufficient facts which, if true, would constitute

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<sup>1</sup> Further code references are to the Welfare and Institutions Code unless otherwise indicated.

probable cause to believe LeFort was likely to engage in sexually violent predatory criminal behavior on his release from prison. As a consequence, Judge Makino ordered LeFort to remain detained pursuant to section 6601.5 in a secure facility until the probable cause hearing.

In August 2008, the Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the State Department of State Hospitals (SDSH), Clinical Evaluator Handbook and Standardized Assessment Protocol (Aug. 2007) (2007 SAP), used for SVPA evaluations, amounted to an “underground regulation” because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to Government Code section 11340.5, part of the Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.). (2008 OAL Determination No. 19 (Aug. 15, 2008) p. 3, available at <[http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008\\_OAL\\_Determination\\_19.pdf](http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008_OAL_Determination_19.pdf)> [as of Jan. 14, 2014]; see *Reilly, supra*, 57 Cal.4th at p. 649.) In *In re Ronje* (2009) 179 Cal.App.4th 509, 516-517 (*Ronje*), disapproved in *Reilly, supra*, 57 Cal.4th 641, we agreed with the OAL and likewise concluded the 2007 SAP was invalid as an underground regulation. In 2009, the SDSH issued the Standardized Assessment Protocol for Sexually Violent Predator Evaluations (Feb. 2009) (2009 SAP), as the new standardized assessment protocol for SVPA evaluations. In February 2009, the OAL took emergency regulatory action to adopt part of the 2009 SAP. In September 2009, the OAL made permanent the emergency regulatory action.

In March 2010, LeFort filed a motion requesting, among other things, that in light of *Ronje*, the trial court order new evaluations to be conducted to determine whether he is a sexually violent predator. In November 2010, Judge Patrick Donahue granted the motion and ordered new evaluations of LeFort, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

In compliance with the court order, the SDSH reassigned Dr. Davis and Dr. Alumbaugh to evaluate LeFort. In a report dated February 12, 2011, Dr. Davis concluded LeFort continued to meet the criteria for commitment as a sexually violent predator. In a report dated March 16, 2011, Dr. Alumbaugh concluded LeFort no longer met those criteria.

Due to the difference of opinions, the SDSH ordered independent evaluations of LeFort to be conducted by Michael Selby, Ph.D., and Laljit Sidhu, Psy.D. Dr. Selby prepared a report dated March 29, 2011, and Dr. Sidhu prepared a report dated May 17, 2011.

In March 2011, LeFort filed a plea in abatement seeking dismissal of the 2006 SVPA recommitment petition based on the post-*Ronje* evaluation reports of Dr. Davis and Dr. Alumbaugh. The reports of Dr. Selby and Dr. Sidhu were not available at that time and were not presented to the respondent court. The district attorney filed opposition to the plea in abatement.

In April 2011, the respondent court issued an order denying the plea in abatement filed by LeFort. The next month, LeFort filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings. In our prior opinion, we denied LeFort's writ petition. We concluded: "LeFort's plea in abatement . . . was based only on the two initial post-*Ronje* evaluation reports, prepared by Dr. Davis and Dr. Alumbaugh. Based on those two evaluation reports, which were the only reports before it, the trial court did not err by denying LeFort's plea in abatement." (*LeFort v. Superior Court, supra*, G045204.)

#### **DISCUSSION**

In *Reilly, supra*, 57 Cal.4th at page 646, the California Supreme Court addressed the issue whether a court must dismiss an SVPA commitment petition that was supported by evaluations conducted under an invalid standardized assessment protocol. The initial evaluations of the alleged sexually violent predator in *Reilly* had been

conducted under the standardized assessment protocol later deemed invalid by the OAL. (*Ibid.*) The trial court found probable cause and set the matter for trial. (*Id.* at p. 650.) A year later, new evaluations pursuant to *Ronje* were ordered, and the two initial post-*Ronje* evaluators agreed the alleged sexually violent predator no longer met the criteria for commitment as a sexually violent predator. (*Reilly, supra*, at pp. 650-651.) The alleged sexually violent predator sought a writ of mandate or prohibition to compel the trial court to grant his plea in abatement to dismiss the SVPA commitment petition. (*Id.* at p. 651.) We granted the petition in an opinion concluding that dismissal of the SVPA commitment petition was required because it was not supported by two concurring evaluations, as required by section 6601. (*Reilly, supra*, at p. 651.)

The California Supreme Court reversed our judgment. (*Reilly, supra*, 57 Cal.4th at p. 646.) The Supreme Court concluded a court is not required to dismiss commitment proceedings under the SVPA if the OAL determines that the initial evaluations supporting the petition were conducted under an assessment protocol that did not comply with the OAL's procedural requirements. (*Reilly, supra*, at p. 646.) "Instead," the Supreme Court concluded, "an alleged sexually violent predator (SVP) must show that any fault that did occur under the assessment protocol created a *material* error. [Citation.]" (*Ibid.*) The Supreme Court disapproved *Ronje* because it did not require the alleged sexually violent predator also to show such material error. (*Reilly, supra*, at p. 655.)

Under the Supreme Court's opinion in *Reilly*, the July 2006 evaluation reports by Dr. Davis and Dr. Alumbaugh were sufficient to support the filing of the 2006 SVPA recommitment petition against LeFort unless he showed that any fault occurring under the standardized assessment protocol in use at that time created "a *material* error." (*Reilly, supra*, 57 Cal.4th at p. 646.) LeFort has not made such a showing.

In this case, however, no probable cause hearing has been conducted on either the 2006 SVPA recommitment petition or any of the prior commitment petitions.

The last sentence of footnote 5 of *Reilly, supra*, 57 Cal.4th at page 657, bears on this situation. That sentence reads: “If a 2007 assessment protocol error is identified before a probable cause determination, the alleged SVP [(sexually violent predator)] may file a plea in abatement asserting the procedural error and asking the court to substitute new evaluations that use the 2009 assessment protocol.” (*Reilly, supra*, at p. 657, fn. 5.)

LeFort asserted the procedural error by filing a motion for new evaluations using the 2009 SAP. Dr. Davis, Dr. Alumbaugh, Dr. Selby, and Dr. Sidhu each prepared a new evaluation report of LeFort using the 2009 SAP. But neither in his motion for new evaluations nor in his plea in abatement did LeFort assert or show the procedural error was material; that is, “the invalid assessment protocol materially affected his initial evaluations.” (*Reilly, supra*, 57 Cal.4th at p. 656.) In this situation, *Reilly* does not permit dismissal of the 2006 SVPA recommitment petition. Absent a showing of material error, the next step is to conduct a probable cause hearing forthwith.

#### **DISPOSITION**

The petition for writ of mandate/prohibition is denied and the stay of the trial court proceedings is lifted.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.