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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SCOTT KINDRED,

Defendant and Appellant.

G048170

(Super. Ct. No. M9167)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Luesebrink, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury found Richard Scott Kindred to be a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). He appeals from the trial court's order committing him to an indeterminate term in the custody of the Department of State Hospitals.

Although defendant's petition was filed in 2001, he did not have a probable cause hearing until September 2011 and a trial until 2013. In 2009, defendant moved to dismiss the petition on grounds the then nine-year delay violated his constitutional right to a speedy trial, but the trial court denied the motion.

Defendant challenges the performance of two appointed attorneys and a prosecutor in conjunction with the court's denial of his motion to dismiss. We conclude the court correctly denied defendant's motion, notwithstanding the 12-year delay between the filing of the petition and trial.

First, SVP's do not have a statutory right to a speedy trial. The SVPA does not specify when trial on a recommitment petition must be held. (*Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1170-1171 (*Litmon I*.) With respect to defendant's constitutional right to due process of law, while the constitution requires legal proceedings to be resolved in a reasonable amount of time (*Barker v. Wingo* (1972) 407 U.S. 514, 515), defendant either requested or stipulated to over 40 continuances between 2001 and 2009, and he requested, or acquiesced, to further continuances even after the court denied his speedy trial motion. Defendant asserts he never agreed to waive time or continue the trial, but the court resolved that factual issue against him. "To the extent there was a credibility question between defendant and counsel at the hearing, the court was "entitled to accept counsel's explanation." [Citation.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) The judgment is affirmed.

## FACTS AND PROCEDURAL HISTORY

### *Qualifying Offenses*

Defendant does not challenge the sufficiency of the evidence to support the jury's finding. Therefore, the facts of his qualifying offenses (Welf. & Inst. Code, § 6600, subd. (a)(1)) may be briefly stated.

In 1982, defendant was convicted of seven counts of lewd acts with a 10-year-old boy and sentenced to three years in prison. In 1984, defendant pled guilty to oral copulation in a case involving his eight- or nine-year-old nephew. He received a sentence of 16 months. In 1992, defendant was sentenced to 16 years after being convicted of three counts of lewd acts with a child, one count of forcible lewd conduct with a child, two counts of sodomy, and two counts of oral copulation with an 11-year-old boy.

### *SVPA Proceedings*

In January 2001, immediately before defendant was to be released from his most recent term of incarceration, the Orange County District Attorney filed a petition seeking to commit defendant as an SVP. (Welf. & Inst. Code, § 6601, subd. (a)(1).) Earnest Eady was appointed in 2001 and represented defendant through 2009. During those years, defendant's case never progressed to the probable cause hearing. It was continued 44 times, and defendant either requested or stipulated to all 44 continuances.

In March 2010, defendant told the court he wanted to discharge Eady (*People v. Marsden* (1970) 2 Cal.3d 118) and represent himself during the upcoming probable cause hearing and trial. At the hearing, defendant complained Eady failed to file numerous pretrial motions, including a motion for new evaluators after the decision in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*), disapproved in *Reilly v. Superior Court* (2013) 57 Cal.4th 641. In *Ronje*, new evaluations and a new probable cause hearing were ordered because *Ronje* had never been evaluated pursuant to a valid protocol. As the *Ronje* court explained, new evaluations and a new probable cause

hearing based on those new evaluations would “cure the underlying error.” (*Ronje*, at p. 518; *People v. Landau* (2013) 214 Cal.App.4th 1, 17 [*Ronje* critical of underground regulations in use at the time].) Defendant also complained because Eady failed to secure defense “evaluators” and because there had been “no trial this whole entire time.”

The court asked Eady for his response. Eady replied, “Actually, I don’t dispute anything that he said about the fact that there was nothing filed with regard to the underground regulation aspect. All of those things that predated the decision in *Ronje* . . . I asked [defendant], when he told me he was filing this request, whether or not he wished me to proceed anyway with the *Ronje* motion on his behalf and he said he did not.” With respect to the appointment of defense experts, Eady said he had a list of potential defense experts but he needed to submit financial information to the Alternative Defense Services to see if they would cover the costs.

The court asked defendant if he had considered the delay replacing Eady would cause. Defendant responded, “I have considered that, your Honor, and if I may, I know – if I understand correctly the court’s opinion is that based on the *Ronje* thing and everything that’s happened prior to *Ronje* is put to the wayside. [¶] . . . [¶] The issue for me, though, your Honor, is the fact that I have been locked up nearly ten years past my release date. I was due to go home December 24, 2000, and I feel that based on the fact that I never waived time, I never openly said, okay, let’s put this off for another 20 years to see what happens, so based on that, if I am given another attorney or if I am not given another attorney, I will find another way to do it, but I am going to put in a motion to dismiss based on the fact even though I don’t have a right to a speedy trial, I have rights under my 5th Amendment and 14th Amendment to be tried within a reasonable period of time. [¶] Nine years is not a reasonable time, your honor. I have lost family members and lost contact with other family members, so the only contact I have is with an aunt that lives in Pennsylvania. She is 85 years old. God only knows how much longer she has. She has opened up her home to me, told me she will allow me to stay there until I get on

my feet and stuff, and that's all I want. I want to be able to get on with my life. I have been locked up 18 years. It's too long."

The court granted the *Marsden* motion, referring to defendant's lack of confidence in Eady's abilities, and the likelihood defendant would pursue a motion to dismiss the petition based, at least in part, on Eady's conduct of the case. The court relieved Eady and appointed Kenneth Reed.

#### *Speedy Trial Motion and Attorney Fees Request*

In March 2011, Reed filed a motion to dismiss the 2001 petition. He argued the nine-year delay from the filing of the petition to probable cause hearing and trial violated defendant's due process right to a speedy trial. Reed primarily relied on *People v. Litmon* (2008) 162 Cal.App.4th 383, 405-406 (*Litmon II*). The prosecution opposed defendant's motion to dismiss on grounds defendant caused the delay by his repeated requests to continue proceedings. In support of the opposition, the prosecutor attached a copy of a declaration and request for attorney fees Eady had filed in June 2010 in connection with defendant's case. (Pen. Code, § 987.2.) At the bottom of the form, Eady wrote, "**THIS IS A REQUEST FOR EXTRAORDINARY FEES BASED ON THE AMOUNT OF TIME SPENT.**" (Boldface & capitalization in original.) There were two attachments with the motion. One attachment was a 43-page log of appearance dates and work Eady performed on defendant's behalf. The other was a two-page, unsigned, untitled document Eady submitted giving the procedural background of the case and the fact he had been relieved after defendant's successful *Marsden* motion.

The two-page document included the following paragraphs: "During the time I represented [defendant] there were numerous occasions in which he indicated an interest in having his case tried, only to subsequently indicate a desire to delay the trial of his case. There were numerous issues that developed over the years as the law regarding [SVP's] continued to develop. In addition [defendant] constantly provided me documents regarding motions in other cases involving [SVP's], new studies,

psychological treatises or articles, and various other documents that he felt were relative to his situation. [¶] Eventually [defendant] decided that the better option for him would be to attempt to have his case dismissed based on the delay in getting his case to trial. In order to be able to blame the delay on me it was necessary that he request a new attorney. That request was granted and I was relieved on April 7, 2010, so that [defendant] could pursue some sort of relief based on my failure to get his case to trial.”

In September 2011, the court conducted a hearing on defendant’s motion to dismiss. The court first chastised both sides for the unnecessarily long delay in the case. In fact, the judge mused that defendant’s was the second oldest SVPA case she had ever seen. However, the court denied defendant’s motion to dismiss the petition, concluding the proper remedy for the delay was not dismissal, but a trial as soon as possible.

The court stated, “I think this gentleman is entitled to a hearing. But I can’t find dismissal as a remedy as under the facts or law. Under the facts, he has requested virtually every continuance. I believe there was one on a motion matter. We had a statewide power outage on another case, and a couple of short matters. And I am going to call that the Enron rule. And we have a couple of continuances looking for courts. [¶] So I also believe that the goals of the Legislature haven’t been met. In some cases – and I can’t speak to this case, Mr. Reed. You haven’t been on it the whole time. [¶] In some cases, there has been a decided philosophy of not getting the cases to trial for the purpose of seeing whether or not there can be a change in opinion based on factors such as age. So while respondents sometimes scream and yell they really want to go to trial, in reality they sometimes don’t. [¶] I don’t know if that’s the case here. But, based on what I have heard and looking at the cold, hard record, I believe that the remedy is to set a trial date as soon as we can.”

#### *Probable Cause and Pretrial Procedures*

After denying defendant’s dismissal motion, the court conducted a Welfare and Institutions Code section 6602 probable cause hearing and found sufficient cause to

hold defendant until trial. Trial was set to begin April 9, 2012, but defendant filed a *Marsden* motion that day, and he asked to represent himself. The court scheduled a hearing for June 19, but the case was continued to June 29 by stipulation of the parties.

At the hearing, the court first denied defendant's request to represent himself, citing *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449 [no Sixth Amendment right to self-representation under SVPA].

As for Reed's representation, defendant complained that Reed failed to secure defense experts as Reed had promised. Defendant explained that he and Reed had a difference of opinion over the value of defense experts and the effect *Ronje* had on his case, the upshot being no defense experts had been retained. Defendant also complained that Reed failed to tell him about a long-term friendship with Eady. In fact, defendant thought Reed's friendship with Eady might explain Reed's poor performance on the motion to dismiss.

When the court asked for Reed's comments, Reed explained he had pursued the motion to dismiss on speedy trial grounds because defendant's case lingered for nine years with Eady. Reed said the hurdle to defendant's motion to dismiss had been defendant's failure to object to multiple continuances over all the years of Eady's representation. As Reed told the court, "I have numerous times explained to my client, the first witness on such a motion would be Mr. Eady. He would not be my witness because I know what he had to say. He would be the government's witness, and that's what happened. So his declaration kind of explained the reasons why the case got that old."

Reed also acknowledged the difference of opinion he had with defendant over the value of hiring defense experts, asserting such experts would not aid defendant's case. Notwithstanding this difference of opinion over tactics, Reed claimed to be surprised by defendant's *Marsden* motion. According to Reed, defendant frequently expressed the desire to stay at his current place of incarceration for some ongoing

medical treatment. As Reed phrased it, “[w]hen the case started coming closer to trial and [defendant’s] stated desire to me . . . is that he does not want to come here while he is still sick.” In fact, on more than one occasion, defendant had told Reed he was too sick to make court appearances.

The court denied defendant’s *Marsden* motion, stating, “it’s clear to me that [defendant] is displeased with Mr. Reed’s representation. But I’m not going to replace him. . . . To the extent there is a deterioration in the [lawyer-client] relationship, it’s really caused by [defendant’s] attitude.” With defendant’s assent, the court set the case for a January 7, 2013 trial.

On January 7, the court granted a defense request to continue the trial. On January 22, defendant again moved to replace Reed under *Marsden*. Due to the motion, defendant’s trial trailed other cases day-to-day from January 22 to March 5. Defendant did not object to the delay.

On March 5, the court conducted another *Marsden* hearing. Defendant again complained that Reed failed to obtain defense experts as he promised. When asked, Reed explained, “[defendant] has been in custody for the better part of almost 13 years . . . . [¶] He stopped treating, or stopped participating in the program that they have. I’m not going to say he stopped treating, because he did start doing something else on his own – in around – well, prior to 2004. Because both evaluators mentioned in 2004 he was no longer in the program. [¶] I know of no case and no defense attorney, least of all this one, that can call two experts who are not treating him, and are now going to come in and say that even though I don’t treat him, I do not see him on an ongoing basis, i.e., for years, he no longer meets the criteria of [Welfare and Institutions Code section] 6600.” Reed told the court defendant had been evaluated by two state-appointed evaluators regularly since 2000. The court denied defendant’s *Marsden* motion and proceeded to trial.

## *Trial*

After the parties selected a jury, clinical psychologists Douglas Korpi and Kathleen Longwell testified as the prosecution's expert witnesses. Both had evaluated defendant five times between 2000 and 2012. After reviewing defendant's criminal records, police and probation reports, medical records and psychosocial history, the experts diagnosed defendant with pedophilia. Korpi also diagnosed alcohol abuse and borderline personality disorder, and Longwell's diagnosed personality disorder not otherwise specified with antisocial and paranoid traits.

Longwell testified pedophilia is a chronic condition in which a person has a sexual attraction to prepubescent children. In Longwell's opinion, defendant is a "regressed" and "fixated" pedophile, meaning defendant emotionally identifies with the children he molests. Longwell testified defendant's urge to molest children is so "phenomenally strong" defendant continued to molest children even though he was terrified of being returned to prison. In the opinion of both doctors, defendant suffers from a mental disorder, pedophilia, which predisposes him to commit violent or predatory sexual offenses.

Korpi and Longwell also testified about their respective administration of a battery of psychological tests, actuarial tools, and assessments they used to determine the likelihood defendant would reoffend in a sexually violent, predatory manner. According to both evaluators, defendant's scores on these tests ranked him at a high risk of reoffending. They further found that during defendant's incarceration, he would occasionally express regret and remorse for his crimes. However, he continued to deny abusing his nephew, and he vehemently denied sodomizing anyone. Longwell stated defendant's refusal to participate in the state sponsored sex offender treatment program and paranoia made it difficult for defendant to succeed in treatment.

Defendant testified. He admitted guilt in the majority of the allegations against him. However, he denied sodomizing anyone, and he denied any sexual contact with his nephew. The prosecution called his nephew as a witness. Defendant's nephew testified he was eight or nine when defendant started to babysit for his grandmother. He testified, "When I'd get home from school, he would take me into my grandmother's bathroom and sodomize me, penetrate me, make me suck his penis. He would play with mine. It went on for approximately an hour each day," for about two years.

Defendant denied having a mental disorder labeled pedophilia. He claimed he committed various sex acts with young boys out of love, and he said the victims had asked for and enjoyed his consideration. Defendant told the court he refused the sexual offender treatment program because it required him to admit having a mental disorder, which he did not have, and the program had yet to be proven effective. Defendant preferred other programs available, and he viewed religion as the best means of self-improvement. Defendant said he had undergone much soul-searching and alternative therapy since 1992 when he was incarcerated for oral copulation, sodomy and lewd acts with an 11-year-old boy. However, he also admitted little to no control over his urge to molest young boys.

## **DISCUSSION**

Defendant claims the order of indeterminate life commitment under the SVPA must be reversed because the trial court erroneously denied his motion to dismiss on speedy trial grounds, his attorneys provided ineffective assistance of counsel, and the prosecutor committed misconduct. We conclude the trial court properly denied defendant's motion to dismiss, and we find meritless his ineffective assistance of counsel and prosecutorial misconduct claims.

### *1. Speedy Trial*

"The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial. . . .” Article I, section 13, of the California Constitution states that “In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial. . . .” [Citation.] The California provision for a speedy trial “reflects the letter and spirit of” the Sixth Amendment to the United States Constitution. . . .” [Citation.]” (*Jones v. Superior Court* (1970) 3 Cal.3d 734, 738.)

To prevail on a claim the prosecution has unconstitutionally delayed a defendant’s trial, the defendant must show that the delay caused prejudice, whereupon the burden shifts to the prosecution to justify the delay. (*People v. Archerd* (1970) 3 Cal.3d 615, 640, disapproved on other grounds in *People v. Nelson* (2008) 43 Cal 4th 1242.) The court then balances the harm against the justification. (*Jones, supra*, 3 Cal.3d at p.740.) If the defendant does not show actual prejudice, the court need not inquire into the justification for the delay. (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.)

As noted, the SVPA does not contain statutory speedy trial requirements. (*Litmon I, supra*, 123 Cal.App.4th at pp. 1170-1171.) Nevertheless, in SVPA proceedings, “the “fundamental requirement of due process”—“the opportunity to be heard ‘at a meaningful time and in a meaningful manner’”” applies in this context. (*Litmon II, supra*, 162 Cal.App.4th at p. 396.)

Defendant relies on *Litmon II*, which found a due process violation when the defendant’s trial was substantially delayed through no fault of his own. *Litmon II* explained that although some postdeprivation delays in SVP cases are acceptable, those due merely to the government’s unwillingness or inability to dedicate resources to ensure a prompt trial are not. (*Litmon II, supra*, 162 Cal.App.4th at p. 403.) The appellate court also mentioned that the defendant’s first trial had resulted in a hung jury, thus there was a risk of an “erroneous deprivation” of the defendant’s rights. (*Id.* at p. 400.) Defendant’s case is distinguishable on both counts.

First, in determining if “the delay[s at issue in this case] violated [defendant’s] right to due process,” we must consider whether “[t]he record reflects the delay in bringing the matter to trial was attributable to [defendant’s] counsel and/or to [defendant] himself.” (*Orozco v. Superior Court* (2004) 117 Cal.App.4th 170, 179 (*Orozco*)). According to the clerk and reporter’s transcripts, defendant through Eady agreed to delay this case from 2001 through 2010 either by defense motions to continue, or by stipulations to prosecution requests for continuances. While the court could have nudged defendant toward a probable cause hearing by denying a defense motion to continue, we observe that whenever pressed to trial, defendant invariably delayed proceedings by making a *Marsden* motion.

Nevertheless, as the *Orozco* court observed, “Obviously, trial on a recommitment petition should occur within a reasonable time after the probable cause hearing. [Citation.] Surely the Legislature did not contemplate the lengthy delay that occurred here. The trial court should not have acquiesced in the leisurely manner in which this matter was approached by the parties. [Welfare and Institutions Code, s]ection 6602 provides that once probable cause has been determined, the trial court ‘shall order that a trial be conducted.’” (*Orozco, supra*, 117 Cal.App.4th at p. 179.)

Without question, a trial court should strive for the speedy resolution of all matters. Nevertheless, in this case, the 10-year delay between the filing of the petition to the probable cause hearing, and the additional three-year delay to trial, was due to defendant and his attorney.

Moreover, defendant makes no effort to establish actual prejudice as the result of the over 10-year delay to his trial. Defendant challenges the truth of his nephew’s allegations and the allegations he sodomized two victims, but he does not explain how the delay in trial affected the outcome of the proceedings. In addition, defendant admits he has a nearly uncontrollable sexual proclivity for young boys.

Defendant fails to demonstrate the lengthy delay in his case affected the outcome of his trial.

## 2. *Ineffective Assistance of Counsel and Prosecutorial Misconduct*

Defendant claims Eady's declaration violated the attorney-client privilege and created "such a conflict of interest situation, that the conflict [by] itself requires a reversal of the judgment, without any showing of prejudice." He also claims "[Eady's] ineffectiveness in divulging confidences, inimical to [defendant's] cause, is reversible as demonstrably prejudicial. It is also irremediable, and prejudicial *per se*, on the several levels, discussed above. But that is not all. To allow such conduct to taint the determination of a crucial defense motion, is to undermine public confidence in the legal profession, and in the judicial process." We find no basis for reversing the judgment.

First, it is not clear to what extent, if any, the court relied on the contents of Eady's declaration to deny defendant's speedy trial motion. Substantial evidence of defendant's consent to repeated continuances was in the court's own minute orders. Nor do we find defendant's claims the court relied upon its own experience and not the record particularly persuasive. The court's musings about delays in other cases included an express disclaimer with respect to defendant's case. The court did not say defendant purposefully delayed his case, only that she knew of some petitioners who had.

But assuming the court relied on some confidential information Eady revealed, to prevail on an ineffective assistance of counsel claim, "defendant must demonstrate both that counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and that counsel's deficient performance resulted in prejudice, in that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.] If petitioner fails to show prejudice, a reviewing court may reject the claim without determining whether counsel's performance was adequate. [Citation.]" (*People v. Lucas* (2014) 60 Cal.4th 153, 305; see also *People v. Johnson* (2003) 114 Cal.App.4th 284, 302)

Here, defendant fails to demonstrate prejudice as a result of Eady's revelation delaying the proceedings was tactical. To establish prejudice, defendants must demonstrate a reasonable probability of a more favorable outcome in the proceeding. (*In re Hardy* (2007) 41 Cal.4th 977, 1018-1019.) As has been noted, evidence defendant frequently changed his mind about going to trial is in the trial court record and defendant's frequent legal filings. The fact defendant either requested or agreed to every continuance granted over the course of nine years is established by the court record, not Eady's revelations. Furthermore, the court's observations about the motivations of some petitioners in SVPA proceedings were clearly based upon her own experiences and not Eady's statements. Consequently, defendant fails to show a likelihood of a more favorable result had Eady not included the two-page statement with his declaration and request for extraordinary attorney fees.

### 3. *Prosecutorial Misconduct*

Defendant also asserts the prosecutor's use of Eady's attorney fees declaration to oppose defendant's motion to dismiss constitutes prosecutorial misconduct. Defendant claims the prosecutor violated his constitutional rights by eavesdropping on conversations between defendant and his attorney, which "is a reversible violation of the Sixth Amendment right to the effective assistance of counsel." We find defendant's claim untenable.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Generally, a defendant may not raise a claim of prosecutorial misconduct on appeal unless he timely objected to the alleged misconduct at trial. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Reed did not object to the prosecutor's inclusion of Eady's letter in his opposition on prosecutorial misconduct grounds. Of course, any forfeiture of rights as a result of this failure raises the ineffective assistance of counsel specter. But, again, defendant fails to demonstrate he suffered prejudice as a result of the prosecutor's attachment of Eady's declaration to the fee motion, or Reed's failure to block admission of the declaration. As emphasized before, Eady's declaration was simply not the bombshell defendant would like it to be.

Furthermore, even when a prosecutor "orchestrates an eavesdropping upon a privileged attorney-client communication in the courtroom and acquires confidential information" (see *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1261), a situation 180 degrees from the present case, eavesdropping does not automatically require reversal of a defendant's conviction. "[A] court properly rejects a Sixth Amendment claim based on surreptitious state participation in communications between a defendant and his or her attorney or the attorney's agent when the record demonstrates there was no realistic possibility of injury to the defendant or benefit to the prosecution." (*People v. Alexander* (2010) 49 Cal.4th 846, 888-889.) Although it is not clear how the prosecution came to possess a copy of Eady's attorney fees declaration in the first place, there is no reasonable possibility of a more favorable result assuming the prosecutor had not included it.

Finally, defendant claims Reed inappropriately referred to Eady as the "government's witness." He asserts Reed's "failure to object to [Eady's] damaging allegations of what passed between him and [defendant], to lead to the unusual pretrial delays in this case, was ineffective assistance of counsel, *per se*." Again, even assuming

conduct below an objective standard of reasonableness, defendant fails to show how his attorney's conduct prejudiced the outcome of his motion to dismiss or trial.<sup>1</sup>

**DISPOSITION**

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

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<sup>1</sup> Defendant submitted a supplemental brief reserving his right to challenge the SVPA on grounds it violates due process, ex post facto, and double jeopardy principles should either the state or federal Supreme Court overrule *People v. McKee* (2010) 47 Cal.App.4th 1172. These issues were not raised or addressed in this appeal.