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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.

JAMES ROY GLENN,

Defendant and Appellant.

G050160

(Super. Ct. No. FMBMS007714)

O P I N I O N

Appeal from an order of the Superior Court of San Bernardino County,  
Lorenzo R. Balderrama, Judge. Affirmed.

Rudy Kraft, 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.

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## INTRODUCTION

James Roy Glenn was committed to an indeterminate term as a sexually violent predator (SVP). While Glenn's petition for an unconditional discharge from commitment was pending, the relevant statute was amended to preclude such a petition until Glenn had been on conditional release for at least one year. Glenn appeals from the dismissal of his petition for unconditional discharge.

We affirm. The amendment to the relevant statute did not constitute an improper retroactive application of the law. Glenn's trial counsel was not ineffective because Glenn cannot establish he would have been granted an unconditional discharge from commitment if a hearing on the petition had occurred before the statute was amended. Finally, we discern no due process or equal protection violation in the statute.

## PROCEDURAL HISTORY

Glenn is now 88 years old. In 1989, he was convicted of four counts of committing lewd and lascivious acts against a child under 14 years old (Pen. Code, § 288, subd. (a)); Glenn's three victims were 7, 9, and 11 years of age. In 2008, Glenn was committed to an indeterminate term as an SVP under the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). In July 2013, Glenn filed a petition for unconditional discharge from his SVP commitment. (*Id.*, § 6608.) The trial court found the petition was not frivolous, but later dismissed it without an evidentiary hearing. Glenn timely filed a notice of appeal.

## DISCUSSION

### I.

#### *THE AMENDMENTS TO WELFARE AND INSTITUTIONS CODE SECTION 6608 PROPERLY APPLIED TO GLENN'S PETITION FOR AN UNCONDITIONAL DISCHARGE FROM HIS SVP COMMITMENT.*

The issue before this court is whether Glenn had the right to a hearing on his petition for immediate, unconditional discharge from his SVP commitment, or whether he was required to first petition for and be granted a conditional release.

Glenn's petition was filed pursuant to Welfare and Institutions Code section 6608. Between 2006 and 2013, former section 6608, subdivision (a) read in relevant part as follows: "Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of State Hospitals." Effective January 1, 2014, that subdivision now reads: "A person who has been committed as a sexually violent predator shall be permitted to petition the court for conditional release with or without the recommendation or concurrence of the Director of State Hospitals." (Welf. & Inst. Code, § 6608, subd. (a).) That amendment also added language that provides specifically: "After a minimum of one year on conditional release, the committed person, with or without the recommendation or concurrence of the Director of State Hospitals, may petition the court for unconditional discharge." (Welf. & Inst. Code, § 6608, subd. (m).)

Glenn contends that because he filed his petition for unconditional discharge before the 2014 amendment to Welfare and Institutions Code section 6608, he was entitled to a hearing on the petition without being on conditional release for one year. The Attorney General contends that the amendments to section 6608 apply to Glenn's petition, and do not constitute an improper retroactive application of the law.

A law applies retroactively "only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157.)

In *Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1279, the defendants were involuntarily committed to two-year terms under the previous provisions of the SVPA. Petitions to extend their commitments by additional two-year terms had been filed before the law was changed to make involuntary commitment terms indeterminate. (*Bourquez v. Superior Court, supra*, at p. 1282.) The trial court concluded that it had the jurisdiction to consider the petitions for extended two-year commitment terms as petitions for indeterminate involuntary commitment terms. (*Id.* at p. 1283.) The appellate court denied the defendants' petition for a writ of mandate or prohibition. (*Id.* at p. 1290.)

“In determining whether someone is an SVP, the last event necessary is the person's mental state at the time of the commitment. For pending petitions, the person's mental state will be determined after the passage of Proposition 83, at the time of commitment. While past qualifying sex crimes are used as evidence in determining whether the person is an SVP, a person cannot be so adjudged ‘unless he “currently” suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which “makes” him dangerous and “likely” to reoffend. [Citation.]’ [Citation.] ‘[T]he statute clearly requires the trier of fact to find that an SVP is dangerous *at the time of commitment.*’ [Citation.] [¶] The requirement that a commitment under the SVPA be based on a currently diagnosed mental disorder applies to proceedings to extend a commitment. Such proceedings are not a review hearing or a continuation of an earlier proceeding. [Citation.] Rather, an extension hearing is a new and independent proceeding at which the petitioner must prove the person meets the criteria of an SVP. [Citation.] The petitioner must prove the person is an SVP, not that the person is *still* one. [Citation.] ‘[E]ach recommitment requires petitioner independently to prove that the defendant has a currently diagnosed mental disorder making him or her a danger. The task is not simply to judge changes in the defendant's mental state.’ [Citation.] [¶] Because a proceeding to extend commitment under the

SVPA focuses on the person’s current mental state, applying the indeterminate term of commitment of Proposition 83 does not attach new legal consequences to conduct that was completed before the effective date of the law. [Citation.] Applying Proposition 83 to pending petitions to extend commitment under the SVPA to make any future extended commitment for an indeterminate term is not a retroactive application.” (*Bourquez v. Superior Court, supra*, 156 Cal.App.4th at p. 1289, fn. omitted.)

In *People v. Carroll* (2007) 158 Cal.App.4th 503, 512-515, another appellate court reached a similar conclusion—that it was not an improper retroactive application of the amendments to the SVPA to impose an indeterminate term of involuntary commitment on an SVP when the recommitment petition was filed before the effective date of the amendments and had requested extension of a two-year term. “Given the manner in which the SVPA was drafted, so that an extension hearing is a new and independent proceeding that essentially requires a new determination of SVP status [citation], application of Senate Bill [No.] 1128 [(2005-2006 Reg. Sess.)]’s provisions to [the defendant] did not change the legal consequences of *past* events or conduct. This is because ‘the trial on any petition for commitment *or recommitment* must focus on the person’s *current* mental condition.’ [Citation.] ‘[T]he statute clearly requires the trier of fact to find that an SVP is dangerous *at the time of commitment*. The statutory criteria are expressed in the present tense, indicating that each must exist *at the time the verdict is rendered*. In addition, a person cannot be adjudged an SVP unless he “currently” suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which “makes” him dangerous and “likely” to reoffend. [Citation.] [¶] By defining the qualifying mental disorder in this fashion, the statute makes clear that it is the *present inability* to control sexually violent behavior which gives rise to the likelihood that more crimes will occur, and which makes the SVP dangerous if not confined.’ [Citations.] [¶] In light of the foregoing, the significant point with respect to retroactivity is not the filing of the petition, but trial and adjudication under the SVPA.

[Citation.] The conduct or event (for want of a better term) to which the SVPA attaches legal consequences is the person's mental condition at the time of adjudication, not at the time the extension petition is filed. In [the defendant]'s case, he was subject to recommitment for an indeterminate term because of the status of his mental condition after Senate Bill 1128's amendments became effective. Accordingly, those amendments applied only to 'events' occurring after their enactment and so were not retrospectively applied. [Citations.] [¶] In concluding that application to [the defendant] of the indeterminate term provisions did not constitute impermissible retrospective application of the Senate Bill 1128 amendments, we emphasize that this is not a situation in which [the defendant]'s two-year term of commitment was deemed to be indeterminate without recommitment proceedings. Altering the length of a commitment during its term, and not at its originally scheduled expiration upon a new and current SVP determination, might very well involve an impermissible retroactive application of the amendments. As it is not the situation before us, however, we do not decide that question." (*People v. Carroll*, *supra*, at pp. 513-515, fns. omitted.)

As with a petition for commitment, a petition for conditional release or for unconditional discharge considers the committed person's current mental condition and current likelihood of reoffending. Therefore, Glenn's ability to seek unconditional discharge from commitment was properly judged at the time of the hearing on the petition, not at the time the petition was filed. The statutory amendments that took effect in 2014 were therefore the ones that applied to the trial court's review of Glenn's petition. The trial court did not err in denying Glenn's petition.

## II.

### *GLENN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.*

We next consider Glenn's argument that his trial counsel was ineffective for failing to insist on a hearing on his petition for unconditional discharge before the

amendments to Welfare and Institutions Code section 6608 went into effect on January 1, 2014 and January 1, 2015. To prevail on a claim of ineffective assistance of counsel, Glenn must prove by a preponderance of the evidence that his trial counsel's representation failed to meet an objective standard of reasonableness, and that absent counsel's deficient performance, there is a reasonable probability the result would have been more favorable to Glenn. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Frye* (1998) 18 Cal.4th 894, 979.)

We turn directly to the second prong and conclude there was no prejudice. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079.) We conclude there is no reasonable probability that Glenn would have obtained a more favorable result if his petition had proceeded more quickly to hearing. Glenn’s petition did not present any changed circumstances as to his mental disorder, dangerousness, or likelihood to reoffend, other than his age. Glenn’s petition was supported by the reports of two psychologists, Dr. Craig Updegrave and Dr. Mark Schwartz. Dr. Updegrave’s report opined that Glenn did not meet the criteria as an SVP. However, Dr. Updegrave had found that Glenn was in the low-moderate risk category on the Static-99R assessment, had “consistently declined sex offender treatment,” continued to deny his sexual offenses, and was still diagnosed as a pedophile and exhibitionist. Only Glenn’s age and declining physical condition supported Dr. Updegrave’s opinion that Glenn was no longer an SVP.<sup>1</sup>

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<sup>1</sup> Dr. Updegrave also stated that his opinion was supported by recent research on the relationship between age and recidivism for sex offenders. That research, however, was not included in Dr. Updegrave’s report.

Dr. Updegrave had provided testimony at Glenn's commitment trial that Glenn was not an SVP; the jury rejected his opinion at that time and found Glenn was an SVP. Nothing in Dr. Updegrave's report explained why the court would have reached a different conclusion at a hearing on a petition for an unconditional discharge.

Dr. Schwartz's report concluded that it was not likely that Glenn would engage in sexually violent predatory behavior if he was unconditionally discharged from commitment, based on Dr. Schwartz's estimation that Glenn had a five-year lifespan, a likely low rate of recidivism, and Glenn's dynamic factors. Dr. Schwartz's report, however, noted that Glenn had consistently refused to participate in the sexual offender commitment program treatment since 2007; still suffered from pedophilia; was in the moderate-high risk category for reoffense; was predisposed to committing future sexually violent crimes; had talked about being "sexually *aroused*" as recently as 2011; had made inappropriate comments to a female staff member; and did not follow rules or listen to staff members. Given that Dr. Schwartz's conclusion was contrary to his own findings, there is not a reasonable probability the court would have granted the petition for unconditional discharge.

We conclude Glenn's trial counsel did not provide ineffective assistance of counsel by failing to ensure that the hearing on Glenn's petition occurred before January 1, 2014.

### III.

#### *WELFARE AND INSTITUTIONS CODE SECTION 6608 DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.*

A civil commitment, such as an involuntary indeterminate SVP commitment, "constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425.) The indeterminate civil commitment for an SVP does not violate principles of due process (*People v. McKee*

(2010) 47 Cal.4th 1172, 1193) or equal protection (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1347-1348). Glenn contends that the SVPA violates the due process and equal protection clauses of the United States Constitution and the California Constitution because it does not permit an SVP to petition for immediate, unconditional discharge, but instead requires that the SVP first spend at least one year on conditional release.

*People v. Beck* (1996) 47 Cal.App.4th 1676 in instructive. In *People v. Beck, supra*, 47 Cal.App.4th at pages 1679-1680, the defendant was found not guilty of kidnapping by reason of insanity, and was committed to a state mental hospital. The defendant, with the support of the hospital, petitioned for release and applied for a trial for restoration of sanity. (*Id.* at p. 1680.) The trial court, pursuant to Penal Code section 1026.2, subdivision (e), found the defendant was not a danger to the health and safety of others due to mental defect, disease, or disorder, and ordered the defendant placed in an outpatient program for one year. (*People v. Beck, supra*, at p. 1680.) The defendant argued that he was entitled to immediate release under *Foucha v. Louisiana* (1992) 504 U.S. 71 because the undisputed evidence established he was neither mentally ill nor violent, and the trial court's order placing him on conditional release therefore violated his due process rights. (*People v. Beck, supra*, at pp. 1680-1681.)

In *People v. Beck*, the appellate court rejected the defendant's argument because there was "a distinct purpose for ordering [the defendant] to participate in the outpatient program: the public interest in careful evaluation of insanity acquittees before release." (*People v. Beck, supra*, 47 Cal.App.4th at p. 1683.) "In reviewing the procedure at issue here, we bear in mind three considerations tending to support the legislative judgment. First, an acquittal by reason of insanity entails a finding that the defendant in fact committed a criminal offense. The commission of the crime in turn supports an inference of potential dangerousness and possible continuing mental illness [citation], which justifies the state in exercising great care in evaluating the offender prior

to release into the community. Second, the process of evaluating the defendant for a prolonged period in a noninstitutional setting has obvious merit. It provides a ‘trial run’ for the defendant’s release, conducted under conditions resembling what the defendant will later find in the community. [Citation.] Third, the fact that participation in an outpatient program involves a lesser interference with personal liberty than institutional commitment makes it easier to justify a longer period of restriction. [Citations.]” (*Id.* at p. 1684.)

The rationale of *People v. Beck* applies here. The State of California properly exercises great care in evaluating an SVP before releasing him or her into the community, given that his or her initial SVP status supports an inference of dangerousness. The ability to monitor an SVP in a noninstitutional setting allows the SVP to reacclimate to a noncontrolled setting filled with the people (whether children or adults, male or female) toward whom the SVP’s criminal conduct was directed. And the one-year conditional release requirement interferes less with the SVP’s liberty interests than would continued commitment.

Glenn contends *People v. Beck* does not control this case because of two differences between Welfare and Institutions Code section 6608 and Penal Code section 1026.2, neither of which we find convincing. First, Glenn contends that while a hearing to have one’s sanity restored cannot be held for 180 days after the order of commitment is filed, the petition may be filed at any time, meaning that the hearing could be held on the 180th day after commitment. (Pen. Code, § 1026.2, subd. (d).) Under the SVPA, Glenn contends that an SVP cannot file a petition until a full year has passed. Welfare and Institutions Code section 6608, subdivision (f) provides: “A hearing upon the petition [for conditional release] shall not be held until the person who is committed has been under commitment for confinement and care in a facility designated by the Director of State Hospitals for not less than one year from the date of the order of

commitment.” The statute does not place any time restrictions on when the petition may be filed.

Glenn correctly notes that the hearing on the petition to determine whether sanity has been restored may be held six months after the order of commitment, while the hearing on the petition to determine whether an SVP should be conditionally released requires 12 months of commitment. Given the purposes behind the SVPA, we do not find the additional six months before a hearing can be held to violate due process.

Glenn also argues that an SVP petitioning for conditional release under Welfare and Institutions Code section 6608 is more like a person found not guilty by reason of insanity under Penal Code section 1026.5 than Penal Code section 1026.2. The SVP under section 1026.2 is still serving his or her commitment. The person treated under section 1026.5, however, has completed his or her maximum commitment but has been placed on an extended two-year term of commitment because he or she was originally “committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.” (Pen. Code, § 1026.5, subd. (b)(1), (8).)

Penal Code section 1026.5 does not violate due process. “The purpose of committing an insanity acquittee is two-fold: to treat his mental illness and to protect him and society from his potential dangerousness. [Citation.] If the acquittee continues to be mentally ill and dangerous at the end of the maximum commitment period, the government may petition to extend the commitment for the same twofold purpose: to treat the mentally ill person and to protect society. By requiring the prosecution to prove dangerousness because of mental disease, defect, or disorder, section 1026.5, subdivision (b) assures that the extended commitment bears a reasonable relation to the purpose of commitment.” (*People v. Wilder* (1995) 33 Cal.App.4th 90, 101.) Similarly,

committing an SVP serves the same two-fold purpose: protecting the public and treating the SVP's mental disorder. The Legislature has determined that given the nature of an SVP's threat to the public and likelihood of reoffense, the commitment should be indeterminate with the SVP given the opportunity to petition for an end to the commitment, while the state will bear the burden of regularly petitioning to recommit a person found not guilty by reason of insanity. Glenn provides no support for an argument that this legislative distinction violates an SVP's due process rights.

Glenn also argues Welfare and Institutions Code section 6608 violates equal protection because SVP's are similarly situated to mentally disordered offenders and those found not guilty by reason of insanity, but receive disparate treatment in terms of the inability to petition for unconditional discharge from commitment absent a one-year term on conditional release. In *People v. McKee, supra*, 207 Cal.App.4th 1325, the Court of Appeal, Fourth Appellate District, Division One, rejected this argument; we agree with the reasoning and result of that case.

Disparate treatment of SVP's is justified because "the inherent nature of the SVP's mental disorder makes recidivism significantly more likely for SVP's as a class than for MDO's [(mentally disordered offenders)] and NGI's [(those persons found not guilty by reason of insanity)]" (*People v. McKee, supra*, 207 Cal.App.4th at p. 1340); "the victims of sex offenses suffer unique and, in general, greater trauma than victims of nonsex offenses," which means SVP's "pose a greater risk to a particularly vulnerable class of victims than do MDO's and NGI's" (*id.* at p. 1342); and "SVP's are significantly different from MDO's and NGI's diagnostically and in treatment" (*id.* at p. 1344).

DISPOSITION

The order is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.