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

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE LUIS RUBIO,

Defendant and Appellant.

H036678

(Monterey County

Super. Ct. No. SC960022)

Jorge Luis Rubio appeals an order committing him as a sexually violent predator (SVP) to the custody of the California Department of Mental Health for an indeterminate term pursuant to the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.)

**STATEMENT OF THE CASE<sup>1</sup>**

In June 2007, the District Attorney of Monterey County filed a petition for an extension of Rubio's commitment as an SVP under Welfare and Institutions Code section 6600 et seq. Following a trial, a jury found the petition true and the court committed Rubio to an indeterminate term.

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<sup>1</sup> The underlying facts of this case are omitted because they are not relevant to the issues on appeal.

## DISCUSSION

On appeal, Rubio asserts that his indeterminate commitment under the SVPA violates his constitutional rights, specifically the rights to equal protection and due process, and the prohibition against ex post facto laws, the double jeopardy protection, the prohibition against cruel and unusual punishment.

Rubio acknowledges that this court is bound by *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*) (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455) but raises certain constitutional challenges to preserve his ability to seek further judicial relief from our state's Supreme Court or federal courts.

### *Equal Protection*

Rubio argues that the SVPA, as amended by Proposition 83, violates equal protection because it “unjustifiably treats persons subject to SVP commitments different[ly] from persons subject to the state's other civil commitment schemes.” He points out that a mentally disordered offender (MDO) and offenders not guilty by reason of insanity (NGI), unlike SVP committees, are not subject to an indeterminate commitment.

As stated by the California Supreme Court, “an MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year.” (*McKee, supra*, 47 Cal.4th at p. 1202; see Pen. Code, §§ 2970, 2972.) NGI committees “may not be in civil custody longer than the maximum state prison term to which they could have been sentenced for the underlying offense (Pen. Code, § 1026.5, subd. (a); *People v. Crosswhite* (2002) 101 Cal.App.4th 494) unless at the end of that period the district attorney extends the commitment for two years by proving in a jury trial beyond a reasonable doubt that the person presents a substantial danger of physical harm to others because of a mental disease, defect, or disorder. (Pen. Code, § 1026.5, subd. (b)(1);

*People v. Haynie* (2004) 116 Cal.App.4th 1224, 1226; *People v. Superior Court (Blakely)* 60 Cal.App.4th 202, 216.)” (*McKee, supra*, 47 Cal.4th at p. 1207.)

In *McKee*, the Supreme Court concluded that “MDO’s and SVP’s are similarly situated” (*McKee, supra*, 47 Cal.4th at p. 1203) for purposes of equal protection analysis and they have “the same interest at stake—the loss of liberty through involuntary civil commitment . . . .” (*Id.* at p. 1204.) The court further determined that “NGI’s and SVP’s are also similarly situated and that a comparison of the two commitment regimes raises similar equal protection problems . . . .” (*Id.* at p. 1207.)

The Supreme Court declared that “imposing on one group an indefinite commitment and the burden of proving they should not be committed, when the other group is subject to short-term commitment renewable only if the People prove periodically that continuing commitment is justified beyond a reasonable doubt, raises a substantial equal protection question that calls for some justification by the People.” (*McKee, supra*, 47 Cal.4th p. 1203.) The Supreme Court recognized that “the People have not yet carried their burden of justifying the differences between the SVP and NGI commitment statutes” and between the SVP and MDO commitment statutes. (*Id.* at p. 1207.) It stated that the government had “not yet shown that the special treatment of SVP’s is validly based on the degree of danger reasonably perceived as to that group, nor whether it arises from any medical or scientific evidence.” (*Id.* at p. 1210.)

The Supreme Court went on: “We do not conclude that the People could not meet its burden of showing the differential treatment of SVP’s is justified. We merely conclude that it has not yet done so. Because neither the People nor the courts below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand.” (*McKee, supra*, 47 Cal.4th at pp. 1207-1208.) The court announced that it was remanding the “case to the trial court to determine whether the People . . . can demonstrate the constitutional justification for imposing on SVP’s a

greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment.” (*Id.* at pp. 1208-1209, fn omitted.) It also specified that the trial court had the power, upon remand, to “permit expert testimony if appropriate.” (*Id.* at p. 1209, fn. omitted.) Superior court proceedings on remand in the *McKee* case have been completed and *McKee*'s appeal is presently pending before the California Court of Appeal, Fourth District (D059843).

In this case, Rubio did not raise any constitutional challenges to his commitment in the trial court. Rubio asks that the matter be remanded to the trial court with instructions that the court determine whether the prosecution can demonstrate the constitutional justification for imposing a greater burden on SVP's than is imposed on MDO's and NGI's.

The Attorney General requests instead, that this court suspend further appellate proceedings pending finality of the proceedings on remand in *McKee*. The Attorney General further asserts that this approach would be consistent with the Supreme Court's transfer orders, issued in other SVP cases after granting review, that directed appellate courts “to suspend further proceedings pending finality of the proceedings on remand in [*People v.*] *McKee* [(2010) 47 Cal.4th 1172]” “[i]n order to avoid an unnecessary multiplicity of proceedings” and defined “finality of the proceedings” to “include the finality of any subsequent appeal and any proceedings in this court.”

In accordance with *McKee*, we will reverse and remand for consideration of Rubio's equal protection claim. But we also recognize that the Supreme Court has determined that an unnecessary multiplicity of proceedings on the equal protection issue should be avoided. Consistent with that determination, we will direct the superior court to suspend further proceedings on that claim pending finality of the proceedings on remand in *McKee*.

***Due Process, Ex Post Facto, Double Jeopardy and Cruel and Unusual Punishment***

Appellant argues that the SVPA as amended by Proposition 83 violates due process, and the constitutional proscriptions against ex post facto laws, double jeopardy and cruel and unusual punishment.

As appellant concedes, the California Supreme Court rejected similar contentions in *McKee*, and we are bound by that decision. (*McKee, supra*, 47 Cal.4th at pp. 1193, 1195; *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455.) We decline to address these claims, which Rubio raises only to preserve them for further review.

**DISPOSITION**

The order of commitment is reversed for the limited purpose of considering Rubio’s equal protection challenge to his indeterminate SVP commitment in light of *McKee* (*McKee, supra*, 47 Cal.4th 1172). In order to avoid an unnecessary multiplicity of proceedings, the superior court is directed to suspend further proceedings on that claim pending finality of the proceedings on remand in *McKee*. “Finality of the proceedings” shall include the finality of the pending appeal in *McKee* and any proceedings in the California Supreme Court in *McKee*.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.