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

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL CURTIS DIXON,

Defendant and Appellant.

H036874

(Santa Clara County

Super. Ct. No. 211212)

Appellant Paul Curtis Dixon appeals from an order committing him for an indeterminate term to the custody of the Department of Mental Health (DMH) after a jury found him to be a “sexually violent predator” (SVP) within the meaning of the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).¹ He claims the denial of his motion to dismiss the petition was reversible error, requiring his immediate release, because the protocol the evaluators used was not a “standardized assessment protocol” within the meaning of section 6601, subdivision (c) and was therefore “invalid.” The use of the “invalid” protocol, Dixon contends, violated his statutory and constitutional rights and deprived the trial court of fundamental jurisdiction.

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

Dixon also challenges the constitutionality of the SVPA on equal protection, due process, ex post facto, and double jeopardy grounds. The California Supreme Court considered similar constitutional claims in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). In accordance with *McKee*, we reverse the commitment order and remand the case for reconsideration of Dixon's equal protection claim. We find no merit in his remaining claims.

I. Background

Dixon molested his 12-year-old daughter in 1984. He pleaded guilty to lewd conduct on a child (Pen. Code, § 288, subd. (a)) and was placed on three years' probation. In 1990, he molested a friend's five-year-old daughter. He pleaded guilty to lewd conduct on a child, admitted an enhancement allegation, and was placed on eight years' probation.

Three years into that probation, Dixon was arrested for molesting another friend's nine-year-old daughter. His molestation of that child, which occurred "approximately once a month," had begun years earlier, when she was only four and he was still on probation and in therapy for molesting his daughter. In 1993, Dixon pleaded no contest to continuous sexual abuse of a child (Pen. Code, § 288.5), and he was serving a 28-year sentence for that crime when the petition to commit him as an SVP was filed in 2007.

The petition was supported by clinical evaluations conducted by psychologists Dawn Starr and Hy Malinek pursuant to the DMH's Clinical Evaluator Handbook and Standardized Assessment Protocol (2007) (the 2007 protocol). Both psychologists concluded that Dixon suffered from a diagnosed mental disorder, pedophilia, that made him likely to engage in further acts of sexual violence without appropriate treatment and custody. In April 2008 the trial court found probable cause to support the petition and set the matter for trial.

In August 2008, the Office of Administrative Law (OAL) concluded that certain provisions of the 2007 protocol met the definition of a “regulation” and should have been adopted pursuant to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). (2008 OAL Determination No. 19 (Aug. 15, 2008).) “A regulation found not to have been properly adopted is termed an ‘underground regulation’” that a court may determine to be invalid. (*People v. Medina* (2009) 171 Cal.App.4th 805, 813-814 (*Medina*).

In February 2009, the DMH filed a new protocol as an emergency measure. (Cal. Code Regs., tit. 9, § 4005.) Public comments were received at a regulatory hearing in May 2009, and on September 14, 2009, the OAL approved the new protocol (the 2009 protocol). In November 2009, the Fourth District Court of Appeal held that the use of the 2007 protocol “constitute[d] an error or irregularity in the SVPA proceedings.” (*In re Ronje* (2009) 179 Cal.App.4th 509, 516-517 (*Ronje*).

In 2010, the parties stipulated to a new probable cause hearing based on updated evaluations conducted pursuant to the 2009 protocol. In August 2010, the court again found probable cause to support the petition and set the matter for trial.

Drs. Starr and Malinek testified for the prosecution at trial. Both diagnosed Dixon with pedophilia, sexually attracted to females, not exclusive. Both opined that this mental disorder caused Dixon volitional impairment and made it likely that he would reoffend in a sexually violent and predatory manner.

Dr. Starr acknowledged that Dixon’s scores on the Static 99-R and Static 2002-R actuarial tools placed him in the “low-moderate” and “moderate” risk categories. She explained that she did not rely exclusively on those scores, but also considered other factors that research has identified as correlated with sexual reoffense. “[I]n general,” she told the jury, “we’re looking at the pattern of the person’s history, and whether these actuarials seem to be an accurate estimate, or sometimes they might be an overestimate maybe based on if the person’s participating in treatment or some medical or mental

issues that might be protected factors, or conversely, they might be an underestimate.”

“[I]n many cases,” Dr. Starr “probably would not” override the actuarials, but she did so here “because of the unusual nature of the case.” The case was unusual because Dixon “managed to get probation twice . . . in a row, which I can’t remember ever seeing in any [molestation] case I’ve done, and in the course of having that opportunity and doing therapy, continued to molest yet another child who remained undetected for five years. And to me that indicates volitional [and] emotional impairment with his pedophilia [and] a continued risk for sexual re-offense in the future, given his lack of participation in any treatment so that he might understand and prevent such urges in the future.” Dr. Starr “would not advocate” relying on clinical judgment alone to assess a person’s risk, but by the same token, she would “never” base a decision solely on an actuarial number, because that would be “unethical and inappropriate.”

Dr. Malinek testified that despite Dixon’s “low to moderate scores” on the actuarial tools, there was a serious and well-founded risk that he would reoffend in a predatory manner. Dr. Malinek distinguished “clinical judgment,” which has been shown to be unreliable when used alone, from “professional judgment.” Professional judgment involves “a systematic consideration” of all relevant risk information about a case. It has to “clearly consider” two of the actuarial statistical methods “but never stops there.” “[O]ne needs to look at the specific facts and details pertaining to a case, to critically evaluate the results of actuarial approaches, to consider high risk factors that are not present in the actuarial schemes, to consider low risk factors that are not covered by them and to balance everything . . . out as you reach some type of a complex judgment call.”

“[A] psychologist should never make an assessment just on the basis of a number in an actuarial formula,” Dr. Malinek testified, “and I don’t do that. And the authors [of the risk assessment tools] recommend against doing that.” In this case, Dr. Malinek opined, the Static 99-R “clearly” underestimated Dixon’s risk. Dixon presented “an atypical kind of a case given that he’s both an incest and extrafamilial . . . pedophile. [¶]

[T]he actuarials alone do not capture the risk. [T]he fact that he recidivated twice and that he was in treatment for so long and this did not stop him at all, is a significant marker here. He hasn't really -- he does not appear to me to have a handle over this. And so even though he gets a low to moderate score on the Static 99-R, I don't think that that suggests that he is not . . . a serious and well-founded risk."

The prosecution called Dixon as a witness. He testified that he was not and had never been a pedophile or "sexually attracted to little girls," although he had been sexually aroused and gratified by fondling a young girl. Dixon admitted molesting his daughter and his other two victims. He declared that he had "picked up Christianity" in prison, however, which gave him "a different outlook on everything." He did not believe he was at risk of molesting another young girl—"Not at all."

Psychologist Dr. Brian Abbott testified for the defense. He did not interview Dixon or review any records but instead relied on the summaries prepared by Drs. Starr and Malinek. Dr. Abbott criticized the Static 2002-R as supported by too few studies to make it a defensible tool in forensic proceedings and the Static 99-R as having "a 30 percent error rate in prediction." He asserted that it was not valid "at this point in time" to rely on any items external to those actuarial tools. Based on Dixon's Static 99-R score "and taking into account its limitations," Dr. Abbott opined that Dixon did not present a serious and well-founded risk of reoffending in a sexually violent and predatory way. Noting that Dixon was 57, he added that "the risk for re-offense will continue to decline with advancing age" Dr. Abbott found "nothing" in the reports of Drs. Starr and Malinek "that would indicate a reason to ignore the actuarial results for some idiosyncratic factor that might cause [Dixon] to have a higher risk than what would be determined by the Static 99-R."

The jury found the petition true. The court committed Dixon to the custody of the DMH for an indeterminate term. Dixon filed a timely notice of appeal.

II. Discussion

A. Motion to Dismiss

On the third day of trial, Dixon moved to dismiss the petition, arguing that the 2009 protocol used to evaluate him was not a “bona fide ‘standardized assessment protocol’” under section 6601, subdivision (c) because it did not contain “a detailed or uniform procedure for evaluators to follow,” but instead “[e]ft] to the discretion of each evaluator which tests and instruments to use, and which static and dynamic risk factors to consider.” “Instead of establishing a protocol that meets the definition that the SVP Act requires,” Dixon argued, “the DMH now has done exactly the opposite by giving all evaluators virtually unlimited discretion in assessing all potential SVP’s.” Because the protocol was “invalid,” Dixon’s argument continued, its use violated his statutory and constitutional rights and deprived the trial court of fundamental jurisdiction. “The only appropriate remedy,” he concluded, was dismissal of the petition, followed by his release from prison. The parties submitted the motion on the papers after the close of evidence, and the court denied it.

On appeal, Dixon contends that the denial of his motion was reversible error. Reduced to its essence, his argument is that the use of an “invalid” protocol deprived the court of fundamental jurisdiction to adjudicate him an SVP. We disagree.

“Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.” (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) “Lack of jurisdiction” may also refer more broadly to cases in which, “though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.” (*Ibid.*)

In *Medina*, the court addressed and rejected a jurisdictional challenge similar to the one Dixon raises here. (*Medina, supra*, 171 Cal.App.4th at pp. 816-818.) The court

observed that “[a]lthough Medina contends that the initial trial court lacked ‘fundamental’ jurisdiction over his petition, thereby producing a void judgment, his claim does not call into question the court’s personal or subject matter jurisdiction. As to personal jurisdiction, there is no evidence to suggest, and Medina does not contend, that he lacked minimum contacts with the State of California [citations] or that he was not served with the documents necessary to initiate the proceedings. [Citations.] As to subject matter jurisdiction, the superior court was undoubtedly the appropriate court to hear the commitment petition (Welf. & Inst. Code, §§ 6602, 6604), and there is no claim of untimeliness. (See *Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1171.)” (*Medina*, at p. 816.) Thus, the *Medina* court concluded, the issue was whether “the court acted in excess of its jurisdiction, rather than without fundamental jurisdiction.” (*Ibid.*) The court held that Medina had forfeited his right to make that claim when he admitted the allegations in the petition. (*Medina*, at p. 817.)

In an analogous case, the court in *In re Wright* (2005) 128 Cal.App.4th 663 (*Wright*) concluded that the trial court was not without jurisdiction. The initial evaluators disagreed on whether Wright should be committed as an SVP. (*Id.* at p. 667.) Two “independent professionals” were appointed pursuant to section 6601, subdivision (e), the case proceeded to trial, and Wright was found to be an SVP. (*Wright*, at pp. 667-669.) He appealed, the reviewing court rejected his sufficiency of the evidence challenge, and he petitioned for a writ of habeas corpus. (*Id.* at p. 669.)

Assuming for the sake of argument that one of the evaluators did not have a doctoral degree in psychology, which section 6601, subdivision (g) required, the *Wright* court proceeded to discuss the effect of that error. (*Wright, supra*, 128 Cal.App.4th at pp. 672-675.) Noting that the SVPA does not require that the evaluations be alleged or attached to the petition and that the People are not required to prove the existence of the evaluations at either the probable cause hearing or at trial, the court defined the issue before it as “whether Wright was deprived of due process . . . where one of two

evaluations supporting a petition was defective, but a trial court found probable cause to proceed to trial on the petition and the individual was committed after receiving a trial on the merits.” (*Wright*, at pp. 672-673.) The court concluded that the trial court was not without fundamental jurisdiction. “Illegality in pretrial commitment proceedings that are not ‘jurisdictional in the fundamental sense,’ are not reversible error per se on an appeal from the subsequent trial. Rather, the ‘defendant [must] show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.’ (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*)). . . . [¶] Irregularities in the preliminary hearing under the Act are not jurisdictional in the fundamental sense and are similarly subject to harmless error review. (*People v. Talhelm* [(2000)] 85 Cal.App.4th [400], 405.) Thus, reversal is not necessary unless the individual can show that he or she was denied a fair trial or had otherwise suffered prejudice. (*Ibid.*)” (*Wright*, at p. 673.)

Here, we need not determine whether the 2009 protocol was invalid because even assuming that it was, for the reasons outlined in *Medina* and *Wright*, the error was not jurisdictional in the fundamental sense. To obtain reversal, therefore, Dixon must establish prejudice. (*Wright, supra*, 128 Cal.App.4th at p. 673; *Pompa-Ortiz, supra*, 27 Cal.3d at p. 529.)

He cannot do so. As the *Medina* court noted, the purpose of the evaluations is “to screen out those who are not SVP’s . . . [and] [t]he legal determination that a particular person is an SVP is made during the subsequent judicial proceedings.” (*Medina, supra*, 171 Cal.App.4th at 814.) These proceedings include a probable cause hearing (§ 6602) and a trial (§§ 6603, 6604). At the probable cause hearing, the People must show “the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. [Citation.]” (*People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) After that determination is made, the matter proceeds to trial, where the prosecution must prove beyond a reasonable doubt that the individual

meets the criteria of the SVPA. (§§ 6603, 6604.) Here, the trial court found probable cause to believe Dixon met those criteria. At trial, Dixon testified in his own defense and, through his counsel, vigorously cross-examined the prosecution's experts and presented the testimony of his own expert. The jury found beyond a reasonable doubt that Dixon was an SVP. He has not challenged the sufficiency of the evidence at either the probable cause hearing or at trial. Because he cannot establish prejudice, his argument that the court lacked fundamental jurisdiction fails.

Dixon's reliance on *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171 (*Butler*), *Peters v. Superior Court* (2000) 79 Cal.App.4th 845 (*Peters*), and *People v. Superior Court (Gary)* (2000) 85 Cal.App.4th 207 is misplaced. In *Butler*, the prosecutor filed an SVPA petition based on one rather than the required two mental health evaluations. (*Butler*, at p. 1174.) This court issued a writ of mandate directing the trial court to dismiss the petition. (*Ibid.*) *Peters* involved the identical factual situation, and the appellate court in that case issued a writ of mandate ordering the trial court to set aside its order denying the defendant's motion to dismiss. (*Peters*, at pp. 847, 851.) In *Gary*, the trial court dismissed a petition for recommitment under the SVPA because one of the mental health professionals recommended against recommitment. (*Gary*, at p. 211.) The Court of Appeal denied the People's writ petition. (*Id.* at p. 220.) Here, unlike in those cases, there was no writ petition filed, and the matter proceeded to trial. Given the procedural posture of this case, Dixon was required to show prejudice. (*Wright, supra*, 128 Cal.App.4th at p. 673; *Pompa-Ortiz, supra*, 27 Cal.3d at p. 529.)

We reject Dixon's effort to distinguish *Medina* and *Pompa-Ortiz* on the ground that those cases involved "procedural" rather than "substantive" flaws. The California Supreme Court has characterized the requirements set forth in section 6601, subdivisions (b) through (g) as "procedures" by which the DMH must make the initial determination that an individual qualifies as an SVP. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 905-906; see also *People v. Scott* (2002) 100 Cal.App.4th 1060, 1063

[characterizing the requirement for evaluations as a “procedural safeguard[]” imposed by the Legislature to prevent meritless petitions from reaching trial].) Contrary to Dixon’s assertion, moreover, the *Butler*, *Peters*, and *Gary* courts described the flaws in those cases as procedural, not substantive. (See *Butler*, *supra*, 78 Cal.App.4th at pp. 1179-1180 [“The fact that the Legislature did not provide any specific procedures for the filing of a petition for recommitment indicates that it intended the recommitment procedures to be the same as the procedures for the filing of an initial petition for commitment, including the requirement that the person be evaluated by *two* psychologists or psychiatrists”]; *Peters*, *supra*, 79 Cal.App.4th at p. 849 [quoting *Butler* and also noting that “the People are unable to identify any portion of the SVPA that specifies the procedures to be used for filing a new petition, other than section 6601.”]; *Gary*, *supra*, 85 Cal.App.4th at pp. 214-215 [quoting *Butler*’s statement that “[t]he recommitment procedure would begin with the ‘full evaluation’ conducted by the DMH.”].)

B. Equal Protection

Dixon contends that indeterminate commitment violates the equal protection clauses of the federal and state Constitutions “because it treats persons committed as SVPs differently from persons committed as mentally disordered offenders (MDO) and persons found not guilty by reason of insanity (NGI).”

In *McKee*, the California Supreme Court concluded that SVP’s are similarly situated to persons who have been found NGI (Pen. Code, § 1026 et seq.) or committed as MDO’s (Pen. Code, § 2960 et seq.). (*McKee*, *supra*, 47 Cal.4th at pp. 1203, 1207.) The court also stated that McKee’s claim of disparate treatment would be reviewed under the strict scrutiny standard. (*Id.* at pp. 1197-1198.) However, the court concluded that “[b]ecause neither the People nor the court below properly understood this burden, the People will have an opportunity to make the appropriate showing on remand. It must be shown that, notwithstanding the similarities between SVP’s and MDO’s, the former as a

class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society.” (*Id.* at pp. 1207-1208.)

Contending that he “is entitled to receive the same remedy as did Mr. McKee,” Dixon argues that the case must be remanded for further proceedings on his equal protection claim. We agree. (*McKee, supra*, 47 Cal.4th at pp. 1207-1211.) Given the high court’s express desire to avoid “an unnecessary multiplicity of proceedings” on the issue, however, we will direct the trial court to suspend further proceedings pending finality of the proceedings on remand in *McKee*.²

C. Other Constitutional Claims

Dixon contends that (1) the SVPA violates due process by permitting indeterminate commitment and placing the burden on him to show he no longer qualifies as an SVP; (2) indeterminate commitment “and other modifications” to the SVPA render the law punitive in nature and violate the ex post facto clause by punishing him for crimes committed before its enactment; and (3) indeterminate commitment violates the double jeopardy clause because it constitutes additional punishment for crimes he has already been punished for. He concedes that the California Supreme Court rejected similar claims in *McKee*, and he acknowledges, as he must, that we are bound by the

² We do so consistent with the California Supreme Court’s directive to the Courts of Appeal in a number of cases, like *McKee*, in which the constitutionality of the SVPA was challenged on equal protection grounds. The high court granted review on a “grant and hold” basis in those cases and, after deciding *McKee*, transferred them back to the Courts of Appeal for reconsideration in light of the decision. “In order to avoid an unnecessary multiplicity of proceedings,” the high court additionally directed the Courts of Appeal “to suspend further proceedings pending finality of the proceedings on remand in *McKee*,” explaining that “[f]inality of the proceedings’ shall include the finality of any subsequent appeal and any proceedings in [the California Supreme Court].” (*People v. Rotroff*, review granted Jan. 13, 2012, S178455, transferred with directions May 20, 2010.)

holding in *McKee*. (*McKee, supra*, 47 Cal.4th at pp. 1193, 1195; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We decline to address these claims, which Dixon raises only to preserve them for further review.

III. Disposition

The order committing Dixon to the custody of the DMH for an indeterminate term is reversed, and the case is remanded to the trial court for the limited purpose of reconsidering Dixon's equal protection claim in light of *McKee*. The trial court is directed to suspend further proceedings pending finality of the proceedings on remand in *McKee*. "Finality of the proceedings" shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.