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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AGUSTINE QUINTERO,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045200

(Super. Ct. No. M10805)

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, Public Defender, Frank Ospino, Interim Public Defender, 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.

* * *

INTRODUCTION

Agustine Quintero is the subject of a commitment petition filed pursuant to the Sexually Violent Predator Act, Welfare and Institutions Code section 6600 et seq. (SVPA).¹ He filed a plea in abatement in the trial court, seeking dismissal of the SVPA commitment petition on the ground it was not supported by the concurrence of the two evaluators appointed pursuant to section 6601 after our decision in *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). His petition for writ of mandamus/prohibition challenges the trial court's order denying his plea in abatement.

Following our decision in *Boysel v. Superior Court* (Mar. 28, 2012, G045202) __ Cal.App.4th __ (*Boysel*), we deny the writ petition without prejudice to renewing the challenge to the SVPA commitment petition based on a consideration of the full reports of all four post-*Ronje* evaluators.

ALLEGATIONS OF THE PETITION AND THE RETURN

In February 2006, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Quintero was a sexually violent predator under the SVPA. The SVPA Petition was based on an evaluation from Harold Goldberg, Ph.D., dated November 22, 2005 and an evaluation conducted by Hy Malinek, Psy.D., dated December 12, 2005.

In February 2006, Judge Kazuharu Makino reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Quintero was likely to engage in sexually violent predatory criminal behavior on

¹ Further code references are to the Welfare and Institutions Code unless otherwise indicated.

his release from prison. As a consequence, Judge Makino ordered Quintero to remain detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

The probable cause hearing was conducted by Judge Richard M. King in May 2006. Judge King reviewed Dr. Goldberg's evaluation and Dr. Malinek's evaluation and found, pursuant to section 6602, probable cause existed to believe Quintero met the criteria for commitment as a sexually violent predator.

In August 2008, the state Office of Administrative Law (OAL) issued 2008 OAL Determination No. 19, in which the OAL determined the 2007 version of the State Department of Mental Health's (DMH) assessment protocol amounted to an "underground regulation" because portions of the assessment protocol, though regulatory in nature, had not been adopted pursuant to the Administrative Procedure Act, Government Code section 11340.5. (See *Ronje, supra*, 179 Cal.App.4th at p. 515.) In *Ronje, supra*, 179 Cal.App.4th at pages 516-517, we agreed with the OAL and likewise concluded the 2007 assessment protocol was invalid as an underground regulation.

In 2009, the DMH drafted a new standardized assessment protocol for SVPA evaluations. Pursuant to Government Code section 11349.6, subdivision (d), the OAL approved the new assessment protocol in September 2009.

In March 2010, Quintero 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 James P. Marion granted the motion and ordered new evaluations of Quintero, 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 DMH reassigned Dr. Goldberg and Dr. Malinek to evaluate Quintero. In a report dated February 22, 2011, Dr. Goldberg concluded Quintero continued to meet the criteria for commitment as a sexually violent predator. In a report dated February 28, 2011, Dr. Malinek concluded Quintero no longer met those criteria.

Due to the difference of opinions, the DMH ordered independent evaluations of Quintero to be conducted by Michael Selby, Ph.D., and Laljit Sidhu, Psy.D. Dr. Selby prepared a report dated March 27, 2011, and Dr. Sidhu prepared a report dated April 20, 2011.

In March 2011, Quintero filed a plea in abatement seeking dismissal of the SVPA Petition based on the post-*Ronje* evaluation reports of Dr. Goldberg and Dr. Malinek. The reports of Dr. Selby and Dr. Sidhu were not available when Quintero filed his plea in abatement. The district attorney filed opposition to the plea in abatement. In a supplemental memorandum of points and authorities, Quintero requested that his plea in abatement also be considered a demurrer under Code of Civil Procedure section 430.10, subdivision (a) and a nonstatutory motion to dismiss.

In April 2011, Judge King issued an order denying the pleas in abatement filed by Quintero and nine others. Judge King could not consider Dr. Selby's report and Dr. Sidhu's report because they had not been presented to him. As these reports were not presented to the trial court, we decline to consider their contents and conclusions.

The next month, Quintero filed his petition for writ of mandate/prohibition. We issued an order to show cause and stayed the trial court proceedings.

DISCUSSION

In *Ronje, supra*, 179 Cal.App.4th 509, we held the use of an invalid assessment protocol in conducting mental evaluations of a person suspected to be a sexually violent predator constituted an error or irregularity in a commitment proceeding under the SVPA. As a remedy, we directed the trial court to order new evaluations pursuant to section 6601 using a valid assessment protocol.

In *Boysel, supra*, ___ Cal.App.4th ___, *Wright v. Superior Court* (Mar. 28, 2012, G045203) ___ Cal.App.4th ___ (*Wright*), and *Reilly v. Superior Court* (Mar. 28, 2012, G045118) ___ Cal.App.4th ___ (*Reilly*), we addressed whether, before the probable cause hearing, a person named in an SVPA commitment petition may challenge the

petition on the ground of lack of concurring evaluators, by means of a plea in abatement, nonstatutory motion to dismiss, or nonstatutory pleading. We concluded that *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 912-913 (*Ghilotti*) authorizes the use of a nonstatutory pleading to challenge an SVPA commitment proceeding, before the probable cause hearing, on the ground of lack of the required concurring evaluations. We deem Quintero's plea in abatement to have constituted such a nonstatutory pleading.

In *Boysel*, *Wright*, and *Reilly*, we addressed the effect of post-*Ronje* evaluations in different scenarios. In *Boysel*, *supra*, ___ Cal.App.4th ___, the two initial post-*Ronje* evaluators disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator. Although two independent post-*Ronje* evaluators had been appointed pursuant to section 6601, subdivision (e), their reports were not before the trial court when it denied the challenge to the SVPA commitment petition. In *Wright*, *supra*, ___ Cal.App.4th ___, the two initial post-*Ronje* evaluators likewise disagreed whether the person named in the SVPA commitment petition met the criteria for commitment as a sexually violent predator, but there was no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In *Wright* and *Boysel*, we denied the petitions for writ of mandamus/prohibition without prejudice to later renewing the challenge to the SVPA commitment petitions. In *Reilly*, *supra*, ___ Cal.App.4th ___, the two initial post-*Ronje* evaluators agreed the person named in the SVPA petition no longer met the criteria for commitment as a sexually violent predator, and, therefore, we were compelled by the SVPA to grant the writ petition in that case.

This case is similar to *Boysel*, *supra*, ___ Cal.App.4th ___, in that the reports of the two post-*Ronje* independent evaluators not were before the court when it denied Quintero's plea in abatement. Quintero's plea in abatement, as the plea in abatement in *Boysel*, was based only on the two initial post-*Ronje* evaluation reports, prepared by Dr. Goldberg and Dr. Malinek. Based on those two evaluation reports, which were the

only two reports before it, the trial court did not err by denying Quintero's plea in abatement. As in *Boysel*, our decision to deny Quintero's writ petition is without prejudice to renewing the challenge to the SVPA Petition in the trial court by motion or pleading pursuant to *Ghilotti*, based on all four post-*Ronje* evaluation reports.

DISPOSITION

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

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.