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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONALD GORDON,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045207

(Super. Ct. No. M9642)

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

Donald Gordon 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 *Wright v. Superior Court* (Mar. 28, 2012, G045203) __ Cal.App.4th __ (*Wright*), we deny the writ petition without prejudice to renewing the challenge to the SVPA commitment petition when the post-*Ronje* evaluation process is completed, based on the full reports of all post-*Ronje* evaluators.

ALLEGATIONS OF THE PETITION AND THE RETURN

In July 2002, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Gordon was a sexually violent predator under the SVPA. The SVPA Petition was based on an evaluation from Mark Schwartz, Ph.D., dated May 22, 2002, and an evaluation conducted by Charles Jackson, Ph.D., also dated May 22, 2002. In July 2004, Douglas Korpi, Ph.D., completed a replacement evaluation and concluded Gordon met the criteria for commitment as a sexually violent predator.

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

In August 2004, Judge Daniel J. Didier conducted a probable cause hearing in which he received the evaluations prepared by Dr. Schwartz, Dr. Jackson, and Dr. Korpi. Judge Didier found, pursuant to section 6602, probable cause existed to believe Gordon met the criteria for commitment as a sexually violent predator.

Dr. Schwartz and Dr. Korpi completed updated evaluations of Gordon in 2006. Both Dr. Schwartz and Dr. Korpi concluded Gordon continued to meet 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, Gordon 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 Patrick Donahue granted the motion and ordered new evaluations of Gordon, 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. Schwartz and Dr. Korpi to reevaluate Gordon. In a report dated February 25, 2011, Dr. Schwartz concluded Gordon continued to meet the criteria for commitment as a sexually violent

predator. In a report dated February 22, 2011, Dr. Korpi concluded Gordon no longer met those criteria.

In March 2011, Gordon filed a plea in abatement seeking dismissal of the SVPA Petition based on the most post-*Ronje* evaluation reports of Dr. Schwartz and Dr. Korpi. The district attorney filed opposition to the plea in abatement. In a supplemental memorandum of points and authorities, Gordon 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 Richard M. King issued an order denying the pleas in abatement filed by Gordon and nine others. The next month, Gordon 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 *Wright, supra*, __ Cal.App.4th __, *Boysel v. Superior Court* (Mar. 28, 2012, G045202) __ Cal.App.4th __ (*Boysel*), 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 Gordon's plea in abatement to have constituted such a nonstatutory pleading.

In *Wright, Boyssel, and Reilly*, we addressed the effect of post-*Ronje* evaluations in different scenarios. In *Wright, 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, but there was no evidence in the record that two independent post-*Ronje* evaluators have been appointed. In *Boysel, 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. 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* 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 *Wright, supra*, __ Cal.App.4th __, in that the post-*Ronje* evaluation process had not been completed when the trial court denied Gordon's plea in abatement. Here, there was a split decision between the two post-*Ronje* evaluators. Thus, it was necessary, under section 6601, subdivision (c), to appoint two post-*Ronje* independent evaluators to examine Gordon and determine whether he met the statutory criteria for commitment as a sexually violent predator. In the reply, Gordon asserts two independent evaluators were appointed and prepared reports dated, respectively, August 25, 2011 and July 26, 2011. The record presented to us does not

establish that the post-*Ronje* evaluation process had been completed when the trial court denied the plea in abatement in April 2011.

Thus, as in *Wright*, the trial court did not err by denying Gordon's plea in abatement because the statutorily required evaluation process had not been completed. Our decision to deny Gordon's writ petition is without prejudice to renewing the challenge to the SVPA Petition by motion or pleading pursuant to *Ghilotti* when the post-*Ronje* evaluation process is completed, depending on the outcome of the two independent post-*Ronje* evaluations.

DISPOSITION

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

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.