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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LEROY LUNDAY,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045208

(Super. Ct. No. M10990)

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

Leroy Lunday 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 August 2006, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Lunday was a sexually violent predator under the SVPA. In September 2006, Judge Richard M. King reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Lunday was likely to engage in sexually violent predatory criminal behavior on his release from prison. As a consequence, Judge King ordered Lunday to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing.

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

Judge Kazuharu Makino conducted the probable cause hearing in October 2006. He reviewed an evaluation conducted by Douglas Korpi, Ph.D., in July 2006 and an evaluation conducted by Christopher Matosich, Ph.D., in the same month. Judge Makino found, pursuant to section 6602, probable cause existed to believe Lunday is a sexually violent predator.

In conducting their evaluations, Dr. Korpi and Dr. Matosich followed the 2004 version of the State Department of Mental Health's (DMH) Clinical Evaluator Handbook and Standardized Assessment Protocol. 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 DMH's 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, Lunday 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 Lunday, pursuant to section 6601, and a new probable cause hearing pursuant to *Ronje* based on the new evaluations.

The DMH appointed Dr. Korpi and Dr. Matosich to conduct the new evaluations of Lunday. In a report dated January 31, 2011, Dr. Korpi concluded Lunday no longer met the criteria for commitment as a sexually violent predator. In a report

dated February 28, 2011, Dr. Matosich concluded Lunday continued to meet those criteria.

In March 2011, Lunday filed a plea in abatement seeking dismissal of the SVPA Petition based on the post-*Ronje* evaluation reports of Dr. Korpi and Dr. Matosich. The district attorney filed opposition to the plea in abatement. In a supplemental memorandum of points and authorities, Lunday 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 Lunday and nine others. The next month, Lunday 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 Lunday's plea in abatement to have constituted such a nonstatutory pleading.

In *Wright, Boysel, 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 Lunday's plea in abatement. Here, there was a split decision between the two post-*Ronje* evaluators, Dr. Korpi and Dr. Matosich. Thus, it was necessary, under section 6601, subdivision (c), to appoint two post-*Ronje* independent evaluators to examine Lunday and determine whether he met the statutory criteria for commitment as a sexually violent predator. The record presented to us does not disclose whether those independent evaluators were appointed and, if so, whether they have examined Lunday and submitted reports.

As in *Wright*, the trial court did not err by denying Lunday's plea in abatement because the statutorily required evaluation process had not been completed. Our decision to deny Lunday'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.