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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RONNIE CHAMBERS,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

G045209

(Super. Ct. No. M11891)

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

Ronnie Chambers 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 2008, the Orange County District Attorney filed a petition for commitment as a sexually violent predator (the SVPA Petition), alleging Chambers was a sexually violent predator under the SVPA. The SVPA Petition was based on an evaluation from Mary Jane Alumbaugh, Ph.D., dated April 27, 2008, and an evaluation conducted by Gary Zinik, Ph.D., dated April 10, 2008.

In August 2008, Judge Robert Fitzgerald reviewed the SVPA Petition and found it stated sufficient facts which, if true, would constitute probable cause to believe Chambers was likely to engage in sexually violent predatory criminal behavior on his

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

release from prison. As a consequence, Judge Fitzgerald ordered Chambers to be detained pursuant to section 6601.5 in a secured facility until the probable cause hearing. One week later, Judge Fitzgerald conducted a probable cause hearing at which he received the evaluations prepared by Dr. Alumbaugh and Dr. Zinik. Judge Fitzgerald found, pursuant to section 6602, probable cause existed to believe Chambers 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, Chambers 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 Chambers, 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. Alumbaugh and Dr. Zinik to evaluate Chambers. In a report dated February 28, 2011, Dr. Alumbaugh concluded Chambers no longer met the criteria for commitment as a sexually violent predator. Dr. Zinik prepared a report dated April 18, 2011.

In March 2011, Chambers filed a plea in abatement seeking dismissal of the SVPA Petition based on the post-*Ronje* evaluation report of Dr. Alumbaugh. The district attorney did not file a formal opposition, but the court considered the oppositions filed in the related pleas in abatement that were before it.

On April 15, 2011, Judge Richard M. King issued an order denying the pleas in abatement filed by Chambers and nine others. Dr. Zinik's report was not available when the trial court issued its order. As Dr. Zinik's report was not before the trial court, we decline to consider its contents and conclusions.

The next month, Chambers filed his petition for writ of mandate/prohibition challenging that order. 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 Chambers'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 Chambers's plea in abatement. In a report dated February 28, 2011, Dr. Alumbaugh concluded Chambers no longer met the criteria for commitment as a sexually violent predator. Dr. Zinik's report, dated April 18, 2011, was not available to the trial court when it denied the plea in abatement on April 15. Although the district attorney has supplied us the first page and the conclusion page of Dr. Zinik's report, we decline to consider them because the report was not presented to the trial court. In addition, we note, only a two-page excerpt of Dr. Alumbaugh's report was presented to the trial court.

Depending on the conclusion of Dr. Zinik's report, it might be necessary, under section 6601, subdivision (c), to appoint two post-*Ronje* independent evaluators to

examine Chambers and determine whether he met the statutory criteria for commitment as a sexually violent predator. There was no evidence in the record that two independent post-*Ronje* evaluators have been appointed.

As in *Wright*, the trial court did not err by denying Chambers's plea in abatement because the statutorily required evaluation process had not been completed. Also as in *Wright*, our decision to deny Chambers'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, including, if necessary, two independent evaluations, is completed. The full reports of all post-*Ronje* evaluators must be attached to or included with any such *Ghilotti* motion or pleading.

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.