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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT SEAN BARBOUR,

Defendant and Appellant.

C061291

(Super. Ct. No.
MHO02001)

In this appeal, defendant Robert Sean Barbour challenges the constitutionality of indeterminate recommitment proceedings for sexually violent predators (SVP's). The California Supreme Court's recent decision in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*) is dispositive. Accordingly, we reject defendant's due process claim but remand for further consideration of equal protection concerns.

FACTS AND PROCEEDINGS

Given the issues raised in defendant's appeal, a detailed description of the underlying facts is unnecessary. Defendant was convicted in 1993 and 1995 of committing lewd and lascivious

acts with a child under the age of 14 (Pen. Code, § 288, subd. (a)), and in 2008, the Sacramento County District Attorney's Office filed a petition to extend defendant's commitment as an SVP.

The petition alleged defendant's convictions and further alleged that two psychologists had evaluated defendant and found him to be an SVP.

At trial, psychologists diagnosed defendant with two mental disorders, pedophilia and fetishism. They testified that defendant had a substantial, well-founded risk of reoffending and they did not believe defendant could control his behavior. A psychologist testifying for defendant challenged the adequacy of the evaluations to predict whether defendant could control his behavior or whether he would reoffend, but he conceded that he had not met or evaluated defendant.

The jury found the allegations in the petition to be true, and the trial court ordered defendant committed for an indefinite term as an SVP.

This appeal followed.

DISCUSSION

Defendant contends that the indeterminate commitment under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, §§ 6600 et seq. [unspecified section references that follow are to the Welfare & Institutions Code) violates due process and equal protection guarantees. The recent California Supreme Court decision in *McKee* resolves both claims.

I

Due Process Claims

Defendant contends that the SVPA "creates an unacceptable risk that a person committed under the Act who no longer qualifies as a sexually violent predator will have his commitment continued in violation of his right to due process. In addition, the mechanisms for judicial review of defendant's confinement under sections 6605 and 6608 are not constitutionally adequate and a person committed under the Act bears the burden of proof by a preponderance of the evidence in order to be released under section 6608."

Under section 6605, the Department of Mental Health (DMH) can file a petition for conditional or unconditional release if it determines that the individual no longer meets the definition of an SVP or can be released to a less restrictive alternative. A petition under this section can be made only by DMH. (§ 6605, subd. (b).) If the state opposes the release, it must prove beyond a reasonable doubt that the committed person remains an SVP.

An individual can petition for release without DMH authorization (§ 6608). In this hearing, the petitioner bears the burden of proof by a preponderance of the evidence. (§ 6608, subd. (i).)

In *McKee*, the petitioner raised the same claim that defendant makes here, namely, that due process is violated by the fact that his commitment is indefinite and that it is his

burden to show by a preponderance of the evidence that he is no longer an SVP. (*McKee, supra*, 47 Cal.4th at pp. 1188-1191.) The *McKee* court rejected that claim. (*Id.* at p. 1191.) Relying on *Jones v. United States* (1983) 463 U.S. 354 [77 L.Ed.2d 694], a case involving commitment proceedings for those adjudged not guilty by reasons of insanity, *McKee* concluded that "the requirement that [an individual], after an initial commitment, must prove by a preponderance of the evidence that he is no longer an SVP does not violate due process." (47 Cal.4th at p. 1191.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

McKee also rejected the claim, identical to one raised here by defendant, that the commitment statutes are unconstitutional because they authorize an appointment of experts only when DMH authorizes an individual to petition for release (§ 6605, subd. (d)), not when the individual files a petition without DMH approval. (§ 6608, subd. (a).) (*McKee, supra*, 47 Cal.4th at pp. 1192-1193.) The court acknowledged that there was no explicit provision to provide experts when an individual petitions for release, but found that the statutory language of the SVPA and legislative history evidenced an intent to appoint experts to insure that a commitment lasts no longer than necessary. (*Ibid.*) The court concluded, "Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608,

subdivision (a), read in conjunction with section 6605, subdivision (a), to mandate appointments of an expert for an indigent SVP who petitions the court for release." (*Id.* at p. 1193.) Consequently, the court concluded, there was no violation of due process. (*Ibid.*)

In sum, *McKee* disposes of defendant's due process claims. The SVP commitment process does not violate due process guarantees.

II

Equal Protection Claims

Defendant contends that his equal protection rights were violated because SVPs are treated less favorably than those committed under other statutes, such as mentally disordered offenders (MDO's) (Pen. Code, § 2960) and those found not guilty by reason of insanity (NGI's) (Pen. Code, § 1026 et seq.). The same claim was raised in *McKee* (47 Cal.4th at p. 1200-1201, 1207) and the court concluded that the prosecution had not met its burden of showing that these different treatments were justified. (*McKee*, at pp. 1201-1207.)

The *McKee* court found that SVP's and MDO's are similarly situated for equal protection purposes because both are involuntarily committed to protect the public from individuals who are dangerously mentally ill. (*McKee*, *supra*, 47 Cal. 4th at p. 1203.) However, SVP's are given "indeterminate commitments and thereafter have the burden to prove they should be released (unless the DMH authorizes a petition for release). In

contrast, an MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year. There is therefore no question that, after the initial commitment an SVP is afforded different and less favorable procedural protections than an MDO." (*Id.* at p. 1202.) The court found similar equal protection problems with the commitment procedures for NGI's. (*Id.* at p. 1207.)

The court determined that there was no proof to substantiate the claim that "the risks involved in erroneously freeing SVPs are substantially greater than the risks involved with freeing MDO's," (*McKee, supra*, 47 Cal.th at pp. 1204-1207), but added, "We do not conclude that the People could not meet its burden of showing the differential treatment of SVP's is justified. We merely conclude that it has not yet done so." (*Id.* at p. 1207.) The Court therefore remanded to the trial court to give the People an opportunity to "demonstrate the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment." (*Id.* at pp. 1208-1209.)

No such evidence was introduced in the case before us. In accordance with *McKee*, we therefore remand to the trial court for further proceedings.

DISPOSITION

The judgment is reversed and remanded with directions to the trial court to hold proceedings to resolve the issue of

whether the People can demonstrate a justification for treating
SVP's differently than MDO's and NGI's.

_____ HULL _____, Acting P. J.

We concur:

_____ ROBIE _____, J.

_____ BUTZ _____, J.