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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY MCKNIGHT, Defendant and Appellant.	A123119 (San Mateo County Super. Ct. No. 407542)

Defendant Timothy McKnight appeals after a jury trial resulted in his recommitment as a sexually violent predator (SVP) under Welfare and Institutions Code sections 6600 et seq.[1] (SVPA, or the Act). He contends the trial court committed *Batson/Wheeler* error; that the psychiatric evaluations underlying the recommitment petition were invalid because they were based on an invalid regulation; and that the Act, as amended to impose indeterminate commitments, violates his constitutional rights to procedural due process and equal protection and is an invalid ex-post facto law.

We order the case remanded for further proceedings on McKnight's equal protection claim pursuant to *People v. McKee* (2010) 47 Cal.4th 1172. We find no merit in any of McKnight's other contentions, and accordingly affirm the judgment in all other respects.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise designated.

BACKGROUND

The crimes that led to defendant's initial commitment as a sexually violent predator are discussed in our prior opinion affirming that commitment. (*People v. McKnight* (May 31, 2002, A094449 [nonpub. opn.].) Their discussion is not relevant to the issues raised in this appeal. The issues presented here arise from the district attorney's petition to extend defendant's commitment under the SVPA filed on October 2, 2006. Defendant moved to strike the petition on the ground that the statute, as amended in 2006 to authorize commitment for an indeterminate term, violated principles of due process, equal protection, ex post facto and double jeopardy. He also asserted the protocol used by the Department of Mental Health (the Department) to evaluate potential sexually violent predators is an unlawful "underground" regulation, and on that ground moved to dismiss the petition. The court denied both motions.

The jury found defendant to be a sexually violent predator. The court committed him to the custody of the Department for treatment and confinement for an indeterminate term. This appeal timely followed.

DISCUSSION

I. Wheeler/Batson Error

Defendant contends the court erred in rejecting his *Batson/Wheeler* challenge to the prosecutor's excusal of an alternate juror. We disagree.

A. Background

The prosecutor used her sixth and last peremptory challenge against prospective juror Mr. B., whose seat was filled by prospective juror Ms. B., whom defendant excused, and then by juror No. 11, to complete the selection of 12 jurors.

The parties then began selection of two alternate jurors. The prosecutor used her first peremptory challenge against Mr. E., the sole African-American man in the original venire from which the 12 jurors were selected. In response to a juror questionnaire that asked prospective jurors about their prior experiences with crime, Mr. E. reported that his

house was burglarized five years earlier and the burglar was never apprehended. In addition, one of Mr. E.'s relatives had been accused of a crime the previous year. Charges were brought against his relative, but Mr. E. did not know the outcome. About three years earlier Mr. E. and the same relative had been stopped for jaywalking and the relative was arrested for evading the police. Mr. E. felt the police handled the situation fairly and appropriately. He had no strong feelings for or against law enforcement as a result of these situations and believed he could fairly judge defendant's case.

Defense counsel argued that the prosecutor's challenge to Mr. E. was racially discriminatory in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. Counsel asserted the prosecutor's challenge lacked race-neutral reasons, particularly in light of "what appeared to me to be similar answers from other individuals who were not challenged." The prosecutor responded that Mr. E. had at least two prior police contacts, and that she had been forced to accept certain jurors she would otherwise have excused from the main jury because she had run out of peremptory challenges. She also stated that Mr. E.'s race could be seen as favorable by the prosecution because some of defendant's victims were African-American.

The trial court found defendant had not made a prima facie case of discrimination and that the prosecutor had lawful, race-neutral reasons for challenging Mr. E. It therefore denied defendant's *Batson/Wheeler* motion.

B. Analysis

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity. [Citations.] When the defense raises such a challenge, these procedures apply: 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes.

[Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' " (*People v. Davis* (2009) 46 Cal.4th 539, 582.) We review the trial court's ruling for substantial evidence.[2] (*People v. Alvarez* (1996) 14 Cal.4th 155, 196.)

Defendant's contention that the court erred when it denied his challenge to the excuse of an alternate juror fails at the outset for the simple reason that no alternate jurors ultimately served on the jury. Accordingly, there is no possibility that *Batson/Wheeler* error, were there such, resulted in prejudice. (*People v. Turner* (1994) 8 Cal.4th 137, 172; *People v. Roldan* (2005) 35 Cal.4th 646, 703; see also *People v. Gray* (2005) 37 Cal.4th 168, 185.) In any event, the record supports the trial court's finding of race-neutral reasons for the strike. Mr. E. had a family member who had been charged with a crime, and himself had been stopped by police with that relative when the relative was arrested. Mr. E. had also been the victim of a break-in that the police were unable to solve. These experiences with law enforcement were a permissible basis for exclusion.

Defendant's attempt to show the prosecutor's reasons for striking Mr. E. were pretextual through a comparative juror analysis is unpersuasive. Defendant argues that juror No. 11, who filled the last vacant seat on the jury, also reported negative contacts with law enforcement officers. Therefore, he maintains, it is clear that something other than Mr. E.'s responses prompted the prosecutor's decision to challenge him. Precisely

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[2] The Supreme Court recently noted an exception to the substantial evidence rule of *Batson/Wheeler* rulings when "it is unclear whether the trial court used the recently disapproved 'strong likelihood' standard, rather than the correct 'reasonable inference' standard." In such cases, appellate courts review the record independently to determine whether it supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis. (*People v. Davis, supra,* 46 Cal.4th 539, 582-583.) The record here contains no indication that the court applied the wrong standard, and defendant raises no such claim. However, out of what is perhaps an excess of caution we have satisfied ourselves that the court's ruling withstands review under either standard.

so. As the prosecutor explained to the court, she did not strike juror No. 11 from the main jury only because she had no peremptory strikes remaining when juror No. 11 qualified. When it came time to choose the alternate jurors, the prosecutor was allotted two additional peremptory challenges. (Code Civ. Proc., § 234.) The fact the prosecution did not exercise a challenge to juror No. 11 because she had no peremptory challenges remaining does not undermine the validity of her stated reasons for striking Mr. E. The court correctly denied defendant's *Batson/Wheeler* motion.

II. The Department's SVP Protocols

Defendant challenges the trial court's denial of his motion to dismiss the SVP petition and/or exclude the People's expert psychiatric testimony on the ground that the Department's protocol for conducting SVP evaluations was not adopted in accordance with the Administrative Procedure Act (APA), and is therefore an unlawful "underground regulation." Here, too, we disagree.

A. Initiation of Commitment Proceedings under the SVPA

Proceedings under the SVPA begin when an inmate scheduled for release from custody is screened by the Department of Corrections and Rehabilitation "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history." (§ 6601, subd. (b).) If it is determined that the individual is likely to be an SVP, he is referred to the Department for a full evaluation. (§ 6601, subd. (b).)

The Department designates two mental health professionals, either psychologists or psychiatrists, to "evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . ." (§ 6601, subds. (c), (d).) The standardized assessment protocol "shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and

psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." (§ 6601, subd. (c).)

If both mental health evaluators agree that the person "has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody," the Department forwards a request for a commitment petition to the county where the person was convicted. (§ 6601, subd. (d).) If the county's designated counsel concurs with the recommendation, he or she files a petition for commitment in the superior court (§ 6601, subd. (i)) and a hearing is held to determine whether there is probable cause to believe that if released from custody the individual is likely to engage in sexually violent predatory criminal behavior. The individual is represented by counsel. (§ 6602, subd. (a).)

If the court finds probable cause, it orders a trial to determine whether the individual is an SVP under section 6600. (§ 6602, subd. (a).) The individual is entitled to a trial by jury, the assistance of counsel, the right to retain experts, and access to relevant medical and psychological records and reports. (§ 6603, subd. (a).) Commitment requires a unanimous verdict and proof beyond a reasonable doubt. (§§ 6603, subd. (f), 6604.) If the jury determines the individual is an SVP, he is committed for an indeterminate term to the Department for appropriate treatment and confinement. (§ 6604.)

B. The 2008 Administrative Determination

In 2008, the Office of Administrative Law (OAL) issued a determination that certain portions of the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" (the protocol) used by the Department to conduct SVP evaluations meet the statutory definition of a regulation, and therefore should have been promulgated pursuant to the procedures required by the APA. Because the protocol was implemented without compliance with the APA, the OAL concluded it is an invalid "underground regulation" as defined in the California Code of Regulations. (*People v. Medina* (2009)

171 Cal.App.4th 805, 810, 814; 2008 OAL Determination No. 19, OAL File # CTU 2008-0129-01, pp. 1, 13.) The OAL's determination, although not binding on this court, is entitled to deference. (*Medina, supra,* 171 Cal.App.4th at p. 814.)[3]

C. Analysis

Defendant initially received a two-year commitment under the SVPA and thereafter was recommitted for additional two-year terms in 2003 and 2005. (*People v. McKnight* (Sept. 10, 2007, A113915) [nonpub. opn].) On October 11, 2006, based on evaluations by two licensed psychologists, the district attorney filed a petition to extend defendant's commitment for an indefinite period of time under the Act as amended in 2006. Defendant contends the status of the Department protocol as an underground regulation invalidates his psychological evaluations and, therefore, that his commitment violates his constitutional rights to due process of law. We disagree.

As a preliminary matter, the People argue that the OAL determination on which defendant relies is irrelevant because the psychological evaluations underlying the 2006 recommitment petition were conducted before the 2007 protocol was in effect. Chronologically, they have a point. Defendant challenges the People for failing to cite evidence that the 2007 protocol was not used in 2006, but it is his burden to demonstrate error, not the People's to demonstrate its absence. (See, .e.g., 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 149, pp. 396-397; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409-410.) He has not established that his evaluations were in fact conducted under the challenged protocol.

But defendant's challenge fails for another reason as well. He cannot show prejudice from use of the 2007 protocol even if we assume arguendo that it was used. Because irregularities in preliminary proceedings under the SVPA are not jurisdictional

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[3] The People state that the Department adopted a new protocol that conforms to the APA in September 2009, although they have not cited or provided this court with a copy of the new regulation.

in the fundamental sense, they are subject to harmless error review. (*People v. Hayes* (2006) 137 Cal.App.4th 34, 50-51; *In re Wright* (2005) 128 Cal.App.4th 663, 673; *People v. Butler* (1998) 68 Cal.App.4th 421, 435; see also *People v. Hurtado* (2002) 28 Cal.4th 1179, 1190.) Thus, the alleged error would require reversal only if defendant can show that he was denied a fair trial or otherwise suffered prejudice. (*In re Wright, supra,* 128 Cal.App.4th at pp. 673; *People v. Butler, supra,* 68 Cal.App.4th at p. 435.) He cannot. " '[T]he requirement for evaluations is not one affecting disposition of the merits; rather, it is a collateral procedural condition plainly designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so.' [Citation.] 'After the petition is filed, rather than demonstrating the existence of the two evaluations, the People are required to show the more essential fact that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior.' " (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1063.) Thus, once the recommitment petition was filed the People could not rely on the evaluations, but were required to, and did, show at an adversarial preliminary hearing that defendant meets the SVP criteria. (§ 6602.) Defendant then received a jury trial and was found, beyond a reasonable doubt, to be an SVP. Accordingly, no prejudice warranting relief resulted from utilizing the 2007 protocol to determine defendant's eligibility for recommitment.

Defendant's claim he was prejudiced because the results of the evaluations formed the basis of the experts' testimony at trial is unpersuasive. He argues: "There is no way to say whether the evaluation procedure or criterion would have been the same if the [Department] had complied with the APA, just as there is no way to say that the individual evaluations of Mr. McKnight would have been the same if the APA process had been followed." But, by the same token, defendant has not shown that the experts' evaluations, or their testimony at trial, would have been any different if the APA process had been followed. Certainly the 2008 OAL determination does not suggest as much, as it expressly remains silent on "the advisability or the wisdom of the underlying action or

enactment." As defendant makes no showing " 'that he was denied a fair trial or otherwise suffered prejudice,' " reversal is not warranted. (*People v. Butler*, *supra*, 68 Cal.App.4th at p. 435, quoting *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 530.)

III. Constitutional Issues

Defendant contends the indeterminate term of commitment prescribed by the amended SVPA violates the due process clause, the equal protection clause, and the ex post facto clauses of the federal and state Constitutions. Our Supreme Court recently addressed identical challenges in *People v. McKee*, *supra*, 47 Cal.4th 1172. The Court concluded that the due process and ex post facto challenges are without merit, and this court is bound by that holding. (*Id.* at pp. 1193-1194; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As to the equal protection challenge, the Court held in *People v. McKee*, *supra*, 47 Cal.4th at page 1184 that the state "has not yet carried its burden of demonstrating why [sexually violent predators], but not any other ex-felons subject to civil commitment, such as mentally disordered offenders, are subject to indefinite commitment," and remanded the case to the trial court to determine whether the People can demonstrate constitutional justification for indefinite commitments imposed on sexually violent predators under the Act. We thus remand this case to the trial court for proceedings consistent with the holding and disposition of *McKee*.[4]

[4] We grant defendant's March 25, 2010 request for judicial notice of the defendant's Supreme Court petition for rehearing in *McKee* and the Court's order denying rehearing.

DISPOSITION

The cause is remanded to the trial court for proceedings on defendant's equal protection challenge to the SVPA consistent with *People v. McKee, supra,* 47 Cal.4th 1172. The judgment is in all other respects affirmed.

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Siggins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.