Filed 6/7/12 P. v. Hicks CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES RILEY HICKS, Defendant and Appellant.	2d Crim. No. B230011 (Super. Ct. No. F328947) (San Luis Obispo County)

James Riley Hicks appeals an order recommitting him as a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code section 6600 et seq. He challenges the manner in which his initial SVP evaluators were selected. He also claims the current version of the SVPA violates equal protection, due process ex post facto and double jeopardy rights. In light of *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), we remand the case to the trial court for reconsideration of Hicks's equal protection claim. In all other respects, we affirm.

FACTS

Hicks was convicted twice, in 1985 and 1994, of committing a lewd act on a child. He was committed as an SVP in 2003 and recommitted in 2006.

On February 1, 2007, the district attorney of San Luis Obispo County filed a petition to extend Hicks's commitment as an SVP. The trial court determined there was probable cause to believe that Hicks is likely to reoffend if he is released and held him over for trial.

In August 2008, the Office of Administrative Law (OAL) determined that the protocol used by the Department of Mental Health (DMH) to evaluate a prisoner prior to an SVP commitment petition was an invalid "underground regulation." (2008 OAL Determination No. 19 (Aug. 15, 2008).) An "underground regulation" is a regulation that has not been properly adopted pursuant to the Administrative Procedure Act. (Gov. Code, § 11340.5; Cal. Code Regs., tit. 1, § 250.)

In February 2009, the DMH enacted new regulations establishing a protocol for evaluators. (Cal. Code Regs., tit. 9, §§ 4000 & 4005.)

In November 2009, the Court of Appeal decided *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). There the court confirmed the OAL's determination that the pre-2009 version of the evaluation protocol constituted an underground regulation. (*Id.* at pp. 516-517.) The Court determined that Ronje was evaluated under the invalid protocol. Because the challenge was made pretrial, the Court concluded that Ronje's remedy was the appointment of new evaluators and a new probable cause hearing. (*Id.* at pp. 518-519.)

In January 2010, Hicks made a motion for new evaluations pursuant to *Ronje*. The trial court granted the motion.

Doctors Craig Updegrove and Lisa Jeko were appointed evaluators. Updegrove opined that Hicks met the SVP criteria, but Jeko opined he did not. The DMH appointed Doctors G. Preston Sims and Douglas Korpi to conduct further evaluations. Neither Sims nor Korpi had previously examined Hicks. Both Sims and Korpi opined Hicks met the SVP criteria.

In the meantime, Hicks hired Doctors Mary Jane Alumbaugh and Marianne Davis to conduct evaluations. Both Alumbaugh and Davis concluded Hicks did not meet the SVP criteria.

Prior to the probable cause hearing, Hicks filed a motion to dismiss the petition. Attached as an exhibit to the moving papers is a copy of what purports to be a memorandum signed by Robert Lucas, Chief of DMH's Sex Offender Commitment Program, to Steve McManus, dated February 16, 2010. The purported memorandum states in part: "Per our discussion with our legal office we will be utilizing the following process when scheduling new evaluations court ordered pursuant to Ronje: [¶] 1. Evaluators currently on the case will be assigned, unless the court orders us to assign new evaluators. [¶] 2. In instances in which more than two evaluators are on a case, only the evaluators who have found the person positive will be scheduled to complete new evaluations. Evaluators who have opined that the person does not meet criteria will not be assigned new evaluations as the outcome of the negative evaluation(s) is unlikely to change."

Hicks's motion argued that if the process described in the memorandum amounts to a protocol or rule, then the DMH may again be "creating a '*Ronje*' type situation," but if it is merely a suggestion, then it should not be controlling. Nevertheless, Hicks argued in his motion that the petition should be dismissed because Doctors Alumbaugh and Davis, who met the memorandum criterion as having previously been assigned to the case, found Hicks was not an SVP.

The trial court denied the motion. We summarily denied Hicks's petition for a writ of prohibition. (*Hicks v. Superior Court*, B227874 [denied Oct. 22, 2010].)

The matter went to a court trial. Doctors Sims, Korpi and Updegrove testified that Hicks meets all criteria to qualify as an SVP. The defense presented Doctors Davis, Jeko and Alumbaugh who testified Hicks did not qualify as an SVP

because he is unlikely to reoffend. Doctor Dawn Starr also testified Hicks does not qualify as an SVP.

The trial court found Hicks meets the criteria and committed him as an SVP.

DISCUSSION

I

Hicks contends the DMH memorandum of February 2010 constitutes an underground regulation and is therefore void.

Hicks points to no evidence authenticating the memorandum. It was simply attached as an exhibit to Hicks's motion to dismiss. Hicks's own motion expresses some uncertainty about exactly what the memorandum is. He argues it constitutes an underground regulation, but also indicates it could be merely a suggestion. The memorandum is addressed to Steve McManus. Hicks admits he does not know who McManus is or why the memorandum was sent. He surmises, "Possibly, the Department of Mental Health has sent the same memorandum out to anyone in early 2010 who asked about their *Ronje* procedures."

Moreover, unlike the regulation declared invalid in *Ronje*, the OAL has never declared the memorandum to be an underground regulation.

On the state of this record, we cannot conclude the memorandum constitutes a regulation. There is simply no foundation to establish what the memorandum is, whether it constitutes the official policy of the DMH, or that the evaluators in this case were appointed pursuant to the policies stated therein.

In fact, it appears the procedure stated in the memorandum was not followed here. The memorandum provides that evaluators currently on the case will be assigned. But here DMH appointed Doctors Sims and Korpi, neither of whom had previously examined Hicks.

Even if we were to conclude the memorandum constitutes an invalid regulation that was applied in Hicks's case, that alone would not require reversal.

The evaluations conducted here were merely preliminary to the filing of an SVP commitment petition. (Welf. & Inst., § 6601.) Reliance on an invalid assessment protocol does not deprive the trial court of fundamental jurisdiction to decide the SVP petition. (See *Ronje, supra*, 179 Cal.App.4th at pp. 517-518.) The existence of the evaluations is not even an issue at trial. (See *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, 1130.) Instead, the issue at trial is simply whether the alleged SVP is likely to engage in sexually violent predatory criminal behavior. (*Ibid.*) The requirement for evaluations is nothing more than a collateral condition designed to ensure that SVP proceedings are initiated only when there is a substantial factual basis for doing so. (*Ibid.*)

Accordingly, reversal is required only if Hicks can demonstrate he suffered prejudice as a result of use of invalid pre-petition evaluations. (*Ronje, supra*, 179 Cal.App.4th at p. 517.) The proper standard for showing prejudice is found in *People v. Watson* (1956) 46 Cal.2d 818, 836-837. Hicks must show a reasonable probability he would have obtained a more favorable outcome in the absence of the error. (*Ibid.*; see *People v. Munoz* (2005) 129 Cal.App.4th 421, 432 [applying the *Watson* test to an SVP commitment proceeding].)

In an attempt to show prejudice, Hicks argues we must eliminate the trial testimony of those evaluators who were appointed under the alleged underground regulation. Hicks cites no authority to support his argument. There is simply no reason why an invalid appointment to perform a preliminary evaluation should preclude the evaluator's testimony at trial. Nothing about the method of appointment affects the substance of the evaluator's professional opinion. In fact, Hicks makes no challenge whatsoever to the substance of the prosecution's expert testimony. Hicks has failed to carry his burden of showing prejudice.

Hicks argues that even if the memorandum does not constitute an underground regulation, the procedures stated therein constitute an abuse of discretion and a violation of his due process rights. But as we have said, there is no foundation to show the memorandum reflects an official policy or that it was

followed in this case. Moreover, even if the policies contained in the memorandum were applied here, Hicks has failed to show prejudice.

Hicks argues that if the DMH procedures for selecting evaluators are valid, the evaluations prepared by Doctors Korpi and Sims should have been ignored. He claims the DMH memorandum implicitly recognizes the trial court's power to appoint evaluators. He states that Korpi and Sims were appointed by the DMH.

But this argument suffers from the same infirmity as his previous arguments. There is no foundation to show that the memorandum constitutes a regulation or was followed in this case. Moreover, Hicks cites no authority to support the proposition that an evaluation should be disregarded simply because the evaluator was appointed by the wrong entity. In any event, relying on an invalid evaluation would not have deprived the court of jurisdiction.

II

Hicks contends the SVP law violates his equal protection rights.

Hicks relies on *McKee, supra*, 47 Cal.4th 1172. There a person committed as an SVP raised an equal protection challenge on the ground that SVP's are subject to indefinite commitment while mentally disordered offenders (MDO) and persons found not guilty by reason of insanity (NGI) are not. Our Supreme Court determined that SVP's are similarly situated to MDO's and NGI's. (*Id.* at pp. 1203, 1207.) The Court remanded the case to the trial court to allow the People to demonstrate a constitutional justification for imposing a great burden on SVP's in order to obtain release from commitment. (*Id.* at pp 1208-1209.)

As the Attorney General concedes, we also must remand the case to the trial court. In order to avoid a multiplicity of proceedings, however, proceedings in the trial court should be stayed pending resolution of *McKee*

III

Hicks contend the current version of the SVP law violates his due process ex post facto and double jeopardy rights.

Hicks acknowledges his contention was rejected by the Supreme Court in *McKee, supra*, 47 Cal.4th 1172. Hicks also acknowledges that we are bound by *McKee*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) He raises the matter here in order to preserve the issue for federal court review.

DISPOSITON

The order for commitment finding Hicks to be an SVP and committing him to the custody of the DMH is affirmed, except as to the commitment for an indeterminate term. The matter is remanded to the trial court for reconsideration of Hicks's equal protection argument in light of *McKee, supra*, 47 Cal.4th 1172, and the resolution of the proceedings on remand in *McKee*, including any proceeding in the San Diego County Superior Court in which *McKee* may be consolidated with related matters. The trial court shall suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*. Finality of the proceedings shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

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