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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROGER DEAN WHITE,<br><br>Defendant and Appellant. | 2d Crim. No. B230686<br>(Super. Ct. No. F340122)<br>(San Luis Obispo County) |

Roger Dean White appeals the order extending his commitment as a sexually violent predator (SVP) pursuant to the Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code,[1] § 6600 et seq.) He contends the trial court committed instructional error. He further contends that the current version of the SVPA violates the equal protection, due process, ex post facto, and double jeopardy clauses of the state and federal Constitutions. In light of *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee)*, we remand the matter to the trial court for reconsideration of appellant's equal protection claim. Otherwise, we affirm.

[1] All further undesignated statutory references are to the Welfare and Institutions Code.

## FACTS AND PROCEDURAL HISTORY

In 1985, appellant was convicted in Oklahoma of sexually molesting an 11-year-old boy and a 12-year-old boy. He was sentenced to 10 years in prison. In 1993, he was released and moved to California. The following year, he was convicted of molesting a three-year-old boy, and was again sentenced to prison. In 2000, he was committed to Atascadero State Hospital (ASH), and in 2001 a petition was filed in the trial court alleging that he was an SVP. In 2002, we affirmed the court's order committing appellant to ASH. (*People v. White* (July 3, 2002, B150252) [nonpub. opn.].) In January 2006, we affirmed a judgment extending appellant's commitment for two years. (*People v. White* (Feb. 6, 2006, B178647) [nonpub. opn.].) A subsequent judgment extending his commitment for an additional two-year term was affirmed in November 2006. (*People v. White* (Nov. 28, 2006, B188679) [nonpub. opn.].)

On January 23, 2007, the San Luis Obispo County District Attorney filed a petition seeking to extend appellant's commitment indefinitely under the then-recent amendment to the SVPA.[2] Forensic psychologists Shoba Sreenivasan and Michael Selby were assigned to evaluate appellant. At a contested jury trial, both doctors testified that appellant met the criteria for commitment as an SVP. Appellant had a longstanding diagnosis of pedophilia and had been convicted of molesting three children under the age of 14. In 1995, he told his probation officer that he had been touching children sexually for 19 years so that he could determine whether they were "good or bad." Appellant believed that his victims had seduced him and that he had not committed any crime. Although he claimed that he no longer thought about children, both doctors opined that he was likely to reoffend if released.

Drs. Robert Halon and John Watts Podboy, both psychologists in private practice, testified that appellant did not qualify for SVP treatment. Both doctors rejected

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[2] The SVPA was amended pursuant to Proposition 83, which was passed by the voters in November 2006. "In essence, [the amendment] changes the commitment from a two-year term, renewable only if the People prove to a jury beyond a reasonable doubt that the individual still meets the definition of an SVP, to an indefinite commitment from which the individual can be released if he proves by a preponderance of the evidence that he no longer is an SVP." (*McKee, supra*, 47 Cal.4th at pp. 1183-1184.)

the diagnosis of pedophilia. Dr. Halon concluded that appellant merely had a "predisposition" toward touching children, while Dr. Podboy believed that he was simply desperate for affection. Dr. Halon declined to opine whether appellant met the first and third criteria for an SVP commitment, i.e., whether he had been convicted of one or more sexually violent offenses against one or more children and was likely to reoffend if released, because he believed that neither opinion was within his expertise. Dr. Podboy conceded that the first criteria had been met. The doctor concluded, however, that appellant was not likely to reoffend if released because he had promised he would not do so and could be successfully managed in the community. Appellant had engaged in adult male sexual relationships since his incarceration, including one with a man he purportedly planned to marry. Dr. Podboy testified that appellant had become "asexual" during his incarceration, while Dr. Halon indicated that appellant was currently unable to participate in sexual activity due to medical problems.

At the conclusion of the trial, the jury found that appellant met the criteria for treatment as an SVP. On December 20, 2010, the court ordered appellant indefinitely committed to the Department of Mental Health (DMH) for treatment.

## DISCUSSION

### *CALCRIM No. 3454*

Appellant contends the court erred in denying his request to modify CALCRIM No. 3454 to require a finding that he had serious difficulty controlling his behavior.[3] The claim that such language is required was expressly considered and rejected by our Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757 (*Williams*).

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[3] In accordance with CALCRIM No. 3454, the jury was instructed in pertinent part: "The petition alleges that [appellant] is a sexually violent predator. [¶] To prove this allegation, the People must prove beyond a reasonable doubt that: [¶] 1. He has been convicted of committing sexually violent offenses against one or more victims; [¶] 2. He has a diagnosed mental disorder; [¶] AND [¶] 3. As a result of that diagnosed mental disorder, he is a danger to the health and safety of others because it is likely that he will engage in sexually violent predatory criminal behavior. [¶] The term diagnosed mental disorder includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him a menace to the health and safety of others."

In that case, "the jury was not separately and specifically instructed on the need to find serious difficulty in controlling behavior" and the defendant claimed "a separate 'control' instruction was constitutionally necessary under *Kansas v. Crane* [(2002) 534 U.S. 407]." (*Williams, supra*, at p. 759.) The court concluded that the SVPA "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Ibid.*)[4] The court further found that jurors instructed with the statutory language "must necessarily understand the need for serious difficulty in controlling behavior" (*id.* at p. 774, fn. omitted), and that no "further lack-of-control instructions or findings are necessary to support a commitment under the SVPA." (*Id.* at pp. 774-775, fn. omitted.)

Here, the jury was instructed with CALCRIM No. 3454, which is substantially similar to the instruction that was deemed sufficient in *Williams*. Indeed, CALCRIM No 3454 is even clearer in conveying the requirement that an SVP must be found to have difficulty in controlling his or her behavior. In *Williams*, the jury was instructed with CALJIC No. 4.19, which states in pertinent part that a ""'[d]iagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.'" (*Williams, supra*, 31 Cal.4th at p. 763.) By contrast, CALCRIM No. 3454 defines diagnosed mental disorders as "conditions either existing at birth or acquired after birth *that affect a person's ability to control emotions and behavior* and predispose that person to commit criminal sexual acts to an extent that makes him . . . a menace to the health and safety of others." (Italics added.)

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**4** The relevant provision of the SVPA provides that an SVP must have a mental disorder "affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) The statute also requires a finding that the individual's diagnosed mental disorder "makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (*Id.*, subd (a)(1); *Williams, supra*, 31 Cal.4th at p. 759.)

We are, of course, bound to follow *Williams*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Appellant's assertion that the case has been implicitly overruled is unpersuasive. The case he cites for that proposition, which found fault in the then-standard instruction governing commitments for mentally disordered juvenile offenders under section 1800, actually discussed *Williams* with approval. (*In re Howard N.* (2005) 35 Cal.4th 117, 130 (*Howard N.*).) The court found that section 1800, unlike the SVPA, did not contain language conveying the requirement of a mental disorder that causes serious difficulty in controlling one's behavior. (*Id.* at pp. 132-133.)[5] Although appellant also asserts that "nothing in *Williams* suggested that it would be error for the trial court to augment the statutory language with the serious difficulty in controlling dangerous behavior language," the court expressly held that it would be error to do so. (*Williams, supra*, 31 Cal.4th at p. 774.) Appellant simply offers nothing that can be construed to undermine our duty to follow *Williams* under principles of stare decisis. (*Auto Equity, supra*, at p. 455.)

We also agree with the People that any error in failing to augment the instructions in the manner asserted by appellant would be harmless beyond a reasonable doubt. (See *Williams, supra*, 31 Cal.4th at p. 778.) In light of the evidence, no reasonable juror would have found that appellant's diagnosed mental disorder did not cause him to have serious difficulty in controlling his behavior. In arguing to the contrary, appellant primarily relies on the fact that the prosecutor took issue with Dr. Halon's testimony that there was no evidence appellant was an "out of control" child molester. On cross-examination, Dr. Halon conceded that the SVPA does not require such a finding. The prosecutor subsequently argued to the jury: "There's no words [*sic*] 'out of control' in there. They set up their own definition so that they could come in and give their opinions about these philosophical discussions. The law has been read to you, and you will be give[n] it to follow, and you will see those words 'out of control' are not in there." According to appellant, this argument contradicted our Supreme Court's

[5] Section 1800 was subsequently amended to make explicit the need to prove difficulty in controlling dangerous behavior. (Stats. 2005, ch. 110, § 1.)

pronouncement that an SVP commitment "is permissible as long as the triggering condition consists of 'a volitional impairment rendering [the person] dangerous beyond their control.' [Citation.]" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1156.)

We are not persuaded. Appellant's expert correctly conceded that the jury did not have to find appellant was an "out of control" child molester in order to conclude that he qualified for treatment as an SVP. "[T]he mental abnormality or personality disorder necessary for involuntary civil commitment of dangerously disordered sex offenders does not require '*total* or *complete* lack of [behavioral] control' [citation], but there must be 'proof of *serious difficulty* in controlling behavior' [citation]." (*Williams, supra*, 31 Cal.4th at p. 763, quoting *Kansas v. Crane*, *supra*, 534 U.S. at pp. 411, 413.) The jury was instructed accordingly. The jury was also instructed pursuant to CALCRIM No. 200 to disregard any comments from the attorneys that conflicted with the court's instructions. We presume the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 431.)

*Constitutional Claims*

Appellant contends that the 2006 amendments to the SVPA violate his equal protection, due process, ex post facto, and double jeopardy rights under the state and federal Constitutions. These challenges are premised largely on changes to the SVPA that eliminated the requirement of a recommitment hearing every two years and instead made SVP commitments indefinite. As appellant acknowledges, these same constitutional arguments were addressed by the California Supreme Court in *McKee*. In *McKee*, the court concluded that the SVPA, as amended, does not violate due process, ex post facto, and double jeopardy rights. (47 Cal.4th at pp. 1193-1195.) We are bound by *McKee* on these points. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

On the equal protection issue, however, the court in *McKee* held that SVP's are similarly situated for equal protection purposes to two other groups of persons committed pursuant to other procedures—mentally disordered offenders (MDO) committed pursuant to Penal Code section 2960 and criminal defendants found not guilty

by reason of insanity (NGI) committed under the Lanterman–Petris–Short Act. (*McKee, supra*, 47 Cal.4th at pp. 1203, 1207.) The court further determined that the People had not yet met their "burden of showing the differential treatment of SVP's is justified." (*Id.* at p. 1207.) Accordingly, the court remanded the case to the trial court to allow the People an opportunity to show "that, notwithstanding the similarities between SVP's and MDO's [and NGI's], the former as a class bear a substantially greater risk to society, and that therefore imposing on them a greater burden before they can be released from commitment is needed to protect society." (*Id.* at p. 1208.)

Appellant contends that this case must also be remanded for an evidentiary hearing on the issue whether his indefinite commitment violates his equal protection rights. The People assert that appellant waived his equal protection claim by failing to raise it below, but otherwise concede that remand is appropriate. Because the claim implicates fundamental constitutional rights, we shall consider it on the merits, notwithstanding appellant's failure to raise it below. (*See People v. Vera* (1997) 15 Cal.4th 269, 276–277, disapproved on another ground as recognized in *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3 [a defendant is not precluded from raising a claim asserting the deprivation of fundamental constitutional rights for the first time on appeal].)[6]

Under *McKee*, further proceedings on appellant's equal protection claim are warranted. To avoid unnecessary multiplicity of proceedings, resolution of the equal protection issue should await resolution of the proceedings on remand in *McKee*, including any resulting proceedings in the Court of Appeal or California Supreme Court.[7]

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**6** For the same reason, we decline to deem forfeited appellant's claims challenging the amended SVPA on due process, ex post facto, and double jeopardy grounds. As we have explained, however, those claims must be rejected under principles of stare decisis.

**7** The People note that on remand in *McKee* the trial court upheld the constitutionality of the amended SVPA. An appeal of that ruling is currently pending. (*People v. McKee* (4th Dist., Div. 1, D059843).)

## DISPOSITION

The order for commitment finding appellant 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 appellant'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.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Teresa Estrada-Mullaney, Judge

Superior Court County of San Luis Obispo

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