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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

THE PEOPLE, Plaintiff and Respondent, v. BILLY RAY REDDING, Defendant and Appellant.	2d Crim. No. B283834 (Super. Ct. No. 2013024657) (Ventura County)

Billy Ray Redding is committed for an indeterminate term of treatment as a sexually violent predator (SVP). (Welf. & Inst. Code, § 6604.)[1] He appeals from an order summarily denying his petition for conditional release as frivolous. (§ 6608, subd. (a).) He contends (1) his petition is not frivolous; (2) the SVP law violates his rights to due process and equal protection because it does not allow him to petition for immediate unconditional release; and (3) it violates his right to equal

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

protection because similarly situated committed people who petition for release are not subject to threshold review for frivolousness. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Redding has a history of raping women who are strangers. He has been incarcerated or committed since 1991. In 1973, he raped a woman at knife point in her home and pled no contest to rape by threat. He was initially committed to a state hospital as a mentally disordered sex offender, but he was transferred to prison after three incidents of sexually aggressive behavior toward staff.

Redding was released on parole in 1977. He raped another woman in her home 16 months later. A jury convicted him of rape by force and threat and rape in concert and sentenced him to 10 years in state prison.

Redding was released on parole in 1985. After release, he was charged with a 1988 forcible rape, but that charge was dismissed when the victim did not cooperate. In 1991, he attempted to rape two women on the same day, each of whom escaped. He pled no contest to two counts of assault with intent to commit rape and was sentenced to 26 years in prison.

In 2004, Redding was committed for treatment as an SVP. He is subject to an indeterminate term. Annual reports have noted significant treatment progress, but have not recommended him for release. Redding filed a petition for conditional release which was denied in 2013.

In August 2016, the medical director of the Department of State Hospitals (DSH) filed an annual report stating that Redding still meets the SVP criteria, has not completed DSH Sex Offender Treatment Program, and is not

ready for outpatient treatment. The report acknowledges significant progress in treatment, service to others, prior nondeceptive polygraphs concerning his sexual history, and tests in which Redding demonstrates no deviant sexual arousal. But the report states that Redding's progress to the next treatment module was interrupted in 2015 when polygraphs indicated he was deceptive in response to questions about whether he had nonconsensual sex in the army and whether he had sexual contact with staff. It states that the number of Redding's victims remains unsettled: he told a prior evaluator he committed six rapes before he was first apprehended in 1973 but now gives inconsistent information.

When Redding was first evaluated years ago he admitted to urges to rape, but now he denies that he ever had those urges. The evaluator opined that Redding's sexual urges "remain unexamined, ignored, and denied but do continue to predispose him to the commission of criminal sexual acts."

Redding is more focused on mentoring his peers than working on his own issues. He was referred to individual therapy in 2015, but was so focused on criticizing his diagnosis and his psychologist that no progress was made. The evaluator reported that there is an ongoing criminal investigation about possible sexual contact with staff arising from one of the polygraph tests. He noted that Redding had not worked at developing a release plan. The evaluator opined that release to a less-restrictive environment would be premature.

Redding declined to participate in the annual review. There was therefore no opportunity for a mental status examination and he was not available to discuss a plan for community treatment.

After DSH filed the annual report, Redding filed a petition for conditional release. He alleges that DSH has deliberately and unlawfully created delays to block his release. He alleges staff turnover delayed his progress. He alleges that a state evaluator incorrectly reported in 2007 that Redding had been dishonorably discharged from the army in 1973 for rape. He alleges that in fact he was falsely accused of rape by an army sergeant after having an affair with the sergeant's wife, that the woman confirmed no rape occurred, the charges were dismissed, and he was undesirably discharged for theft. He attached documentation of his discharge to the petition.

Redding's petition describes his active participation in treatment and peer mentorship. He alleges he completed two treatment programs with 10 years of monthly progress reports. He alleges he showed commitment to his treatment when he disclosed sexual fantasies about staff members in 2011 and 2014, and in both instances his urges were determined to be normal and healthy. He alleges he was approaching the final phase of the treatment program when he was assigned a new psychologist who changed his diagnosis from paraphilia not otherwise specified to sexual sadism and narcissism personality disorder without clinical grounds. He alleges that when he challenged her diagnosis, his treatment team penalized him and began making negative observations about him, such that he has not been allowed to progress.

He describes the recent negative polygraphs, and contends they are unreliable and should have been given earlier. He expresses frustration that he was asked whether he had sex with staff. He alleges that he was once inadvertently locked in a

closet with a staff member and she testified that he behaved like a gentleman.

The People filed opposition to Redding's petition in which they asked the court to summarily deny the petition on the grounds it is frivolous. The trial court appointed counsel to represent Redding. Counsel submitted supplemental points and authorities. No request for appointment of an expert appears in the record.

The trial court reviewed the petition, the opposition, and supplemental points and authorities and found the petition is frivolous. By video conference, Redding expressed his frustration about the polygraphs and told the court that he feels he has done the work to justify release, feels he is ready for release, and is "not the same person" he once was. The court explained that it takes its responsibility as guardian of this indeterminate commitment seriously and that it would err on the side of setting a hearing if there were any plausible basis, but it found none.

DISCUSSION

The Sexually Violent Predator Act (SVPA) provides for civil commitment, for an indefinite period, of persons who are found beyond a reasonable doubt to be an SVP. An SVP is a person convicted of a sexually violent offense against one or more victims, and who has been diagnosed with a mental disorder that renders them a danger to public health and safety because they are likely to reoffend and commit additional sexually violent acts. (§§ 6600, subd. (a)(1), 6603, subd. (d), 6604.) Commitment is for an indeterminate term.

During the commitment, the director of DSH must conduct an annual mental health examination and report to the

court whether the person currently meets the definition of an SVP and whether conditional release to a less restrictive alternative, or unconditional discharge, is in their best interest under conditions that would adequately protect the community. (§ 6604.9.)

If the director does not recommend release, the SVP may petition for conditional release. An SVP who does so bears the burden of proving by a preponderance of the evidence that they would not be a danger to others due to their diagnosed mental disorder while under supervision and treatment in the community. (§ 6608, subd. (g).) The SVP is entitled to an evidentiary hearing only if the petition is not frivolous.

"[T]he court shall endeavor whenever possible to review the petition and determine if it is based upon frivolous grounds and, if so, shall deny the petition without a hearing." (§ 6608, subd. (a).) If, like Redding, the committed person previously filed a petition for release which was denied, the trial court also considers whether there has been a change: It "shall deny the subsequent petition unless it contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (*Ibid.*) The committed person is entitled to appointed counsel and a mental health expert to assist with their petition. (*Ibid.*; *People v. McKee* (2010) 47 Cal.4th 1172, 1192 (*McKee I*).) The committed person may petition for unconditional release after one year of conditional release. (§ 6605.)

Our Supreme Court has held that due process is not violated by indeterminate commitment or by the provision that imposes the burden on the SVP to prove they should be released. (*McKee I*, *supra*, 47 Cal.4th at p. 1191.) Similarly, the court's

discretion to summarily deny the petition as frivolous does not violate due process. (*Id*. at p. 1192.)

The equal protection clause requires the state to justify different and less favorable procedural protections afforded to SVP's as compared to NGI's and MDO's, because they are similarly situated for purposes of the SVPA. (*McKee I*, *supra*, 47 Cal.4th at pp. 1203, 1207.) In *McKee I*, the SVPA's indeterminate term and burden provisions were subject to strict scrutiny because NGI's and MDO's enjoy more favorable release procedures. But on remand, the state justified the different treatment of SVP's with substantial evidence that the inherent nature of an SVP's mental disorder makes recidivism significantly more likely, they pose a greater risk and unique dangers to a particularly vulnerable class of victims as compared to NGI's and MDO's, and there are diagnostic and treatment differences that warrant differential treatment. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1347 (*McKee II*).)

Determination that Petition is Frivolous

Redding contends the trial court abused its discretion when it decided his petition is frivolous. He argues his petition "raised questions" that could not be answered without a hearing, and his "contention that he had progressed far enough in the treatment program that he could be safely treated in the community was not inherently implausible." We are not persuaded.

A petition is frivolous if it "'indisputedly has no merit.' [Citation.]" (*McKee I*, *supra*, 47 Cal.4th at p. 1192; see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The question is whether "any reasonable attorney would agree that the petition is totally and completely without merit." (*People v. Olsen*

(2014) 229 Cal.App.4th 981, 996 (*Olsen*).) Review is facial; the petitioner need not support the petition with admissible evidence. (*People v. Smith* (2013) 216 Cal.App.4th 947, 953, fn. 4 (*Smith*).)

At this threshold review, the court does not weigh evidence or decide the ultimate issue of the SVP's qualification for conditional release. (*Olsen*, *supra*, 229 Cal.App.4th at pp. 997, 999.) The court may make only a limited credibility determination to decide if the petition is "so unworthy of belief that no reasonable trier of fact would credit it," in view of the pleading, any supporting evidence, and reports filed in opposition. (*People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1071, fn. 8 (*LaBlanc*).) The petition is not frivolous if the defendant "has made a showing that he or she 'would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community.' [Citations.]" (*Olsen*, at p. 996; see § 6608, subd. (e).)

Redding did not meet his burden to allege facts showing he would not be a danger if released into the community. (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1407 (*Reynolds*).) He does not offer any opinion of a mental health professional in support of his petition. He does not allege that he will refrain from sexually violent criminal behavior if released. He does not acknowledge that he ever had the urge to rape or allege that he no longer experiences that urge or is able to control it. He alleges that "over the years" he "has been subjected to" tests "related to" being completely forthcoming about his victims and crimes, not having rape fantasies, and not being a danger if released under supervision. But he does not directly allege that he has disclosed all his victims, has no rape fantasies, or would not be a danger.

He criticizes his treatment program and his providers, and expresses sincere frustrations, but he does not explain how these criticisms, if proven, establish anything about his current dangerousness to the community. The petition illustrates his psychologist's concern that Redding is unable to "look at himself."

This case is unlike those Redding cites in which summary denials were reversed because the petitions were not frivolous. In *LaBlanc*, the petition was supported by a psychologist's report that LaBlanc was no longer dangerous and his recidivism risk was "almost nonexistent." (*LaBlanc*, *supra*, 238 Cal.App.4th at pp. 1064, 1068.) Similarly, in *People v. Collins* (2003) 110 Cal.App.4th 340, 351, the petition was supported by a psychiatrist's report that Collins's risk of reoffending was "greatly reduced" and he could be managed safely in the community, and two treating staff members offered to testify he could be managed safely if released.

In *Olsen*, the petition was supported by a psychologist's report that Olsen no longer met the criteria of an SVP, was not likely to reoffend, and posed a low risk to the community. (*Olsen*, *supra*, 229 Cal.App.4th at p. 989.) In *Smith*, no expert opinion supported the petition but the trial court had denied Smith's request to appoint an expert and counsel. (*Smith*, *supra*, 216 Cal.App.4th at pp. 951-952.) The annual evaluation stated that Smith could be managed in the community once he is "successfully staffed into Phase III" of the treatment program, Smith alleged that Phase III was no longer offered, and he presented a medical article that undermined the validity of his diagnosis. (*Ibid.*)

Without citation to the record, Redding contends that his increased age and corresponding reduction in his Static-99R score alone render his petition nonfrivolous. Passage of time may be a relevant consideration, because the SVPA is concerned with current dangerousness and because the risk of reoffending generally decreases with age, but the mere passage of time is not sufficient to render a petition nonfrivolous. (*LaBlanc*, *supra*, 238 Cal.App.4th at pp. 1075-1076; *Reynolds*, *supra*, 181 Cal.App.4th at p. 1406.)

Redding contends the trial court should not have considered information about polygraph results in the annual report because, he contends, polygraphs are unreliable in a forensic setting and have never met the standard for admissibility under *People v Kelly* (1976) 17 Cal.3d 24. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 115 [polygraph results inadmissible in dependency case to disprove allegation that child was at risk of abuse by father]; see Evid. Code, § 351.1, subd. (a) [inadmissible in criminal case absent stipulation].) Whether or not polygraph evidence would be admissible at an evidentiary hearing to prove Redding's dangerousness is beside the point; it was presented here only to explain why concerns arose among Redding's treatment team about whether he could progress into the next treatment module. Redding concedes polygraphs "may have some use as part of a treatment program."

The trial court did not, as Redding contends, erroneously combine the question of frivolousness with the question whether Redding should be released. When conducting its threshold review, a trial court does not decide the issue of the defendant's qualification for conditional release; it only determines whether the defendant presented a petition based on

nonfrivolous grounds. (*Olsen*, *supra*, 229 Cal.App.4th at p. 999.) The court asked, "is there a plausible factual basis which, if proven at a hearing, would result in conditional release?" But it understood the limits of its inquiry. It said it was making a "facial determination," and "I don't weigh . . . credibility. I don't weigh evidence. It's literally a screening protocol for facial validity of the petition," "[i]f anything, I err on the side of [the petitioner], if there is some plausible basis."

Redding's petition does not contain facts showing that his condition has changed so much that a hearing is warranted. It does not contain facts which, if proven, would establish that he will not be a danger due to his mental disorder if released into the community under supervision and treatment. The trial court's determination that the petition is frivolous is supported by the evidence and we will not disturb it. (*Reynolds*, *supra*, 181 Cal.App.4th at p. 1408.)

Due Process and Equal Protection Challenges to Lack of Immediate Unconditional Release

Redding contends that the SVPA violates his rights to due process and equal protection because it does not permit one who is no longer an SVP to petition for immediate unconditional release; it first requires at least one year of conditional release, in addition to delays for trial setting and other practicalities. (§ 6608, subd. (m).)

Neither *McKee I* nor *McKee II* addressed this issue. They were decided before 2013 amendments to the SVPA, when the act still allowed a petition for immediate unconditional release. (§ 6608, subd. (a), as amended by Stats. 2013, ch. 182, § 3; *LaBlanc*, *supra*, 238 Cal.App.4th at p. 1069, fn. 7.)

But the challenge is not properly presented by this case. Redding forfeited it when he did not raise it in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) And his petition does not allege he is ready for unconditional discharge. He alleges that "the cognizable grounds for this claim is limited to presenting evidence and authority for a release to an outpatient commitment . . . Conditional 'Outpatient" Release.'" He does not directly allege that he is no longer an SVP. He does not allege that he could be safely released unconditionally into the community. He "believe[s], based upon his performance in treatment, that he [is] ready for conditional release."

Redding would not be likely to prevail on the merits even if the challenge was properly presented. It is settled that due process is not violated when an NGI is required to undergo a period of conditional release following full restoration to sanity, although the person is no longer mentally ill nor violent. (*People v. Beck* (1996) 47 Cal.App.4th 1676, 1683.) There, as here, the public interest in careful evaluation before release is strong, and the "process of evaluating the defendant for a prolonged period in a noninstitutional setting has obvious merit. It provides a 'trial run' for the defendant's release, conducted under conditions resembling what the defendant will later find in the community," and "the fact that participation in an outpatient program involves a lesser interference with personal liberty than institutional commitment makes it easier to justify a longer period of restriction." (*Id.* at p. 1684.)

Equal Protection Challenge to Frivolousness Review

Redding contends that summary denial of a petition for release under section 6608 violates equal protection because MDO's and NGI's are not subject to similar threshold

"frivolousness" review. He forfeited the argument when he did not raise it in the trial court. And it is without merit. *McKee I* and *McKee II* did not necessarily foreclose the argument because they considered other provisions of the SVPA. (*People v. McCloud* (2013) 213 Cal.App.4th 1076, 1079.) But the same compelling interests that make those lesser procedural protections necessary also justify section 6608. Higher recidivism rates, greater trauma to victims, and diagnostic and treatment differences, "support a reasonable perception that SVP's pose a unique and/or greater danger to society than do MDO's and NGI's, thereby justifying disparate treatment of SVP's under the Act." (*McKee II*, *supra*, 207 Cal.App.4th at p. 1338; *People v. Bocklett* (2018) 22 Cal.App.5th 879, 899-900.) The frivolousness screening is particularly justified because SVP's are less likely to acknowledge there is anything wrong with them and more likely to be deceptive and manipulative. (*McKee II*, at p. 1347.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Matthew Guasco, Judge

Superior Court County of Ventura

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