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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; PHILLIP GILBERT, Real Party in Interest.	B230886 (Los Angeles County Super. Ct. No. ZM015186)

ORIGINAL PROCEEDING in prohibition. Harold E. Shabo, Judge. Petition granted.

Steve Cooley, District Attorney, Irene Wakabayashi, Patrick D. Moran and Roberta Schwartz, Deputy District Attorneys, for Petitioner.

No appearance for Respondent.

Ronald L. Brown, Public Defender, Albert J. Menaster, David Santiago and Jack T. Weedin, Deputy Public Defenders, for Real Party in Interest.

By petition for writ of prohibition, the People challenge an order of the trial court dismissing a petition for the civil commitment of defendant and real party in interest Phillip Gilbert under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.[1] We grant the petition and direct the trial court to vacate its order of dismissal and to proceed instead with a probable cause hearing under section 6602.[2]

Defendant was convicted of a violation of Penal Code section 289, subdivision (a), sexual penetration with a foreign object of his eight-year-old victim, and sentenced to eight years in prison, which qualifies as a predicate offense for civil commitment under the SVPA. (§ 6600, subd. (b).) We will not describe defendant's lengthy history of sex crimes or his various parole violations, as they are unnecessary to our analysis. Defendant was first paroled on August 6, 2005. On May 6, 2009, while on parole, defendant was arrested for indecent exposure and trespassing after police received a report that he was seen standing in the walkway below the victim's apartment holding his penis; police found him in the utility room of the apartment building, wearing no pants. Defendant was found in violation of parole on May 28, 2009, and he was returned to custody. Before this parole violation, defendant's parole discharge date had been July 28, 2009. After the violation, the discharge date was recalculated to August 6, 2009.

Under section 6601, subdivision (a)(1), the Department of Corrections and Rehabilitation is required to refer any inmate who may be a sexually violent predator for evaluation by the Department of Mental Health within six months of the scheduled date for release from prison, unless, as was the case here, the inmate was returned to custody

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[1] In November 2006, California voters approved Proposition 83, known as "The Sexual Predator Punishment and Control Act: Jessica's Law," various provisions of the SVPA, effective November 8, 2006. All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The People sought a writ of prohibition or supersedeas on the ground that an appeal of the order was an inadequate remedy. We construed the petition to be one for a writ of prohibition. By issuing our order to show cause, we necessarily determined that in this case, resolution of the People's challenge is appropriately resolved by a writ proceeding.

with less than nine months left to serve. Defendant was returned to custody with slightly more than two months left to serve. He was housed in Los Angeles County Jail from the time of his arrest until July 23, 2009. Dean Oesterle, a parole agent with the Department of Corrections and Rehabilitation, was responsible for conducting sexually violent predator screenings in the region where defendant was housed in custody. Mr. Oesterle testified that defendant should have been screened within 10 days of his arrest on May 6, 2009, while he was housed in county jail. However, defendant was not screened within that time. Mr. Oesterle did not know why defendant was not screened within 10 days of his arrest or why his screening was performed under emergency circumstances, as described below.

On July 24, 2009, defendant was transferred to the Lancaster State Prison Reception Center, where he was housed on August 6, 2009, his controlling discharge date -- the last date of any parole term. At 3:26 p.m. that afternoon, a correctional counselor at the Lancaster prison called Gerald Franklin, a correctional counselor with the Department of Corrections and Rehabilitation in Sacramento, to ask about defendant's status. Mr. Franklin searched the sexually violent predator computer database and discovered defendant had not been screened after his return to custody in May 2009, as required by section 6601, subdivision (b) to determine if he was a sexually violent predator subject to civil commitment. At 3:28 p.m. (only two minutes later), Mr. Franklin called the Board of Parole Hearings to notify them that defendant was an offender in custody at Lancaster prison who had not been screened, and that Mr. Franklin would try to find someone to review defendant's records to begin the screening process.

Mr. Franklin saw in the sexually violent predator database that defendant had been screened on four previous occasions, which indicated defendant had been convicted of an offense that qualified for civil commitment and, consequently, under section 6601, the Department of Corrections and Rehabilitation was mandated to refer defendant for evaluation by the Department of Mental Health as a potential sexually violent predator. Mr. Franklin reported to the Board of Parole Hearings that the database indicated defendant had a qualifying conviction that required an evaluation by the Department of

Mental Health before his release into the community. It was clear there was not enough time for the Department of Mental Health to evaluate defendant that day.

The Board of Parole Hearings, acting on behalf of the Department of Mental Health, issued a three-business-day hold on defendant's release. August 6 fell on a Thursday that year. Since the hold was issued near the end of the day, and the next day was a state-imposed furlough Friday for the Department of Mental Health, the three-business-day hold authorized the Department of Corrections and Rehabilitation to keep defendant in custody through and including August 11 or (if the furlough day did not count as a workday) August 12, 2009, for purposes of an evaluation by the Department of Mental Health. The Board of Parole Hearings will issue a three-day hold only in an emergency situation when necessary for the Department of Corrections and Rehabilitation to fulfill its mandated duty under the SVPA to refer a qualifying inmate or parole violator for evaluation by the Department of Mental Health.

Although defendant was housed in Lancaster, his prison records were kept at "case records south" in Rancho Cucamonga. Seven minutes after Mr. Franklin notified the Board of Parole Hearings that defendant had not been screened, he called Mr. Oesterle, the parole agent responsible for conducting sexually violent predator screenings in the region where defendant was housed, to ask him to screen defendant's file and submit a screening packet to the Department of Corrections and Rehabilitation in Sacramento. But Mr. Oesterle, who ordinarily worked in Rancho Cucamonga where defendant's records were kept, was in Los Angeles at a mandatory training session that day. He had turned off his cell phone during the training, which caused delay in receiving the message from Mr. Franklin asking him to perform a first stage or Level 1 screening.

The purpose of a Level 1 screening is to confirm whether an inmate or parole violator has a qualifying conviction for a Department of Mental Health evaluation as a potential sexually violent predator. Although the database that Mr. Franklin reviewed indicated defendant had a qualifying conviction, that database was not available to the Board of Parole Hearings, which is empowered to issue a three-day hold. In order for the Board of Parole Hearings to issue the three-day hold, Mr. Oesterle had to review

defendant's prison records and complete a first level screening form 7377 confirming defendant had a qualifying conviction and there was at least one victim. After Mr. Oesterle completed the form 7377, it would have to be faxed to the Board of Parole Hearings to support issuance of the three-day hold so the Department of Mental Health could perform a second level clinical evaluation.

Mr. Oesterle drove as quickly as he could in the late afternoon Los Angeles traffic to Rancho Cucamonga. He arrived after 5:00 p.m. He spoke by telephone with Mr. Franklin at 5:11 p.m., explaining that since "case records south" ordinarily closed at 5:00 p.m., he did not expect to be able to submit the screening forms until the next day. However, Mr. Oesterle encountered a manager and received special permission to review defendant's records and perform the screening after hours. Mr. Oesterle reviewed a previous screening of defendant with the form 7377 associated with that earlier screening, the probation officer's report, the abstract of judgment, and the information for the original qualifying case. Based on this review, he concluded defendant qualified for a Level II screening. Mr. Oesterle completed the Level I screening forms and sent them by fax to Mr. Franklin in Sacramento at 5:25 p.m. on August 6, 2009. No one was in the office of Mr. Franklin's unit at that hour, so his office forwarded the screening forms by fax to the Board of Parole Hearings at 8:42 a.m. the next morning, August 7, 2009. By letter dated August 7, 2009, the Board of Parole Hearings notified the Department of Mental Health of the need to evaluate defendant.

Since August 7, 2009, was a state-imposed furlough Friday for the Department of Mental Health, the request to evaluate defendant was not received until Monday, August 10, 2009. Dr. Shelley Coate evaluated defendant and completed a Level II screening that day. Dr. Coate concluded another Level III screening was warranted because defendant remained at "high risk of sexually reoffending if released to the community. He may not act in a violent manner all the time, but there is little doubt that he will commit a sexually violent offense in the future . . . ." On August 11, 2009, the Department of Mental Health requested that the Board of Parole Hearings issue a 45-day hold to conduct a full-blown, Level III evaluation.

The Board of Parole Hearings found good cause and issued the 45-day hold on August 11, 2009, effective as of August 6, 2009, and expiring at midnight on September 20, 2009. Two doctors were assigned to evaluate defendant, and they both concluded defendant met all the criteria of a sexually violent predator under the SVPA. (§ 6600, subd. (a)(1).) On September 14, 2009, the district attorney filed a petition pursuant to section 6601.5 to determine if defendant should be civilly committed as a sexually violent predator. In light of the 45-day hold which would have expired on September 20, 2009, the petition was filed well within 45 days of defendant's controlling discharge date.

Defendant moved to dismiss the petition on the ground that he had been unlawfully detained in custody since August 6, 2009, arguing that the 45-day hold was illegally imposed. Section 6601, subdivision (a)(2) provides, in pertinent part: "A petition may be filed under this section if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3, at the time the petition is filed. A petition shall not be dismissed on the basis of a later judicial or administrative determination that the individual's custody was unlawful, if the unlawful custody was the result of a good faith mistake of fact or law."

Section 6601.3 provides that the Board of Parole Hearings may order that a person referred to the Department of Mental Health for evaluation may, upon a showing of good cause, remain in custody for no more than 45 days beyond the scheduled release date so that a full evaluation may be performed to determine whether the person meets the criteria of a sexually violent predator. "Good cause" is defined in the statute to mean "circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the full evaluation . . . ." (§ 6601.3, subd. (b).) California Code of Regulations, title 15, section 2600.1 authorizes the Board of Parole Hearings to order a three-working-day hold beyond the scheduled release date of an inmate or parolee in revoked status who may or does require a full evaluation as a sexually violent predator

"where exceptional circumstances preclude an earlier evaluation . . . pursuant to section 6601 of the Welfare and Institutions Code."

Defendant's motion to dismiss argued initially that since he was eligible for release at 12:01 a.m. on August 6, 2009, he could not be referred for evaluation at any time on that day, because section 6601, subdivision (a)(1) requires any referral be made "prior to" his release date. The supervisor of the Department of Corrections and Rehabilitation's sex offender unit testified defendant could be retained under parole supervision and custody until 11:59 p.m. on August 6, 2009, and a hold could be placed on him up to and until the time of his release on August 6, 2009. Defendant offers no evidence or legal authority for the argument that no hold could be placed on his release at any time after 12:01 a.m. on August 6, 2009. We are not persuaded that the language on which defendant relies in section 6601, subdivision (a)(1) should be interpreted to preclude a hold placed, as it was in this case, in the late afternoon on defendant's scheduled release date.

More to the point, even if defendant were unlawfully in custody after 12:01 a.m. on August 6, 2009 (an argument we reject), section 6601, subdivision (a)(2) expressly states that a petition to civilly commit a sexually violent predator may not be dismissed if the inmate's custody was unlawful, "if the unlawful custody was the result of a good faith mistake of fact or law." "Good faith" has been defined for purposes of interpreting section 6601, subdivision (a)(2) to mean " 'that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. [Citations.]' [Citation.]" (*Langhorne v. Superior Court* (2009) 179 Cal.App.4th 225, 239.) Defendant contended that Mr. Oesterle admitted using a fraudulent form 7377 that showed the signature of his supervisor, when in fact the supervisor neither signed the form nor concurred in the decision that defendant met the criteria of a sexually violent predator. Defendant also argued that the Board of Parole Hearings defrauded the Department of Mental Health by obtaining the three-day hold on August 6, defendant's release date, a few hours before Mr. Oesterle filled out the Level I screening form 7377, thereby creating a false impression that the Department of

Mental Health was already involved in the screening process when, in fact, the Department did not conduct the Level II screening until August 10.

Contrary to these arguments, Mr. Oesterle testified that to complete form 7377, he used a template in his laptop bearing the authorized signature of his supervisor, with the permission of his supervisor and the knowledge and approval of the personnel in charge of sexually violent predator screenings. Likewise, defendant's argument that the Board of Parole Hearings misled the Department of Mental Health is not supported by the testimony of any witness or any other evidence. There is no evidence in the record to support a finding that anyone with the Department of Corrections and Rehabilitation or the Board of Parole Hearings acted with any intent other than to honestly and faithfully perform their duties under the SVPA. Therefore, even if defendant had been unlawfully detained after 12:01 a.m. on August 6, 2009, section 6601, subdivision (a)(2) expressly provides the petition could not be dismissed on that ground. (See *Garcetti v. Superior Court* (1998) 68 Cal.App.4th 1105, 1113-1118 [lawful custody is not a jurisdictional requirement for filing a petition for civil commitment; unlawful custody does not provide immunity from civil commitment under the SVPA]; *People v. Superior Court (Whitley)* (1999) 68 Cal.App.4th 1383 [defendant was unlawfully in custody because of unlawful parole revocation due to mistake of law, and court had jurisdiction to consider petition]; but cf. *People v. Superior Court* (*Small*) (2008) 159 Cal.App.4th 301, 309-310 (*Small*) [lawful custody has never been a jurisdictional prerequisite to filing a petition under SVPA, but trial court properly dismissed petition filed after expiration of 45-day hold because delay in filing petition was not due to mistake but was due to allocation of heavy workload within Department of Mental Health]).

Defendant next argued that, even if a hold could be placed on his release from custody on August 6, 2009, there were no "exigent" or "exceptional circumstances" excusing the delay in making the referral to the Department of Mental Health and no good cause to impose a 45-day hold because the People never gave any explanation for missing the statutory deadlines for referral, evaluation or placing a hold on his release. The trial court agreed with defendant, finding the Department of Corrections and

Rehabilitation was obligated to provide adequate staff to timely screen potential sexually violent predators and negligently failed to screen defendant within 10 days of his May 2009 arrest or "in a timely fashion at all." The court also found: "I understand the Department acting in good faith. [*Sic*.] I don't see any evidence that there was any intent to oppress Mr. Gilbert or to illegally hold . . . him for nefarious reasons. That is not the issue. The issue is whether the Department acted in a timely fashion before he was entitled to release . . . ." The trial court dismissed the petition on the basis that the Department of Corrections and Rehabilitation acted unreasonably by failing to refer defendant for evaluation before his release date.

On the People's petition for a writ of prohibition in this court, we stayed the order granting the motion to dismiss and issued an order to show cause why the People are not entitled to the relief requested in the writ petition. We now hold the trial court erred in dismissing the petition on the ground that the Department of Corrections and Rehabilitation could have and should have referred defendant for evaluation before August 6, 2009, and negligently failed to do so. There is no dispute among the parties that defendant should have been referred for an evaluation before August 6, 2009, but that fact alone is of no consequence. Clearly, the provisions of the SVPA and the policies and procedures of the Department of Corrections and Rehabilitation contemplate a potential sexually violent predator will be referred for evaluation with plenty of time to enable the Department of Mental Health to evaluate whether such an individual should be civilly committed. In this case, none of the witnesses who testified for the Department of Corrections and Rehabilitation, the Board of Parole Hearings, or the Department of Mental Health could explain how it happened that the screening of defendant "slipped through the cracks" until his discharge date.

Nothing in the record supports the conclusion that the delay in referring defendant for evaluation by the Department of Mental Health was the result of systemic negligence rather than honest mistake. Mr. Oesterle testified at some length to the challenges he faced in screening the potential sexually violent predators for whom he was responsible, but neither he nor any other witness testified the workload prevented performance of the

duty to refer defendant for evaluation in a timely fashion. Rather, the People argued that with Mr. Oesterle's heavy workload, and with over 75,000 parole violators passing through the Department of Corrections and Rehabilitation, inevitably there will be mistakes in processing and an inmate may "fall[] through the cracks" due to inadvertent error.

That is the critical distinction between this case and *Small*, *supra*, 159 Cal.App.4th 301, where the court ordered dismissal of a petition filed more than 45 days after Mr. Small's scheduled release date. In *Small*, the Department of Mental Health received a referral on January 5, 2007, requesting that Mr. Small be evaluated under the SVPA. (*Id*. at p. 305.) The day before Mr. Small was scheduled to be released in early February, the Board of Parole Hearings placed a 45-day hold on him since he had not yet been evaluated. The Department of Mental Health did not complete its evaluation until near the end of Mr. Small's 45-day hold period, in late March. Therefore, the District Attorney was unable to file the petition until *after* the 45-day hold period had expired. The Department of Mental Health explained the delay resulted from changes it had made in the way it prioritized evaluations due to the dramatic increase in workload after the passage of Jessica's Law. (See fn. 1, *ante*.) The trial court found the late filing of the petition was due to delay on the part of the Department of Mental Health, not from either a mistake of fact or law, and the People did not challenge that finding. (*Small*, *supra*, 159 Cal.App.4th at pp. 305-306.) Unlike the circumstances in *Small*, the petition in this case was filed well within the 45-day hold period, and the evidence showed everyone within the system acted without delay as soon as the mistake in failing to refer defendant for evaluation before his release date was discovered.

The undisputed evidence was that an inmate rarely comes up for screening on his discharge date as happened here. Webster's Dictionary defines "mistake" as "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention." (Webster's 3d New Internat. Dict. (2002) p. 1446.) Anticipating such mistakes, the Legislature authorized the Board of Parole Hearings to issue up to a 45-day hold under exigent circumstances (§ 6601.3), and section 2600.1 of title 15 of the

California Code of Regulations authorizes the Board of Parole Hearings to order a three-day hold to determine if a full evaluation is necessary "where exceptional circumstances preclude an earlier evaluation." "Exigent" circumstances are those "requiring immediate aid or action: pressing, critical"; and "exceptional" circumstances are "out of the ordinary: uncommon, rare." (Webster's 3d New Internat. Dict., *supra*, at pp. 796, 791.)

We find the only reasonable conclusion to be drawn in this case is that, due to inadvertent errors for which no one could account, the Department of Corrections and Rehabilitation and the Board of Parole Hearings had to act under emergency conditions to see to it that the Department of Mental Health evaluated defendant while he was in custody to determine if he was a sexually violent predator, as required by the SVPA. (§ 6601.) The representatives of those agencies acted in good faith to execute their duties under extraordinary circumstances that required immediate action, and there is no basis under the law for dismissing the timely-filed petition to civilly commit defendant as a sexually violent predator.

DISPOSITION

The petition for writ of prohibition is granted. The trial court is directed to vacate its order granting defendant's motion to dismiss the petition, issue a different order denying the motion, and proceed with a probable cause hearing under section 6602. Our prior order staying dismissal of the petition is vacated.

CERTIFIED FOR PUBLICATION

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.