IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/26/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

LARRY EUGENE COX, Petitioner, v. THE HONORABLE ANDREW KLEIN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, STATE OF ARIZONA ex rel. WILLIAM MONTGOMERY, Real Party in Interest.	)	No. 1 CA-SA 11-0301 Maricopa County Superior Court No. MS 2011-000007 DEPARTMENT B **DECISION ORDER**

This special action came on regularly for conference this 24th day of January, 2012, before Presiding Judge Diane M. Johnsen and Judges Donn Kessler and Lawrence F. Winthrop, participating. For the reasons stated below, we accept jurisdiction of the petition for special action but deny relief.

FACTUAL AND PROCEDURAL HISTORY

In May 2009, Larry Eugene Cox ("Cox") was found guilty of aggravated assault with sexual motivation. The court sentenced him to three years' probation with sex offender terms. In July 2011, the Adult Probation Department filed a petition to revoke

probation. Cox was arrested on the petition but on September 13, 2011, the superior court ordered him reinstated on probation without additional jail time. A day before he was to be released from jail, the Maricopa County Attorney's Office ("MCAO") filed a petition to have Cox declared a sexually violent person ("SVP") pursuant to Arizona Revised Statutes ("A.R.S.") sections 36-3701 to -3717 (2009 & Supp. 2011) (the "Act").

Cox moved to strike the SVP petition, arguing that the petition was statutorily deficient because: (1) he was not incarcerated with an anticipated release date so the petition was not filed within the required time period prior to his release from confinement under A.R.S. § 36-3702(A) (Supp. 2011); (2) the petition was not initiated by an agency having jurisdiction to release Cox from incarceration; and (3) the petition did not attach the documents required by A.R.S. § 36-3702(C).

The trial court denied the motion and agreed to stay the expedited probable cause hearing provided under the Act if Cox filed a special action, stating it would not release Cox during any such stay. The court rejected Cox's arguments that an SVP petition must be filed within a particular period and must concern a person in custody. While the court concluded an SVP petition must attach the documents listed in A.R.S. § 36-

3702(C)(9), it summarized the findings in the documents attached to the SVP petition and found that Cox presented a clear sexual threat to others. The court also indicated that if the evidence at the probable cause hearing was insufficient, it would release Cox. Cox then filed this special action.

JURISDICTION

We accept jurisdiction of the petition because Cox has no effective remedy on appeal. *Ariz. Dep't of Pub. Safety v. Superior Court (Falcone)*, 190 Ariz. 490, 493-94, 949 P.2d 983, 986-87 (App. 1997) (accepting jurisdiction because the remedy on direct appeal was not adequate); *see* Ariz. R.P. Spec. Act. 1(a) (special action relief generally is not available "where there is an equally plain, speedy, and adequate remedy by appeal"). If the petition is legally defective or otherwise inappropriate, Cox should not have to participate in the evidentiary hearing or be subject to incarceration pending an appeal after either the probable cause determination or the ultimate trial. *See Henke v. Superior Court (Kessler)*, 161 Ariz. 96, 98-99, 775 P.2d 1160, 1162-63 (App. 1989) (accepting jurisdiction of denial of motion to dismiss on qualified immunity from being sued).

DISCUSSION

Cox argues that the petition should have been dismissed because: (1) it was untimely; (2) necessary papers were not attached to the petition; and (3) no agency as defined by the

SVP statutes forwarded a request to the MCAO to file the petition. We reject these arguments.

We review issues of statutory construction de novo. *State v. Peek*, 219 Ariz. 182, 183, ¶ 6, 195 P.3d 641, 642 (2008). Our goal in construing a statute is to give effect to the legislative intent. *In re Wilputte S.*, 209 Ariz. 318, 320, ¶ 10, 100 P.3d 929, 931 (App. 2004). If the statutory language is clear, that language is the best indicator of the legislative intent and we will not apply other methods of statutory construction. *Mejak v. Granville*, 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). If, however, statutory language is subject to differing interpretations, we consider the consequences of alternative constructions to see what light they shed on the proper interpretation of the statute. *Walter v. Wilkinson*, 198 Ariz. 431, 433, ¶ 10, 10 P.3d 1218, 1220 (App. 2000).

Cox's first argument is that A.R.S. § 36-3702(A) requires that an agency with jurisdiction over a person shall submit a written request for an SVP petition not more than 180 days and not less than thirty days before the person's anticipated release. Relying on cases from other jurisdictions, Cox argues that since he was to be released one day before the petition was filed, the petition was untimely and the court lacked jurisdiction to consider the petition. We disagree for two

reasons. First, A.R.S. § 36-3702(A) does not state the petition must be filed within 120 days of release, only that any request from an agency to the MCAO or the Attorney General must be made within that time period. Second, A.R.S. § 36-3702(F) clearly states, "An agency's inability to comply with the time requirements . . . does not preclude the county attorney" from filing an SVP petition. Thus, the legislature did not envision that an untimely request to file a petition would bar such a filing.

Cox next argues that the petition is invalid because it did not attach certain required documents; most notably, a final release of discharge report and a report including an opinion expressing to a reasonable degree of professional certainty that the person has a mental disorder and as result is likely to engage in a sexually violent offense. Again, the statute is clear. Section 36-3702(C)(9) only requires that any request from an agency attach those documents, not that those documents be attached to the petition. Section 36-3704 (2009), which deals with the petition itself, does not require the filing of any attachments. Simply stated, the legislature knew how to require attachments to the petition but concluded that no such attachments were needed. *See Peek*, 219 Ariz. at 185, ¶ 19, 195 P.3d at 644. We will not read such a requirement into the clearly stated legislative scheme.

We do note that the MCAO attached to the petition voluminous records and documents to support its allegations that Cox might be an SVP. Most notably, this included an email from Cox's mental health provider pursuant to the terms of his probation that she had discharged Cox from treatment as uncooperative and that Cox was likely to engage in sexually violent offenses. The discharge report indicated that Cox was simply going through the motions of treatment until probation terminated, and during a recent polygraph interview Cox reported fantasies about sexual conduct with minors and raping his prosecuting attorney.

Cox's third argument is the crux of his petition. He contends that since no agency requested the MCAO to file an SVP petition, the petition was not permitted by the Act. We disagree. Cox relies on an equally divided per curiam decision of the Wisconsin Supreme Court affirming an unreported Wisconsin Court of Appeals decision that held a petition could only be filed after the Department of Corrections had requested an SVP petition. *In re Commitment of Thomas*, 603 N.W.2d 84 (Wis. 1999) (per curiam) (affirming *In re Commitment of Thomas*, 1998 WL 847720 (Wis. Ct. App. 1998)). While we will not consider unreported decisions either from Arizona or other jurisdictions, *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 401 n.20, ¶ 65, 121 P.3d 1256, 1271 n.20 (App. 2005), we can compare the Wisconsin

statutory scheme with our own. The Wisconsin statute provides that the Attorney General can file an SVP petition after a request by the department with jurisdiction over the person and only if the Attorney General refused, a local prosecutor could file the petition. Wis. Stat. Ann. § 980.01(1).[1] Under that statute, the filing entity clearly must await the request for a petition by an agency with jurisdiction over the person.

In contrast, A.R.S. § 36-3704(A) (2009) merely provides the Attorney General or the county attorney in the county in which a person was found incompetent to stand trial of, found guilty except insane of or convicted of a sexually violent offense can file a petition. The Arizona statute does not require that a

[1] Wis. Stat. Ann. § 980.02 provides in pertinent part that:

> (1) A petition alleging that a person is a sexually violent person may be filed by one of the following:
>
> (a) The department of justice at the request of the agency with jurisdiction over the person.
>
> (b) If the department of justice does not file a petition under par. (a), the district attorney for [various counties] . . . .

petition can only be brought if an agency as defined by the Act makes a request for an SVP petition.[2]

In his reply, Cox contends that while A.R.S. § 36-3704 could be read as not requiring an agency request, A.R.S. § 36-3702 does provide for agency requests to prosecutors to file an SVP petition. Cox argues that the Act must be read as a whole.

We agree the Act must be read as a whole and when there are other possible constructions, we should consider the consequences of those alternative constructions to see what light they shed on the interpretation of the statute. *Walter,* 198 Ariz. at 433, ¶ 10, 10 P.3d at 1220. Neither principle of statutory construction supports Cox's arguments. Initially, nothing in the Act requires an agency to request an SVP petition before such a petition can be filed by a county attorney or the Attorney General. If the legislature had wanted to impose such a prerequisite, it could have added such language in A.R.S. § 36-3704. While the legislature may have anticipated that most

[2] Maricopa Adult Probation brought the petition to revoke Cox's probation and gathered some of the documentation relating to Cox possibly being an SVP. Cox argues in part that Adult Probation is not an agency which can request an SVP petition because under A.R.S. § 37-3701(1) (Supp. 2011), an agency is defined as one that has authority "to direct the release of a person who is serving a sentence or term of confinement or who is receiving treatment." Since we conclude that a county attorney or the Attorney General can bring an SVP petition without an agency request, we need not address Cox's argument that a petition cannot be brought upon the request of an adult probation department.

SVP petitions would be triggered by an agency request, it did not include such a requirement in A.R.S. § 36-3704.

Additionally, adopting Cox's argument that the language in A.R.S. § 36-3702 referring to an agency request with documentation means such a request is a prerequisite to an SVP petition would make other language of the Act superfluous. The legislature provided in A.R.S. § 36-3701(7)(a) that the subject of an SVP petition can include someone who was "ever" convicted of a sexually violent offense, which could include persons who were convicted, sentenced and either released from incarceration or never incarcerated. By Cox's interpretation, persons who had already been released from custody after such an offense and are not presently incarcerated or in the Arizona State Hospital could never be the subject of an SVP petition, regardless of whether they otherwise qualified as an SVP. Such a construction would make the reference to "ever" a nullity. We construe statutes so as to give meaning to every word and not make any language superfluous or a nullity. *Mejak*, 212 Ariz. at 557, ¶ 9, 136 P.3d at 876. In those types of cases in which the person is no longer in custody, the county attorney or the Attorney General, once alerted to a person posing a threat as an SVP, can bring such a petition.

This does not mean that a person such as Cox has no remedy if he thinks a county attorney or the Attorney General has

brought a frivolous petition based on a denial of a request to revoke probation. The remedy is provided by the Act. The Act first requires that, upon the filing of a petition, the court shall make a preliminary probable cause determination that the person is an SVP. A.R.S. § 36-3705(A) (Supp. 2011). Following that determination, the court will order the person detained at a facility under the supervision of the Arizona State Hospital. A.R.S. § 36-3705(B). Within seventy-two hours of that order, the court shall provide notice and an opportunity for the person to participate in a contested probable cause hearing at which the person alleged to be an SVP can present evidence and cross-examine witnesses. A.R.S. § 36-3705 (D), (E). At the close of that hearing, if the court finds no probable cause exists, it shall dismiss the petition. A.R.S. § 36-3705 (F). If after that hearing the court reaffirms probable cause exists, the court shall order an evaluation of the person. A.R.S. § 36-3705 (G). A trial, with the right to a jury, on the SVP status of the person must then be held within 120 days of the petition. A.R.S. § 36-3706 (2009).

In this case, at Cox's request, the court has delayed a probable cause hearing. If he thought the petition was unfounded, Cox's remedy was to attend a contested probable cause hearing provided by the Act. If he had done so and the court had agreed that there was no probable cause for the petition,

the court would have dismissed the petition and he would have been released.

Accordingly, we accept jurisdiction of the petition but, for the reasons stated above, deny relief.

/S/
DONN KESSLER, Judge