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SJC-12841

MICHAEL BRACE vs. COMMONWEALTH.

February 24, 2020.

Supreme Judicial Court, Superintendence of inferior courts. Sex Offender. Practice, Civil, Sex offender, Interlocutory appeal.

The petitioner, Michael Brace, appeals from a judgment of a single justice of this court denying his petition pursuant to G. L. c. 211, § 3. We affirm.

On June 24, 1993, Brace pleaded guilty, pursuant to North Carolina v. Alford, 400 U.S. 25, 37-38 (1970), to a two-count indictment alleging sex offenses. On the first count, he was sentenced to a committed term in State prison. On the second count, he received a suspended sentence of ten to fifteen years in State prison, from and after the sentence imposed on the first count, and he was placed on probation for five years under certain conditions.¹ In 2005, while on probation, Brace was charged with a new crime, his probation was revoked, and the suspended portion of his sentence was imposed.

Brace's anticipated release date was April 1, 2019. On March 26, 2019, the Commonwealth filed a petition to commit him as a sexually dangerous person, pursuant to G. L. c. 123A, § 12 (b) (SDP petition). The Commonwealth's motion for temporary commitment was allowed and, on or about April 1, 2019, Brace was transferred to the Massachusetts Treatment Center.

¹ The respondent's pleas preceded enactment of the Truth in Sentencing Act, St. 1993, c. 432, § 11, which eliminated the authority to suspend a sentence of incarceration in State prison, pursuant to G. L. c. 127, § 133.

Prior to that, on March 14, 2019, Brace had filed a motion seeking sixteen days of jail credit, reflecting time spent in custody while he awaited trial on an unrelated State charge, and to correct the mittimus. On April 8, 2019, after Brace had completed his sentence, a second judge allowed Brace's motion, purportedly revising his release date to March 16, 2019.

In May, 2019, Brace moved to dismiss the Commonwealth's SDP petition on the ground that, at the time it was filed, he was not a "prisoner" as defined by G. L. c. 123A, § 12 (b), because the release date had been revised. The motion was denied, as was his motion for reconsideration.² Brace thereafter filed a petition in the county court, pursuant to G. L. c. 211, § 3. A single justice of this court denied the petition, and Brace appealed.

The case is now before us pursuant to S.J.C. Rule 2:21, as amended, 434 Mass. 1301 (2001), which requires a petitioner to "set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means." Brace failed to make such a showing. We recognize that, in sexual dangerous person proceedings, "an individual may seek interlocutory relief pursuant to G. L. c. 211, § 3, from the denial of a motion to dismiss a petition on the basis that the Commonwealth failed to timely petition for trial." Flood v. Commonwealth, 465 Mass. 1015, 1016 (2013). In that very limited circumstance, the "right at issue is a right not to be tried" beyond the statutory maximum. Id. See Gangi v. Commonwealth, 462 Mass. 158, 163 (2012).

Brace's claim is different in kind, because it implicates the merits of the Commonwealth's SDP petition. He essentially alleges that the Commonwealth cannot demonstrate (among other things) that he was a "prisoner" for purposes of G. L. c. 123A, § 12 (b), at the time his discharge petition was filed. Claims of this nature "can be raised on appeal from an adverse final judgment in this matter, and the single justice did not err or abuse [her] discretion in concluding that the ordinary appellate process provides an adequate remedy." Schumacher v. Commonwealth, 477 Mass. 1005, 1006 (2017) (ordinary appellate process adequate to address claim that district attorney lacked authority to file SDP petition; allegation that petitioner had not been convicted of sex offense within meaning of G. L.

² Brace also filed a notice of appeal from that ruling in the Superior Court.

c. 123A, § 1; and constitutional considerations). See Commonwealth v. Sargent, 449 Mass. 576, 579 (2007) (noting use of G. L. c. 231, § 118, first par., for review of interlocutory ruling in c. 123A proceeding); Sheridan, petitioner, 422 Mass. 776, 777 (1996). See also Crittenden v. Commonwealth, 481 Mass. 1028, 1029 (2019).

We express no view as to the merits of Brace's claim at this juncture. His claim can adequately be resolved by the Appeals Court (see note 2, supra) in the ordinary course. See Commonwealth v. Ballard, 92 Mass. App. Ct. 701, 707 (2018) (notwithstanding subsequent withdrawal of guilty plea, defendant was prisoner for purposes of G. L. c. 123A, § 12 [b], at time petition was filed).

Judgment affirmed.

The case was submitted on the papers filed, accompanied by a memorandum of law.

Joseph M. Kenneally for the petitioner.