MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Derrick C. Brown,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 18, 2025

Court of Appeals Case No.
24A-CR-2094

Appeal from the St. Joseph Superior Court

The Honorable David L. Francisco, Judge

Trial Court Cause No.
71D02-9912-CF-753

Memorandum Decision by Judge Brown
Chief Judge Altice and Judge Tavitas concur.

Brown, Judge.

[1] Derrick C. Brown, pro se, appeals the trial court's denial of his petition to remove his status as a sexually violent predator ("SVP"). We affirm.

Facts and Procedural History

[2] On December 22, 1999, the State charged Brown with three counts of attempted child molesting as class A felonies and four counts of child molesting as class C felonies. A jury found Brown guilty of two child molesting counts as class A felonies and two counts as class C felonies, and the trial court imposed a sixty-year aggregate sentence. This Court affirmed Brown's convictions and sentence by memorandum decision. *Brown v. State*, No. 71A04-0112-CR-526 (Ind. Ct. App. Jun. 14, 2002).

[3] As of July 1, 1998, and thus in effect at the time Brown was convicted and sentenced, the SVP designation was applied to "an individual who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly engage in any of the offenses described in section 4 of this chapter," which included child molesting as a class A felony. Ind. Code § 5-2-12-4.5 (1998). The statute required a trial court to consult with two board certified psychologists or psychiatrists before determining at the sentencing hearing whether a person was an SVP. Ind. Code § 35-38-1-7.5(c) (1998). Brown was not determined to be an SVP pursuant to this process. Rather, in 2007, the Indiana Legislature amended the statutory definition of SVP by designating a person who committed a qualifying offense—including class A felony child

molesting—as an SVP "by operation of law," and removed the requirement for expert examination for those offenses. Ind. Code § 35-38-1-7.5(b).

[4] On January 25, 2024, Brown filed a pro se petition to remove his SVP status. He asserted that the trial court should remove his SVP status because, at the time of his conviction, the law required the trial court to consult with two psychologists or psychiatrists and hold a hearing before finding that an offender was an SVP. He argued that the Department of Correction ("DOC") is not authorized to now label him as an SVP "by operation of law" pursuant to the statutory changes that occurred in 2007. Appellant's Appendix Volume II at 7. He contended that the 2007 statutory changes resulted in an unlawful ex post facto punishment when applied to him, and the fact that he has never had a hearing to determine his status as an SVP is a violation of his due process rights. The State filed a response pointing out that "this exact issue has been raised previously, and rejected by the [appellate] courts[.]" Appellee's Appendix Volume II at 19. Brown filed a reply again requesting removal of his SVP status and requesting "a hearing to be set in this matter[.]" *Id.* at 22. On June 26, 2024, the trial court issued its written order denying Brown's petition without a hearing.

Discussion

[5] Brown's sole assertion on appeal is that the trial court erred in denying his petition to remove his SVP status because such status was imposed retroactively by "operation of law," and as such it constitutes an "ex post facto law" and "a violation of Due Process." Appellant's Brief at 4. The State responds that the

trial court properly denied Brown's petition because he has not established that he is entitled to relief on the bases argued. We agree with the State.[1]

[6] We begin by noting that Brown has elected to proceed pro se. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Basic v. Amouri*, 58 N.E.3d 980, 983 (Ind. Ct. App. 2016). This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so. *Id*. at 983-984. These consequences include waiver for failure to present cogent argument on appeal. *Id*. at 984. We will not become an advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood. *Id*.

[7] It is well established that under Indiana law, "there are two avenues by which a sex offender may qualify as an SVP." *Gonzalez v. State*, 980 N.E.2d 312, 319-320 (Ind. 2013). "First, a person can qualify as an SVP by reason of a 'mental

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[1] Although the State did not raise this issue below in response to Brown's petition, the State also argues on appeal that the trial court did not err in denying Brown's petition because the petition was premature. Ind. Code § 35-38-1-7.5(g) provides in pertinent part that:

> A person who is a sexually violent predator may petition the court to consider whether the person should no longer be considered a sexually violent predator. The person may file a petition under this subsection not earlier than ten (10) years after:
>
> (1) the sentencing court or juvenile court makes its determination under subsection (e); or
>
> (2) the person is released from incarceration or secure detention.

In accordance with the foregoing, a defendant who is an SVP "by operation of law" must wait until ten years have passed following his release from incarceration to "petition the court to consider whether [he] should no longer be considered [an SVP]." Thus, Brown may petition to have his status as an SVP changed ten years after his release from custody. According to the State, Brown is scheduled to remain incarcerated until 2028. Because Brown's petition is premature as he remains incarcerated, we agree with the State that the trial court could have properly denied his requested relief on this basis.

abnormality or personality disorder that makes the individual likely to repeatedly commit a sex offense.'" *Id*. (quoting Ind. Code § 35-38-1-7.5(a)). "This determination may be made by the court upon request by the prosecuting attorney." *Id*. (citing Ind. Code § 35-38-1-7.5(e) (providing that, if it grants the motion of the prosecuting attorney, the court shall conduct a hearing at which two court-appointed psychologists or psychiatrists with expertise in criminal behavior disorders evaluate the person and testify)). "Second, a person may become an SVP "by operation of law" by virtue of the offense committed." *Id*. (quoting Ind. Code § 35-38-1-7.5(b)).

[8] It is undisputed that Brown's SVP designation occurred "by operation of law" because he committed a qualifying offense. Although Brown challenges his SVP designation asserting that it constituted an ex post facto punishment, the Indiana Supreme Court has twice held that the "by operation of law" provision of the SVP statute was not an ex post facto law as applied to defendants similarly situated to Brown. Specifically, the Court addressed the "by operation of law" amendment to the SVP statute first in *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009), and again in *Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011). In both cases, as here, the criminal conduct that supported the convictions occurred when the SVP statute was in place but before the "by operation of law" provision was added. *See Jensen*, 905 N.E.2d at 389-394; *Harris*, 946 N.E.2d at 809-813. Both the *Jensen* and *Harris* Courts thoroughly addressed the SVP statutory amendment and rejected the defendants' claims that the "by operation of law" provision constitutes an ex post facto law as applied, and thus we need

not repeat that analysis here as Brown makes no novel or specific assertions indicating that his claim is unique. In short, Brown's ex post facto claim fails for the same reasons the defendants' claims failed in *Jensen* and *Harris*.[2]

[9] As for Brown's underdeveloped argument that the "by operation of law" SVP designation violates "separation of powers" by granting the DOC sentencing powers reserved for the judiciary, that argument has also been explicitly rejected. Appellant's Brief at 7. Indeed, in *Harris*, the defendant made this same argument, namely that "the DOC is not authorized to change his status to SVP where the trial court at sentencing did not make that determination[.]" *Harris*, 946 N.E.2d at 808. The *Harris* Court explicitly noted that the SVP classification occurs "by operation of law" and "[t]he statute does not grant the DOC any authority to classify or reclassify. SVP status under Indiana Code Section 35-38-1-7.5(b) is determined by the statute itself." *Id*. at 815. Because the DOC does not make status determinations that alter a judicial determination, the Court also found that there was no separation of powers issue. *Id*. at 814-15. *Harris* is squarely on point on this issue, and Brown's argument fails.

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[2] This Court has also considered, and rejected this claim, on multiple occasions. *See Harlan v. State*, 971 N.E.2d 163, 169 (Ind. Ct. App. 2012) (relying on *Harris* and rejecting claim that "by operation of law" SVP designation constituted ex post facto punishment); *Vickery v. State*, 932 N.E.2d 678, 683 (Ind. Ct. App. 2010) (relying on reasoning in *Jensen* in determining that defendant failed to demonstrate that the "by operation of law" SVP designation violated the Indiana constitutional prohibition against ex post facto laws).

[10] Finally, we find no due process violation in the trial court's denial of Brown's request for a hearing to determine his SVP status. Specifically, Brown complains that his due process rights have been violated because he has never been provided a hearing to "consider the state of [his], if any, 'mental abnormality.'" Appellant's Brief at 7. Relying on Indiana Supreme Court precedent, this Court has twice rejected this exact due process claim. *Flanders v. State*, 955 N.E.2d 732, 747-748 (Ind. Ct. App. 2012) (citing *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003)), *trans denied*; *Vickery v. State*, 932 N.E.2d 678, 683 (Ind. Ct. App. 2010) (also citing *Doe*). In *Doe*, the Indiana Supreme Court held that "due course of law" did not entitle a defendant to a hearing to "establish a fact" that "is not material" under a sex offender registry statute. *Doe*, 790 N.E.2d at 989. In *Vickery*, we explained that the SVP statute "specifically states the criteria for 'per se' classification of a sex offender as an SVP, and Vickery satisfies those criteria." *Vickery*, 932 N.E.2d at 683. Although Vickery wanted "the opportunity to prove that he does not fall within this definition," we determined that there was no need for a hearing when the "necessary fact," that Vickery was convicted of a qualifying offense, "is not arguable." *Id*. Accordingly, we concluded that Vickery's due process rights were not violated. *Id*. Similarly, in this case, there is no need for a hearing when the necessary fact—that Brown was convicted of a qualifying offense—is not arguable. Brown's due process argument fails.

[11] For the foregoing reasons, we affirm the trial court's denial of Brown's petition.

[12] Affirmed.

Altice, C.J., and Tavitas, J., concur.

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