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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CLYDE ALLYN,

Defendant and Appellant.

A133053

(Marin County Super. Ct.
No. SC-175062A)

Defendant Michael Clyde Allyn appeals from an order after a bench trial, in which the trial court found him incompetent to stand trial pursuant to Penal Code section 1367.¹ He contends there was a lack of substantial evidence to support the finding of incompetency. We conclude otherwise and affirm the trial court's order.

BACKGROUND

A complaint filed April 6, 2011, charged Allyn with a felony violation of section 422 (criminal threat), a misdemeanor violation of section 602.1, subdivision (a) (intentional interference with business or occupation), and a misdemeanor violation of section 602, subdivision (o) (refusal to cease trespass on property when requested to leave). After initially pleading not guilty to these charges, defendant entered a change of plea on April 27, pleading guilty to all three counts.

¹ Further statutory references are to the Penal Code unless otherwise indicated.

At a hearing on May 20, 2011, defendant's trial counsel told the court she had received two messages from the county jail concerning Allyn's "deteriorating" condition, and afterwards visited him. While she believed Allyn had been competent when he entered his change of plea, she now believed his condition had worsened, and she no longer believed Allyn was competent to proceed with sentencing. The court agreed, suspended proceedings pursuant to section 1368, and appointed Drs. Martin Blinder and Ronald McKinzey to examine Allyn regarding his competency. (§§ 1368, subd. (c), 1369, subd. (a).)

On June 15, 2011, following the submission of the evaluations by Drs. Blinder and McKinzey, the trial court held a competency hearing pursuant to section 1369. (See also §§ 1368, subd. (b), 1368.1.) Defense counsel informed the court Allyn refused to appear, noted both doctors were in agreement as to Allyn's incompetency, and agreed to submit on the reports, so that defendant might "proceed to the hospital expeditiously." The court, after confirming defense counsel was willing to submit on the reports in the defendant's absence, and noting both parties had thus submitted the matter, found Allyn to be mentally incompetent to stand trial on the basis of the reports submitted by Drs. Blinder and McKinzey.²

The trial court's initial order committed defendant to Napa State Hospital (NSH). NSH, however, informed the court in a subsequent letter that Allyn did not meet its criteria for admission "due to his previous escape history." The court then accordingly entered a commitment order directing Allyn to be delivered to Atascadero State Hospital (ASH). This order stated that Allyn's maximum period of confinement was three years, with a total of 129 days' credit.

Allyn appeals that order. (See § 1237, subd. (a).)

² Section 1367 provides a defendant is mentally incompetent to "be tried or adjudged to punishment" when, "as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

DISCUSSION

The only contention we address is defendant's claim that the reports of Dr. Blinder and Dr. McKinzey are insufficient to support the order of commitment, because, while they state the requisite conclusions, these conclusions are not supported by adequate facts and reasoning, and they adopt "hearsay reports and conclusions of other examiners that may not properly be relied on."³

In a competency hearing conducted under section 1369, a defendant may be found mentally incompetent to stand trial by a preponderance of the evidence. (*People v. Campbell* (1976) 63 Cal.App.3d 599, 608 (*Campbell*); see § 1369, subd. (f).) We review such a finding to determine whether it is supported by substantial and credible evidence. (*Campbell, supra*, 63 Cal.App.3d at p. 608.) In doing so, we review the evidence in the light most favorable to the finding. (See *People v. Marshall* (1997) 15 Cal.4th 1, 31.)

As noted above, the parties submitted the matter on the reports of Drs. Blinder and McKinzey, and it was these reports on which the trial court relied in making its finding of mental incompetency within the meaning of section 1367. Martin Blinder, M.D., stated in his report that he had performed a psychiatric examination of Allyn on June 3, 2011, at the Marin County Jail. Prior to the interview, Dr. Blinder had reviewed the police reports concerning the current charges, as well as Allyn's prior criminal record, which Dr. Blinder described as a "compendium of similar offenses over the years" that "document[ed] at the very least, [that] Allyn suffer[ed] from a particularly malignant alcohol addiction which would appear to be behind most of his arrests, probation violations, etc." Allyn, 57 years of age, described himself as being somewhere between 50 and 60 years old. Although he said he had some college education after high school, he could not say how much or at what school. When asked about his marital history

³ Allyn also adverts to a letter dated October 2011, in which ASH requested that the trial court order Allyn to be returned to court for further proceedings pursuant to section 1370, subdivision (c)(2), and attached a report indicating there was no substantial likelihood Allyn would regain mental competence in the foreseeable future. (See § 1370, subd. (b)(1).) In addition, Allyn argues that his claim of error as to the commitment order is not rendered moot by this transfer request. As the Attorney General essentially concedes his appeal is not yet moot, we need not address this point.

Allyn said, “there’s been some interaction with social groups.” Defendant stated he could not be an alcoholic because there was no alcohol in jail. He admitted, “grudgingly,” to numerous arrests, but seems mystified as to why he kept “getting arrested.” Allyn seemed genuinely “puzzled” about the arrest underlying the current charges against him; his memory deficit about the events suggested he truly did not remember the details. Dr. Blinder observed Allyn to “present[] as a befuddled man” who “appear[ed] to have great difficulty getting his mind around some of the questions and even loses a mental grip on his answers before he can finish them.” Allyn was oriented as to place and person, but not time, being unable to give the correct date. Dr. Blinder described Allyn’s “narrative” as “halting, tangential, and marked by perseveration,” that is, “a preoccupation with getting out of jail at the expense of concentrating on the questions put to him.” Many of Allyn’s answers were “non sequitor” responses. The interpretation of “everyday proverbs” was “beyond” Allyn—a task which Dr. Blinder explained provided “a rough measure of abstracting ability.” When asked to provide the number of a “hundred less seven,” defendant replied “between seven and a hundred.” Dr. Blinder stated Allyn also did “poorly with the standard [section] 1368 competency questions.” When asked the role of defense counsel he said, “I don’t want one.” As to the role of the prosecutor, he said the prosecutor “offered me a plea and I said yes but I’m still here.” Allyn did not know the function of a jury, and as to that of the judge he responded, “it’s no big deal.” When asked his defense strategy he replied, “I don’t like to start fights with any people.” Dr. Blinder diagnosed Allyn as suffering from Alcoholism and Dementia secondary to Alcoholism. He said that Allyn, “[h]aving immersed his brain in chronic quantities of ethanol for many decades, . . . is no longer psychologically equal to his day in court.” He “exhibit[ed] numerous cognitive deficits and is now largely incapable of collaborating rationally with counsel in the preparation of a defense.” Because Allyn appeared to have “no intention of ever giving up alcohol,” Dr. Blinder could recommend “no means by which [he might] be restored to competency.”

Ronald McKinzey, Ph.D., stated in his report that he performed a section 1368 evaluation of Allyn one week later, on June 10, 2011. Like Dr. Blinder, Dr. McKinzey

reviewed the police reports, and additionally reviewed three of his own prior evaluations of Allyn performed in 1997 and 1998, prior evaluations of Allyn performed by a Dr. Fraga in 2006 and a Dr. Kamena in 2009, a discharge summary from Marin General Hospital completed by a Dr. Vercoutare in June 2010, a jail health summary by Marsha Grant, R.N., completed in 2010, and a capacity declaration completed in 2010 by I. Weisz, M.D. Dr. McKinzey was unable to interview Allyn because he refused to enter the contact interview room at the jail, and when taken to the noncontact interview room refused to pick up the telephone. Dr. McKinzey then consulted “jail mental health staff” who “confirmed that [Allyn] is quite demented, with an uncontrolled seizure disorder.” He “presented himself for release” on a daily basis, despite a daily explanation by deputies concerning his continuing confinement. He refused to take Dilantin, an anti-seizure medication. Dr. McKinzey stated the evaluations performed by Drs. Fraga and Kamena, indicated Allyn had begun to develop “severe dementia” as early as 2006 and 2009. Dr. McKinsey’s diagnosis was essentially the same as Dr. Blinder’s: “Alcohol-induced persisting dementia.” He stated Allyn “is gravely disabled,” his “dementia . . . profoundly impairing his competency,” such that he does not appreciate “his legal peril” and is unable to cooperate with attorney presenting a defense.

Allyn complains the report of Dr. McKinzey was not based on a personal interview of Allyn, and provided no facts or reasoning to support the conclusion or diagnosis. Defendant also objects to the sources on which Dr. McKinzey relied, particularly on the unidentified jail staff who described Allyn as “quite demented,” and the conclusions regarding Allyn’s “severe dementia” made by other evaluators—Drs. Fraga and Kamena—which he claims were improper under *People v. Campos* (1995) 32 Cal.App.4th 304 (*Campos*).

Similarly, defendant argues Dr. Blinder’s conclusion or diagnosis is not supported by adequate facts and reasoning, in particular, he failed to explain how the tests he administered established the existence of a mental disorder that rendered him unable to cooperate with defense counsel. He urges Dr. Blinder failed to explain the source of his assertion Allyn had “immersed his brain in chronic quantities of ethanol for many

decades,” and did not specify the “cognitive deficits” he observed in Allyn. He further objects that Dr. Blinder used nonpsychiatric terms—“puzzled” and “befuddled”—and claims there is nothing “inherently mentally disordered” about Allyn’s preoccupation with getting out of jail.

Allyn’s reliance on *Campos* is misplaced. The Court of Appeal in that case cited the proposition an expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts. (*Campos, supra*, 32 Cal.App.4th at p. 308.) But, as the court in *Campos* went on to explain, the principle is based on the parties’ inability to cross-examine the nontestifying experts, and a party remains free to cross-examine an expert witness with respect to the content of the reports of others on which the expert may have relied, although it is improper to solicit content that is inadmissible under the rules of evidence. (*Ibid.*)

Here, Dr. McKinzey did not reveal the opinions of unidentified jail staff or Drs. Fraga and Kamena in the context of *direct testimony* at the competency hearing. The requirements applicable to the *reports* to be prepared for a competency hearing by court-appointed psychiatrists or psychologists say nothing about the use of inadmissible evidence. (§ 1369, subd. (a); see also Evid. Code, § 730.) On the other hand, it is well settled that an expert may generally base his or her opinion on any “matter” known to him and her, including hearsay not otherwise admissible, so long as that “matter” may be reasonably relied on for that purpose. (*People v. Caitlin* (2001) 26 Cal.4th 81, 137.) A physician may also base his or her opinion in part upon the opinion of another physician. (*Ibid.*) As indicated by *Campos, supra*, 32 Cal.App.4th 304, it is only in the context of expert *testimony* that concerns arise about matters relied on that are inadmissible under the Evidence Code.

Allyn’s counsel was entitled to examine, or cross-examine, Drs. Blinder and McKinzey. (See § 1369, subd. (b); Evid. Code, § 732.) Had she chosen to cross-examine Dr. McKinzey, the principle cited in *Campos, supra*, 32 Cal.App.4th 304, would have applied, but she did not. Nor did his counsel make any objection as to the admissibility of any part of either report, because it was hearsay or otherwise inadmissible. Any such

objections are therefore forfeited on appeal. (Evid. Code, § 353.) Allyn urges his defense counsel evidently supported a finding of incompetency and failed to object because she was not on Allyn’s “side” during the hearing. Allyn raises no claim of ineffective assistance of counsel, however, and such a claim is not supported by the record before us. Defense counsel has an ethical obligation to raise doubts about a client’s competency where he or she personally observes the symptoms. Submission of the case on expert reports is not uncommon in trial courts.

Turning to facts and reasoning given in the reports, both doctors concluded Allyn was incompetent due to dementia induced by his chronic alcoholism. It is reasonable to infer Dr. Blinder knew of Allyn’s long history of alcoholism based on his review of Allyn’s criminal history, which provided a “compendium” of alcohol-related offenses. It is likewise reasonable to infer Dr. McKinzey knew of Allyn’s long-standing alcoholism from his own prior evaluations, as well as the other more recent evaluations and the discharge summary on which he relied in part.

Defendant’s resulting dementia is commonly defined, regardless of its cause, as a condition of deteriorated mentality—that is, a *loss of brain function*.⁴ Such cognitive impairment or loss of mental function is amply demonstrated by the observations Dr. Blinder recorded during his interview with Allyn. As we have summarized, defendant could not give the correct date, his own age, or the name of the college he said he once attended. Nor could he remember the more recent details of his arrest. He was completely nonresponsive to a number of questions, such as the query concerning his marital history. He was unable to perform a simple arithmetic problem, and was unable to interpret everyday proverbs, which Dr. Blinder regarded as a test to determine Allyn’s ability to engage in abstract thought. Defendant’s responses to questions related to his ability to assist in his own legal defense demonstrated a complete lack of insight and

⁴ The DSM-IV, the diagnostic manual for mental disorders, states “Dementia” disorders are “characterized by the development of multiple cognitive deficits (including memory impairment) that are due to the direct physiological effects of a general medical condition, to the persisting effects of a substance, or to multiple etiologies” (American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000) p. 147.)

understanding. Dr. McKinzey, for his part, reported Allyn’s persistent inability to understand why he could not be immediately released from jail, and relied in part on the opinions of other experts who reported defendant’s development of “severe dementia” several years ago.

We conclude substantial evidence supports the trial court’s finding, by a preponderance of evidence, that Allyn was mentally incompetent to be “adjudged for punishment” because he was, by reason of a mental disorder, “unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.” (§ 1367, subd. (a).)

DISPOSITION

The order of commitment is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.