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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK DELAWRENCE BROWN,

Defendant and Appellant.

A133101

(Contra Costa County
Super. Ct. No. 2-272445-8)

I.

INTRODUCTION

Appellant Frederick Delawrence Brown appeals from the third successive denial of his restoration of sanity petition brought pursuant to Penal Code section 1026.2, subdivisions (a) and (h).¹ He contends the trial court abused its discretion in denying the latest petition because there was no substantial evidence that he continued to be a danger to the public “due to mental defect, disease, or disorder.” (§ 1026.2, subd. (e).) Respondent argues there is substantial evidence supporting the lower court’s decision to deny the petition.

Regardless of whether we apply an abuse of discretion or substantial evidence standard of review, we conclude it was not error to deny appellant’s petition, and therefore, we affirm.

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

II.

PROCEDURAL BACKGROUND

Appellant was initially charged by the Contra Costa County District Attorney in a criminal complaint filed in 2001 with two counts of attempted murder (§§ 187, 664, subd. (a)), and one count of second degree commercial burglary (§§ 459, 460, subd. (b)). Numerous sentencing enhancements were also alleged. Appellant entered a plea of not guilty by reason of insanity on August 28, 2002.

Thereafter, appellant waived his right to a jury trial on the issue of his sanity, and the case was heard by the trial court on February 6, 2003. After hearing from counsel, the court found that appellant had committed all of the charged crimes, but that he was not guilty by reason of insanity. All of the alleged enhancements also were found to be true, except the court made no finding relative to the allegations of prior conviction and state prison terms, within the meaning of section 667.5, subdivision (b). Appellant was referred to the director of the Contra Costa County Department of Mental Health (county director) for an evaluation and recommendation.

A report and recommendation was submitted to the court by the county director, and on February 28, 2003, appellant received a life commitment to the California Department of Mental Health at Napa State Hospital Pilot Program, pursuant to section 1026.

In February 2006, appellant filed a petition to be transferred to outpatient treatment under the supervision of Contra Costa County's Conditional Release Program (CONREP), and requested that a hearing be set to determine his suitability for conditional release. A hearing on the petition was held on June 21, 2006. After hearing testimony from appellant and Dr. Joginder Singh, and considering related exhibits, the court denied the petition. On May 22, 2007, appellant filed another petition for transfer to outpatient treatment, and a request that a hearing be set to determine his suitability for conditional release.

Based on the recommendation of CONREP, the court ordered that appellant be released to outpatient treatment under CONREP supervision on November 13, 2007. An

order extending appellant's commitment for one year, or until November 8, 2009, was filed on October 28, 2008. Appellant's commitment was extended again by order dated March 1, 2010.

On April 11, 2011, appellant filed the instant petition for restoration of sanity and for unconditional release, pursuant to section 1026.2, subdivisions (a) and (h). A hearing on that petition was held on June 30, 2011, at which appellant testified, as did Dr. Bluford Hestir, a licensed psychologist with CONREP. At the conclusion of testimony, the trial court noted that appellant had made significant progress since 2001, but denied his request for restoration of sanity and for unconditional release. Instead, the court extended appellant's commitment an additional year on supervised outpatient treatment status. This appeal followed.

III.

DISCUSSION

A. Appellant's Contention, Overview, and the Standard of Review

Appellant claims that the trial court abused its discretion in not granting his petition under section 1026.2, because there was no substantial evidence supporting its finding that appellant continues to be dangerous "due to mental defect, disease, or disorder." (§ 1026.2, subd. (e).)

Section 1026.2 provides a mechanism whereby criminal defendants previously committed upon a finding of not guilty by reason of insanity may be released in cases where they have recovered their sanity. The statute allows an application for release to be brought before the superior court by either the medical director of the facility where the person is being held or by the patient. (§ 1026.2, subd. (a).) Preconditions to filing an application for unconditional release are that the patient: (1) has been on outpatient status for at least six months following the commitment order; and (2) that the patient has been in a "forensic conditional release program" for one year. Placement in outpatient status for one year qualifies as participation in a "forensic conditional release program." § 1026.2, subds. (d), (e), (f).) Appellant satisfies these prerequisites.

The applicant has the burden of proving by a preponderance of evidence that the conditions for unconditional release have been met (§ 1026.2, subds. (h), (k)); to wit: he or she “is no longer a danger to the health and safety of others due to a mental defect, disease, or disorder.”

The parties disagree as to the standard of review on appeal from a trial court’s denial of an application for unconditional release. Appellant contends it is abuse of discretion. (*People v. Bartsch* (2008) 167 Cal.App.4th 896, 900.) Respondent argues it is whether the court’s findings, express or implied, are supported by substantial evidence. (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1431; *People v. Crosswhite* (2002) 101 Cal.App.4th 494, 507.) We conclude that our result is the same regardless of which standard is applied. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067, superseded by statute on another ground as stated in *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032 [“[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling”].)

B. The Hearing on Appellant’s Application

The first and only witness to appear at the restoration of sanity hearing on appellant’s behalf was appellant himself. After admitting the underlying crimes of two counts of attempted murder, appellant explained that he believed he committed the crimes because he failed to take enough medication to control his mental illness. He was driven to the crimes by voices saying “we’re going to get you.” He now understands that he suffers from schizoaffective bipolar-type illness. Since coming to Napa, appellant stated that he has not been hearing voices any longer. If he were to hear them, he would tell his therapist. He also thinks that the medication he has been taking, 40 milligrams of Zydis, has helped him. Although appellant admitted on cross-examination that he would probably hear voices again if he stopped taking his medication, he testified that if he were to be released, he would continue to take the medication.

Upon release, appellant would also continue to seek the help of mental health professionals at a county health facility, most probably in Oakland. He has developed a support system consisting of his mother, sister, niece, and nephew, and he would

continue to seek their help if he were released. Structure helps appellant reduce stress, and he notes that he works three days each week as a volunteer for the food bank in Concord. He also plays table games with the people in the community home in which he lives. Although he likes structure, he has been warned about becoming overwhelmed with too much responsibility.

Appellant also explained that he has been clean and sober for more than seven years. To help him maintain his sobriety, appellant attends AA meetings regularly. One such meeting is held at the home where he lives each week.

Appellant testified that during a recent visit with his therapist, he told the therapist he had the feeling that people were staring at him as he walked down the street in Concord. He has learned to ignore stares and not to take them personally.

On cross-examination, appellant admitted that he had been committed to Atascadero State Hospital before he committed the crimes in question. At the time of the current offenses, he had been released under CONREP for two months and was living with relatives.

Appellant has been told by his doctors that, in addition to bipolar disorder, he also suffers from antisocial personality disorder, but he disagrees with that diagnosis. Appellant admitted that he had been in three physical altercations while he was in Napa. According to appellant, “they started it.”

The prosecution called licensed psychologist Dr. Bluford Hestir. Dr. Hestir has a Ph.D. in psychology, and is an outpatient supervisor at the CONREP forensic mental health unit. Dr. Hestir is appellant’s assigned outpatient supervisor. In his opinion, appellant suffers from a “serious mental illness” called schizoaffective disorder with bipolar type. Persons with this condition suffer from hallucinations, distortions of perception, and mood swings with depression. Appellant also has polysubstance dependence.

In Dr. Hestir’s opinion, appellant should not be released. He still presents a unacceptably high risk of reoffending. Although he has shown improvement, given his history, the risk remains high.

For example, presently appellant is still struggling with impulsive behaviors. He is taking a “very hefty dose” of Zydys. When he first left Napa, appellant was still “pretty symptomatic” in terms of hearing voices and problematic behaviors. The drug helped decrease his symptoms, although he still experiences them. Appellant takes a dosage of Zydys that is more than the maximum normally prescribed as a standard adult dose.

Dr. Hestir testified that, despite taking his medication, appellant still has paranoia. He does not understand that this is a symptom of his current illness. He is also secretive about his journaling. The size and neatness of his handwriting is also consistent with his paranoid way of thinking. These symptoms show that, despite his treatment, the illness “is still very much present.”

Dr. Hestir testified further that appellant still gets into conflicts with the people with whom he lives. On one occasion, people in his group therapy session were concerned that appellant was going to act out in a violent way. The situation de-escalated when appellant left the room.

Areas where appellant needs to improve before he can be unconditionally released include more work on self-management. This includes improving his money managing, following social rules, a better understanding of society’s expectations and how to meet them, continuing to work on remaining sober, and a greater understanding about his mental illness and how it effects his relationships with other people.

At the conclusion of the hearing, the court complimented appellant on his significant progress made since his initial commitment, but denied the petition, and ordered that appellant’s outpatient treatment status be renewed and extended for another year.

C. The Trial Court Did Not Abuse Its Discretion In Denying Appellant’s Petition

Appellant’s abuse of discretion claim is grounded on three arguments:

(1) Dr. Hestir did not directly relate any current assessment of appellant’s dangerousness to a “mental defect, disease, or disorder”; (2) Dr. Hestir failed to link any of appellant’s mental health symptoms to a finding of dangerousness; and (3) any residual mental illness is controlled by medication rendering appellant non-dangerous.

We note initially that appellant’s arguments disclose some apparent confusion about the burden of proof in a hearing under section 1026.2 seeking the restoration of sanity and an unconditional release. There is no burden on the prosecution to prove that the defendant still suffers from mental illness that makes him or her a danger to others if released. The burden is on the *defendant* to prove by a preponderance of evidence that he no longer suffers from a mental illness that would render him a danger to others if released. (*People v. Bartsch, supra*, 167 Cal.App.4th 896; *People v. Dobson, supra*, 161 Cal.App.4th 1422.) That is to say, at the commencement of the hearing, the defendant is *presumed* to be still suffering from a mental illness that renders him or her a danger to society if released. (*In re Franklin* (1972) 7 Cal.3d 126, 141.)

Based on the evidence appellant presented, he clearly had not established his right to a restoration of sanity and an unconditional release. Not only did appellant not call any health care professional to opine on whether he met the conditions for unconditional release, he failed to even express his own belief that conditions for release existed. (See *People v. Mapp* (1983) 150 Cal.App.3d 346, 350, 352-353 [directed verdict proper where defendant failed to produce evidence demonstrating conditions for release existed under section 1026.2].)²

The prosecution witness, Dr. Hestir, cast even more doubt on the merits of appellant’s petition. In his opinion, appellant should not be released because he still presents an unacceptably high risk of reoffending. Although he has shown improvement, given his history, the risk remains high. Dr. Hestir pointed out that appellant suffers from a “serious mental illness” called schizoaffective disorder with bipolar type. Persons with this condition suffer from hallucinations, distortions of perception, and mood swings with depression. Appellant also has polysubstance dependence.

² The *Mapp* court also observed: “In proceedings of this kind testimony of a mental health expert often is the only way to establish whether the requisite dangerousness exists. [Citation.]” (*People v. Mapp, supra*, 150 Cal.App.3d at p. 352.)

Appellant is still struggling with impulsive behaviors, despite his medication. When he first left Napa, appellant continued to hear voices and he exhibited inappropriate behavior. While the Zydys has helped decrease his symptoms, he still experiences them.

Also, despite his medication, appellant still experiences paranoia, exemplified in part by his secretiveness and the ongoing, potentially violent, conflicts he has with others with whom he lives. These symptoms show that, despite his treatment, his mental illness “is still very much present.”

The quarterly medical report authored by Dr. Hestir for the period of January to March 2011, which was entered into evidence, further supports the conclusion that appellant failed to prove by a preponderance of the evidence that he no longer is a danger to others due to his mental illness.

For example, appellant had a number of issues arise concerning his living conditions. After attaining outpatient status in 2007, he went AWOL in 2010, and eventually was rehospitalized. He was last rereleased to outpatient status in September 2010, only nine months before the hearing.

During the reporting quarter, appellant had ongoing “difficulties” with the staff assigned to his residential facility. He complained that he was being singled out for criticism. Appellant also has ongoing “paranoid perceptions about other people in the community watching him.” He also was verbally abusive to staff during the last quarter. He also was still struggling with impulsive behavior. Dr. Hestir concluded that appellant’s current symptoms make him difficult to manage in treatment. His anger has been escalating to “highly inappropriate verbal aggression.” If it were not for the highly structured nature of the outpatient program and the potential for hospitalization, appellant “at some point would not stop with mere verbal behavior.”

Importantly, Dr. Hestir’s report also discusses the level of appellant’s insight into his mental illness:

“Less than a year ago Mr. Brown had been hospitalized [*sic*] after being AWOL from the program. During the hospitalization he was in three fights that he initiated. In community placement he has significant though [*sic*] disorder and paranoid thinking. Yet

he currently he denies [*sic*] having a mental illness and believes himself to be ready for restoration to sanity.”

As to the crimes which led to appellant’s hospitalization in 2001, the report summarizes that appellant committed two attempted murders when he “entered a Safeway store in a paranoid state, took a display knife and stabbed a customer repeatedly. He then attempted to stab another individual who he thought was trying to stop him.”

Given the legal standard applicable to consideration of appellant’s petition seeking an order restoring him to sanity and ordering his unconditional release from outpatient status back into the community, we have no hesitation in concluding that the trial court did not err in denying appellant’s petition.

IV.
DISPOSITION

The order denying appellant’s petition under section 1026.2 is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.