

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD JAMES LUCERO,

Defendant and Appellant.

A133706

(Solano County
Super. Ct. No. FCR188252)

I. INTRODUCTION

Appellant appeals the decision of the Solano County Superior Court denying his petition, filed under Penal Code section 1026.2, subdivision (m),¹ to declare his sanity restored. Such an appeal is permitted by section 1237, subdivision (b). Appellant has, via appointed counsel, filed a brief asking this court to conduct an independent review of the record, i.e., a review similar to that required pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and determine if there are any issues in the record deserving of further briefing. Pursuant to other authority regarding the scope of *Wende*-type review proceedings, we decline to do so. However, appellant has also personally filed a brief asking this court to reverse the trial court's order denying his petition. We have reviewed that brief, the Attorney General's response to it, and the record in the trial court. Based on that review, we affirm the trial court's order denying appellant's petition.

¹ Hereafter section 1026.2(m). All subsequent statutory references are to the Penal Code unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2002, the Solano County Superior Court found appellant (who, at the time of the offense, was serving a prison term for possession of a deadly weapon) not guilty by reason of insanity (§ 1026) of one felony count of assault with a deadly weapon by a state prisoner (§ 4501) and one felony count of custodial possession of a razor blade. (§ 4502, subd. (a)(2).) The court also found true a great bodily injury enhancement (§ 12022.7), two prior serious felony enhancements (§ 667, subd. (a)(1)), and two prior convictions within the scope of sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d).

On March 19, 2002, the court committed appellant to Atascadero State Hospital for a maximum term of life (§ 1026.5, subd. (a)) or “until such time as defendant’s sanity has been fully restored as found by a court of competent jurisdiction.”

On June 17, 2011,² appellant filed a petition under section 1026.2(m) to declare that his sanity had been restored. In it, he asked for a jury trial, the right to represent himself at a hearing on the petition, and for the appointment of an independent expert to examine him and determine his current mental condition.

On July 19, via appointed counsel, appellant withdrew his request to represent himself.

On July 25, at the request of the defendant, the court appointed Dr. Roger Wiere to examine appellant.

On August 25, appellant waived his right to a jury trial and the court calendared a court trial for October 28.

Shortly before the scheduled court trial, i.e., on October 20, appellant filed a trial brief in which he maintained that he did not suffer from a qualifying mental disorder; the brief attached various supporting documents.

The bench trial on appellant’s petition took place on October 28; appellant was represented by counsel at that trial. The court heard from two witnesses, i.e., appellant

² All further dates noted are in 2011.

and a prosecution expert, Dr. Joshua Deane. After hearing their testimony and argument from counsel, the court denied appellant's petition and, also, his request to be transferred to another state hospital.

Appellant filed a timely notice of appeal on November 1.

III. DISCUSSION

A. The Wende Appeal

As noted above, in his brief to us appellant's counsel contends that, pursuant to the dissenting opinion in *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 544-557 (*Ben C.*), we should exercise our discretion to treat this as a *Wende* appeal, and examine the record to determine if there are any issues deserving of further briefing. He also suggests that we should afford "appellant the opportunity to file a supplemental brief." As noted above, appellant has done so, and we will discuss his contentions further below.

However, in his brief to us, appellant's counsel correctly notes that the controlling authority on whether a *Wende*-type procedure applies to a hearing conducted under section 1026.2(m), has held that it does not, and that any such appeal should, therefore, be dismissed. (See *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1427-1439 (*Dobson*)). We agree with the analysis of the *Dobson* court, and reject appellant's counsel's suggestion that we should exercise our discretion to undertake a *Wende*-type review of the record in this case, as suggested by the dissenting opinion in *Ben C.*

However, in view of the filing of, and arguments presented in, appellant's personal supplemental brief, we will not dismiss this appeal as per the *Dobson* decision but will, hereafter, consider the arguments presented in that brief.

B. The Contentions in Appellant's Supplemental Brief Fail

In his pro se supplemental brief, appellant makes several arguments as to why the trial court erred in denying his section 1026.2(m) petition. We will, hereafter, summarize these arguments and why, we conclude, they all fail to convince us to reverse the trial court's decision not to grant appellant's petition to declare that his sanity has been restored. The applicable law regarding such a petition is, as one of our sister courts has held: "Subsequent release from a state hospital after an insanity commitment occurs

upon (1) restoration of sanity pursuant to section 1026.2, (2) expiration of the maximum term of commitment under section 1026.5, or (3) approval of outpatient status under section 1600 et seq. [Citation.]” (*People v. Cross* (2005) 127 Cal.App.4th 63, 72; see also *People v. Bartsch* (2008) 167 Cal.App.4th 896, 899-900 (*Bartsch*); *Dobson, supra*, 161 Cal.App.4th at pp. 1432-1434.)

First of all, appellant argues that the trial court violated the law as set forth in *Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*), where the United States Supreme Court held that, in order to continue to hold a person found not guilty by reason of insanity, the state must demonstrate that such a person continues to be dangerous to society. (*Id.* at pp. 76-80.) The court also confirmed that such a person “may be held as long as he is both mentally ill and dangerous, but no longer.” (*Id.* at p. 77.)

There was clearly substantial evidence upon which the trial court could find, as it did, that appellant was still dangerous to society. That testimony was presented by Dr. Deane, an Atascadero State Hospital staff psychiatrist. Dr. Deane testified, among other things, that appellant’s commitment history demonstrated that he “represents a cognizable danger to others” because, among other things, of his periodic “violent outbursts” and “aggressive behavior” which had to be contained by the staff of the hospital. As a result, Dr. Deane concluded, appellant “remains dangerous” to others. Dr. Deane’s testimony was clearly substantial evidence supporting the standard laid down by the court in *Foucha*.

Next, appellant attempts to reargue (as his counsel did at the section 1026.2 hearing) that there was insufficient evidence upon which to deny his petition. Specifically, he argues that the “trial court failed to establish or find that appellant was not restored to sanity based on the law. Furthermore the petition was denied due to the sworn testimony. Who’s [sic] and what part of the testimony was the petition denied?” The answer to this question is fairly simple: appellant’s testimony and that of Dr. Deane. Appellant himself, in his testimony to the trial court, admitted that, in 2009, he had pled no contest to a charge of assault on another Atascadero patient, an assault he testified derived from a “disrespect issue,” and involved appellant’s use of his fists on the other

patient. Once again, there was substantial evidence supporting the trial court's determination.

Third, appellant argues that the trial court applied the "wrong standard," i.e., a "higher standard" for petitioners seeking to be returned to prison than for those seeking to be totally released, i.e., to return to community life. He so argues because, he claims, the trial court applied the standard set forth in section 1026.2, subdivision (e), i.e., the standard applicable to a petitioner seeking to be under supervision and treatment in the community. But appellant, who was still subject to serving the remainder of his prison term, had petitioned under section 1026.2(m), which specifically applies to such petitioners. In denying that petition, the trial court apparently misspoke by using the phrase "should he be released to the community." However, appellant's counsel clearly understood—via both his brief to the trial court and his argument before it—that such was *not* what was being sought via appellant's section 1026.2(m) petition.

Next, appellant complains that the trial court erred in not appointing an independent doctor to examine him. But the trial court did so, appointing Dr. Roger Wiere—a doctor specifically identified—to examine appellant. There was no explanation presented at the hearing by appellant's counsel as to why Dr. Wiere was not called as a witness, nor do we find anything on that subject in the record before us. However, and significantly, in a trial brief filed eight days before the hearing in the trial court, appellant's counsel made no mention of any intention to call Dr. Wiere as a witness nor attached any reports or memorandum from that doctor to his trial brief. As the Attorney General points out in its supplemental brief to us, appellant's counsel ably represented appellant at the hearing, especially by vigorously cross-examining Dr. Deane. No prejudicial error has been demonstrated by the failure to present Dr. Wiere as a witness.

Fourthly, appellant argues that the trial court denied him his First Amendment rights by denying his pro se pretrial motion requesting judicial notice of documents from a San Luis Obispo County criminal proceeding in 2009 in which appellant was convicted, via a plea he entered, of a violation of section 245, subdivision (a)(1) (assault with a

deadly weapon) while in prison, and also admitted an enhancement charged under section 12022.7. At the same time appellant moved pro se for such judicial notice, he also filed pro se motions (1) to be allowed to represent himself at the hearing on his section 1026.2(m) petition, and (2) directing that he be allowed to take with him, as and when he was transferred to prison, materials relating to a federal civil action that was apparently then still pending. Annexed to these two motions was a declaration by appellant that he planned “to represent myself in the restoration proceedings.”

On, apparently, July 19, the trial court declined to allow these documents to be filed because appellant “is represented by Counsel.” And, as noted above, he was, and properly so. There is no First Amendment violation shown by the failure of the trial court to receive the material appellant asked it to receive via his earlier pro se filings.

Sixth, appellant contends that the trial court erred in refusing his counsel’s request, at the hearing, to transfer appellant to another state facility. At the hearing, appellant’s counsel stated that appellant was having “enough problems at Atascadero with the lawsuit [presumably meaning the federal civil action noted above] and so forth that I don’t think he’s getting any treatment . . . because of the conflict of interest . . . between the staff and Mr. Lucero because of the suit.”

That counsel then asked the court to “direct that Mr. Lucero be transferred to another hospital where he could receive treatment that wasn’t conflicted, if you will.” The trial court declined to do so on two grounds, first of all that it did “not have the authority to” do so and, secondly, that doing so would be intruding into the “practice of psychiatry.” The court then stated that any such determination would have to be made by the Department of Mental Health.

This issue is not as perfunctory as the Attorney General argues. There is, indeed, some precedent to the effect that, after a commitment or a refusal by the trial court to grant a petition to terminate a commitment under section 1026.2, the trial court nonetheless retains jurisdiction over the individual’s confinement, e.g., to review the retaining authorities’ determination as to whether or not a detainee may be given “grounds privileges” at the facility where he or she is being detained. (See, e.g., *People*

v. Michael W. (1995) 32 Cal.App.4th 1111, 1116-1117 (*Michael W.*); *In re Cirino* (1972) 28 Cal.App.3d 1009, 1014-1016.) But, first of all, we have been cited to no authority which holds that a trial court has the authority to order the Department of Mental Health to transfer a specific detainee to another of that Department's facilities. Although perhaps the trial court used a bit too strong language regarding its "lack of authority" (given the law cited above regarding "ground privileges"), clearly it was correct in its second reason for declining appellant's request, i.e., that court's lack of knowledge of what facilities of that Department are and are not equipped to deal with detainees with certain specific types of psychiatric problems.

Perhaps more importantly, the law is clear that any such order by a trial court under sections 1026 and 1026.2 is reviewed for abuse of discretion, and the burden is on appellant to show such abuse. (See, e.g., *Bartsch*, *supra*, 167 Cal.App.4th at p. 900; *Michael W.*, *supra*, 32 Cal.App.4th at pp. 1117-1120.) Under the circumstances present here, especially the failure of appellant to establish that any other specific facility of the Department would provide him with better treatment, we find no abuse of discretion by the trial court.³

Finally, appellant contends in his pro se supplemental brief that he received ineffective assistance of counsel in that his court-appointed expert, Dr. Roger Wiere was not called to testify. Appellant contends that his counsel "lied to [him] when informing him that his Doctor was there to testify, and instead informed appellant's family that the Doctor could'nt [sic] make it leaving appellant to testify on his own."

In the same vein, appellant argues that his trial counsel was also ineffective because he (a) did not move to have appellant placed elsewhere during the proceedings triggered by the petition, (b) did not raise the judicial notice issue with the trial court, (c)

³ This is especially true here given the fact that, at a pretrial hearing on July 19, appellant's counsel twice represented to the trial court, that he would "look into" whether appellant could be transferred to Napa State Hospital. No further mention was made of this facility, much less the possibility of a transfer to it, by either appellant in his testimony at the October 28 hearing or by his counsel in his argument to the court at that hearing.

“failed to object to prejudicial, misleading and untrue evidence” presented in the section 1026.2 report and at trial, and (d) failed to call other witnesses to testify on appellant’s behalf, e.g., a doctor at Atascadero Hospital who allegedly was “willing to testify that [appellant] . . . did not belong in a State Hospital with prison being appropriate.”

We also reject these contentions. First of all, they are not supported by any evidence offered to either us or the trial court. Secondly, our own review of the transcripts of both the pretrial hearing of July 19 and the October 28 hearing on the petition reveals not only no inadequate performance by appellant’s counsel but, on the contrary, both (a) thorough direct examination of appellant by that counsel and (b) competent and thorough cross-examination of the state’s expert witness, Dr. Deane.

IV. DISPOSITION

The trial court’s order denying appellant’s petition is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.