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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD PHILLIPS,

Defendant and Appellant.

A137036

(Napa County  
Super. Ct. No. CR6195)

Donald Phillips appeals from an order extending his commitment under Penal Code section 1026.5.<sup>1</sup> He has filed an appeal raising no specific issues and asks us to perform a full-record review under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). His appellate counsel acknowledges that *Wende* review is not required under these circumstances. However, she points out that we could nevertheless conduct a *Wende* review in the exercise of our discretion. We decline to do so and affirm the order.

**PROCEDURAL BACKGROUND**

Appellant, now 67 years old, has spent most of his adult life institutionalized, much of it in the custody of the Department of Mental Health. In 1968 he assaulted someone with a handgun during a failed robbery attempt, and in 1974 he stabbed his roommate/lover to death. He is now housed at Napa State Hospital (NSH) in the geriatric unit. He has been before this court previously, also attempting to secure his release into the community. His criminal and psychiatric history is described in more detail in our

<sup>1</sup> References to statutes without code designation are to the Penal Code.

nonpublished opinion in his prior appeal in *People v. Phillips* (July 20, 2009, A121094). Without reviewing the whole record, we set forth the background of the present appeal based on counsel's recitation in the opening brief.

Appellant's commitment was due to expire on April 1, 2012. On December 13, 2011, the Napa County District Attorney filed a petition to extend appellant's involuntary commitment pursuant to section 1026.5. The petition requested extension for two years, until April 1, 2014.

On December 30, 2011, appellant filed a petition for restoration to sanity pursuant to section 1026.2. That petition was withdrawn on June 29, 2012, without being heard.

On March 14, 2012, appellant stipulated that his commitment could be continued until May 14, 2012, to allow trial to be set after the April 1, 2012 expiration date. On two additional occasions, appellant again agreed to short extensions of his commitment to allow for a continuance of the trial date.

Jury trial ultimately began on October 22, 2012. The jury found the petition true. Since the petition had not been amended to reflect the agreed-to extensions, the trial court ordered appellant's commitment extended to April 1, 2014. Appellant filed a timely notice of appeal.

## **STATEMENT OF FACTS**

### **Facts relating to the commitment offense**

On May 5, 1985, appellant was housed at NSH, having been committed as a mentally disordered offender. At approximately 1:30 a.m., he was exercising in his room. Staff persons told him to stop exercising as it was disturbing his roommates. He was given the option of going to a quiet room to continue. He responded, "You will have to kill me or I'll kill someone before I go to the side-room." Appellant then went to his room and got a pencil, returned to the hallway and advanced on the staff person using the pencil as a weapon. Another staff person entered and appellant was restrained. In the process, appellant stabbed a staff member with the pencil next to his eye and in the shoulder. As he was being restrained, he said, "You lived through it this time, you son of

a bitch, but next time you won't." Appellant admitted that he had intended to kill the victim by stabbing him in the heart and kidney with the pencil.

In a subsequent interview, appellant explained that he felt the staff was harassing him and he was not being given the treatment he needed for his asthma, hypothyroidism, and insomnia. He reported feeling bad, having trouble sleeping, and not thinking clearly. He had wanted an inhaler for his asthma and thought the staff would not give it to him. He felt the staff were trying to kill him.

Appellant was charged with attempted murder and deemed incompetent to stand trial. Eventually, he was found not guilty by reason of insanity.

### **Facts related to the petition to extend**

At trial, the prosecution called two witnesses, Dr. Nina Woods, a staff psychologist at NSH and Dr. Richard Geisler, a court appointed forensic psychologist.

#### *Dr. Woods*

Dr. Woods was unit psychologist on the geriatric unit, where appellant was housed from January 26, 2012, until October 3, 2012. The geriatric unit was a closed unit, housing 50 men, between the ages of 60 and 90.

Dr. Woods had almost daily contact with appellant. She testified appellant was diagnosed with schizo-affective disorder, bipolar type, which is essentially a combination of symptoms of schizophrenia and symptoms of a mood disorder. In appellant's case, the mood disorder manifested as manic episodes. Schizophrenia caused distortions in perception and thought process. This could range from hallucinations to mild delusions. Speech and behavior were also affected.

Dr. Woods defined delusions as a fairly firmly held belief that something is true even if there is objective data to say it's not. Delusions could vary from persecutory to grandiose, they could be quite specific, or more general. Difficulty with thinking could be reflected in jumbled speech patterns, or distracted speech, flowing from one topic to another. Some people experienced a decreased need for sleep.

Appellant himself had not experienced hallucinations for many years. He did still harbor delusions, though, some paranoid and some grandiose. In 2010, he was under the

delusion that he was receiving threatening telephone calls from the family of the victim he killed in 1974. He later realized that was not real. Appellant also expressed a desire, upon release, to become an entrepreneur by starting three businesses, to live in a mansion, and to run a department store. Dr. Woods viewed these as mild grandiose delusions, unrealistic but not factually impossible.

Dr. Woods did not think it unusual for a diagnosis to change, as evidenced by appellant's diagnosis over the years. Appellant had been receiving treatment for psychotic disorders since 1968. In the past, he was diagnosed with schizophrenia. While a diagnosis might change, and there could be periods of remission, typically these types of disorders did not simply go away on their own.

Dr. Woods thought some medications were very effective for some of the symptoms. But even on medication, a person's symptoms could worsen. Appellant took medication, provided by the hospital on a regular schedule. He was committed to taking his medication and viewed it as an important element to staying safe. He recognized that without the right medication, he gets depressed, mean, hard to deal with, and violent. He was familiar with his prescriptions and intended to continue taking them.

Despite this, in Dr. Woods's opinion, appellant still represented a substantial danger to the community if released. She based this on appellant's history of mental illness, history of aggression, factors of the environment to which appellant would be released, how much support was available, and what kind of stressors appellant would face.

Dr. Woods also considered complaints that appellant engaged in sexually harassing conduct, made by two female patients, which precipitated his move to the geriatric unit. Dr. Woods viewed the complaints with some skepticism, since the complained of acts were not observed by staff. Appellant denied the allegations. However, an incident with staff after appellant's transfer concerned her, as well as appellant's repeated expressed belief that staff were out to get him and that he didn't feel safe with them. Additionally, appellant had exhibited symptoms of irritability and disproportional anger towards staff.

Of uppermost concern to her was an incident on September 11, 2012, just a month before trial. Appellant had fixed the watch of another patient in exchange for \$8. When the other patient refused to pay him, appellant became extremely angry. He went to his room and got a remote control and went after the other patient. Staff intervened and appellant ended up striking a staff member in the shoulder.

Appellant was placed in seclusion for 15 minutes and was able to calm down. Afterwards, appellant was thankful to staff for stopping him. He did not remember hitting a staff member but did know that he had the remote control with the intention of hitting and killing the other patient.

Dr. Woods thought it was possible this incident fell into a pattern in which appellant sabotaged himself every time he got close to leaving the hospital. She thought the stress of leaving the hospital caused appellant difficulties.

Because the September 11, 2012, incident had occurred while appellant was compliant with his medication, Dr. Woods did not think that medication alone was enough to make him safe in the community. She viewed the incident as evidence that appellant had significant difficulty controlling his dangerous behavior and believed he would need a great deal of assistance if released or else would pose a significant danger.

*Dr. Geisler*

Dr. Geisler was court appointed to conduct a risk assessment on appellant. He had evaluated appellant two additional times over the years. The first evaluation was in 1986, pursuant to a plea of not guilty by reason of insanity. The second was in January of 1998, pursuant to a previous petition to extend appellant's commitment.

In conducting his review, Dr. Geisler looked at appellant's history of violent and aggressive conduct, including the incident on September 11, 2012. He also reviewed appellant's psychiatric history and interviewed appellant. Dr. Geisler diagnosed appellant with schizo-affective disorder bipolar type. He also diagnosed appellant as having personality disorder with borderline antisocial traits. He made this diagnosis despite the fact that neither appellant's current treating psychiatrist, nor current treating psychologist thought he had a personality disorder.

During the interview with appellant, Dr. Geisler asked appellant about his plans upon release. Appellant told him that he wanted to marry a German woman, have 15 children, and start two or three businesses. Dr. Geisler viewed appellant's response as evidence of grandiosity. He thought appellant's unrealistic plans would cause appellant stress when he failed to reach them.

In conducting his risk assessment, Dr. Geisler employed several actuarial tests. One was the HCR-20. Appellant scored as moderate to high risk for reoffense on that instrument. Another was the Violence Risk Appraisal Guide (V-RAG). Using that instrument, Dr. Geisler predicted the chance of appellant's reoffending as 55 percent in seven years and 64 percent in ten years. Dr. Geisler also rated appellant on the Psychopathy Checklist Revised. He gave appellant a score of 26 points, putting him below the 30-point threshold for designating someone a psychopath.

Based on his review of appellant's history and the instrument scores, Dr. Geisler opined that appellant was a moderate to high risk for committing a violent reoffense. He thought the September 11, 2012, incident increased appellant's risk slightly.

Dr. Geisler related appellant's violent behavior to his diagnosis of mental disorders. He viewed appellant's schizo-affective disorder as causing grandiosity and mild delusions. It caused appellant to think irrationally. He viewed appellant's personality disorder as lowering his threshold for committing violence. The fact that appellant was committed to taking his medication did not lower his risk of reoffense in Dr. Geisler's view.

### *Appellant*

Appellant took the stand and testified on his own behalf. He was then 66 years old and had bad hearing. He enjoyed advocating for others. If released, he wanted to live in San Francisco. He did not know how close San Francisco was to Napa and thought he would fly there.

He was aware that he was diagnosed with paranoid schizo-affective disorder bipolar type. He defined paranoid as being very suspicious and affected by mood swings.

He explained that, in the past, he had been abused and hurt very badly, and that made him suspicious of people.

He knew the names of his medication, Depakote and Abilify, and he knew the doses prescribed. He recognized that he needed the medication and was committed to taking it. He described the benefit of the medication: “it slows me down so I can think before I react, and then it just keeps me calm. So even though when I get upset a lot of times I can walk away . . .”

In the years at the hospital, he had been assaulted approximately 70 times. He reacted to those assaults by walking away. He knew his anger was triggered by external events. He knew the type of things that set him off, he had learned to recognize them in treatment. He denied the allegations of the two female patients, consistent with what he told the hospital police when they contacted him about it.

Appellant discussed the September 11, 2012, incident, describing the remote control he retrieved as four inches by two inches and plastic. He grabbed it to try to scare the patient who owed him \$8 into paying. He recognized now that his actions were wrong, that he had no legal right to that money, and that he should have walked away.

Appellant also explained the effect on the hospital of the murder of a staff person two years earlier. Prior to that murder, the hospital was open. Patients were given badges and allowed to walk around the grounds. Afterwards, the hospital was locked down and patients were stuck inside. They had been in lock down since the murder. This created a more stressful environment because everyone was “clustered up” day and night. Appellant thought it would be less stressful to be on the streets than in the hospital.

Appellant recognized that finding a German woman to marry and having 15 children was a fantasy, but it made him feel better to daydream about it. He planned to continue to take his medication if released but had not yet checked into mental health services in San Francisco. He thought he would be able to receive Medi-Cal, and could get assistance from the Catholic Church.

## DISCUSSION

When an indigent defendant files an appeal in a criminal case, he is entitled to have the court independently review the record even if appointed appellate counsel has found no arguable issues. (*Anders v. California* (1967) 386 U.S. 738, 744; *Wende, supra*, 25 Cal.3d 436; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 535 (*Ben C.*))

In the instant case, appointed appellate counsel filed a brief setting out the applicable facts and law, and informed the court that she found no arguable issues on appeal. She further filed a declaration indicating she had advised appellant he could file a supplemental brief or specification of issues within 30 days. He has not done so. Acknowledging we have no obligation to do so, she nevertheless asks us to review the whole record in accordance with *Wende* procedures, pointing out we have the discretion to do. (*Ben C., supra*, 40 Cal.4th at p. 556 (dis. opn. of George, C.J.))

But *Wende* review is required only for “appointed appellate counsel’s representation of an indigent criminal defendant in his first appeal as of right.” (*In re Sade C.* (1996) 13 Cal.4th 952, 978.) In *Ben C., supra*, 40 Cal.4th at pages 537, 543, our Supreme Court held that *Wende* review is inapplicable in a proceeding brought under the Lanterman-Petris-Short Act. (Welf. & Inst. Code, § 5000 et seq.) In so holding, *Ben C.* refused to extend the right to independent review by the appellate court to judgments that are civil in nature, even when those judgments result in the deprivation of a liberty interest. (*Ben C., supra*, 40 Cal.4th at pp. 535, 537, 544.) Proceedings under section 1026.5, subdivision (b) are considered to be civil and not criminal in nature. (See *People v. Powell* (2004) 114 Cal.App.4th 1153, 1159.)

Cases decided after *Ben C.* have extended the “no *Wende* review” rationale to other analogous contexts, including appeals similar to the one before us. (*People v. Taylor* (2008) 160 Cal.App.4th 304, 308, 313 [*Wende* review not required in appeal from order declaring the appellant a mentally disordered offender]; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1425 [no *Wende* review of order denying outpatient status pursuant to petition to restore competency under section 1026.2]; see also, *In re Sade C.*,

*supra*, 13 Cal.4th at p. 959 [pre-*Ben C.* case holding no *Wende* review in appeals from orders affecting parental custody in juvenile dependency cases].)

Neither due process nor equal protection safeguards mandate *Wende*-like review by this court of the instant case. In accordance with the foregoing authorities, we conclude that *Wende* review does not apply to section 1026.5 proceedings.

We are mindful of the dissent in *Ben C.* authored by Chief Justice George and joined by Justices Kennard and Moreno, which stated, “It is undisputed that the private interests at stake are of the most fundamental nature as the conservatee may be subjected to restraints upon physical freedom and personal autonomy for lengthy periods, and may be denied other basic civil rights as well.” (*Ben C.*, *supra*, 40 Cal.4th. at p. 545.) As the dissent indicated, under the circumstances it is a small matter for the Court of Appeal “to confirm that proper procedures were followed and that the order is supported by sufficient evidence.” (*Id.* at p. 555.) As also stated by this dissent, “The majority’s holding that independent review is not constitutionally required in LPS appeals in no way prevents the Courts of Appeal from expending the minimal effort required to provide these appeals with a second look and to provide an opinion that briefly notes the court has reviewed the record and that identifies the findings and evidence supporting the order.” (*Id.* at p. 556.)

On the other hand, counsel offers no reason why we should conduct a discretionary whole-record review in this case. As noted, defendant was invited to submit additional briefing and state any grounds of appeal he may wish this court to consider. Defendant has failed so to do.

Finally, as the above synopsis shows, counsel has given us a good understanding of the procedures employed and the evidence relied upon. Substantial evidence supported the court’s order extending defendant’s hospital commitment for another term not to exceed two years. Defendant was represented by counsel at the trial on the recommitment petition and on this appeal. We have no reason to believe appellate counsel has failed to perform appropriately as an advocate on appellant’s behalf. Based

on counsel's briefing and our limited review of the record, we find no reason to think a more thorough review of the whole record would turn up any arguable issues.

**DISPOSITION**

The order extending appellant's commitment to April 1, 2014, is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.