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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.

MICHAEL DAVID DERTHICK,

Defendant and Appellant.

A140424

(Contra Costa County
Super. Ct. No. 50283663)

In 1984, charged with committing arson in 1982, Michael David Derthick was found not guilty by reason of insanity (NGI) and was committed to a state hospital pursuant to Penal Code section 1026.¹ Following his initial term of confinement, Derthick's commitment was regularly extended by two-year terms pursuant to section 1026.5. In 2013, following a bench trial, the court ordered Derthick's commitment extended to November 2015. Derthick appeals from that order, contending: (1) insufficient evidence was presented to support an extension, and (2) the court committed reversible error by failing to advise him of his right to a trial by jury and failing to obtain from him a personal waiver of that right.

We conclude that substantial evidence supports an extension of Derthick's commitment. However, the Supreme Court's recent decision in *People v. Tran* (2015) 61 Cal.4th 1160, 1163 (*Tran*) requires conditional reversal so that the trial court can determine whether Derthick made a knowing and voluntary waiver of his right to a trial

¹ All further statutory citations are to the Penal Code.

by jury or whether, at the time his counsel waived trial by jury, Derthick lacked the capacity to do so personally.

BACKGROUND

Derthick has a criminal record dating back to 1973, when he was 19 years old. His record includes arrests for car theft, arson, hitchhiking, burglary, vandalism, indecent exposure, being under the influence of drugs and drunk in public. Prior to his commitment, Derthick used marijuana “whenever possible” and LSD, sometimes in high doses.

Derthick set fire to a church in 1982. He acted in response to auditory hallucinations commanding him to “burn the church down.” He believed that the church was “trying to dominate and was projecting a demonic influence.” The voices had become overwhelming and he felt compelled to burn down the church.

In 1984, Derthick was tried on a charge of violating section 451, subdivision (c) (arson of a structure), a felony, and was found not guilty by reason of insanity. He was committed to the state hospital on May 30, 1984, with a maximum commitment date of August 7, 1989. At approximately two-year intervals thereafter, Derthick’s maximum commitment date was extended pursuant to section 1026.5 until, at the time of the extension at issue in this case, the maximum commitment date was set to November 13, 2013.

Derthick was originally committed to Atascadero State Hospital. He was transferred to Patton State Hospital in 1988 and was discharged to outpatient status in 1993. Outpatient status was revoked in November 1993, and Derthick was committed to Napa State Hospital because he had been “argumentative and hostile” to the outpatient care providers, and he had two unauthorized absences.

On July 26, 2013, the People petitioned for another 1026.5 extension of Derthick’s maximum term of commitment. An affidavit from Dr. Patricia Tyler, medical director of Napa State Hospital, attesting that Derthick qualifies for extension of commitment under section 1026.5, accompanied the petition. Also accompanying the petition was a report on Derthick by Dr. Kamaljeet Boora, a staff psychiatrist at Napa State Hospital.

Derthick's recommitment case was called on the court's calendar several times before a bench trial occurred on November 6, 2013. On August 14, and September 25, 2013, nothing was reported on the matter, but the clerk's docket and minutes identify a public defender appearing on Derthick's behalf. On October 9, 2013, the case was continued to October 15. On October 15, a public defender was present who identified another public defender who would take the case and stated: "She anticipates it would be a court trial." On October 17, the case was continued to October 18. On October 18, the prosecutor informed the court that he had exchanged email with the public defender and asked the court to "put this on 10/23 in this department with the understanding that it will be sent with the other case or cases to Judge Goode for those court trials." On October 24, trial was set for November 6. There is no indication in the record that Derthick was present for any of these preliminary proceedings, no indication that he waived a trial by jury, and no explicit waiver of a trial by jury by Derthick's appointed counsel. When trial commenced on November 6, 2013, Derthick was present, but the court did not ask Derthick or his appointed counsel whether he waived a trial by jury.

The People called two witnesses to testify: Dr. Boora, and Dr. Kimberly Wooldridge, a psychologist at Napa State Hospital. Both witnesses testified as experts in risk assessment and the diagnosis of mental disorders.

Dr. Boora was Derthick's treating psychiatrist for the year preceding May or June 2013. He diagnosed Derthick as suffering from polysubstance dependence and schizoaffective disorder, which exhibits itself in psychotic symptoms such as delusions and hallucinations; the negative symptoms of schizophrenia; and mood symptoms such as mania and depression. During the time he treated Derthick, Derthick denied delusions and hallucinations, but he still showed symptoms of schizophrenia: his hygiene and grooming were poor, he was isolated from patients and staff and he exhibited a disorganized thought process when interviewed.

Dr. Boora testified that Derthick had exhibited no recent physical aggression, but on November 28, 2011, Derthick had been verbally aggressive towards the staff, yelling

at them and refusing to follow direction. In 2007, Derthick had consensual sex with a male peer in the bathroom and in 2006 he touched a female peer's buttocks.

When asked if Derthick was "specifically a risk of physical harm to others when he is symptomatic of his schizoaffective disorder," Dr. Boora answered, "Yes." He testified that Derthick had poor insight into his mental illness, a factor that would put him at high risk of non-compliance with his medication in an unsupervised environment. Patients are encouraged to develop a wellness recovery action plan to assist them in developing insight and planning for the future. Derthick's plan was "very incomplete" and "disorganized." Dr. Boora explained that a patient who does not recognize his symptoms as a problem to be managed "can respond to [his] delusional hallucination and can do that dangerous thing." If Derthick's lack of insight resulted in non-compliance with prescribed medication, he could act "on his dreams and hallucination as he did before." Dr. Boora believed that if Derthick did not take his medication, "his mental illness symptoms will get worse. He will become more psychotic, delusional, he will have hallucination." Although Derthick was considered compliant with his medication at the hospital, Derthick threw away his medication on one occasion a week before the trial.

On cross-examination, Dr. Boora admitted that he was unaware of any instance of physical aggression by Derthick in the 31 years since he committed arson. He also confirmed that recent nursing reports stated that Derthick had been assaulted by a peer at the State Hospital and did not retaliate. Derthick continued to be harassed by the same peer, but his response was to run away. Dr. Boora also confirmed that although inmates at Napa State Hospital can obtain methamphetamine, cocaine and other drugs, it had never been reported that Derthick had done so.

Dr. Wooldridge worked on Derthick's unit for eight months until October 2013 and had interviewed him the day before the trial. She was responsible for the wellness recovery action plan group. Derthick participated in the group "sporadically," and when he attended, he did not participate. Derthick's plan was not complete and was "pretty vague." Dr. Wooldridge explained that the plans are important because patients "need to have something that they filled out that gives them specific, or more specific ideas of

what they can do if they start to have symptoms of their mental illness.” A patient who does not have a specific plan in place to help manage symptoms is “more apt to relapse, have symptoms, perhaps even relapse on substances, if they have a substance abuse problem.” She believed that Derthick has only a “mild” understanding of his symptomology and mental health condition. She opined that Derthick would not be medication compliant in an unstructured environment.

Dr. Wooldridge believed that Derthick’s risk for violence at the hospital was low, but that in an unsupervised environment the risk would be moderate, and “[i]f he engages in substance abuse, it goes from moderate to high.” When asked if Derthick now poses “a substantial risk of physical harm to others,” Wooldridge reiterated her opinion that “he’s a moderate risk of harm to others.”

Following testimony and argument by counsel, the court granted the petition and extended Derthick’s period of commitment for two years, to November 13, 2015.

Derthick timely filed a notice of appeal on December 2, 2013.

DISCUSSION

Section 1026 provides for the commitment of a person found to be NGI to a state hospital or private treatment facility. An original NGI commitment is for a maximum term of commitment, which is “the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits.”

(§ 1026.5, subd. (a)(1).)

An NGI commitment may exceed the maximum term of commitment “only under the procedure set forth” in section 1026.5, subdivision (b). (§ 1026.5, subd. (b)(1).) An extension of commitment pursuant to section 1026.5, subdivision (b), is permitted only if the original commitment was for a felony and the committee “by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others.”

(*Id.* subd. (b)(1).) The first step for an extension of commitment is for the medical director of the committee’s treating facility to submit to the prosecuting attorney his or

her opinion as to whether the committee qualifies for an extension of commitment. (*Id.* subd. (b)(2).) The prosecuting attorney may then file a petition seeking an extended commitment. (*Ibid.*) “When the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial.” (*Id.* subd. (b)(3).) “The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney.” (*Id.* subd. (b)(4).) “The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees.” (*Id.* subd. (b)(7).) If the court or jury finds that the committee qualifies for extended commitment as specified in section 1026.5, subdivision (b)(1), the extended commitment “shall be for an additional period of two years from the date of termination of the previous commitment, and the person may not be kept in actual custody longer than two years unless another extension of commitment is obtained in accordance with the provisions of this subdivision.” (*Id.* subd. (b)(8).)

Derthick contends that (1) insufficient evidence was presented at trial that he qualifies for extended commitment under section 1026.5, subdivision (b)(1), and (2) the trial court erred by failing to advise him of his right to a jury trial and to obtain a personal waiver of that right as required by section 1026.5, subdivisions (b)(3) and (4).

I.

Substantial Evidence Supports the Trial Court’s Finding that Derthick is a Person Described by Section 1026.5, Subdivision (b)(1).

The People were required to prove beyond a reasonable doubt that Derthick “(1) was committed for a felony and (2) has a mental disease, defect, or disorder (3) which causes him to represent a substantial danger of physical harm to others.” (*People v. Bolden* (1990) 217 Cal.App.3d 1591, 1599 (*Bolden*)). It was uncontested that Derthick was committed for a felony (arson) and that he has a mental disorder (schizoaffective disorder). It is the third element, dangerousness, for which Derthick contends the People presented insufficient evidence.

“ “Whether a defendant ‘by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others’ under section 1026.5 is a question of fact to be resolved with the assistance of expert testimony.” [Citation.] “In reviewing the sufficiency of evidence to support a section 1026.5 extension, we apply the test used to review a judgment of conviction; therefore, we review the entire record in the light most favorable to the extension order to determine whether any rational trier of fact could have found the requirements of section 1026.5(b)(1) beyond a reasonable doubt. [Citations.]” [Citation.].’ [Citation.] A single psychiatric opinion that an individual is dangerous because of a mental disorder constitutes substantial evidence to support an extension of the defendant’s commitment under section 1026.5.” (*People v. Bowers* (2006) 145 Cal.App.4th 870, 878–879.) Proof of dangerousness must include “proof that a person under commitment has serious difficulty in controlling dangerous behavior.” (*Id.* at p. 878.)

Here, Dr. Boora’s testimony provides substantial evidence to support an extension of Derthick’s commitment. Dr. Boora clearly expressed his opinion that Derthick represented a substantial danger of physical harm to others because of his schizoaffective disorder. He explained that although Derthick does not currently suffer delusions and hallucinations and is not violent in a supervised setting in which he is compliant with his medication, Derthick’s lack of insight into his mental illness, demonstrated by his inability to complete a wellness recovery action plan, makes it likely that in an unsupervised setting he would be noncompliant with his medication, leading to a recurrence of the delusions and hallucinations he previously experienced. It was uncontested that, in the past, Derthick’s delusions and hallucinations caused him to set fire to a church, an act posing a substantial risk of harm to others. Moreover, when Derthick committed arson, “the voices commanding him to burn down the church had become overwhelming and he felt compelled to burn down the church.” This is substantial evidence that Derthick’s delusions and hallucinations cause him difficulty in controlling dangerous behavior. Dr. Wooldridge’s testimony substantially confirmed that

of Dr. Boora, even though she was unwilling to state that Derthick represented a substantial risk of harm to others (instead describing the risk as “moderate”).

It is Derthick’s argument that at the time of his trial, 31 years had passed since his arson and he had exhibited no violent behavior during that period, even when provoked by assault and harassment by another patient at the state hospital. We acknowledge that the evidence allows no conclusion other than that Derthick does *not* represent a substantial risk of harm to others when he is compliant with his medication in a supervised environment. But the effect of medication is not relevant to the People’s case in chief.

“[N]ondangerous behavior while medicated is irrelevant under section 1026.5(b) without evidence [defendant] would self-medicate if unsupervised.” (*Bolden, supra*, 217 Cal.App.3d at p. 1595.) “Given a release under section 1026.5 is an unconditional one—the released person leaves the psychiatric facility without further supervision or compulsory treatment—the Legislature’s failure to define dangerousness under section 1026.5(b)(1) in terms of behavior while under treatment is no mere oversight. Both the language in section 1026.5 and the policy of protecting the public compel the conclusion that under section 1026.5(b)(1), the state sustains its burden by showing, among the other elements, the [committee] is dangerous to the physical safety of others, *without regard to the effect of any medication.*” (*Id.* at p. 1599.)

This does not leave without a remedy the committee who is able, through medication in an unsupervised environment, to successfully manage the symptoms of his mental disorder that could, without medication, make him dangerous to the physical safety of others. The *Bolden* court concluded: “(1) The People present a prima facie case under section 1026.5(b)(1) by showing, beyond a reasonable doubt, that the [committee] was committed for a felony and has a mental disease, defect, or disorder which causes him to represent a substantial danger of physical harm to others, without regard to the effect of treatment or medication upon his behavior; (2) however, the effect of medication in controlling the [committee’s] dangerousness and whether he will self-medicate in an unsupervised environment may be raised by the [committee] as a defense.” (*Bolden*,

supra, 217 Cal.App.3d at p. 1600.) The *Bolden* court went on to conclude that the committee has the burden of proving such a defense by a preponderance of the evidence. (*Id.* at p. 1602.)

Here, Derthick did not plead an affirmative defense. Both Drs. Boora and Wooldridge were of the opinion that Derthick would not be compliant with his medication in an unsupervised environment due to his poor insight into his mental disorder. Derthick presented no evidence tending to show those opinions were wrong. Accordingly, the fact that Derthick is not a risk to the physical safety of others when medicated is not relevant here and detracts in no way from the substantial evidence demonstrating that Derthick does represent a substantial risk of physical harm to others.

II.

The Trial Court's Failure to Advise Derthick of His Right to a Trial by Jury and Failure to Obtain a Personal Waiver of That Right Requires Reversal.

As we have already noted, section 1026.5, subdivisions (b)(3) and (4), require the court to “advise the person named in the petition” of the right to a jury trial and to conduct the trial by jury “unless waived by both the person and the prosecuting attorney.” The Supreme Court recently examined these provisions and concluded: “The trial court must advise the NGI defendant personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the defendant unless the court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision.” (*Tran, supra*, 61 Cal.4th at p. 1163.)²

² In the companion case *People v. Blackburn* (2015) 61 Cal.4th 1113, the Supreme Court addressed similar language in the statutory scheme governing the commitment of a mentally disordered offender. (§ 2972, subd. (a).) It held that the trial court must personally advise the mentally disordered offender of his or her right to a jury trial and, before holding a bench trial, obtain the defendant’s personal waiver of the right to a jury trial, unless the court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision.

In *Tran*, “[n]o record was kept of the relevant pretrial proceedings. According to a settled statement requested by the Court of Appeal, defense counsel notified the court that Tran opposed an extension of his commitment and wanted a trial. Defense counsel requested a bench trial, and the prosecutor agreed.” (*Tran, supra*, 61 Cal.4th at p. 1164.) As in *Tran*, the record here is devoid of any indication that the court advised Derthick of his right to a jury trial or that Derthick personally waived that right. Derthick did not appear in court until the day of the bench trial and the court did not address him personally during the proceeding. From the pretrial proceedings for which we have transcripts, it appears that defense counsel and the prosecutor anticipated a bench trial, but there is no explicit waiver of a jury trial or direct request for a bench trial in lieu of a jury trial. We have no reason to distinguish the jury waiver issue raised by Derthick from that raised in *Tran*.

“When a trial court errs in completely denying an NGI defendant his or her statutory right to a jury trial, the error constitutes a miscarriage of justice and automatically requires reversal. In *Tran*’s case, however, because the trial court and the parties, in reliance on prior law, likely did not contemplate the need to make a record in conformity with our holding, we reverse the Court of Appeal’s judgment upholding the extension order and remand to that court with directions to remand the case to the trial court for a proper determination of whether *Tran* personally made a knowing and voluntary waiver of his right to a jury trial or whether, at the time of counsel’s waiver, there was substantial evidence that *Tran* lacked the capacity to make a knowing and voluntary waiver.” (*Tran, supra*, 61 Cal.4th at p. 1163.) *Tran* makes clear the required remedy when the jury waiver issue is raised in a case that granted an NGI commitment extension before *Tran* was decided. In letters to the court, Derthick’s appellate counsel and the People agree that we should provide that remedy.

DISPOSITION

The order of the trial court extending Derthick’s commitment is conditionally reversed. The matter is remanded for the trial court to determine whether Derthick made a knowing and voluntary waiver of his right to a jury trial or whether, at the time of

counsel's (implied) waiver, there was substantial evidence that Tran lacked the capacity to make a knowing and voluntary waiver. If the court determines that Derthick made a knowing and voluntary waiver, or there was substantial evidence that he lacked the capacity to make such a waiver, the order extending Derthick's commitment shall be reinstated.³

³ The court extended Derthick's commitment to November 13, 2015, so proceedings to extend his commitment for another two years may already be in progress. If the trial court cannot make the determinations necessary to reinstate its order extending Derthick's commitment to November 13, 2015, then proceedings to further extend his commitment have no validity and any orders resulting therefrom shall be withdrawn.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

People v. Derthick (A140424)