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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

TULIO ERNESTO GRAJEDA,

Defendant and Appellant.

C074816

(Super. Ct. No. 05F2543)

In October 2007, defendant Tulio Ernesto Grajeda pleaded no contest to carjacking (Pen. Code, § 215, subd. (a))¹ and admitted a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). After he waived trial by jury, the trial court found him not guilty by reason of insanity. (§ 1026.) Defendant was committed to Napa State Hospital for a maximum of 10 years.

¹ Undesignated statutory references are to the Penal Code.

On February 4, 2013, defendant filed a petition for transfer to outpatient treatment pursuant to section 1026.2, subdivision (a). At a trial on August 6, 2013, the trial court denied the petition.

On appeal, defendant contends the evidence, consisting exclusively of reports of medical experts, is not sufficient to support the trial court's ruling. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of defendant's commitment offenses are not at issue and need not be set forth in this opinion.

On February 4, 2013, defendant filed a petition for transfer to outpatient treatment.

On March 13 and 28, 2013, defendant's treating psychologist at Napa State Hospital, David San Giovanni, Ph.D., issued reports that were administratively reviewed by different physicians. Dr. San Giovanni gave defendant an Axis I diagnosis of adult antisocial behavior.² Dr. San Giovanni explained: "[Defendant's] current diagnosis is V71.01 Adult Antisocial Behavior. It is not known if he meets the criteria for Antisocial Personality Disorder because his juvenile history is not known, having been raised in El Salvador. He denied any criminal behavior as a child. He would meet the criteria for Antisocial Personality Disorder, other than not having adequate evidence that he had symptoms of Conduct Disorder. He was originally diagnosed with Schizophrenia Disorder, Paranoid Type, at the time of the offense. He has not shown any psychotic signs or symptoms of a psychotic disorder at [Napa State Hospital] and is not taking any antipsychotic medications."

Dr. San Giovanni reported that, "[s]ince arriving at Napa State Hospital, [defendant] has repeatedly been verbally and physically assaultive . . . to both staff and

² The diagnosis was pursuant to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (2000) (DSM-IV-TR).

patients” He possessed in his room “numerous contraband and possessions of other patients.” Numerous patients reported defendant took their money and personal property. These patients were fearful of defendant.

As examples, in 2013, defendant reportedly beat another patient, fracturing the patient’s rib; he was yelling in a hallway and refusing to follow directions from staff; he was sexually inappropriate with female staff in that, among other things, he masturbated in their presence; and he threatened staff and patients, including an attempt to throw a large metal trash can at a medical doctor. In 2012, defendant extorted \$700 from another patient; beat another patient in a bathroom stall; threatened to hit another patient with a chair; was in a fight in the dining hall; and pressured female patients to have oral sex with him. Drugs and “pruno” were confiscated from defendant’s room.

On psychological testing, defendant scored in the 99th percentile, “a very high risk for violent re-offending.” Defendant’s responses indicated “psychopathic traits including glibness and superficial charm, grandiose sense of self, need for stimulation, pathological lying, manipulation, lack of remorse, shallow affect, callous lack of empathy, poor behavioral controls, promiscuous sexual behaviors, early behavioral problems, lack of realistic long term plans, impulsivity, irresponsibility, failure to accept responsibility, and criminal versatility.” These traits indicate a strong correlation to “an Antisocial Personality Disorder with a chronically unstable, antisocial, and socially deviant lifestyle.”

On April 22, 2013, the trial court responded to defendant’s petition for transfer to outpatient treatment by issuing an order for removal of state mental hospital detainee. On April 30, 2013, defendant was discharged from Napa State Hospital and sent to court.

On May 21, 2013, defendant was evaluated in local custody by psychologist Kent Caruso, Ph.D. The evaluation included discussion of defendant’s “several years at Napa [State Hospital], his medication history there, his diagnostic history, and even about the multiple incident reports pertaining to his inappropriate behavior beginning

approximately 14 months ago. In this regard, much of the focus was on [defendant's] being a 'banker' on the unit or units where he was being housed. He explained that he loaned money out to people who had no available cash, 50 cents on the dollar interest per month. He admitted to involvement in a number of the different incidents while denying involvement in others. [Dr. Caruso found] it rather strange that according to Napa [State Hospital] staff, [defendant] was alleged to have committed a number of felonies including extortion, battery with great bodily injury, and possession of illegal substances, but no formal charges were brought against him. Even [defendant] agreed with [Dr. Caruso] that had there been proof to substantiate these staff claims, he would have or should have been arrested and taken to the Napa County Jail. This would especially be the case given the fact that Napa [State Hospital] staff has not considered [defendant] to be actively psychotic, nor suffering from any serious mental illness, disease, or defect, for some time now."

Dr. Caruso continued: "By way of [defendant's] more recent history at Napa [State Hospital], in combination with his lengthy and significant criminal history over the past 2+ decades, and then reviewing results of the recently administered Psychopathy Checklist--Revised, it is safe to conclude that *we are probably dealing with a psychopath or a sociopath*. Other than those mild elements of paranoia, and some hypomanic features including accelerated speech and mild to moderate grandiosity, we do not appear to be dealing with significant underlying psychopathology." (Italics added.)

Later, Dr. Caruso wrote, "I would have to agree with hospital staff that [defendant] will probably continue to represent danger or threat to others in the community, because of his underlying psychopathy or sociopathy; but *not* presently *because* Napa [State Hospital] staff has demonstrated that [defendant] has a defect, disease, or disorder

making him a danger to the health and safety of others.”³ (Italics added.) According to Dr. Caruso, Napa State Hospital staff had *not* considered defendant to be “suffering from any serious mental illness, disease, or defect, for some time now.”

Defendant’s petition was heard on August 6, 2013. The prosecutor acknowledged that Dr. San Giovanni “very clearly state[d that defendant] doesn’t have a mental disorder.” But she argued that Dr. San Giovanni “authored this report believing that [defendant’s] . . . [adult] antisocial behavior . . . would be a mental defect or disease that would warrant his continued inpatient treatment.”

The trial court ruled that the relevant statute (§ 1026.2, subd. (e)) “is not limited to mental disorder. I realize that the reports from [Dr. San Giovanni] make reference to [defendant] not meeting the criteria for antisocial personality disorder, but that is characterized as a disorder. The other two prongs is [*sic*] that it could be a mental defect or it could be a mental disease. And when I look at all of the reports in their totality, the Court interprets it to be that the diagnosis is a serious antisocial behavioral problem and that the serious antisocial behavioral problem does fall under the category of a mental defect or mental disease. [¶] I think the reports can be read that it would fall within a mental defect. And the Court finds that [defendant] continues to present a substantial risk of danger of physical harm to others because of his serious antisocial behavioral problem. And that he’s likely to be a danger to the health and safety of others if he is on outpatient status.”

³ At the hearing, the trial court considered this passage and stated, “That’s what [Dr. Caruso] wrote. I don’t know if he misspoke.” The court considered whether Dr. Caruso had meant to say that Napa State Hospital staff has “not” demonstrated that defendant has a defect, etc. Defendant’s trial counsel evidently conformed the defense exhibit by handwriting the word “not” where the trial court suggested it had been omitted. Subsequently, the handwritten word was blacked out when the exhibit was prepared for this appeal. Our review discloses little if any probability that Dr. Caruso had mistakenly omitted the word “not” from his report.

DISCUSSION

Evidence Supporting Denial of Petition for Outpatient Status

Defendant contends the record contains insufficient evidence to support the trial court's denial of his petition for outpatient status, thus violating his constitutional right to due process. Defendant argues he met his burden to show that he does not suffer from a current volitional impairment that renders him dangerous beyond his control.

1. *Relevant Legal Principles*

“A person who has been found not guilty by reason of insanity and committed to a state hospital may apply to the superior court for release from commitment ‘upon the ground that sanity has been restored.’ [Citation.] ‘If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year.’ [Citation.] ‘[T]he applicant shall have the burden of proof by a preponderance of the evidence.’ [Citations.]” (*People v. Bartsch* (2008) 167 Cal.App.4th 896, 899-900, fn. omitted; § 1026.2, subs. (a), (e), (k).)

“The trial court’s ruling at this stage is reviewed for an abuse of discretion. [Citations.]” (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1433.) “In determining whether the trial court abused its discretion, we look to whether the court relied on proper factors and whether those factors are supported by the record. [Citation.]” (*People v. McDonough* (2011) 196 Cal.App.4th 1472, 1489.) The People concede that, in the present case, the abuse of discretion standard “appears indistinguishable” from the substantial evidence review requested by defendant.

2. *Danger to the Health and Safety of Others*

Defendant contends he “met his burden of showing that he did not presently suffer from a volitional impairment rendering him dangerous *beyond his control.*”

(Unnecessary capitalization omitted, italics added.) His claimed burden is less onerous --

and thus more easily satisfied -- than the statutory burden to prove by a preponderance of evidence that he “*will not be* a danger to the health and safety of others.” (§ 1026.2, subd. (e), italics added.) The statute requires proof that he will not be a danger *for any reason*, not merely that he will not be such a danger *for reasons that are beyond his control*. (*People v. Bartsch, supra*, 167 Cal.App.4th at pp. 899-900.)

Defendant claims the lesser showing is constitutionally compelled because due process requires that a person not be subjected to involuntary civil commitment unless the person, as a result of mental abnormality, has serious difficulty controlling his or her dangerous behavior. (Citing *In re Lemanuel C.* (2007) 41 Cal.4th 33, 40-41; *In re Howard N.* (2005) 35 Cal.4th 117, 127-132; *People v. Williams* (2003) 31 Cal.4th 757, 759, 766.)

But the defense did not ask the trial court to construe section 1026.2 in light of the foregoing authorities, such that a *dangerous* insanity committee is entitled to release from commitment so long as his or her dangerous behavior *is within his or her control*.⁴ This makes it unnecessary to consider whether the evidence would have supported a finding in favor of defendant under his proposed standard.

“ ‘ “No procedural principle is more familiar . . . than that a constitutional right,” or a right of any sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” [Citation.]’ [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *U.S. v. Olano* (1993) 507 U.S. 725, 731 [123 L.Ed.2d 508, 517].) Defendant’s claim that his continued confinement violates his constitutional right to due process is not properly before us.

⁴ The written petition for transfer to outpatient status was submitted by defendant in propria persona. At the hearing, defendant was represented by counsel.

3. *Danger Due to Mental Defect, Disease, or Disorder*

Defendant appears to contend the evidence was insufficient because Dr. San Giovanni stated that defendant “does not have a current diagnosis of a mental disorder.” The trial court acknowledged this state of the evidence but ruled that defendant’s “serious antisocial behavioral problem does fall under the category of a mental defect or mental disease.”

Defendant claims in effect that the evidence does not support the court’s ruling because Dr. Caruso had opined that “Napa [State Hospital] staff” had failed to demonstrate that defendant has “a *defect, disease* or disorder making him a danger to the health and safety of others.” (Italics added.) But in this passage, Dr. Caruso did not offer an expert opinion as to whether defendant had certain psychological conditions. Rather, Dr. Caruso offered a legal conclusion that defendant’s conditions did not fall within the statutory meaning of “mental defect, disease, or disorder.” (§ 1026.2, subd. (e).) The trial court was not bound by Dr. Caruso’s conclusion.

Defendant does not purport to define the statutory terms “mental defect” and “mental disease” or attempt to show error in the trial court’s definition.⁵ Nor does he attempt to show that neither term encompasses his mental condition. His claims that the evidence fails to support the court’s ruling, and that the ruling was an abuse of discretion, have no merit.

⁵ Defendant asserts that he “had no Axis II diagnosis (mental illness).” But Axis II is not coextensive with mental illness. According to the DSM-IV-TR, “Axis II is for reporting Personality Disorders and Mental Retardation.” (DSM-IV-TR, *supra*, at p. 26.) Defendant does not claim the statutory term “mental disease” is limited to matters properly reported on Axis II.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

MAURO, J.

HOCH, J.