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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD DANIEL MARTINEZ,

Defendant and Appellant.

E062974

(Super.Ct.No. FMB1400488)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

During a pre-preliminary hearing proceeding, defendant's trial counsel, Joel S. Agron, expressed doubt as to defendant and appellant Edward Martinez's competence to stand trial. The trial court suspended the criminal proceedings in order to determine defendant's competence. (Pen. Code, § 1368.)¹ At that same hearing, defendant expressed a desire to file a *Marsden*² motion. The trial court did not hold a *Marsden* hearing. Defendant contends the trial court erred by not holding a *Marsden* hearing. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On September 16, 2014, in a felony complaint, the San Bernardino County District Attorney charged defendant with (1) criminal threats (§ 422, subd. (a)); (2) exhibiting a deadly weapon (§ 417, subd. (a)(1)); (3) resisting, obstructing, or delaying a peace officer or emergency medical technician (§ 148, subd. (a)(1)); and (4) disobeying a court order (§ 166, subd. (a)(4)).

At a pre-preliminary hearing proceeding on September 23, Agron expressed doubt as to defendant's competence to stand trial. The trial court suspended criminal proceedings and ordered a competency exam. (§ 1368.) Defendant objected. The trial court noted the objection and set a hearing for October 24. The following exchange occurred:

¹ All subsequent statutory references will be to the Penal Code unless otherwise indicated.

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

“The Defendant: May I speak up for a minute, please?”

“The Court: No. Your attorney will speak on your behalf.”

“The Defendant: I wish to file a *Marsden* motion right now.”

“The Court: It’s time for you to go, sir.”

“The Defendant: Thank you. And I don’t want that attorney to represent me.”

Conflict of interest.

“The Court: We will discuss that at our next hearing.”

“The Defendant: I understand.”

“The Court: Okay.”

“The Defendant: Thank you.”

“The Court: Okay. For the record, the court is not going to act under that request by counsel [*sic*] since proceedings have already been suspended at Mr. Agron’s request.”

A psychologist diagnosed defendant as suffering from schizoaffective disorder, bipolar type, which is a “severe mental illness.” On October 24, the trial court found defendant incompetent to stand trial. Defendant did not raise the *Marsden* issue at the October 24 hearing. A second psychologist conducted a placement evaluation for defendant, and recommended he “receive competency training in a locked forensic setting.” (Underline and boldface omitted.)

Defendant was initially placed in a competency restoration program in the West Valley Detention Center. A third psychologist explained to the court that defendant was unsuitable for treatment in the county jail because defendant was refusing to consent to

treatment, such as the administration of medication. The third psychologist informed the court that defendant would be transferred to the state hospital for treatment.

On April 3, 2015, the trial court found defendant to be mentally competent. The trial court reinstated defendant's criminal proceedings. Defendant requested a *Marsden* hearing. The *Marsden* hearing was held. The trial court denied defendant's *Marsden* motion.

DISCUSSION

A. MARSDEN HEARING

Defendant contends the trial court erred by not holding a *Marsden* hearing on September 23, 2014. Defendant asserts the trial court incorrectly "believed it could not conduct a *Marsden* hearing because criminal proceedings had been suspended due to [defendant's] apparent lack of competency."

Although section 1368 requires criminal proceedings to be suspended once a mental competency examination has been ordered, the Sixth Amendment right to effective assistance of counsel compels a *Marsden* hearing be conducted when such a motion is made. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069 (*Solorzano*)). "Hearing a *Marsden* motion during a competency hearing does not reinstate criminal proceedings against the defendant." (*Ibid.*) Thus, a *Marsden* hearing should be held even if criminal proceedings have been suspended pending a mental competency determination. (*Ibid.*)

The denial of a *Marsden* motion without a hearing is error. (*Marsden, supra*, 2 Cal.3d at p. 126.) We will assume, for the sake of judicial efficiency, that the trial court

effectively denied defendant's motion without a hearing because the trial court did not permit defendant, at the September 23 hearing, to explain the alleged conflict of interest. (See *People v. Richardson* (2009) 171 Cal.App.4th 479, 484 [a trial court must permit a defendant to relate specific instances of the attorney's problematic performance].) Thus, we assume the trial court erred.

We examine whether the assumed error was harmless beyond a reasonable doubt. (*Marsden, supra*, 2 Cal.3d at p. 126.) We review the record to determine whether defendant would "have obtained a more favorable result had the motion been entertained." (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1148.)

The trial court effectively denied defendant's motion on September 23. At that September 23 hearing, the trial court informed defendant that it could address his *Marsden* motion at the October 24 hearing. Defendant's two-hour psychological evaluation was conducted on October 6. On October 24, the trial court conducted defendant's competency hearing, and found defendant incompetent. At the competency hearing, the trial court asked defendant if he would agree to the administration of prescribed psychotropic medications. Defendant agreed. Defendant did not raise the *Marsden* issue at the October 24 hearing.

At a hearing on November 14, concerning defendant's placement in a competency restoration program at West Valley Detention Center, defendant asked to speak to his attorney for five minutes; Agron agreed to speak with defendant. Defendant did not raise the *Marsden* issue at the November 14 hearing. A hearing was held on February 13, 2015, concerning defendant being placed in Patton State Hospital

because he was unsuitable for treatment in jail, in part because he was refusing medication. Agron was at the hearing, but defendant was not present.

The record reflects defendant suffered from schizoaffective disorder, bipolar type, which is “a severe mental illness.” At the time of defendant’s evaluation he was “not mentally stable.” The psychologist who diagnosed defendant recommended (1) he be found incompetent to stand trial, and (2) placed in an inpatient hospital program. A second psychologist, who conducted the placement evaluation for defendant, recommended he be placed in a “locked forensic setting.”

With Agron representing defendant, defendant was placed in a competency restoration program at West Valley Detention Center, which was described as “a lot faster and a lot more straightforward than any of the programs at the hospital.” Ultimately, a third psychologist informed the trial court that defendant was found to be unsuitable for treatment in jail, and needed to be transferred to Patton State Hospital.

The record reflects nothing of substance occurred in regard to defendant’s criminal proceedings, and defendant received the opportunity to participate in a faster and more straightforward restoration of competency program, but was ultimately unsuitable for that program. Given the severity of defendant’s mental illness, as documented in the record by different sources (the diagnosing psychologist; the placement psychologist; and the county jail psychologist), we conclude any error in failing to conduct the *Marsden* hearing was harmless beyond a reasonable doubt; a more favorable result would not have occurred even if the *Marsden* hearing had taken place and the motion had been granted—a different attorney, or defendant himself, could not

have achieved a more favorable result in the competency proceedings given the severity of defendant's mental illness. The evidence in the record reflects no doubt that defendant was suffering from a severe mental illness, as documented by three different sources, and therefore, it is unreasonable to conclude someone other than Agron would have achieved a more favorable result. Accordingly, we conclude the assumed error was harmless.

Defendant contends the trial court's error was prejudicial because a different attorney may have cross-examined witnesses, thus producing different evidence. As explained *ante*, three separate sources in the record addressed defendant's mental illness: (1) a psychologist diagnosed defendant as suffering from schizoaffective disorder, bipolar type; (2) a second psychologist, who made the recommendation for defendant's placement, suggested he receive "competency training in a locked forensic facility"; and (3) a third psychologist informed the court that defendant was unsuitable for treatment in the county jail and needed to be transferred to a state hospital.

Thus, there is evidence from three different sources reflecting defendant was suffering from a severe mental illness. The diagnosing psychologist explicitly labeled it "a severe mental illness." The placement psychologist noted defendant needed a "high level of structure and support," reflecting defendant's mental illness was severe because he needed a great deal of assistance. The jail psychologist's determination that defendant needed to be transferred to a state hospital also reflects defendant's mental illness was severe because he needed to be medicated and could not be handled in the county jail. Given the consensus among three different psychologists, we are not

persuaded that, if a different attorney had been appointed and elected to cross-examine witnesses, a more favorable result would have occurred in the competency proceedings.

Defendant asserts this case should have an outcome similar to *Solorzano*. In *Solorzano*, the defendant's competency was put at issue during pre-preliminary hearing proceedings. The defendant made two *Marsden* motions. In response to the first motion, made on April 14, the trial court declined to address the motion because criminal proceedings had been suspended pending the competency proceeding (§ 1368). (*Solorzano, supra*, 126 Cal.App.4th at pp. 1066-1067.) Following the second motion, on April 22, the trial court initially did not address the motion, and then found defendant competent to stand trial. Later in the day, the trial court held a hearing on the *Marsden* matter. (*Id.* at pp. 1067-1068.) The trial court denied the motion. (*Id.* at p. 1068.)

On appeal, the defendant faulted the trial court for not holding a *Marsden* hearing prior to the competency hearing. (*Solorzano, supra*, 126 Cal.App.4th at pp. 1065-1066.) The appellate court concluded the trial court erred by not conducting a timely *Marsden* hearing. (*Solorzano*, at p. 1070.) As to prejudice, the appellate court, quoting *Marsden*, wrote, ““On this record we cannot ascertain that [the defendant] had a meritorious claim, but that is not the test. Because [he] might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel, the trial judge[']s denial of the motion without giving [him] an opportunity to do so denied him a fair trial. We cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to [the finding he was

competent to stand trial].” (*Solorzano*, at p. 1071.) The appellate court reversed the judgment and ordered a new trial. (*Ibid.*)

The instant case is distinguishable from *Solorzano* because (1) defendant was found incompetent; and (2) the severity of defendant’s mental illness was documented by three different sources. In *Solorzano*, the defendant was ultimately found competent. There is nothing in the current record reflecting defendant could have been found competent. The only evidence, from three different sources, reflects defendant suffered from a severe mental illness. As a result, unlike *Solorzano*, there is nothing in the current case reflecting a different result might have occurred but for the trial court’s error. Accordingly, we are not persuaded by defendant’s analogy to *Solorzano*.

B. DISMISSAL

The People contend defendant’s appeal should be dismissed because the *Marsden* issue exceeds the scope of an appeal from a competency ruling.

“Our Supreme Court has established that an order determining the defendant to be incompetent and committing him to a state hospital is appealable as a final judgment in a special proceeding.” (*People v. Christiana* (2010) 190 Cal.App.4th 1040, 1045 [Fourth Dist., Div. Two].) The scope of review in such an appeal is limited; allegations of error may be based “only on the lack of jurisdiction of the trial court to institute commitment proceedings or the invalidity of the proceedings culminating in the order itself.” (*People v. Murphy* (1969) 70 Cal.2d 109, 114-115, fn. omitted.)

As explained *ante*, a *Marsden* hearing implicates a defendant’s Sixth Amendment right to effective assistance of counsel. (*Solorzano*, *supra*, 126

Cal.App.4th at p. 1069.) Arguably, an alleged Sixth Amendment violation relates to the potential invalidity of the proceedings. Accordingly, we decline to dismiss the appeal because the *Marsden* issue can arguably be included in an appeal from a competency ruling.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.