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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY MOUA,

Defendant and Appellant.

F062976

(Super. Ct. No. CF05909490)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Paul Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Billy Moua was found to be a mentally disordered offender (MDO) and involuntarily committed to a mental health facility for one year for treatment. Moua contends his commitment as a MDO is invalid pursuant to either Penal Code section 2962 or 2970.¹ Moua further contends that substantial evidence does not support the finding that he: (1) has a severe mental disorder or (2) lacks the ability to control his dangerous behavior.

The People concede section 2962 cannot support Moua's commitment, but assert the commitment is valid under section 2970 and that substantial evidence supports the findings.

We agree and will affirm.

FACTUAL AND PROCEDURAL SUMMARY

On June 8, 2011, the Fresno County District Attorney's Office filed a petition pursuant to sections 2962 and 2970 seeking to commit Moua as a MDO. Moua was originally convicted of assault with a deadly weapon. Moua had become agitated when an ice cream truck was in the parking lot of the apartment complex where he lived; Moua yelled at the driver and then attacked the truck with an object, breaking the window.

A jury was empanelled to try the case on July 13, 2011. In support of the petition, the People presented testimony from Dr. Donald Tweedie, a clinical psychologist. Tweedie opined that Moua suffers from a severe mental disorder. In reaching this diagnosis, Tweedie looked at Moua's history of signs and symptoms, his behavior during an in-person interview, and Moua's prior mental health evaluations.

Moua showed signs of impulsivity, aggression towards others, episodes of high energy, episodes of depressive mood, and great difficulties with impulse control. His symptoms included auditory hallucinations, depression, anxiety, difficulty sleeping, and

¹ References to code sections are to the Penal Code unless otherwise specified.

agitation. Tweedie also described specific instances where Moua showed aggression toward others. Tweedie also noted that Moua has an extensive history of psychiatric hospitalizations.

Tweedie diagnosed Moua with mood disorder not otherwise specified, which is a general diagnosis. Tweedie concluded that Moua's disorder qualified as a severe mental disorder because it significantly impaired Moua's impulse control.

Tweedie also opined that Moua's disorder was not in remission. A patient can demonstrate that a severe mental disorder cannot be kept in remission without treatment in four ways: (1) engaging in violence toward others; (2) making threats toward others; (3) failing to comply with treatment; and (4) destroying property. Tweedie opined that Moua demonstrated some of these factors, as shown by Moua's failure to take his medications on numerous occasions and to comply with treatment; threats he made to officers taking him into custody; and fights while in custody.

Dr. Emily Wisniewski also testified for the People as an expert in the area of forensic psychology. She opined that Moua suffered from a mood or psychotic disorder and that it was a severe mental disorder. Wisniewski noted that Moua's symptoms included elevated mood, fast or pressurized speech, loud speech, hyper-talkativeness, tangential thoughts, auditory hallucinations, aggression, agitation, paranoia, and delusional beliefs. Moua also engaged in numerous instances of assaultive behavior while incarcerated or hospitalized at Atascadero State Hospital.

Wisniewski testified that in her opinion, Moua's mental disorder was at least an aggravating, if not the causative factor, in the commission of his crime. She also testified that Moua's mental disorder was not in remission. Wisniewski opined that Moua presents a substantial danger to others, in that he had a history of violent behavior toward others when he was symptomatic and not stabilized on medication.

Moua testified in his own behalf. He stated that he did not have serious difficulty controlling his behavior; each time he engaged in assaultive conduct, he was in control and knew what he was doing; and he did not pose a substantial risk of harm to others.

On July 18, 2011, the jury found the allegations of the petition to be true. The trial court ordered Moua to undergo continued treatment for an additional year.

DISCUSSION

Moua contends the petition to extend his commitment as a MDO was invalid under either section 2962 or 2970. He also contends there is insufficient evidence to support the findings that he has a severe mental disorder and that he has serious difficulty in controlling his behavior.

I. Petition to Extend Commitment

Moua contends the petition to extend his commitment as a MDO was invalid because it failed to establish he previously had been certified as a MDO. Alternatively, he contends the People sought to pursue a section 2962 and a section 2970 commitment in a single petition.

The People concede that the requirements of section 2962 were not satisfied. Therefore, we will address only whether there is a proper recommitment pursuant to section 2970.

Section 2970 provides, in relevant part: “Not later than 180 days prior to the termination of parole, ... if the prisoner’s severe mental disorder is not in remission or cannot be kept in remission without treatment, the medical director of the state hospital which is treating the parolee, ... shall submit to the district attorney ... his or her written evaluation on remission.... [¶] The district attorney may then file a petition with the superior court for continued involuntary treatment for one year. The petition shall be accompanied by affidavits specifying that treatment, while the prisoner was released from prison on parole, has been continuously provided ... either in a state hospital or in an outpatient program. The petition shall also specify that the prisoner has a severe mental

disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.”

In July 2008, Moua was certified as a MDO and committed for treatment. In November 2010, San Luis Obispo County Superior Court decertified Moua as a MDO because his mental disorder appeared to be in remission. Moua was released on parole on November 10, 2010. On November 14, 2010, Moua was arrested for public intoxication and making threats, and was returned to custody. Moua was placed in a mental health unit.

Moua contends the petition for continued treatment as a MDO was invalid because there was no commitment for treatment in place that could be continued. He is mistaken.

First, the petition was accompanied by an affidavit from O. Del Pilar, the chief psychiatrist at Wasco State Prison. Pilar's affidavit stated that Moua had been continuously treated by the State Department of Mental Health as a condition of parole. Second, the petition alleged that Moua's severe mental disorder was not in remission, could not be controlled by psychotropic medications or psychological support, and that by virtue of his severe mental disorder, Moua presented a substantial danger of physical harm to others if released. The petition and accompanying affidavit alleged all the requisite facts for a continued commitment. (§ 2970.)

Nothing in section 2970 requires the People to plead the existence of a valid section 2962 petition. Moreover, if the petition was defective, Moua should have raised this issue in the trial court, for failure to raise a defect in the petition constitutes a waiver of the defect. (*People v. Williams* (1999) 77 Cal.App.4th 436, 459 & fn. 11.)² Waiver is

² Although the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a “waiver,” the correct legal term for the loss of a right based on failure to timely assert it is “forfeiture,” because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the ““intentional

particularly appropriate when the alleged defect involves factual issues, such as here where Moua now claims the existence of a section 2962 petition had to be pled and proven, because if Moua had demurred or otherwise raised the alleged defect in the trial court, the People would have had an opportunity to correct any defect. (*People v. Williams, supra*, at p. 460; *People v. Jennings* (1991) 53 Cal.3d 334.)

Moua cites *People v. Crivello* (2011) 200 Cal.App.4th 612 for the proposition that an offender cannot be recommitted as a MDO under section 2970 if the offender was never committed as a MDO under section 2962. *Crivello* stands for the limited proposition that an offender who could not be committed under section 2962 because of a failure of proof of the static criteria—whether a severe mental disorder was an aggravating or causative factor in the offenses—cannot later be subject to a section 2970 petition. (*Crivello, supra*, at pp. 616-617.) Moua’s reliance on *Crivello* is misplaced, because Moua was initially certified pursuant to section 2962. Moua’s brief decertification was based on a failure of proof of dynamic criteria—whether the severe mental disorder was in remission. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1062.)

II. Substantial Evidence

Moua contends there is no substantial evidence to support the finding that: (1) he has a severe mental disorder and (2) lacks the ability to control his dangerous behavior. We review the trial court’s findings for substantial evidence. (*People v. Pace* (1994) 27 Cal.App.4th 795, 797.)

relinquishment or abandonment of a known right.”” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Nevertheless, since the cited cases use the term “waiver” in this context, we use it also.

Severe Mental Disorder

The trial court must recommit a MDO for an additional year of psychiatric treatment where the court or jury find beyond a reasonable doubt that the offender (1) has a severe mental disorder, (2) the severe mental disorder is not in remission or cannot be kept in remission without continued treatment, and (3) by reason of the severe mental disorder, the MDO represents a substantial danger of physical harm to others. (§§ 2970, 2972.) A severe mental disorder is defined as:

“an illness or disease or condition that substantially impairs the person’s thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely.” (§ 2962, subd. (a)(2).)

Here, two experts testified regarding the signs and symptoms presented by Moua and offered their opinions that Moua suffered from a severe mental disorder. Tweedie testified regarding Moua’s impulsivity, aggression toward others, episodes of high energy, episodes of depressive mood, difficulty with impulse control, auditory hallucinations, depression, anxiety, and agitation. Tweedie concluded that Moua suffered from a severe mental disorder, diagnosed as a mood disorder not otherwise specified.

Wisniewski also concluded that Moua suffered from a severe mental disorder, which she diagnosed as a mood disorder or psychotic disorder. She based this diagnosis on Moua’s symptoms and signs, which she described in her testimony as elevated mood, fast or pressurized speech, loud speech, hyper-talkativeness, tangential thoughts, auditory hallucinations, aggression, agitation, paranoia, and delusional beliefs.

Moua contends that the diagnoses of Tweedie and Wisniewski were not specific enough to support the jury’s finding that he suffered from a severe mental disorder. Section 2962, however, does not require a specific diagnosis to support a finding of a severe mental disorder. Where testimony regarding an expert diagnosis is supported by evidence of the defendant’s history, symptoms, treatment, and medication, as here, this

constitutes substantial evidence supporting a finding of a severe mental disorder. (*People v. Butler* (1999) 74 Cal.App.4th 557, 563.)

Where the evidence is sufficient to support the finding, this court does not reweigh or reinterpret the evidence. (*People v. Pace, supra*, 27 Cal.App.4th at p. 798.)

Dangerous Behavior

Moua also contends the evidence is insufficient to support a finding that because of his severe mental disorder, he lacked the ability to control his dangerous behavior. We disagree.

The standard of proof at trial for determining whether Moua presents a “substantial danger of physical harm to others” is proof beyond a reasonable doubt. (§ 2972, subds. (a) & (c).) In context, substantial danger of physical harm to others “appears to mean a prediction of future dangerousness by mental health professionals.” (*In re Qawi* (2004) 32 Cal.4th 1, 24.) “[S]ubstantial danger of physical harm” does not require proof of a recent overt act. (§2962, subd. (f); see *People v. Hubbard* (2001) 88 Cal.App.4th 1202, 1219.)

Both Tweedie and Wisniewski opined that Moua presented a substantial danger of physical harm to others as a result of his severe mental disorder. A mere four days after Moua was released on parole, he was arrested for public intoxication and making threats, and was returned to custody. After violating his parole and being placed into custody, Moua instigated two fights while in custody and was written up for battery on inmates. These instances of violence against other inmates occurred after it was reported that Moua had an elevated mood and was agitated. Moua’s original offense was an assault on an ice cream vendor, and while hospitalized for treatment, Moua committed assaults.

Wisniewski opined that Moua’s disorder was a causative factor in his original criminal assault offense. Shortly before committing that assault, Moua had been involuntarily hospitalized for psychiatric treatment. After the assault, Moua expressed paranoid beliefs about the victim. Tweedie opined that Moua’s history of assaultive

behavior, combined with his substance abuse problem and history of gang involvement were factors that were to be considered when assessing whether Moua presented a danger to others as a result of his severe mental disorder, because those factors impacted Moua's ability to comply with any outpatient treatment.

Moua cites *In re Anthony C.* (2006) 138 Cal.App.4th 1493 for the proposition that substantial evidence he presents a danger of physical harm to others is not present in his case. In the case of *In re Anthony C.*, however, unlike here, the expert testimony was that the defendant posed “some risk, moderate at least,” but not a serious risk. (*Id.* at p. 1507.) Expert opinion testimony presented also disclosed that the expert had not prepared a formal risk assessment evaluation; was unable to identify the risk factors for the defendant; and was reluctant to quantify how high a risk the defendant posed. (*Ibid.*) In Moua's case, both experts interviewed and evaluated him, identified the risk factors, and quantified the risk, with both concluding that Moua posed a substantial danger of physical harm to others.

DISPOSITION

The judgment is affirmed.

Kane, Acting P.J.

WE CONCUR:

Poochigian, J.

Franson, J.