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

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL KEITH HENDRIX,

Defendant and Appellant.

F064542

(Super. Ct. No. CF05908311)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Don Penner, 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, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J. and Franson, J.

STATEMENT OF THE CASE

On March 18, 2008, appellant Daniel Keith Hendrix pleaded not guilty by reason of insanity to second degree robbery (Pen. Code,¹ § 211) and grand theft from a person (§ 487, subd. (c)), as alleged in counts 1 and 3, respectively of a second amended information filed by the Fresno County District Attorney.

On April 8, 2008, appellant was admitted to Atascadero State Hospital (ASH) with an adjusted maximum commitment date of November 1, 2025.

On December 9, 2011, the ASH Forensic Services Director and Medical Director filed a certification that appellant would no longer be a danger to the health and safety of others if placed on outpatient status (§ 1603).

On March 1, 2012, the court conducted a hearing on the certification after appellant waived his rights to personally appear and have a trial by jury. The parties stipulated to the evidentiary admission of reports from ASH and the outpatient program. The defense presented testimony from the program director and the court took the matter under submission.

On March 8, 2012, the court denied appellant's motion for outpatient treatment.

On March 16, 2012, appellant filed a timely notice of appeal.

STATEMENT OF FACTS

Facts of the Underlying Offenses

On September 12, 21, and 27, 2005, appellant snatched purses from unsuspecting female victims who were seated at public bus stops. He was charged with second degree robbery (§ 211) and grand theft (§ 487, subd. (c)). Appellant was initially committed to ASH as incompetent to stand trial (§ 1370). On June 22, 2010, the court ordered

¹ All further statutory references are to the Penal Code unless otherwise stated.

appellant to participate in community outpatient treatment in the Central California Conditional Release Program (CONREP) (§§ 1026, 1604).

Facts Relating to Appellant's Performance in Outpatient Treatment

On February 18, 2011, appellant was remanded to Fresno County Jail after a toxicology sample revealed his use of methamphetamine (§ 1608). On February 22, 2011, CONREP petitioned for the revocation of appellant's outpatient status, citing three instances of substance abuse, polysubstance dependence, and theft of money from a peer, among other things. On April 4, 2011, the court filed an order revoking appellant's outpatient status and recommitting him to ASH (§ 1609). The court based its order on a stipulation by all parties that appellant "presents a danger to society while on outpatient status and ... is no longer suitable for outpatient status."

Facts from the ASH Progress Report of October 6, 2011

On October 6, 2011, ASH Staff Psychiatrist Joshua C. Deane, M.D. filed a progress report with the court (§ 1026, subd. (f)). Dr. Deane initially observed: "In committing his controlling offense, Mr. Hendrix repeatedly snatched purses from unsuspecting female victims, awaiting city buses." Based on appellant's interviews with mental health professionals in 2007, Deane concluded that appellant's "delusional thinking, confusion, disorganization, poor impulse control, and impaired insight/judgment, fueled by his concurrent alcohol/drug use, figured prominently in his commission of the instant offense. [¶] By all measures, he has come a long way from the disorienting moment when he was possessed by the mission of saving the souls of his female victims." Dr. Deane recommended that appellant be retained and treated in ASH.

Facts from the December 7, 2011 Court Report

Dr. Deane filed a progress report under Penal Code section 1026 in conjunction with his request that appellant be considered for placement on outpatient status (§§ 1603-1604). The progress report quoted from appellant's updated Relapse Prevention Plan, which stated: "One of my options for support in the community will be my family. My

family has always supported me morally and has been there to listen to any problems or issues that I have had.” Dr. Deane stated in the “Social Support” portion of the report: “He enjoys solid support from his entire family and his mother. He speaks to his wife, his mother, and his children on a regular basis. (His father passed away in January 2010). [¶] He has been married for about 18 years. His wife works as a home health aide. The[y] have had three children together. (Being faithful to each other apparently has not been a feature for the union. Both of them openly have had relationships with other parties.”

On January 5, 2012, Thomas F. Lee, Psy.D., the primary clinician of Central California CONREP, and Mark L. Duarte, the CONREP Community Program Director, completed a placement recommendation (§ 1604). Dr. Lee and Duarte noted that appellant was married but in the process of divorcing. According to their report, “Daniel Keith Hendrix reports a long history of infidelity throughout his marriage. There has been frequent conflict in their marriage due to the infidelity and drug abuse.” With respect to other family relationships, Deane said appellant’s “adult relationships with his siblings have been described in terms of ambivalence and conflict.... Since the death of his father he no longer has contact/has minimal [contact] with his siblings.” Lee and Duarte said that appellant reportedly had a good relationship with his mother and “some infrequent contact” with his 22-year-old son from a nonmarital relationship. Lee and Duarte recommended that the superior court order the outpatient treatment and supervision of appellant for one year (§§ 1026, 1604).

Facts Elicited at the March 1, 2012 Hearing

Duarte testified on appellant’s behalf at the March 1, 2012, hearing and said he had spoken “directly face-to-face” with appellant at ASH in November 2011, and answered several of appellant’s telephone calls, the most recent call within 30 days of the March 1 hearing date. Appellant’s trial counsel asked Duarte about an excerpt of the report that stated: “Mr. Hendrix is ignorant of living without drugs and stealing to

support his habit of addiction. In light of our prior experience with him we have learned some more about his pattern. The treatment team at [ASH] have stated they have done all they can do for Mr. Hendrix now. He is therefore referred for community outpatient treatment and supervision.” When asked about appellant’s suitability for an outpatient program, Duarte said appellant’s drug addiction factored into “his long-term vulnerability. It was prior to my ever meeting him, it is the reason he was revoked from the program and it would be what I’m looking out for when he is referred back to the community. It’s conditional release and the conditions are based on fact rather than feeling.... I don’t think he has learned how to maintain lawfully in the community and you only get that through practice. It’s one thing to learn in a class in the hospital, it’s another thing to practice it in the community so that’s the part that we take care of, the practice.” Duarte said he believed appellant earned another chance in an outpatient program.

On cross-examination, Duarte acknowledged that one of appellant’s problems was his inability to voluntarily follow a regimen. Duarte acknowledged that appellant’s prior participation in CONREP was revoked after six months because of a positive test for methamphetamine. Duarte further acknowledged that appellant’s polysubstance dependence included dependence on methamphetamine, crack cocaine, alcohol, and ecstasy. He indicated that appellant’s drug use was a trigger for his commission of crimes and was a common thread for his commission of robberies. Duarte said that if appellant were released as an outpatient, he would live in an apartment next to Duarte’s office but would not be placed in a locked facility. Duarte said appellant would be subjected to more supervision this time than he was given on his last release to outpatient status.

Upon further questioning, Duarte testified: “Mr. Hendrix has reached maximum hospital benefit. The system is set up so that he’s only conditionally released. He will have to prove to the court that he is responsible and committed to following his regimen

to regain his sanity. I wouldn't recommend that his sanity is restored. He has to prove that his sanity is restored. So it's a high bar for him."

Duarte further testified that appellant did not give authorities a release to contact his family for the clinical report. Appellant related to the clinician that he had family support but Duarte said that information was uncorroborated and incorrect. Duarte said appellant and his wife, Crystal, both had issues with fidelity and "[i]t's not a supportive environment." Duarte acknowledged that appellant had "[h]ardly any" family support and noted: "We've done family therapy. We're in place to help him do whatever he can or wants to try to be responsible."

The Trial Court's Ruling of March 8, 2012

The trial court denied appellant's petition for outpatient treatment, stating in relevant part:

"This is an unusual case in the respects that the NGI finding on the defendant in this case at the time of the litigation of the guilt phase and the sanity phase of this trial ... there was a stipulation finding the defendant NGI, not guilty by reason of insanity and in this case, that mental state is so closely related to his drug addiction over which the defendant has admitted himself[.] I think he's used the word in the past that he is powerless. This case is unusual in the court's mind in that while it is common for individuals who have been found NGI to also have substance abuse issues with street drugs, this particular defendant's sanity or insanity finding is much more closely tied to his use of illegal street drugs. He has been on [outpatient] treatment before, just last year. That was revoked. He was placed back in the hospital, that apparently – actually he was revoked and not placed back in the hospital and then Conrep subsequent to that revocation filed a motion to withdraw the petition to revoke his [outpatient] treatment. He was released again on [outpatient] treatment and then subsequently revoked because again of the use of narcotics and ... Conrep's position was that the danger he posed with that trigger mechanism of using drugs again. I cannot say that the defense has met the burden of proving that he is no longer a danger and suitable for [outpatient] treatment. I do have in mind Mr. Duarte's testimony. Part of the reasoning of the hospital's report on the [outpatient] recommendation, part of that was that he has the support of his family and Mr. Duarte on the stand candidly admitted that that is not the case. It appears to the court that the

information or at least some of the information that the doctors at the hospital were relying on in making the petition or filing the petition is erroneous and at any rate, the court would like to see a longer period of institutional remission on the use of drugs before I make a finding that he is a suitable candidate for [outpatient] treatment.”

DISCUSSION

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE PETITION FOR OUTPATIENT RELEASE

Appellant contends the trial court abused its discretion in denying the petition for outpatient release.

A. Specific Contention

Appellant specifically argues:

“Although the court gave as its reason for denying the petition that the hospital report had been based on inaccurate information as to the availability of family support in the community, the availability or non-availability of family support was not a dispositive factor in the recommendations of either the hospital or the conditional release program and therefore does not constitute evidence sufficient to rebut Mr. Hendrix’s showing, based on both of those uncontradicted reports, that he could be safely treated in the community.... If the hospital was wrong about those facts [relating to family support] there is nothing in its report to indicate that the conclusion would have been different, and Mr. Duarte, who drew the same conclusion recommending release, was the source of the new information about family support. It simply was not a dispositive issue, but simply something mentioned in passing in the report. It did not change Mr. Duarte’s recommendation, and there is no reason to speculate that it would have changed the hospital’s recommendation had the hospital had the new information.”

Appellant further contends “[t]here is no evidence that Mr. Hendrix becomes a danger to society instantly upon using. Therefore, there would be ample time for the program to monitor him and revoke him at the first signs that he might be starting to become dangerous, such as precursors to drug use, lying, missing appointments, or speaking inappropriately to staff. The last time he was revoked it was because he was caught drinking, not because he had committed another criminal offense or posed any

immediate danger to society. The program is designed for persons who are not yet ready to be released outright, who still have some issues to work through than can only be worked through in the community, rather than the artificial environment of the locked hospital. The evidence was uncontroverted that Mr. Hendrix can be non-dangerous while under the supervision of the program. If he becomes dangerous, he will be returned to the hospital. There was no evidence that the program would be unable to protect the public should that happen.”

B. Applicable Law

“An insanity acquittee committed to a state hospital may be released from the hospital as provided by [Penal Code] section 1600” and companion sections. (*People v. McDonough* (2011) 196 Cal.App.4th 1472, 1490.) Specifically, a person committed to a state hospital after being found not guilty by reason of insanity of a criminal offense may be released from the state hospital under one of three enumerated circumstances, including “restoration of sanity pursuant to the provisions of section [Penal Code] 1026.2” (*People v. Sword* (1994) 29 Cal.App.4th 614, 620.) “ ‘Subdivision (e) of [Penal Code] section 1026.2 sets up a two-step process for processing an application for release: first, a determination of whether the applicant should be placed in a local program, and later, after a year in such a program, a determination of whether the applicant’s sanity has been restored.’ [Citations.]” (*Ibid.*) The first part of that process is “a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community .” (§ 1026.2, subd. (e).) Thus, the “ ‘relevant standard ... is not whether the person committed is no longer legally insane, but whether he has improved to the extent that he is no longer a danger to the health and safety of others, including himself.’ ” (*People v. Allesch* (1984) 152 Cal.App.3d 365, 372.) The applicant has the burden of proof by a preponderance of the evidence that he or she is either no longer mentally ill or not dangerous. (*People v. McDonough, supra,*

196 Cal.App.4th at p. 1491; *People v. Sword, supra*, 29 Cal.App.4th at p. 624; § 1026.2, subd. (k).)

We may not disturb the court’s denial of appellant’s petition for release on outpatient status unless such denial constitutes an abuse of discretion. (Cf. *People v. Sword, supra*, 29 Cal.App.4th at p. 626.) “ ‘The term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking. [Citation .] “ ‘When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.]” [Citation.] Discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.]” (*Ibid.*)

C. Analysis

At the March 1, 2012 hearing, the court received evidence that appellant had engaged in three incidents of substance abuse during his earlier experiences in outpatient status in February 2011. These incidents entailed a positive test for methamphetamine, the use of ecstasy, and consumption of alcohol leading to intoxication. The experts who submitted reports agreed that appellant’s delusional thinking, poor impulse control and impaired insight/judgment – fueled by his concurrent use of alcohol and drugs – figured prominently in his commission of criminal offenses. According to the ASH experts, appellant recognizes “that his use of alcohol/drugs is the ‘triggers’ of his violence” Those same experts acknowledged: “As long as [appellant] dutifully subjects himself to CONREP supervision and religiously stays sober and clean, he will not likely represent a substantial danger of physical harm to others or an undue public hazard to the community.”

Appellant’s updated Relapse Prevention Plan stated in relevant part: “One of my options for support in the community will be my family. My family has always

supported me morally and has been there to listen to any problems or issues that I have had.” At the March 1, 2012 hearing, Duarte testified to the contrary, noting that appellant had “hardly any” family support. Although appellant attempts to minimize that contradiction on appeal, the trial court had every reason to evaluate that inconsistency in conjunction with appellant’s longstanding addiction to narcotics, his lengthy criminal history, and his poor prior performance on outpatient status in making its determination. Moreover, it was reasonable for the court to conclude in light of all of the facts and circumstances that the defense did not meet “the burden of proving that [appellant] is no longer a danger and suitable for [outpatient] treatment.”

The trial court’s denial of appellant’s petition for release on outpatient status did not constitute an abuse of discretion.

DISPOSITION

The judgment is affirmed.