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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BROUILLETTE,

Defendant and Appellant.

F067428

(Super. Ct. No. FP3599A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael Bush, 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, Daniel B. Bernstein and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J. and Franson, J.

INTRODUCTION

Following a hearing, the trial court ordered appellant Michael Brouillette recommitted to the conditional community release program (CONREP) for mentally disordered offenders. On appeal, appellant contends the court could not continue him on CONREP without the prosecutor first filing a new petition. We reject this contention.

LEGAL PROCEEDINGS

In December 1994, Brouillette was placed on felony probation after entering into a plea agreement in which he admitted one count of violating Penal Code section 245, subdivision (a)(1).¹ In June 1995, Brouillette's probation was revoked and proceedings were suspended pursuant to section 1368. In July 1995, Brouillette was found to be incompetent under section 1368. He was found restored to competency in October 1995. In November 1995, Brouillette was sentenced to 365 days in jail for his probation violation.

Brouillette violated probation in August 1997, and was found incompetent in December 1997. Brouillette was committed to Patton State Hospital. Brouillette was restored to competency in April 1998, and two months later sentenced to the Department of Corrections for three years. In July 1999, Brouillette was certified as a mentally disordered offender (MDO) and admitted to Atascadero State Hospital.

In May 2002, a jury found Brouillette to be an MDO pursuant to section 2970. Brouillette's commitment was extended for successive one-year terms in June 2003, June 2004, May 2005, and April 2006. Brouillette was briefly in CONREP in 2004, but his outpatient release was revoked because he was found in a psychotic state after days of alcohol consumption. Beginning in 2005, Brouillette's Penal Code status was changed to a civilly committed MDO pursuant to section 2972.

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

In September 2007, Brouillette was admitted into CONREP. In March 2008, Brouillette's CONREP was revoked due to alcohol and methamphetamine abuse, and he was placed in Metropolitan State Hospital. Brouillette's maximum controlling commitment date was November 25, 2008. In April 2008, a medical director stated that Brouillette qualified for an extended commitment pursuant to section 2970.

Brouillette's trial date was continued several times between 2008 and 2009. On May 15, 2009, the trial court found Brouillette to be an MDO and ordered him committed to Metropolitan State Hospital. On December 22, 2010, Brouillette was again placed in CONREP in the Northstar program. Brouillette was transferred to Kern County CONREP on May 25, 2011. On January 11, 2012, Brouillette stipulated to an extension of his outpatient status for one year until December 22, 2012.

The hearing on the extension of Brouillette's CONREP was continued on January 15, 2013, for his attorney to review his mental health report, and on January 17, 2013, for Brouillette to obtain retained counsel. The prosecutor did not file a formal petition for the extension of CONREP. On February 15, 2013, the trial court substituted Frederick Foss as Brouillette's counsel of record and set the case for a trial readiness hearing on March 29, 2013, and a trial on the extension of Brouillette's commitment on April 15, 2013. At the trial readiness hearing on March 29, 2013, Brouillette waived a trial by jury.

At the conclusion of the trial on April 15, 2013, the trial court extended Brouillette's CONREP until December 22, 2013. At a hearing on May 2, 2013, Brouillette was appointed new counsel, Andrew Kendall, from the public defender's office. The court learned from the CONREP director that Brouillette had "decomposed," could not remain in CONREP, and was currently residing in Metropolitan State Hospital.

At a hearing on May 9, 2013, the court ordered Brouillette's appearance and the hearing was continued until May 16, 2013. The prosecutor did not file a petition seeking revocation of Brouillette's CONREP or Brouillette's involuntary commitment to a state

mental hospital. Brouillette executed a waiver of his right to appear at the hearing and waived his right to contest the allegations and his state hospital commitment.²

On May 16, 2013, the trial court revoked Brouillette's CONREP. The court revoked Brouillette's outpatient status and committed Brouillette to the Department of Mental Health at Metropolitan State Hospital to and including December 22, 2013. On May 20, 2013, the trial court filed a written order recommitting Brouillette to Metropolitan State Hospital for a term to end on December 22, 2013. On June 11, 2013, Brouillette's retained counsel at the hearing on April 15, 2013, Mr. Foss, filed a notice of appeal from the orders rendered against Brouillette at the hearing on April 15, 2013.

FACTS

CONREP Evaluation

Brouillette's CONREP evaluation was filed with the court on December 27, 2012. In September 1994, Brouillette was convicted of section 245, subdivision (a)(1), a felony. Brouillette threw a piece of metal at a moving vehicle causing the passenger side window to shatter. Shattered glass hit the driver's shoulder. Brouillette admitted he did a "stupid thing" because he was without medication for his schizophrenia. Brouillette said he became upset and "felt like 'breaking something.'" At the time of the offense, Brouillette was affiliated with Psychiatric Alternative Resources, for parolees receiving mental health treatment and case management services. Brouillette said he did not intend to hurt anyone.

² The waiver document was executed under penalty of perjury. Brouillette personally waived his appearance at the hearing and stated that he did not want to be transported from the state hospital to Bakersfield for the hearing. Brouillette said he spoke to his attorney, Andrew B. Kendall, and advised him "that I wish to waive my right to contest the allegations, including my right to confront and cross-examine witnesses and my right to have the matter decided by a neutral fact finder by a preponderance of the evidence." Brouillette stated he agreed "to submit on my current placement in Metropolitan State Hospital." Brouillette stated that neither Mr. Kendall nor the staff of Metropolitan State Hospital forced him or encouraged him to waive his right to contest the allegations and he had decided to waive the rights described of his own freewill.

Brouillette's CONREP evaluation noted he was living in a local board and care facility. Brouillette had not been gainfully employed and supported himself on Veterans Administration (VA) benefits. Brouillette had a conservator who looked after his financial affairs and visited him.

Brouillette had no episodes of alcohol intoxication or amphetamine use as of May 2011, and maintained good attendance at CONREP groups. Brouillette's past revocations of CONREP were due to substance dependence. Brouillette denied any intent to hurt himself or others, had no suicidal or homicidal ideation, but he had limited insight into his mental illness and minimized his substance abuse problems. Brouillette was diagnosed with schizoaffective disorder, bipolar type; amphetamine and alcohol dependence; cannabis abuse; and some physical ailments. Brouillette was taking Zyprexa, Lithium, Depakote, Prozac, and Artane to treat his mental illness. Brouillette's CONREP advisor recommended Brouillette remain in CONREP.

Hearings

At the beginning of the hearing on April 15, 2013, the court noted that the case was a petition under section 2970. The court noted there was a petition filed in 2008. The court asked counsel if there was a more recent petition filed. After a brief pause, the court found the evaluation and report prepared by Dr. Akira Suzuki in 2012. Although the prosecutor did not have a copy of the evaluation, Brouillette's counsel Mr. Foss did have a copy.

Dr. Suzuki testified that he was a licensed clinical psychologist, worked for Kern County Mental Health Department as director of the CONREP community outpatient treatment program, and had performed an examination of Brouillette. Dr. Suzuki last saw Brouillette on April 13, 2013. Dr. Suzuki performed an informal examination of Brouillette by watching him in a group meeting, making a home visit, and talking with him.

During the preceding year, Dr. Suzuki saw Brouillette twice a month. Brouillette regularly attended his group and individual therapy sessions. Brouillette received his medications from the VA. Brouillette's medications were given by the board and care people and Brouillette was taking them. Brouillette was clean of drug and alcohol use during his current time in CONREP.

Dr. Suzuki explained that Brouillette had schizoaffective disorder, which is a combination of bipolar disorder, a mood disorder that affects a person's emotional state, and schizophrenia, a thought disorder characterized by delusional thinking, paranoia, and a distorted world view. Brouillette's mental illness was not in remission, meaning the symptoms of the disease were still adversely or overtly present.

Brouillette's illness presented a risk of danger or physical harm to others because Brouillette had difficulty rationally controlling his distorted thought processes. When this occurred, it was possible for Brouillette to act out by false sensory processing, based on his delusions and hallucinations. Although Dr. Suzuki did not think Brouillette was going to act out in such a fashion at that time, he had some hesitation indicating Brouillette was completely safe given his mental status. Dr. Suzuki concluded Brouillette suffered from a severe mental illness, schizoaffective disorder, and Brouillette was not in remission. Brouillette presented a substantial danger of physical harm to others.

Joe Acosta was a clinical social worker, director, and a team leader for the VA. According to Acosta, Brouillette sought psychotropic medication support and support counseling at the VA. Brouillette attended A.A. group meetings and individual counseling sessions once a week at the VA. Acosta described Brouillette as independent and high functioning.

Verlene Cameron acted as the professional conservator over Brouillette's estate for the previous three years. Cameron did not act as conservator over Brouillette's person. Cameron made sure Brouillette's housing, allowance, and bills were paid. She personally contacted Brouillette by telephone three to four times a week and personally visited him

seven times a year. Cameron recalled a meeting with Dr. Suzuki in which Dr. Suzuki told her that Brouillette met the criteria for discharge from CONREP. Cameron said Brouillette never got angry and was one of her best clients.

At the end of the hearing, the trial court extended Brouillette's CONREP until December 22, 2013. At a hearing on May 9, 2013, the court ordered Brouillette's appearance and the hearing was continued until May 16, 2013. Brouillette executed a waiver of his right to appear at the hearing.

On May 16, 2013, Brouillette was represented by Mr. Kendall of the public defender's office. Kendall told the court that he and Brouillette discussed Brouillette's waiver of an appearance at the hearing and Brouillette executed it. Kendall represented that Brouillette was prepared to stay at Metropolitan State Hospital. The court found that Brouillette had violated the requirements of CONREP and ordered him placed at Metropolitan State Hospital. On May 20, 2013, the court issued a written order reflecting that Brouillette was committed to Metropolitan State Hospital until December 22, 2013.

DISCUSSION

Brouillette appeals from the trial court's order on April 15, 2013, contending that under sections 2970 and 2972, the prosecutor was obligated to file a new petition in his case prior to seeking an extension of his CONREP. Brouillette argues that because a petition was not filed, his status as an MDO has lapsed and he must be immediately released. Respondent argues that because Brouillette was on a conditional release program, the more informal procedures of section 2972.1 applied to Brouillette and the prosecutor did not have to file a written petition in order to extend Brouillette's conditional release. We agree with respondent that section 2972.1 was operative in this case and the prosecutor did not have to file a petition under the facts of this case.

Because the parties have limited the issue on appeal to whether the prosecutor was statutorily required to file a petition to continue Brouillette on CONREP, we do not formally review the proceeding on May 16, 2013, revoking Brouillette's CONREP and

committing him to a state hospital. We note at the end of our opinion that as matters of due process and Brouillette's liberty interest, the parties and the trial court need to review Brouillette's current mental health and commitment status and proceed under proper statutory procedures.

The MDO Act was enacted in 1985. It requires that offenders who have been convicted of violent crimes related to their mental disorders, and who continue to pose a danger to society, receive mental health treatment until their mental disorder can be kept in remission. (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1061 (*Lopez*), disapproved on another point in *People v. Harrison* (2013) 57 Cal.4th 1211, 1230, fn. 2.) Commitment as an MDO is not indefinite. An MDO is committed for one-year periods and thereafter has the right to be released unless the People prove beyond a reasonable doubt that he or she should be recommitted for another year. (*Lopez, supra*, at p. 1063.)

A recommitment under the MDO law requires proof beyond a reasonable doubt that the patient has a severe mental disorder; the disorder is not in remission or cannot be kept in remission without treatment; and by reason of that disorder, the patient represents a substantial danger of physical harm to others. (§ 2970; *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1404.)

On appeal, we assess the sufficiency of the evidence to support an MDO commitment under the substantial evidence standard. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083.) This requires us to determine, on the whole record, whether a rational trier of fact could have found that defendant is an MDO beyond a reasonable doubt, considering all the evidence in the light which is most favorable to the People, and drawing all inferences the trier could reasonably have made to support the finding. The evidence must be reasonable, credible, and of solid value. It is the exclusive province of the jury, or the trial judge, to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*Ibid.*)

A single opinion by a psychiatric expert that a person is currently dangerous due to a severe mental disorder can constitute substantial evidence to support the extension of a commitment. (See *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165 [§ 1026.5 commitment].) Expert medical opinion evidence, however, cannot constitute substantial evidence if it is based upon a guess, surmise, or conjecture, rather than relevant, probative facts. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1504.)

Brouillette's argument is based on the California Supreme Court's decision in *People v. Allen* (2007) 42 Cal.4th 91 (*Allen*). During his parole period, Allen was transferred to Atascadero State Hospital for an involuntary commitment. Before his scheduled release on October 14, 2000, the prosecutor successfully petitioned to extend Allen's commitment three times to October 14, 2003. In April 2003, the director of Napa State Hospital, where Allen was then being held, sent a letter to the prosecutor recommending Allen's commitment be extended again. No petition was filed and Allen's commitment terminated on October 14, 2004. Allen filed a petition for habeas corpus from Napa State Hospital claiming the trial court lacked jurisdiction to extend his commitment because no recommitment petition was filed before October 14, 2003. The prosecutor filed such a petition on January 21, 2004, and did not explain any reasons for the delay. (*Id.* at p. 95.)

Allen filed a motion to dismiss the petition. The trial court denied Allen's motion and his petition for a writ of habeas corpus. On August 3, 2004, the trial court issued an order extending Allen's commitment to October 14, 2004. Allen appealed. (*Allen, supra*, at pp. 95-96.) The issue in *Allen* was whether the trial court had the authority to extend an *involuntary* MDO commitment *after* the prior commitment had terminated. (*Id.* at p. 94.)

In *Allen*, the Supreme Court held that the provisions in section 2972, subdivision (e) (section 2972(e))³ were not directory but mandatory and that the People's failure to file a new petition before the end of the commitment period of one year violated Allen's due process rights and took him out of the jurisdiction of the MDO act. (*Allen, supra*, 42 Cal.4th at pp. 95, 101-105.) The Supreme Court concluded, however, that under such circumstances, Allen could still come within the custodial treatment provisions of the Lanterman-Petris-Short Act (LPS Act) and proceedings could be initiated pursuant to its terms. (*Allen, supra*, 42 Cal.4th at pp. 95, 105-108.)

Respondent relies on *People v. Morris* (2005) 126 Cal.App.4th 527 (*Morris*). The trial court committed Morris as an MDO for a term of one year that was to end on February 3, 2004. Pursuant to section 2972, subdivision (d) (section 2972(d)), Morris spent the entire term of the commitment in outpatient status. The prosecutor failed to file a petition for recommitment until February 6, 2004. The trial court granted Morris's motion to dismiss the action on the ground that the prosecutor failed to file a petition for recommitment prior to the termination of the term of commitment. Section 2972(d) provides that a person committed as an MDO may be treated on an outpatient basis if the trial court finds there is reasonable cause to believe the person can safely and effectively be treated in such a manner. (*Morris, supra*, 126 Cal.App.4th at p. 533.)

The court in *Morris* observed that section 2972.1 sets forth a distinct set of recommitment procedures applicable to MDO committees who have been placed in outpatient treatment. *Morris* found that section 2972.1 does not require that the

³ Section 2972(e) provides: "Prior to the termination of a commitment under this section, a petition for recommitment may be filed to determine whether the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and whether by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others. The recommitment proceeding shall be conducted in accordance with the provisions of this section."

prosecutor “file a petition for recommitment in order to continue the involuntary treatment of an MDO.” (*Morris, supra*, 126 Cal.App.4th at p. 533.)

The prosecutor in *Morris* asserted section 2972.1 did not require the filing of a petition for recommitment in order for the trial court to extend the commitment of an MDO who had received a year of *outpatient* treatment. (*Morris, supra*, 126 Cal.App.4th at pp. 544-545.) An MDO who has received a year of involuntary inpatient treatment is subject to the recommitment procedures set forth in sections 2970 and 2972. Unlike sections 2970 and 2972, section 2972.1 does not require that the prosecutor file a petition in order to continue the involuntary treatment of an MDO who has received a year of outpatient treatment. Section 2972.1 authorizes the trial court to conduct a hearing without the prosecutor filing a petition. (*Morris, supra*, 126 Cal.App.4th at pp. 544-545.) Examining the legislative history of the MDO Act, the *Morris* court found that the act was intended to streamline the process of recommitting an outpatient MDO. The *Morris* court reversed the trial court’s order dismissing the action. (*Morris, supra*, 126 Cal.App.4th at p. 547.)

The instant appeal was taken from the trial court’s order of April 15, 2013, recommitting Brouillette to CONREP until December 22, 2013. Prior to the April 15, 2013 hearing, Brouillette had been on CONREP, receiving involuntary *outpatient* services. Under these facts, the prosecutor was not required to file a petition seeking Brouillette’s recommitment to CONREP because Brouillette was committed to CONREP pursuant to the alternative commitment procedure for outpatient MDOs set forth in section 2972.1. We therefore find the facts of *Allen* to be inapposite to those in the instant action and apply the holding of *Morris* here.

Brouillette’s appellate counsel argues that the clerk’s minutes and the trial court’s references during the hearing were to a section 2970 hearing. We do not find appellate counsel’s argument persuasive. The instant proceedings initially began years ago pursuant to sections 2970 and 2972, but Brouillette’s recommitment as an MDO at the

hearing on April 15, 2013, followed a prior commitment to outpatient services. Because Brouillette was being committed to outpatient services, the prosecutor was not obligated to file a formal petition to keep Brouillette in CONREP, even though the case was initiated over a decade ago pursuant to sections 2970 and 2972.

Brouillette has not appealed from the trial court's order of May 16, 2013, revoking his outpatient status and committing him to inpatient services at Metropolitan State Hospital. We note that Brouillette did not contest this commitment and waived his presence at the hearing on May 16, 2013. Subdivision (a) of section 2972.1 provides that in a hearing pursuant to its provisions, the court shall, "either discharge the person from commitment under appropriate provisions of law, order the person confined to a treatment facility, or renew its approval of outpatient status." (§ 2972.1, subd. (a).) We observe that the revocation of outpatient status and confinement to a treatment facility are contemplated by section 2972.1, subdivision (a) and section 1608, and a court may, therefore, confine an MDO to a treatment facility upon revocation of outpatient status without the filing of a petition to do so by the prosecutor.⁴

Brouillette's current commitment and mental health status are facts that are not before this court on this appeal. Because Brouillette's due process rights and liberty interests are at stake, we reiterate the following legal principle to guide the trial court and the parties in Brouillette's future MDO proceedings, if any. If Brouillette has remained an involuntarily committed inpatient MDO in a state mental hospital or other mental health facility, his continued inpatient commitment as an MDO will be governed by sections 2970 and 2972, as well as our Supreme Court's decision in *Allen*.

⁴ Section 1608 permits the revocation of outpatient status by the court after notice to the court by the CONREP treatment supervisor. This occurred in the instant action. Section 1609 permits a request for revocation of outpatient status by a petition filed by the prosecutor. A request for revocation of CONREP by the prosecutor under section 1609, however, is not a prerequisite to the revocation of CONREP by the trial court where, as here, the CONREP director notified the court of Brouillette's violation of CONREP pursuant to section 1608.

DISPOSITION

The judgment is affirmed.