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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK BARTOLOMEO PASCALI,

Defendant and Appellant.

H037198

(Santa Clara County

Super. Ct. No. CC128753)

Nick Bartolomeo Pascali appeals from an order extending his commitment under the Mentally Disordered Offender (MDO) Act. (Pen. Code, § 2960 et seq.)<sup>1</sup> Pascali contends that the MDO Act requires the committing court to advise him of the right to a jury trial and that a jury trial must be had absent his affirmative personal waiver of the right. Although the record fails to show that the court gave the required advisement or that either Pascali or his attorney expressly waived a jury, the record also demonstrates that Pascali actually knew of his jury trial right and participated in the court trial without objection, impliedly waiving the right. Accordingly, we shall affirm.

**I. LEGAL FRAMEWORK**

The MDO Act insures that persons 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. (*People v. Robinson* (1998) 63 Cal.App.4th 348, 351-352; §§ 2962, 2970.) If an offender's

<sup>1</sup> Further unspecified statutory references are to the Penal Code.

condition cannot be kept in remission without continued treatment, the offender can be subject to continued involuntary commitment even after a scheduled parole release date. (§ 2970.) Continued involuntary commitment “shall be for a period of one year from the date of termination of parole or a previous commitment or the scheduled date of release from prison as specified in Section 2970.” (§ 2972, subd. (c).)

In order to recommit a person under section 2972, the trial court must find (1) the person continues to have “a severe mental disorder”; (2) the person’s “mental disorder is not in remission or cannot be kept in remission without treatment”; and (3) the person continues to represent a “substantial danger of physical harm to others.” (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1398-1399; § 2972, subds. (c), (e).) If the committing court finds that there is “reasonable cause to believe that the committed person can be safely and effectively treated on an outpatient basis,” section 2972, subdivision (d) requires the court to order the person released as an outpatient.

## **II. FACTUAL BACKGROUND**

In 2001, Pascali struck a woman on the head with a pipe. He pleaded no contest to one count of inflicting corporal injury on a spouse or cohabitant and was placed on probation. When he violated probation he was sentenced to prison, certified as a mentally disordered offender under the MDO Act, and transferred to the state hospital. In 2005, he was released to South Bay Conditional Release Program (CONREP). In 2007, the placement was revoked because he twice drank cough medicine, failed to attend Alcoholics Anonymous (AA) meetings, forged signatures on AA attendance sheets, made unwelcome and verbally aggressive sexual advances to the operator of the board and care home, and had not disclosed to his CONREP care team the details of his relationships with women. Pascali’s commitment has been extended annually since then. This case commenced with the May 4, 2011 petition filed by the Santa Clara County District Attorney, seeking another one-year extension.

Trial was to the court on July 28, 2011. Napa State Hospital staff psychiatrist Leif Skille testified that he was Pascali's treating psychiatrist. He stated that Pascali suffers from a psychotic disorder, a mood disorder, a cognitive disorder (borderline intellectual functioning), and alcohol dependence that is in remission while in a controlled environment. Pascali cannot read or write and speaks only Spanish. Pascali's medical regimen treats his psychosis and has stabilized his mood disorder but there are no medicines to treat his borderline intellectual functioning. "So he has some difficulties with processing information. Has a tendency to be somewhat of a rigid thinker, not real flexible in terms of his thinking, and especially in terms of problem solving, and needs things to be presented to him in very simple--simple ways for him to understand it."

According to Skille, Pascali's danger to the community relates to his use of alcohol, his relationships with women, and his deceitfulness when dealing with his care providers. His treatment plan is that he complete a relapse plan for mental illness and substance use, fully disclose all relationships with women, follow the rules while in the hospital, and be honest. In spite of his cognitive deficit he has been able to move forward with a relapse plan. But he has not been completely successful with the rest of the treatment plan. He became involved with a female client and did not disclose the relationship to his care team. He had accepted gifts from the woman, which was a breach of hospital rules. He also lied about having sold a portable music player to another resident. Hospital rules forbid the unsupervised exchange of property between residents.

Skille believed that the best test of how a person will function upon release is to release him "in a CONREP setting," maintaining the person's MDO status until his functioning can be assessed in the more stressful outpatient environment. But CONREP was unwilling to take Pascali because CONREP could not provide the level of supervision they believed he would need. The STARS (Specialized Treatment Recovery Services) program, a highly structured outpatient program in Sacramento, could provide

more intensive supervision and was willing to take Pascali but Pascali was not willing to go there, preferring release to the Santa Clara County area where his family lives.

On cross-examination Skille agreed that he believed Pascali's mood and psychotic disorders were stable and that Pascali would continue to take his medication even if unsupervised. His principal concern is that he remains sober: "If he does not relapse into substance use at all and he takes his medication, I think he could be stable."

Pascali was the only other witness. He stated, "I have no mental problems because I have not attacked anyone" since being incarcerated. At first he stated that he does not know what his medication is for and has asked the doctor to reduce it because "it was hurting me a lot." He later stated that he knew the medicine was to prevent a relapse, which might mean he would hear voices or stop eating or sleeping. He would continue to take the medicine if released to prevent such a relapse.

Pascali remained unwilling to go to Sacramento. "They can kill me. It's impossible for me. I'm going to suffer more over there than what I am doing here." The prosecutor explained that CONREP was unwilling to take him but that there was an outpatient program in Sacramento that would take him. He could go there "for just a while and then transition back [to Santa Clara County]." Counsel asked if he were "willing to give that program in Sacramento a chance? It's outpatient. You would not be in a hospital any longer." Pascali responded, "It's very hard for me without seeing my family. That's the problem that I have. But if they don't want to release me from Napa, I want to go to jury trial in court."

The trial court noted that Pascali was doing a "really terrific job" in some ways. "The problem I'm seeing is is [sic] that you're really fixated on wanting to get back here to San Jose where your family is, and the problem is--and the problem is is [sic] that they're not going to accept you unless you go through the STARS program in Sacramento. Sounds to me like the way to San Jose is through Sacramento." The court explained that the best way to get to CONREP in San Jose is to do well at STARS and

asked, “What do you think?” Pascali responded, “So if I do things right, how long is it going to take me to be there before I can come back here?” The trial court told him that there was no concrete answer and it would depend upon how well he followed his treatment plan. The following colloquy ensued:

“[Pascali]: I prefer to go to jury trial again.

“The Court: Well, that’s not in the cards.

“[Pascali]: Well, I have my rights, though, on the case.

“[Pascali’s Attorney]: I’m sure Mr. Pascali thanks the court for his kind words and encouragement.”

The court found the allegations of the petition to be true and that Pascali suffers from a “severe mental disorder, that it’s not in remission, cannot be kept in remission without continued treatment. By reason of a mental disorder he represents a substantial danger of physical harm to others. I will therefore grant the [P]eople’s petition for another year.” The order expires August 22, 2012. This timely appeal followed.

### **III. DISCUSSION**

Pascali contends that under the MDO Act the trial court must advise him of his right to a jury trial and that absent his affirmative, personal waiver of the right to trial must be by jury. Indeed, section 2972, subdivision (a), provides, “The court shall conduct a hearing on the petition under Section 2970 for continued treatment. The court shall advise the person of his or her right to be represented by an attorney and of the right to a jury trial. . . . [¶] . . . The trial shall be by jury unless waived by both the person and the district attorney.”

The statute clearly requires the trial court to advise the person being committed under the MDO Act of his or her right to a jury trial. Here, there is no indication that the trial court gave that advisement. Reporter’s transcripts for the three pretrial hearings have not been made part of the record but the clerk’s minutes for those hearings indicate that Pascali was not present. The forms that are used for the clerk’s minutes contain

check boxes to show that a defendant has been advised of his right to a jury trial but none of them is checked. And the reporter's transcript of the trial contains no express advisement. Nevertheless, there is no question that Pascali knew he had a right to a jury trial. At the end of the hearing, when it looked as if the court might grant the petition and continue his commitment, Pascali stated that "if they don't want to release me from Napa, I want to go to jury trial in court," and repeated that he wanted to "go to jury trial again." Indeed, in an earlier appeal, Pascali raised the very same issue he raises here, which means he must have known he had the right to a jury.<sup>2</sup> If the purpose of the advisement is to insure that the inmate is aware of the right, then the failure to advise in this case was completely harmless because Pascali was aware.

Pascali also argues that he must make a personal waiver of the right to a jury trial; his counsel's waiver, he says, is not enough. Even if the person must make the waiver personally, Pascali implicitly did so when he participated in the court trial, without objection, knowing he could have had a jury if he wanted one. Pascali cites *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1273, in support of his argument that any jury waiver must be express. But in *Cosgrove*, trial was before a jury; the error involved the trial court's granting the prosecution's motion for a directed verdict. *Cosgrove* held that in light of the statutory requirements the trial court did not have discretion to take the matter away from the jury when neither defendant nor his counsel had waived the jury. (*Id.* at pp. 1274-1275.) The case does not stand for the proposition that a jury waiver cannot be implied.

We conclude that the trial court's failure to advise Pascali of his right to a jury trial was harmless error, whether we analyze the question under *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24. Pascali knew he had a

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<sup>2</sup> On our own motion we have taken judicial notice of our nonpublished opinion in *People v. Pascali* (Dec. 18, 2008) H031995.

right to a jury and he implicitly waived it. Given our conclusion that Pascali was not erroneously deprived of a jury trial we need not reach his further arguments relating to the deprivation of the right.

**IV. DISPOSITION**

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.