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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SON VAN NGO,

Defendant and Appellant.

H037535

(Santa Clara County

Super. Ct. No. 150919)

Defendant Son Van Ngo appeals from the trial court's order extending his commitment as a mentally disordered offender (MDO) for one year. On appeal, Ngo asserts that the order of commitment must be reversed because the court did not advise him of his right to a jury trial nor did he personally waive his right to a jury trial.

We disagree and shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the petition to compel involuntary treatment and supporting documents, in February 1992, Ngo was convicted of violating Penal Code former section 12020, subdivision (a),¹ after he "entered a bank, presented a demand note to a teller, and was subsequently arrested inside the bank; Mr. Ngo had in his possession a six-inch dagger, a derringer replica, and two homemade guns." Ngo was sentenced to two years in prison.

¹ Further unspecified statutory references are to the Penal Code.

In July 1994, Ngo was transferred to Atascadero State Hospital for treatment after being certified as an MDO. On November 15, 1994, he was released on outpatient status to the South Bay Conditional Release Program (CONREP).

From November 1994 to May 1998, Ngo was treated through CONREP, but on May 13, 1998, he failed to keep his appointment. CONREP staff learned Ngo had left the county. A bench warrant was issued for his arrest on May 15, 1998.

In February 1999, Ngo was arrested in Hawaii and returned to Santa Clara County. His outpatient status was revoked and he was remanded to confinement at the Atascadero State Hospital.

In 2007, Ngo was again released on outpatient status to CONREP. In August of that year, he again failed to comply with the terms of his release and “went AWOL once again.” His outpatient status was revoked and he was placed at Patton State Hospital.

On July 18, 2011, the district attorney filed a petition seeking to extend Ngo’s involuntary treatment at Patton State Hospital, pursuant to section 2970, for a period of one year, from December 14, 2011 to December 14, 2012. The petition was based on a recommendation submitted by the medical director at Patton State Hospital and a report prepared by two Patton State Hospital staff members, consisting of a clinical social worker and a psychiatrist.

The report indicated that Ngo “suffers from chronic paranoid schizophrenia, with delusions and auditory hallucinations.” He believes “that Russian Jew scientists put some voodoo into his body many years ago, and that voodoo controls his dreams and visions. He also complains that voodoo gives him pain all over his body. When released he plans to go to Hanoi, marry his girlfriend and start a family. In addition, he plans to search for the Russian scientists who put the voodoo in his body and make them remove it so he can be normal again.”

While committed, Ngo assaulted a male peer in November 2010, “because the peer was talking to himself in Vietnamese and Mr. Ngo believed that the individual was

talking about him.” Ngo has a long history of substance abuse, including heroin and opium, and is the subject of an involuntary medication order due to his refusal to take his psychotropic medications.

Ngo “continues to be seen laughing and talking to himself on a daily basis, although not as often. It is clear he still suffers from the symptoms of his illness but the intensity has decreased.” Ngo “denies he is mentally ill or that he needs psychotropic medications. Furthermore, Mr. Ngo states that when he is released from the hospital he will discontinue his medication regiment.”

At an August 19, 2011 hearing, the petition was set for an October 24, 2011 court trial. Ngo was not present at this hearing, and no reporter’s transcript was provided with the record on appeal. The pre-printed minute order prepared in connection with this hearing includes a tick mark in a box labeled “CT” and a tick mark in a box labeled “Peo/Def Wav Jury.”

Ngo was present at the October 24, 2011 court trial. There was no discussion about Ngo’s right to a jury trial, and neither he nor his attorney objected to proceeding without a jury. Dr. Ramila Duwal, Ngo’s treating psychiatrist at Patton State Hospital, testified as an expert in the diagnosis and treatment of mental disorders and in risk assessment. According to Dr. Duwal, in addition to the incident involving the bank, Ngo had previously been convicted of manslaughter, attempted manslaughter, carrying concealed weapons and causing great bodily injury. Dr. Duwal diagnosed Ngo as having “schizophrenia paranoid subtype,” and “polysubstance dependence.” Up to two months prior to the hearing, Ngo’s symptoms included his belief that the Russians were controlling him with electrodes which had been put into his brain. He also believed he had voodoo in his body, and “when he is ill, his mind is preoccupied with the Russians and voodoo.”

After the incident in November 2010 in which Ngo assaulted another patient, Dr. Duwal sought and obtained an involuntary medication order. After that, Ngo has not acted out violently, though Dr. Duwal ascribes this to the medication.

Dr. Duwal stated Ngo's condition had improved in the two months preceding the hearing because he had been taking his medication, though he still has a significant mental disorder. Up until two months ago, Ngo denied having a mental disorder and was not taking his medication voluntarily. He now admits having a mental disorder and would like to go to CONREP if possible. Ngo is now in the beginning stages of his wellness and recovery plan, since he "understands he has a mental disorder, but he's not to the point where he can tell you what his triggers are and what he needs to do in order to stay away from trouble or substances." When asked what Ngo would need to do to transition into the community, Dr. Duwal said "We . . . would like to see him know about his mental illness, his triggers, his symptoms, his medications and also not just for his mental illness but substance abuse so that when he gets out he doesn't re-offend and come back because he has been in CONREP before and he AWOLed [*sic*]." Dr. Duwal admitted that Ngo was "moving in the right direction." In Dr. Duwal's opinion, Ngo is a person with a severe mental disorder and posed a substantial risk of physical harm to others if his commitment were not extended.

On cross-examination, Dr. Duwal said that Ngo had not been talking to himself as much during the past two months, nor had he talked about his delusions. Ngo told Dr. Duwal he "doesn't think like that anymore and that the medication has helped those delusions go away." Ngo also told Dr. Duwal he would continue taking his medication if released from the hospital. Prior to two months ago, he would never say that.

Dr. Duwal also said that there had been no indications that Ngo had used heroin while in the hospital, though he admitted to heroin use in the past. According to Dr. Duwal, it is possible for patients to obtain illegal drugs and sometimes patients do use

such drugs while in the hospital. However, Dr. Duwal did not believe Ngo's polysubstance dependence was in remission.

Ngo presented no evidence on his behalf.

The court found Ngo met the criteria of section 2970 and extended his commitment for one year, to December 14, 2012.

II. DISCUSSION

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 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.

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."

A. *The right to jury trial on extending an MDO commitment is statutory, not constitutional*

Ngo asserts that the trial court's failure to advise him of his right to a jury trial and its failure to obtain his personal waiver of that right before proceeding with a court trial on the recommitment petition violated his federal and state constitutional due process and equal protection rights.

We disagree. The right to a jury trial on extending on MDO commitment is wholly statutory, as we explain below.

1. *Federal authority*

Under the Fourteenth Amendment, the Sixth Amendment right to a jury trial in all criminal prosecutions is extended to proceedings in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) It does not, however, apply to proceedings that are not criminal prosecutions. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528, 541, 550, 553-554.) The United States Supreme Court has not directly considered whether the right to a jury trial applies to civil commitments based on a person's dangerousness due to a mental disorder. The Ninth Circuit Court of Appeals, among other federal appellate courts, has considered this question and concluded that a federal hospital commitment for a person adjudged incompetent to stand trial "serves a regulatory, rather than punitive purpose," thus the Sixth Amendment right to a jury trial does not apply. (*United States v. Sahhar* (9th Cir. 1990) 917 F.2d 1197, 1205-1206.)

The Seventh Amendment also provides for the right to a jury trial for civil suits at common law, but this is not one of the amendments selectively incorporated as part of the process due in state courts under the Fourteenth Amendment. (*McDonald v. City of Chicago* (2010) __ U.S. __ [130 S.Ct. 3020, 3034-3035, fn. 13].)

Finally, the Fifth Amendment's due process clause has not been interpreted to require a jury trial in federal civil commitment proceedings based on a person's dangerousness or mental incompetence. (*United States v. Sahhar, supra*, 917 F.2d at

page 1207 [“due process does not require a jury trial” in a federal criminal proceeding determining a defendant’s competence to stand trial]; *United States v. Carta* (1st Cir. 2010) 592 F.3d 34, 43 [no due process right to jury trial in federal civil commitment as sexually dangerous person].)²

2. *State authority*

The California Constitution affords “an inviolate right” to a jury trial in criminal actions in which a felony or a misdemeanor is charged. (Cal. Const., art. I, § 16.)³ A variety of California statutes have provided for the involuntary commitment and treatment of persons incompetent to stand trial or otherwise dangerous by virtue of mental illness. These proceedings are generally recognized to be essentially civil, not criminal, although their subjects are afforded by statute some of the same rights constitutionally due criminal defendants. (E.g., *In re De La O* (1963) 59 Cal.2d 128, 150 [narcotics addict commitment proceedings “are in the nature of special civil proceedings unknown to the common law, and hence there is no right to jury trial unless it is given by the statute.”]; *In re Beville* (1968) 68 Cal.2d 854, 858 [commitments under mentally disordered sex offender statutes (since repealed) “are civil in nature and are collateral to the criminal proceedings.”]; *In re Gary W.* (1971) 5 Cal.3d 296, 309 [extensions of

² Other due process rights, such as the right to counsel, the opportunity to be heard, the right to confront and cross-examine witnesses, the right to present evidence on his own behalf and the right to findings adequate to allow for a meaningful appeal, have been found to apply to civil commitment proceedings. (*Specht v. Patterson* (1967) 386 U.S. 605, 610.)

³ The California Constitution also affords a right to jury trial in civil cases when such a right existed at common law when the Constitution was adopted in 1850. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286-287.) Ngo has not suggested there was any pre-1850 common law analog to proceedings to extend the outpatient treatment of an MDO. (Cf. *People v. Fuller* (1964) 226 Cal.App.2d 331, 335 [sexual psychopathy proceedings were “civil in nature and of a character unknown at common law” and therefore, “the use of a jury is a matter of legislative grant and not of constitutional right.”].)

commitment to the California Youth Authority under Welf. & Inst. Code, former § 1800 “are not juvenile proceedings, and are not criminal,” but “are ‘special proceedings of a civil nature.’ ”.)

In *People v. Masterson* (1994) 8 Cal.4th 965, 969 (*Masterson*), the Supreme Court surveyed authority pertaining to the right to a jury trial in a proceeding to determine competency to stand criminal trial. “[W]hat applies to a criminal case does not necessarily apply to a competency proceeding. A competency proceeding, although certainly related to the underlying criminal case, is not itself a criminal action. As the Court of Appeal correctly observed, ‘A proceeding to determine competency to stand trial is neither a criminal action nor a civil action; rather, it is a special proceeding. (Code Civ. Proc., § 23; [citations].)’ [Citation.] ¶] Although there is a constitutional right to a jury trial in criminal and civil actions (Cal. Const., art. I, § 16), there is no such right in a competency proceeding. There is indeed a right to a jury trial in a competency proceeding, but it is statutory, not constitutional. (Pen. Code, § 1369; [citations].)” The court concluded in *Masterson* that defense counsel could waive the statutory right to a jury trial in a mental competency hearing pursuant to sections 1368 and 1369, even over the defendant’s objection. (*Masterson, supra*, at p. 974.)

The rationale of *Masterson* was extended to MDO proceedings in *People v. Montoya* (2001) 86 Cal.App.4th 825 (*Montoya*). In *Montoya*, the section 2970 extended commitment hearing was originally scheduled for a jury trial, but was reset for a court trial in the defendant’s absence. When the court trial commenced with the defendant present, defense counsel acknowledged having waived jury. (*Montoya, supra*, at pp. 827-828.)

The defendant in *Montoya* argued “at length, citing to numerous federal cases dealing with the Sixth Amendment jury trial rights of criminal defendants, that because he did not *personally* waive his right to a jury trial, his federal and state constitutional rights were infringed.” (*Montoya, supra*, 86 Cal.App.4th. at pp. 828-829.) The appellate

court stated: “in proceedings that are neither civil nor criminal, but ‘special proceedings,’ such as a competency hearing, the right to a jury trial may be waived by counsel, even over defendant’s express objection. (*Masterson, supra*, [8 Cal.4th] at p. 969.) [¶] Although a section 2970 hearing, like a competency hearing, is something of a hybrid, a civil hearing with criminal procedural safeguards, [fn. omitted] it is nonetheless, as the statute clearly states and California courts have consistently agreed, a civil hearing.” (*Id.* at pp. 829-830.) The court concluded, “[a]s a civil hearing, jury trial may thus be waived ‘as prescribed by statute.’ (Cal. Const., art. I, § 16.) The question then is whether the words ‘[t]he trial shall be by jury unless waived by both the person and the district attorney’ in section 2972 mean defense counsel may waive jury trial on behalf of his client, as happened in the instant case. We think they do.” (*Ibid.*)

Finding no federal due process right, the *Montoya* court observed that, “[a] jury sitting in a civil hearing pursuant to sections 2970 and 2972 does not impose criminal punishment and has no power to determine the extent to which the defendant will be deprived of his liberty. Defendant’s jury trial interest thus is, in this case, ‘merely a matter of state procedural law’ and does not implicate the Fourteenth Amendment.” (*Montoya, supra*, 86 Cal.App.4th at p. 832.)

To the extent Ngo relies on *People v. Alvas* (1990) 221 Cal.App.3d 1459 (disapproved in *People v. Barrett* (2012) 54 Cal.4th 1081) and *People v. Bailie* (2006) 144 Cal.App.4th 841 (disapproved in *Barrett*), to support his constitutional due process and equal protection arguments, the analyses in those cases has been expressly disapproved by the California Supreme Court in *Barrett*.

The possible outcomes of a section 2972 hearing, if the petition is sustained, are that “the court shall order the patient recommitted to the facility in which the patient was confined at the time the petition was filed, or recommitted to the outpatient program in which he or she was being treated at the time the petition was filed, or committed to the State Department of Mental Health if the person was in prison. The 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 Ngo’s case, the infringement on his liberty is to require him to continue to receive treatment at a state hospital for one year.

While some process is constitutionally due whenever an involuntary commitment involves a significant deprivation of liberty, that process does not include elevating a statutory right to a constitutional right that is not otherwise recognized at common law in special proceedings. We conclude that Ngo has neither a federal nor a state constitutional right to a jury trial in a hearing under sections 2970 and 2972.

B. Ngo has not shown prejudice

Here, the appellate record does not establish that the trial court advised Ngo of his statutory right to a jury trial. It does appear that, at the August 19, 2011 hearing, Ngo’s attorney waived that right and opted for a court trial instead. To the extent either of these circumstances constitutes error, they are errors of state law reviewable under *People v. Watson* (1956) 46 Cal.2d 818, and the question is whether it is reasonably probable that a result more favorable to Ngo would have been reached absent the errors.

Ngo’s position appears to be that, because Dr. Duwal acknowledged on cross-examination that Ngo had recently admitted he had a mental illness and was taking his medication, there was a reasonable probability a jury would have reached a different conclusion than that reached by the judge. We disagree.

People v. Cosgrove (2002) 100 Cal.App.4th 1266, found the denial of a jury trial harmless when the expert testimony in support of an MDO finding was “overwhelming” and essentially unshaken by cross-examination. (*Id.* at p. 1276.) Dr. Duwal’s testimony may not qualify as overwhelming, but it cannot be described as unreliable regarding Ngo’s need for continued involuntary treatment. Ngo had only recently acknowledged that he was a person with a mental disorder, which required medication to control. Though Ngo was voluntarily taking his prescribed medication, Dr. Duwal testified she

believed he was doing so only because he understood it would be forcibly administered if he were to refuse. Ngo presented no expert evidence to contradict Dr. Duwal regarding his potential for danger; in fact, Ngo presented no evidence whatsoever on his own behalf. We conclude that it is not reasonably probable that a jury would have evaluated the trial testimony any differently than did the trial judge.⁴

III. DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Grover, J.*

⁴ In light of this conclusion, we need not resolve the Attorney General's contention that Ngo has forfeited his appellate challenge by failing to object to a court trial.

* Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.