

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN LAROY KELLUM,

Defendant and Appellant.

H037676

(Santa Clara County

Super. Ct. No. C1108261)

Defendant Sean Laroy Kellum pleaded no contest to residential burglary of his mother's house. The trial court suspended the imposition of his sentence and placed him on probation for three years with a condition, among others, that he serve 180 days in jail. Near the end of his jail term—but when there were no actual or potential proceedings pending that put defendant in penal jeopardy—he was brought before the trial court to address his jailers' concerns about his mental health. Defendant's counsel also declared a doubt regarding defendant's mental competence, so the court suspended criminal proceedings pursuant to Penal Code section 1368 and appointed two psychologists to assess his mental competence. Those psychologists concluded defendant was mentally incompetent to assist in his defense. One of them further opined that he was delusional for believing his defense had concluded, whereas the other psychologist said that this belief was rational and not delusional. Subsequently, over defendant's objections, the

trial court issued a commitment order sending defendant to a mental hospital for up to three years or until his competence is restored.

On appeal, defendant asserts that because he had pleaded no contest and was already sentenced, there was no pending trial that required his assistance. Furthermore, because his counsel urged the court to declare him incompetent, he also presents an ineffective assistance of counsel claim.

We conclude that the trial court lacked the authority to issue the commitment order after it had already granted probation and defendant had begun to comply with his probation requirements, including the jail-term component, and when there were no actual or potential proceedings pending that put defendant in penal jeopardy. The proceedings to which section 1368 apply—defendant’s mental competence to understand the nature of the criminal proceedings against him or to assist counsel in the conduct of his defense in a rational manner—were finished once defendant pleaded no contest to the charges and probation was granted. Defendant’s probation was not revoked; no one was proposing to revoke it; and there was no evidence that he was violating any probation condition. Yet the court, apparently out of concern for defendant’s well being, invoked proceedings under section 1368 to assess whether defendant was mentally competent to be released from jail in the normal course of complying with his probation terms. There are a number of statutory schemes to address the mental health needs of those who pose a danger to themselves or others due to their mental illness; section 1367 et seq. of the Penal Code is not one of those schemes. Thus, the court exceeded its authority when it issued the commitment order in the absence of actual or potential proceedings pending that could put defendant in penal jeopardy. We will reverse the order.

#### FACTS AND PROCEDURAL BACKGROUND

Defendant pleaded no contest to the felony offense of first-degree residential burglary in violation of Penal Code sections 459 and 460. The trial court suspended imposition of sentence and placed defendant on three years’ formal probation. One

condition of probation required him to serve 180 in county jail, minus 68 days' worth of presentence credits, for a net commitment term of 112 days.

Defendant began to serve his time in jail. There his mental condition apparently deteriorated. He did not maintain his hygiene and according to jail staff was hostile, would remain awake through the night, and was "somewhat paranoid."

The case returned to the trial court on August 25 and September 8, 2011, to consider these matters. By this time defendant appears to have been on the verge of release. The court told defendant, who objected to further proceedings when his release from custody was imminent, "we have to determine whether or not you are competent [to] proceed on probation." Defense counsel also told defendant during the hearing, "You have to be competent to be on probation." "You're not cooperating with the terms and conditions," she added. The court signed a form document stating that "a doubt having arisen before judgment as to the present competency of said defendant," a competence inquiry would be undertaken.

The trial court ordered psychological evaluations, which were done by two licensed clinical psychologists. During these evaluations, defendant commented, as he had told the trial court, that he was "just waiting for his release" after entering his plea and serving the jail confinement that was one component of the probation conditions. Defendant's point was that because there was no remaining defense, he did not see that he needed to assist in any defense.

One of the psychologists regarded this stance as delusional. He stated in his report, "marked deficits were evident in his rational understanding of his own case. For example, [he] repeatedly made statements such as, 'I've already done my time. They have to let me go,' and 'I've already been sentenced.' When asked about these claims, he stated he had previously pled 'no contest,' accepted a plea bargain, and was 'sentenced in June.'"

The other psychologist reached the opposite conclusion. Regarding defendant's "actual legal predicament," "[h]is responses did not evince any delusional thinking. . . . [H]e said that he has already pled guilty, waived his right[s] and done his time. He gave a similar explanation . . . about how much punishment he might get if he is found guilty."

The psychologists both concluded that defendant could not assist in his defense. The trial court then convened proceedings to discuss these psychological assessments. Over defendant's renewed and personally expressed objection, his trial counsel moved to have him declared incompetent to assist in his defense. The trial court granted the motion and, following an assessment from the South Bay Conditional Release Program that defendant "is not a candidate for outpatient treatment," ordered him institutionalized "in a locked psychiatric facility" for mental health treatment for as long as three years. The commitment order stated, "Criminal proceedings remain suspended."

It is from this commitment order that defendant appeals, as authorized by decisional interpretation of subdivision (a)(1) of Code of Civil Procedure section 904.1. (*People v. Christiana* (2010) 190 Cal.App.4th 1040, 1045-1046.)

## DISCUSSION

On appeal, defendant claims that because there were no actual or potential proceedings pending that put him in penal jeopardy, the trial court lacked authority under state law to find him incompetent to assist in his defense—i.e., no defense was pending or necessary—and, therefore, the court lacked authority to commit him to a state hospital for evaluation of suitability for such proceedings. He further claims that the court's actions violated his right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. Along with this legal argument, he observes as a policy matter that the result is harsh, because the commitment period for a person declared incompetent could last three years, whereas the jail-term component of his probation conditions was shorter and he had already served most of it. Finally, he claims

ineffective assistance of counsel since his attorney moved to have him committed as incompetent.

By way of brief background, it is important to note that there are two alternative ways of granting felony probation to a defendant. (Pen. Code, § 1203.1, subd. (a); see *Stephens v. Toomey* (1959) 51 Cal.2d 864, 870-871.) First, a trial court may impose judgment, sentence the defendant, and then suspend execution of the sentence, thereby placing the defendant on probation. (3 Witkin & Epstein, Cal. Criminal. Law (4th ed. 2012) Punishment, § 646, p. 1044.) Or second, the court may instead decline to pronounce judgment and suspend the imposition of the sentence. (*Id.*, § 645, p. 1044.) “Under this [second] method, the judge suspends imposing the sentence, by refraining from any pronouncement of judgment. Without the pronouncement and entry of judgment, the judge cannot commit the defendant to the prison authorities, and the effect is necessarily the equivalent of probation granted.” (*Ibid.*)

Under California law, the trial-competence inquiry is, naturally, an inquiry that precedes the end of the trial and the imposition of judgment. “When a trial court is presented with evidence that raises a reasonable doubt about a defendant’s mental competence to stand trial, federal due process principles require that trial proceedings be suspended and a hearing be held to determine the defendant’s competence. [Citations.] Only upon a determination that the defendant is mentally competent may the matter proceed to trial. [Citation.] [¶] California law reflects those constitutional requirements. [Penal Code] [s]ection 1368, in subdivision (a), requires a trial court to suspend criminal proceedings at any time ‘prior to judgment’ if the court reasonably doubts ‘the mental competence of the defendant.’” (*People v. Ary* (2011) 51 Cal.4th 510, 517; see *Drope v. Missouri* (1975) 420 U.S. 162, 171, 172, 173.)

The People assert that defendant is wrong to argue that he had been “adjudged to punishment.” They maintain that he “ignores the fact that in this case the sentencing judge suspended imposition of sentence before imposing formal probation for three

years,” which is the second alternative way to grant felony probation that was described earlier. Next, they contend that “[t]he record suggests that the trial court was considering summary revocation of probation pursuant to Penal Code section 1203.2.” (As we will discuss further below, however, the record does not suggest to us that the trial court had this in mind.) Given that perception of the record, they argue, with respect to defendant’s ineffective assistance of counsel claim, reasonable counsel could want to spare defendant a prison sentence by having him committed to a mental hospital instead, and that such a concern would have been well-founded, because probation revocation proceedings may be suspended if a doubt is declared that a defendant is competent to contest the proposed revocation.

We take up these points in turn. The People’s first point is that there was still no judgment in the case when the trial-competence inquiry was commenced. That is true, technically speaking, and that circumstance implicates subdivision (a) of Penal Code section 1367, which provides in relevant part: “A person cannot be tried or adjudged to punishment while that person is mentally incompetent.” It also implicates Penal Code section 1368, which provides that if, “prior to judgment,” (*id.*, subd. (a)) the trial court doubts a defendant’s competence, the court may be required to suspend criminal proceedings until the defendant’s mental capabilities can be determined.

The California Supreme Court has said that the probation alternative granted to defendant here constitutes “neither ‘punishment’ [citation] nor a criminal ‘judgment’ ” (*People v. Howard* (1997) 16 Cal.4th 1081, 1092). “When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. [Citations.] The probation order is considered to be a final judgment only for the ‘limited purpose of taking an appeal therefrom.’ ” (*Id.* at p. 1087.)

The phraseology “no judgment is then pending against the probationer” (*People v. Howard, supra*, at p. 1087) is not entirely clear. Further analysis shows that the *Howard*

court meant there is no judgment in place at all—it remains a contingent future possibility. “Although there is no judgment pending against him, he is still subject to the restraints of the order of probation and for the duration thereof. If he should violate its conditions he is subject to a revocation of the order of probation with pronouncement of judgment and sentence to follow.” (*Stephens v. Toomey, supra*, 51 Cal.2d at p. 871.) It is also true that probation revocation proceedings may be suspended if a doubt is declared about the probationer’s competence prior to judgment. (*People v. Hays* (1976) 54 Cal.App.3d 755, 759; *People v. Humphrey* (1975) 45 Cal.App.3d 32, 36.)

But we have found no authority for the proposition that a trial court may remove from jail a defendant who is complying with his probation conditions and is about to be released to commit him to mental health treatment for up to three years, even if as a technical matter final judgment remained to be entered if certain contingent circumstances arose. The purpose of the criminal defendant mental competence statutes is to “evaluate the nature of the defendant’s mental disorder, if any, the defendant’s ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder and . . . whether or not treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence.” In other words, the statutes apply to the question whether a defendant is “mentally incompetent to stand trial . . .” (Pen. Code, § 1370, subd. (a)(1)(B)(ii).) The Legislature’s intent is that “[i]f the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged shall proceed, and judgment may be pronounced.” (*Id.*, § 1370.01, subd. (a)(1).) Here, no trial was pending or even foreseeable. And defendant—once restored to competence, if indeed he is incompetent—would face no further proceedings so long as he continued to comply with his probation terms without incident, as he had been doing. Thus, no purpose was served at this stage

in the proceedings in holding a competency hearing to commit defendant to a mental hospital for up to three years or until his competence is restored.

Turning to the People's second point that the trial court was considering the revocation of defendant's probation: It would be different if the trial court had first summarily revoked defendant's probation or announced an intention to do so. But as stated, the record does not suggest that the trial court had this in mind. To be sure, if the court did have revocation in mind, then even if it were mistaken that defendant had violated his probation conditions, its mere triggering of a revocation proceeding would place defendant in jeopardy of punishment and he would be entitled to the protections of, and subject to the rigors of, the mental competence inquiry statutes. *People v. Hays*, *supra*, 54 Cal.App.3d 755, and *People v. Humphrey*, *supra*, 45 Cal.App.3d 32, held that individuals whose probation had been or was proposed to be revoked were, in the words of *Humphrey*, entitled to "a hearing to determine" competence before the court could "pronounc[e] sentence." (*Humphrey*, *supra*, at p. 38.) In the words of *Hays*, the guaranties contained in the competence inquiry statutes apply when "the defendant is before the court on a motion to revoke probation." (*Hays*, *supra*, at p. 759.) But we are not presented with that procedural situation.

The parties not having made us aware of any authority to support the trial court's commitment order, and none appearing to us through our own research, the order will be reversed on state law grounds. Because we reach this conclusion, we need not address defendant's constitutionally based due process or ineffective assistance of counsel claims.

#### DISPOSITION

The order committing defendant to a locked psychiatric facility for mental health treatment is reversed.

---

Márquez, J.

WE CONCUR:

---

Premo, Acting P. J.

---

Mihara, J.