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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
JAMES ALLEN O'DAY,
Defendant and Appellant.

H038343
(Santa Clara County
Super. Ct. No. CC116051)

Defendant James Allen O'Day appeals the Superior Court's order extending his civil commitment pursuant to Penal Code section 1026.5, subdivision (b).¹ On appeal, defendant claims the trial court erred by failing to: (1) personally advise defendant of his statutory right to a jury trial; and (2) obtain defendant's personal waiver of that right. Defendant contends these errors were prejudicial because it is reasonably probable a result more favorable to defendant would have occurred if the extension proceeding took place before a jury. For the reasons stated here, we will affirm the trial court's order extending defendant's commitment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant's commitment arose from an altercation between defendant and a woman in 2001. After the woman passed him on the street, defendant grabbed her from behind and threw her down, causing a three-inch hematoma on the back of her head. Defendant was drunk at the time of the incident.

¹ All further unspecified statutory references are to the Penal Code.

The People charged defendant with felony assault with a deadly weapon (§ 245, subd. (a)(1)), and an enhancement for causing great bodily injury (§ 12022.7). After being found not guilty by reason of insanity, the trial court committed defendant to Atascadero State Hospital² in January 2002 pursuant to sections 1026 and 1026.5.

In January 2012, the People petitioned to extend defendant's commitment under section 1026.5, subdivision (b). At a status conference in April 2012, defendant's court-appointed counsel stated it was defendant's "desire" to waive his right to a jury trial. Based on that representation, the trial court conducted a bench trial in May 2012, where the court heard testimony from defendant as well as defendant's treating psychologist, Nina Woods, Ph.D.

Woods testified she had been defendant's treating psychologist for three and one-half years at the time of the trial. According to Woods, defendant is diagnosed with schizoaffective disorder (bipolar-type), polysubstance dependence, and borderline intellectual functioning. During her testimony, Woods identified areas in which defendant had made positive progress, including: attending and positively participating in group sessions; taking medication; indicating willingness to go to a mental health center if released; decreased statements of desire for alcohol; and decreased pressuring of peers for items such as money. Despite this positive progress, Woods nonetheless opined that defendant was not prepared for release.

As support for her recommendation to extend defendant's commitment, Woods pointed to several remaining concerns. She noted defendant "continues to have pressured speech, distractibility, problems with impulse control, some problems with impaired judgment, and he is quickly angered." Woods was also concerned that, although defendant can identify his diagnosis by name, he does not appear to understand what the diagnosis means. Because he fails to understand his conditions and the need for

² Defendant was later transferred to Napa State Hospital, where he currently resides.

medication to keep them under control, Woods lacked confidence that defendant would take his medication if released and feared he might turn to alcohol and street drugs instead. Her concern was increased because defendant refused to create a wellness and recovery plan and lacked a community support group who might help him with his recovery. Woods expressed doubt that defendant could take the right steps on his own to find a mental health center, arrange transportation there (both for appointments and to pick up prescriptions), pay for the medication, and take the medication. Based on these concerns, Woods concluded it was “very likely” defendant would be violent if released.

Defendant briefly testified on his own behalf. He stated that, if released, he would continue taking his medications, would not use alcohol or street drugs, and was willing to create and comply with a wellness plan. The trial court ultimately sustained the petition and extended defendant’s commitment for an additional two years, finding the People proved beyond a reasonable doubt that defendant continued to present a substantial danger of harm to others by reason of a mental disease, defect, or disorder.

II. DISCUSSION

Defendant claims the trial court erred by failing to: (1) obtain defendant’s personal waiver of his statutory right to a jury trial (§ 1026.5, subd. (b)(4)); and (2) personally advise defendant of that right (§ 1026.5, subd. (b)(3)). Defendant asserts that these errors were prejudicial because it is reasonably probable he would have obtained a more favorable result before a jury. The People counter that defendant forfeited these claims by failing to object below and, alternatively, that defendant’s claims lack merit.

A. FORFEITURE

The People urge that defendant forfeited his arguments regarding section 1026.5 because they were not raised below. “Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court.” (*People v. French* (2008) 43 Cal.4th 36, 46.) However, this general rule is not automatic

and appellate courts have discretion to review otherwise forfeited legal challenges “in cases presenting an important legal issue.” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute as recognized in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.)

Defendant offered no counterargument in his reply brief, and we find no evidence in the record suggesting defendant objected regarding his statutory rights below.

Notwithstanding defendant’s failure to counter the People’s argument on this point, we decline to find a forfeiture in this context because the right to a jury trial is an important legal issue. Application of the general rule here would always preclude the issue unless defendants personally took the affirmative step of disagreeing with their attorneys and voicing their concerns in open court. Such a result seems unfair to defendants, particularly those whose mental state is at issue in the proceeding, as well as those who are unfamiliar with substantive and procedural rules governing trial. Thus, because this case presents an important legal issue, we exercise our discretion and will consider defendant’s section 1026.5 arguments.

B. STATUTORY RIGHT TO JURY TRIAL (SECTION 1026.5, SUBDIVISION (B)(4))

Defendant claims the trial court should have provided a jury trial unless it obtained a personal waiver from defendant, citing section 1026.5, subdivision (b)(4). That subdivision states that commitment extension trials for individuals previously found not guilty by reason of insanity (NGI’s) shall be by jury “unless waived by both the person and the prosecuting attorney.” (§ 1026.5, subd. (b)(4).)

Turning to the text of section 1026.5, subdivision (b)(4), the language requiring waiver by “the person” is ambiguous. Comparison with other laws requiring express personal waiver of rights, however, supports the conclusion that waiver of a jury in this context can be made by an attorney on an NGI’s behalf. For example, article I, section 16 of the California Constitution states that waiver of a jury in a criminal case can only occur “by the consent of both parties expressed in open court by the defendant *and the*

defendant's counsel." (Cal. Const., art. I, § 16, italics added.) By separately requiring consent from the defendant and the defendant's counsel, the constitutional provision makes clear the need for personal waiver by the defendant. Similarly, Welfare and Institutions Code section 1801.5, governing extended detention of juveniles who are physically dangerous to the public due to a "physical deficiency, disorder, or abnormality," calls for a jury trial "unless the right to a jury trial is *personally* waived by the person" (Welf. & Inst. Code, § 1801.5, italics added.) Like the constitutional provision, there is no doubt that waiver in the juvenile commitment context must be made personally. Other California laws that explicitly require a personal waiver include section 861, subdivision (a)(1) (preliminary examination in criminal cases to be completed in a single session or within 10 court days unless "defendant personally waives his or her right to a continuous preliminary examination"), and section 977, subdivision (b)(1) (mandating defendant's presence at all pretrial proceedings in felony criminal cases unless defendant "execute[s] in open court, a written waiver of his or her right to be personally present").

The foregoing laws show that legislators are capable of explicitly requiring personal waivers when that is their intention. (Cf. *People v. Otis* (1999) 70 Cal.App.4th 1174, 1176 [analyzing analogous waiver language in § 2966, subd. (b) regarding commitment of mentally disordered offenders: "[h]ad the Legislature intended that waiver could only be made personally by the petitioner, the Legislature would have made its intent clear".])

Further support for an interpretation allowing waiver of a jury trial by counsel is found in *People v. Powell* (2004) 114 Cal.App.4th 1153 (*Powell*). In *Powell*, defense counsel waived a jury for an NGI commitment extension proceeding over the objection of his NGI client. (*Id.* at p. 1157.) The Second District Court of Appeal held counsel's waiver satisfied section 1026.5, subdivision (b)(4). (*Powell, supra*, at p. 1158.) In so holding, the court compared the jury trial right in section 1026.5, subdivision (b)(4) to the

right to a jury in commitment extension proceedings involving mentally disordered offenders (MDO's). The court looked to section 2966, subdivision (b), which guarantees a jury trial "unless waived by both the person and the district attorney," noted the similarity between the waiver provisions in sections 2966 and 1026.5, and explained that neither waiver provision contained an explicit requirement of personal waiver of the right to a jury trial. (*Powell, supra*, at p. 1159.) Further, the court pointed to case law interpreting section 2966, subdivision (b), to allow waiver through counsel. (*Powell, supra*, at p. 1159 [discussing *Otis, supra*, 70 Cal.App.4th 1174, 1177].) Based on the statutory language of section 1026.5, as well as *Otis*' identical interpretation of the analogous MDO statute, the *Powell* court concluded that section 1026.5, subdivision (b)(4) allows an attorney to waive a jury trial on behalf of an NGI client. (*Powell, supra*, at p. 1159.)

Based on the foregoing, we conclude that the language of section 1026.5, subdivision (b)(4), prescribing that a waiver be made by "the person," does not require an express, personal waiver of the right to a jury trial from an NGI facing a commitment extension petition. We note that in this case we need not decide whether the provision permits an attorney to waive a jury trial over the objection of an NGI client. Here, defendant's counsel informed the trial court on the record that it was *defendant's* desire to waive jury. Because counsel's waiver was apparently a reflection of defendant's wishes, and because section 1026.5, subdivision (b)(4) does not require a personal waiver from defendant, we find the waiver in this case was adequate.

C. JURY TRIAL ADVISEMENT (SECTION 1026.5, SUBDIVISION (B)(3))

Defendant asserts that section 1026.5, subdivision (b)(3), which states "the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial," requires the trial court to advise defendant personally of his right to a jury trial. Unlike the language of section 1026.5, subdivision (b)(4),

discussed previously, subdivision (b)(3) refers to advising “the person *named in the petition*” of these rights. (§ 1026.5, subd. (b)(3), italics added.)

Given the reference in section 1026.5, subdivision (b)(3) to both the right to counsel and the right to a jury trial, the statute contemplates that an NGI would not necessarily have counsel at the commencement of proceedings on a petition for extended commitment. Here, however, defendant was already represented by counsel, who conveyed to the court defendant’s desire to waive jury. Although the general rule in both civil and criminal cases is that “a party’s attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters” (*In re Horton* (1991) 54 Cal.3d 82, 94), this court has recently addressed the scope of the attorney’s authority in this context and concluded section 1026.5, subdivision (b)(3) requires a personal advisement. (*People v. Tran* (2013) 216 Cal.App.4th 102, 112.)

Rules of Professional Conduct, rule 3-500 requires attorneys to keep clients “reasonably informed about significant developments related to the . . . representation” (State Bar Rules Prof. Conduct, rule 3-500.) The existence of the right to a jury trial is certainly a significant development related to the case covered by rule 3-500. In light of the Rules of Professional Conduct, as well as other laws governing the practice of law in California,³ there is little risk that allowing an attorney to appear for an NGI for purposes of an advisement of rights would prevent an NGI from learning of the right to a jury trial. Nonetheless, because of the mandatory language in section 1026.5, subdivision (b)(3), the record should reflect the NGI’s personal advisement by the court, even if the earliest

³ See, e.g., *Conservatorship of John L.* (2010) 48 Cal.4th 131, 151-152 [“Like all lawyers, the court-appointed attorney is obligated to keep her client fully informed about the proceedings at hand, to advise the client of his rights, and to vigorously advocate on his behalf. (Bus. & Prof. Code, § 6068, subd. (c).)”]

opportunity for advisement is the day of trial.⁴ The record here does not reflect a personal advisement at any point in the proceedings.

An error based on the absence of the personal advisement will not result in reversal, however, unless it is “reasonably probable that a result more favorable to [defendant] would have been reached in the absence of error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We find no reasonable probability here. Defendant’s desire to waive jury, conveyed through counsel and not contradicted by any evidence in the record, presupposes defendant’s knowledge of his right to a jury trial. Because defendant apparently knew about the jury trial right, the purpose of the advisement mandated by section 1026.5, subdivision (b)(3) was satisfied, even if the trial court failed to advise defendant personally. For this reason, we determine the error to be harmless. (See *Tran, supra*, 216 Cal.App.4th at p. 113 [finding no prejudice when record suggested the defendant was aware of right to jury trial despite trial court’s failure to advise].)

⁴ As we recently noted in *Tran*, due to the nature of NGI commitment extension proceedings-where attorneys generally waive the NGI’s appearances and NGI’s remain at their psychiatric facilities until the date of trial-we recognize trial courts may not have the opportunity to personally advise NGI’s until the date of trial. (*Tran, supra*, 216 Cal.App.4th at p. 112.)

III. DISPOSITION

For the foregoing reasons, the trial court's order extending defendant's commitment is affirmed.

Grover, J.

I CONCUR:

Premo, Acting P.J.

I CONCUR IN THE JUDGMENT ONLY:

Mihara, J.