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

THE PEOPLE,

Plaintiff and Respondent,

v.

NGAI FUNG FONG,

Defendant and Appellant.

H040461

(Santa Clara County

Super. Ct. No. EE504098)

INTRODUCTION

Defendant Ngai Fung Fong appeals after the trial court granted a petition to extend his commitment under the outpatient conditional release program (CONREP), pursuant to Penal Code section 1606.¹ Defendant contends that the trial court erred in ruling that he had the burden of proof in the proceedings to extend outpatient commitment. For the reasons stated below, we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2011, the trial court granted an order releasing defendant on outpatient treatment pursuant to sections 1603 and 1604. On September 24, 2013, the district attorney filed a petition under section 1606 to renew defendant's outpatient status. The petition alleged that in October 2006, defendant was admitted to a state hospital after he

¹ All statutory references are to the Penal Code, unless otherwise indicated.

was found not guilty by reason of insanity for several crimes. Defendant was then released on outpatient status to CONREP, which was set to expire on October 27, 2013. The petition further alleged that by reason of mental disease or disorder, defendant continued “to represent a substantial danger to the health and safety of others, including himself, if continued supervision was terminated.”

On December 3, 2013, the trial court held a hearing on the petition to extend defendant’s outpatient commitment. At the beginning of the hearing, the parties raised the issue of the burden of proof under section 1606. After hearing argument on the issue, the court ultimately determined that defendant had the burden of proof by a preponderance of evidence.

A. Defendant’s Evidence

At the outpatient status renewal hearing, defendant testified that he had been at CONREP for three years. Prior to that, he had been in a state mental hospital for about three and a half years.²

Defendant was originally from Hong Kong, but came to the United States in 1992 to study electrical engineering. Defendant was employed as an engineer at Oracle, but was fired in 2001. Defendant testified that he believed his termination contributed to his deterioration.

In 2003 or 2004, defendant voluntarily committed himself to a hospital on two occasions because he had “some psychological thought[s].” He was diagnosed with “major depression with psychotic features,” and was prescribed medication. Despite the medication, defendant’s mental condition deteriorated from 2003 to 2005.

² In February 2005, defendant was first committed for his offense. In August 2006, defendant was declared not guilty by reason of insanity and admitted to a state hospital. Defendant was then released to CONREP in 2009, but was revoked and sent back to a state hospital. In 2012, he was released back to CONREP.

In February 2005, defendant committed the incident offense. On the days leading up to the offense, defendant began having delusions. On the day of the incident, defendant confronted his girlfriend because he believed she was spying on him. He tied up his girlfriend, interrogated her, beat her with a clock, and threatened to kill her. He then locked her up and left the house in his car. While driving his car, he saw a family of four—two parents pushing a stroller with two children. At the time, he heard voices and believed the family was humiliating him. He ran them over with his car and then drove around to hit them a second time.

Defendant testified that he now feels remorse for his actions and takes full responsibility. He acknowledged that he had a mental illness and that he would need to take medication for the rest of his life. Since the incident offense, defendant had been on medication and had been attending group therapy at CONREP four times a week. In addition, defendant volunteered twice a week at a library. Defendant had also formulated a relapse prevention plan and a wellness recovery plan. Defendant claimed that he was aware of his triggers, early warning signs, and symptoms and that he planned to seek help if he experiences any of them. He also said that he would continue seeing a psychiatrist and a therapist. Defendant mentioned that his long-term plan was to go back to Hong Kong to be closer to his family. Defendant believed that he was ready to leave CONREP and live independently.

B. Prosecution's evidence

Anna Bandjak testified on behalf of the prosecution as an expert witness in the field of diagnosing mental disorders and risk assessment. Bandjak had been working with defendant at CONREP since January 2012 and had been meeting with him a minimum of three times a month. Bandjak testified that since working with defendant, she had not reported or observed any positive symptoms of his disorder. However, defendant had exhibited negative symptoms of alogia, which is a “parity of speech” where his answers to questions were very brief.

Bandjak mentioned that defendant was mostly medication compliant. She also noted that defendant had acknowledged his mental illness. However, she noticed that defendant was closed off when the therapists had attempted to explore his feelings towards the incident offense. Bandjak noted that defendant “has a very difficult time engaging” in one-on-one sessions. Although defendant was able to say that he felt remorse towards the victims, he minimized the bystanders that were present at the scene. Defendant also “minimally” engaged in group sessions at CONREP. When his lack of participation was pointed out to him, he would temporarily make an effort to be more engaging, but then would go back to putting minimal effort into the group sessions.

Bandjak believed that though defendant could recognize some of the symptoms, “he has poor insight with that.” For example, defendant approached Bandjak a couple weeks prior to ask if he could get a driver’s license. After discussing how driving was a “red flag,” defendant responded that “it’s not a big deal, he can drive.” Bandjak also testified about a complaint by defendant’s house manager the prior year. The house manager had found pictures of a tied up Asian woman printed on defendant’s dresser. During a home visit, Bandjak discovered that defendant had been searching pornography websites daily. Defendant denied that he had visited these websites and minimized the seriousness of the pictures. Additionally, Bandjak discovered that defendant had been checking the Oracle website daily. Defendant explained that he visited the Oracle website to keep updated on technology. Bandjak also mentioned several other incidents when defendant acted dishonestly. She noted that dishonesty was a recurring problem with defendant.

In a recent one-on-one session, Bandjak and defendant discussed his relapse prevention plan and his wellness recovery plan. Bandjak expressed concerns about his wording, insight, and acceptance towards his mental illness. Defendant disagreed and became upset, and they did not further discuss these plans. Bandjak believed that the failure to discuss these plans was a problem for his possible success without supervision.

Bandjak testified that she did not think defendant was ready to be unsupervised. She based her conclusion on defendant's history of dishonesty in treatment and his failure to discuss or explore his symptoms. She stated that it was hard for her to tell if he was aware of his "red flags" or warning signs. She concluded that "if he's not supervised, potentially he could bypass certain symptoms or warning signs that he is not able [to catch] himself." Bandjak noted that defendant is still unwilling to accept feedback from therapists; he has selective reporting and memory; he is treatment resistant and he has made little progress towards gaining insight into his mental illness. She also mentioned that some of the tools in his recovery and wellness plans were not feasible. Bandjak pointed out that one of his tools was to spend time with close friends and family. However, defendant did not seem to interact with friends, and his family lived far away. Defendant was also resistant to telling people about his mental illness. Based on these observations, Bandjak believed that defendant would only get minimal support outside of CONREP and thus, he would have no one to catch his symptoms before he would start decompensating. She concluded that if defendant was unsupervised, he would still be dangerous and that he would "represent a substantial danger of physical harm to other people."

The prosecution also called Dr. Douglas Johnson, a clinical psychologist, to testify as an expert in the field of risk assessment and diagnosing patients for mental disorders. Dr. Johnson first met defendant in 2008, when he first recommended that defendant be released to CONREP.

Dr. Johnson was particularly concerned about defendant's honesty. Dr. Johnson recounted an incident that led to his outpatient status being revoked in 2009. At that time, he met with defendant regarding a secret account containing \$600. Defendant was dishonest and denied that he knew about the secret account. Dr. Johnson stated that since that incident, defendant continued to exhibit dishonesty.

Dr. Johnson noted that defendant had done better in many areas since being admitted to CONREP a second time. Nonetheless, Dr. Johnson observed that defendant was still lacking a larger support network and that he needed to work on accepting peers at CONREP. Dr. Johnson also expressed that defendant had not improved upon “trying to get in depth in the areas of his life prior to his crime that are really rich with material to review for relapse prevention.” Specifically, Dr Johnson pointed out defendant’s hesitancy to address potential connections to his incident offense.

Dr. Johnson was also concerned with the fact that defendant was very self-reliant. For instance, defendant created his relapse prevention plan by completing a pamphlet, rather than working with a therapist to create an operable plan. Dr. Johnson believed that defendant lacked the sufficient insight into his mental illness and that defendant still refused to open up. Dr. Johnson was worried that if defendant’s friends and family warned him about potential problems, defendant would be impervious to any kind of feedback.

In sum, Dr. Johnson believed that many of defendant’s problems that were documented in 2009 were still prevalent. Dr. Johnson concluded that defendant still has work to do in CONREP and that if defendant was left unsupervised, he would present a risk of substantial danger of physical harm to others.

At the conclusion of the hearing, the court found that due to his mental condition, defendant would represent a danger without continued supervision at CONREP. The court thus granted the petition to renew the outpatient status.

DISCUSSION

Defendant’s sole argument on appeal is that the trial court erred in placing the burden of proof on him in the proceedings to renew the outpatient status.

A. Statutory Scheme

Under section 1026, subdivision (a), when a defendant is found not guilty by reason of insanity, he or she may be “committed to the State Department of State

Hospitals for the care and treatment of the mentally disordered.” The maximum term of commitment to a state hospital is “the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted.” (§ 1026.5, subd. (a)(1).)

A defendant found not guilty by reason of insanity may thereafter be released from the state hospital upon the occurrence of one of three events: “ ‘(1) the restoration of sanity pursuant to the provisions of section 1026.2; (2) expiration of the maximum term of commitment . . . (§ 1026.5, subd. (a)(1)); or (3) approval of outpatient status pursuant to the provisions of section 1600 et seq. (§ 1026.1; see *People v. Soiu* (2003) 106 Cal.App.4th 1191, 1194-1195.)’ ” (*People v. Dobson*, (2008) 161 Cal.App.4th 1422, 1432.)

With respect to the third event, a defendant may be placed on outpatient status “upon the recommendation of the state hospital director and the community program director with the court’s approval after a hearing.” (*People v. Cross* (2005) 127 Cal.App.4th 63, 72; see § 1600 et seq.) Section 1606 states in relevant part: “Outpatient status shall be for a period not to exceed one year. At the end of the period of outpatient status approved by the court, the court shall, after actual notice to the prosecutor, the defense counsel, and the community program director, and after a hearing in court, either discharge the person from commitment under appropriate provisions of the law, order the person confined to a treatment facility, or renew its approval of outpatient status. Prior to such hearing, the community program director shall furnish a report and recommendation to the medical director of the state hospital, where appropriate, and to the court, which the court shall make available to the prosecutor and defense counsel. The person shall remain on outpatient status until the court renders its decision unless hospitalized under other provision of the law.” “A person may remain an outpatient as long as he will not be a danger to others and will benefit from an outpatient program. [Citation.]” (*People v. Superior Court (Henry)* (1993) 12 Cal.App.4th 1308, 1312; see § 1602, subd. (a).)

“[T]he primary purpose of the statutory scheme is protection of society.” (*People v. Harner* (1989) 213 Cal.App.3d 1400, 1406.) Thus, a person subject to the scheme should not be released unconditionally without “a court’s determination that he is no longer in need of such supervision or treatment.” (*Ibid.*)

B. Burden of Proof

Defendant contends that under section 1606, the prosecution has the burden of proving, by clear and convincing evidence, that defendant continues to represent a danger to the health and safety of others without the care and supervision of a conditional release program. Defendant argues that since the application of the incorrect standard of proof requires reversal (see *Estate of Chambers* (2009) 175 Cal.App.4th 891, 897), “[b]y the same principle, the court’s imposition of the burden” of proof on defendant requires reversal.

Section 1606 does not specify whether the burden of proof is on the prosecution or on the defendant at an annual outpatient status review hearing. In *People v. Sword*, (1994) 29 Cal.App.4th 614 (*Sword*), the appellate court indicated that the defendant has the burden of proof, by a preponderance of the evidence, at an outpatient status hearing. (*Id.* at p. 621.) In that case, the defendant, who had been committed to a state hospital, sought release on outpatient status pursuant to section 1026.2. The court acknowledged that though section 1026.2 specified that the defendant had the burden of proof by a preponderance of evidence at a restoration of sanity hearing, it did not specify the burden of proof at an outpatient status hearing. (*Ibid.*) The *Sword* court observed that section 1026.2, subdivision (e) sets forth a two-step process for processing an application of release on the ground that the defendant has been restored to sanity: “ ‘ first, a determination of whether the applicant should be placed in a local program, and later, after a year in such a program, a determination of whether the applicant’s sanity has been restored.’ [Citations.]” (*Id.* at p. 620.) The court ultimately determined that because the “outpatient release procedure was an integral part of the restoration of sanity procedure

stated in section 1026.2, . . . placement of the burden of proof on defendant” at the outpatient status hearing was proper. (*Id.* at p. 621.)

The reasoning in *Sword* applies in the instant case. In our view, the ultimate focus of the proceedings under section 1026.2 and the related annual review proceedings under section 1606, is the adjudication of a defendant’s restoration to sanity. Thus, as with the initial outpatient status hearing in *Sword*, the proceedings regarding the *renewal* of outpatient status are an integral part of the restoration of sanity procedure. We therefore conclude that placing the burden of proof on defendant at the outpatient status renewal hearing was proper.

Defendant also contends that due process principles required that the prosecution carry the burden of justifying continued confinement. He relies on *Foucha v. Louisiana* (1992) 504 U.S. 71 (*Foucha*), for this proposition. In *Foucha*, the United States Supreme Court struck down a Louisiana statute that “allow[ed] a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.” (*Id.* at p. 73.) Relying on *Jones v. United States*, 463 U.S. 354, the court stated that as a matter of due process, a “ ‘committed acquittee is entitled to release when he has recover his sanity or is no longer dangerous,’ [citation]; *i.e.*, the acquittee may be held as long as he is both mentally ill and dangerous, but no longer.” (*Foucha, supra*, at p. 77.) Under those set of circumstances, where a defendant no longer suffered from a mental illness, the court determined that the prosecution has the burden to prove by clear and convincing evidence that there were grounds for the defendant’s continued confinement. (*Id.* at p. 86.)

In *Sword*, the appellate court rejected a due process challenge, similar to the one defendant raises here. The defendant in *Sword* argued that placing the burden of proof on the defendant in section 1026.2 proceedings violated due process and cited to *Foucha* as support for his contention. (*Sword, supra*, 29 Cal. App. 4th at pp. 622-624.) The *Sword*

court distinguished *Foucha*, observing that the “defendant here conceded insanity but contends that he is no longer dangerous. *Foucha* considered the opposite situation: Mr. Foucha was not insane, but was dangerous.” (*Id.* at pp. 623-624.) Additionally, in contrast to *Foucha*, the “defendant *Sword* concededly has a mental illness, and always will. The mental illness is controlled by medication, but there is a danger that it will manifest itself and become a danger if defendant does not take the medication.” (*Id.* at p. 624.) The court concluded that there was no “due process problem with the California procedure.” (*Ibid.*) The court explained, “there is a presumption of continued insanity: ‘ . . . it is reasonable to presume under such circumstances that defendant’s insanity, established by a preponderance of evidence, has continued to the date of trial.’ [Citation.] The term ‘date of trial’ refers to the trial on present sanity, i.e., the release hearing.” (*Ibid.*) As such, the *Sword* court found that there was no due process violation on placing the burden on the defendant in an outpatient status hearing. (*Ibid.*)

We agree with the analysis and conclusion reached in *Sword*, and we determine that there was no due process violation in placing the burden on defendant at the outpatient status renewal hearing. Here, as in *Sword*, the defendant conceded that he was suffering from a mental illness. In addition, the record indicates that defendant was still considered a danger to the public without supervision.³ As the record stands, defendant’s outpatient status is based upon both his mental illness and dangerousness. Therefore, there was no due process violation in placing the burden on defendant at the outpatient renewal hearing.

C. Sufficiency of Evidence

Regardless of the burden of proof below, the result would have been the same; and thus, any error in applying the burden of proof would have been harmless beyond a

³ Defendant contends that Dr. Johnson testified that he was no longer dangerous. To the contrary, the record indicates that Dr. Johnson testified that defendant presented a “risk of substantial danger [of] physical harm [to] others” if left unsupervised.

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Our review of the trial court's findings is the same despite the burden of proof, as substantial evidence must support the finding that defendant would still be dangerous, due to his mental illness, without continued supervision on outpatient status. (See *In re Mark L.* (2001) 94 Cal.App.4th 573, 581, fn. 5.)

A single psychiatric opinion that an individual on outpatient status would be dangerous because of a mental disorder without continued supervision can constitute substantial evidence to support an extension of outpatient status. (See *People v. Bowers* (2006) 145 Cal.App.4th 870, 879 [one expert opinion sufficient to support psychiatric recommitment]; accord *People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165.) In this case, Bandjak and Dr. Johnson's conclusions that defendant would pose a substantial danger of physical harm to other people without continued supervision provided substantial evidence to support the trial court's decision to extend defendant's outpatient status. Although Bandjak acknowledged that defendant was treatment compliant, did not exhibit any positive symptoms of schizophrenia paranoia, showed progress in talking about the incident offense and acknowledging his mental illness, and was able to recognize and state some symptoms and "red flags," she believed that he had "poor insight" into his mental illness. She also testified that parts of defendant's recovery and relapse prevention plan were not realistic or feasible and that the failure to discuss these plans with a therapist was a problem for his possible success without supervision. Furthermore, she testified that defendant had a recurring problem with dishonesty and had failed to engage fully in therapy sessions. Based on these observations, Bandjak felt that it was difficult to know if defendant was aware of his "red flags" or warning signs. She expressed that defendant still had hesitancy telling others about his mental illness and had issues receiving feedback. Additionally, defendant did not seem to have many close friends or family nearby. Because of these factors, she believed that defendant would not

have a strong support network outside of CONREP and that defendant could miss some warning signs of his mental illness if he had to identify them himself.

Similarly, Dr. Johnson acknowledged that defendant did not seem to present a danger to the public on the date of the hearing, but he nonetheless believed that defendant presented a future danger to the public without continued supervision. Dr. Johnson testified that defendant's understanding and insight into his mental illness was still limited. Additionally, he found that defendant had yet to explore or understand other possible connections in his life that may have led to the incident offense. Dr. Johnson also felt that defendant's self-reliance was a problem because he would likely reject feedback from his support network outside of CONREP. Moreover, the doctor noted that many of defendant's problems that were documented in 2009 were still prevalent and that defendant still had work to do in CONREP.

Based on the ongoing issues cited by Bandjak and Johnson, including defendant's limited insight into his illness, his recurring problems with dishonesty, his hesitancy to share or receive feedback from others, his lack of support outside of CONREP, and his failure to create a feasible recovery and relapse prevention plan, we conclude that there is substantial evidence to support the trial court's finding that defendant would pose a danger to the health and safety of others, as a result of his mental illness, without continued supervision.

DISCUSSION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.