Filed 4/20/10 P. v. Zayer CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BASEM ZAYER, Defendant and Appellant.	2d Crim. No. B217747 (Super. Ct. No. F430945) (San Luis Obispo County)

Basem Zayer appeals from an order of the trial court committing him to the Department of Mental Health (DMH) for treatment as a mentally disordered offender (MDO).[1] He argues that there was insufficient evidence to support the finding that his mental disorder was a cause or aggravating factor in the qualifying offense, or that he represents a substantial danger of physical harm to others.

FACTS

In 2004, appellant was convicted of second-degree robbery (§§ 211, 212.5, subd. (c)) and sentenced to five years in state prison. He entered a Jack-in-the Box restaurant, asked for a cup of water and looked through a telephone book on the counter. An employee handed him a cup and appellant said, "'Give me your money. This is a robbery. . . . I need drugs to survive.'" Appellant pretended he had a gun in his pocket

[1] All further statutory references are to the Penal Code unless otherwise stated.

and the employee gave him $40.00 from the register. The employee reported that he was "'shocked, nervous and feared for his life.'"

During an interview at the jail, appellant denied that he had pretended to have a gun, and said he was sick from hemorrhoids, an ulcer, and had not taken his bipolar medication. He went to the restaurant to ask for water to make him feel better. Once the employee opened the cash register, appellant realized he was in a business establishment. He told the employee that he did not want money from the business, but from the employee himself.

Appellant has served two prior prison terms. He was convicted of corporal injury on a spouse in 1997. In 2007, while incarcerated for the instant offense, he received a citation for mutual combat. Due to a conviction for indecent exposure, he is required to register as a sex offender. (§ 290.)

The parties stipulated that appellant's earliest possible parole release date was February 4, 2009. The Board of Prison Terms (BPT) certified that he met the MDO criteria and appellant was admitted to Atascadero State Hospital (ASH). He filed a section 2966, subdivision (b) petition challenging his certification.[2] Appellant waived his right to a jury determination and his MDO status was confirmed following a court trial. The court found he met the statutory criteria and ordered him committed to the DMH.

Testimony of Dr. Joe Debruin

Dr. Debruin is a forensic psychologist at ASH. He reviewed appellant's medical records, physician progress notes, a probation officer's report, psychological evaluations, and consulted with appellant's treatment team. It was his opinion that appellant suffered from a schizoaffective order, bipolar type and met all the statutory criteria to qualify as an MDO. Appellant exhibits paranoid delusions, believing that the

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[2] On April 27, 2009, appellant filed a petition for a writ of habeas corpus, in pro per. The trial court denied the writ as premature, because a 2966 hearing was set to address issues raised in the habeas petition. The writ was denied at the MDO hearing.

Jordanian government is keeping him incarcerated to prevent the discovery that they kidnapped him as a boy. He also believes that he is being tracked through a special device that has been inserted into his body by the FBI, and that a recording device was imbedded into his brain to record the activity inside the prison.

Appellant also suffers from "bizarre self-harm" behavior. He will repeatedly bang his head against a wall while spitting and yelling. Dr. Debruin described appellant's mood as ranging from expansive and grandiose to depressed. He demonstrates pressured speech and his thinking is tangential. He has an overall belief that others are conspiring against him and has been hospitalized multiple times pursuant to Welfare and Institutions Code section 5150.

It was Dr. Debruin's opinion that appellant's severe mental disorder was a cause or an aggravating factor in the commission of the offense. He based this on the fact that appellant walked into the restaurant and asked for a cup of water. The police surveillance tapes showed appellant looking through a telephone book on the counter. Dr. Debruin "thought this was more evidence of just really odd behavior at the time of the offense. [¶] . . . [¶] Looking at his history, his symptom profile, looking at the oddness of the offense, it's my opinion that his mental illness was an aggravating factor in the commission of the crime." He testified that appellant had not been taking his taking medication at the time of the offense. Dr. Debruin stated that he had tried to conduct an interview with appellant, but it only lasted five minutes because appellant became agitated and angry and refused to participate.

Dr. Debruin testified that appellant represented a substantial danger of physical harm to others by reason of his severe mental disorder. He based his belief upon "arrests and convictions [appellant] has for a number of different offenses in multiple charges of inflicting corporal injury to spouse. Multiple charges of threatening crime with intent to terrorize." The court sustained defense counsel's objections to Debruin's reference to appellant's unchanged offenses. Dr. Debruin also relied on the fact that appellant had served prior prison terms, was required to register as a sex offender, and has a history of substance abuse.

On cross-examination, defense counsel elicited testimony from Dr. Debruin that appellant's violent criminal history consisted of the 1997 spousal abuse conviction and the instant offense where he pretended to have a gun. Although appellant has refused medication, ASH has not attempted to obtain an order for involuntary medication because appellant has not physically hit another patient or threatened to cause himself harm.

Report of Dr. Judith Dietch

The California Department of Corrections and Rehabilitation evaluated appellant in December 2008. Dr. Judith Dietch, the evaluating psychologist, determined that appellant met the statutory criteria. She diagnosed appellant as suffering from a bipolar disorder with psychotic features and polysubstance dependence. During his evaluation, appellant told Dr. Dietch that he had asked for water at the Jack-in-the-Box restaurant because he had stomach problems and hemorrhoids. No one was at the counter, so he looked in a book and leaned against a wall. He was "spaced out" and forgot he was a customer. A clerk came to the counter and appellant "yelled and screamed at him" and demanded water, but the clerk instead gave him money. Appellant said it was a "misunderstanding with language."

Dr. Dietch indicated that appellant's severe mental disorder was a cause or aggravating factor in the commission the offense. He had not taken his medication and admitted to yelling and screaming at the employee. The symptoms of his mental disorder may have been active, as reflected by his confused description of the incident. His agitation, irritability and impulsiveness are characteristic of his mental disorder. According to the probation officer's report, during his two months on parole, appellant had twice tested positive for drugs, was not taking his medication, and had a history of mental illness.

Dr. Dietch stated that appellant represented a substantial danger of physical harm because he has a history of violent behavior and had served prior prison terms. She enumerated his "arrests or convictions," which included corporal injury to a spouse, making threats, stalking, vandalism and indecent exposure. She added that appellant had

incurred numerous rules violations while in prison and had been on parole for only two months when he committed the qualifying offense.

Report of Dr. Denise Mock

Dr. Mock is an evaluating psychologist for the DMH. She interviewed appellant in January 2009, and reported that his severe mental disorder was "at least" an aggravating factor in the commission of the crime. His behaviors in the restaurant demonstrated odd thinking, impulsivity and a lack of criminal sophistication, all of which are consistent with his mental illness. After being apprehended, he admitted to not having taken his psychotropic medication.

It was Dr. Mock's opinion that appellant did not meet the statutory criteria because he does not represent a substantial danger of physical harm to others by reason of his severe mental disorder. She stated that the symptoms of appellant's disorder have not caused him to be physically harmful toward others. The only violent offense on his record was a conviction for the infliction of corporal injury on a spouse 10 years earlier, in 1997. In 2007, while incarcerated, he received a citation for mutual combat. Although appellant has been the victim of assault resulting from his behaviors, there was no record that he initiated or has been violent towards others.

Dr. Mock noted that appellant has little insight into his mental illness and has a pattern of not following his treatment plan and decompensating while off his psychotropic medications. He has a minimal ability to initiate a medication regimen on parole.

Trial Court's Findings

The trial court found that appellant met the statutory criteria to qualify as an MDO. It acknowledged that there have not been "physical issues" and the parole violations did not involve violence. It added, ". . . I do note your criminal history does include violence, that you are a 290 registrant, that you have had a history of drug[ ] [use], and the fact that you were [in] violation of your parole within two months with the substance abuse history is compelling to me."

DISCUSSION

The issue before us is whether substantial evidence supports the findings that appellant's mental disorder was a cause or an aggravating factor in the commission of the offense, and whether he represents a substantial danger of physical harm to others.

Six criteria must be met for a prisoner to qualify as an MDO.[3] Among them are that the prisoner's "severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison." (§ 2962, subd. (b).) In reviewing the sufficiency of evidence to support an order made in MDO proceedings, we review the entire record to determine if reasonable and credible evidence supports the decision of the trier of fact. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083.) We view the evidence and draw all reasonable inferences in favor of the order. (*Ibid*.)

Aggravating Factor

First we address appellant's contention that the evidence was insufficient to support a finding that his mental illness was an aggravating factor in the commission of the offense. Asking for a cup of water and leafing through the phone book, viewed in isolation, could be seen as innocuous, and the theft of money to purchase drugs unrelated to mental illness. Our analysis is not, however, limited to these facts. We must also consider the behavior appellant exhibited during the commission of this offense.

After his arrest, appellant told the police that he had requested water at Jack-in-the-Box because he had hemorrhoids and an ulcer. Once the employee opened the cash register, he realized he was in a business establishment. Appellant told the employee that he did not want money from the business, but from the employee himself.

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[3]The six criteria are as follows: (1) the prisoner has a severe mental disorder; (2) he used force or violence in committing the underlying offense; (3) his severe mental disorder was a cause or aggravating factor in his commission of that offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) he was treated for the disorder for at least 90 days in the year prior to his parole; and (6) as a result of his disorder, he represents a substantial danger of physical harm to others. (§ 2962; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.)

This account of events, combined with appellant's agitation and confusion, suggests the behavior of a mentally ill individual who has decompensated due to his refusal to take his medication. The opinions of three psychologists constitute substantial evidence to support the trial court's finding that appellant's severe mental disorder was an aggravating factor in the commission of the qualifying offense.

Present Dangerousness

Appellant contends that the evidence does not support a finding of present dangerousness under the MDO statute. (§ 2962, subd. (d)(1).) The statute is intended to "protect the public by identifying those offenders who exhibit violence in their behavior and pose a danger to society." (*People v. Dyer* (2002) 95 Cal.App.4th 448, 455.) A "'substantial danger of physical harm' does not require proof a recent overt act." (§ 2962, subd. (f); see *In re Qawi* (2004) 32 Cal.4th 1, 24.)

The psychologists relied upon the probation report in rendering their opinions. A mental health professional "may and should take into account the prisoner's entire history in making an MDO evaluation. This includes prior violent offenses as well as the prisoner's mental health history." (*People v. Pace* (1994) 27 Cal.App.4th 795, 799.) Although appellant's probation report was not admitted into evidence, two psychologists relied upon it in reaching their conclusions of dangerousness. Admitted into evidence was a certified copy of a California Law Enforcement Telecommunications System (CLETS) printout of appellant's criminal history. It reflected convictions for drug-related offenses, inflicting corporal injury on a spouse, making a false bomb report, indecent exposure and numerous parole violations.

Dr. Mock's conclusion that appellant was not dangerous was based upon her reasoning that he had not been violent to others *since* his 1997 conviction. This is effectively an argument that appellant's commitment offense was non-violent. The nature of the commitment offense was not disputed at the MDO hearing and is not an issue on appeal.

The evidence reflects that appellant decompensates when he is unmedicated. At present, he is in a highly structured setting, yet refuses to take

medication or attend treatment. If released into the community, he may decompensate and become a danger to others. These facts distinguish the present case from *People v. Gibson* (1988) 204 Cal.App.3d 1425, upon which appellant relies. There, we held unconstitutional a former version of the MDO statute because it did not require proof of present dangerousness. (*Id.* at p. 1436.) Here, the finding of dangerousness is based upon appellant's past violent behavior and the expert opinions that the symptoms of his current illness create a substantial risk that he will physically harm others.

DISPOSITION

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Linda D. Hurst, Judge

Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan, Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.