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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAMES EARL HUBBARD, Defendant and Appellant.	B217739 (Los Angeles County Super. Ct. No. ZM013438)

APPEAL from an order of the Superior Court of Los Angeles County, Maria E. Stratton, Judge. Affirmed.

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, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant James Earl Hubbard appeals from an order denying his motion to dismiss the offense on which his recommitment as a mentally disordered offender (MDO) was based. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was committed as an MDO under Penal Code section 2962[1] following his conviction of attempted grand theft person in violation of sections 487, subdivision (c), and 664.[2] The commitment was set to expire on November 11, 2008. On July 3, 2008, the Los Angeles County District Attorney filed a petition for involuntary commitment under section 2970 (recommitment petition). Defendant denied the allegations of the petition and waived his right to a jury trial on the matter.

At the February 13, 2009 hearing on the recommitment petition, forensic psychiatrist Mark Jaffe, M.D., testified that he examined defendant at Patton State Hospital on November 4, 2008. Defendant "presented in a somewhat manic state. He was very active during the interview. He sang some songs for me at one point. He was grandiose and spoke about being a producer and performer. And he became very agitated

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1 All further section references are to the Penal Code.

2 According to the preliminary hearing transcript, defendant confronted the victim at a gas station. He demanded money. She gave him two quarters, but he demanded more. He grabbed the gas pump nozzle, inserted it into her car's gas tank and began to lick the car's gas cap. He then grabbed the victim's wrist. She tried to pull away, but he was holding her too tightly. He pulled at her and kissed her on her forehead. When he finished pumping gas into the car, he let the victim go. As she got back into her car, he began hitting it. She started to drive away, but he grabbed her hand and pulled on it. She managed to get away, but he followed her. When she stopped at a red light, he came to her window, grabbed her hand again, pulled on it and demanded more money.

and paranoid during the course of the interview. And accused me of being against him. And he terminated the interview after approximately about a half hour." He said Dr. Jaffe "was a bad doctor. And that he was going to tell the court on [the doctor]." Defendant walked out, "mutter[ing] something under his breath that sounded like honky."

Dr. Jaffe reviewed defendant's hospital records. Based on these records and the interview, Dr. Jaffe diagnosed defendant with schizoaffective disorder, a severe mental illness. It was evidenced by paranoid delusions: Defendant believed he never committed the offense of which he was convicted but had been "set up," his father was Elvis Presley, and he was a prophet of God.

Defendant's hospital records showed that he had engaged in threatening, hostile behavior toward hospital staff. He made punching motions when he did not want to take his medication. He claimed to be a dangerous man and said he wanted to attack people as he had done before. He said that he was "going to blow up" and "sock somebody."

Dr. Jaffe believed defendant was not in remission. Defendant represented a danger of substantial physical harm to others due to his mental illness, difficulty controlling his violent and aggressive behavior, and his lack of insight into his condition. Additionally, defendant's history of substance abuse increased the risk of violent behavior.

Defendant testified on his own behalf. Defendant acknowledged that he was schizophrenic and paranoid. He said that he was willing to take his medication and had never refused to do so.

While testifying, defendant gave rambling and sometimes nonsensical answers to questions. For example, when asked if he had a relapse prevention plan in place, he responded: "I'm taking relapse, I finishing it ma'am, ma'am, ma'am. I don't have no problem completing my plan. Something to do. Now doing real good. I'm ready. They want to go home. That's—they sent me over here. They sent me over—on a horse, riding a horse. I was half—come on here, you do not got to do—that is wrong kind of horse."

When asked if he thought he was dangerous, he said: "No. I'm dangerous? Not nothing wrong with me—a misunderstanding. And then you are my mouth. Just like daddy, daddy—that is my mouth." He said all he did was "smile and laugh, joke around and sing. I don't bother nobody. . . . Can you try to steal that song, stop stealing from me."

DISCUSSION

The MDO Law (§ 2960 et seq.) was enacted "to protect the public from dangerously mentally disordered criminal offenders." (*People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 830; see § 2960.) It "requires certain mentally disordered prisoners who have committed specifically identified violent crimes to submit to continued mental health treatment after their release on parole." (*Myers*, *supra*, at p. 830; see § 2962.) Treatment is inpatient unless the State Department of Mental Health agrees to treat the prisoner on an outpatient basis. (*Myers*, *supra*, at p. 831; see § 2964.) If the prisoner's mental disorder can be put into and kept in remission, treatment must be discontinued. (§ 2968; *Myers*, *supra*, at p. 831.) If not, the district attorney may petition the court for an additional year of involuntary treatment. (§ 2970; *Myers*, *supra*, at p. 831.)

In order to commit a prisoner as an MDO under section 2962, it must be shown that the prisoner "(1) has a severe mental disorder; (2) used force or violence in committing the underlying offense; (3) had a disorder which caused or was an aggravating factor in committing the offense; (4) the disorder is not in remission or capable of being kept in remission absent treatment; (5) the prisoner was treated for the disorder for at least 90 days in the year before being paroled; and (6) because of the disorder, the prisoner poses a serious threat of physical harm to other people." (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1075-1076.)

The crimes for which a prisoner may be committed as an MDO are listed in subdivision (e) of section 2962. In addition to specific offenses, the list includes "[a]

crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. . . ." (Subd. (e)(2)(Q).)

Under section 2970, a recommitment petition may be filed at least 180 days prior to the termination of parole. The prisoner may be recommitted if it is found "(1) that the [prisoner] has a severe mental disorder; (2) that the disorder is not in remission or cannot be kept in remission without treatment; and (3) that the [prisoner] represents a substantial danger of physical harm to others by reason of the disorder. (§ 2972, subd. (c).)" (*People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2.)

The question we address here is whether, after a prisoner has been committed under section 2962, and the district attorney has filed a recommitment petition under section 2970, the prisoner may challenge the recommitment petition on the ground his crime is not one for which commitment is permitted under section 2962, subdivision (e)(2). Under the factual situation before us, we answer this question in the negative.

The trial court denied defendant's motion to dismiss the offense on which his recommitment as an MDO was based in reliance on the recently-decided case of *Lopez v. Superior Court* (2009) 173 Cal.App.4th 266. *Lopez* held that "so long as a prisoner has received timely notice of his or her right under section 2966 to request a hearing on the original MDO certification, and unless specific compelling circumstances justify a delayed request for a hearing[,] a prisoner forfeits the right under the [MDO Law] to request a hearing on the original MDO certification unless he or she files a petition prior to the expiration of the initial commitment. [Citations.]" (*Lopez*, *supra*, at p. 276.)

The *Lopez* court distinguished its holding from that of *People v. Merfield*, *supra*, 147 Cal.App.4th 1071, decided by Division Six of this District, which held that a subsequent challenge to the original MDO certification was barred on grounds of mootness and waiver, as well as on res judicata and collateral estoppel grounds. (*Lopez v. Superior Court*, *supra*, 173 Cal.App.4th at p. 277 and fn. 4.) The Supreme Court granted review in *Lopez* on July 29, 2009.

In *People v. Merfield*, *supra*, the court observed that although the MDO Law has no time limit for seeking a hearing challenging a commitment order, the court had "previously recognized that the *appeal* from a commitment order following such a hearing is moot once the commitment period has expired. [Citations.]" (147 Cal.App.4th at pp. 1074-1075.) From this conclusion, "[i]t necessarily follow[ed] that a petition challenging the commitment that is filed after that period has expired is also moot." (*Id.* at p. 1075.)

The defendant contended that the initial commitment could never be moot, in that the initial commitment required that six criteria be met, while recommitment required only three of those criteria. (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075.) The court disagreed, noting that "[t]hree of the original criteria 'concern past events that once established, are incapable of change.' [Citation.] By contrast, the other three criteria are based on evidence as it existed at the time of the [Board of Prison Terms's (BPT)] initial commitment hearing or the annual review hearing continuing that commitment—namely, whether the prisoner is currently suffering from a severe mental disorder, whether that disorder is not in remission or cannot be kept in remission without treatment, and whether he presently represents a substantial danger of physical harm to others by reason of that disorder. [Citations.]" (*Ibid.*)

The court acknowledged that it "review[s] the merits of timely filed petitions that are rendered technically moot during the pending of the appeal . . . because the appellant is subject to recertification as an MDO, and the issues are otherwise likely to evade review due to the time constraints of MDO commitments." (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1075, italics omitted.) The court also agreed that it should review the merits of a timely filed petition that becomes moot due to factors beyond the appellant's control. But where "the petitioner causes the delay by waiting until after the commitment order has expired to seek relief, the petition is untimely and is subject to dismissal on the ground of mootness." (*Ibid.*, italics omitted.)

Additionally, the court observed that "'[u]nder the doctrines of res judicata and collateral estoppel, issues relating to the three criteria concerning past events that have

been litigated in an MDO proceeding cannot be relitigated in a subsequent proceeding. [Citation.]' [Citation.]" (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1076.) This rule applies to both issues actually litigated and those which could have been litigated. (*Ibid*.)

The court thus concluded that a prisoner determined to be an MDO "has a right to a court hearing on the six criteria only following the initial commitment determination. Once the time has passed for that first determination and proceedings have been instituted to extend the commitment, the [prisoner] may only challenge the BPT's determination of his or her current mental status. (§ 2966, subd. (c).) This rule applies irrespective of whether the first commitment resulted from the [prisoner's] acceptance of the BPT's determination or from a hearing conducted in the trial court." (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1077.)

Defendant attempts to distinguish *Merfield* on the ground the defendant in that case filed, but later withdrew, a petition challenging his initial commitment. As stated above, the *Merfield* court stated that its holding applied even where the prisoner did not challenge his initial commitment. (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1077.)

Defendant also suggests that the "continued validity" of *Merfield* is "severely compromised" by the Supreme Court's grant of review in *Lopez*. We disagree, since the bases of the courts' holdings were different in each case.

In addition, defendant cites cases—predating *Merfield*—in support of his position. They do not convince us that *Merfield* was wrongly decided.

In *People v. Hayes* (2003) 105 Cal.App.4th 1287, the defendant challenged the finding that his offense was a qualifying offense on appeal from a recommitment order. (*Id*. at p. 1288.) The court did not examine whether his challenge was barred, noting only that "[t]he record does not indicate that Hayes challenged his initial commitment on the ground that the offense of which he was convicted was not a proper basis for such a commitment. However, the People agree that the record of this case does not establish

that Hayes is collaterally estopped from raising the issue in connection with his continued commitment." (*Id.* at p. 1289, fn. 2.)

People v. Francis (2002) 98 Cal.App.4th 873, decided by Division Six of this District prior to its decision in *Merfield*, held that relitigation of the defendant's mental status was not barred by res judicata or collateral estoppel. (*Id.* at pp. 874, 879.) As in *Merfield*, the court noted that three of the six criteria for initial commitment "concern past events that once established, are incapable of change." (*Id.* at p. 879.) This included the findings that, at the time of the offense, the defendant did not suffer from a severe mental disorder and a severe mental disorder was not an aggravating factor in the commission of the crime. Relitigation of these findings was barred by principles of res judicata and collateral estoppel. (*Ibid.*)

Defendant argues that, unlike the situation in *Francis*, because there was no adjudication that his offense was a qualifying offense under section 2962, he could litigate the matter during proceedings on the recommitment petition. As observed in *Merfield*, however, res judicata applies to both issues actually litigated and those which could have been litigated. (*People v. Merfield*, *supra*, 147 Cal.App.4th at p. 1076; accord, *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 821.) That defendant failed to litigate the question whether his offense was a qualifying offense during the initial commitment proceedings does not entitle him to litigate the question during subsequent proceedings.

We agree with *Merfield* that, once the time has passed in which to challenge an initial commitment order, litigation of the question whether a defendant's offense was a qualifying offense under section 2962 is barred on the grounds of mootness and res judicata/collateral estoppel. It follows that the trial court properly denied defendant's motion to dismiss the offense on which his commitment was based.[3]

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[3] That the trial court relied on *Lopez* in making its ruling is of no consequence. We will affirm a judgment or order if it is correct in law, even if made on an incorrect ground

DISPOSITION

The order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

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or for an erroneous reason. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211.)