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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEO NICK SHADY, JR., Defendant and Appellant.	E043986 (Super.Ct.No. RIF096191) OPINION

APPEAL from the Superior Court of Riverside County. Dallas Scott Holmes, Judge. Reversed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Pamela Ratner Sobeck, and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found that Leo Nick Shady, Jr., defendant and appellant (hereafter defendant), is a mentally disordered offender within the meaning of Penal Code sections 2970 and 2972.[1] The trial court ordered him to be held for one year in continued involuntary treatment. Defendant appeals, contending that the trial court's order must be reversed because (1) his trial occurred after expiration of his prior commitment order and no good cause was shown for the delay, and (2) the trial court failed to consider outpatient treatment as an alternative.

We agree with defendant's initial claim and will reverse on that basis. Therefore, we will not consider his other claim.

FACTUAL AND PROCEDURAL BACKGROUND

On November 9, 2006, the District Attorney of Riverside County filed a petition under section 2970 for continued involuntary treatment of defendant based on an evaluation from the medical director of Atascadero State Hospital dated November 7, 2006.[2] According to the allegations of the petition and the supporting affidavit, defendant was sentenced to state prison for a term of four years on May 7, 2002, after he was convicted of assault with force likely to produce great bodily injury in violation of section 245, subdivision (a)(1). While serving that sentence, the Department of

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

[2] The medical director's request to file the petition, although purportedly attached to the affidavit of the deputy district attorney submitted in support of the petition, is not included in the record on appeal. What is included, under separate cover in a confidential clerk's transcript, is a request dated September 7, 2007, to extend defendant's involuntary treatment yet again, i.e., for a year beyond the year at issue in this appeal.

Corrections transferred defendant from prison to Atascadero State Hospital, in accordance with section 2684.[3] Defendant was found to meet the criteria for a mentally disordered offender (MDO) on March 6, 2004, "and his commitment was changed to Penal Code section 2962." The petition further alleged that defendant has a mental disorder that is not in remission and cannot be kept in remission without treatment, and his involuntary treatment will expire on March 6, 2007.

At the first hearing on December 15, 2006, a deputy public defender requested a brief continuance in order to determine whether a conflict existed that would prevent the public defender's office from representing defendant. At the next hearing on December 22, another deputy public defender, who remained defendant's attorney of record in this matter, asked the trial court to appoint a doctor to conduct a "confidential evaluation for the defense."[4] The trial court appointed a doctor to evaluate defendant, and at defense counsel's request to set the next hearing for sometime in early February, set a hearing "for the return of the doctor's report" on February 9, 2007.

At the hearing on February 9, which the clerk's minute order identifies as a "return of doctor's report hearing," defense counsel stated that the court-appointed doctor had been unable to locate defendant in the jail and had been told that defendant had been sent

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[3] Section 2684 provides a procedure for the Department of Corrections to transfer mentally ill, mentally deficient or insane prisoners to a state mental facility if after evaluation by "the director of the appropriate department" that director determines that the prisoner would benefit from such care and treatment.

[4] We presume the trial court appointed the public defender's office to represent defendant although that appointment is not revealed in the record on appeal.

back to Atascadero.[5] The court clerk contacted the county jail and confirmed that defendant was there and had not been sent back to Atascadero.[6] The trial court continued the hearing for one week, to February 16, 2007, and also ordered a "contact visit" between the doctor and defendant so the doctor could interview defendant and complete the evaluation. At the hearing on February 16, defense counsel stated that she wanted to set a trial date as soon as possible but acknowledged that they were waiting for "the doctor's report." At the prosecutor's request, the trial court continued the matter to March 2, 2007, for a trial setting conference.

At the trial setting hearing on March 2, 2007, defense counsel asked the court to "put this matter over" a month for further proceedings regarding the "doctor's evaluation," and requested in the meantime that defendant be returned to Atascadero for treatment. In accordance with that request, the trial court set the next hearing for April 6, 2007. The pertinent minute order incorrectly states, "Motion for jury trial is set on 4/06/2007 [capitalization omitted]," but correctly indicates that the trial court ordered

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[5] At the initial hearing on December 15, the public defender asked the trial court to order defendant returned to Atascadero so he could continue to receive treatment pending trial.

[6] The confidential clerk's transcript includes a letter, dated February 8, 2007, from the court-appointed doctor to the court requesting an extension of time to complete the evaluation of defendant because the doctor had been unable to meet with defendant in jail. According to the letter, the doctor twice went to interview defendant in jail and both times was told by a deputy at the front desk that the interview booths on the fifth floor of the jail were "broken," that defendant "is in lockdown and cannot be seen in the 'non-lockable attorney booths,'" and that the jail was "waiting for some parts to come so the doors can be fixed."

defendant be sent back to Atascadero State Hospital. In order to determine whether the jail complied with the order to return defendant to Atascadero, the trial court conducted a status hearing on March 16, 2007. After determining that defendant had not been returned to Atascadero, and after also determining that they were "still waiting for a doctor's report," the trial court set another status hearing on both issues for March 29, 2007. On March 29, defense counsel reported that defendant was still in Riverside County jail and that Atascadero State Hospital has a "housing freeze." At defense counsel's request to "put this matter over" the trial court set the next hearing for April 6, the date previously set for trial.

Defendant was still in Riverside County jail by the time of the hearing on April 6, 2007, and could not return to Atascadero pending trial because according to defense counsel Atascadero was "completely shut down . . . for anybody coming in, and that includes returning patients." Defense counsel moved to dismiss the petition because "[i]t is completely unacceptable for somebody on a one-year MDO commitment to be sitting around for months on end." The trial court denied that motion, and also denied defense counsel's motion to move defendant to a local hospital. Defense counsel then requested that the matter "proceed to trial forthwith" and objected to any further continuances. After determining that a trial date had not been set, the trial court denied defense counsel's request to immediately begin defendant's trial. Instead the trial court set defendant's trial for May 14, 2007, over defense counsel's objections that the delay "is cruel and unusual punishment. It's a denial of due process and equal protection under

both the state and federal Constitutions. It's a denial of his right to a speedy trial under . . . Section 2972, subdivision (a)." At a pretrial hearing on May 11, 2007, that was not reported, the trial court confirmed the trial date of May 14.

The May 14 trial date was vacated under circumstances that are not disclosed in the record on appeal. The pertinent minute order consists of a single word, "Vacate," and does not contain any other information. There apparently was no hearing and there is no court reporter's transcript even if a hearing occurred.

The next hearing occurred on May 22, 2007, at which time the trial court continued defendant's trial to May 30, 2007, because defense counsel by then was involved in another trial. After the trial court stated that the last day for trial is June 11, 2007,[7] counsel appearing for defendant's trial attorney objected to continuing or trailing defendant's trial beyond May 30. On May 30, the trial court continued defendant's trial to June 4, 2007, because defense counsel was still in trial.[8]

At the hearing on June 4, 2007, the prosecutor made an oral motion for release of defendant's medical records and also requested a continuance of the trial date. The trial court granted both motions, and over defense counsel's objection, continued the matter to June 20. On June 20, the prosecutor asked the trial court to "trail" until Friday (June 22)

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[7] The record on appeal does not reveal how the trial court came up with this date as the purported last day for trial.

[8] The clerk's minute order for the May 30 hearing includes the entry, "Counsel Stipulate the LAST DAY for Trial is 6/14/2007." That stipulation is not included in the reporter's transcript of the proceedings.

because although they had been mailed, the prosecutor had not yet received defendant's medical records. Defense counsel in turn moved to dismiss the petition because defendant had not been brought to trial 30 days or more prior to his release date as required by section 2972, subdivision (a). The trial court denied defense counsel's motion to dismiss but granted the prosecutor's request to trail the matter. On June 22, the prosecutor again asked the trial court to trail the matter because although she had received the medical records, the prosecutor had not had time to make the necessary copies. Over defense counsel's objection, the trial court again continued the matter this time to June 25.

On June 25, the prosecutor requested yet another continuance, this time only for one day, in order to copy the medical records for the defense. Over defendant's objection to the continuance, the trial court granted the prosecutor's request. The next day, June 26, 2007, the prosecutor represented to the trial court that several pages were missing from the medical records and "[t]hey're supposed to fax them to me tomorrow." The prosecutor stated that she had just realized the pages were missing and represented to the trial court that she "needed those pages to go forward." The trial court granted the prosecutor's request to continue the matter to the following day "based on good cause." On June 27, both sides announced ready for trial, and the trial court then assigned the matter to another department. Later that day, the judge to whom the case was assigned stated that he needed the balance of the day to address "the press of other civil business," and to read defendant's various pretrial motions. The record on appeal does not include a

minute order for this proceeding on June 27, but the record does include a minute order for June 28, 2007, in which the court on its own motion, and without the appearance of counsel, continued defendant's trial to July 2, 2007.

The next court appearance of record occurred on July 3, 2007, even though the previous minute order states the matter had been continued to July 2. At the July 3 proceeding, the trial court addressed and ruled on defendant's various pretrial motions and then set trial to start on July 5, 2007. Jury selection did not actually begin until July 9 because defendant was not dressed out for trial on July 5, 2007, and his clothing could not be located.[9]

DISCUSSION

We only address defendant's initial claim that his right to a hearing within the time limits designated in the MDO Act was violated, and that in turn resulted in a due process violation, because that claim is dispositive.

1.

DUE PROCESS CLAIM

MDO proceedings are subject to several time constraints. The first is contained in section 2970 and requires that, "[n]ot later than 180 days prior to the termination of parole . . . unless good cause is shown for the reduction of that 180-day period, if the prisoner's severe mental disorder is not in remission or cannot be kept in remission

[9] Because they are not relevant to the issues defendant raises on appeal, we will not recount the details of defendant's trial.

without treatment, the medical director of the state hospital which is treating the parolee . . . shall submit to the district attorney of the county . . . of commitment, his or her written evaluation on remission." The next deadline is set out in section 2972, subdivision (a), and requires that trial on the petition "commence no later than 30 calendar days prior to the time the person would otherwise have been released, unless the time is waived by the person or unless good cause is shown." As defendant acknowledges, both deadlines are directory, not mandatory, i.e., they are not jurisdictional. (*People v. Tatum* (2008) 161 Cal.App.4th 41, 56-57 (*Tatum*); *People v. Williams* (1999) 77 Cal.App.4th 436, 451, 456 (*Williams*).) The only jurisdictional, or mandatory, time limit is set out in section 2972, subdivision (e), which requires "the district attorney to file a recommitment petition *before* the MDO's current commitment term ends." (*People v. Allen* (2007) 42 Cal.4th 91, 104 (*Allen*).) In *Allen*, the Supreme Court held that a petition not filed before that deadline must be dismissed. (*Ibid*.)

The directory time limits in the MDO statute can be waived, or extended for good cause, and in any event, violation of the deadlines invalidates an MDO proceeding only if the error results in a due process violation. (*Williams, supra*, 77 Cal.App.4th at p. 456; *People v. Fernandez* (1999) 70 Cal.App.4th 117, 131 (*Fernandez*).) Consequently, in order to prevail in the trial court on a motion to dismiss, defendant had to show that he did not waive either the 180-day or the 30-day deadline, or that there was no good cause to extend the deadline, and that failure to meet the deadline resulted in a violation of due process. Whether the delay violated defendant's right under the Fourteenth Amendment

to procedural due process depends first on whether it was prejudicial. "Except where there has been an extended delay, prejudice will not be presumed, and it will be incumbent upon the defendant to demonstrate actual prejudice." (*Fernandez*, at p. 131.)

In the context of MDO commitment proceedings, "the courts have recognized that relevant prejudice will generally take one of two forms: (i) an inability to prepare for trial in the time remaining prior to the offender's release date . . . or (ii) the involuntary confinement of an offender beyond the offender's statutorily authorized release date. [Citation.]" (*Tatum, supra*, 161 Cal.App.4th at p. 61.) "Where there is no prejudice, there is no due process violation, regardless of the reasons (or lack thereof) for the delay." (*Id.* at p. 57.) If the defendant demonstrates prejudice, then the prejudicial effect of the delay must be weighed against the justification, or good cause, for the delay in order to determine whether a due process violation has occurred. (*Ibid.*; *Fernandez, supra,* 70 Cal.App.4th at p. 131.)

With the foregoing principles in mind, we address the delays at issue in this case, beginning with failure to meet the 180-day deadline.

A. 180-day Deadline

Defendant's current commitment expired on March 6, 2007. In order to comport with section 2970, the medical director of Atascadero State Hospital should have sent a written evaluation on remission to the district attorney 180 days before that date, or by September 6, 2006. The evaluation was not sent until November 7, 2006. Defendant did not waive that time limit, but he also did not object in the trial court to the timing of the

evaluation. The rule is well established "that points not urged in the trial court may not be urged for the first time on appeal." (*Damiani v. Albert* (1957) 48 Cal.2d 15, 18.) Because he did not raise the issue in the trial court, defendant has not preserved violation of the 180-day deadline for review on appeal.

Moreover, defendant has not demonstrated in this appeal that he was prejudiced as a result of the purported failure to meet the 180-day deadline. Both the 30-day trial deadline and the 180-day deadline are directed at ensuring there is "a reasonable amount of time in which to conduct a trial before the defendant is due to be released. [Citations.]" (*Williams, supra*, 77 Cal.App.4th at pp. 450-451; see also *Allen, supra*, 42 Cal.4th at p. 104.) In other words, the deadlines ensure that a person committed as an MDO is not unlawfully detained in violation of due process. The district attorney filed defendant's recommitment petition on November 9, 2006, four months before defendant's release date. The first hearing on that petition occurred in December, three months before defendant's release date. Three months is sufficient time to begin defendant's trial before his current commitment expired, and defendant has not demonstrated otherwise.

We are persuaded from our review of the record that defendant's trial did not take place until four months after his release date because, after the district attorney filed the petition to extend defendant's commitment, the trial court participants effectively ignored the 30-day trial deadline. Which brings us to the next issue: Did failure to meet that deadline result in a due process violation?

B. 30-day Trial Deadline

In order to comply with the 30-day deadline in section 2972, subdivision (a), defendant's trial should have started on or before February 5, 2007. As set out above, defendant's attorney requested the continuances that resulted in the postponement of defendant's trial to April 6, 2007, a month beyond defendant's release date and two months past the 30-day deadline. Although defense counsel arguably had good cause for those requests, namely that the court-appointed doctor had not completed an evaluation of defendant, the record on appeal does not disclose whether, and if so when, defense counsel received that evaluation.

Defendant's real issue is with the continuances that extended his trial beyond April 6, 2007. Defense counsel made her first motion to dismiss the petition at that hearing, although she only expressly cited section 2972 in her objection to continuing defendant's trial beyond that date. The trial court overruled that objection citing "the crush of last-day criminal trials" as good cause for continuing defendant's trial to May 14, 2007. The record does not disclose why the May 14, 2007, trial date was vacated. The next two continuances occurred because defense counsel was in trial on another matter. Then, on June 4, 2007, the prosecutor for the first time sought disclosure of defendant's medical records and requested a corresponding continuance of defendant's trial. Defendant again objected to the continuance, but the trial court found good cause. As recounted above, this continuance and all remaining continuances are attributable entirely to the prosecutor.

In the analogous situation of a defendant's statutory right to a speedy trial under section 1382, what constitutes good cause for a continuance lies within the discretion of the trial court. (*People v. Johnson* (1980) 26 Cal.3d 557, 570.) "In reviewing trial courts' exercise of that discretion, the appellate courts have evolved certain general principles. The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause. Neither does delay caused by improper court administration. [Citation.]" (*Ibid.*, fns. omitted.)

The continuance on April 6, and those that occurred thereafter are problematic. At the time the trial court granted the April 6 continuance, defendant was one month past the expiration of his current commitment and therefore was being held without a current finding that he continued to meet the MDO requirements. Although the trial court found that the crush of other cases was good cause for that continuance, the record suggests that the court only considered its own calendar and did not determine whether other courtrooms were available for trial. Although the Supreme Court held in *In re Lopez* (1952) 39 Cal.2d 118, 120, "that 'where the condition of the court's business would not permit the trial to proceed' good cause is shown and a continuance is justified[,] [t]he burden of showing the existence of this condition . . . is upon the prosecution [citation],

and on the record before us the prosecution has failed to sustain that burden." (*People v. Tahtinen* (1958) 50 Cal.2d 127, 132.) In *People v. Tahtinen*, the court held that a notation in a minute order "that the case is continued for trial 'owing to congested condition of the calendar' falls short of establishing that trial could not proceed in any department of the Superior Court of Los Angeles County." (*Ibid*.)

The trial court's statement in this case is equally inadequate to show that defendant's trial could not go forward in another courtroom in Riverside County. Accordingly, we conclude the record does not support the trial court's finding of good cause for the April 6 continuance and that the trial court abused its discretion in continuing defendant's trial. That however does not end our inquiry because, as previously discussed, that error must also be prejudicial to constitute a due process violation. (See *People v. Kirkland* (1994) 24 Cal.App.4th 891, 910.) If the trial court had granted only a brief continuance, and defendant's trial had started immediately or very soon after April 6, we could not find the error prejudicial. However, the trial court continued defendant's trial for nearly a month and then granted several more continuances, two of which (May 11 and May 14) are completely unexplained, the latter occurring with only the notation "vacate" in the court's minutes for the date. Because they are unexplained, we cannot assume the continuances were supported by good cause. We will not address each of the remaining continuances and instead focus on the one that occurred on June 4, which in our view is the most troublesome.

The trial court found good cause to continue defendant's trial on June 4 because the prosecutor needed time to obtain defendant's medical records. In the abstract, a continuance for the purpose of obtaining apparently relevant medical records constitutes good cause. However, in granting the continuance, the trial court in this case did not consider the timing of the prosecutor's request or the resulting effect on defendant. The petition to extend defendant's MDO commitment had been pending in court for six months by the time the prosecutor made the medical records request, but the trial court did not ask the prosecutor to explain why she had not earlier requested defendant's medical records. The prosecutor's belated request for defendant's medical records also supports an inference that the prosecutor was not ready for trial on any of the earlier court dates and would have requested continuances even if defendant had not. Moreover, the trial court did not consider, in granting the prosecutor's motions for defendant's medical records and a continuance, that defendant had already been held for three months beyond the expiration of his current MDO commitment. Because the trial court did not ask the prosecutor to explain, least of all justify, the belated medical records request, we cannot conclude that good cause existed for granting that request or for granting the related and subsequent continuances.

We further conclude that the error was prejudicial and resulted in a violation of defendant's due process rights because it caused defendant to be held for four months, one third of the one-year MDO period of commitment, without a hearing to determine the lawfulness of that involuntary detention. It does not matter, as the Supreme Court

explained in *Allen*, *supra*, that a jury ultimately found defendant to be an MDO: "[M]ore often than not, an MDO would be unable to show prejudice if his or her mental disorder is not in remission. For instance, the Attorney General asserts that—notwithstanding the district attorney's untimely petition—Allen has suffered no actual prejudice because he would have been recommitted anyway as he continues to suffer from his severe mental disorder. Nonetheless, Allen was denied his annual review under the MDO Act, which may be deemed prejudicial. However prejudice may be characterized here, Allen is entitled to some type of remedy, or more precisely, a resolution of his commitment status." (*Allen, supra,* 42 Cal.4th at p. 105.) The same analysis pertains here.

As in *Allen*, defendant is entitled to a timely resolution of his MDO status. Because the continuances in this case were not based on good cause and the unnecessary delay resulted in prejudice to defendant, we must conclude that the trial court erred in granting those continuances and also in denying defendant's motions to dismiss the petition. In reaching this conclusion we note, as the court did in *Allen*, that our conclusion does not necessarily mean defendant will be released; if he is still in need of mental health treatment, defendant could be evaluated under the Lanterman-Petris-Short Act (LPS; Welf. & Inst. Code, § 5000 et seq.) for continued involuntary treatment. (See *Allen*, *supra*, 42 Cal.4th at pp. 105-108.)

DISPOSITION

The order continuing defendant's involuntary treatment under the MDO Act is reversed and the matter is remanded to the trial court for further proceedings, namely evaluation and commitment under LPS, if appropriate, or release from custody.

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/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Miller
J.