Filed 3/24/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSE DE JESUS VERDIN, Petitioner, v. THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, Respondent; THE PEOPLE, Real Party in Interest.	E038165 (Super.Ct.No. BAF003065) OPINION

ORIGINAL PROCEEDINGS in mandate. Robert J. McIntyre, Judge. Petition denied.

Gary Windom, Public Defender, and Richard V. Myers, Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Grover Trask, District Attorney, and Elise J. Farrell and Elaina Gambera Bentley, Deputy District Attorneys, for Real Party in Interest.

Thomas J. Orloff, District Attorney (Oakland) and Jeff H. Rubin, Deputy District Attorney, for the California District Attorneys Association as Amicus Curiae on behalf of Respondent.

FACTUAL AND PROCEDURAL HISTORY

Petitioner is charged with attempted murder, spousal battery and related crimes. Following the preliminary hearing, the defense indicated it would raise a "diminished actuality" defense pursuant to Penal Code[1] section 28, and had Dr. Francisco Gomez examine petitioner and prepare a psychological evaluation. The prosecution sought discovery of materials from Dr. Gomez's report and also access to petitioner for the purpose of conducting its own mental examination.

The trial court granted the prosecution's motion. This petition followed with petitioner seeking to set aside that portion of the order compelling him to submit to a prosecution mental examination. He contends that a compelled prosecution mental examination of a criminal defendant is a form of criminal discovery unauthorized by the reciprocal criminal discovery statutes. (§ 1054 et seq.) We summarily denied the petition. However, the California Supreme Court later granted a petition for review and transferred the matter back to this court with directions to issue an order to show cause why the relief prayed for in the petition should not be granted. We have done so, and we again deny the petition.

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

ANALYSIS

Noting that the criminal discovery statutes provide that no discovery shall occur in criminal cases except as contained in its provisions (§§ 1054, subd. (e), 1054.5, subd. (a)), petitioner contends that an examination of defendant by a prosecution expert is a form of criminal discovery unauthorized by the reciprocal criminal discovery statutes because it is not listed in section 1054.3 as something that defense counsel must disclose to the prosecution. We disagree. Statutory language supports our conclusion, and we are in accord with the interpretation of the court in *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30 (*Centeno*), that "section 1054.3, . . . requires defense counsel to 'disclose' information in the possession of defense counsel, such as reports of experts and results of tests. Examination of a defendant by a prosecution expert is unrelated to disclosure of information by defense counsel and thus is not logically encompassed by the criminal discovery statutes." (*Id*. at p. 41.)

It had long been held in California that a criminal defendant may be required to submit to an examination by a prosecution expert upon request when he places his mental condition at issue. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 412; *People v. Danis* (1973) 31 Cal.App.3d 782.) This rule predates the passage of this state's criminal discovery statutory scheme in 1990 with the passage of Proposition 115, and we are convinced that the enactment of these statutes did not and was not intended to change it. This principle has been reaffirmed after the enactment of the criminal discovery statutes. (*In re Hawthorne* (2005) 35 Cal.4th 40, 45.) The rationale for this rule is to prevent a defendant from trifling with the courts by

raising his mental condition as an issue that could not be rebutted by the prosecution. "By tendering his mental condition as an issue . . . defendant waived his Fifth and Sixth Amendment rights to the extent necessary to permit a proper examination of that condition. . . . Any other result would give an unfair tactical advantage to defendants, who could, with impunity, present mental defenses at the penalty phase, secure in the assurance they could not be rebutted by expert testimony based on an actual psychiatric examination. Obviously, this would permit and, indeed, encourage spurious mental illness defenses." (*People v. McPeters*, *supra*, 2 Cal.4th at p. 1190; see also *People v. Carpenter*, *supra*, 15 Cal.4th at p. 412.)

This rationale dovetails with the intent of the voters in passing the criminal discovery statutes as part of Proposition 115. "The manifest intent behind the measure was to reopen the two-way street of reciprocal discovery. The preamble to Proposition 115 states that 'comprehensive reforms are needed *to restore balance* and fairness to our criminal justice system.' (Prop. 115, § 1(a), italics added.)" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372.) It has been stated, "[r]eciprocal discovery is intended to protect the public interest in a full and truthful disclosure of critical facts, to promote the People's interest in preventing a last minute defense, and to reduce the risk of judgments based on incomplete testimony. [Citation.]" (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.) The criminal discovery statute itself tells us its provisions are to be interpreted "[t]o promote the ascertainment of truth in trials by requiring timely pretrial discovery." (§ 1054, subd. (a).) It would indeed be contrary to this purpose if we were to hold that the People were now prevented by the passage of Proposition 115 from

obtaining and introducing information to rebut a defendant's defense based on his mental condition, when they could do so before its passage.

In sum, both the language and the express intent of the voters support our conclusion that a compelled prosecution mental examination in these circumstances is not a form of discovery prohibited by the criminal discovery statutes.

Assuming arguendo that the criminal discovery statutes apply, we find that a compelled prosecution mental examination is authorized under section 1054, subdivision (e), which provides, "no discovery shall occur in criminal cases except as provided by this chapter, *other express statutory provisions*, or as mandated by the Constitution of the United States." (Italics added.) There is express statutory authorization for the trial court's order under Evidence Code section 730, which permits the trial court to appoint an expert on its own motion or a motion by any party when it appears that expert evidence is or may be required by the court or by any party. Given this broad language, we believe that the trial court may appoint an expert at the request and on behalf of the prosecution. (Cf. *People v. Dunkle* (2005) 36 Cal.4th 861, 881-882.) Petitioner complains that the trial court did not make an Evidence Code section 730, order but a Penal Code section 1054.3 order as requested by the prosecution. However, we note the prosecution cited *People v. Carpenter*, *supra*, in support of its request for access to the petitioner in order to conduct the examination, and the trial court did not cite any specific authority in support of its order granting that request. A trial court's ruling will be affirmed if any valid basis exists to support it. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

In light of our conclusion that the trial court did have the authority to order a prosecution mental examination as discussed above, we need not address the issue of whether such an examination is also authorized under section 1054.4 as nontestimonial evidence. (See *Centeno, supra*, 117 Cal.App.4th at p. 41, fn. 5.)

Petitioner also complains that the trial court did not prohibit the prosecution expert from questioning him about the factual circumstances of the crime nor did it indicate whether defense counsel would be permitted to observe the examination and consult with him. He notes that the trial court had limited the examination in *Centeno*. Although the trial court in *Centeno* imposed these conditions, the appellate court did not hold that these conditions were required in all cases and under all circumstances. Here, petitioner did not request the trial court to impose these requirements in the event it granted the prosecution's motion. Thus, the trial court was faced only with the broad issue of whether or not to require petitioner to submit to an examination by a prosecution expert. We reviewed that ruling, and have concluded that the trial court did not err. We believe it is not appropriate at this stage, and based on this record, to bar the prosecution expert from asking petitioner about the specifics of the crime where petitioner is claiming he did not have the specific intent to commit it because of his mental condition. The expert may find it necessary to ask questions touching upon the underlying facts of the offense in order to form an opinion on this issue. On remand petitioner may request the court to impose conditions and limitations on the prosecution examination, and the trial court retains the discretion to order those conditions it finds warranted in the circumstances of this case. Although a defendant is not entitled to counsel at the examination, the trial

court has the discretion to authorize defense counsel to be present as an observer. (*In re Spencer* (1965) 63 Cal.2d 400, 413; *People v. Burns* (2005) 128 Cal.App.4th 794, 805.)

As a final note, we add that petitioner's defense places him in a position comparable to a defendant who enters an insanity plea, and statements he makes during the examination may be admissible, as there exists no statutory immunity and the Fifth and Sixth Amendments to the United States Constitution do not require any further immunity. (*Centeno*, supra, 117 Cal.App.4th at pp. 43-44.) Of course, if petitioner refuses to be interviewed by the prosecution's expert, that lack of cooperation may be brought to the attention of the jury. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 412; *People v. McPeters*, *supra*, 2 Cal.4th at p. 1190; also see *People v. Sumahit* (2005) 128 Cal.App.4th 347.)

DISPOSITION

The petition for writ of mandate is denied.

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/s/ McKINSTER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ RICHLI
J.