

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON MITCHELL,

Defendant and Appellant.

B286381

Los Angeles County
Super. Ct. No. ZM007561

APPEAL from an order of the Superior Court of Los Angeles County, Roberto Longoria, Judge. Reversed.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Damon Mitchell appeals the trial court's order extending his involuntary commitment as a mentally disordered offender. Mitchell contends—and the People properly concede—that he was not advised of and did not personally waive his right to a jury trial. We agree and reverse.

BACKGROUND

On August 4, 1999, while he was a patient at Metropolitan State Hospital, Mitchell punched a nurse in the face because he believed the hospital was poisoning his food. He was convicted of battery with serious bodily injury (Pen. Code,¹ § 243) and sentenced to four years in prison. On September 27, 2000, Mitchell was found to be a mentally disordered offender (MDO) and was committed under section 2962 to the care of the agency then known as the Department of Mental Health.

Mitchell's first MDO commitment was scheduled to expire on November 29, 2004, but on July 8, 2004, the prosecution petitioned to extend treatment under section 2970. The court granted the prosecution's petition and extended Mitchell's commitment for one year. Mitchell received annual one-year extensions for the next 12 years.

On May 16, 2017, the prosecution petitioned to extend Mitchell's MDO commitment a 13th time. On June 20, 2017, Mitchell appeared by video conference. Through his attorney, he denied the allegations and asked the court to appoint a doctor to examine him. On August 8, 2017, Mitchell again appeared by video conference. Defense counsel said, "I spoke with Mr. Mitchell

¹ All undesignated statutory references are to the Penal Code.

about setting this for a court trial. He previously waived jury trial back on June 20th.”

On November 2, 2017, after a court trial at which Mitchell testified on his own behalf, the court granted the prosecution’s petition and extended Mitchell’s MDO commitment for the 13th time. The court set a maximum confinement date of August 31, 2018.

Mitchell filed a timely notice of appeal.

DISCUSSION

Mitchell contends we must reverse the court’s extension order because the record does not reflect that he personally waived his right to a jury trial as required by *People v. Blackburn* (2015) 61 Cal.4th 1113 (*Blackburn*). The People concede the issue, and we agree.

The statutory scheme for extending the involuntary commitment of a mentally disordered offender beyond termination of parole requires the trial court to “advise the person of his or her right to be represented by an attorney and of the right to a jury trial” and to hold a jury trial “unless waived by both the person and the district attorney.” (§ 2972, subd. (a).) Thus, before conducting a bench trial in an MDO proceeding, the court must advise the defendant of his right to a jury trial and must personally obtain a knowing, intelligent, and voluntary waiver of that right unless the court finds substantial evidence that the defendant lacks the capacity to make such a waiver. (*Blackburn, supra*, 61 Cal.4th at pp. 1116, 1125, 1130–1131.)

Here, the record contains no evidence that the court advised Mitchell of his right to a jury trial or that he knowingly and voluntarily waived that right. Although the reporter’s transcript of the August 8, 2017, proceeding includes defense

counsel's statement that Mitchell "previously waived jury trial back on June 20th," the minute order from June 20, 2017, does not contain either an advisement or a waiver. Nor does the minute order from any other date contain the required advisement and waiver. Finally, the court made no finding on the question of capacity, and the record does not affirmatively show that Mitchell lacked the required capacity. (*Blackburn, supra*, 61 Cal.4th at pp. 1136–1137.) As the error is structural, reversal is required. (*Id.* at pp. 1132–1137.)

In *Blackburn*, the court conditionally reversed to afford the district attorney an opportunity to submit evidence that the defendant personally made a knowing and voluntary waiver of his right to a jury trial or that he lacked the capacity to do so. The court chose this remedy because its decision had rejected the previous rule "that counsel invariably controls the decision to waive a jury trial in an MDO commitment proceeding." (*Blackburn, supra*, 61 Cal.4th at p. 1137.) Accordingly, the court reasoned, "the trial court and the parties may have reasonably relied on that prior law in proceeding with a bench trial without making a record of Blackburn's personal waiver or his inability to make a knowing and voluntary waiver." (*Ibid.*) The court held that approach would apply to all cases on direct appeal when the opinion was issued. (*Ibid.*) But *Blackburn* was issued in 2015, and the trial in this case was not held until 2017. As this case was not on direct appeal when the court issued its decision in *Blackburn*, conditional reversal is not warranted here.

Because the confinement at issue here expired on August 31, 2018, by the time our remittitur issues, the prosecution will have either released Mitchell or filed a petition to extend his commitment a 14th time. Accordingly, we decline to remand for a

new trial with respect to the 13th extension. Our holding here will instead govern any future commitment proceedings. (*People v. Blancett* (2017) 15 Cal.App.5th 1200, 1206–1207 [MDO defendant’s failure to waive jury trial requires reversal, not a remand for further proceedings, even if initial commitment likely expired].)

DISPOSITION

The November 2, 2017, order extending Mitchell’s involuntary commitment is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.