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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER BLAGG, Defendant and Appellant.	B221381 (Los Angeles County Super. Ct. No. MA024055)

APPEAL from an order of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed.

Jean Matulis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, David C. Cook and Shira B. Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Blagg petitioned for restoration of sanity pursuant to Penal Code section 1026.2.[1] In a prior proceeding we granted his petition for writ of mandate and directed the trial court to set a hearing on the petition under section 1026.2. On remand, the trial court held the hearing and determined that Blagg no longer presented a danger to others and was eligible for placement in an appropriate forensic conditional release program. This appeal concerns the choice of program in which Blagg was placed.

Blagg contends the trial court improperly abdicated its decision making authority on placement decisions by placing him in a program in Los Angeles rather than one in San Francisco. He argues this constituted a violation of the separation of powers doctrine because the court indicated it was willing to place him in San Francisco but ultimately followed the proposal of a Los Angeles conditional release program that he be placed locally. Alternatively, Blagg argues the trial court abused its discretion in placing him in a conditional release program away from his family and support system. He asserts that the placement violated his due process rights.

We conclude the trial court properly exercised its discretion in placing Blagg in a Los Angeles conditional release program, and that there is no separation of powers or due process violation.

FACTUAL AND PROCEDURAL SUMMARY

We take a portion of our summary from our nonpublished opinion (*Blagg v. Superior Court* (Dec. 16, 2008, B209241)) in which we granted Blagg's petition for writ of mandate and directed the trial court to provide him a hearing on restoration of sanity as required by section 1026.2.

Blagg was found not guilty by reason of insanity of assault committed during a residential burglary. He filed an application for restoration of sanity pursuant to section 1026.2 in October 2007, but the trial court denied a hearing. We issued an alternative writ of mandate, directing the trial court to either vacate its order denying Blagg a hearing

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[1] Statutory references are to the Penal Code unless otherwise indicated.

under section 1026.2 and to make a new order granting the hearing, or to show cause why a peremptory writ of mandate should not issue. We also appointed counsel for Blagg. Respondent conceded Blagg's right to a hearing as to whether he should be placed in an outpatient facility. Following oral argument, we granted Blagg's writ petition and directed the court to hold the hearing required by section 1026.2.

On remand at an April 15, 2009 hearing, the trial court found Blagg no longer posed a danger to himself or others so long as he was under supervision and treatment in the community. Blagg was ordered released from Patton State Hospital and enrolled in CONREP, a community release program. The trial court stated that it "had no objection to Mr. Blagg being supervised and attending CONREP in the San Francisco Bay Area." Gateways CONREP in Los Angeles County (Gateways) filed a letter in May 2009 asking the trial court to rescind the order because it had not been given an opportunity to present its recommendation regarding Blagg; based on past behaviors, it did not consider Blagg a suitable candidate for community outpatient treatment; and it was not clear whether the San Francisco CONREP was willing to accept Blagg or whether it was an appropriate placement.

At a subsequent hearing, the trial court apologized to Blagg, saying that its April 15, 2009 order was based on a lack of knowledge of the process because CONREP had a right to be heard on his suitability for release. On December 10, 2009, the trial court found that Blagg was not a danger to the community and that he would benefit from outpatient treatment. This ruling was based on the Gateways report of November 19, 2009, an October 8, 2009 report by Dr. Joshua Horsley of Patton State Hospital, and a February 28, 2009 report by Dr. Kory Knapke. Blagg was granted outpatient status and was released to Gateways. The trial court was informed that the San Francisco CONREP program denied a request to transfer Blagg to its program. The court informed Blagg that it was agreeable to a transfer to the San Francisco CONREP if Gateways ordered it. This timely appeal followed.

DISCUSSION

I

"A person who has been found not guilty by reason of insanity and committed to a state hospital may apply to the superior court for release from commitment 'upon the ground that sanity has been restored.' (§ 1026.2, subd. (a).) 'If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year.' (§ 1026.2, subd. (e).)" (*People v. Bartsch* (2008) 167 Cal.App.4th 896, 899, fn. omitted.)

A petition for restoration of sanity under section 1026.2 involves a two-step process. (*People v. Dobson* (2008) 161 Cal.App.4th 1422, 1432.) "The first step requires the person to apply for release to the superior court of the county from which the commitment was made. (§ 1026.2, subd. (a).)" (*Ibid.*) "Once the application is filed, the court must conduct a hearing, commonly called the outpatient placement hearing. (§ 1026.2, subd. (a); see [*People v.*] *Soiu* [(2003)] 106 Cal.App.4th [1191,] 1196-1197.)" (*Ibid.*) At the outpatient placement hearing the applicant must demonstrate by a preponderance of the evidence that he or she will not present a danger to others due to mental defect, disease, or disorder, while under supervision and treatment in the community. (*Ibid*; § 1026.2, subd. (3).) "The second step in the section 1026.2 release process is referred to as the restoration of sanity trial, and can only be reached if the applicant has already met the threshold test for placement in 'an appropriate forensic conditional release program.' (§ 1026.2, subd. (e); [citations].)" (*Id.* at p. 1433)

Trial court decisions denying an application for release upon restoration of sanity have been reviewed for abuse of discretion. (*People v. McDonough* (2011) 196 Cal.App.4th 1472, 1489; *People v. Bartsch*, *supra*, 167 Cal.App.4th at p. 900.) We have found no reported decision in which an appeal was taken from the placement choice after the court ordered release. We conclude that the abuse of discretion standard is appropriate here because it is based, like the decision to grant release, upon the same

record. Under the abuse of discretion standard in this context, "'it is not sufficient to show facts affording an opportunity for a difference of opinion. [Citation.] ". . . [D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered."' [Citation.]" (*People v. Bartsch*, *supra*, 167 Cal.App.4th at p. 900.)

In *People v. Sword* (1994) 29 Cal.App.4th 614, the court considered whether the trial court erred in rejecting an applicant's effort to be placed on outpatient status under section 1600 et seq. When the defendant is found to have been insane at the time of the offense, the trial court may commit him or her to a state hospital, or other facility or outpatient status under section 1600 et seq. (*Id*. at pp. 619-620.) "A person may be released from a state hospital (1) upon restoration of sanity pursuant to the provisions of section 1026.2, (2) upon expiration of the maximum term of commitment under section 1026.5 [citation], or (3) upon approval of outpatient status pursuant to the provisions of section 1600 et seq. (§ 1026.1.)" (*Id*. at p. 620.) The *Sword* court characterized the outpatient release procedure as "an integral part of the restoration of sanity procedure stated in section 1026.2, . . ." (*Id*. at p. 621.) In *Sword*, doctors and other experts unanimously testified that in their opinion, Sword would not be dangerous on outpatient status. (*Id*. at pp. 625-626.) The trial court concluded that the opinions of the doctors and social worker were not supported by Sword's file. (*Id*. at pp. 627-628.) The Court of Appeal emphasized that the role of the trial court in exercising its discretion is not to "rubber-stamp" the recommendations of the doctors and community release program staff experts. (*Id.* at p. 628.)

Blagg's separation of powers argument is that the trial court improperly declined to order him placed in San Francisco CONREP because of objections interposed by Gateways. He contends that this amounted to an abdication of judicial duties in favor of the agencies entrusted with delivering outpatient care, analogizing this situation to dependency cases regarding the court's relegation of visitation decisions to a third party. (*In re S.H.* (2003) 111 Cal.App.4th 310 [order that visitation will not be enforced over child's rejection was found to be invalid delegation of judicial authority to decide

whether *any* visitation will be allowed]; *In re Christopher H.* (1996) 50 Cal.App.4th 1001 [order for reasonable visitation not unlawful delegation of sole judicial authority to whether visitation will occur].)

We conclude that another dependency decision, *In re M.C.* (2011) 199 Cal.App.4th 784, is more instructive. In that case, a social services agency declined to file a dependency petition under Welfare and Institutions Code section 300 regarding a 16-year-old who had left his parents in Guatemala and had come to San Francisco. Attorneys for the minor challenged the agency's decision not to initiate dependency proceedings pursuant to Welfare and Institutions Code section 331.[2] The juvenile court ordered the agency to file a petition, took the minor into protective custody, and eventually declared him a dependent child. (*Id*. at p. 815.)

The Court of Appeal rejected a separation of powers challenge to the court's order. The court emphasized that the juvenile law system "'"envisions a cooperative effort between the [social services agency] and the juvenile court." [Citation.]'" (*In re M.C.*, *supra*, 199 Cal.App.4th at p. 809.) It noted that while the social services agency acts as an administrative agency of the executive branch, "[*t*]*he juvenile court maintains ultimate control* over the delivery of services through its authority to decide that the services offered or provided to the parents were unreasonable and that further services must be offered . . . . [Citations.]" (*Id*. at p. 810.) The court stressed the role of the social service agency in providing essential information to the juvenile court through statutorily mandated reports and recommendations. (*Ibid.*) It concluded that "the scope of the juvenile court's and the social service agency's authority in the 'cooperative effort' is defined by the juvenile dependency statutes themselves." (*Ibid.*) In *In re M.C.*, the juvenile court had the statutory authority to review the social worker's decision to decline

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[2] Welfare and Institutions Code section 331 allows a person who has applied to a social worker for commencement of dependency proceedings to seek judicial review of the social agency's decision not to file a dependency petition. The statute provides that the court may either affirm the decision of the social worker or order the commencement of juvenile court proceedings.

to initiate dependency proceedings pursuant to Welfare and Institutions Code section 331. (*Id*. at p. 811.) It concluded that the judiciary could not usurp a power never exclusively vested in the executive branch and found no violation of the separation of powers doctrine. (*Id*. at p. 815.)

The question presented in this case is whether the trial court failed to exercise power vested in it by the statutory scheme for restoring a patient found not guilty by reason of insanity to sanity. It is similar to the question resolved in *In re M.C.*, *supra*, 199 Cal.App.4th 784, because the answer turns on the cooperative statutory scheme which rests the ultimate decision with the judiciary but provides a role for recommendation by the agencies providing outpatient or community treatment.

Section 1026.2 sets out the procedure applicable here for outpatient placement. Under section 1026.2, subdivision (b), pending the outpatient placement hearing, the community program director or a designee "shall review the summary [of treatment programs at the facility in which the applicant has been confined] and *shall designate a facility within a reasonable distance from the court in which the person may be detained pending the hearing on the application for release*." (Italics added.) The trial court is given the authority at the outpatient placement hearing to "order the applicant placed with *an appropriate forensic conditional release program* . . . ." (Italics added.) (§ 1026.2, subd. (e).) But the court must receive a recommendation from the community program director *before* making a placement order: "Before placing an applicant in an appropriate forensic conditional release program, the community program director *shall submit to the court a written recommendation as to what forensic conditional release program is the most appropriate for supervising and treating the applicant*." (Italics added.) (§ 1026.2, subd. (g).) The trial court is given express authority to reject the community program director's recommendation, so long as the court specifies the reasons for that order. (§ 1026.2, subd. (g).)

This is a cooperative program between the courts, the treatment facilities and the community conditional release programs analogous to the cooperative dependency system. Here, the trial court followed the prescribed procedure by receiving the

recommendation from Gateways that Blagg be released to it rather than the San Francisco CONREP. The court did not abdicate its decision to others. Rather, the record reflects that it considered the recommendations made pursuant to the statutory scheme. This conclusion also disposes of Blagg's argument that his right to due process was violated by the court's failure to comply with its own statutes by improperly deferring to the Gateways recommendation.

As we next discuss, the court did not abuse its discretion in placing Blagg in the Gateways program rather than in San Francisco.

II

Blagg argues the trial court abused its discretion by placing him in Gateways rather than CONREP in San Francisco. He claims there was uncontested evidence that his support system was in the San Francisco Bay Area and that the staff at Patton State Hospital recommended his placement there.

In making its order, the court had before it an excerpt of a letter from CONREP in San Francisco rejecting a possible referral of Blagg to their program: "It is clear that Mr. [Blagg] has significant difficulty negotiating with authority figures, especially Conrep, as evidenced by his refusal to cooperate at his last two liaison visits. This combined with his general attitude of defiance, as manifested through his behaviors at Patton State Hospital, does not make him an attractive candidate for transfer, *especially so while considering our lack of housing resources*. I am willing to consider a transfer in the event he is able to meaningfully and successfully participate in your program for a one year period." (Italics added.)

In light of the position taken by CONREP in San Francisco, we conclude that the trial court did not abuse its discretion in placing Blagg in Gateways. The court expressed its hope that Blagg is successful in the Gateways program and gets the transfer to the Bay Area program.

DISPOSITION

The December 10, 2009 order placing Blagg in the Gateways CONREP program is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.