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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT DORN,

Defendant and Appellant.

2d Crim. No. B241034
(Super. Ct. No. F470497)
(San Luis Obispo County)

Vincent Dorn appeals the order committing him for treatment as a mentally disordered offender (MDO) (Pen. Code,¹ § 2962 et seq.). Appellant contends the Board of Parole Hearings (BPH) lacked authority to make the determination that he qualified as an MDO because the California Department of Corrections and Rehabilitation (CDCR) did not certify his MDO status prior to his scheduled release date. We conclude the certification, which was issued the day appellant was scheduled to be released on parole but prior to his release, satisfies the requirement that he be certified "[p]rior to release on parole," as contemplated by subdivision (d)(1) of section 2962. Accordingly, we affirm.

BACKGROUND

Appellant suffers from schizophrenia and has a lengthy criminal history. In 2010, appellant was convicted of battery by a prisoner on a nonconfined person (§ 4501)

¹ All further undesignated statutory references are to the Penal Code.

and was sentenced to two years in state prison. He was scheduled to be released on parole on December 1, 2011.

On November 30, 2011, a psychologist evaluated appellant and concluded he qualified for MDO treatment. The same conclusion was reached by another psychologist who evaluated appellant on December 1, 2011. That same date, the chief psychiatrist of the CDCR certified to the BPH that appellant met the section 2962 MDO criteria. The BPH determined that appellant met the MDO criteria and sustained the requirement of treatment as a condition of his parole.

Appellant filed a petition challenging the BPH's determination. In support of the petition, appellant filed a motion asserting that the CDCR's certification was untimely under section 2962, subdivision (d)(1). The court denied the motion following a hearing. After appellant waived his right to a jury, the court found that appellant met the MDO criteria and ordered him committed for treatment as a condition of his parole. This appeal followed.

DISCUSSION

Appellant contends the BPH's determination that he meets the criteria for MDO treatment and the order committing him for treatment as a condition of his parole must be reversed because the CDCR did not certify his MDO status "[p]rior to release on parole," as required under section 2962, subdivision (d)(1). We conclude otherwise.

"We construe the provisions of the Penal Code 'according to the fair import of their terms, with a view to effect its objects, and to promote justice.' [Citation.] We must 'give effect to the words themselves [and] determine the effect of words used in light of the usual, ordinary import of the language employed,' in order to give effect to the purpose of the law. [Citation.]" (*People v. Morrison* (2011) 191 Cal.App.4th 1551, 1556.)

"California's anti-lenity statute provides that, '[t]he rule of the common law, that penal statutes are to be strictly construed, has no application to this Code.' [Citation.] Nevertheless, constitutional guarantees of due process require that true ambiguities in a penal statute are resolved in a defendant's favor. [Citation.] But a court must 'not strain

to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent.' [Citation.] Thus, '[t]he rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable. [Citations.]' [Citation.]" (*People v. Morrison, supra*, 191 Cal.App.4th at pp. 1556-1557.)

Section 2962 enumerates the criteria for MDO treatment. Subdivision (d)(1) provides the requirement that "[p]rior to release on parole, . . . a chief psychiatrist of the Department of Corrections and Rehabilitation has certified to the Board of Parole Hearings that the prisoner has a severe mental disorder" Although appellant's certification was issued prior to his actual release on parole, he argues that the statute's reference to "[p]rior to release on parole" must be construed in this context to mean prior to the date the prisoner *is scheduled to be released* on parole. According to appellant, "[his] status changed, by operation of law, as of midnight on December 1, 2011 and, even though appellant was held in custody beyond that time, his status as of that date was as a parolee, and not a prisoner that remained subject to evaluation as an MDO." We are not persuaded.

The statute plainly states that CDCR certifications must be issued prior to a prisoner's release on parole. That is what happened here. If the Legislature had intended to require that the certifications be issued prior to the prisoner's scheduled parole release date, it would have said so. (See *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727 ["We presume the Legislature knew what it was saying and meant what it said"]; see also *People v. Williams* (1999) 77 Cal.App.4th 436, 452 ["[W]hen the Legislature intends to . . . make the scheduled release date a deadline, it does so expressly and not by implication"].) For example, the MDO's 90-day treatment requirement states that the prisoner must have been in treatment "for 90 days or more within the year prior to his or her parole release day." (§ 2962, subd. (d)(1).) "When the Legislature uses different words or phrasing in contemporaneously enacted statutory provisions, a strong inference arises that a different meaning was intended." (*In re C.H.* (2011) 53 Cal.4th 94, 107.)

No such requirement is stated in the statutory phrase at issue here. Because the law merely requires that CDCR certifications be issued prior to the prisoner's release on parole, and the certification in this case was so issued, there is no basis for us to conclude that the certification was untimely.

In arguing to the contrary, appellant primarily relies on *Blakely v. Superior Court* (2010) 182 Cal.App.4th 1445 (*Blakely*). In *Blakely*, however, the CDCR's certification was issued a week *after* the prisoner's scheduled release date. (*Id.* at pp. 1449-1450.) The reviewing court was faced with the question whether a certification issued on the prisoner's parole release date is timely. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 481-482, fn. 7.)

Appellant also argues that recent amendments to section 2963 reflect a legislative recognition that acts impacting a prisoner's release must, to be effective, occur before the scheduled release date. That section states: "(a) Upon a showing of good cause, the Board of Parole Hearings may order that a person remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation pursuant to paragraph (1) of subdivision (d) of Section 2962 and any additional evaluations pursuant to paragraph (2) of subdivision (d) of Section 2962. [¶] (b) For purposes of this section, good cause means circumstances where there is a recalculation of credits or a restoration of denied or lost credits, a resentencing by a court, the receipt of the prisoner into custody, or equivalent exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the evaluations described in subdivision (d) of Section 2962." Appellant thus argues that MDO certification must be conducted on or before the date preceding the scheduled release date, because it also impacts a prisoner's release.

While section 2963 establishes a method for obtaining additional time to evaluate a person after his scheduled release date upon a showing of good cause, it does not mention CDCR certification or support appellant's claim that such certifications must occur on the day preceding a person's scheduled release date. On the contrary, the

statute's reference to extending the prisoner's custody "for no more than 45 days *beyond the person's scheduled release date*" (italics added) provides further support for the conclusion that certifications issued on or before the scheduled release date are to be considered timely. While the statute also refers to "exigent circumstances which result in there being less than 45 days prior to the person's scheduled release date for the evaluations described in subdivision (d) of Section 2962," this clause merely reflects a determination that MDO evaluations generally take up to 45 days to complete. Where, as here, the evaluations and the BPH's MDO determination are all completed as of the prisoner's parole release date, and prior to his release, there is simply no basis for courts to reject the BPH's determination that the prisoner must accept treatment as a condition of his or her release.

Appellant also argues that "artificially delaying a prisoner's release on his or her scheduled release violates the 'mandatory kick-out provision' contained in Penal Code section 3000, subdivision (b)(1)." Appellant has made no showing, however, that his release was "artificially" delayed. As we have noted, the BPH's determination that he qualifies for MDO treatment was made on the date of his scheduled release. Appellant had no right to be released prior to that date. Because the entire process was completed "[p]rior to release on parole" as contemplated by section 2962, the court correctly rejected his claim that the CDCR's certification of him as an MDO was untimely.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Barry T. LaBarbera, Judge
Superior Court County of San Luis Obispo

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

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