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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DOMONIQUE D. MADDEN, Defendant and Appellant.	2d Crim. No. B264893 (Super. Ct. No. 15PT-00179) (San Luis Obispo County)

In *People v. Achrem* (2013) 213 Cal.App.4th 153, 157 (*Achrem*), this court held that "[t]reatment before a defendant is convicted of [a] commitment offense cannot satisfy the 90-day treatment criteria" of the Mentally Disordered Offender (MDO) Law (Pen. Code,[1] § 2962, subd. (c)). Domonique D. Madden appeals his MDO commitment on the ground that the evidence is insufficient to prove he received at least 90 days of postconviction treatment. He is correct and we reverse.

BACKGROUND

In July 2014, appellant was convicted of assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) and was sentenced to two years in state prison. He was awarded 457 days of presentence custody credit. Prior to appellant's

[1] All statutory references are to Penal Code.

scheduled release date of December 13, 2014, the Board of Parole Hearings (BPH) determined that he met the criteria for MDO treatment and should be committed for treatment as a condition of his parole. Appellant filed a petition challenging that decision and waived his right to a jury trial.

Dr. Brandi Mathews, a psychologist at Atascadero State Hospital (ASH), testified at the hearing on behalf of the prosecution. Dr. Mathews concluded that appellant met all of the criteria for MDO treatment. In concluding that appellant had received at least 90 days of treatment during the year prior to his parole release date (§ 2962, subd. (c)), the doctor included treatment that appellant had received in jail prior to his conviction. The doctor also conceded that appellant had only received 75 days of treatment after his conviction.

At the conclusion of the hearing, the prosecutor asked the trial court to reject *Achrem* for the proposition that only postconviction treatment can satisfy the MDO law's 90-day treatment requirement. He characterized *Achrem*'s express disapproval of this court's prior decision to the contrary in *People v. Martin* (2005) 127 Cal.App.4th 970 (*Martin*) as "dictum" and urged the court to instead follow *Martin*. He claimed that *Achrem* was simply wrong on the relevant point and should be rejected because it "would frustrate the purposes of" the MDO law and "lead[] to an absurd result . . . ." The court agreed that appellant's preconviction treatment counted toward the 90-day requirement and accordingly denied the petition.

DISCUSSION

Appellant contends the evidence is insufficient to support the finding that he received at least 90 days of treatment in the year prior to his release on parole, as contemplated in subdivision (c) of section 2962. In their response, the People acknowledge that appellant only received 75 days of postconviction treatment. They also

concede that the trial court's inclusion of treatment appellant received in jail prior to his conviction directly conflicts with our decision in *Achrem*.[2]

The People nevertheless refuse to concede the issue. For the first time on appeal, they assert that appellant cannot challenge the 90-day treatment element of his MDO commitment because he did not voluntarily comply with his treatment plan while in prison. But neither of the authorities cited in support of this assertion so holds. (*People v. Kirkland* (1994) 24 Cal.App.4th 891, 908 [continued MDO commitment under section 2970 does not require showing that prior treatment was "continuous" or "involuntary"]; *Thor v. Superior Court* (1993) 5 Cal.4th 725, 738 [recognizing "as a general proposition that a physician has no duty to treat an individual who declines medical intervention after 'reasonable disclosure of the available choices with respect to proposed therapy [including nontreatment] and of the dangers inherently and potentially involved in each'"].) Moreover, the prosecution's failure to prove the 90-day treatment requirement had nothing to do with appellant's compliance or noncompliance. Dr. Mathews conceded that appellant actually received treatment for all 75 days he spent in prison. The doctor also conceded that the 90-day requirement could not be met without including treatment appellant received prior to his conviction.

The People alternatively urge us to revisit *Achrem*, but give us no persuasive reason to do so. Contrary to the People's claim, the reference in section 2981 to treatment in "county jail" does not undermine the decision. As appellant notes, a defendant might receive treatment while in jail awaiting transfer to prison. As we made clear in *Achrem*, "[t]reatment before a defendant is convicted of the commitment offense

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[2] The court plainly erred in refusing to read or consider *Achrem*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon . . . all the superior courts of this state. . . . Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction"].) It is also clear that *Achrem*'s express disapproval of *Martin* is not dicta. (See *People v. Sullivan* (1978) 80 Cal.App.3d 16, 20, overruled on another point in *People v. Whitmer* (2014) 59 Cal.4th 733, 739-741 [opinion's express disapproval of prior opinion "cannot [be] dismiss[ed] . . . as mere dicta"].)

cannot satisfy the 90-day treatment criterion because the defendant is not a 'prisoner' when the treatment is provided." (*Achrem*, *supra*, 213 Cal.App.4th at p. 157.) Because it is undisputed that appellant only received 75 days of treatment after his conviction, the evidence is insufficient to sustain the finding that he qualifies as an MDO.

The judgment (MDO commitment order) is reversed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

James F. Iwasko, 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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