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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. EMMANUEL CORRAL, Defendant and Appellant.	2d Crim. No. B296572 (Super. Ct. No. 18PT-01266) (San Luis Obispo County)

Emmanuel Corral appeals the trial court's order committing him for treatment as a mentally disordered offender (MDO) (Pen. Code,[1] § 2962 et seq.). Appellant contends the record does not affirmatively demonstrate that he knowingly, voluntarily and intelligently waived his right to a jury trial. We agree and reverse.[2]

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[1] All statutory references are to the Penal Code.

[2] Appellant also claims the evidence was insufficient to support the finding that he represents a substantial danger of physical harm to others by reason of his severe mental disorder,

FACTS AND PROCEDURAL HISTORY

In August 2017, appellant pled guilty to battery with serious bodily injury (§ 243, subd. (d)) and was sentenced to two years in state prison. In December 2018, the Board of Prison Terms (BPT) determined that appellant met the MDO criteria and sustained the requirement of treatment as a condition of his parole. Appellant petitioned for a hearing pursuant to section 2966, subdivision (b).

At appellant's first appearance in the matter, the trial court appointed counsel to represent appellant. Immediately after accepting the appointment, counsel stated "my client and I have discussed a court trial versus a jury trial.. He would like to waive jury." The following colloquy ensued: "The Court: And is this is what you want to do, sir? [¶] [Appellant]: Yes, sir. [¶] The Court: Do you understand what a jury trial is? [¶] [Appellant]: Yes, sir. [¶] The Court: Do you understand what a court trial is? [Appellant]: I think so. [¶] The Court: All right. And the People waive on all other matters? [¶] [Prosecutor]: Standard waiver, your Honor. [¶] The Court: Thank you."

Dr. Angie Shenouda, a forensic evaluator at Atascadero State Hospital, testified at the hearing on appellant's petition. Based on her interview of appellant and her review of his records, Dr. Shenouda concluded that he met the criteria for MDO treatment. The doctor opined that (1) appellant suffers from

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as set forth in subdivision (d)(1) of section 2962. We need not address this claim because the lack of a valid jury waiver compels reversal of the judgment, and double jeopardy principles do not apply to MDO proceedings. (*People v. Francis* (2002) 98 Cal.App.4th 873, 877.)

schizophrenia, a severe mental disorder; (2) the disorder was not in remission as of the date of the BPT hearing; (3) the disorder was a cause or aggravating factor in his commission of the commitment offense (battery with serious bodily injury); (4) appellant received at least 90 days of treatment for his mental disorder in the year prior to his parole release date; and (5) as of the date of the BPT hearing, he represented a substantial danger of physical harm to others by reason of his severe mental disorder. In support of the latter opinion, Dr. Shenouda offered among other things that appellant lacked sufficient insight into his mental disorder and the need for medication and did not have an adequate discharge plan.

Psychologist Carl Bonacci testified on behalf of appellant. After interviewing appellant and reviewing his records, Dr. Bonacci concluded that he did not qualify for MDO treatment because he did not currently represent a substantial danger of physical harm to others by reason of his mental disorder. Dr. Bonacci reasoned that appellant had no prior criminal history other than his commitment offense and did not have any disciplinary actions while in prison. The doctor also noted that although appellant was convicted of battery with serious bodily injury, the probation and police reports regarding the offense—in which appellant lunged at the victim with a knife while mimicking stabbing motions—contained no facts indicating that the victim suffered any physical harm.

At the conclusion of the hearing, the trial court determined that appellant met the MDO criteria beyond a reasonable doubt. The court then ordered him committed to the State Department of State Hospitals for treatment as a condition of his parole.

DISCUSSION

Appellant contends the trial court's order must be reversed because the record does not affirmatively show that he knowingly, voluntarily, and intelligently waived his right to a jury trial. We agree.

"[S]ection 2966, like section 2972, requires the trial court to advise the petitioner in MDO commitment proceedings of the right to a jury trial and, before holding a bench trial, to elicit a personal waiver of that right unless the court finds substantial evidence that the petitioner lacks the capacity to make a knowing and voluntary waiver." (*People v. Blancett* (2017) 15 Cal.App.5th 1200, 1205 (*Blancett*), citing *People v. Blackburn* (2015) 61 Cal.4th 1113, 1116, 1136.) To be valid, a jury waiver must be "knowing and intelligent, [i.e.], ""made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,"" as well as voluntary ""in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."""" (*People v. Collins* (2001) 26 Cal.4th 297, 305.) Whether a jury waiver is valid depends upon the totality of the circumstances. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 166 (*Sivongxxay*).) A waiver cannot be upheld, however, unless the record ""affirmatively shows that it is voluntary and intelligent under the totality of the circumstances."" (*People v. Daniels* (2017) 3 Cal.5th 961, 991 (*Daniels*) (lead opn. of Cuéllar, J.); see also id. at p. 1018 (conc. & dis. opn. of Corrigan, J.).)

Blancett, like the instant matter, involved a jury trial waiver at an MDO initial commitment hearing. Blancett's counsel told the court "'[w]e'd like to set it for a court trial.'" (*Id.* at p. 1203.) The trial court asked Blancett if he was "'okay with

having a judge decide your case and not a jury'" and Blancett replied, "'Yes, your honor.'" (Ibid.)

In reversing, we concluded that Blancett "did not waive his right to a jury trial with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." (*Blancett*, *supra*, 15 Cal.App.5th at p. 1206.) The trial court did not advise Blancett of his right to a jury trial or "explain the significant attributes or mechanics of a jury trial. [Citation.] Neither did the court inquire whether Blancett had sufficient opportunity to discuss the decision with his attorney, whether his attorney explained the differences between a bench trial and a jury trial, or whether Blancett had any questions about the waiver." (*Ibid.*) We further noted that "the record does not suggest that Blancett was familiar with MDO proceedings or that he was aware that he was entitled to a jury trial. Although he pleaded guilty to two counts of child molestation two years prior to the MDO hearing, we have no record of the advisements he received before entering that plea." (*Ibid.*) We went on to conclude that "[i]n view of the trial court's stark colloquy, the lack of evidence that Blancett discussed his jury trial right and waiver with counsel, Blancett's inexperience with the criminal justice system, and Blancett's lack of familiarity with MDO proceedings, . . . his waiver was not knowing and intelligent." (*Id.* at pp. 1206-1207.)

In *People v. Jones* (2018) 26 Cal.App.5th 420 (*Jones*), the defendant (Jones) was asked if she understood her right to a jury trial and if she agreed to waive that right and have the trial judge "'sitting alone, decide the case.'" (*Id.* at p. 428.) Although it could be inferred that Jones had some discussion with her attorney regarding a jury waiver, "the record [did] not show

whether Jones's attorney ever discussed with her the nature of a jury trial, including for example, that the jury would be comprised of 12 of her peers from the community." (*Id.* at p. 435.)

In reversing the judgment, the Court of Appeal concluded that the "sparse record" did not affirmatively show that Jones's jury waiver was voluntary and intelligent under the totality of the circumstances. (*Jones*, *supra*, 26 Cal.App.5th at p. 435.) The court reasoned that "[t]here is no showing from this record that Jones understood the nature of the right to a jury trial she was relinquishing. While the Supreme Court in *Sivongxxay* made clear there is no precise formulation for a valid jury waiver advisement, the [C]ourt recommended that the trial court advise the defendant that in a trial by jury, the jury is comprised of 12 members of the community, the defendant through his or her attorney may participate in jury selection, 12 jurors must unanimously agree to render a verdict, and in a court trial, the judge alone will decide the defendant's guilt or innocence. [Citation.] Of this list, the trial court here only advised Jones that it alone would decide whether Jones was guilty or innocent." (*Id.* at p. 436.)

The court in *Jones* went on to conclude that "[b]ecause the trial court did not advise Jones as to the specific rights she would be giving up or inquire if her attorney explained those rights to her, her bare acknowledgment that she understood her right to a jury trial was inadequate." (*Jones*, *supra*, 26 Cal.App.5th at p. 436.) The court also noted that "unlike the defendants in *Sivongxxay* and *Daniels*, who had previously waived their rights in connection with guilty pleas [citations], Jones had no experience with the criminal justice system. Neither the

information nor the probation report reveals a prior criminal charge." (*Id.* at pp. 436-437.)

Here, we are presented with an even starker colloquy and a similarly sparse record. In *Blancett* and *Jones*, the trial court merely advised the defendant that the court alone would decide the issues in a court trial; here, the court did not advise appellant of *any* of the factors set forth in *Sivonggxay*. Although appellant's attorney stated that she and appellant had "discussed" proceeding with a court trial rather than a jury trial, "the record does not show whether [appellant's] attorney ever discussed with [him] the nature of a jury trial, including for example, that the jury would be comprised of 12 of [his] peers from the community." (*Jones*, *supra*, 26 Cal.App.5th at p. 435.) As in *Blancett*, "the court appointed counsel moments before [appellant] entered his waiver and there is no record of discussion between [appellant] and his attorney prior to the waiver." (*Blancett*, *supra*, 15 Cal.App.5th at p. 1206.)

Moreover, nothing else in the record supports a finding that appellant "waive[d] his right to a jury trial with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." (*Blancett*, *supra*, 15 Cal.App.5th at p. 1206.) When the court asked appellant if he "understand[s] what a court trial is," appellant merely replied "I think so." This is plainly insufficient to constitute an affirmative showing that appellant's jury waiver was voluntary and intelligent under the totality of the circumstances.

Although evidence of a defendant's prior experiences with the criminal justice system can help demonstrate that a jury trial waiver was knowing, voluntary and intelligent (see *Sivongxxay*, *supra*, 3 Cal.5th at p. 167), the evidence of appellant's prior

criminal history offers no such support here. Although the People correctly note that appellant pled guilty to his commitment offense, "we have no record of the advisements he received before entering that plea. On this record, we do not presume that [appellant] was legally sophisticated." (*Blancett*, *supra*, 15 Cal.App.4th at p. 1206.)

Because the record does not affirmatively show that appellant's jury trial waivers was knowing, voluntary and intelligent under the totality of the circumstances, the MDO commitment order must be reversed. (*Daniels*, *supra*, 3 Cal.5th at p. 991; *Blancett*, *supra*, 15 Cal.App.5th at pp. 1206-1207; *Jones*, *supra*, 26 Cal.App.5th at p. 437.)

DISPOSITION

The judgment (MDO commitment order) is reversed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Hugh F. Mullin, III, Judge
Superior Court County of San Luis Obispo

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

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael Johnsen and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.