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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

S.M.,

Defendant and Appellant.

2d Crim. No. B282195
(Super. Ct. No. 16MH-0062)
(San Luis Obispo County)

S.M., a mentally disordered offender (MDO; Pen. Code, § 2962 et seq.), appeals an order authorizing the Department of State Hospitals (DSH) to involuntarily administer psychotropic medication to treat his severe mental disorder. (*In re Qawi* (2004) 32 Cal.4th 1.) Appellant contends that the trial court erred in denying his motion to represent himself and the evidence does not support the finding that he lacks the capacity to refuse treatment. We affirm.

Facts and Procedural History

In 2014, appellant (age 51) was adjudicated an MDO and committed to Atascadero State Hospital for treatment. On April 6, 2017, DSH filed a petition to renew a *Qawi* order (*In re Qawi*, *supra*, 32 Cal.4th 1) to involuntarily administer

psychotropic medication. (Welf. & Inst. Code, § 5300 et seq.) The *Qawi* petition stated that appellant suffered from schizophrenia, a severe mental disorder manifested by delusional thinking, disorganized thoughts, and paranoid and grandiose delusions. Appellant believed that he played golf and other sports for famous teams, that his girlfriend was Miss America, that he graduated from college at age four, that he was kidnapped by two parolees. Appellant's thoughts were so disorganized that he believed he did not need psychotropic medication. Any mental health provider who did not believe his delusions was conspiring against him.

Appellant waived jury trial and, on the first day of trial, requested that substitute counsel be appointed. (*People v. Marsden* (1970) 2 Cal.3d 118.) The hearing soon transitioned into a request for self-representation. The trial court denied the motion and proceeded with the trial at which a psychiatrist opined that appellant lacked the capacity to refuse treatment.

Right to Self-Representation

Appellant concedes that the right to self-representation in a MDO proceeding is a statutory rather than a constitutional right. (*People v. Williams* (2003) 110 Cal.App.4th 1577, 1588 (*Willliams*).) This is so because MDO proceedings are civil proceedings and not punitive in nature. (*Ibid.*) Welfare and Institutions Code section 5302 provides that in a postcertification treatment proceeding, the trial court must advise the defendant of his right to be represented by counsel. The statutory right to appointed counsel includes the correlative right of self-representation. (*Ibid.*) "The right only being statutory, any denial of a request to represent oneself is governed by due

process principles and the decision is reviewed for an abuse of discretion." (*Williams*, *supra*, at p. 1588.)

Appellant stated that his trial attorney represented him at the first *Qawi* hearing a year earlier and that he wanted new counsel. Trial counsel explained that appellant actually wanted to represent himself. The trial court conducted a closed hearing in which counsel stated there was no conflict and that he could adequately represent appellant. Appellant said "I would like to represent myself pro per" and that he had successfully represented himself in a prior real estate case.

The trial court denied the request for self-representation and indicated that it was relying on information in the *Qawi* petition "regarding your current mental status. . . . [I]f I allowed you to represent yourself I would be doing you a disservice." Appellant asked, "Can I submit writings to you and have you read them that would refute items in the [petition] or is it just a one-sided submission?" The trial court denied the request and stated that appellant's only recourse was to go through a "writ and appeal process."

We conclude that the trial court erred by not determining whether appellant had a rational and factual understanding of the proceedings, sufficient to represent himself. (*In re Shawnn F.* (1995) 34 Cal.App.4th 184, 195; *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429, 441.) No questions were asked of appellant or trial counsel. Nor was appellant permitted to present written information in support of his request for self-representation. It was antithetical to appellant's due process right to be heard. (*Williams*, *supra*, 110 Cal.App.4th at p. 1592.) "[A] substantial state-created right, even though not constitutionally compelled, may not be

arbitrarily withheld." (*Wilson v. Superior Court of Los Angeles County* (1978) 21 Cal.3d 816, 823.) We reject the Attorney General's argument that the request for self-representation was equivocal or made in passing anger after the trial court denied the *Marsden* request for substitute counsel.

On review, we apply the harmless error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Appellant must show it is more probable than not that he would have received a better result at trial had he been allowed to represent himself. (*Williams*, *supra*, 110 Cal.App.4th at pp. 1592-1593.) Citing *People v. Blackburn* (2015) 61 Cal.4th 1113 (*Blackburn*), appellant argues that the error is structural and requires automatic reversal. (*Id.* at p. 1136.) There, our Supreme Court held that the trial court's failure to solicit defendant's personal waiver of jury trial in a MDO proceeding required automatic reversal. (*Ibid.*) In *Blackburn,* jury trial was the default procedure absent a waiver. (Pen. Code, § 2972, subd. (a).) The failure to solicit a personal waiver "denie[d] the defendant 'the basic procedure by which' the validity of his or commitment 'should have been determined' . . . . [Citation.]" (*Blackburn*, *supra*, at p. 1136.) Unlike *Blackburn,* the right of self-representation is not the default procedure in a *Qawi* proceeding and the denial of appellant's pro per request did not affect his fundamental right to a fair trial. (See Welf. & Inst. Code, § 5302 ["The [court-appointed] attorney shall advise the person of his rights in relation to the proceeding and shall represent him before the court"].) After the request for self-representation was denied, appellant continued to receive assistance of trial counsel and was provided a full trial on the merits. Appellant makes no showing that he would have obtained a more favorable ruling on

the *Qawi* petition had the trial court granted his request for self-representation. (*Williams*, *supra*, at pp. 1592-1593.)[1]

Substantial Evidence

Appellant argues that the evidence does not support the finding that he lacks the capacity to make treatment decisions. We review for substantial evidence. (*People v. O'Dell* (2005) 126 Cal.App.4th 562, 570.) Our courts have held that an MDO's right to refuse antipsychotic drugs is qualified. (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013.) Judicial determination of whether an MDO is competent to refuse antipsychotic medication focuses on three factors: (1) whether the patient is aware of his mental illness; (2) whether the patient understands the benefits and risks of treatment as well as the

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[1] Appellant cites *People v. Hill* (2013) 219 Cal.App.4th 646, for the proposition that *Faretta* error is subject to a harmless beyond a reasonable doubt standard of review. (*Id.* at p. 653.) *Hill* is a SVPA case (Welf. & Inst. Code, § 6600 et seq.) and holds that *Marsden* error affects a defendant's due process rights to effective representation. "[R]eversal is required unless we can find the denial of defendant's right to bring a *Marsden* motion harmless beyond a harmless doubt." (*Ibid.*) *Faretta* error in a SVPA proceeding, however, is subject to a harmless error analysis because there is no Sixth Amendment right to self-representation in SVPA proceedings. (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1449-1450 (*Fraser*), cited with approval in *People v. Allen* (2008) 44 Cal.4th 843, 860.) Appellant makes no showing that he would have reached a more favorable result had he been allowed to represent himself. (*Williams*, *supra*, 110 Cal.App.4th at p. 1580 [denial of *Faretta* motion in MDO proceeding]; *Watson*, *supra*, 46 Cal.2d at p. 837 [harmless error standard applied]; *Fraser*, *supra*, at p. 1450 [same; denial of *Faretta* motion in SVPA proceeding].)

alternatives to treatment; and (3) whether the patient is able to understand and evaluate the information regarding informed consent and participate in the treatment decision by rational thought processes. (*In re Qawi*, *supra*, 32 Cal.4th at pp. 17-18; *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1322-1323.)

Doctor Mark Daigle, a psychiatrist at Atascadero State Hospital, testified that appellant suffered from schizophrenia that was manifested by grandiose and paranoid delusions and had to be treated with psychotropic medication. Appellant did not believe he had a mental illness or that he needed medication. The doctor opined that appellant "doesn't have the rational ability to weigh the risks and benefits of treatment because he has an astounding level of denial of any psychiatric problems." "[H]e's unwilling to discuss the possibility that he has a mental disorder[. H]e does not want to take medication, he would like them stopped immediately."

Appellant argues that Dr. Daigle's expert opinion testimony lacked foundation and was based on hearsay. Appellant did not object and is precluded from raising those issues for the first time on appeal. (*People v. Eubanks* (2011) 53 Cal.4th 110, 142 [hearsay objection forfeited]; *People Houston* (2012) 54 Cal.4th 1186, 1213-1214 [lack of foundation objection forfeited.) Psychiatrists may rely on reliable hearsay in forming their opinion concerning a patient's mental state. (*People v. Campos* (1995) 32 Cal.App.4th 304, 307-308.) Dr. Daigle interviewed appellant, reviewed his medical records, and consulted with appellant's treating psychiatrist in forming his opinion. As a medical expert, the doctor was permitted to rely on hearsay and tell the trier of fact in general terms that he did so in

rendering his opinion. (*People v. Sanchez* (2016) 63 Cal.4th 665, 685.) "[T]estimony relating [to] the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. [Citations.]" (*People v. Leon* (2015) 61 Cal.App.4th 569, 603.)

Dr. Daigle's testimony clearly shows that appellant suffers from schizophrenia and grandiose and paranoid delusions that render appellant unable to make rational decisions about his treatment. (*Qawi*, *supra*, 32 Cal.4th at pp. 9-10.)

Disposition

The judgment (*Qawi* order permitting involuntary administration of psychotropic medication) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Richard M. Curtis, Judge

Superior Court County of San Luis Obispo

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

Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Senior Assistant Attorney General, Leslie P. McElroy, Supervising Deputy Attorney General, Cristina M. Matsushima, Deputy Attorney General, for Plaintiff and Respondent.