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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.

SPENCER MOSS,

Defendant and Appellant.

2d Crim. No. B280835
(Super. Ct. No. 16PT-00584)
(San Luis Obispo County)

Spencer Moss appeals the trial court's order committing him for treatment as a mentally disordered offender (MDO). (Pen. Code,¹ § 2972.) Moss contends the commitment order should be vacated because the court erred when it permitted his attorney to waive his right to a jury trial over his objection without finding that he lacked the capacity to make a knowing and voluntary waiver of that right. (See *People v. Blackburn* (2015) 61 Cal.4th 1113, 1125 (*Blackburn*).) We vacate the order and remand.

¹ All further statutory references are to the Penal Code.

BACKGROUND

The Board of Parole Hearings determined that Moss met the criteria for classification as an MDO. (§§ 2962, 2966, subd. (a).) At a pretrial hearing on Moss’s petition for review of that determination (§ 2966, subd. (c)), counsel told the trial court that Moss wanted a jury trial, while she was “of the opinion that he has a much more significant chance of prevailing in this case and securing his release if he were to have a court trial.” Citing *Blackburn*, the court asked for a basis to grant counsel’s request. Counsel replied that a jury would be unlikely to find Moss’s descriptions of events in his life credible, while a court would see that Moss’s descriptions, true or not, did not make him a danger to society. Moss then described the events to which counsel referred, including his 1979 kidnapping and his subsequent killing of the kidnappers.

The trial court asked counsel if Moss suffered from any other delusions. Counsel said Moss claims relationships with various celebrities and political figures, and claims he was a pallbearer at J. Edgar Hoover’s funeral when he was seven years old. Moss said he had evidence to support his claims. The court then granted counsel’s request for a court trial.

DISCUSSION

Moss contends the trial court erred when it permitted counsel to waive his right to a jury trial over his objection without finding that he lacked the capacity to make a knowing and voluntary waiver of that right. We agree.

“[A] court must obtain a personal waiver of the [petitioner’s] right to a jury trial before holding a bench trial.” (*Blackburn, supra*, 61 Cal.4th at p. 1125; see § 2972, subd. (a).) “But when the trial court finds substantial evidence that [the

petitioner] lacks the capacity to make a knowing and voluntary waiver, control of the decision shifts to defense counsel.” (*Blackburn*, at p. 1125.) The court’s finding must appear in the record. (*Id.* at p. 1130.) “[E]vidence is substantial when it raises a reasonable doubt about the [petitioner’s] capacity to make a knowing and voluntary waiver.” (*Ibid.*) If the court accepts counsel’s waiver without making the requisite findings, its error will “be deemed harmless if the record affirmatively shows that there was substantial evidence that the [petitioner] lacked [the] capacity [to make a knowing and voluntary waiver] at the time of counsel’s waiver.” (*Id.* at p. 1136.) “[N]o valid waiver may be presumed from a silent record.” (*Id.* at pp. 1136-1137.)

The trial court erred when it accepted counsel’s waiver of a jury trial because it failed to find evidence sufficient to raise a reasonable doubt about Moss’s capacity to make a knowing and voluntary waiver. (*Blackburn*, *supra*, 61 Cal.4th at p. 1125.) There was no required on-the-record finding of reasonable doubt about Moss’s capacity made here. (*Id.* at p. 1130.) And there is no evidence in the record on which to base the requisite finding: As the *Blackburn* court recognized, “the conditions that result from a mental illness or related disorder . . . ‘do not necessarily imply incompetence or a reduced ability to understand, and make decisions about, the conduct of the proceedings.’ [Citations.]” (*Id.* at pp. 1128-1129.) Indeed, “many persons who suffer from mental illness or related disorders can understand the nature of legal proceedings and determine their own best interests.” (*Id.* at p. 1128.) While Moss’s delusions may indicate he suffers from mental illness, nothing in the record suggests that he did not understand the nature of the

proceedings against him. (*Ibid.*; see *In re Qawi* (2004) 32 Cal.4th 1, 17.)

The cases cited by the Attorney General are not persuasive. The discussion of personality disorders in *United States v. Mitchell* (D.Utah 2010) 706 F.Supp.2d 1148, 1220, is inapposite to the facts of this case. And while a jury's potential receptiveness to a planned defense may be a proper consideration in determining whether counsel's advice to forgo a jury trial constitutes ineffective assistance (see *People v. Diaz* (1992) 3 Cal.4th 495, 558), that has no relevance here since Moss does not claim ineffective assistance of counsel. More significantly, there has been no showing that Moss lacked the capacity to reject counsel's advice; he did the opposite when he insisted on a jury trial.

This case is like *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241 (*Kevin A.*). In *Kevin A.*, as here, the conservatee told the trial court he wanted a jury trial, but his counsel requested a bench trial. (*Id.* at p. 1251.) In *Kevin A.*, as here, the court accepted counsel's waiver, but "made no specific finding that [the conservatee] lacked the capacity to decide for himself whether to proceed before a jury." (*Ibid.*) The acceptance of counsel's waiver was error in *Kevin A.*, just as it was here. (*Id.* at p. 1253.)

The trial court's error was not harmless. The court made no finding that Moss lacked the capacity to make a knowing and voluntary waiver, and we cannot presume a valid waiver on a silent record. (*Blackburn, supra*, 61 Cal.4th at pp. 1136-1137.) We must therefore vacate the commitment order. (*Ibid.*)

But a remand is required to determine whether Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial. (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 385 (*Heather W.*); see *Blackburn*, *supra*, 61 Cal.4th at p. 1130.) The trial court may “reinstate its order ‘if it finds substantial evidence that [Moss] lacked the capacity to make’ such a waiver. [Citation.]” (*Heather W.*, at p. 385.)

DISPOSITION

The trial court’s December 22, 2016, commitment order is vacated, and the matter is remanded to the court for proceedings to determine whether Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Michael L. Duffy, 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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