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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. B288065
(Super. Ct. No. 16PT-00584)
(San Luis Obispo County)

Like a bad penny, this case returns to us after we remanded it to the trial court to determine whether Spencer Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial when it granted his counsel's request for a court trial over his objection. In the mentally disordered offender (MDO) proceedings that followed, the court found that Moss met the criteria for a commitment extension.¹ (*People v. Moss* (Sept.

¹ We previously granted the parties' requests to take judicial notice of our unpublished opinion and the docket in

20, 2017, B280835) 2017 WL 4161578 [nonpub. opn.] (*Moss*.) Moss contends the commitment order should again be vacated because substantial evidence does not support the court's finding on remand that he lacked capacity to waive his right to a jury trial when counsel purported to do so. (See *People v. Blackburn* (2015) 61 Cal.4th 1113 (*Blackburn*.) We agree. We vacate the order and remand once again.

FACTUAL AND PROCEDURAL HISTORY

During an MDO extension hearing, Moss's counsel told the trial court that she wanted a court trial but that Moss wanted a jury trial. (*Moss, supra*, 2017 WL 4161578 at p. *1.) The court made inquiries of Moss and counsel. (*Ibid.*) Both of them told the court about Moss's various delusions: his alleged kidnapping and subsequent killing of the kidnappers, his relationships with various celebrities, that he was a pallbearer at J. Edgar Hoover's funeral when he was seven, and more. The court then granted counsel's request for a court trial. (*Ibid.*)

In Moss's prior appeal, we vacated his commitment order because the trial court made no on-the-record finding that Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial. (*Moss, supra*, 2017 WL 4161578 at p. *2.) We noted that "nothing in the record suggests that [Moss] did not understand the nature of the proceedings against him." (*Ibid.*) We remanded the case to permit the court to conduct further proceedings to determine whether Moss lacked the capacity to make such a waiver. (*Ibid.*)

On remand, the trial court did not take any additional evidence, but did find that Moss lacked the capacity to

Moss's prior appeal. (See *People v. Putney* (2016) 1 Cal.App.5th 1058, 1063, fn. 4.)

make a knowing and voluntary jury trial waiver. It then reinstated the commitment order.

DISCUSSION

Moss contends his commitment order should be vacated because substantial evidence does not support the trial court's finding that he lacked capacity to waive his right to a jury trial. We once again agree.

In an MDO commitment extension hearing, the trial court must obtain a personal waiver of the petitioner's right to a jury trial before it holds a court trial. (*Blackburn, supra*, 61 Cal.4th at p. 1125; see Pen. Code, § 2972, subd. (a).) But if the court finds substantial evidence that the petitioner lacks the capacity to make a knowing and voluntary waiver, control of the decision to waive jury trial shifts to counsel. (*Blackburn*, at p. 1125.) "[E]vidence is substantial when it raises a reasonable doubt about the [petitioner's] capacity to make a knowing and voluntary waiver." (*Id.* at p. 1130.) The court's finding of a reasonable doubt "must appear on the record." (*Ibid.*) If the court accepts counsel's waiver without making the requisite finding, we will deem the error harmless only 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.)

The trial court erred when, on remand, it concluded that Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial because there was no evidence to support that conclusion. In our prior opinion, we said "there is no evidence in the record on which to base the requisite finding." (*Moss, supra*, 2017 WL 4161578 at p. *2.) We said that Moss's

delusions “do not necessarily imply incompetence or a reduced ability to understand, and make decisions about, the conduct of the proceedings.” (*Ibid.*) And we said that “nothing in the record suggests that [Moss] did not understand the nature of the proceedings against him.” (*Ibid.*)

But on remand, the trial court found that Moss “lacked the capacity to decide for himself whether to proceed before a jury” without taking any additional evidence related to his mental capacity. That is not consistent with *Blackburn*, *supra*, 61 Cal.4th at page 1137, or with *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 385, which we cited in our prior opinion. Accordingly, we again vacate Moss’s commitment order and remand the case for further proceedings.

On remand, the trial court must first permit the district attorney to “submit evidence, if any, that . . . [Moss] lacked the capacity to make a knowing and voluntary waiver at the time of counsel’s waiver” and then, based on that evidence, make the requisite finding regarding Moss’s capacity. (*Blackburn*, *supra*, 61 Cal.4th at p. 1137.) If the court finds substantial evidence that Moss lacked the capacity to make a knowing and voluntary waiver when counsel waived jury trial, it may reinstate the commitment order. (*Ibid.*) Otherwise, Moss is entitled to a jury trial.

DISPOSITION

The commitment order is vacated, and the matter is remanded to the trial court for further proceedings to determine whether Moss lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial at the time counsel waived that right.

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TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

H. Morgan Dougherty, 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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