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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. HARVEY WILLIAMSON, Defendant and Appellant.	2d Crim. No. B233151 (Super. Ct. No. F458348) (San Luis Obispo County)

Harvey Williamson appeals the trial court's dismissal of his petition challenging the determination of the Board of Parole Hearings (BPH)[1] that he qualifies for continued treatment as a mentally disorder offender (MDO) as a condition of his parole (Pen. Code, §§ 2962, 2966, subd. (c)). Appellant, who filed his petition the day after his parole expiration date, contends the court erred in dismissing the petition. In a supplemental brief, he further contends that his trial attorney provided constitutionally ineffective assistance of counsel by failing to argue that the petition was timely filed. We affirm.

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1 "'Effective July 1, 2005, the former Board of Prison Terms was abolished, and all statutory references to the Board of Prison Terms was [*sic*] deemed to be a reference to the Board of Parole Hearings [(BPH)]. (§ 5075, subd. (a).) We adopt the new designation, although the record in this case continues to refer to the former.'" (*Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1060, fn. 4.)

PROCEDURAL HISTORY

On May 3, 2007, appellant was convicted of a felony[2] and was sentenced to state prison. On February 3, 2010, the BPH ordered him committed for treatment as an MDO for one year as a condition of his parole. On November 8, 2010, the BPH continued appellant's MDO treatment as a condition of his parole pursuant to section 2966, subdivision (c).[3] Appellant's parole expired on March 22, 2011.

On March 23, 2011, the day after his parole expiration date, appellant filed a petition challenging his continued commitment under subdivision (c) of section 2966. Counsel was appointed and the initial hearing was set for April 6, 2011. At that hearing, counsel informed the court that appellant's parole had expired the day before the petition was filed and stated, "It's my opinion that the court probably doesn't have jurisdiction on this case because of the fact that [section] 2960 depends on whether the person is on parole." The prosecutor responded: "[Appellant] obviously is still in custody. And apparently he has a [section] 2970 hold which is the way you maintain custody after the parole period has lapsed. . . . So I would submit that it would be incumbent on [appellant] to withdraw his petition. We're just the respondent." After defense counsel

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[2] The record on appeal does not reflect the charge of which appellant was convicted.

[3] In filling out the petition, appellant wrote "3-1-11" as the date that the BPH "determined the parolee has a severe mental disorder, and the severe mental disorder is not in remission or cannot be kept in remission without treatment." March 1, 2011, is also the date appellant purportedly prepared and signed the petition. No other evidence in the record indicates that the BPH made a second determination regarding appellant's continued treatment. Appellant's notation to that effect appears to be inaccurate, and appellate counsel does not claim otherwise. It is impossible to conceive that the BPH determination on November 8, 2010, did not purport to continue appellant's treatment until at least March 22, 2011, the date his parole was set to expire. Although the People assert that the determination allegedly made on March 1, 2011 "would appear to be within the meaning of section 2970," the BPH has nothing to do with orders for continued commitment under that section. We note, however, that the result of the appeal would be the same if the BPH did in fact make a third determination that appellant qualified for MDO treatment on March 1, 2011.

discussed the matter with appellant, the court granted his request to set the matter for trial.

When the case was called for trial on May 18, 2011, defense counsel stated, "It's our position that the court still maintains jurisdiction on this case and we would ask the court to continue with the trial. The reason we believe that the court still maintains jurisdiction is because he's still in the state hospital and he's still being treated under the guise of a [section] 2962 type of treatment program. [¶] It's my understanding that a 2970 has been filed. . . . But I don't have any verification independent of my client's statement that the 2970 was filed. So I'd ask the court to maintain jurisdiction on this case and hear the 2962." In response, the prosecutor asserted that the court lacked jurisdiction to hear the matter due to the fact that appellant's parole had expired. In agreeing with that assertion, the court reasoned: "[T]he purpose of the 2966(c) petition would be to address the issue of whether or not, as a term of his parole, he should continue to be subject to treatment pursuant to 2966 — or 62 et seq. Given that his parole period has expired, I don't know what jurisdiction I would have to proceed on that issue. [¶] Whether his county of commitment wishes to file their own petition to continue to maintain treatment pursuant to Penal Code 2970 et seq. is up to the county of commitment." The court proceeded to dismiss the petition. Appellant timely appealed.

DISCUSSION

Appellant contends the court erred in dismissing his petition challenging his continued commitment under section 2966, subdivision (c). He asserts, and the People agree, that the issue should be framed as one of mootness, not jurisdiction. Appellant further claims that his petition was not moot and that the court should have treated the petition as constructively filed on or before March 22, 2011, the date his parole expired. In a supplemental brief, he contends that his trial attorney's failure to raise the constructive filing argument below amounts to constitutionally ineffective assistance of counsel. We agree that the issue is one of mootness, yet find no merit in appellant's remaining contentions.

This case is governed by our prior decision in *People v. Merfield* (2007) 147 Cal.App.4th 1071 (*Merfield*). In *Merfield*, we affirmed the dismissal of a petition challenging an initial MDO commitment that was filed after the one-year period for that commitment had expired. In concluding that the petition was properly dismissed as moot, we reasoned: "While we review the merits of appeals from *timely filed petitions* that are rendered technically moot during the pending of the appeal, we do so because the appellant is subject to recertification as an MDO, and the issues are otherwise likely to evade review due to the time constraints of MDO commitments. [Citations.] For the same reasons, trial courts consider the merits of timely filed petitions that are subsequently rendered technically moot as the result of the delays inherent in the judicial process, which are beyond the petitioner's control. Where, as here, the *petitioner* causes the delay by waiting until after the commitment order has expired to seek relief, the petition is untimely and is subject to dismissal on the ground of mootness." (*Id.* at p. 1075.) We further concluded that in failing to timely challenge his initial commitment the petitioner had lost the opportunity to challenge the BPH's findings on the three criteria that need not be proven at subsequent annual review hearings, i.e., whether (1) the prisoner used force or violence in committing the underlying offense; (2) his severe mental disorder was a cause or aggravating factor in his commission of that offense; and (3) he was treated for the disorder for at least 90 days in the year prior to his parole.**4** (*Id.* at pp. 1075-1076.)

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4 The criteria that must be proven at the initial commitment hearing are: (1) the prisoner has a severe mental disorder; (2) he used force or violence in committing the underlying offense; (3) his severe mental disorder was a cause or aggravating factor in his commission of that offense; (4) the disorder is not in remission or capable of being kept in remission without treatment; (5) he was treated for the disorder for at least 90 days in the year prior to his parole; and (6) as a result of his disorder, he represents a substantial danger of physical harm to others. (§ 2962.) For continued treatment either as a condition of parole or after parole has expired, the court must find (1) that the parolee/patient has a severe mental disorder; (2) that the disorder is not in remission or cannot be kept in remission without treatment; and (3) that the parolee/patient represents a substantial danger of physical harm to others by reason of the disorder. (§§ 2966, subd. (c), 2972, subd. (c).)

Appellant asserts that *Merfield* is inapposite because "[u]nlike the defendant in *Merfield*, appellant did not have a full year to file his petition. Instead, he had less than two months." He further argues that his case was not moot due to "the subsequent filing of a Penal Code section 2970 petition in which appellant could not litigate the question of whether his underlying offense qualified him for commitment as an MDO[,] whether his severe mental disorder was a cause or aggravating factor of that offense, and whether or not he had received 90 days of treatment in the year prior to his scheduled parole date."

We are not persuaded. Appellant does not explain how he arrived at the conclusion that he had "less than two months" to file his petition. From the substance of his argument, it appears that the assertion is premised on the initial commitment order entered pursuant to *subdivision (b)* of section 2962 on February 3, *2010*, i.e., *one year* and two months prior to his parole expiration date. Appellant's petition challenges the order continuing his commitment under *subdivision (c)* of section 2962, which was entered four and a half months prior to the expiration of his parole.[5]

Appellant fares no better to the extent he argues that the November 8, 2010, order continuing his commitment was not rendered moot by the expiration of his parole. Appellant posits: "Possibly, appellant was in remission as of the date of his [BPH] hearing or, perhaps, even if he were not in remission, the State would be unable to prove, beyond a reasonable doubt, that he was still dangerous. The fact that appellant might, at some subsequent time, have gone out of remission would in no way entitle the State to extend his commitment when he should have been released through the proceedings in this case." This argument is based on speculation that is dispelled by appellant's

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5 To the extent appellant urges us to construe the petition as challenging the initial one-year commitment order, that order necessarily would have expired on or before February 3, 2011. This order was plainly moot when appellant filed his petition, and the delay was solely attributable to appellant. It is also clear that appellant's failure to timely challenge the order prevents him from litigating the three "non-static" criteria that need only be proven at the initial commitment hearing. (*Merfield, supra*, 147 Cal.App.4th at pp. 1075-1076.)

acknowledgment that a section 2972 petition to continue his commitment has been filed. That petition is necessarily premised on the medical director's evaluation indicating that appellant continues to require MDO treatment. Absent a showing of good cause, the evaluation had to be filed no later than 180 days prior to appellant's parole expiration date. (§ 2970.) Appellant offers no authority for the assertion that the court's power to hold a hearing on the section 2972 petition is contingent on the BPH's initial and subsequent determinations that appellant qualified for MDO treatment. In the same vein, any relief appellant might have obtained in challenging the BPH's continuation of his commitment as a condition of his parole under section 2966, subdivision (c), would have no effect on the substance or result of the proceedings to continue his commitment under section 2972.

Appellant also fails to demonstrate that the court should have treated his petition as constructively filed a day earlier, or that his trial counsel was ineffective in failing to urge the court to do so. The argument is premised on speculation that appellant either mailed the petition or gave it to someone else to file before March 23, 2011. He offers "that there was nothing in the [trial court] file—such as a postmarked envelope—indicating how the petition arrived at the court." This fact, however, supports a conclusion that the petition was not mailed, but was rather hand-delivered.[6] According to appellant's petition, the BPH continued his treatment on November 8, 2010. He waited almost five months, however, to file. More importantly, it is undisputed that a petition has been filed to continue appellant's commitment under section 2972. In the litigation of that petition, appellant has the right and opportunity to challenge the findings upon which it is premised, which are the same as those that were at issue in the proceedings that are the subject of the petition at issue here. Appellant may also appeal any unfavorable

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6 The lack of evidence that the petition was mailed also undermines appellant's assertion that the court should have applied the so-called "prison delivery rule," which provides that filings submitted by prisoners who are unrepresented by counsel are deemed constructively filed when they are delivered to the prison for mailing. (See, e.g., *In re Jordan* (1992) 4 Cal.4th 116.) In any event, the rule would be unworkable in this context because the issue is primarily one of mootness, not untimeliness.

result. Because appellant fails to demonstrate it is reasonably likely that he would have achieved a more favorable result if the court had been called on to treat appellant's petition as constructively filed the day before, trial counsel's failure to raise the issue did not amount to ineffective assistance. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Bolin* (1998) 18 Cal.4th 297, 333.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, Lauren E. Dana, Deputy Attorney General, for Plaintiff and Respondent.