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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **CHARLES THOMAS McENTIRE, JR.,** **Defendant and Appellant.**	**A121192** **(Contra Costa County Super. Ct. No. 050503755)**

Appellant Charles Thomas McEntire, Jr. pled guilty to second degree murder and, after waiving his right to a jury, was determined by the trial court to be not guilty by reason of insanity. (Pen. Code, §§ 187, subd. (a), 1026.)[1] He appeals from the order committing him to Napa State Mental Hospital, arguing that at the time of sentencing, his sanity had been "recovered fully" within the meaning of section 1026, subdivision (a). Appellant also contends the trial court erroneously ordered direct victim restitution and imposed a restitution fine when he had not been "convicted" of any offense. We agree the restitution order was unauthorized but affirm the commitment order.

[1] Statutory references are to the Penal Code.

I. *BACKGROUND*

In the fall of 2004, 19-year-old Jamil Posey was home on humanitarian leave from the Marine Corps to care for his mother, Edrina Gibson, who had been diagnosed with terminal cancer. Appellant, who was then 58 years old, was married to Gibson and together they had adopted Charles Thomas McEntire III (C.J.), who was 18 months old at the time.

On the morning of November 22, Posey was playing video games with C.J. on the computer in one of the bedrooms of the family apartment. Appellant had retreated into the master bedroom after he argued with Gibson and she threatened to contact a divorce attorney. Posey went into the bathroom for a few minutes and when he returned, appellant was pacing back and forth between the master bedroom and the front door and C.J. was no longer at the computer.

Richmond Police Department Officer Daggs and her partner Officer Thompson arrived at the apartment complex after dispatch received a call from a man saying he had killed his son. Appellant walked outside and approached Officer Thompson, telling him, "Just take me, I killed him. I killed my son. You don't have to cuff me. I'm not going nowhere. I don't know why I did it." Thompson handcuffed appellant and noticed his hands were covered in blood.

Officer Daggs knocked at the door of the apartment and found Posey and Gibson inside the living room. When she told them she was there because someone had called and said he killed his son, they looked at her like she was crazy. They all walked into the master bedroom and found C.J. covered in a blanket and lying under a pillow on the bed. When Gibson picked him up they saw that he was completely limp with a pool of blood under his body. He had been fatally stabbed in the chest.

Appellant was charged with murder with an enhancement for personally using a dangerous and deadly weapon and entered pleas of not guilty and not guilty by reason of insanity. (§§ 187, subd. (a), 12022, subd. (b)(1).) In an amended information, the prosecution added a charge of assault on a child causing death. (§ 273ab.) Appellant pled

guilty to second degree murder and the parties stipulated that the court would determine the sanity issue on the murder count based solely on the four reports prepared by the mental health practitioners who had evaluated him. The remaining charge and enhancement were ultimately dismissed.

Dr. Eugene Schoenfeld, a psychiatrist appointed by the court, submitted a mental health report in which he concluded that while appellant had no past history of mental illness, he had "had a psychotic episode and was legally insane" when he killed C.J. Dr. Schoenfeld believed appellant was "incapable of knowing or understanding the nature and quality of his act" and "could not distinguish right from wrong at the time of the commission of this offense." According to the report, appellant was described by friends and family as friendly, easygoing and gentle with no history of anger, but he had been under a lot of financial and emotional pressure. His wife constantly belittled him and had threatened to take away C.J., whom he deeply loved.

The court also appointed psychologist Marlin Griffith to evaluate appellant. Dr. Griffith noted in his report that while appellant had no history of mental illness before the murder, he had been diagnosed with a major depressive disorder while in county jail and was taking Paxil. Appellant explained during his interview that his wife had been diagnosed with bipolar disorder and constantly belittled him in front of the children. Asked about the murder, he claimed that he remembered C.J. following him into the bedroom and then nothing else until the police arrived. Dr. Griffith opined that on the day of the murder, appellant "snapped" and experienced "an acute psychological event." "The prime contributing factor to this moment of dissociation was likely the unrelenting emotional abuse he suffered from his wife's apparent bipolar episodes. He experienced emotional abuse in the form of verbal attacks (ridicule, verbal harassment, name calling, berating, etc.), threats (divorce and abandonment), and destruction of his personal property. His home life constituted an abusive environment and, consistent with psychological research on abused men, he exhibited depression, anxiety, psychosomatic symptoms in the form of chest pains, low self-esteem, and dependency tendencies."

Dr. Griffith believed appellant was "very severely mentally disordered" at the time he killed C.J. and "lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law." In a supplemental letter to the court, Dr. Griffith clarified that in his opinion appellant was legally insane under the definition of insanity contained in section 25, subdivision (b); that is, appellant was incapable of understanding the nature and quality of his act and of distinguishing right from wrong at the time of the commission of the offense.[2]

The defense retained psychiatrist Fred Rosenthal to evaluate appellant. Dr. Rosenthal submitted a report opining that appellant was legally insane when he killed C.J., noting that he was on "mind altering medications [pain medicine for his back and knees], had a fever, had experienced constant verbal abuse from his wife during the preceding month and felt under severe stress because of financial pressure and his wife's terminal illness." According to Dr. Rosenthal, appellant was "unable to appreciate the nature and quality of the act when he attacked the child."

A different conclusion was reached by Dr. Paul Berg, a forensic psychologist retained by the prosecution. Dr. Berg noted that appellant had no documented history of mental illness, and he did not detect true signs of remorse during his interview. "The other alienists all described that his murdering his son was a product of his mental illness, either a dissociative state or an actual psychotic state. Clearly there is no evidence for a psychosis and [the] only evidence for any kind of dissociative or amnestic condition is

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[2] In 1978, the California Supreme Court adopted the American Law Institute (ALI) test for legal insanity, which was " 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.' " (*People v. Drew* (1978) 22 Cal.3d 333, 345.) In 1982, the electorate passed an initiative that changed the definition of insanity to require that the accused "was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b); *People v. Kelly* (1992) 1 Cal.4th 495, 533.) This effectively reinstated the so-called *M'Naghten* rule. (*M'Naghten's Case* (1843) 10 Clark & Fin. 200 [8 Eng.Rep. 718].)

the report of accused. The rationale that he was suffering from an alteration of consciousness during the commission of an act, aside from its obvious self-serving purposes is based upon the fact that he was subjected to a lot of stress. The major stress that he describes is the ongoing enmity between [him] and his wife, his wife being angry, verbally abusive of him, threatening and in combination with other life stressors, and essentially he "flipped out." Dr. Berg concluded that the circumstances cited by the other evaluators pointed just as logically to the fact that appellant was very angry with his wife and could not vent that anger, suggesting he was punishing her by taking away what she loved.

After considering these reports and listening to the arguments of counsel, the court issued a written decision concluding that appellant had proved by a preponderance of the evidence that he was legally insane at the time of the killing. The court referred the case for a report by the Community Program Director of the Contra Costa County Health Services Conditional Release Program (CONREP).

The CONREP report recommended that appellant be sent to a state hospital for further evaluation and treatment, rather than being released into the community at that time. It concluded he had not achieved sufficient stability for release and noted a number of reasons that state hospital treatment was necessary: (1) appellant had reported a head injury in the ninth grade and could be suffering from a cognitive impairment; (2) given the lack of clarity regarding his psychiatric/psychological diagnosis, he should be evaluated by hospital staff to rule out a dissociative disorder, explosive rage disorder, depression, or bipolar disorder; (3) because of the severity of the offense and appellant's lack of clarity and/or memory of his actions, he needed to demonstrate some insight into his violent acts and go for a significant period without exhibiting violent or aggressive behavior; (4) appellant was on dialysis and should be screened to determine the possible effects of related medication; (5) appellant was currently taking Paxil and "lots of medication" for his health problems and needed to be observed before he could be safely released into the community; (6) appellant expressed little to no concrete understanding of his mental illness and needed to understand its warning signs and symptoms so he can

comply with treatment; and (8) he should undergo an abstinence program to ensure treatment compliance.

After considering the CONREP report, the court committed appellant to the Department of Mental Health, to be initially confined at Napa State Hospital, for a maximum term of life. It found that appellant lacked the capacity to make decisions regarding antipsychotic mediation and that without medication, it was probable that he would suffer serious harm or inflict substantial physical harm on others. Over defense objection, the court ordered appellant to pay a $200 victim restitution fine under section 1202.4, subdivision (b), along with direct victim restitution under section 1202.4, subdivision (a)(1) in an amount to be determined.

II. *DISCUSSION*

A. *Commitment to State Mental Hospital*

Appellant argues the trial court erred in committing him to a state hospital because the reports showed he had fully recovered his sanity by the time that order was made. We disagree.

Under California law, a defendant is legally insane if he or she "is incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." (§ 25, subd. (b).) Section 1026, subdivision (a) provides that when a defendant has been found not guilty by reason of insanity, "the court, unless it shall appear to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility. . . or the court may order the defendant placed on outpatient status . . . ." If the defendant's sanity has been "recovered fully, the defendant shall be remanded to the custody of the sheriff until the issue of sanity shall have been finally determined in the manner prescribed by law." (§ 1026, subd. (b).)

Section 1026, as judicially construed, provides that an insanity acquittee who has "recovered fully" his sanity prior to the initial commitment will be remanded to the custody of the sheriff and evaluated for a possible involuntary civil commitment under the Lanterman-Petris-Short (LPS) Act. (*People v. Kelly* (1973) 10 Cal.3d 565, 577-578, fn. 18; *In re Lee* (1978) 78 Cal.App.3d 753, 756-757.) Appellant argues that this provision applied to his case, and that he should have been remanded to the sheriff for an LPS evaluation rather than being committed a state hospital.

A full recovery of sanity requires a showing that the defendant had " ' "improved to such an extent that he is no longer a menace to the health and safety of others." ' " (*People v. Cleveland* (1972) 27 Cal.App.3d 820, 832.) This standard is much more stringent than a showing that a defendant has recovered sanity in the sense that he can understand the nature of his conduct and understand right from wrong. (See § 25, subd. (b).) It is also more stringent than the standard for showing that a person has been restored to sanity following a state hospital commitment, which requires proof that a person be "no longer dangerous while in treatment." (§ 1026.2, subd. (e); *People v. Williams* (1988) 198 Cal.App.3d 1476, 1480.) Significantly, a defendant who is not currently dangerous due to medication and treatment has not recovered his sanity under section 1026. (*People v. De Anda* (1980) 114 Cal.App.3d 480, 490.)[3]

Appellant correctly observes that the doctors who evaluated him had concluded he was no longer legally insane. But this does not mean his sanity had been "recovered fully" within the meaning of section 1026. The CONREP report made it clear that the bizarre and unexpected nature of appellant's violent act and the lack of any prior history of mental illness made it difficult to assess whether he could safely be released. He was taking Paxil for his depression and could not be assessed in an unmedicated state.

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[3] "Since the purpose of a commitment under section 1026 is 'to protect the defendant and the public during the period necessary to appraise the defendant's present sanity,' [citation] psychopharmaceutical restoration of sanity should not be considered a 'full' recovery within the meaning of section 1026, subdivision (a) and under such circumstances an institutional examination is necessary to truly evaluate the dangers posed by a defendant." (*People v. De Anza*, *supra*, 114 Cal.App.3d at p. 490.)

Substantial evidence supports the trial court's implicit conclusion that appellant had not "recovered fully" his sanity under section 1026.

Appellant suggests the court found he had fully recovered his sanity but erroneously believed the only possible disposition was a commitment to a state hospital. This is not borne out by the record. The court stated that appellant, though insane at the time of his violent act, was "legally sane shortly before the act and shortly after the act." This does not amount to a finding that appellant had recovered fully his sanity in the sense of being no longer a danger to others in an unmedicated state. The court properly committed appellant to a state mental hospital for further treatment.

B. *Restitution Order*

Appellant challenges the trial court's imposition of direct victim restitution in an amount to be determined along with a $200 restitution fine. (§ 1202.4, subds. (a)(3)(B) & (b)(1).) He argues that section 1202.4 allows victim restitution and restitution fines to be imposed only against persons "convicted of a crime." (§ 1202.4, subds. (a)(1), (b)(1).) As the People concede, a defendant who is found not guilty by reason of insanity has not been "convicted" of a crime. (See *People v. Morrison* (1984) 162 Cal.App.3d 995, 998.) The restitution order was unauthorized.

III. *DISPOSITION*

The order that appellant pay direct victim restitution is vacated. The $200 restitution fine imposed by the court is stricken. As so modified, the judgment (order committing appellant to Department of Mental Health) is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

STEVENS, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.