SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION, PART 92
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THE PEOPLE OF THE STATE OF NEW YORK

Indictment No. 1311/2013
Interim Decision (Amended)

-against-

DARRYL T.,
Defendant
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FABRIZIO, J.

Defendant entered a plea of not-responsible by reason of mental disease or defect in this matter on February 27, 2015. Justice Troy Webber, who presided over this matter at the time, issued the requisite examination order pursuant to CPL § 330.20(2). Defendant was examined by two psychiatrists, Dr. Mark Bernstein and Dr. Nancy Flores-Migenes, as required by CPL § 330.20(3) and (4). Both psychiatric examiners submitted their reports, as required by CPL § 330.20(5). On May 28, 2015, defendant and counsel appeared for the initial hearing required by CPL § 330.20(6). Defendant's attorney conceded defendant suffered from a dangerous mental disorder and Justice Webber signed a commitment order, designating defendant a "track one" insanity acquitee, suffering from a then-existing dangerous mental disorder.

As is relevant here, nearly two years after the not responsible plea, on March 7, 2016, defendant moved "for a new initial hearing pursuant to Criminal Procedure Law § 330.20(6)." He argued that his trial attorney was ineffective for conceding he had a dangerous mental disorder, and because of that he did not have a "proper initial" hearing. In a decision filed June 9, 2016, this Court, which had been assigned to decide

the motion after Justice Webber was appointed to the Appellate Division, denied defendant's application for a new initial hearing. Defendant appealed that ruling. In a decision dated March 29, 2018, the First Department reversed this Court's ruling. The First Department found that defendant was in fact denied effective assistance of counsel when his trial attorney conceded that his client had a dangerous mental disorder. The First Department remanded the case for "a new initial hearing." Once again, that was the relief requested by the defendant in his motion to this Court.

The case was returned to me to conduct the "new initial hearing" pursuant to CPL § 330.20(6). Defendant asked the Court to sign a new "examination order" pursuant to CPL § 330.20(2), directing the Commissioner of Mental Health to designate two additional psychiatric examiners and to have them determine whether defendant now, more than three years after his not responsible plea, has a dangerous mental disorder or is mentally ill. The Court declined to do so, stating that the First Department had ordered a new initial hearing, and not a new initial examination. Moreover, it is this Court's belief that the First Department only ruled on the relief this Court denied – a request for a new initial hearing – and ordered only that relief. Thus, this Court believes it was ordered to conduct a new initial hearing using the examination reports and other records that existed immediately following defendant's not responsible plea.

As defendant never asked this Court to rule on the sufficiency of the examinations conducted by Dr. Bernstein or Dr. Flores-Migenes, or the thoroughness of the reports they prepared, this Court never had the opportunity to consider such an argument, let alone issue any ruling addressing the whether a new initial examination was necessary. Thus, this issue was not part of the appellate review of this Court's

denial of the application for a hearing. Curiously, defendant does not now argue that those examinations or reports were in anyway insufficient, or that he lacks any ability to challenge the findings in those reports or use the extensive records that were entered into evidence before Justice Webber.[1] He only assumes that he is legally entitled to have a new examination order. Put simply, the Appellate Division did not order a new initial examination, and their decision makes no mention of any other infirmity in the procedures at the time of the initial examination. They only found an error in the manner in which counsel conducted, or failed to conduct, the initial hearing scheduled before Justice Webber. Thus, this Court has no directive to order a new initial examination.

The reason this issue has not been put to rest by this Court's denial of the defense application is that the Bronx District Attorney's Office has now taken a position contrary to that ruling. They are prepared to stipulate that the First Department's decision should be read to require that this Court sign a new examination order pursuant to CPL § 330.20(2). They cite no law supporting their position; nor has defense counsel cited any case that would require a new examination order in such a circumstance. That is, of course, understandable. The fact is, this is perhaps the first reported case where an appellate court has ordered a "do over" for an initial

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[1]Defendant is, by law, currently represented by Mental Hygiene Legal Services (MHLS). They have never claimed they were not provided with the initial examination reports, as required by CPL § 330.20(5), prior to the scheduling of the initial hearing. They certainly had an ability, therefore, to contest the sufficiency of those reports at any time, or request a new order of examination based on an argument that the reports or the examinations were insufficient in some way. They never did. The Court inquired whether they may have had a conflict in conducting the new initial hearing, since part of the records at the time of the initial examinations indicate that defendant physically attacked his MHLS attorney at the Mid-Hudson Psychiatric Facility. That attorney apparently shared that information with defendant's trial counsel. MHLS apparently does not believe a conflict exists.

commitment hearing.[2] Thus, the scope of the evidence to be received at the new initial hearing in this case is likely to be precedent setting. This is not an issue to be considered lightly.

The Court denied defendant's application for a new order of examination not just because the First Department did not order one; conducting an "initial hearing" based only on an examination evaluating defendant's mental condition three years after the not-responsible plea appears to violate the letter as well as the purpose of CPL Article 330. This is particularly true in regard to the statutory mandate about the timing of the determination of the "track" designation, as well as the type of evidence relevant to such a determination. That designation is made based on the defendant's mental condition as it existed when the court, after accepting the plea, signed the examination order and the defendant was examined to determine what track would be appropriate. The legislature has required that the findings about whether a defendant has a dangerous mental disorder be made contemporaneous with the not-responsible plea and those initial examinations. See CPL §§ 330.20(2), (3), (4), (5) and (6). There is simply no authorization in the statute for a Court to issue a CPL § 330.20(2) examination order other than at that time.

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[2]Since the First Department's ruling in this case, the Third Department was faced with a similar issue in Matter of Matheson KK., 161 AD3d 1260 (3rd Dept 2018). In that case, following the receipt of initial examination reports that this defendant suffered from a dangerous mental disorder at the time of his October 2017 commitment, defense counsel stated at the initial hearing that "he was not contesting the findings at this time." As in this matter, that Court found defense counsel did not provide effective assistance by not challenging the findings of those examiners, and in particular failing to "cross-examine the psychiatric examiners" at an initial hearing. Id. at 1262. That Court remitted the matter for a new hearing. That decision does not order a new initial examination prior to the new hearing. However, MHLS has informed me that the trial judge assigned to preside over that matter has signed a new order of examination.

The authorization for updated psychiatric examinations for insanity acquitees appears in the statutes that provide procedures to protect the acquitee's rights after the initial track designation is ordered. The statute requires that the Commissioner apply for either a first retention order, if there is still evidence that a defendant still is diagnosed as having a dangerous mental disorder, or apply for the individual's release if there is no such diagnosis. Where the Commissioner applies for a retention order, the Court must conduct a hearing upon the acquitee's request. CPL § 330.20(5). These same procedures are in place for any and all subsequent retention order applications. CPL § 330.20(6). Thus, the individual's due process rights are protected by ongoing medical and psychiatric evaluations, as well as ongoing court review based on information relevant to those findings. There is no revisiting of the initial track designation authorized by the statute.

Defendant has been in the custody of the Commissioner for more than three years. His mental status, in relation to whether, today, he has a dangerous mental disorder, or is mentally ill, may, or may not be, the same as his mental status at the time of the initial statutorily authorized examinations. This Court has been informed by the parties that the Commissioner has repeatedly applied for orders to retain defendant in the same secure psychiatric facility located in Rochester, New York. Presumably, those applications would contain information that defendant continues to be a danger to himself or others. [3] It would therefore appear that if defendant's application were

[3]The Court has requested that the New York State Attorney General, based on the Court's understanding of their ongoing role in representing the Commissioner in connection with the retention applications as well as the public policy implications of the MHLS application, appear in this proceeding. The Attorney General did appear, but has said that neither that Office nor the

granted, the Court would have to allow into evidence at the "initial hearing" all the psychiatric records generated while defendant has been in the custody of the Commissioner of Mental Health. That would, in effect, turn the new "initial hearing" into a hybrid initial hearing and retention hearing. If this were happen in a case where a defendant was designated a "track two" patient, and has an application granted for a new initial hearing based on ineffective assistance of counsel, it could be conceivable that this individual could be designated a "track one" patient at a later date. That is not permitted under the statute.

Defendant suggests that challenging those retention applications would have somehow resulted in his forfeiting his argument on appeal that he was deprived effective assistance of counsel at the initial hearing. That simply cannot be true. In fact, the law has long recognized that "Given the 'vital[ ] importanc[e]' of a track designation (Matter of Norman D., 3 NY3d 150,154 (2004)), the initial commitment hearing [is] ' a critical stage of the proceedings.'" Matter of Matheson KK., 161 AD1262 (citing Matter of Brian HH, 39 AD3d 1007, 1009 (2007)). As such, since a court must always consider whether any defendant was deprived of meaningful representation at any critical stage of any litigation, including in this case the initial hearing stage, this argument cannot be waived. See Id.; see also People v. Darryl T., 161 AD3d 47, 55 (2018), lv. to appeal denied, 2018 N.Y. LEXIS 1625 (N.Y. June 28 2018).

The legislative intent that the track designation be made based on examinations done at the time when the defendant is found to be not responsible is clear. The

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Commissioner of Mental Health is taking any position about whether the Court should order new initial examinations.

decision at the initial hearing determines which of three "tracks" an insanity acquitee would be assigned. Norman D., 3 NY3d at 154. "The track designation places more dangerous acquitees under the purview of the Criminal Procedure Law, while less dangerous, though mentally ill, acquitees are committed to the custody of the Commissioner of Mental Health and come under the supervision of the Mental Hygiene Law." Id. "These track designations arose out of the Insanity Defense Reform Act of 1980." Id. Based on serious legislative and public policy concerns, these statutes "strike a balance between public safety and the individual rights of an acquitee." Id. In striking that balance, the legislature determined that track designation be made at the time of the finding that a defendant is not responsible. Darryl T., 161 AD3d at 55.

Significantly, the Legislature has specifically exempted the track designation determination from the "rehearing and review" rights a defendant has to challenge retention decisions pursuant to CPL § 330.20(16). At that type of proceeding, whether before "judge or jury . . . [a] review [is performed] of the earlier record as well as any new evidence presented by the parties concerning the acquitee's mental status at the time of a rehearing and review." Norman D., 3 NY3d at 155. This proceeding is done to assure "that the conditions of supervision originally imposed are appropriate at the time of the new proceeding." Id. at 155-56. Determination of the validity of the initial track designation "is based on the record at the time of the earlier proceeding." Id. at 156. A challenge to the merits of a track designation can only be made by direct appeal, and not by any type of "rehearing and review."

In this case, the First Department never said that the record made at the time of the initial hearing did not support a track one designation; they said, in essence, that

defendant had been deprived of his right to have constitutionally valid legal representation at that initial hearing. They ordered a new "initial hearing," at which a record will be made about the appropriate track designation; they did not order a "rehearing and review." The fact that a defendant only has a right to challenge the hearing court's designation of the track is further evidence of the legislature's intent that the track designation itself be based on the evidence that would have been introduced and challenged by a defendant at the initial hearing. What defendant seeks here is in reality something he is not entitled to: a review and rehearing based on evidence of events and examinations after the statutory initial hearing period. Id. at 155-56.

In this Court's opinion, given the First Department's decision recognizing the importance of the initial hearing to public safety in having the track designation determined based on findings made of a defendant's mental condition at that time, albeit at a hearing where defendant is represented by competent counsel, granting the application for a new initial examination three years later would upset the delicate balance struck by the legislature and thereby violate the statute. It would also potentially compromise public safety. Had this Court determined that defendant's application should have been granted, which it now understands would have been the appropriate ruling, it would have maintained that delicate balance by having a new initial hearing based on the initial examination reports and other evidence relevant to the defendant's mental status at that time.

According to the letter of the First Department's ruling, this Court is mandated only to conduct that type of hearing. At this hearing, defendant will be given the opportunity to challenge, through counsel, the findings of the two original psychiatric

examiners that defendant suffered from a dangerous mental disorder at the relevant time. He will be able to call experts to review the records and in this way have the ability to challenge the findings of those examiners. He has access to what was characterized as thousands of pages of psychiatric records generated during defendant's lifetime prior to the not-responsible plea, and can use them to make whatever arguments he chooses about how those records demonstrate what track designation is appropriate.

Conducting a similar type of hearing to determine a defendant's mental status at an earlier date based on a complete record of that status is hardly unprecedented. The First Department has allowed a hearing to be conducted to determine a defendant's fitness to stand trial after the defendant has been convicted by a jury, where contemporaneous and complete records existed to allow a court to make such a fitness finding. People v, Maddicks, 118 AD2d 437 (1st Dept 1986). A defendant's constitutional right to be mentally fit to stand trial is no more or less important than a defendant's right to have a "track" designation made at an appropriate hearing. This Court sees no legal impediment to holding an appropriate new initial hearing in this matter based on the well-documented records about defendant's mental status right after he was found to be not responsible for his crime by reason of mental disease or defect.

The Court understands that the parties will be seeking clarification from the First Department of their order that a new retention hearing take place, to see if the First Department was also ordering a new initial examination. This Court welcomes such clarification, if the First Department agrees to provide it, and of course will be bound by that decision. If they do not provide such clarification, this Court will likely grant the

order for a new initial examination based solely on the fact that the Bronx District Attorney's Office appears to be now joining in that application. This Court recognizes that ruling against both sides on a pure legal issue not only invites appellate review, but likely appellate reversal.

This constitutes the interim Decision of this Court.

Dated: July 18, 2018

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Hon. Ralph Fabrizio