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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-903
	:	
of	:	<u>JANUARY 14, 1981</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Paul H. Dobson	:	
Deputy Attorney General	:	
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The Director of the Department of Mental Health, has requested an opinion on the following questions:

1. What procedure must be followed for the release of a person committed to a state hospital as a mentally disordered sex offender at the end of the “maximum term of commitment” as determined pursuant to Welfare and Institutions Code section 6316.1?

2. What procedure must be followed for the release of a person committed to a state hospital after having been found not guilty by reason of insanity at the end of the “maximum term of commitment” as determined pursuant to Penal Code section 1026.5?

CONCLUSION

The procedure to be followed for the release of a person committed to a state hospital as a mentally disordered sex offender or as having been found not guilty by reason of insanity at the end of the “maximum term of commitment” as determined by Welfare and Institutions Code section 6316.1 or Penal Code section 1026.5 is a discharge directly from the state hospital complying with the requirements of Welfare and Institutions Code section 7355.

ANALYSIS

The present inquiry concerns the procedure to be followed in the release of a person committed to a state hospital as a mentally disordered sex offender (hereafter “MDSO”) or a person committed to a state hospital after having been found not guilty by reason of insanity in a criminal case (hereafter “NGI”) at the end of the “maximum term of commitment” specified for such persons in Welfare and Institutions Code section 6316.1 and Penal Code section 1026.5, respectively. While, for reasons set forth below, our conclusion as to both MDSOs and NGIs in this respect is the same, for the sake of clarity, we will first address the case of an MDSO.

MDSO COMMITMENTS

When a person is convicted of certain types of sex offenses, the trial judge on his own motion or on motion of the prosecuting attorney may adjourn the proceedings or suspend the sentence as the case may be and certify the person for a hearing and examination by the superior court to determine whether the person is an MDSO as defined in Welfare and Institutions Code section 6300. (Welf. & Inst. Code, § 6302.) After an examination and a hearing in which the court finds the person is an MDSO and that the person could benefit by treatment in a state hospital or other mental facility, the court, as one alternative, may order the person committed to the Department of Mental Hygiene for placement in the state hospital. (Welf. & Inst. Code, § 6316.)

In the case of such a commitment, Welfare and Institutions Code section 6316.1 provides for the determination of a “maximum term of commitment” beyond which “the person may not be kept in actual custody.” The section specifies how the maximum term of commitment is to be determined in some cases by the court and in other cases by the Board of Prison Terms. In cases in which the court determines the maximum term of commitment, it is to specify that term in the commitment order. In cases where the Board of Prison Terms is required to determine the term, it is required to provide the person committed, the prosecuting attorney, the committing court, and the state Department of Mental Health a written statement setting forth the maximum term of commitment.

Prior to the enactment of Welfare and Institutions Code section 6316.1 in 1977 (Stats. 1977, ch. 164, § 2), the statutory scheme relating to MDSOs provided for an indeterminate commitment to the department, potentially for life. (*In re Moye* (1978) 23 Cal. 3d 457, 463.) Provision was made for return of a person so committed under two circumstances by Welfare and Institutions Code section 6325. Section 6325 provided then, and still provides, for the return of an MDSO to the committing court if the superintendent of the state hospital is of the opinion (a) the person has been treated to such an extent that he would not benefit from further care and treatment in the hospital and that the person is not dangerous or (b) the person has not recovered and is still a danger to the health and safety of others. (Welf. & Inst. Code, § 6325.) When a person has been so returned the criminal case may be resumed and sentence imposed. (*In re Beville* (1968) 68 Cal. 2d 854, 855. Welfare and Institutions Code section 6325 presently provides that if a person is sentenced on the criminal charge, time spent under the indeterminate commitment as an MDSO is to be credited by the court or the Board of Prison Terms against such sentence.

The question presented for analysis herein concerns the case of an MDSO who is not returned pursuant to section 6325 and whose maximum term of commitment under section 6316.1 expires. The Director of the Department of Mental Health asks whether at the expiration of the term the person is to be returned to the criminal court for disposition of the case or whether the person is to be released directly from the state hospital.

We believe it is clear that the person is to be released directly by the state hospital. Welfare and Institutions Code section 6316.1 sets forth a “maximum term of commitment” beyond which a person may not be kept in actual custody “except as provided in section 6316.2.” Section 6316.2, subdivision (a) commences:

“A person may be committed beyond the term prescribed by section 6316.1 only under the procedures set forth in this section . . .”

It then continues to provide a particular procedure by which a petition is filed in court to extend the commitment specified in section 6316.1. Subdivision (d) of section 6316.2 provides:

“The court shall conduct a hearing on the petition for extending commitment. The trial shall be by jury unless waived by both the patient and the prosecuting attorney. The trial shall commence no later than 30 days prior to the time the patient *would otherwise have been released by the state Department of Mental Health.*” (Emphasis added.)

In *People v. Saffell* (1979) 25 Cal. 3d 223, 231, the Supreme Court discussed the relationship among Welfare and Institutions Code sections 6316.1, 6316.2 and 6325:

“The MDSO may still, by operation of law, be committed indefinitely. The initial commitment merely sets the date at which the state must release the MDSO or make a showing that the individual still presents a serious threat of substantial harm to the health and safety of others.” (§ 6316.2, subd. (a)(2).) *Before the maximum commitment date is reached, however, the individual may be returned to the criminal court if he will not benefit by further care and treatment and is not dangerous or if he has not recovered and still is a danger to the health and safety of others. (§ 6325.) . . .*” (Emphases added.)

As may be seen, the court indicated that the “state must release the MDSO” at the end of the maximum term of commitment. It also stated that the MDSO may be returned to the criminal court *before* the maximum commitment date. We think the language of the court clearly implies its understanding that the statutory scheme does not contemplate a return to the criminal court *at the end* of the maximum term of commitment, but contemplates a release directly from the state institution unless judicial proceedings are commenced pursuant to section 6316.2.

Division 7, chapter 3, article 7 (§ 7350 *et seq.*) of the Welfare and Institutions Code generally provides for the leaves of absence, discharges, and restorations to capacity of persons committed to state hospitals, other than mentally disordered criminals. Welfare and Institutions Code section 7350 was amended by Statutes of 1978, chapter 1291, section 9, to include the phrase “except for section 7355. “Section 7350 now provides:

“The provisions of this article *except for section 7355* shall not apply to any patient held upon an order of the court or judge in a proceeding arising out of a criminal action.” (Emphasis added.)

Thus, it is clear that in 1978, the Legislature made applicable provisions of Welfare and Institutions Code section 7355 to persons committed to a state hospital by a proceeding arising out of a criminal action. Section 7355 provides in pertinent part:

“No patient shall be discharged . . . from a state hospital without suitable clothing adapted to the season in which he is discharged; and, if it cannot otherwise be obtained, superintendent, under general conditions prescribed by the department having jurisdiction over the hospital, shall furnish such clothing and money, not to exceed fifty dollars (\$50), to defray

the necessary expenses for such patient who . . . is to be discharged, until he can reach his relatives or friends, or find employment to earn a subsistence.”

The Legislature in making Welfare and Institutions Code section 7355 applicable to a commitment arising out of criminal actions has contemplated that an MDSO may be released directly from a state hospital at the expiration of the MDSO’s maximum term of commitment. We conclude that an MDSO whose maximum term of commitment has expired should be released directly from the hospital and the requirements of section 7355 apply to such discharge.

It should also be noted that the Legislature has set forth certain requirements with respect to registration of MDSOs in Penal Code section 290, subdivision (b).

NGI COMMITMENTS

In October 1978, the Supreme Court decided the case of *In re Moya*, *supra*, 22 Cal. 3d 457. In *Moya* the court considered whether a person who is committed to the Department of Mental Health following his acquittal on criminal charges because of insanity may be held in the department’s custody for a period in excess of the maximum term provided for the underlying offense of which he is charged and acquitted. At the time of the *Moya* decision, Penal Code section 1026 provided that if a defendant is found to have been insane at the time he committed the criminal offense, unless the court finds that he has fully recovered his sanity, the court must direct either that the defendant be confined in the state hospital or other mental facility, or that he undergo outpatient treatment. (*Moya*, *supra*, at p. 461.) Under Penal Code section 1026, a person so committed can apply for his release on the ground that his sanity had been restored. (*Id.*)

The court in *Moya* pointed to the 1977 legislation with respect to MDSO commitments and found that NGIs and MDSOs were similarly situated such that in the absence of further legislation applicable to commitments under Penal Code section 1026, as a matter of equal protection of the laws, NGIs were subject to a maximum term of punishment “in accordance with the principles expressed in section 6316.1 of the Welfare and Institutions Code.” (*Id.*, at p. 467.) The court additionally held:

“To the extent practicable, in the absence of further legislation on the subject, the procedure for the extended commitment of persons committed following their acquittal on the ground of insanity should conform to the procedure specified in section 6316.2 of the Welfare and Institutions Code.” (*Id.*)

As a result of the court's decision in *Moye*, the Legislature enacted Penal Code section 1026.5 by Statutes of 1979, chapter 1114, section 3, effective September 28, 1979. In similar fashion to Welfare and Institutions Code section 6316.1, Penal Code section 1026.5 provides for a "maximum term of commitment" for an NGI beyond which he "may not be kept in actual custody." The section specifies that the court in some cases shall state in the commitment order the maximum term of commitment, and in other cases the "Community Release Board," now the Board of Prison Terms, shall determine the maximum term of commitment. This section also provides for determination of the maximum terms of commitment by the Board of Prison Terms for persons committed to state hospitals as the effective date of the subdivision. In cases in which the court determines the maximum term of commitment, it is to state that term in the commitment order. In cases where the Board of Prison Terms determines the maximum term of commitment, it is to provide the persons, prosecuting attorney, committing court, the state hospital or other facility with a written statement setting forth the maximum term of commitment.

By Statutes of 1980, chapter 547, section 3 (effective Jan. 1, 1981) the Legislature has enacted Penal Code section 1026.1 which provides:

"A person committed to a *state hospital* or other treatment facility under the provisions of Section 1026 shall be released *therefrom* only:

"(a) Upon determination that sanity has been restored, as provided in Section 1026.2; or

"(b) *Upon expiration of the maximum term of commitment as provided in subdivision (a) of Section 1026.5*, except as such term may be extended under the provisions of subdivision (b) of Section 1026.5; or

"(c) As otherwise expressly provided in Title 15 (commencing with Section 1600) of Part 2." (Emphasis added.)

Thus, this section expressly provides for the release of the NGI directly from the state hospital upon the expiration of the maximum term of commitment. It would appear that Welfare and Institutions Code section 7355 is applicable to such release of an NGI and, as in the case of an MDSO, that section sets forth certain requirements for discharge at the expiration at the maximum term of commitment determined pursuant to Penal Code section 1026.5.

We finally note that by Statutes of 1980, chapter 547, section 17, the Legislature also has added title 15 (commencing with § 1600) to part 2 of the Penal Code

under the heading: “OUTPATIENT STATUS FOR MENTALLY DISORDERED AND DEVELOPMENTALLY DISABLED OFFENDERS.”

Penal Code section 1600 provides:

“Any person committed to a state hospital or other treatment facility under the provisions of Section 1026, or Chapter 6 (commencing with Section 1367) of Title 10 of this code, or Section 6316 or 6321 of the Welfare and Institutions Code may be placed on outpatient status from such commitment subject to the procedures and provisions of this title, except that a developmentally disabled person may be placed on outpatient status from such commitment under the provisions of this title as modified by Section 1370.4.”

Penal Code section 1612 provides:

“Any person committed to a state hospital or other treatment facility under the provisions of section 1026, or Chapter 6 (commencing with Section 1367) of Title 10 of this code, or Section 6316 or 6321 of the Welfare and Institutions Code shall not be released therefrom except as expressly provided in this title.”

When read in isolation, Penal Code section 1612 suggests releases for NGIs or MDSOs are limited to the provisions of title 15. However, it is clear that “release” mentioned in section 1612 does not include a release upon the expiration of the maximum term of commitment. The title makes no provision for such a final discharge. As to NGIs, section 1026.1, subdivision (c) indicates that the procedures set forth in title 15 do not apply to the situation of the expiration of the maximum term of commitment. Title 15 is limited to releases on outpatient status *during* the term of commitment. (*Cf.* Welf. & Inst. Code, § 6325.1, as enacted by Stats. 1980, ch. 547, § 23.) Accordingly, section 1612 does not apply to a release of an MDSO from a state hospital upon his maximum term of commitment.

In summary, it is our conclusion that the procedure to be followed for the release of a person committed to a state hospital as a mentally disordered sex offender or as having been found not guilty by reason of insanity at the end of the “maximum term of commitment” as determined by Welfare and Institutions Code section 6316.1 or Penal

Code section 1026.5 is discharge directly from the hospital complying with the requirements of Welfare and Institutions Code section 7355.1.¹

¹ Our opinion herein is limited to cases where there is a valid order by the court or the Board of Prison Terms specifying the “maximum term of commitment.” (*Cf. People v. Wadsworth* (1979) 92 Cal. App. 3d 978.)