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Johnny Earl

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,) NO. H000666
)
Plaintiff and Respondent,) Santa Clara County
) Superior Court No.
v.) UT123456)
)
JOHNNY EARL)
)
Defendant and Appellant.)
_____)

**MOTION FOR LEAVE TO EXAMINE SEALED PORTION OF
CLERK’S TRANSCRIPT AND TO EXTEND TIME FOR FILING
OPENING BRIEF**

Appellant Johnny Earl moves, through counsel, to unseal portions of the clerk’s transcript, and extend the time for filing the opening brief.

Pursuant to rule 12.5 of California Rules of Court, appellant moves to

examine a sealed portion of the clerk's transcript which is part of the record on appeal, and asks that copies of said documents be transmitted to his appointed counsel on appeal. The sealed portions consist of four mental health reports. (CT 6-32, 37-38, 65-70, 84-85.)

Pursuant to rules 45 and 45.5, appellant moves that the deadline for filing the opening brief be extended to 30 days after the filing of the augmented record and the transmission of the sealed record.

The motions are based on this notice, the accompanying declaration of counsel and the Memorandum of Points and Authorities which follows.

MEMORANDUM OF POINTS AND AUTHORITIES

A. APPELLATE COUNSEL IS ENTITLED TO VIEW REPORTS WHICH ARE NOT CONFIDENTIAL AS TO THE CLIENT.

Mental health reports are generally confidential, and the public is not permitted access to the reports. (See, e.g., Welf. & Inst. Code, § 5328.) Thus, they might properly be considered “sealed records” under rule 12.5(b) of the California Rules of Court. The patient, however, is permitted to review his own mental health records. Psychological reports on a defendant submitted to the court must be made available to the defendant or his attorney. (See Pen. Code, §§ 1026.5, subd. (b)(7), 1027; cf. Welf. & Inst. Code, § 5328, subd. (j).) Since this is an appeal from an order extending his commitment after a finding of being not guilty by reason of insanity under Penal Code section 1026.5, the state of his mental health is at issue. Accordingly, appellate counsel must be permitted to review mental health records that were considered by the superior court in committing Mr. Earl.

In order to protect an indigent client’s right to equal protection and due process on appeal under the Fourteenth Amendment to the United States Constitution and to protect the right to effective assistance of counsel on appeal under the Fourteenth Amendment, appellate counsel must be permitted to review the records. (*Draper v. Washington* (1963) 372 U.S. 487, 496-497.) “[A]n appellate record that will permit a meaningful, effective presentation of

the indigent's claims" is "constitutionally necessary for a 'complete and adequate' appeal by an indigent . . ." (*People v. Barton* (1978) 21 Cal.3d 513, 518; accord, *Draper, supra*, 372 U.S. at pp. 496-497.) As a component of due process, the United States Supreme Court has repeatedly identified an appellate record that permits a meaningful, effective presentation of an indigent's claims as a "basic tool" that is constitutionally necessary. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227; *Griffin v. Illinois* (1956) 351 U.S. 12; see also *Barton, supra*, at pp. 519-520.) The Legislature has required the same constitutional rights that apply in criminal cases to apply in recommitment proceedings after a patient has been found not guilty by reason of insanity. (Pen. Code, § 1026.5, subd. (b)(7); see also *People v. Leonard* (2000) 78 Cal.App.4th 776, 784 [assuming there is the right to effective assistance of counsel in commitment proceedings].) There is good cause presented as to why the requested sealed portion of the clerk's transcript should be copied and transmitted under seal to counsel on appeal. Wherefore, appellant respectfully requests that the Court order that copies of the mental health records be sent to counsel for appellant.

B. THE DEADLINE FOR FILING THE OPENING BRIEF SHOULD BE EXTENDED TO PERMIT COUNSEL TO REVIEW THE AUGMENTED AND SEALED RECORDS.

The opening brief in the present case is scheduled to be filed on March 9, 2004. Appellant requests that the Court extend the time for filing the

opening brief until thirty days after the requested sealed portion of the clerk's transcript and the augmented record have been transmitted to counsel on appeal.

DATED: February 9, 2004.

Respectfully submitted,

By: _____
Jonathan Grossman
Attorney for Appellant
Johnny Earl

DECLARATION OF COUNSEL

I, Jonathan Grossman, am counsel for appellant, and I respectfully request that I be permitted to view the sealed portions of the clerk's transcript and that the record be augmented to include the above listed items.

I am a staff attorney with the Sixth District Appellate Program which has been appointed to represent Johnny Earl. I am handling the appeal as a staff case.

On December 29, 2003, appellant was recommitted under Penal Code section 1026.5, subdivision (b), after being found not guilty by reason of insanity of arson (Pen. Code, § 451, subd. (d)). The recommitment expires on September 9, 2005.

As reflected in the attached motion, it is my professional opinion that appellant cannot receive a full and fair review of the trial court proceedings unless the motions to view the sealed records is granted. It is also my good faith belief that the items requested are essential for appellate review.

I request that the time for filing the opening brief be extended to a date 30 days after the filing of the requested augmented record. The original record was filed on January 29, 2004. There has been no previous extension of time.

The original record consists of 143 pages of clerk's transcript (excluding the sealed records) and 106 pages of reporter's transcript. I have read the clerk's transcript and reporter's transcript and learned material is missing from the original record which is necessary for adequate review.

I need the additional time to assimilate the information requested in this motion in order to fully develop the issues and draft the opening brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Santa Clara, California, on February 9, 2004.

