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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CALVIN LEONARD SHARP, Petitioner, v. THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	2d Civil No. B222025 (Super. Ct. No. 2008014330) (Ventura County) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed on January 18, 2011, be modified as follows:

1. The entire section of the opinion entitled "*Statute Applied Prospectively*" beginning on page 13 and ending on page 15 is modified to read as follows:

"*Statute Applied Prospectively*

Sharp contends that the January 25, 2010, order is an improper retrospective application of a statute that operates prospectively only.

It is presumed that criminal statutes apply prospectively. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287.) Section 1054.3(b) includes no contrary language or other indication to rebut that presumption, and the People concede the statute

does not apply retroactively. The People, however, argue that application of section 1054.3(b) in this case is a "prospective" application. We agree with the People.

A statute is retrospective if it defines conduct occurring prior to its effective date as criminal, increases the punishment for such conduct, or eliminates a defense to a criminal charge based on the conduct. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.) Conversely, application of a statute affecting the conduct of "trials which have yet to take place" is not deemed to be retroactive, even if the trial pertains to conduct that occurred prior to the statute's enactment. (*Ibid*.) "[T]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." (*Ibid*.; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

Section 1054.3(b) permits the trial court to order an additional mental examination in addition to examinations pursuant to section 1027 and, thereby, relates to the procedures to be followed in the conduct of a sanity trial. When utilized in the conduct of "trials which have yet to take place," application of section 1054.3(b) is deemed to be prospective. (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 288.) In this case, Sharp's sanity trial had not commenced on the January 1, 2010, effective date of section 1054.3(b) and, therefore, its application in this case is prospective and permissible.

Sharp argues that the guilt and sanity phases of his case are part of the same unitary criminal proceeding, and that the guilt phase of trial commenced on October 27, 2009 prior to the effective date of section 1054.3(b). (*People v. Hernandez* (2000) 22 Cal.4th 512, 523.) We agree that there is only one trial in a case involving an NGRI defense. The fact that the sanity phase of the trial "is conducted in a separate proceeding and that the defendant bears the burden of proof does not convert it into a separate criminal . . . action." (*Id.* at p. 524.) We do not agree, however, that the trial commenced on October 27, 2009, or at any other time prior to the effective date of section 1054.3(b).

The trial court called the case for the guilt phase trial on October 27, 2009. The process of jury selection and other pretrial preparation began but, on November 6, 2009, Sharp withdrew his not guilty plea to the offenses before the jury was empanelled

and, therefore, the guilt phase of the proceeding was terminated without trial. The case was continued to January 11, 2010, to conduct pretrial proceedings for the sanity trial.

Sharp's argument that trial commenced when the case was called for trial on the guilt phase is unpersuasive. Trial may be deemed to commence when jury selection begins for purposes of a particular statute or public policy. (See *People v. Granderson* (1998) 67 Cal.App.4th 703, 705, 711-712 [interpreting trial as including jury selection for purposes of § 1043, subd. (b)(2)].) The only reasonable date for the commencement of trial under the circumstances of this case would be when the jury is empanelled and jeopardy attaches. (See *Jackson v. Superior Court* (1937) 10 Cal.2d 350, 356; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057, fn. 3; *People v. Gephart* (1979) 93 Cal.App.3d 989, 998.) The effect of Sharp's change of plea was to eliminate the necessity of a guilt trial, not to constitute the trial. Although part of a single unitary proceeding, the guilt and sanity phases of an NGRI case are conducted in separate hearings and concern entirely different issues. No purpose would be served by artificially treating the trial to have commenced when Sharp changed his plea merely because jury selection was in progress at that time.

Sharp also argues that section 1054.3(b) is being applied retrospectively in this case because it creates a new obligation and imposes a new duty and "disability" on defendants who plead NGRI. We disagree. Based on his plea, Sharp had the obligation and duty to submit to mental examinations as set forth in section 1027 and to accept the consequences of testimony from these and other mental health experts at trial. Sharp may be concerned that the testimony by Dr. Mohandie will be adverse to his interests, but it will not increase the punishment for Sharp's conduct, or eliminate a defense to a criminal charge based on the conduct. (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.)

In a related argument, Sharp claims he justifiably relied to his detriment on the law in existence in 2009. It is not entirely clear whether he intends this argument to pertain to the issue of retroactivity or as support for some fairness proposition that is not revealed by his argument. In either case, Sharp cites no authority which supports his position.

Moreover, his argument regarding detrimental reliance is unpersuasive. He asserts that he made a "tactical" decision to provide full discovery to the prosecution in 2009 or earlier, changed his plea to guilty as to the offenses and thereby gave up his right to a jury trial and to any contentions that could have been made in pretrial motions. These assertions, however, do not show prejudice. Sharp does not explain how his decisions prior to 2010 would have been significantly different if he knew that he could be ordered to submit to a mental examination by a prosecution expert. Also, Sharp was aware of *Verdin*, its invitation for the Legislature to act, and the fact that the law regarding court-ordered mental examinations was to some degree unsettled. (See *People v. Richardson* (2008) 43 Cal.4th 959, 998.)

[There is no change in the judgment.]

Petitioner's petition for rehearing is denied.