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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JESSE WAGNER,

Plaintiff and Appellant,

v.

WILLIAM D. GORE, as Sheriff, etc. et al.,

Defendants and Respondents.

D059967

(Super. Ct. No.  
37-2009-00103208-CU-WM-CTL)

APPEAL from an order of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Jesse Wagner appeals an order denying his petition for writ of mandate that apparently sought release of certain public records held by the San Diego County Sheriff's Department (County). On appeal, he contends the trial court: (1) erred because it had no discretion under Code of Civil Procedure<sup>1</sup> section 583.420 to dismiss his

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

petition for lack of prosecution; and (2) violated his constitutional due process rights by dismissing his petition without adequate notice.

#### FACTUAL AND PROCEDURAL BACKGROUND

Wagner apparently filed a petition for writ of mandate seeking release by County, County Sheriff William D. Gore, and Sanford A. Toyen (together Respondents) of certain information pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.).<sup>2</sup> On May 27, 2011, the trial court confirmed its tentative ruling and denied the petition, stating in its minute order (Order):

"This hearing was originally set for October 22, 2010. No moving papers were filed, but just prior to the hearing [Wagner] requested, and was granted, a continuance. The hearing was then set to January 14, 2011.

"[Wagner] did not file moving papers for the January 14, 2011 hearing. At the hearing, [Wagner] requested a second continuance, which was granted. The hearing was continued to May 27, 2011.

"On May 11, 2011, [Wagner] requested a third continuance to October 14, 2011. The request was denied.

"The court will hear the matter because the court has continued the matter twice and no moving papers have been filed. The Petition is thus denied."

Wagner timely filed a notice of appeal.

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<sup>2</sup> Although, as discussed below, the record on appeal filed by Wagner is wholly inadequate, and does not contain a copy of his petition, we presume for purposes of this appeal that he filed a petition substantially as described above.

## DISCUSSION

### I

#### *Waiver Based on Inadequate Record on Appeal*

Wagner contends the trial court erred because it had no discretion under section 583.420 to dismiss his petition for lack of prosecution. He also contends the trial court violated his constitutional due process rights by dismissing his petition without adequate notice. However, because Wagner has not provided an adequate record on appeal, we conclude he has waived those contentions.

### A

In *Denham v. Superior Court* (1970) 2 Cal.3d 557, the court stated:

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Id.* at p. 564.)

"A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed."

(*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn.

9; see also *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1002 [if record on appeal is

inadequate, appellate contention is deemed abandoned].) Alternatively stated, "a record

is inadequate, and appellant defaults, if the appellant predicates error only on the part of

the record he provides the trial court, but ignores or does not present to the appellate

court portions of the proceedings below which may provide grounds upon which the

decision of the trial court could be affirmed." (*Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.) "The burden of affirmatively demonstrating error is on the appellant." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) The appellant has the burden to provide an adequate record on appeal to allow the reviewing court to assess the purported error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

## B

The record on appeal in this case consists of a clerk's transcript that includes only one document relevant to the merits of Wagner's appeal—namely, the Order.<sup>3</sup> The clerk's transcript omits Wagner's petition for writ of mandate, any answer by Respondents, and any proofs of service of those documents. The record also omits the minute orders noting the trial court twice continued the hearing on the petition. The record on appeal also omits a reporter's transcript for the instant May 27, 2011, hearing that may have included the trial court's reasoning for denying the petition.

We conclude the record on appeal in this case is wholly inadequate to provide a basis on which we can consider Wagner's appellate contentions. The Order begins by merely describing the procedural background leading to the May 27, 2011, hearing (i.e., that Wagner had not filed any moving papers before the first two hearing dates and the

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<sup>3</sup> The other documents in the clerk's transcript (i.e., tentative ruling, notice of appeal, and designation of record on appeal) do not relate to the merits of this appeal.

trial court had granted both of Wagner's requests for continuances of those hearings). The Order then notes that the court denied Wagner's May 11 request for continuance of the May 27 hearing date. Noting that Wagner had not filed any moving papers, the Order then states that the trial court would hear the matter. The Order then denied the petition without any specific reason expressed for that decision. Based on this inadequate record, we cannot address the merits of Wagner's appellate contentions. There is nothing in the record on appeal indicating the trial court denied the petition for lack of prosecution by Wagner (whether pursuant to § 583.420 or otherwise). Because Wagner has not provided an adequate record on appeal from which we can address the merits of his contentions, we conclude he has waived those contentions. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 564; *Mountain Lion Coalition v. Fish & Game Com., supra*, 214 Cal.App.3d at p. 1051, fn. 9; *In re Valerie A., supra*, 152 Cal.App.4th at p. 1002; *Uniroyal Chemical Co. v. American Vanguard Corp., supra*, 203 Cal.App.3d at p. 302.)

We further conclude Wagner has waived his contention that his constitutional due process rights were violated because he has not presented any substantive legal analysis showing he was denied any constitutional right to prior notice of the hearing at which the trial court purportedly dismissed his petition. "Where a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) "Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues

waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99; see also *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary."]; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [contention was deemed waived because "Appellant did not formulate a coherent legal argument nor did she cite any supporting authority."]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["The dearth of true legal analysis in her appellate briefs amounts to a waiver of the [contention] and we treat it as such."]; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation* (1993) 21 Cal.App.4th 561, 571.) Appellants acting in propria persona are held to the same standards as those represented by counsel. (See, e.g., *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819.)

## II

### *Wagner Has Not Carried His Burden on Appeal*

Assuming arguendo Wagner has not waived his appellate contentions by not providing an adequate record on appeal, we nevertheless conclude he has not carried his burden on appeal to persuade us the trial court erred by denying his petition. First, as Respondents note, a proceeding on a petition for writ of mandate, as in this case, is *not* a *civil action* subject to section 583.420 and related provisions regarding dismissals for lack of prosecution. (Cf. *Cohen v. Hughes Markets, Inc.* (1995) 36 Cal.App.4th 1693 [trial court erred by dismissing a civil action (i.e., personal injury action) for lack of prosecution because action was less than two years old under § 583.420, subd.

(a)(2)(B)].) Rather, a proceeding on a petition for writ of mandate is a *special proceeding*. (*Elmore v. Imperial Irrigation Dist.* (1984) 159 Cal.App.3d 185, 190.)

Wagner does not present any substantive legal analysis persuading us that section 583.420 or any other statute or case law applies in the circumstances of this case to preclude dismissal of the petition (assuming *arguendo* the trial court dismissed it) at the time of the Order. Because Wagner has not carried that burden on appeal, the presumption of the Order's correctness remains unrebutted. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564.)

Furthermore, we note that, as Respondents argue, Wagner was required to file a memorandum in support of his petition for writ of mandate. California Rules of Court, rule 3.1112(a)<sup>4</sup> provides:

"Unless otherwise provided by the rules in this division, the papers filed in support of a motion [e.g., petition for writ of mandate per rule 3.1103(a)(2)] *must* consist of at least the following:

"(1) A notice of hearing on the motion;

"(2) The motion itself; and

"(3) *A memorandum in support of the motion . . . .*" (Italics added.)

Furthermore, rule 3.1113(a) provides:

"A party filing a motion [e.g., a petition for writ of mandate] . . . *must* serve and *file a supporting memorandum*. *The court may construe the absence of a memorandum as an admission that the motion . . . is not meritorious and cause for its denial . . . .*" (Italics added.)

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<sup>4</sup> All rule references are to the California Rules of Court.

At the May 27, 2011, hearing, the trial court noted Wagner had not filed any "moving papers" (e.g., a memorandum in support of his petition). Based on the absence of a supporting memorandum, the trial court had authority to construe its absence as an admission by Wagner that his petition was not meritorious and constituted cause for denial of his petition. (Rule 3.1113(a).) Absent any contrary indication in the record on appeal, we presume this ground provided the legal basis for the trial court's denial of Wagner's petition. Wagner does not carry his burden on appeal to show the court erred by denying his petition pursuant to rule 3.1113(a).

#### DISPOSITION

The order is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.