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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER STEELE SHIDELER,

Defendant and Appellant.

E053648

(Super.Ct.No. FSB06039)

OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West, Judge. Affirmed.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Following a court trial, defendant Walter Steele Shideler's two-year commitment

to the Department of Mental Health (DMH), based on an earlier finding he was not guilty by reason of insanity, was extended for an additional two years pursuant to Penal Code section 1026.5. Defendant appealed, claiming that his right to a jury trial was abrogated because the trial court failed to (a) advise him of his right to a jury trial, and (b) obtain defendant's personal waiver of that right, prior to conducting a court trial. We affirm.

## BACKGROUND

### Commitment Offense

In 1994, defendant was charged with aggravated assault (Pen. Code, § 245, subd. (a)(1)), after he struck a young woman, who was three months pregnant at the time, repeatedly in the face and head. As the victim screamed for help, some bystanders approached with a baseball bat, which the defendant grabbed and used to continue to strike the victim in the head until she fell to the ground. After she fell to the ground, the defendant "stomped on her stomach" several times and then left the scene with the bat in his hand.

The defendant had the delusional belief that the victim was following him and intended to harm him. Defendant was found to be insane at the time of the offense and was committed to the DMH pursuant to Penal Code section 1026.

### Current Commitment Extension Proceedings

On June 9, 2010, the DMH reported that defendant still represented a substantial danger of physical harm to others and qualified to have his commitment extended for an additional two years. His Axis I diagnosis is schizophrenia, undifferentiated type and

polysubstance abuse, the latter in remission in a controlled environment. Defendant has a long history of psychiatric illness, going back to when he was in the tenth grade, and he has been hospitalized for his mental illness on multiple occasions. The evaluation of his mental status revealed that defendant currently demonstrated symptoms of severe disorganized thinking, paranoid delusions, and auditory hallucinations. Defendant's current commitment was scheduled to expire on November 20, 2010.

On July 9, 2010, the district attorney filed a petition to extend the commitment. On December 17, 2010, at a status conference hearing, defense counsel requested a court trial. Defendant was not present at that hearing, his presence having been waived.

On May 19, 2011, the court trial commenced. At trial, two experts testified that defendant presented a substantial danger of physical harm to others due to his mental disorder. Defendant's symptoms have not changed during his commitment and he has exhibited symptoms of schizophrenia continuously since his commitment. He has been involved in several verbal and/or physically aggressive acts over the past year and did not understand the potential for danger or recognize the precursors or warning signs that precede his threatening actions. If defendant believes that others are targeting him or intend to do him harm, he will confront them, sometimes bumping into them.

Defendant's understanding of his mental illness is superficial and he does not understand the connection between his mental illness and his crime. Defendant's lack of insight and his inability to manage his symptoms presents the risk he might engage in

aggressive behavior in a less structured setting. Both experts were of the opinion that defendant would not continue to take his medication in an unsupervised setting.

Defendant's unit psychologist felt if he stayed on medication, his symptoms would not get worse, but observed that his symptoms were not improving, either. Defendant's psychiatrist explained that the medications prescribed for his condition help, but they do not clear all his symptoms. The psychiatrist also observed that defendant receives Prolixin by way of injection every two weeks, and that people who received their medications by this means usually have been uncooperative in taking pills. The psychiatrist wanted to put him on Clozaril, but that drug requires weekly blood monitoring which defendant refuses.

Both experts feared that defendant's lack of insight into his mental illness, coupled with his inability to manage his symptoms effectively, could easily lead to aggressive and hostile behavior in a less structured environment because he was unlikely to continue to take his medication outside a hospital setting. For this reason, both experts concluded defendant poses a substantial danger of physical harm to others because of his mental disorder.

At the conclusion of the testimony of all witnesses, including the defendant, who testified on his own behalf, the court found defendant met the criteria under Penal Code section 1026.5 and granted the People's petition to extend the commitment. Specifically, the court found defendant still suffered from a mental disease or defect and will have

difficulty controlling his behavior such that he represents a substantial danger of physical harm to others. Defendant appealed.

## DISCUSSION

On appeal, defendant contends that his due process and statutory right to a jury trial were violated because the trial court failed to advise him of his right to a jury trial and failed to obtain his waiver of that right prior to proceeding on the bench trial. We disagree.

Penal Code section 1026.5, governs the procedures for recommitment of persons who have been committed to the DMH upon findings that such persons were not guilty by reason of insanity (NGI). Subdivision (b)(3) of section 1026.5, provides, among other things, that when the petition is filed, the court shall advise the person named in the petition of the right to be represented by an attorney and of the right to a jury trial. Subdivision (b)(4) of section 1026.5 provides, in part, that the trial shall be by jury unless waived by both the person and the prosecuting attorney. Defendant interprets these subdivisions as requiring that the court personally advise a committee directly of the right to a jury trial and obtaining a personal waiver from the proposed committee. However, case law has adopted a different interpretation.

It is now well established that proceedings for recommitment of a person who has been found to be NGI are civil in nature, directed to the treatment of a patient's illness, not punishment. (*People v. Angeletakis* (1992) 5 Cal.App.4th 963, 967, 969; *People v. Powell* (2004) 114 Cal.App.4th 1153, 1157, 1159 [rev. denied March 30, 2004,

S122768].) Notwithstanding the civil nature of the proceedings, many procedural safeguards have been incorporated, including the right to counsel and the right to a jury trial. (*Id.* at p. 970.) But not all procedural safeguards are necessary in recommitment proceedings. (*Ibid.*; see also *Moore v. Superior Court* (2010) 50 Cal.4th 802, 818.) Thus, despite the literal language of the subdivisions of section 1026.5, the statute only guarantees the rights guaranteed by due process, such as the requirements of proof beyond a reasonable doubt and a unanimous verdict, but not other rights that are granted to criminal defendants. (*People v. Lopez* (2006) 137 Cal.App.4th 1099, 1113-1114.)

The right to trial by jury at a civil extension hearing is statutory, not constitutional. (*People v. Givan* (2007) 156 Cal.App.4th 405, 410.) “Like the protections of the double jeopardy clause and the ex post facto clause, the requirement of a personal waiver of the right to trial by jury has no application in a civil extension hearing. (*Ibid.*, quoting *People v. Powell, supra*, 114 Cal.App.4th at pp. 1157-1158.) For this reason, an insane person who is a substantial danger of physical harm to others has no right to veto his or her attorney’s waiver of the right to trial by jury in a civil extension hearing. (*Givan*, at p. 410, quoting *Powell*, at p. 1158.)

In *People v. Masterson* (1994) 8 Cal.4th 965, 969, the California Supreme Court concluded that counsel may waive jury over defendant’s objection in a Penal Code section 1368 competency proceeding. The court’s reasoning was that even if counsel is not authorized to waive a constitutional right to jury trial [as in criminal cases], the same rule does not necessarily apply to the statutory jury trial right in special proceedings. (*Id.*

at p. 970.) The court also adopted the reasoning of other precedents holding that when the evidence indicates that the defendant may be insane, it should be assumed that he is unable to act in his own best interests. (*Id.* at p. 971.)

In a mentally disordered offender (MDO) proceeding, the right to a jury trial may be waived by counsel. (*People v. Otis* (1999) 70 Cal.App.4th 1174, 1177.) In *Otis*, the court observed that the Legislature did not say the waiver had to be made “personally.” (*Id.* at p. 1176.) Recommitment proceedings under section 1026.5 are analogous to MDO proceedings pursuant to Penal Code section 2966 et seq. (*People v. Powell, supra*, 114 Cal.App.4th at p. 1159.) Both are commitment proceedings and, as such, are “special proceedings.” (*People v. Rowell* (2005) 133 Cal.App.4th 447, 451.) As we held in *People v. Montoya* (2001) 86 Cal.App.4th 825, at page 829, citing *People v. Masterson, supra*, 8 Cal.4th at page 969, in “special proceedings,” such as competency hearings, the right to a jury trial may be waived by counsel, even over defendant’s express objection. Thus, in recommitment proceedings under the NGI statute, a waiver of jury trial through counsel does not violate the person’s constitutional right to a jury trial. (*Powell*, at p. 1159.)

Defendant argues that the trial court had an affirmative duty to advise defendant, in person, of the right to a jury trial, relying upon *People v. Alvas* (1990) 221 Cal.App.3d 1459, 1463-1464. The *Alvas* case involved an involuntary commitment under Welfare and Institutions Code section 6500, where the reviewing court concluded that the record must show an advisement and waiver of the right to a jury trial. (*Id.* at p. 1465.) In

*People v. Bailie* (2006) 144 Cal.App.4th 841, the Third District Court of Appeal followed *Alvas* in reversing a section 6500 commitment for failure to advise the defendant of his right to a jury trial or to secure a waiver. In *Bailie*, there was no waiver of the right to a jury trial by either the committee or his counsel, so it is distinguishable.

However, the holding of *Alvas* regarding advisement of the right to a jury trial, on which defendant relies, is now pending review in the California Supreme Court. (See *People v. Barrett* (2009) formerly at 181 Cal.App.4th 196 [rev. gtd., April 14, 2010, S180612].) The decision in *Alvas* predated cases in which courts have reevaluated the nature of civil commitment proceedings and the application of criminal procedural safeguards in those proceedings, so it is possible that its reasoning has been undermined. (*People v. Bailie, supra*, 144 Cal.App.4th at pp. 846-847; see also *People v. Rowell, supra*, 133 Cal.App.4th at pp. 453, 454.)

Here, the defendant was not present when he was arraigned on the petition. Penal Code section 1026.5, subdivision (b)(3), requires that a defendant be informed of the right to a jury trial when the petition is filed. However, the petition does not inform the defendant of the right and defendant was not present at the arraignment. If Penal Code section 1026.5 is interpreted by the Supreme Court to require that defendant be personally advised of the right to a jury trial, a procedural error occurred, since the right to a jury trial is statutorily required, and not constitutionally mandated. (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1275-1276.) However, since the right to a jury trial may be waived by counsel, even over defendant's objection (*People v. Montoya,*

*supra*, 86 Cal.App.4th at p. 829, citing *People v. Masterson*, *supra*, 8 Cal.4th at p. 969), it is not probable that a different result would have occurred had defendant been personally advised of his right to a jury trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

We conclude that the trial court's failure to advise the defendant personally of his statutory right to a jury trial, or to obtain defendant's personal waiver of that right after counsel requested a court trial on defendant's behalf, did not violate defendant's due process rights.

#### DISPOSITION

The judgment is affirmed.

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RAMIREZ

P.J.

We concur:

McKINSTER

J.

RICHLI

J.