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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR JORGE VARGAS,

Defendant and Appellant.

G044957

(Super. Ct. No. 00NF2596)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Christopher Blake, 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, Andrew Mestman and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Jorge Vargas appeals from an order extending his commitment under Penal Code sections 1026 and 1026.5 for two years.<sup>1</sup> He argues the court violated his due process right to a jury trial by not taking a personal waiver from him before conducting a court trial. We find no violation of Vargas' constitutional rights and affirm the recommitment order.

I  
FACTS

The facts of the underlying crime are not relevant to this appeal and may be briefly stated. On October 11, 2000, Vargas was charged with vandalism of religious property (§ 594.3, subd. (a)) after he used a hatchet to deface the walls of Our Lady of Guadalupe Church in La Habra. Witnesses heard Vargas "talking gibberish, using profanity, and expressing his hate for Jesus Christ" and "making several statements about being the devil . . . ." Initially, he was declared incompetent to stand trial. Two years later, he regained his competency, and in February 2003, Vargas pled not guilty by reason of insanity. The following month, the court made the necessary findings and committed Vargas to Patton State Hospital for a maximum term of three years (see § 1026.5, subd. (a)(1)).

Vargas' commitment was extended by stipulation three times between 2003 and 2008 (see § 1026.5, subd. (b)(2)). In January 2010, the hospital's medical director filed the instant petition. The matter was continued several times over the next few months, but on May 17, 2010, Vargas' attorney, Ernest Eady, and Deputy District Attorney Carolyn Carlisle-Raines appeared before Judge Thomas M. Goethals for jury trial. After counsel stated their appearances for the record, the court commented, "We discussed this case in chambers – 'we' being both counsel and I – and it was indicated, although this case was set for jury trial today on [section] 1026.5 extension, both sides

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

are agreeable to waiving jury.” Counsel confirmed the court’s representation and then the court and defense counsel engaged in the following colloquy: “The court: Okay. I think probably the trial judge would have to take a personal waiver from the defendant. You’re confident as to that Mr. Eady? [¶] Mr. Eady: My position is even if he doesn’t waive, I have the power to waive over his objection, and I intend to do that.” The court assigned the matter to a different judicial officer for a court trial to begin the following day.

On May 18, Judge Richard M. King convened the matter for trial. Although a different prosecutor appeared for the People, the court noted that he had discussed the case with Eady and the previous deputy district attorney and was familiar with the court file. Eady said he intended to submit the matter on documentation prepared with the petition. Deputy District Attorney Rebecca Olivieri stipulated to submit the matter and rested her case. There was no further discussion about Vargas’ right to a jury trial and the court did not explain this right to him on the record.

Eady called Vargas to testify, questioning his client about what he understood about the proceedings, his desire to “go home,” the treatment he received at the mental health facility, the medications he takes, and his plan for release. Although Vargas responded appropriately to some questions, other answers reflected confused thinking. For instance, when Eady asked Vargas why he thought he should be able to go home, Vargas responded, “What I believe is that when someone gives their – what should be said, it is my honesty or whatever it is, constitution, or by choice, if that man is called a judge, wouldn’t you give that honor to say he’s . . . he’s somehow transporting you to a place, a place, no matter what it is, I – I think different. So excuse that. So it values to the judge.” At the conclusion of the trial, the court found beyond a reasonable doubt Vargas suffers from schizophrenia, paranoia and polysubstance dependence, conditions that continued to pose a substantial danger of physical harm to others. Consequently, the court granted a two-year extension on his commitment. This appeal followed.

## II

### DISCUSSION

Section 1026.5, subdivision (b) contains three references to the right to a jury trial. In subdivision (b)(3), the statute provides, “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) states, “The court shall conduct a hearing on the petition for extended commitment. The trial shall be by jury unless waived by both the person and the prosecuting attorney.” Subdivision (b)(7) does not specifically address the right to a jury trial, but it does state, “The person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees.”

Vargas claims the court’s failure to advise him of his right to a jury trial and obtain a personal waiver of that right, combined with his attorney’s waiver of a jury trial violates his right to due process of law. We disagree.

First, while the statutory language certainly states the right to a jury trial and refers to that right in relation to “the person named in the petition,” it does not specifically state this person must personally waive the right. Subdivision (b)(7) is as close as the statutory scheme gets in this regard, and current case law does not support Vargas’ argument. We find no reason to depart from that precedent.

With the identical issue before it, the appellate court in *People v. Powell* (2004) 114 Cal.App.4th 1153 (*Powell*), explained, “Appellant contends that the right to jury trial, like jury trial in a criminal case, must be personally waived. (See Cal. Const., art. I, § 16 [jury in criminal case must be waived ‘by the defendant and the defendant’s counsel’].) An extension trial, however, is civil in nature and directed to treatment, not punishment. [Citations.] ‘[A]lthough many constitutional protections relating to criminal proceedings are available in extension proceedings, the application of all such protections

is not mandated by section 1026.5. The statutory language merely codifies the application of constitutional protections to extension hearings mandated by judicial decision.’ [Citation.] Notwithstanding section 1026.5, subdivision (b), the following constitutional rights have been held not applicable in a ‘not guilty by reason of insanity’ commitment extension trial: 1. ex post facto, 2. privilege against self-incrimination, and 3. double jeopardy. [Citation.] We add to this list the personal waiver of jury trial.” (*People v. Powell, supra*, 114 Cal.App.4th at pp. 1157-1158.) It’s a straightforward issue, straightforward analysis, and straightforward result, one repeated in *People v. Givan* (2007) 156 Cal.App.4th 405, 410 (*Givan*). As noted in *Powell* and *Givan*, “[a]n insane person who is ‘a substantial danger of physical harm to others’ [citation] should not be able to veto the informed tactical decision of counsel.” (*People v. Powell, supra*, 114 Cal.App.4th at p. 1158; *People v. Givan, supra*, 156 Cal.App.4th at p. 410.)

Our sister courts’ analysis is sound and the result makes practical sense. Although Vargas was not present when counsel waived a jury trial, the statutory scheme requires the committed person to act through counsel. (See § 1026.5, subd. (b)(7).) Here, the waiver of a jury trial was a tactical decision on counsel’s part (*People v. Powell, supra*, 114 Cal.App.4th at p. 1158), the type of decision we are reluctant to second-guess. (*People v. Andrade* (2000) 79 Cal.App.4th 651, 660.) And, our independent review of the record supports a finding counsel made an informed decision based on the information before him and his observations of his client. (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)

Vargas discusses *Powell* and *Givan* in his reply brief and criticizes cases involving either mentally disordered offender (MDO) (*People v. Rowell* (2005) 133 Cal.App.4th 447) or sexually violent predator (SVP) (*People v. Otis* (1999) 70 Cal.App.4th 1174, *People v. Montoya* (2001) 86 Cal.App.4th 825) proceedings by claiming they failed to properly analyze the due process issue. But we find their analysis more persuasive than his and we adopt it here.

III

DISPOSITION

The order of recommitment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.