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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACOB JOHN BAHOU,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G046332

(Super. Ct. Nos. 09SF1076;
09SF0494; 09SF0163; 10SM00619)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Edward Hall, Temporary Judge. (Pursuant to Cal.Const. art VI, §21.) Petition granted.

Frank Ospino, Public Defender, Jean Wilkinson, Chief Deputy Public Defender, Mark Brown, Assistant Deputy Public Defender, and Irene A. Pai, Deputy Public Defender, for Petitioner.

No appearance for Respondent.

No appearance for Real Party in Interest.¹

THE COURT: *

Petitioner, John Jacob Bahou (Bahou), seeks extraordinary relief from an order of the Orange County Superior Court dated December 22, 2011. The court's order denied Bahou's refusal to stipulate to Commissioner Edward Hall (Commissioner Hall) as a judge for all purposes in Bahou's probation violation case. In declining to accept Bahou's refusal to stipulate, the court reasoned that Bahou's earlier request for an indicated sentence was equivalent or "tantamount" to a stipulation that Hall serve as the trial judge for "all purposes."

We conclude the trial court's ruling was wrong. Because the trial court's error is plain, we issue a peremptory writ of prohibition/mandate in the first instance.

I

BACKGROUND

In November 2008 and March 2009, Bahou was charged with drug possession and possession of paraphernalia. Bahou pled guilty to these charges. He was sentenced to drug court treatment and placed on probation pursuant to the Substance Abuse and Crime Prevention Act of 2000" (Pen. Code, § 1210 et seq; [diversion of nonviolent offenders to community based substance abuse treatment programs].) Bahou was arrested again, in October and December 2009, and was charged in two additional drug related cases. Bahou pled guilty to these charges, and was again placed on probation pursuant to the provisions of Penal Code section 1210.

In November 2011, Commissioner Hall, who was the judicial officer assigned to preside over department C-60, set Bahou's formal probation violation hearing

¹ We offered the People a chance to respond in our order dated January 3, 2012. As will be further discussed below, the People declined to do so.

* Before O'Leary, P.J., Rylaarsdam, J., and Moore, J.

for December 22, 2011. On December 20, 2011, Bahou's trial counsel, Deputy Public Defender Jon Feldon, filed a formal written refusal to stipulate to Commissioner Hall as the trial judge. On December 22, 2011, after argument by the parties, Hall ruled that he would not accept Bahou's refusal to stipulate to the court as trial judge for all purposes. In so ruling, Hall found that Bahou's prior actions had been tantamount to stipulating to the court as judge for "all purposes."

Hall explained that in November 2011, at the behest of Bahou's trial counsel, he had provided an indicated sentence of two years to resolve all of petitioner's pending cases. Bahou, however, did not wish to plead guilty after hearing the indicated sentence. Hall found that because Bahou had requested an indicated sentence, he had impliedly accepted him as the judge for all purposes.

The Instant Case

Bahou filed a petition for a writ of prohibition/mandate and request for a stay. In his petition Bahou requested a peremptory writ of mandate in the first instance. We requested an informal response from the People, and on January 3, 2012, the People responded they had no "legally cognizable interest in its resolution."

On January 18, 2012, we issued another order granting Bahou's request for a stay of the probation violation hearing. The order included the following additional language: "The People advised us on January 13, 2012, that the office of the district attorney declined to respond to the petition on the merits because the People had 'no legally cognizable interest in its resolution.' We interpret the People's response to indicate that the district attorney agrees the court lacked jurisdiction and that the petition should therefore be granted. If we misinterpreted the People's position, the People are ordered to reply in the form of an informal letter brief, addressing the merits of the petition, no later than January 30, 2012."

The People did not file a response by January 30, 2012. Thus, we conclude that the People have conceded the matter. We also conclude the People have no

objection to this court's issuance of a peremptory writ in the first instance. Because Bahou's entitlement to the relief requested is so obvious "that no purpose could be served by plenary consideration of the issue," we issue a peremptory writ of mandate in the first instance. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1260.)

II

DISCUSSION

The Legislature has specified the powers of a commissioner and the circumstances in which he or she may act as a temporary judge. However, none of these powers permit a commissioner to act as a temporary judge without the stipulation of the parties. The stipulation of the parties is a constitutional and jurisdictional requirement. (*In re Britany K.* (2002) 96 Cal.App.4th 805, 813.) In the absence of an express or implied stipulation to a commissioner, the order or judgment issued by that commissioner is void. (*Kim v. Superior Court* (1998) 64 Cal.App.4th 256, 260.)

The parties by their conduct may impliedly stipulate that a commissioner may act as a temporary judge in a particular proceeding. (*In re Courtney H.* (1995) 38 Cal.App.4th 1221, 1227.) "[A]n implied stipulation, also called a de facto or tantamount stipulation, may be made if the hearing involves the performance of a judicial function, e.g., a trial sentencing, or preliminary hearing, and the party affirmatively participates in the proceeding and then fails to object to the conduct of the proceeding by a commissioner until after it is completed." (*Foosadas v. Superior Court* (2005) 130 Cal.App.4th 649, 655.

In *People v. Oxaca* (1974) 39 Cal.App.3d 153, the court concluded that even though the court commissioner sentenced the defendant without a stipulation, a "tantamount" stipulation between the parties existed. The court's conclusion was based on the fact that the parties entered into a complete plea bargain; the defendant accepted the sentence after its rendition and lived with the conditions of probation for an extended period of time; the attack upon the validity of the proceedings was made in a different

and separate proceeding; and the defendant and his counsel participated in all phases of the plea bargain proceedings. (*Id.* at pp. 164, 166-167.)

The facts here are otherwise. Commissioner Hall gave an indicated sentence only, and no plea negotiations were entered into or agreed upon by the parties. In an indicated sentence the court informs the defendant ““what sentence he will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea”” The defendant retains the right to reject the proposed sentence (as Bahou did here) and the right to proceed to hearing. Moreover, the sentencing court may withdraw its indicated sentence if the factual predicate is disapproved. (*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1146.)

Also, trial counsel here filed a timely written notice of an objection to stipulate, and made a timely refusal to stipulate on the record. Unlike in *People v. Oxaca, supra*, 39 Cal.App.3d 153, Bahou did not sit through the probation violation hearing, only to object upon its completion. Rather, Bahou made it clear by his actions that he had accepted “no benefits” from the court. Our conclusion is also supported by *People v. Haendiges* (1983) 142 Cal.App.3d Supp. 9, where the Appellate Division of the Superior Court in Los Angeles County held that no stipulation to a court commissioner acting as a temporary judge existed, even though the commissioner had given an indicated sentence based on a request by the defense.

In *Haendiges*, the defendant received an indicated sentence from the court commissioner who was sitting in a master calendar court. The People, on hearing the indication, said they would not consent to the commissioner, and were “withdrawing” their stipulation that a “commissioner go forward in the case.” The court concluded the facts failed to establish the commissioner could act as a temporary judge, because the parties had not so stipulated either orally or in writing. “When the parties have not stipulated that a commissioner may act as a temporary judge, the commissioner has only the authority to perform subordinate judicial [duties]’ which do not include the power to

sentence a defendant. [Citation.]” (Id. at p. 15.) The offer of an indicated sentence without more is a subordinate judicial duty and does not constitute a tantamount stipulation. (Id. at pp. 15-16.)

III

DISPOSITION

A peremptory writ of prohibition/mandate shall issue directing the superior court to vacate its order denying Bahou’s refusal to stipulate to Commissioner Hall as a temporary judge for all purposes in his probation violation hearing. The court is further required to enter a new order accepting Bahou’s refusal to stipulate and to allow Bahou’s probation violation hearing to be reassigned to a trial judge.