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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL GAUWAIN,

Defendant and Appellant.

H037019

(Santa Clara County

Super. Ct. No. 113483)

Paul Gauwain appeals from an order extending his commitment as a mentally disordered offender. (Pen. Code, § 2970.) On May 25, 2011, the Santa Clara County District Attorney filed a petition pursuant to Penal Code section 2970, requesting a one-year extension of appellant's involuntary commitment to Napa State Hospital where appellant resides. The matter was set for court trial. At the trial the People called two witnesses in support of the petition, Dr. Nader Wassef, a staff psychiatrist at Napa, and Dr. Carol Humphreys, a staff psychologist at Napa. Dr. Wassef testified that appellant suffered from chronic paranoid schizophrenia, and had previously been diagnosed with polysubstance dependence and pedophilia. He opined that this diagnosis causes appellant serious difficulty in controlling his dangerous behavior because he would not recognize the warning signs to prevent dangerous behavior. Dr. Humphreys testified that she did not think appellant's mental illness was in remission, and that he posed a danger of harm

to others if released. The trial court found the petition true and ordered appellant's commitment extended for one year. This timely appeal ensued.

On appeal, we appointed counsel to represent appellant in this court. Appointed counsel filed an opening brief which states the case and the facts but raises no specific issues. (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 543-544 (*Ben C.*); *People v. Taylor* (2008) 160 Cal.App.4th 304.) We notified appellant of his right to submit written argument in his own behalf within 30 days. On September 19, 2011, we received a letter from appellant forwarded by his appellate counsel. In his letter, appellant claims he is receiving ineffective assistance of appellate counsel, that he was denied his right to a jury trial despite his requests for one, and that the witnesses against him had committed perjury.

There is no basis from which we can conclude that appellant is receiving ineffective assistance of counsel. Merely filing an opening brief pursuant to *Ben C.* does not constitute ineffective assistance of counsel. Further, there is no basis from which we can conclude that the witnesses against the appellant committed perjury. The trier of fact, here the trial court, was empowered to make such a determination, and to give the evidence presented its proper weight. On appeal, we cannot indulge in presumptions to defeat a judgment. (*People v. Blackburn* (2013) 215 Cal.App.4th 809, 832 (*Blackburn*)). Therefore, neither of these arguments have any merit on appeal.

Appellant also contends that he was deprived of his right to a jury trial. While under *Ben C.* we are not required to review the record, we are not prohibited from doing so. (*Ben C.*, *supra*, 40 Cal.4th at pp. 535-536.) Our review of the record reveals that the record is silent as to whether the trial court advised the appellant of his statutory right to a jury trial, or assured that appellant had so been advised by counsel. The record is also silent as to whether appellant, or counsel on his behalf, properly waived the right to a trial by jury. (Pen. Code sec. 2972, subd. (a).) Indeed in this instance, appellant's letter tends to suggest that he attempted to ask for a jury trial but was told to be quiet. We, therefore,

asked appellate counsel to further brief the question of whether the trial court erred in failing to advise appellant and secure a waiver, and if there were error whether such error was harmless under *People v. Watson* (1956) 46 Cal.2d 818. Both counsel for appellant and counsel for respondent have filed a supplemental brief, and we now address these issues.

Recently in *Blackburn, supra*, 215 Cal.App.4th 809, the majority found that the Santa Clara County Trial Court's practice of taking jury waivers off the record, in chambers, with only counsel present was "troubling." (*Id.* at p. 835.)<sup>1</sup> We further found that the purpose of the jury trial mandates are "frustrated and an MDO's right to a jury trial is undermined" (*Id.* at p. 386) when the trial court fails to make a record regarding compliance with a appellant's rights under Pen. Code sec. 2972, subdivision (a). In his letter, appellant contends that he did ask for a jury trial, but was told to be quiet. The record before us does not support such an assertion.<sup>2</sup> While we are not able to accept appellant's claim on appeal that his pleas for a jury trial were ignored, we can conclude, by implication, that he knew of his right to a jury trial. In *Blackburn*, the record was silent regarding compliance with both the advisement and waiver provision of Penal Code section 2972, subdivision (a). Here, the record on appeal is silent as to both as well, despite appellant's admission.

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<sup>1</sup> In the course of further briefing in this case, we received a request for judicial notice from the Attorney General. We granted that request on February 15, 2012, and took judicial notice of two settled statements prepared by the trial court in *People v. Collier* (May 9, 2013, H036720) [nonpub. opn.] and *People v. Thomas* (May 11, 2012, H036517) [nonpub. opn.] as well as a motion to settle the record filed in *People v. Tran* 216 Cal.App.4th 102.

<sup>2</sup> Where the evidence supporting appellant's claim that he opposed waiving his right to a jury trial lays outside the record on appeal, appellant has the alternative remedy of habeas corpus to challenge his commitment on the ground of ineffective assistance of counsel. (*Blackburn, supra*, 215 Cal.App.4th at p. 834, fn.12.)

In *Blackburn*, we found the failure to make a record, error, and held that “compliance with the statutory mandates matters even when there is overwhelming evidence to support a commitment order and the failure to comply with the statute can be deemed harmless error.” (*Blackburn, supra*, 215 Cal.App.4th at p. 836.) Similarly here, we find that the trial court’s failure to make a record regarding advisement and waiver of the statutory right to jury trial was error. From the record before us we are unable to determine if appellant, or counsel acting properly on appellant’s behalf, waived his right to a jury trial. (*Id.* at p. 831.)

However, as in *Blackburn*, this error is harmless because there was overwhelming evidence to support the commitment order. Two experts testified in support of the petition. Both testified that appellant’s mental illness was not in remission and that he was a danger to the community. Appellant presented no competing expert to challenge these conclusions. Given the uncontroverted testimony of the prosecution’s experts, we are unable to conclude that it is reasonably probable that a jury would have reached a different result than the trial judge. (*People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1276.)

The appellant having failed to raise any issue on appeal, we have no alternative but to dismiss the appeal as abandoned. (*Ben C., supra*, 40 Cal.4th at p. 529.)

**DISPOSITION**

The appeal is dismissed as abandoned.

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RUSHING, P.J.

I CONCUR:

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PREMO, J.

ELIA, J., Dissenting

I respectfully dissent in that I would affirm the judgment since this court addresses the substantive merits of appellant's cognizable arguments and finds no reversible error.

In requested supplemental briefing in this case, appellant has raised multiple issues related to jury trial, including the court's failure to advise him of his right to a jury trial and the lack of an express, personal waiver of a jury trial. As the majority indicates, no reversible error has been shown. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We must presume for purposes of this appeal that appellant's counsel informed appellant that he was entitled to be tried by a jury and counsel requested a court trial in accordance with appellant's informed consent. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [all presumptions are indulged to support a lower court judgment or order regarding matters as to which the record is silent; error must be affirmatively shown]; see also *Conservatorship of John L.* (2010) 48 Cal.4th 131, 148 ["When a statutory right in a civil commitment scheme is at issue, the proposed conservatee may waive the right through counsel if no statutory prohibition exists. [Citations.]", 151-152 [attorney is obligated to keep client fully informed of proceedings, to advise client of his rights, and to refrain from any act or representation that misleads the court].)

Even assuming arguendo that appellant had a constitutional right to a jury trial as a matter of due process, the same presumption regarding waiver applies on appeal. (See *Denham v. Superior Court, supra*, 2 Cal.3d at p. 564; *Conservatorship of John L., supra*, 48 Cal.4th at pp. 151-152.) To the extent appellant is arguing that he had concomitant due process rights, under either the United States or California Constitution, to a judicial advisement of his right to a jury trial and to personally waive a jury on the record, his arguments are unpersuasive since he was represented by counsel who presumably advised and consulted with him and there is no constitutional provision explicitly requiring an express, personal waiver of a jury in noncriminal proceedings. (See Cal.

Const., art. I, § 16; cf. Code Civ. Proc., § 631; *People v. Bradford* (1997) 14 Cal.4th 1005, 1052-1053 [in criminal prosecution, no express, personal waiver from a defendant is required for waiver of constitutional right to testify; a trial judge may safely assume that a nontestifying defendant is abiding by his counsel's trial strategy].)

It is unnecessary in this case to repeat statements of the majority in *People v. Blackburn* (2013) 215 Cal.App.4th 809. As the U.S. Supreme Court stated: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653 [16 S.Ct. 132]; see *Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

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ELIA, J.