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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALAN LARA,

Defendant and Appellant.

H028895

(Santa Clara County  
Super. Ct. No. C9803113)

David Lara appeals from an order extending his commitment under Penal Code section 1026 pursuant to Penal Code section 1026.5, subdivision (b).<sup>1</sup> Before trial, he unsuccessfully moved to dismiss the petition to extend the commitment on the ground that the untimely filing of the petition violated his statutory and due process rights. Following trial, a jury found that appellant, by reason of mental disease, defect or disorder, continued to represent a substantial danger of harm to others.

On appeal, he argues that the trial court denied him due process by proceeding on an untimely petition filed late without good cause, erroneously admitted prejudicial hearsay at trial, and gave an unconstitutional jury instruction. We agree that the petition should have been dismissed.

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

### *A. Procedural History*

After pleading guilty and not guilty by reason of insanity (NGI) to the charge of false imprisonment effected by violence, menace, fraud, and deceit (§§ 236, 237) and admitting a prior conviction, appellant submitted the NGI plea on a doctor's report. The trial court found David Lara not guilty by reason of insanity of the charge and found a prior conviction allegation to be true (§§ 667, subds. (b)-(i); 1170.12). The court ordered appellant committed to a state hospital.

On September 21, 2004, a petition to extend appellant's NGI commitment was filed. It alleged that appellant's current commitment pursuant to a plea of not guilty by reason of insanity was due to expire on October 15, 2004. It further stated that appellant "by reason of mental disease, defect or disorder, continues to represent a substantial danger of physical harm to others, and continues to be a person described in paragraph (1) of section 1026.5(b) of the Penal Code."

On September 29, 2004, appellant's counsel orally moved to dismiss the petition on the ground that the filing of the petition was untimely in that it did not comply with the statutory deadlines. Counsel asked the court "to either dismiss the petition, or if the Court is hesitant to do that at this point, to set a trial before October 15th." Judge Kevin Murphy took the motion to dismiss under submission and scheduled a "further discussion and possible ruling on the motion" before Judge Fernandez on October 1, 2004 and set the matter for trial on October 8, 2004.

On October 1, 2004, appellant's counsel, appearing before Judge Fernandez, indicated she had made an oral motion to dismiss and informed the court that she did not believe she would have adequate time to prepare for trial prior to expiration of appellant's commitment. Counsel nevertheless asked that the October 8, 2004 trial date remain as set and indicated that she would "make efforts to prepare for trial on that date . . . ." Judge Fernandez left the motion to dismiss to be decided by Judge Murphy since it had already been taken under submission and left the trial date as set.

On October 7, 2004, appellant's counsel filed a written motion to dismiss for violation of statutory time limits. In the motion, she argued that violation of the statutory time limits violated due process and required dismissal. She stated that she would not be prepared to try the case because there was insufficient time "to acquire and evaluate Mr. Lara's medical records and consult an appropriate expert."

At the October 12, 2004 hearing on the motion to dismiss, appellant's counsel told the court that she had received the petition and had been appointed on September 29, 2004. But she had been unable to contact appellant until October 1, 2004, he was not transported to jail until October 6, 2004, and she had only met with him on October 7, 2004. She also informed the court: "I have requested S.D.T. for his hospital records to prepare for a trial in this case. The S.D.T. is set October 15th. After reviewing those documents, then I must make a determination as to whether I need to hire independent evaluation by a psychiatrist in preparation for trial. [¶] I cannot be ready to proceed in this case by October 15th, which is the date . . . Mr. Lara's commitment expires." She indicated the 15th was the soonest the "documents could be ready for release." She maintained that the People had not presented good cause for the late filing of the petition.

When asked about the reason for the delay, the deputy district attorney representing the People conceded that there was not "good cause" and indicated that Napa State Hospital's request for a petition extending the commitment had mistakenly ended up in a "huge pile" of "quarterly reports from the 1026 cases and from the 2970 cases" and he had belatedly discovered the petition when he was going through the pile.

The court denied the motion to dismiss and set a trial date of October 25, 2004. In setting the matter for trial, the court recognized that appellant was not waiving any rights regarding the motion to dismiss.

We take judicial notice that appellant filed a petition for writ of habeas corpus (H028038) and a petition for writ of mandate and/or prohibition (H028039) in this court, which we denied on December 6, 2004. (Evid. Code, §§ 452, subd. (d), 459.)

The jury was selected and trial commenced in May 2005, almost seven months after appellant's commitment expired.

*B. Applicable Law*

Section 1026.5, subdivision (a)(1), states: "In the case of any person committed to a state hospital or other treatment facility pursuant to Section 1026 . . . , who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in this section. For the purposes of this section, 'maximum term of commitment' shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5, and disregarding any credits which could have been earned pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3."

Section 1026.5, subdivision (a)(2), provides in pertinent part: "In the case of a person confined in a state hospital or other treatment facility pursuant to Section 1026 . . . , the Board of Prison Terms shall determine the maximum term of commitment which could have been imposed under paragraph (1), and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in subdivision (b). *The time limits of this section are not jurisdictional.*" (Italics added.)

Subdivision (b) of section 1026.5 provides in part: "(1) A person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others. [¶] (2) Not later than 180 days prior to the termination of the maximum term of commitment prescribed in subdivision (a), the

medical director of a state hospital in which the person is being treated, or the medical director of the person's treatment facility or the local program director, if the person is being treated outside a state hospital setting, shall submit to the prosecuting attorney his or her opinion as to whether or not the patient is a person described in paragraph (1). If requested by the prosecuting attorney, the opinion shall be accompanied by supporting evaluations and relevant hospital records. The prosecuting attorney may then file a petition for extended commitment in the superior court which issued the original commitment. *The petition shall be filed no later than 90 days before the expiration of the original commitment unless good cause is shown.* The petition shall state the reasons for the extended commitment, with accompanying affidavits specifying the factual basis for believing that the person meets each of the requirements set forth in paragraph (1)." (Italics added.)

Section 1026.5, subdivision (b)(4), requires: "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. *The trial shall commence no later than 30 calendar days prior to the time the person would otherwise have been released,* unless that time is waived by the person or unless good cause is shown." (Italics added.)

Section 1026.5, subdivision (b)(10), states: "Prior to termination of a commitment under this subdivision, a petition for recommitment may be filed to determine whether the patient remains a person described in paragraph (1). The recommitment proceeding shall be conducted in accordance with the provisions of this subdivision."

### *C. Failure to Comply With Statutory Time Limits*

There is no dispute in this case that the statutory filing deadlines were not met and good cause did not support the delayed filing. Appellant asserts the filing provisions are compulsory under due process absent a showing of good cause. To support his due process claim, he invokes rules of statutory construction and urges a mandatory

construction of the time provisions. He is not alone in confusing the issue of due process with issues of statutory construction and jurisdiction.

"A court acts in excess of its jurisdiction when 'it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' [Citation.]"<sup>2</sup> (*People v. Tindall* (2000) 24 Cal.4th 767, 776.) Time deadlines may be deemed mandatory and jurisdictional in nature or directory. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1148 [concluding, after analysis, time limits of Government Code section 18671.1 were directory, not mandatory and jurisdictional].)

"The word 'mandatory' may be used in a statute to refer to a duty that a governmental entity is required to perform as opposed to a power that it may, but need not exercise. As a general rule, however, a "directory" or "mandatory" designation does not refer to whether a particular statutory requirement is "permissive" or "obligatory," but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates.' (*Morris v. County of Marin, supra*, 18 Cal.3d 901, 908, . . . .)" (*California Correctional Peace Officers Assn. v. State Personnel Bd., supra*, 10 Cal.4th at p. 1145.) "A statutory requirement may impose on the state a duty to act in a particular way, and yet failure to do so may not void the governmental action taken in violation of the duty. [Citations.]" (*In re Richard S.* (1991) 54 Cal.3d 857, 865.) "If the action is invalidated, the requirement will be termed 'mandatory.' If not, it is 'directory' only." (*California Correctional Peace Officers Assn. v. State Personnel Bd., supra*, 10 Cal.4th at p. 1145.)

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<sup>2</sup> Fundamental subject matter jurisdiction cannot be conferred by waiver, estoppel, or consent. (*People v. Tindall* (2000) 24 Cal.4th 767, 776, fn. 6.) "In contrast, a court's act in excess of its jurisdiction is valid until set aside, and a party may be precluded from setting it aside, due to waiver, estoppel or the passage of time. [Citation.]" (*Ibid.*)

"In order to determine whether a particular statutory provision as to time is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.]" (*Pulcifer v. Alameda County* (1946) 29 Cal.2d 258, 262.) "Time limits are usually deemed to be directory unless the Legislature clearly expresses a contrary intent. (*Edwards v. Steele* [1979] 25 Cal.3d 406, 410.)" (*California Correctional Peace Officers Assn. v. State Personnel Bd.*, *supra*, 10 Cal.4th at p. 1145.) Here, legislative intent is clear because the Legislature added statutory language explicitly stating that the time limits in section 1026.5 are *not* jurisdictional. (§ 1026.5, subd. (a)(2).)

"[C]onstitutional considerations necessarily inform our interpretation of the statutory language." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509.) Where necessary to preserve the constitutionality of a statute, courts apply the following well-established rule of statutory construction: "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.]" (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal.2d 818, 828.)

In this case, however, appellant does not contend that the statutory time limits in section 1026.5 were jurisdictional and failure to comply with them divested the trial court of authority to extend his NGI commitment and rendered the recommitment order voidable. Neither does he contend that section 1026.5 is unconstitutional. Therefore, we have no occasion to engage in statutory interpretation.

A failure to comply with a statutory deadline is not ipso facto a constitutional due process violation. (Cf. *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 92, fn. 8 [98 S.Ct. 948] [university officials' failure to follow university rules in the dismissal of student from public medical school does not itself amount to a constitutional violation of due process].) The question before us is whether the minimum demands of procedural due process were satisfied in this case.

*D. Delayed Filing of Petition and Due Process*

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. [Citations]" (*Addington v. Texas* (1979) 441 U.S. 418, 425 [99 S.Ct. 1804].) "[F]or the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty,' *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972), and in consequence 'requires due process protection.' *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, 45 L.Ed.2d 396 (1975) (BURGER, C. J., concurring)." (*Vitek v. Jones* (1980) 445 U.S. 480, 491-492 [100 S.Ct. 1254]; see *Zinerman v. Burch* (1990) 494 U.S. 113, 131 [110 S.Ct. 975] ["there is a substantial liberty interest in avoiding confinement in a mental hospital"].)

"For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." ' *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (other citations omitted))." (*Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 533 [124 S.Ct. 2633].)



The opportunity to be heard is ordinarily required *before* deprivation of a protected interest. (See *Zinerman v. Burch*, *supra*, 494 U.S. at p. 127 [the U.S. Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property"]; *Hughes v. Rowe* (1980) 449 U.S. 5, 9, 11 [101 S.Ct. 173] (per curiam) ["Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions"]; *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 570, fn. 7 [92 S.Ct. 2701] ["Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event' "]; see also *U.S. v. James Daniel Good Real Property* (1993) 510 U.S. 43, 62 [114 S.Ct. 492] "Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture"; *Barry v. Barchi* (1979) 443 U.S. 55, 74 [99 S.Ct. 2642] conc. opn. of Brennan, J. ["To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a [license] suspension can still be avoided- i.e., either before or immediately after suspension"]; *Fuentes v. Shevin* (1972) 407 U.S. 67, 81-82 [92 S.Ct. 1983] ["If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented" and "the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect"]; *Boddie v. Connecticut* (1971) 401 U.S. 371, 379, fns. omitted [91 S.Ct. 780] [a "root requirement" of due process is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"].) Thus, the meaningful time for a hearing to extend an NGI commitment

normally will be before the current commitment expires and the person is deprived of personal liberty without "constitutionally adequate procedures to establish the grounds for his confinement" (*Foucha v. Louisiana* (1992) 504 U.S. 71, 79 [112 S.Ct. 1780]).

Notice for the hearing must provide adequate time to prepare a defense. (See *Application of Gault* (1967) 387 U.S. 1, 33 [87 S.Ct. 1428] ["Notice [in juvenile delinquency hearing], to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded"].) There is no constitutional obligation to necessarily provide 60 days to prepare for trial as contemplated by section 1026.5. "[T]he requirements of due process are 'flexible and cal[.] for such procedural protections as the particular situation demands,' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) . . . ." (*Wilkinson v. Austin* (2005) 545 U.S. 209, 224 [125 S.Ct. 2384].) "The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances. [Citations.]" (*Landon v. Plasencia* (1982) 459 U.S. 21, 34 [103 S.Ct. 321].)

Where a petition to extend an NGI commitment is *not* filed sufficiently in advance to allow adequate time to prepare a defense for a predeprivation hearing, two courts have concluded that due process requires dismissal of the petition. (See *People v. Dougherty* (1983) 143 Cal.App.3d 245, 248-249 [petition filed approximately three and a half weeks before expiration of maximum term of commitment]; *People v. Hill* (1982) 134 Cal.App.3d 1055, 1059-1060 [petition filed 10 days and only six court days before expiration of original commitment].) Regardless, the People argue that the filing of the petition in this case 24 days before expiration of the maximum term of commitment does not demonstrate actual prejudice in that appellant did not show that he was deprived of an adequate opportunity to prepare for trial. They also assert that a "short- term confinement" after expiration of a commitment pending trial does not violate due process. The People urge this court to follow *People v. Mitchell* (2005) 127 Cal.App.4th 936.

In *Mitchell*, a petition to extend commitment pursuant to section 1026.5 was filed less than 30 days prior to the expiration date of the maximum term of commitment, the trial took place after the commitment expired, and good cause for the delay was not shown. (*Id.* at p. 940.) The reviewing court, nevertheless, concluded no due process violation had occurred because "appellant had *over six months* to prepare for trial from the time respondent filed its petition to the actual date court trial commenced" and he did not "assert that he was denied a fair hearing or given insufficient opportunity to prepare for the trial" (*id.* at p. 945) and "appellant suffered no actual prejudice from the delay" (*id.* at p. 946). The appellate court discerned no due process violation because "the trial court granted ample time to the defense to prepare its case for trial." (*Id.* at p. 946.)

Due process analysis focuses on the adequacy of the notice and the opportunity to be heard at a meaningful time and in a meaningful manner, not on compliance with statutory time requirements. *Mitchell* concentrated on the fairness of the hearing but overlooked other protections of procedural due process. We do not believe that a person whose personal liberty is placed at risk by a recommitment petition is required to forgo a predeprivation hearing to which he is entitled and suffer further deprivation of liberty without constitutionally adequate procedures in order to retain other safeguards of procedural due process, namely adequate time to prepare and a fair hearing.

In this case, on October 12, 2004, appellant's appointed counsel informed the court of the steps she had taken to prepare for trial and outlined her inability to be ready for trial by October 15, 2004, the date appellant's commitment expired. The deputy district attorney mainly argued that the time deadlines were not jurisdictional. No suggestion was made by the court or the prosecuting attorney that appellant's counsel could be ready to try the case on or before October 15, 2004 and, in fact, the court initially set trial for October 25, 2004. Trial did not actually go forward until more than six months after expiration of appellant's commitment.

There are no unusual circumstances in this case to suggest a legitimate justification for forcing appellant to suffer a deprivation of his liberty interest following the expiration of his NGI commitment without a determination that he met the standard for further involuntary commitment. Arguably, due process might not be offended where an unexpected exigency outside the government's control delayed a hearing on the petition for extended commitment hearing beyond expiration of an involuntary commitment and the hearing proceeded as promptly as possible. One appellate court, reversing an order extending an NGI commitment due to the extremely late filing of the petition, stated: "Of course, in reaching our conclusion here, we were not called upon to consider what type of 'good cause,' if any, might permit a hearing to be conducted even beyond the termination of a committee-patient's initial period of confinement upon a petition filed prior thereto, albeit *somewhat* belatedly, as for example by reason of an unexpected and most marked change in his condition less than 90 days before his scheduled release date." (*People v. Hill, supra*, 134 Cal.App.3d at p. 1060.) While we have recognized that due process is "a flexible concept that varies with the particular situation" (*Zinermon v. Burch, supra*, 494 U.S. at p. 127) and courts weigh a number of factors to determine what procedural protections are constitutionally required in a particular instance (*ibid.*), nothing in this case justifies a postdeprivation hearing. (Cf. *Foucha v. Louisiana, supra*, 504 U.S. at p. 72 [continued commitment of insanity acquittee, entitled to release, "in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness"].)

Appellant's counsel made an unchallenged claim that the late filing left inadequate time to prepare for a predeprivation hearing. The onus was then on the People to show that the government had extraordinary reasons for the delay that warranted deprivation of appellant's liberty following expiration of the current commitment pending a post-

deprivation hearing. In the absence of any such showing, appellant was entitled to dismissal of the petition.<sup>3</sup>

The order extending appellant's commitment is reversed. The court is directed, upon remand, to enter an order granting the motion to dismiss.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.

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<sup>3</sup> In light of our conclusions, we do not reach appellant's remaining contentions. Our decision does not address whether writ relief may be available to challenge the legality of an involuntary civil confinement continuing after expiration of a commitment. It does not deal with the availability of civil damages for any period of involuntary confinement in violation of due process. (See *Zinermon v. Burch*, *supra*, 494 U.S. at p. 134, fn. 19.) It also does not consider the effect of a dismissal on subsequent petitions to extend commitment under section 1026.5.