

Electronically Filed
Supreme Court
SCWC-11-0000338
30-OCT-2013
08:07 AM

IN THE SUPREME COURT OF THE STATE OF HAWAII

---oOo---

STATE OF HAWAII, Respondent/Plaintiff-Appellee,

vs.

LUIS GOMEZ-LOBATO, Petitioner/Defendant-Appellant

SCWC-11-0000338

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000338; FC-CR NO. 10-1-279K)

OCTOBER 30, 2013

RECKTENWALD, C.J., NAKAYAMA, McKENNA, AND POLLACK, JJ.,
WITH ACOBA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY RECKTENWALD, C.J.

Luis Gomez-Lobato was charged with one count of Abuse of Family or Household Member in relation to an incident involving his former girlfriend. At a pre-trial hearing, Gomez-Lobato was represented by counsel and had the assistance of a Spanish-language interpreter. After a brief exchange, the Family

Court of the Third Circuit Court recessed, and Gomez-Lobato and his interpreter reviewed the standardized jury trial waiver form. Gomez-Lobato provided his initials and signature on the form. The family court then reconvened and asked Gomez-Lobato several questions through the interpreter, including: (1) whether his initials and signature were on the form; (2) whether he understood what he was signing; (3) whether the form was explained to him in Spanish; and (4) whether he discussed the form with his attorney. Gomez-Lobato answered these questions affirmatively. The family court also asked Gomez-Lobato if he had any questions, to which Gomez-Lobato responded, "No." The family court concluded that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial.

Following a bench trial, Gomez-Lobato was convicted of one count of Abuse of Family or Household Member. Gomez-Lobato appealed to the Intermediate Court of Appeals and argued that he did not validly waive his right to a jury trial. The ICA, however, affirmed his conviction and determined, inter alia, that under the totality of the circumstances, Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a trial by jury. State v. Gomez-Lobato, No. CAAP-11-0000338, 2012 WL 5272234, at **1-2 (Haw. App. Oct. 25, 2012).

In his application for writ of certiorari, Gomez-Lobato raises the following questions: (1) whether he validly waived his right to a jury trial; and (2) whether the family court erred in

sentencing Gomez-Lobato. Based on the record before us, we conclude that the family court erred in determining that Gomez-Lobato's jury waiver was made voluntarily, knowingly, and intelligently. We therefore vacate the ICA's and the family court's judgments and remand the case for a new trial. Given this disposition, we do not address Gomez-Lobato's argument regarding sentencing.

I. Background

The following factual background is taken from the record on appeal.

A. Family Court Proceedings

Gomez-Lobato was charged by complaint with "intentionally, knowingly or recklessly physically abus[ing Complainant], a family or household member, thereby committing the offense of Abuse of Family or Household Member," in violation of Hawai'i Revised Statutes (HRS) § 709-906(1).¹

¹ HRS § 709-906(1) (Supp. 2010) provides:

It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

At his Entry of Plea hearing, Gomez-Lobato, represented by a deputy public defender (DPD) and assisted by a Spanish interpreter, entered a not guilty plea.² The DPD then stated that the interpreter needed to go over a waiver of jury trial form with Gomez-Lobato. The court then recessed. After reconvening, the following conversation occurred, with the assistance of the interpreter:

[DPD]: [Gomez-Lobato] has reviewed the waiver of jury trial form.

. . . .

THE COURT: Good morning, Mr. Gomez Lobato. I have with me a waiver of jury trial form. Are these your initials, and is this your signature on this form?

[Gomez-Lobato]: Yes.

THE COURT: Prior to placing your initials and signature on this form, did you understand what you were doing and signing?

[Gomez-Lobato]: Yes.

THE COURT: And was that explained to you in Spanish?

[Gomez-Lobato]: Yes.

THE COURT: Did you discuss this with your attorney?

[Gomez-Lobato]: Yes.

THE COURT: Okay. Do you have any questions for me?

[Gomez-Lobato]: No.

THE COURT: Okay. The Court concludes that the defendant knowingly, voluntarily, intelligently waived his rights to a jury trial.

In the Waiver of Jury Trial form, Gomez-Lobato provided his initials next to the following statements, which were written in English:

2. I understand that I have the constitutional right to a jury trial. Furthermore, I understand that a jury trial is a trial in the Circuit Court before a judge and a jury and that I can participate in the process of selecting a jury of twelve (12) citizens

² The Honorable Aley K. Auna, Jr., presided over the entry of plea hearing.

from the Third Circuit. This jury would hear the evidence in my case, and then decide if I am guilty or not guilty. Finally I understand that in order for me to be convicted by a jury, their vote must be unanimous.

3. I know that if I give up my right to a jury trial, the trial will be held in this Court before a judge who alone would decide if I am guilty or not guilty. I request that my case be tried by a judge.

. . . .
4b. I am satisfied with my attorney, and am entering this waiver with his [or] her advice.

5. I know that the punishment cannot be increased merely because I want a jury trial.

6. I am entering this waiver of my own free will after careful consideration. No promises or threats have been made to me to induce me to waive my right to a jury trial.

The State subsequently filed an Amended Complaint, which changed the date of the incident from "[o]n or about the 23rd day of September, 2010," to "[o]n or about the 24th through the 25th day of September, 2010[.]" No further waiver of jury trial form was executed in relation to the Amended Complaint.

The family court held a one-day bench trial,³ at the conclusion of which the family court determined that the State proved beyond a reasonable doubt that the defendant committed the offense of Abuse of Family or Household Member. Accordingly, the family court entered its Judgment, Guilty Conviction and Sentence finding Gomez-Lobato guilty, and sentencing him to two years probation. Gomez-Lobato timely filed a notice of appeal.

B. ICA Appeal

In his opening brief, Gomez-Lobato argued, *inter alia*, that the family court plainly erred in proceeding with a bench trial when Gomez-Lobato did not validly waive his right to a jury

³ The Honorable Joseph P. Florendo, Jr., presided.

trial. Gomez-Lobato, citing United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997), specifically argued that "[a]lthough a Spanish interpreter was present to assist [him], the [family] court never directly addressed [him] to verify his understanding of the jury waiver." (Emphasis in original).

Gomez-Lobato contended that the "court just asked yes/no questions despite [his] language barrier" and "never ascertained if [he] truly understood the waiver of the right to trial by jury."

In its answering brief, the State argued that Gomez-Lobato did not argue below that the waiver of his right to a jury trial was invalid and, accordingly, this issue could only be reviewed for plain error. Nevertheless, the State argued that under the totality of the circumstances, Gomez-Lobato validly waived his right to a jury trial orally and in writing.

Gomez-Lobato filed a reply brief, in which he reasserted his argument that he did not provide a valid waiver of his right to a jury trial given the "language barrier," and argued that he did not provide a "knowing, intelligent and voluntary waiver" of his right to a jury trial on the charge set forth in the amended complaint because "the State did not even properly present the date of the alleged offense to [him] at the time of the alleged waiver[.]"

In a summary disposition order, the ICA determined that, under the totality of the circumstances, the family court

did not err in concluding that Gomez-Lobato's waiver of a jury trial was knowing, intelligent, and voluntary. Gomez-Lobato, 2012 WL 5272234, at *1. The ICA also rejected Gomez-Lobato's other arguments on appeal. Id. at *2. Accordingly, the ICA affirmed the family court's March 15, 2011 Judgment, Guilty Conviction and Sentence. Gomez-Lobato timely filed an application for writ of certiorari. The State did not file a response.

II. Standard of Review

The validity of a criminal defendant's waiver of his or her right to a jury trial presents a question of state and federal constitutional law. . . . We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard.

State v. Friedman, 93 Hawai'i 63, 67, 996 P.2d 268, 272 (2000) (citations and quotation marks omitted).

III. Discussion

A. **The record does not reflect that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial**

In his application, Gomez-Lobato argues that the family court failed to adequately ensure that he understood that he was waiving his right to a jury trial. Gomez-Lobato specifically contends: "When the court addressed [him] there was a language barrier where the court solicited one word responses (yes/no) to questions, rather than delving into whether [he] clearly understood exactly what constitutional right [he] was giving up." As discussed below, based on the record before us, we cannot

conclude that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial.⁴

A criminal defendant is statutorily entitled to a trial by jury when the potential penalty for the charged crime is imprisonment for six months or more.⁵ HRS § 806-60. A defendant is also entitled to waive his or her right to a jury trial. See State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993) (citing HRPP Rule 5(b)(3)). Generally, "[t]he waiver shall be either by written consent filed in court or by oral consent in open court entered on the record." HRPP Rule 23(a). Although the rule indicates the waiver may be given by written or oral consent, the rule does not relieve the court of its obligation to ensure, through an appropriate oral colloquy in court, that the waiver was knowingly, intelligently, and voluntarily given. Cf.

⁴ The issue of whether Gomez-Lobato validly waived his right to a jury trial was not raised before the trial court. However, Gomez-Lobato asks this court to recognize such error as a "[p]lain error[] or defect[] affecting substantial rights[.]" See Hawaii Rules of Penal Procedure (HRPP) Rule 52(b). Under the circumstances of this case, we conclude that the district court's failure to obtain a valid waiver of Gomez-Lobato's fundamental right to a jury trial constituted plain error.

⁵ In certain cases, this court has recognized the right to a jury trial under the Hawaii Constitution for particular offenses even though the maximum authorized terms of imprisonment do not exceed six months. See, e.g., State v. Nakata, 76 Hawaii 360, 374, 878 P.2d 699, 713 (1994). In this regard, if the maximum term of imprisonment for a particular offense does not exceed thirty days, it is presumptively a petty offense to which the right to a jury trial does not attach. State v. Lindsey, 77 Hawaii 162, 165, 883 P.2d 83, 86 (1994). This presumption can only be overcome in extraordinary cases, when consideration of the treatment of the offense at common law, the gravity of the offense, and the authorized penalty for the offense, "unequivocally demonstrates that society demands that persons charged with the offense at issue be afforded the right to a jury trial." Id. If the maximum authorized term of imprisonment for an offense is more than thirty days but not more than 180 days, no presumption applies, and the three factors set forth above must be considered to determine whether the right to a jury trial attaches. Id. at 86 n.5, 883 P.2d at 165 n.5.

Tachibana v. State, 79 Hawai'i 226, 236, 900 P.2d 1293 (1995) (requiring on-the-record waiver of defendant's right to testify). In other words, while the defendant may execute a written waiver form, the court should also engage in an oral colloquy with the defendant to establish that the waiver was knowing, intelligent, and voluntary. See Ibuos, 75 Haw. at 121, 857 P.2d at 578 ("The necessity for colloquy between the court and a defendant is especially apparent in light of the importance we place on the personal nature of a defendant's right to a jury trial."); Friedman, 93 Hawai'i at 68, 996 P.2d at 273. Lastly, "[w]here it appears from the record that a defendant has voluntarily waived a constitutional right to a jury trial, the defendant carries the burden of demonstrating by a preponderance of the evidence that his/her waiver was involuntary." Friedman, 93 Hawai'i at 69, 996 P.2d at 274 (citing Ibuos, 75 Haw. at 121, 857 P.2d at 578).

In Friedman, this court provided further guidance on determining the validity of a waiver of the constitutional right to a jury trial. The defendant, Bernd Friedman, was charged with abuse of a family or household member. Id. at 65-66, 996 P.2d at 270-71. At his arraignment, the trial court engaged Friedman in the following colloquy:

THE COURT: You're going to enter a plea of not guilty to the complaint in this case, you're also going to give up your right to a jury trial; is that correct?
[Friedman]: Yes.
THE COURT: And, you understand what a jury trial's about?
[Friedman]: Yes.
THE COURT: And can you explain in your own words what you understand that to mean?

[Friedman]: A jury trial is where the outcome of the-the results of whether it's guilty or not is to be determined by 12 adults instead of a judge.
The COURT: So by waiving that right means that your case will be decided by a judge, the judge alone is to decide your guilt or innocence.
[Friedman]: Yes, Your Honor.
THE COURT: Is your decision to waive your right to jury trial something you thought about and decided to do yourself voluntarily[?]
[Friedman]: Yes.

Id. at 66, 996 P.2d at 271.

On appeal, Friedman, citing the Ninth Circuit's opinion in Duarte-Higareda,⁶ argued that the trial court erred in failing to obtain a valid waiver of his right to a jury trial because he was not orally informed that a jury is comprised of twelve members, that he could take part in jury selection, or that a jury verdict must be unanimous. Id. at 69, 996 P.2d at 274.

This court expressly rejected Friedman's argument:

Friedman appears to urge this court to adopt a "bright line rule" that a jury waiver can never be voluntary and knowing if a trial court fails to advise a defendant of any of the four aspects of a jury trial, as expressed in the colloquy suggested in Duarte-Higareda. . . . [H]owever, Duarte-Higareda does not stand for the proposition that its suggested colloquy is required in every case. Although we are mindful of a criminal defendant's fundamental right to a jury trial and advise the trial court to engage in such a colloquy to aid in ensuring voluntary waivers, we decline to adopt Friedman's contention that the Duarte-Higareda colloquy is constitutionally required in every case.

Rather than adhering to a rigid pattern of factual determinations, we have long observed that the validity of a waiver concerning a fundamental right is reviewed under the totality of the facts and circumstances of the particular case.

⁶ In Duarte-Higareda, the Ninth Circuit determined, inter alia, that the trial court was required to inform the defendant that: "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." 113 F.3d at 1002.

Id. (citations omitted) (emphasis added).

Moreover, this court stated that the validity of the waiver of a right to a jury trial is reviewed "under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct." Id. at 70, 996 P.2d at 275 (citation omitted) (emphasis added). Citing, inter alia, to the trial court's colloquy and Friedman's statement regarding his understanding of the right to a jury trial, this court determined that Friedman's waiver was knowing and voluntary. Id. at 70, 996 P.2d at 275.

Like Friedman, Gomez-Lobato, citing the Ninth Circuit's decision in Duarte-Higareda, 113 F.3d at 1002, argues that he did not validly waive his right to a jury trial because the family court in this case did not "directly inform[]" him that: "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." Although this court has advised the trial courts to conduct Duarte-Higareda's suggested colloquy, we have rejected the argument that such a colloquy is required in every case. See Friedman, 93 Hawai'i at 69, 996 P.2d at 274; see also State v. Myers, 108 Hawai'i 300, 307, 119 P.3d 608, 615 (App. 2005) ("[I]t is well-settled under Hawai'i law that the Duarte-Higareda four-part colloquy is not mandatory for a waiver of the right to a jury trial to be valid. Rather, a

determination of whether a defendant intelligently, knowingly, and voluntarily waived his or her right to a jury trial must be based on the totality of the circumstances.") (citations omitted); State v. Mitchell, 94 Hawai'i 388, 395, 15 P.3d 314, 321 (App. 2000).

Moreover, Gomez-Lobato signed a waiver form that listed all four factors. Therefore, the issue before this court is whether the signed waiver form, together with the questions asked of Gomez-Lobato in the oral colloquy, were enough to show that the defendant knowingly, voluntarily, and intelligently waived his right to a jury trial. Duarte-Higareda provides guidance on this question. There, the defendant, Sergio Duarte-Higareda, was indicted for conspiracy to possess methamphetamine and possession of methamphetamine with intent to distribute. 113 F.3d at 1001. Duarte-Higareda, who was not fluent in English, signed a jury trial waiver form that was printed entirely in English. Id. at 1002. The record was silent as to whether the waiver form had been translated for Duarte-Higareda. Id. At his arraignment, Duarte-Higareda's counsel informed the federal district court that Duarte-Higareda wanted to waive his right to a jury trial. Id. Although an interpreter was present to assist Duarte-Higareda throughout the court proceedings, the district court never directly addressed Duarte-Higareda to verify his understanding of the waiver he had signed. Id. The district

court held a bench trial and Duarte-Higareda was subsequently convicted of the charged offenses. Id.

On appeal, the Ninth Circuit determined that the "language barrier" between Duarte-Higareda and the court was a "'salient fact' that gave notice to the district court that Duarte's waiver 'might be less than knowing and intelligent[.]'" Id. at 1003 (citation omitted). To ensure that the waiver was voluntary, the Ninth Circuit stated:

[W]e have previously set forth guidelines for a district court to follow in determining whether a defendant's jury waiver is voluntary, knowing, and intelligent. The district court should inform the defendant that (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial. Furthermore, the district court should question the defendant to ascertain whether the defendant understands the benefits and burdens of a jury trial and freely chooses to waive a jury.

Id. at 1002 (emphasis added) (citations omitted).

The Ninth Circuit, however, declined to impose an "absolute requirement of such a colloquy in every case." Id. at 1003. Nevertheless, the Ninth Circuit vacated Duarte-Higareda's conviction on the ground that he possessed the "special disadvantage or disability" of not speaking English, which affected his ability to understand the waiver of his right to a jury trial. Id. at 1003.

The instant case is distinguishable from Duarte-Higareda in several respects, most notably because the record here indicates that the waiver form was translated for Gomez-

Lobato and the court communicated directly with Gomez-Lobato through the interpreter. Nevertheless, the language barrier between Gomez-Lobato and the family court was a “salient fact” that . . . gave notice to the [family] court that [Gomez-Lobato’s] waiver ‘might be less than knowing and intelligent.’” See id. Accordingly, this “salient fact” should have prompted the family court to ask additional questions to verify that Gomez-Lobato understood the right he was waiving.

Although the family court conducted a colloquy with Gomez-Lobato regarding the waiver form, the family court’s questions were not sufficient to establish that Gomez-Lobato knowingly, voluntarily, and intelligently waived his right to a jury trial. Specifically, the family court asked Gomez-Lobato whether the form contained his initials and signature, whether he understood “what he was doing and signing,” whether the form was explained to him in Spanish, and whether he discussed “this with [his] attorney[.]”⁷ Respectfully, in light of Gomez-Lobato’s language barrier, his affirmative answers to each of these questions did not establish that he understood he was waiving his right to a jury trial.⁸

⁷ It is not clear what the district court was referring to when it asked Gomez-Lobato whether he discussed “this” with his attorney. The district court could have used “this” to refer to the waiver form, the general concept of a waiver of a right to a jury trial, or the fact that he placed his initials and signature on the form.

⁸ In circumstances where a defendant needs the assistance of an interpreter, defense counsel is obligated to explain any waiver of the defendant’s constitutional rights through an interpreter; such explanations must not be given by the interpreter independent of counsel. See Hawaii (continued...)

This is particularly true where, as here, the record contains little information with respect to the defendant's background, experience and conduct. Friedman, 93 Hawai'i at 70, 996 P.2d at 275 ("[W]e review the validity of a defendant's waiver of his/her right to a jury trial under the totality of the circumstances surrounding the case, taking into account the defendant's background, experience, and conduct."). Indeed, there is nothing in the record to indicate Gomez-Lobato's educational or employment background, or experience with the criminal justice system, that could establish that he understood his right to a jury trial.

This does not mean that the court is required to conduct the full Duarte-Higareda, four-factor colloquy in every case.⁹ See id. at 69, 996 P.2d at 274; Duarte-Higareda, 113 F.3d at 1002; HRPP Rule 23(a). Again, whether a colloquy is sufficient to establish that a defendant validly waived his or

⁸(...continued)

Rules for Certification of Spoken and Sign Language Interpreters, Appendix B, Part III, Rule 9 (1995) ("A court interpreter shall not give legal advice to parties and witnesses."). In this case, it is not clear from the record whether defense counsel explained the waiver form and the defendant's constitutional rights through the interpreter or whether the interpreter independently explained the defendant's rights.

⁹ Accordingly, we respectfully do not adopt the concurring opinion's suggestion that this court should mandate an oral on-the-record Duarte-Higareda four-part colloquy in every case where a defendant waives his or her right to a jury trial. See Concurring opinion at 20-33. Nevertheless, as this court has previously stated, "we are mindful of a criminal defendant's fundamental right to a jury trial and advise the trial court to engage in such a colloquy to aid in ensuring voluntary waivers[.]" Friedman, 93 Hawai'i at 69, 996 P.2d at 274 (emphasis added); see State v. Han, 130 Hawai'i 83, 91, 306 P.3d 128, 135 (2013) (defining "colloquy" as "[any] formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights" (citation omitted) (emphasis added)).

her right to a jury trial is reviewed "under the totality of the circumstances surrounding the case[.]" Friedman, 93 Hawai'i at 70, 996 P.2d at 275. Trial courts are best situated to determine what questions need to be asked of individual defendants.¹⁰

However, where a language barrier indicates that a defendant's written waiver executed outside the presence of the judge "might be less than knowing and intelligent," see Duarte-Higareda, 113 F.3d at 1003, the court should take additional steps to ensure the defendant understands the right that he or she is waiving.

For example, in the instant case, the court did not expressly confirm with Gomez-Lobato that he understood that he had a right to trial by jury and that he was waiving that right. The court could have asked those questions, or, as Gomez-Lobato suggests, the court could have asked Gomez-Lobato what the document he signed meant to him, which would have required more than a yes or no answer and would have allowed the court to assess whether Gomez-Lobato truly understood the right he was waiving. Cf. Friedman, 93 Hawai'i at 70, 996 P.2d at 275.

Because the questions asked by the family court were insufficient to establish that Gomez-Lobato in fact understood he was waiving his right to a jury trial, we conclude that the family court

¹⁰ This flexibility, however, does not relieve a trial court of its duty to inform a defendant of the right to a jury trial, see HRPP Rule 5(b)(1), nor does it diminish the "serious and weighty" responsibility placed on trial courts in approving a waiver of jury trial. See United States v. Saadya, 750 F.2d 1419, 1421 (9th Cir. 1985) (quoting Johnson v. Zerbst, 304 U.S. 458 (1938)); see also Han, 130 Hawai'i at 92, 306 P.3d at 137 (quoting Duarte-Higareda, 113 F.2d at 1003); HRPP Rule 23(a).

erred in determining that Gomez-Lobato's jury waiver was made voluntarily, knowingly, and intelligently.¹¹

IV. Conclusion

Based on the foregoing, we vacate the ICA's judgment filed on November 23, 2012, and the family court's judgment filed on March 15, 2011, and remand the case for a new trial.

Shawn A. Luiz
for petitioner

/s/ Mark E. Recktenwald

Linda L. Walton
for respondent

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack



¹¹ Gomez-Lobato argues that this court should draw upon the analyses articulated in State v. Valdez, 98 Hawai'i 77, 79, 42 P.3d 654, 656 (App. 2002), and State v. Kaupe, No. 22725 (Haw. May 10, 2001) (mem.), to support his contention that he did not validly waive his right to a jury trial. However, this court need not address these cases because Valdez is distinguishable inasmuch as the State, in that case, conceded that the defendant's waiver was invalid, and Kaupe is an unpublished disposition issued prior to July 1, 2008, see HRAP Rules 35(c)(1) and (2).

Gomez-Lobato also argues that the waiver was invalid because it was executed prior to the amended complaint. The general rule is that a valid waiver remains effective after a complaint is amended, unless the amended complaint added additional counts or substituted a more serious offense. Wayne R. LaFave, et. al., Criminal Procedure 1077 (5th ed. 2009) ("Once a valid jury waiver has occurred, a defendant has no constitutional right to withdraw or revoke the waiver, and it may be considered in effect even if there is some adjustment in the charges, provided there has not occurred an addition of counts or a substitution of a more serious charge, and even if there is a change of judge."); Le Louis v. Superior Court, 257 Cal. Rptr. 458, 467-68 (Cal. Ct. App. 1989) ("Generally speaking, if the prosecutor amends a complaint, indictment, or information to charge a new offense or to add a prior conviction or penalty enhancement, this renders a prior jury trial waiver ineffective.") (emphasis added); State v. Williams, 534 A.2d 230, 235 (Conn. 1987); People v. Spain, 415 N.E.2d 456, 460 (Ill. App. Ct. 1980).

In this case, at the time of Gomez-Lobato's waiver of the right to a jury trial, he was aware that he was charged with one count of Abuse of Family or Household Member that occurred "[o]n or about" September 23, 2010. The amended complaint merely changed the date of the same Abuse of Family or Household Member charge. The amended complaint neither charged a new offense, nor substituted the initial charge with a more serious offense. See Le Louis, 257 Cal. Rptr. at 467-68. Moreover, Gomez-Lobato fails to cite any authority that supports his contention that the family court was required to obtain another waiver in these circumstances. Thus, Gomez-Lobato's argument that the amendment to the complaint required execution of a new waiver, under the circumstances of this case, is without merit.