

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

In re Andrew G.,)
A Minor) No. A105329
_____))
PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,)
vs.)
)
ANDREW G.,) No. 188442
) (Alameda County)
Defendant and Appellant.)
_____)

APPELLANT’S REPLY BRIEF

Introduction

This reply brief is designed solely to respond to the Attorney General’s contentions that require further discussion for proper determination of the issues raised on appeal. This brief does not respond to those issues that appellant believes were adequately discussed in the opening brief, and appellant intends no waiver of those issues by not expressly reiterating them in this reply brief.¹

¹ All references to respondent’s brief shall be designated “RB.” All references to appellant’s opening brief shall be designated “AOB.”

Argument

THE COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT COMMITTED TO CYA AS A FIRST OFFENDER WHEN THERE WAS NO EVIDENCE OF PROBABLE BENEFIT TO APPELLANT FROM THE COMMITMENT

As fully discussed in appellant’s opening brief, at the time of the offense appellant was 14-years old, had no prior juvenile record, and in the commission of the offense, in which all but one of his co-participants were between 17 and 19 years-old. (CT 333-334, 338, 340, 355, 366; RT 2, 18.)

Critical to this court’s review of the juvenile court’s order committing appellant to CYA is whether or not there was *substantial* evidence to support the court’s finding of “probable benefit” to appellant from his commitment to CYA. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 452.) The California Supreme Court has clearly defined “substantial evidence:”

As we explained in *People v. Bassett* (1968) 69 Cal. 2d 122, 138-139: “The critical word in the definition is “*substantial*”; it is a door which can lead as readily to abuse as to practical or enlightened justice.’ Seeking to determine the meaning of ‘substantial’ in this connection, the court in *Estate of Teed* (1952) 112 Cal. App. 2d 638, 644, canvassed dictionary and judicial definitions and concluded that the term ‘clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with “any” evidence. It must be reasonable in nature, credible, and of solid value; it must actually be “substantial” proof of the

essentials which the law requires in a particular case.’”
(Original italics.)
(*People v. Jones* (1998) 18 Cal. 4th 667, 682, fn. 3.)

A review of respondent’s argument, and the record on appeal, establishes that, not only was there not “substantial” evidence to support the court’s finding when it committed appellant to CYA, there was essentially *no* evidence to support those findings.

A. There Was No Evidence That A Single Program Was Available At CYA For Appellant’s Rehabilitation

In the case at bar, the probation department report stated its recommendation for a facility which would treat appellant’s gang-related issues. (CT 359, 371.) The court’s *only* basis for rejecting the probation department’s recommendation was that the program was not a locked facility. Without *any* evidence of a single program available at CYA which treats gang-related issues, much less evidence that appellant would be eligible for placement or placed in such a program, the court committed appellant to CYA based *solely* on its belief that appellant needed to be in a locked facility. While there was *no* evidence that appellant would receive *any* treatment at CYA, the court made the unsupported finding that appellant would “no doubt receive more treatment than he would in an ordinary group-home setting.” (RT 29.)

Quite simply, there is no evidence on this record, and respondent points to none, of any programs at CYA which would provide appellant the treatment he needs for rehabilitation. Therefore, respondent resorts only to arguments which include general statements about the law and purpose of Juvenile Court Law.

Respondent cites *People v. Pride* (1992) 3 Cal.4th 195, 256² (RB 6), for the proposition that the purpose of juvenile law is to benefit the public by providing juvenile offenders with rehabilitative programs “such as education, vocational training, work furloughs, and supervised parole.” (*Ibid.*) Respondent also relies on *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151 (RB 6) to argue that CYA has “specialized institutions and rehabilitation programs tailored to the delinquent’s sophistication and need for security”, and thus there is “promise of rehabilitative benefit.” (*Ibid.*)³ But, significantly, respondent has not pointed to a single “rehabilitation program tailored” to appellant’s needs

² *People v. Pride, supra*, was a death penalty case in which the only issue related to juvenile law was the defendant’s claim that an honorable discharge from CYA meant that the underlying offense could not be used against him in the penalty phase. (*supra*, 3 Cal.4th at p. 256.) This case provides no authority for the position that there currently are treatment programs at CYA which would be available to appellant.

³ While respondent criticizes the value of appellant’s citation to a 2002 report to the Senate which included CYA recidivism statistics from 1994 (RB 12-13), the authority upon which the court in *Tyrone O.* was based was a 1981 CEB Practice manual with a 1988 supplement. This is hardly current information as to the programs available at CYA for appellant’s rehabilitation.

which is available at CYA, or if available, if appellant would be even considered, much less placed in such a program.

B. While “Accountability” Is Not Sufficient To Support The CYA Commitment, Appellant Would Be Equally “Accountable” In The Recommended Treatment Facility

Respondent also contends that appellant will receive be rehabilitated because being committed to CYA will assure that appellant receives ““a measure of accountability”” which would be “rehabilitative punishment.”” (RB 7, quoting *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258.) In obvious recognition of the lack of evidence of any rehabilitation programs available to appellant, respondent essentially argues that merely holding appellant “accountable” for his offenses through a commitment to CYA would provide the “probable benefit” to appellant that is required by the statute. Respondent fails, however, to explain how appellant would be any less “accountable” if placed in the recommended facility. Appellant would be still be out of his home, his liberty would still be restricted, and he would still be obliged to follow the court’s orders for participation in the treatment programs.

Welfare and Institutions Code section 202, subdivision (b), specifically states, in pertinent part:

Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, *receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their*

behavior, and that is appropriate for their circumstances.
This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. (Italics added.)

Significantly, the concept of “accountability” in the language of the statute is directly linked to “care, treatment and guidance” that is “consistent with” the minor’s best interest. There is nothing in the statutory language, and respondent does not cite any case law, which holds that a CYA commitment can be upheld strictly on the basis that it would hold the minor “accountable” for his offense. In this case, the record clearly establishes that the court *did not* consider appellant’s best interests when it committed him to CYA, the court’s *only* concern, couched in the rote “probable benefit” language of the statute, was to keep appellant locked away from the public. (RT 29.)

As section 202, subdivision (b) establishes, while public safety is a concern, the juvenile court cannot, as it did here, ignore the best interests of the minor.

The language of the cases cited by respondent in support of its position contain nothing more than dicta; however, even if it was not merely dicta, each of the cases cited by respondent are clearly distinguishable from the case at bar.

In *Gerardo B.*, *supra*, 207 Cal.App.3d 1252, the minor was 16-years old, involved in a three-month crime spree, and he admitted 17

separate auto thefts. The probation officer considered “all local less restrictive programs” and then “recommended that [the minor] be committed to YA.” (*Id.* at p. 1253-1254.) The court in *Gerardo B.* “considered the programs at YA,” the fact that “[the minor] was a ‘mental giant’ over his co-participants” (*id.* at p. 1258), and stated it would have placed the minor in a local program if one had been available. (*Id.* at p. 1256.) The concept of “accountability through rehabilitative punishment” was not the basis of the juvenile court’s decision when it entered the commitment order. Thus, in *Gerardo B.*, the juvenile court had considered the *actual* programs at CYA available to the minor and the programs that were available to him in the local area. The court did not do so in the case at bar. Further, unlike appellant, the youngest and least culpable of the co-participants in a single offense, the minor was the older, most active participant, and his offenses were not a single event, but in a three-month crime spree.

Another case cited by respondent, *In re Tyrone O.*, *supra*, 209 Cal.App.3d 145 (RB 4, 6), also does not provide support for respondent’s argument. In *Tyrone O.*, the minor had argued on appeal that CYA commitment was reserved for only the most serious delinquent guilty of the most serious crimes requiring penal retribution for the protection of society.⁴ The minor had a record of progressively serious offenses and

⁴ Appellant has not made this argument on appeal.

numerous less restrictive alternative placements had failed. (*Id.* at p. 152.) The minor had made repeated escape attempts from the lesser restrictive alternative placements. (*Ibid.*) Prior to committing the minor to CYA, the juvenile court had “thoroughly considered and rejected existing alternatives.” (*Ibid.*) The court said:

While it is true that the circumstances of the minor’s offense are always considerations in determining his proper disposition these factors are not dispositive. The court must also consider the minor’s age and previous delinquent history, in addition to other relevant and material evidence. Also, because courts have expressed a persistent concern for committing young, unsophisticated youths with individuals who are experienced, sophisticated, criminally oriented types, alternative placement options should be adequately explored. CYA commitment made with some punitive purpose is proper *where consistent with rehabilitative purposes* of the Juvenile Court Law and not retributive.

(*In re Tyrone O., id.*, 209 Cal.App.3d at p. 152. Citations omitted.)

None of the factors that existed in *Tyrone O.* existed in the case at bar. No lesser restrictive alternative had ever been tried, the court did not thoroughly explore the lesser restrictive alternatives, but rejected the available and recommended program out of hand solely on the basis that it was not a locked facility despite the fact that there was *no* evidence that appellant was a flight risk.

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C. There Is No Evidence That Appellant Required A “Locked Facility”

As fully discussed, *ante* and in appellant's opening brief, the court's sole basis for rejecting the recommended placement was its belief that appellant needed to be in a locked facility. There was no evidence on this record to support the court's stated concern. Appellant has no history of running away from home, no history of failing to obey court orders, and nothing indicated that he would fail to do so if placed in the recommended facility.

Because there was no evidence to support the court's finding, respondent resorted to the claim that appellant's status as a flight risk can be based solely on the fact that he left the scene of the offense. (RB 11-12.) This argument borders on the absurd. Respondent cites not a single authority, legal or otherwise, which indicates the fact that an offender did not stay at the location of the offense makes him more likely to attempt escape from an unlocked rehabilitation facility.

D. Placement With the Older More Sophisticated Gang Members At CYA Is Contrary To Appellant's Best Interests And The Interests of the Public In His Rehabilitation

Respondent argues that "appellant's recidivism is a matter for him to decide." (RB 12.) The very underpinnings of Juvenile Court Law are society's recognition that a 14-year old offender is ill-equipped, without care, guidance and rehabilitative programs, to make the kinds of choices we expect of adults. Respondent has cited no evidence that appellant will receive any "treatment" at CYA with which he could "cooperate" so

that the treatment would be “effective. (RB 12.) Respondent cites no authority, legal or social, which supports its conclusion that appellant “determination” alone will provide him with the ability to “negate the impact of any exposure in CYA” to the negative influence (RB 12) of the more sophisticated, older delinquents, which have long been a concern in CYA commitments. (See, *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577; *In re Maria A.* (1975) 52 Cal.App.3d 901, 903; *In re Aline D.* (1975) 14 Cal.3d 557.)

Indeed, respondent’s citation to authority for this proposition not only do not lend support to respondent’s argument, but establish the strength of appellant’s claim that placing him in CYA makes it more likely that he will have contact with the type of older, more sophisticated males with whom his association led him into trouble in the first case. In *People v. Lopez* (1998) 66 Cal.App.4th 615 (RB 12), the issue was a probation condition requiring the defendant to refrain from associating with gang members. This probation condition was upheld because the court recognized, “[b]ecause ‘[a]ssociation with gang members is the first step to involvement in gang activity’ [Citation.]” (*Id.* at p. 624.) It must be considered as common knowledge that gang members make up a significant percentage of the current CYA population. These are the very people with whom appellant should not have, but will have, association with while committed to CYA. As recognized in *People v. Lopez*, it is

unlikely, without specific rehabilitation treatment that appellant's potential association with gang members at CYA will not decrease, but will likely increase, his involvement in gang activity.

By this argument, respondent seeks to make appellant solely responsible for his rehabilitation. Not only is that a violation of statutory law which holds *all* participants in the juvenile system accountable for its results (§202, subd. (d)), but it ignores the very basis of juvenile law, that juvenile offender must “receive *care, treatment, and guidance* that is consistent with their best interest...” (§202, subd. (b). Italics added.)

Conclusion

Significantly, it is not only the minor that must be held accountable. Section 202, subdivision (d) states, in pertinent part:

Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public, the importance of redressing injuries to victims, and *the best interests of the minor in all deliberations* pursuant to this chapter. *Participants in the juvenile justice system shall hold themselves accountable for its results.* (Italics added.)

The requirement of accountability of all of the participants in appellant's case is especially critical here because there is insufficient evidence on this record to establish any benefit to appellant from a commitment to CYA, but a great deal of evidence that the commitment,

in the long run, will prove harmful to appellant and the public when appellant does not receive the appropriate care, guidance and treatment he both needs and deserves.

Date: August 9, 2004

/s/ Rita L. Swenor
RITA L. SWENOR
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CERTIFICATE OF WORD COUNT

I, Rita L. Swenor, attorney for appellant herein, do certify pursuant to the laws of the State of California that the word count of this Appellant's Reply Brief is 2404 words, based on the count of the Microsoft Word 2000 program.

Dated: August 9, 2004

/s/ Rita L. Swenor
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