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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JOHN G., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
JOHN G.,  
Defendant and Appellant.

A106174

(San Mateo County  
Super. Ct. No. 71137)

Appellant John G. contends that the juvenile court abused its discretion by committing him to the California Youth Authority (CYA) and by refusing to order his psychiatric assessment; ordered his commitment without benefit of a sufficient probation department social study; improperly relied on a “personal, off-record briefing” about CYA in committing appellant there; improperly issued an order without notice or hearing that appellant did not have exceptional needs after committing him to CYA; and miscalculated appellant’s maximum term of confinement to CYA as four years and two months rather than four years. Respondent opposes each contention, except regarding appellant’s maximum term of confinement. We affirm all of the juvenile court’s rulings, except that we modify its commitment order to state that appellant’s maximum term of confinement is four years, rather than four years and two months.

## **BACKGROUND**

On February 26, 2003, respondent filed a petition pursuant to Welfare and Institutions Code section 602 charging appellant, then 17 years old, with misdemeanor possession of a stun gun after appellant had purportedly engaged in a gang-related fight. On June 2, 2003, after appellant entered a no contest plea, the court sustained the petition and ordered appellant placed on one year's probation in his mother's home subject to certain conditions, including that he not engage in any gang-related activity. On July 18, 2003, respondent filed a second petition alleging appellant had engaged in numerous violations of these probation conditions.

On July 25, 2003, respondent filed a third petition charging appellant with two counts of felony second degree burglary (Pen. Code, § 460, subd. (b)), one count each of felony theft (Pen. Code, § 487, subd. (a)), felony vandalism of a religious building (Pen. Code, § 415, subd. (a)), and misdemeanor disturbing the peace (Pen. Code, § 415, subd. (3)). Among other things, respondent contended that appellant and other juveniles burglarized and vandalized the Congregational Church of American Samoa in Daly City in late June 2003 in a gang-related incident. The petition also requested the aggregation of the terms of confinement for these offenses and any previously sustained petitions. (Pen. Code, § 12651, subd. (d).)

On July 28, 2003, respondent filed a fourth petition charging appellant with felony automobile burglary (Pen. Code, § 460, subd. (b)), felony vandalism (Pen. Code, § 594.3, subd. (b)(1)), and misdemeanor theft (Pen. Code, § 484). On August 8, 2003, respondent filed a fifth petition charging appellant with misdemeanor theft of property worth less than \$400 (Pen. Code, § 490) and misdemeanor vandalism on May 26, 2003.

At an August 11, 2003 hearing, appellant admitted to, and the court sustained, the felony burglary count charged in the July 25 petition, the felony burglary count charged in the July 28 petition, and the misdemeanor theft count charged in the August 8 petition. The court continued appellant's probation under the same terms and conditions as the

previous grant of probation, and ordered appellant to serve a year of detention in juvenile hall.

On November 6, 2003, respondent filed a sixth petition, this time alleging appellant violated terms of his probation and juvenile hall rules by, among other things, disrupting the hall and possessing three letters with gang-related writings. At a court hearing on that same date, the following exchange occurred:

“THE COURT: I’m wondering if it’s not being made clear to you . . . that you can’t follow rules because you’re headed to the youth authority. If you can’t follow—if you really like participating in gang-related stuff you’ll get that up there. And your life will be changed forever. Forever. Do you know that that’s what’s happening here?”

“THE MINOR: Yes.

“THE COURT: Do you know that’s the kind of decisions you’re making by even doing a little rule violations here? It all builds up.

“THE MINOR: I understand.”

A December 1, 2003 probation department report to the court stated that appellant “has worked hard to escalate gang tension . . . as he is seen by his peers as ‘the leader’ of the Nortenos gang. Numerous attempts have been made . . . to counsel [appellant] on his disruptive negative behavior . . . but nothing positive has been evident from these counseling sessions.” The report also indicated that the bottom of appellant’s bunk in his room had been defaced with the writings “Norte” and “Little Bandit.”

A January 4, 2004 probation department report stated that appellant “has had a problematic but improved stay,” and “has made a marked improvement this last month in not pursuing an active gang orientation.” The report also stated that appellant “is a Norteno gang member.”

At a January 20, 2004 hearing regarding the November 6, 2003 petition, appellant admitted the disruption charge and to possession of a letter that contained “Gang writing

. . . Norteno writing.” The court, after granting respondent’s motion to strike the remaining allegations, sustained the November 6, 2003 petition, and continued disposition hearing to receive more information regarding CYA programs dealing with gang-related issues. Referring to a report that appellant was still engaged in gang activity, the court stated that appellant must quit his gang.

In a January 26, 2004 memorandum, a deputy probation officer informed the court that appellant had been disciplined for writing a gang-related letter signed “Bandit,” appellant’s purported gang name, to a female minor who had been involved in the June 2003 church incident, despite orders that he not associate with her. Appellant denied writing the letter. The officer also stated, “It appears that [appellant] is not serious about changing his negative lifestyle, as he is still claiming affiliation to ‘Norte.’ ”

The probation officer also reported his inquiries into alternative placements to CYA, informing the court that these placements either were southern California, thereby exposing appellant to a risk of being assaulted as a Norteno, or ended when appellant turned 19 years old, and that CYA operated programs that could help appellant curb his gang behaviors.

A February 2, 2004 probation department report to the court about appellant’s behavior since January 20, 2004 stated, among other things, that appellant’s “attitude on the unit is acceptable, yet can be immature at times. . . . [He] has not had any gang issues on the unit or in the institution to report.” The report graded appellant below average in four behavioral areas, and below average in three.

At a February 2, 2004 hearing, the court stated its conclusion that CYA would provide the best services for appellant, and committed appellant to CYA for a maximum term of confinement of four years two months, less 196 days custody credit. The court found appellant not to be a person with “exceptional needs,” and ordered him to remain in juvenile hall pending acceptance to CYA. On February 5, 2004, the court stayed

appellant's CYA commitment to allow the court's review of reports of "very serious management issues" concerning CYA that had come to the court's attention.

A February 11, 2004 probation department report covering appellant's behavior from February 2 to February 11, 2004, graded appellant "average" in all seven behavioral categories evaluated, stated he had "shown improvement" and "respects Unit staff as authority figures and has a good relationship with the rest of his peers." Following another hearing continuance, a February 21, 2004 probation department report also rated appellant as "average" in the seven behavioral categories, indicated he was improving, attending school, participating in programs "to the best of his ability," and that he "responds well to counseling and follow[s] the rules of the living unit without being told what to do."

The probation department subsequently submitted a petition to modify pursuant to Welfare and Institutions Code section 778,<sup>1</sup> indicating that it was not opposed to appellant serving a year in juvenile detention rather than being committed to CYA, given the court's moratorium on CYA commitments. The court, after hearing argument at a February 23, 2004 hearing, did not rule on the petition, continuing its stay pending further review of CYA.

The probation department submitted extensive papers regarding appellant for the court's March 24, 2004 hearing,<sup>2</sup> including a behavior summary that graded appellant "average" across the board and "non-delinquent," as well as a memorandum and incident report indicating that appellant had been recently disciplined for gang-related activity again. Appellant had admitted on March 9, 2004, to etching into a couch at juvenile hall

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<sup>1</sup> The written petition apparently was not actually filed with the court.

<sup>2</sup> The appellate papers note an immaterial discrepancy in the record regarding whether this hearing occurred on March 23 or March 24, 2004. We refer to the hearing as having occurred on March 24, 2004, the date of hearing stated in documents contained in the clerk's transcript.

the initials “FTDC,” which apparently stood for the gang affiliation “Fog-Town Daly City.” The probation department also stated that a group supervisor believed that appellant was a Norteno “shot caller” based on statements that appellant had made. The reporting probation officer, acknowledging that he had previously recommended that appellant serve a year of juvenile detention, stated that “in view of the fact that the moratorium has been cancelled, this officer is of the opinion that [appellant’s] commitment to the [CYA] is warranted.”

At the March 24, 2004 hearing, the court concluded that CYA was operating in a satisfactory manner, lifted its stay on CYA commitment, and confirmed its previous commitment of appellant to CYA for a maximum term of confinement of four years two months, less 255 days credit for time he had been held in custody. The court made clear that its confirmation took into considerable account appellant’s continued gang-related activities after the court’s February 2, 2004 stay.

Appellant filed a timely notice of appeal of the court’s March 24, 2004 order on March 24, 2004. On April 27, 2004, the court issued an order amending its March 24, 2004 findings and orders to state that its commitment order should reflect that appellant is not an individual with exceptional needs.

## **DISCUSSION**

### **I. The Court Did Not Abuse Its Discretion in Committing Appellant to CYA**

Appellant contends the juvenile court abused its discretion by committing him to CYA when his behavior was improving and without considering less restrictive alternatives first. This contention is incorrect.

“We review a commitment decision only for abuse of discretion, and indulge all reasonable inferences to support the decision of the juvenile court.” (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) “[J]uvenile placements need not follow any particular order under [Welfare and Institutions Code section] 602 and section 777, including from the least to the most restrictive. [Citations.] Nor does the court necessarily abuse its

discretion by ordering the most restrictive placement before other options have been tried.” (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.) Furthermore, “the 1984 amendments to the juvenile court law reflected an increased emphasis on punishment as a tool of rehabilitation, and a concern for safety of the public. (*In re Michael D.*, *supra*, at p. 1396.)” (*In re Asean D.*, *supra*, 14 Cal.App.4th at p. 473.)

In the year before his placement in CYA, appellant repeatedly engaged in criminal and gang-related activities, despite efforts by the court and juvenile authorities to deter him from doing so through less restrictive means than CYA, including an initial in-home probation and, when he violated probation by engaging in further gang-related activity, placement in juvenile hall. While at juvenile hall, appellant persisted in engaging in prohibited gang-related activity. The court repeatedly cautioned appellant about gang activities, but appellant disregarded the court, including by defacing juvenile hall furniture with a gang-related etching during the court’s stay of his commitment to CYA.

Appellant argues that the probation department reports in the months before the court’s placement of him to CYA indicated his conduct was improving, as demonstrated by appellant’s slower frequency of misconduct over time during his stay at juvenile hall. This is hardly persuasive, because it acknowledges that his misconduct continued throughout his stay. Regardless, appellant admitted defacing juvenile hall furniture with a gang-related etching in the March 9, 2004 incident, and the court was well within its discretion to consider this incident as the proverbial “straw that broke the camel’s back” in light of appellant’s history and the court’s prior cautions. At the March 24, 2004 hearing, the court indicated it was confirming its prior dispositional order in significant part because of this latest incident when it stated: “[I]f there was any time in your life when you should have been not just okay with doing things, it should have been during this period when you were given this stay. You know, if your hall report today had been over here very high showing me that you were really trying hard to follow the rules, and really trying to show us that you could stay here and be responsible, that this would have

been the time, but what do I get? I get a hall report saying [your] behavior has deteriorated. This report says you're still claiming affiliation to Nortenos. . . . You're not serious about changing your negative lifestyle. You continue to disregard probation, especially gang orders, and your group supervisor thinks you're a shot caller."

Furthermore, the court indicated that commitment to CYA was appropriate in light of appellant's repeated gang-related activities and potentially rehabilitative to him: "And if you want to be an outlaw, you're going to suffer the consequences. We want to send you to the youth authority with the hope that you will learn to leave the outlaw behavior behind and learn behavior that will allow you to be a constructive member of this community. That's what we're hoping."

The court, before committing appellant to CYA, also considered the probation department's report about possible alternative placements, reviewed CYA's management, and determined appellant's commitment to CYA was the most appropriate course to take.

Appellant also refers to the probation department's February 2004 petition to change appellant's CYA commitment to a year of juvenile detention for support. The probation department's petition was premised on the court's moratorium of CYA commitments, which the court later lifted. At the March 24, 2004 hearing, the department stated to the court that commitment to CYA was "warranted."

In short, placements less restrictive than CYA failed to deter appellant from engaging in prohibited gang-related activities. The court considered alternative placements to CYA, reviewed CYA's programs and questions about its management, and determined appellant's commitment to CYA was both appropriate in light of his continued misconduct and potentially rehabilitative to him. The court did not abuse its discretion in taking any of these actions.

## **II. The Court Did Not Improperly Deny Appellant a Psychiatric Assessment**

Appellant contends the juvenile court deprived appellant of a full and fair disposition hearing and prevented him from gathering "highly relevant and material

evidence” in violation of Welfare and Institutions Code section 706 and California Rules of Court, rule 1492(b) by failing to grant his request for a psychiatric assessment at a November 6, 2003 hearing. Appellant’s contention is without merit.

Appellant’s argument centers around the court hearing on November 6, 2003, regarding respondent’s petition, filed on that same date, which petition alleged appellant had engaged in certain probation violations. Appellant’s attorney, Mr. Pasternak, after waiving the reading of the petition and advice of rights, and asking that the matter be set for pretrial conference, stated, “And I do have a request, your Honor. After talking with mother and John, I understand there was some issues not to excuse the behavior, and he understands it’s not out of line but prior to -- I guess it was about June he had no record at all. In May he lost his father. His grandfather died. Two of his friends died. There was a reference to grief counseling at one of his early court appearances apparently telling me he was seen by a counselor yesterday, but it doesn’t sound like this was anything on an ongoing basis. *Maybe mental health evaluation. Certainly counseling.* He knows he has time he has to do here. He knows he can’t do it the way he’s been doing the last period of time.” (Italics added.)

After the court noted that counseling “hasn’t been working so I’m not sure what kind of counseling you’re talking about,” Pasternak stated, “I’m not talking about counseling by staff here. Probation officer’s. *I’m talking about counseling directed by a mental health evaluation.*” (Italics added.)

The court then asked appellant some questions directly, including if he understood what gang activity was, and whether he understood that he was headed to the youth authority if he continued participating in gang-related activity, to which appellant answered affirmatively. Appellant acknowledged, “I got to keep calm and keep myself in order while on the [juvenile hall] unit.” The court warned him that he was heading to CYA and “out of control.” After further discussion, Pasternak stated, “That you consider a mental health evaluation, I’d like to renew,” which led to the following exchange:

“THE COURT: There’s been nothing here that would indicate that we need that. I think [appellant’s] a perfectly sane and smart guy.

“MR. PASTERNAK: I’m relying largely on the mother’s perception of that, and I think my own feelings too. If you lose a grandfather and father and two friends in a short period of time that is going to impact your functioning and chronology here. The father died within a month or so of the minor’s first real misconduct.

“THE COURT: Is there grief counseling?

“[PROBATION OFFICER]: If he would like to speak to a mental health counselor, he can speak to one.

“THE COURT: I have some personal experience because I lost my sister and my wife within 18 months and was left as a single dad and lost them, so I know what grief is all about. I know you have to process it. . . . You’ve got to talk about it. You’ve got to grieve. . . . And there are . . . counselors who will work with you in that area. . . . So if it’s really bugging you and you really want to talk to somebody, take advantage of the grief counseling that they have there. . . . But I don’t think -- I’m not seeing anything here about you other than perhaps being depressed about the terrible losses you’ve had. . . .”

This review shows that the court did nothing to prohibit appellant from presenting expert testimony or other evidence on the issue of his mental health or psychological condition because Pasternak made no request related to the preparation of such evidence. Pasternak noted that appellant had suffered several recent losses and that grief counseling was not available on an “ongoing basis,” then asked that appellant be provided counseling and “*maybe*” mental health evaluation. When asked to clarify what he meant, Pasternak stated merely that he was “talking about counseling directed by a mental health

evaluation,” and later “renewed” his ambivalent request.<sup>3</sup> The hearing discussion, including the court’s inquiries to appellant, its confirmation that grief counseling was in fact available to appellant, and its encouragement to appellant to use grief counseling as necessary, indicate that it viewed appellant’s request as about ongoing counseling only, and Pasternak never indicated otherwise. The court did not deny appellant the opportunity to prepare or present evidence under these circumstances.

Furthermore, even if Pasternak had requested a mental health evaluation to help prepare expert testimony or other evidence, he provided little, if anything, to support his request, referring only to his and appellant’s mother’s purported concerns. Even worse, Pasternak relied on the inaccurate argument that appellant did not engage in misconduct until June 2003, after the death of his father. In fact, appellant had entered a no contest plea to a February 2003 petition alleging that he had been unlawfully in possession of a stun gun in November 2002, apparently after a gang-related fight. The court’s reluctance to refer appellant to a mental health evaluation was appropriate in light of appellant’s presentation, or lack thereof, and the court’s own inquiries.

Appellant also suggests that the court’s failure to refer appellant for a mental health evaluation violated his federal constitutional right to present evidence in his favor, and deprived him of his liberty without due process of law. As indicated by the discussion above, the court did not deprive appellant of any such rights because his counsel did not actually request a mental health evaluation for the purpose of gathering evidence and, in any event, did not make a presentation sufficient to warrant a mental health evaluation. Regardless, any such error would have been harmless error beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), because the court

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<sup>3</sup> In light of this renewed request, we reject respondent’s contention that appellant waived his right to appeal the court’s determinations at the hearing because appellant was “satisfied” with the probation officer’s statement that counseling was available.

confirmed appellant's CYA commitment over four months later in large measure because of appellant's misconduct after the November 2003 hearing and the court's conclusion that CYA's programs were the most appropriate for him under the circumstances.

### **III. The Probation Department's Social Study Was Sufficient**

Appellant contends that his commitment must be reversed because the court placed him in CYA without the benefit of a proper social study from the probation department in violation of his "fundamental procedural right to have a full social study report at the final commitment hearing." This too is incorrect.

Welfare and Institutions Code section 706 directs that, "[a]fter finding that a minor is a person described in [Welfare and Institutions Code] Section 602, the court . . . shall receive in evidence the social study of the minor made by the probation officer and any other relevant and material evidence that may be offered. . . . In any judgment and order of disposition, the court shall state that the social study made by the probation officer has been read and that the social study and any statement has been considered by the court." A minor is entitled to have a "current social study" prepared for the hearing. (*In re Deon W.* (1998) 64 Cal.App.4th 143, 147.) "While there are no precise requirements . . . as to the contents of the social study . . . the probation officer's report should address, in addition to other relevant and material evidence, the age of the minor, his social, personal and behavioral history, the circumstances and gravity of the offense committed by the minor, and the minor's 'previously delinquent history.' (§ 725.5.) The social study should also include 'an exploration of and recommendation to the wide range of alternative facilities potentially available to rehabilitate the minor.' " (*In re L.S.* (1990) 220 Cal.App.3d 1100, 1104.)

Appellant contends that the probation department did not provide a sufficient social study for the March 24, 2004, hearing because it submitted only a March 19, 2004 "inter-department correspondence" to the court. This is incorrect. The probation officer filed on March 19, 2004, not only an "inter-departmental correspondence" (which

discussed the officer's disposition recommendation, appellant's recent misconduct and other behavior), but also submitted a juvenile hall incident report of the March 9 incident, an extensive review of appellant's record and the relevant charges sustained, and a behavioral study. These materials were reviewed and discussed in the course of the March 24, 2004 hearing, as indicated by references to them at the hearing and in the court's findings and orders.

Furthermore, the probation department had previously submitted reports regarding appellant to the court for the February 2 hearing, when the court had originally ordered appellant committed to CYA, as well as for hearings scheduled for February 13 and 23, 2004, which were continued. The probation department prepared four separate reports for the court in the space of approximately seven weeks leading up to the March 24 hearing.

The March 19 probation materials extensively discussed appellant's age, social, personal and behavioral history, the offenses committed and his delinquent history. While these materials did not discuss alternative disposition possibilities for appellant, the probation department presented a report on these alternatives to the court for the February 2, 2004 hearing, when the court made its original disposition determination. The department's report of alternative disposition possibilities seven weeks prior was sufficiently "current" for the purposes of the March 24, 2004 hearing. (*In re Deon W.*, *supra*, 64 Cal.App.4th at p. 147.) Furthermore, given the probation department's extensive report to the court for the March 24 hearing and in the prior two months, there is no basis for disturbing the court's disposition order. (*In re Melvin J.* (2000) 81 Cal.App.4th 742, overruled in part on other grounds in *John L. v. Superior Court* (2004) 33 Cal.4th 158, 181, fn. 7 [court could proceed with disposition after receiving an oral report of a yet-to-be received social study, in part because of social studies submitted to the court in the previous six months]; see also *In re Eugene* (1980) 107 Cal.App.3d 605, 615 [refusing to set aside disposition order where there was no prejudice shown by the

probation department's limited last report to the court, particularly because the report, when "merged" with a prior social study, demonstrated a "substantial compliance" with the department's statutory responsibilities], disapproved on other grounds in *In re Ricky H.* (1981) 30 Cal.3d 176, 185-190, superseded by statute as stated in *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1395.)

The only legal support appellant cites, *In re Devin J.* (1984) 155 Cal.App.3d 1096 (*Devin J.*), involved a minor who was committed to the youth authority at a disposition hearing, for which a probation officer had prepared a summary memorandum stating that his recommendation had not changed from his previous one, which had advocated commitment to CYA. (*Id.* at p. 1099.) The officer's prior recommendation, however, was prepared for a fitness hearing, not a disposition hearing. (*Ibid.*) The appellate court, noting the differences between the two hearings and in the probation reports for each, reversed the minor's order of commitment to CYA. (*Id.* at pp. 1100-1102.) The case is inapposite, since the March 19 probation materials were extensive, and the previous probation materials were prepared with regard to appellant's disposition as well.<sup>4</sup>

#### **IV. The Court Did Not Improperly Rely on a Personal, Off-Record Briefing**

Appellant contends that the juvenile court denied him federal due process of law at the March 24, 2004 disposition hearing because the court relied on a "personal briefing from the director of CYA without disclosing the pertinent circumstances of that briefing or allowing appellant notice of that briefing." This contention is also incorrect.

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<sup>4</sup> *Devin J.* discusses statutory issues only. Appellant makes reference to purported constitutional rights in the section of his appellate brief that raises his social study contention, but only regarding the court's denial of his mental health evaluation. To the extent appellant might contend his constitutional arguments are intended to relate to his social study argument as well, we conclude that any such error was harmless error beyond a reasonable doubt, as discussed in section II, *ante*.

A juvenile court may consider a broader range of information at a disposition hearing than may be considered at a jurisdictional hearing. (*In re Michael V.* (1986) 178 Cal.App.3d 159, 170.) More to the point, a party who fails to raise in the court below a claim that his federal due process rights were violated with regard to evidentiary issues waives his right to raise such a claim on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1214, fn. 6, citing *People v. Benson* (1990) 52 Cal.3d 754, 788.) Similarly, a claim of judicial misconduct for considering information outside of the evidence is waived on appeal by the failure to make a timely objection below. (See *Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108.)

Here, the court itself raised concerns about CYA's management at the February 5, 2004 hearing when it stated that "it has come to my attention . . . that there have been a number of reports that have come out recently criticizing the Youth Authority for some very serious management issues. And accordingly, I'm going to find good cause to stay commitment to the Youth Authority, and we will detain the minor pending the courts review of these new reports." The court then continued the matter to February 13 and asked for questions from counsel. Appellant's counsel did not object, did not request to present evidence, or request to review any report himself, asking only when the court "will have had an opportunity to review that report by [February 13] and be making a decision based on that" because counsel would not be available on the morning of February 13.

At the February 13, 2004 hearing, the court continued the matter further after being informed by a court officer present that another judge, Judge Diaz, was going to review all minors committed to CYA "and ask to review for recommendations," indicating that only staff and a Mr. Hilliard would be appearing at that review, and not the minors themselves. Once more, appellant's counsel did not object, nor did he request that he be present at any review or be allowed to present anything himself.

At the February 23, 2004 hearing, the court, in discussing the probation

department's petition to modify, indicated that it had been absent the previous week, did not have the results of any evaluation of CYA, and invited appellant's counsel to "inform me if there's some other information that's been provided to the courts that Judge Diaz or probation or you, personally, Mr. Pasternak, or to the district attorney that I'd be able to consider . . . ." Pasternak, referring to a report that is not in the appellate record, stated that "the conclusion of the committee that did this report was that the problems with CYA is systemic." He referred to an "interview" he had heard that morning involving an Assemblyman and probation officer, and stated, "so it seems to me the consensus at this point, there are some basic systemic problems . . . ." The court then indicated a team, including a court officer, had gone to investigate CYA, and suggested that it continue the matter until it received the results of "our own in-house evaluation," to which Pasternak agreed and made no additional requests or objections. The court then continued the hearing.

At the March 23, 2004 hearing, Pasternak stated that he was not privy to the probation department report, but that "the well-publicized more formal report" regarding the youth authority indicated it was not a place for anyone but "the most dangerous youths." After respondent referred to a county probation department review of CYA, the court turned to a court officer present at the hearing who was on the team that went to the youth authority and asked her if she had anything to add to the matter. The officer stated that her team had "interviewed 42, 45 kids. We felt they were receiving treatment. They were safe. They were receiving programs and based on that we informed the court of that information and she's continued to commit kids to the youth authority." At that point, the court stated that he and Judge Diaz had a personal briefing from the director of CYA, "along with most of our senior probation team that went down there," and stated his conclusion that while there were "issues to be dealt with" and that reforms would occur, he thought that "there are many areas . . . in need of praise . . . because of the high quality of the staff, because of the high quality of the programs to deal with very very difficult

individuals.” The court proceeded to confirm its prior order committing appellant to CYA without any objection from appellant’s counsel.

The court’s comments at the March 24 hearing indicated that, contrary to appellant’s contention that the court’s briefing with CYA director was inappropriately “personal,” a term we acknowledge the court used itself, the court’s briefing was also attended by Judge Diaz and “the senior probation team” that had conducted a review of CYA during the court’s stay of appellant’s CYA commitment. Appellant had, through his counsel, welcomed such a review, had repeated opportunities to object to this review and present his own information, had asked the court to rely on an “interview” his counsel had heard outside of court in determining his commitment, and had not raised a single objection to the information the court considered about CYA over the course of almost two months and several hearings. Appellant made no objection at the March 24 hearing to the information referred to by the court, including the court’s “personal briefing.” Accordingly, we find, without determining whether or not any error was made below, that appellant waived any right to raise a claim on appeal that the court improperly considered information regarding CYA in committing him to that facility because appellant failed to raise a timely objection below. (See *People v. Jackson, supra*, 13 Cal.4th at p. 1214, fn. 6; *Guadalupe A. v. Superior Court, supra*, 234 Cal.App.3d at p. 108.)

**V. The Court’s Amendment of Its March 24, 2004 Commitment Order Did Not Violate Appellant’s Rights**

On April 27, 2004, the court, represented in this instance by Judge Diaz, issued an amendment to the court’s findings and orders made at the March 24, 2004 hearing. This amendment stated in its entirety: “The findings and orders of the court made at the hearing of: 3/24/04 are hereby amended as follows: The California Youth Authority Commitment should reflect that the minor is not an individual with exceptional needs.”

Appellant contends that this order violated California Rules of Court, rule 1410(b) because both the minor and his counsel were entitled to be present at any juvenile court proceeding at which decisions were made about appellant's case. Appellant also contends that his federal and state constitutional due process rights were violated because he was entitled to notice that such a decision was being considered, the opportunity to be heard on the issue, and a chance to affect any resulting order. Appellant's contentions are incorrect because the April 27 order was not a new decision by the court, but an amendment of the court's previous findings and orders to reflect the court's previous determination at hearing that appellant did not have special needs.

As respondent points out, at the February 2, 2004 disposition hearing, the court expressly found that appellant was "not an individual of exceptional needs" when it ordered him committed to CYA, which order the court then stayed on February 5, 2004, because of its concerns about CYA's management. At the March 24, 2004 hearing, the court lifted its stay of appellant's CYA commitment, stating: "So the order that was stayed is now lifted. And the commitment *that is already in place to send [appellant] to the youth authority will now be implemented*, and the matter will proceed. [¶] I don't know that I have to do anything other than that because we already have the youth authority commitment." (Italics added.) The court also issued written "findings and orders" on that same date stating that "CYA commitment of 2/2/04 is confirmed; stay of CYA commitment lifted." The April 27, 2004 order amended these findings and orders.

The court's statements at the March 24 hearing and in its related findings and orders made clear that it was confirming its previous findings and orders regarding appellant's commitment to CYA made at the February 2 hearing, which included that appellant did not have exceptional needs. The April 27 order did nothing more than amend the court's March 24 findings and orders to reflect that determination. Therefore, appellant's contentions that the court made a "decision" on April 27 requiring notice and hearing is incorrect. Appellant does not cite any legal authority indicating that the court

acted improperly under these circumstances, and we have not found any in our independent research. We find, therefore, that the court did not commit any of the errors appellant complains of by issuing its April 27 order.<sup>5</sup>

## **VI. The Juvenile Court's Commitment Order Should Be Modified To Reflect The Correct Maximum Period of Confinement**

Both parties acknowledge that in its commitment order, dated March 24, 2004, and filed on April 1, 2004, the juvenile court erroneously stated that appellant's maximum period of CYA confinement was four years two months, when it actually is four years only.

A juvenile court cannot set a maximum term of physical confinement for a minor in excess of the maximum period of adult imprisonment. (Welf. & Inst. Code, § 731, subd. (b).) The maximum term for multiple offenses is calculated pursuant to Penal Code section 1170.1. (Welf. & Inst. Code, § 726, subd. (c).) The maximum term of confinement is comprised of the principal term, the subordinate terms, and any additional term imposed for applicable enhancements; the principal term consists of the greatest term of imprisonment imposed by the court for any of the crimes. (Pen. Code, § 1170.1, subd. (a).) The subordinate term for each consecutive offense consists of one-third of the middle term of imprisonment prescribed for each felony conviction (*ibid.*) and, in juvenile court, the same calculation is used for misdemeanors. (*In re Eric J.* (1979) 25 Cal.3d 522, 537-538.)

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<sup>5</sup> Appellant argues in his reply brief for the first time that the juvenile court's February 2, 2004 finding at hearing that appellant did not have exceptional needs "was a mechanical mouthing of a stock phrase" and that "[t]here was no basis for such a finding given the multiple references in the record to appellant's special education needs." To the extent appellant means by these arguments that the court abused its discretion at the February 2 hearing by finding that he had no exceptional needs, appellant waived this argument by raising it for the first time in his reply brief. (*Landis v. Pinkertons, Inc.* (2004) 122 Cal.App.4th 985, 993.)

Here, the parties agree that appellant's principal term was three years for a felony second degree burglary count sustained by the court on August 11, 2004, and that a subordinate second degree felony burglary count also sustained on that date was correctly calculated as adding another eight months of confinement. The parties also agree that the count alleging a misdemeanor violation of Penal Code section 484, also sustained on August 11, 2004, was incorrectly calculated as adding four additional months of confinement when only two should have been ordered, since the violation was punishable by imprisonment not exceeding six months (Pen. Code, § 490), and that the stun gun misdemeanor violation of Penal Code section 12651, subdivision (d), was incorrectly calculated as adding three more months of confinement when only two should have been ordered, since the maximum term of imprisonment for such a violation cannot exceed six months. (Pen. Code, § 19.) The parties are correct. We modify the juvenile court's commitment order accordingly.

### **DISPOSITION**

We affirm all of the juvenile court's rulings, except that we hereby modify the court's commitment order, dated March 24, 2004, and filed on April 1, 2004, to state a term of two months for each of appellant's violations of Penal Code sections 484 and 12651, subdivision (d), and to state that appellant's maximum period of confinement is four years.

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Lambden, J.

We concur:

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Kline, P.J.

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Ruvolo, J.

*In re John G. A106174*