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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re RAFAEL C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v.	A106783
RAFAEL C., Defendant and Appellant.	(Alameda County Super. Ct. No. J184802)

Rafael C., a minor, challenges his commitment to the California Youth Authority (CYA) after admitting a felony assault with a knife (Pen. Code, § 245, subd. (a)(1)) and personally inflicting great bodily injury on the victim (Pen. Code, § 12022.7). He claims that the juvenile court abused its discretion in committing him, a seriously mentally ill minor, to CYA. He also argues that the court erred in failing to exercise its statutory discretion in setting his maximum term of physical confinement at CYA. Finally, he asserts that the court erred in calculating his presentence credits.

For the same reasons we have recently set forth in *In re Sean W.* (2005) 127 Cal.App.4th 1177 (*Sean W.*), we are remanding for the juvenile court to exercise its discretion to determine Rafael's maximum term of confinement pursuant to recently

amended Welfare and Institutions Code section 731, subdivision (b).[1] The People concede that the commitment order does not reflect the proper award of credit against the maximum term of confinement. Thus, on remand the court shall correct the credit calculation. We reject Rafael's argument that the court abused its discretion in committing him to CYA.

BACKGROUND

Rafael, a minor, was born in July 1987. On December 23, 2003, the district attorney filed a juvenile wardship petition (§ 602). The petition charged Rafael with assault with a knife by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)), and personally inflicting great bodily injury on the victim (Pen. Code, § 12022.7).

On January 5, 2004, Rafael admitted the charges. The facts as set forth in the probation report stated that Rafael approached a 49-year-old man while the man (the man or the victim) was walking down a street in Oakland. Rafael stepped behind the victim and, without notice or provocation, stabbed him in the back with a carving knife that had a five-inch blade. Rafael then fled the scene. The man, with the knife still sticking in his back, ran to his home. Subsequently, he went to the hospital, underwent surgery, and survived.

In January 2004, the probation officer recommended a CYA placement because of the premeditation and violence involved in the current offense. Rather than selecting a disposition at the hearing on January 20, 2004, the court continued the proceedings and referred Rafael to the Guidance Clinic for a mental health evaluation.

The probation report signed March 2, 2004, recommended that Rafael be declared a ward of the court and committed to out-of-home placement. It also recommended that the matter be continued two weeks for placement review. The probation report stated that Rafael's "mental and emotional status collapsed" on the weekend of January 31, 2004. On February 2, the emergency psychiatric unit at Alta Bates admitted him. Rafael

[1] All further unspecified code sections refer to the Welfare and Institutions Code.

had been "flashing his genitals, defecating and urinating in his pants and playing with his feces." He also, without provocation, attacked another minor.

According to the probation report, Alta Bates had refused to accept Rafael and he was returned to juvenile hall. He received psychotropic medication and his condition improved. The report stated that, after reviewing the report of the Guidance Clinic prepared by Roberto E. Montalvo, Ph.D., a licensed clinical psychologist at the Guidance Clinic, it was clear that Rafael needed "the resources of a facility with on-site schooling and psychiatric support." The report stated that CYA at this time could not offer the extreme services Rafael needed and such a commitment "would burden the mother." It further explained that the mother's "proximity is essential" for Rafael's recovery.

The probation report relied principally on the Guidance Clinic report submitted on February 27, 2004, by Montalvo. Montalvo explained that, prior to the offense, Rafael had no history of violence against himself, but while at juvenile hall he had scratched to remove gang-related tattoos, assaulted another minor without provocation, and urinated on staff. In addition, Rafael complained about hearing voices. Although Rafael had a history of using cocaine and marijuana three times per week, Montalvo opined that the delinquent behavior could be primarily attributed to a mental disturbance. Montalvo stated that Rafael would "benefit most from being placed within a highly structured, residential treatment facility with psychiatric coverage in order to monitor his psychotropic medication." (Italics omitted.)

Montalvo specified two primary psychological issues that contraindicated a CYA commitment for Rafael. "The first involves the likelihood that he cannot, within the current CYA be provided with the necessary psychiatric treatment that he requires. The second involves geography, the importance of Rafael's relationship with his mother and the improved prognosis for him if he is allowed frequent and recurring contact during his treatment."

Montalvo made the following recommendation: "Rafael presents with a continuing thought disturbance, psychotic symptoms that are likely signs of a first break

in an emerging psychotic process. Given its short prodromal period and assuming he receives continued psychiatric treatment, his prognosis is guarded but hopeful. 1) Rafael needs to be placed within a highly structured treatment facility, possibly with an on grounds psychiatric facility, an on grounds school program as well as access to group and individual therapy. 2) Although further screening may be helpful to better understand the extent of Rafael's substance abuse, he can benefit from completing a substance abuse education program. 3) Although he was vague regarding the details of his sexual molest of a 9-year-old three years ago and he does not have a sexual offense legal finding, Rafael can benefit from some education regarding the underlying reasons for sexual offending. 4) Until his thought disturbance clears Rafael will require an on grounds school within a structured classroom in order to continue his education. 5) Rafael's current medication regimen needs to be carefully monitored by a physician who is a contributing member of his treatment team. 6) Rafael should continue to have regular visitation with his mother and if possible, with his younger sister."

The court held a dispositional hearing on March 2, 2004. The probation officer told the court that Rafael was not eligible for the high profile programs such as Boys Republic and Rite of Passage because of the nature of his offense. The court stated that it "just" did not "see what options we have." He asked counsel for Rafael if he knew of any program that would work for Rafael. Counsel responded that there was one facility in Los Angeles that he would "look into, but generally, it would be Boys Republic." The district attorney stated that he was unaware of any facility that could handle a juvenile who does violent acts, but if the court wanted to "put it over[,]" he would "check around the state and see what other facility may be there, but I don't know of any, and that's the problem." The court asked Rafael's attorney if he wanted the court to put it over and counsel could "see what [he could] dig up[.]" Counsel requested the court to do so, explaining that it would not take him that long—"they either exist or they don't." The court continued the matter for one month until April 5.

The probation officer submitted a report signed on April 2, 2004. The report indicated that Rafael's behavior had stabilized and there were no further incidents since he last appeared in court. The probation officer spoke to Guidance Clinic evaluator David Brown on April 2, 2004. Brown stated that Rafael had stabilized but he remained disturbed. He was presently being administered the medication of zyprexea, haldol, and benadryl. Rafael, according to Brown, seemed to do better in a structured environment. Brown also asserted that if Rafael returned home he might stop taking his medication and " 'decompensate.' "

At the continued hearing on April 5, 2004, counsel for Rafael stated that he "did look around, and you'd be surprised that there is not a single other locked facility [other than CYA]." Counsel for Rafael elaborated that, "because of the nature of the crime, that basically just scares everyone away, as you can imagine." Having found no other locked facility, he said that he "simply [had] to just beg for any other placement than CYA and submit it." The prosecutor responded: "We don't see any other option than the California Youth Authority. He is a danger to himself, and he's a danger to the public. This is a very serious offense, and he's almost 17 years old. The intervention that has to occur has to occur now."

The court stated that everyone had tried but it did not "really see that there's any other options here." The court declared Rafael a ward of the court and committed him to CYA for a maximum period of confinement of seven years, less 103 days of custody credit. The court found that it was "reasonable to conclude that [Rafael] will be provided with all of the services that he needs [at CYA]." The court concluded: "For the record, I'll say it again. His mental and physical conditions and qualifications are such that would render it probable he'd benefit from the reformatory educational disciplinary or other training provided by the California Youth Authority." The court admonished Rafael to stay out of trouble and to try to stay out of the gangs "because they have a lot of gangs up there . . . ." In addition, the court noted for the record Rafael's special mental and medication needs.

Rafael filed a timely notice of appeal.

DISCUSSION

I. *CYA Commitment*

Rafael contends that the juvenile court abused its discretion when it committed him, a child with mental problems, to CYA. He maintains CYA cannot provide the mental health treatment he needs and the record is devoid of any evidence that CYA could meet his educational needs. Further, he asserts that he would be exposed to gang members at CYA.

"We review a commitment decision only for abuse of discretion, and indulge all reasonable inferences to support the decision of the juvenile court. [Citations.] Furthermore, it is clear that a commitment to the Youth Authority may be made . . . without previous resort to less restrictive placements. [Citation.] Finally, the 1984 amendments to the juvenile court law reflected an increased emphasis on punishment as a tool of rehabilitation, and a concern for the safety of the public." (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) Substantial evidence must support the placement order. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 579.)

Before 1984, California courts held that the purpose of juvenile law was rehabilitation and treatment, not punishment. (See, e.g., *In re Aline D.* (1975) 14 Cal.3d 557, 567.) However, 1984 amendments to juvenile law reflected an increased emphasis on punishment as a tool of rehabilitation, as well as a concern for safety of the public. (*In re Asean D., supra,* 14 Cal.App.4th at p. 473; § 202.) Still, "[b]ecause commitment to CYA cannot be based solely on retribution grounds (§ 202, subd. (e)(5)), there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate." (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396; accord, *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) A CYA commitment may be made, however, without previous resort to less restrictive placements. (*In re Eddie M.* (2003) 31 Cal.4th 480, 507; *In re Angela M.,* at p. 1396.)

The question of whether a CYA commitment constitutes an abuse of discretion must be considered in light of sections 202 and 734. Section 202 provides in pertinent part: "(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court . . . . [¶] (b) Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment and guidance consistent with their best interest and the best interest of the public. 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 which is consistent with their best interest, which holds them accountable for their behavior, and which is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. . . . [¶] . . . [¶] (d) 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 and the best interests of the minor in all deliberations pursuant to this chapter. . . . [¶] (e) As used in this chapter, 'punishment' means the imposition of sanctions which include the following: [¶] . . . [¶] (4) Commitment of the minor to a local detention or treatment facility, such as a juvenile hall, camp, or ranch. [¶] (5) Commitment of the minor to the Department of the Youth Authority."

Section 734 states: "No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."

In the present case, Rafael maintains that the record establishes that placing him with criminally sophisticated juveniles at CYA will be detrimental to him and the record contained no evidence that he would benefit from CYA commitment or that he would receive the mental health treatment that he needs. He claims that he had no history of

violence until this psychotic break and, once he was treated with medication, his condition stabilized. The record established that he needed medication and family visits. Both the probation officer and the psychologist agreed that Rafael would not receive the treatment he needed at CYA and that it would be difficult for his mother to visit him there. Further, Montalvo emphasized Rafael's need to be in a structured educational program and there was no evidence that CYA would meet this need. Rafael concludes that the record contained no evidence of a probable benefit from a CYA commitment and therefore the juvenile court abused its discretion in committing him to CYA.

We are troubled that the record contains little evidence regarding any rehabilitative value of a CYA commitment. However, as the People point out, the "punishment" inherent in such commitment itself serves "rehabilitative purposes." (See, e.g., *In re Michael D., supra,* 188 Cal.App.3d at p. 1396.) While the record indicates that Montalvo believed that Rafael's behavior was probably due to an emotional disturbance, he acknowledged that it could have been related to Rafael's 18-month history of using cocaine and marijuana three times per week. The "GAIN-Q" report prepared about the same time as the Guidance Clinic evaluation also noted Rafael's drug abuse, rating him in the "moderate" range on the "Substance Use and Abuse Index" and the "Substance Dependence Index." Further, Montalvo noted that Rafael's "potential for violence toward others remains moderate to high and he should be carefully supervised."

Rafael ignores the overwhelming evidence that he posed a substantial risk to the public and he needed to be placed in a locked facility. The court gave his attorney extra time to find a suitable alternative to CYA, but he could not find one and there is no evidence that one was available. The record establishes that Rafael engaged in a vicious, unprovoked attack and therefore posed a serious risk to the public. Brown, a Guidance Clinic evaluator, stated that Rafael might " 'decompensate' " if he were removed from a "highly structured environment" and if he stopped taking his medication.

Indulging all reasonable inferences in support of the juvenile court's order, we conclude there was no abuse of discretion in committing Rafael to CYA. (See *In re*

Angela M., *supra*, 111 Cal.App.4th at p. 1396.) Given the lack of any available locked facility, the juvenile court did not abuse its discretion in finding that a less secure facility would pose an unacceptable risk to the community and would not meet Rafael's needs for a structured environment. The record reflects that the juvenile court did not lightly commit the minor to CYA, but considered its options. It chose CYA because Rafael could receive some treatment there, and because less restrictive options were clearly inappropriate and unavailable. Further, to ensure that Rafael received the proper treatment it provided CYA with notification of Rafael's "special mental and medication needs" and an order that CYA "evaluate him as soon as he gets there." Finally, if new evidence or changed circumstances arises to support a different commitment, Rafael can petition the court pursuant to section 778 to modify the order of commitment.

II. *Section 731, Subdivision (b)*

Rafael contends the juvenile court failed to exercise its statutory discretion in setting his maximum term of physical confinement pursuant to recently amended section 731, subdivision (b). Rather, the juvenile court imposed the maximum allowable term of confinement pursuant to section 726, subdivision (c).

Section 731, subdivision (b), provides in relevant part: "A minor committed to the Department of the Youth Authority may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. *A minor committed to the Department of the Youth Authority also may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section.*" (Italics added.) The Legislature amended section 731, subdivision (b), to add the above italicized language to the

provision, with an operative date of January 1, 2004. (See 2 Stats. 2003, ch. 4, § 1, eff. Apr. 8, 2003, operative Jan. 1, 2004.)

As a preliminary matter, the People assert that Rafael has waived this issue by failing to raise it in the juvenile court. (See, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 852.) Rafael, however, does not contend that the court imposed a commitment "in a procedurally or factually flawed manner" (*People v. Scott* (1994) 9 Cal.4th 331, 354), but instead makes the distinct argument that the court completely failed to exercise its discretion, under section 731, subdivision (b), in setting Rafael's maximum term of confinement. " '[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law. [Citations.]' [Citation.] 'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.' " (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

The record supports Rafael's claim that the juvenile court did not believe it had any discretion with respect to the maximum term of confinement when it committed him to CYA. The court twice mentioned Rafael's maximum term of confinement during the proceedings. On January 5, 2004, just four days after amended section 731, subdivision (b) became operative, the court first told Rafael that the maximum amount of time was five years and subsequently corrected itself when it stated: "All right, Rafael, I made a mistake earlier on the amount of time you could get for this crime. It actually carries seven years rather than five years." At the continued dispositional hearing on April 5, the court asked: "Is this a four year—no, it's a five-year max?" The district attorney responded: "Seven-year top." The court stated, "Seven." The court again repeated that the maximum is seven years. The court, counsel, and the probation department indicated no awareness of court discretion in setting the maximum term of confinement. Accordingly, the issue is not waived.

In *Sean W., supra,* 127 Cal.App.4th at pp. 1181-1189, we have already addressed and rejected the arguments set forth by the People that the added language of section 731, subdivision (b), is unambiguous and that it merely clarifies existing law. Rather, we concluded that the added language of section 731, subdivision (b), unambiguously provides that the juvenile court has discretion to set a maximum term of physical confinement, based on the facts and circumstances of the case, so long as that term does not exceed the maximum period that could be imposed on an adult convicted of the same offense. (Id. at p. 1183.) In addition, in *Sean W., supra,* 127 Cal.App.4th at pp. 1184-1186, we analyzed the legislative history and concluded that the Legislature's intent was to expand the juvenile court's discretion in CYA commitments.

We have already analyzed and addressed the arguments raised by the People in *Sean W., supra,* 127 Cal.App.4th 1177. We need not revisit the issue and, for the same reasons set forth in our earlier decision, we conclude that the juvenile court erred when it did not recognize it had discretion to impose a maximum confinement time less than the maximum term for an adult.

The People maintain that remand is not necessary because Rafael has not established prejudice. From this record, however, we cannot determine that the juvenile court would not impose a commitment less than seven years. Accordingly, we remand for the juvenile court to exercise its discretion to set a maximum term of physical confinement based on the facts and circumstances of the case.

III. *Presentence Credits*

The juvenile court awarded Rafael 103 days credit as evidenced by the minute order and commitment order. Rafael was in custody from the date of his arrest on December 22, 2003, until the dispositional hearing on April 5, 2004. As of the April 5, 2004 disposition hearing, Rafael had been in custody for 106 days. The People agree that Rafael was entitled to 106 days of custody credit. Since we are remanding, the juvenile court should correct its order to award Rafael 106 days of custody credit.

DISPOSITION

The matter is remanded to the juvenile court with directions to exercise its discretion in setting Rafael's maximum term of confinement, pursuant to section 731, subdivision (b), and to award Rafael 106 days of custody credit. The juvenile court's orders are otherwise affirmed.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Ruvolo, J.