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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re JOSE S., a Person Coming Under
the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE S.,

Defendant and Appellant.

A106801

**(San Mateo County
Super. Ct. No. 67140)**

Two wardship petitions (Welf. & Inst. Code, § 602) regarding Jose S. (appellant) were filed on March 19 and April 1, 2004, respectively, and jurisdictional findings were made on each. As to the March 19 petition, the juvenile court found that appellant committed a criminal threat (Pen. Code, § 422) for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)) (count 3), and participated in a criminal street gang (Pen. Code, § 186.22, subd. (a)) (count 4). As to the April 1 petition, the court found that appellant committed an assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)) (count 1), a simple assault (Pen. Code, § 240) (count 3), and two counts of battery (Pen. Code, § 242) (counts 4 & 5).

Appellant appeals the court’s dispositional order committing him to the California Youth Authority (CYA) and argues the court committed numerous errors. We agree and remand for the court to issue a new dispositional order.

BACKGROUND

On March 3, 2004, 15-year-old A.A., a current or former member of the Sureno gang, was chased home by 17-year-old appellant, a member of the Norteno gang, and four other juveniles. When A.A.'s father, S.A., came outside, appellant was saying, "I want to kill you," and making a gesture suggesting he might have a gun.

On March 14, 2004, A.A., L.S., R.C. (L.S.'s brother), and M.R.¹ were attending a barbecue at a park. Appellant was with a large group of men, some of whom were Norteno gang members. Appellant and other members of his group approached A.A., started yelling "scrapa," wanting to fight. After putting on brass knuckles, appellant struck L.S. When R.C. tried to defend L.S., he (R.C.) was struck in the head with a bottle. When M.R. tried to break up the fight, he was struck in the face and insulted. When A.A. tried to help L.S., appellant punched A.A. in the ribs.

The probation report stated that appellant had first been adjudged a ward of the court in April 2000 after he was found to have committed misdemeanor petty theft of a bicycle (Pen. Code, §§ 484, 488) and misdemeanor battery (§ 243.2). In November 2000, appellant was found to have committed misdemeanor battery with serious bodily injury (§ 245, subd. (a)). In April 2002, he was found to have committed "assault with a deadly weapon with three overt acts" and "assault with a deadly weapon" with an infliction of great bodily injury special allegation (§ 12022.7). Both offenses were gang-related and involved a high degree of violence, cruelty, viciousness and callousness. In July 2003, appellant was arrested on charges of conspiracy (§ 182), first degree burglary (§ 460, subd. (a)), and misdemeanor assault (§ 241, subd. (a)). The July 2003 charges were later dropped for lack of proof.

At the dispositional hearing, the court adopted the probation department's recommendation that appellant be committed to CYA.

¹ L.S. and R.C. were A.A.'s cousins.

DISCUSSION

I. *Failure to Declare Three Offenses as Felonies or Misdemeanors*

Appellant contends the court erred by failing to expressly declare that the offenses of making criminal threats for the benefit of a criminal street gang (Pen. Code, §§ 422, 186.22, subd. (b)), participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)), and assault with a deadly weapon for the benefit of a criminal street gang (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)) were felonies or misdemeanors as required by Welfare and Institutions Code section 702. The Attorney General concedes that the three offenses underlying appellant's claim of error are "wobblers," and may be treated as either felonies or misdemeanors.

Welfare and Institutions Code section 702 provides in relevant part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or a felony." In *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204, the Supreme Court stated: "The language of [section 702] is unambiguous. It requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." "The requirement is obligatory: '[S]ection 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.' [Citations.]" (*Id.* at p. 1204.) Section 702 serves the dual purpose of "providing a record from which the maximum term of physical confinement for an offense can be determined, particularly in the event of future adjudications," (*id.* at p. 1205) and "ensuring that the juvenile court is aware of, and actually exercises, its discretion under [section] 702." (*Id.* at pp. 1207.) "[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*Id.* at p. 1208.) "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Id.* at p. 1209.)

California Rules of Court,² rules 1488(e)(5) and 1493(a)(1), implement this requirement in Welfare and Institutions Code section 702. Rule 1488, which lists the findings that must be made by the court after it finds true the allegations of the section 602 petition, provides in part: “(e)(5) . . . If any offense may be found to be either a felony or a misdemeanor, the court shall consider which description shall apply and shall expressly declare on the record that it has made such consideration, and shall state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing.” Rule 1493(a)(1), which governs disposition hearings states: “If the court has not previously considered whether any offense is a misdemeanor or felony, the court must do so at this time and state its finding on the record. If the offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and must expressly declare on the record that it has made such consideration and must state its finding as to whether the offense is a misdemeanor or a felony.”

The Attorney General concedes that the court made no express declaration that the three “wobblers” were felonies rather than misdemeanors at the jurisdiction or disposition phase of the hearing. The Attorney General argues, however, that because the Penal Code section 186.22, subdivision (b)³ enhancements appended to the criminal threats and assault with a deadly weapon counts could only be imposed if the underlying convictions were felonies, the court, by finding the section 186.22, subdivision (b) gang enhancements true, impliedly found that the underlying offenses were felonies. As to the

² All rule references are to the California Rules of Court.

³ Penal Code section 186.22, subdivision (b)(1) provides, in relevant part: “Except as provided in paragraphs (4) and (5) [indeterminate life term or life term with possibility of parole for certain enumerated felonies], any person who is convicted of a *felony* committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that *felony*, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows” (Italics added.)

substantive gang offense (§ 186.22, subd. (a)) (count 4 of the March 19 petition), the Attorney General argues “it seems highly unlikely, almost absurd, that the juvenile court would retain the gang enhancements for count 3 of the March 19 petition thus necessarily rendering the charge a felony, yet reduce the substantive gang offense in count 4, essentially based on the same evidence, to a misdemeanor.” The Attorney General’s logic begs the question whether the court was aware that it had discretion to treat the criminal threats and assault with a deadly weapon offenses as misdemeanors. If the court was unaware of its discretion to treat the two offenses as misdemeanors, it is possible that upon exercising its discretion it would have treated the section 422 and section 245, subdivision (a)(1) offenses as misdemeanors, and, necessarily, the section 186.22, subdivision (b) gang enhancements would not have attached. Rules 1488(e)(5) and 1493(a)(1) make clear that the juvenile court’s awareness of its discretion to treat “wobblers” as misdemeanors is not to be presumed and must be articulated by the court on the record.⁴

Our concerns are reinforced by actions taken by the court at the jurisdiction phase. There, after finding true one misdemeanor count of assault and two misdemeanor counts of battery, the court stated that it found the Penal Code section 186.22, subdivision (b) allegations true as to each of these misdemeanor counts. Only after the prosecutor informed the court that Penal Code section 186.22, subdivision (b) “applies only to felonies,” did the court strike the Penal Code section 186.22, subdivision (b) allegations as to those three counts. Given our determination, *post*, that the matter must be remanded for the court to consider whether to exercise its discretion pursuant to Welfare and Institutions Code section 731, subdivision (b), and out of an abundance of caution, on remand the juvenile court is directed to expressly declare whether the three “wobbler” offenses were sustained as misdemeanors or felonies, and, if appropriate, recalculate the

⁴ The petitions, the probation report and the court’s CYA commitment order refer to the three “wobbler” offenses as felonies. However, the form jurisdiction order does not indicate whether the three “wobblers” were felonies or misdemeanors.

maximum period of confinement accordingly. (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1210-1211.)

II. *Welfare and Institutions Code Section 731, Subdivision (b)*

Next, appellant contends the court failed to exercise its discretion in setting his maximum term of physical confinement pursuant to recently amended Welfare and Institutions Code section 731, subdivision (b) (hereafter section 731(b).) The statutory change to section 731(b) became operative on January 1, 2004, four months prior to appellant's disposition hearing. (See Stats. 2003, ch. 4, § 1, eff. Apr. 8, 2003, operative Jan. 1, 2004.)

With the added sentence italicized, Welfare and Institutions Code section 731(b), provides: "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.* This section does not limit the power of the Youth Authority Board to retain the minor on parole status for the period permitted by Section 1769."

A. *Waiver*

Preliminarily, the Attorney General argues that appellant has waived this issue by failing to raise it in the juvenile court, because the claim involved a sentence that was imposed in a procedurally or factually flawed manner. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354; accord, *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072.) We reject the waiver argument because appellant is not asserting that the court imposed the term of commitment in a procedurally or factually flawed manner. Appellant's argument is that the court failed to exercise its discretion under Welfare and Institutions Code

section 731(b) in setting the 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. [Citations.]” [Citation.]’ [Citation.]” (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1181-1182 (*Sean W.*) [no waiver of section 731(b) issue where court unaware of discretion in setting maximum term of confinement].)

As in *Sean W.*, the record supports appellant’s claim that the court was unaware that it had any discretion regarding the maximum term of commitment. It relied on the prosecutor’s calculation of a 16-year 2-month maximum term and imposed that term without considering any lesser term. We conclude the issue is not waived.

B. *The Merits*

Appellant argues that the amendment to Welfare and Institutions Code section 731(b) provides the juvenile court with discretion to impose a maximum term of commitment that is less than the statutory upper term for an adult offender. We agree with the published cases that have considered the new language in section 731(b) and its legislative history and have held that section 731(b) unambiguously gives the juvenile court discretion to fix a maximum commitment in CYA cases at less than the adult statutory maximum considering the individual facts and circumstances of the matter or matters before it. (See *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1533, 1543 (*Carlos E.*); *Sean W.*, *supra*, 127 Cal.App.4th at p. 1185.)

The Attorney General asserts that the added language of Welfare and Institutions Code section 731(b) is merely a clarification of existing law and a directive to the CYA that a ward cannot be physically confined beyond the maximum term set by the court, and that the only discretion the juvenile court has in setting the maximum term is (1) to declare a “wobbler” to be a misdemeanor or felony (§ 702); and (2) to decide whether to aggregate terms when there are multiple counts or petitions in order to extend the

maximum term of commitment. (§ 726, subd. (c).)⁵ It argues that appellant’s interpretation of section 731(b) would “conflict with, and essentially nullify” section 726, subdivision (c). This argument was rejected by both *Carlos E.* and *Sean W.* As *Carlos E.* discusses, section 726, subdivision (c) sets the upper limit for a term of confinement in all cases by requiring that the court may not order a minor held in confinement in excess of the maximum term of imprisonment that could be imposed on an adult. (*Carlos E., supra*, 127 Cal.App.4th at p. 1538; *Sean W., supra*, 127 Cal.App.4th

⁵ Section 726, subdivision (c) provides:

“If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term 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.

“As used in this section and in Section 731, ‘maximum term of imprisonment’ means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code or to consider time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled.

“If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the ‘maximum term of imprisonment’ shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code, which includes any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1 of the Penal Code, and Section 11370.2 of the Health and Safety Code.

“If the charged offense is a misdemeanor or a felony not included within the scope of Section 1170 of the Penal Code, the ‘maximum term of imprisonment’ is the longest term of imprisonment prescribed by law.

“‘Physical confinement’ means placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to Section 730, or in any institution operated by the Youth Authority.

“This section does not limit the power of the court to retain jurisdiction over a minor and to make appropriate orders pursuant to Section 727 for the period permitted by Section 607.”

at pp. 1186-1187.) Section 731(b) retains this requirement, but now permits the court to impose a maximum CYA commitment at less than the statutory maximum based on the facts and circumstances of the matter. (*Carlos E.*, at p. 1538.)

The Attorney General's arguments that appellant's interpretation of Welfare and Institutions Code section 731(b) would "inject an aspect of retributive punishment into the juvenile indeterminate disposition scheme" and raise equal protection challenges, have also been expressly rejected by *Sean W.*, which explained that the amendment to section 731(b) merely permits the juvenile court to set a shorter maximum term in CYA cases, but "does not otherwise alter the administrative system for assessment and determination of the timing of successful rehabilitation of the minor, and does not alter the purposes and goals of juvenile law." (*Sean W.*, *supra*, 127 Cal.App.4th at p. 1188.) In rejecting the identical equal protection claim that, in the absence of reasonably clear guidelines, the amendment to section 731(b) would permit juvenile courts across the state unfettered discretion to set different maximum terms of confinement for similarly situated minors, *Sean W.* reasoned that by permitting juvenile courts to tailor the maximum term to the "facts and circumstances" of each particular case, setting the maximum term under the amendment would lessen the likelihood of arbitrary treatment in CYA cases. (*Ibid.*)

Because the juvenile court failed to exercise its discretion to set a maximum term of confinement based on the facts and circumstances of the case, the matter must be remanded to permit the court to consider whether to exercise such discretion.

III. *The Court Miscalculated the Maximum Term of Confinement*

Appellant contends, and the Attorney General concedes, that the court mathematically miscalculated the maximum term of confinement as 16-years 2-months instead of 15-years 8-months. We agree and direct the court on remand, to mathematically recalculate the maximum period of confinement.

IV. *The Court Properly Aggregated The Petitions*

Appellant contends the record establishes that the court was misinformed by the prosecutor that the court was required to aggregate all sustained petitions.⁶ Appellant concedes he failed to object on this ground below, but argues that we should exercise our discretion to consider the issue rather than treat it as waived. (*See People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

Even assuming the issue is not waived, appellant's claim fails. Welfare and Institutions Code section 726, authorizes the juvenile court in its discretion, to aggregate multiple counts or multiple section 602 petitions, including previously sustained petitions. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.) In appellant's case, the April 2004 petition gave appellant the requisite notice of the People's intention to seek an increase of the maximum term of confinement by aggregating the terms of appellant's previously sustained petitions. (*See In re Michael B.* (1980) 28 Cal.3d 548, 554.) The court need not state its reasons in aggregating counts or petitions. (*In re Ismael A.* (1989) 207 Cal.App.3d 911, 913-914; *In re Jesse F.* (1982) 137 Cal.App.3d 164, 168.) Since the record does not establish that the court was unaware that the aggregation of prior sustained petitions was discretionary, no error is demonstrated.

V. *Custody Credits*

Appellant contends that at the May 7, 2004 disposition hearing, on the probation officer's recommendation, the court properly awarded appellant 526 days of custody credit. However, the court's June 7, 2004 commitment order to CYA credited him with only 495 days in custody. In addition, appellant argues that the commitment order failed to reflect the additional 31 days that he spent in secure custody between May 7 and June 7 before his transfer to the CYA. Thus, appellant asserts that the commitment order

⁶ In light of our determination that on remand the court should mathematically recalculate the maximum term of confinement, we need not address appellant's claim that the court failed to independently calculate the maximum term of confinement.

should be corrected to reflect 557 days of custody credit. The Attorney General concedes the error.

On remand, the court is ordered to direct the court clerk to correct the CYA commitment order.

DISPOSITION

This matter is remanded to the juvenile court for an express declaration pursuant to Welfare and Institutions Code section 702, the possible exercise of discretion pursuant to section 731(b), the mathematical recalculation of the maximum period of confinement; and the correction of the custody credits as reflected on the CYA commitment order. The disposition order is otherwise affirmed.

Simons, J.

We concur:

Jones, P.J.

Stevens, J.