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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re GIOVANNI W., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

GIOVANNI W.,

Defendant and Appellant.

A107070

(Alameda County  
Super. Ct. No. J179435)

In this juvenile delinquency case, Giovanni W. appeals from the dispositional order committing him to the California Youth Authority. Initially his counsel raised no issues and asked this court for an independent review of the record to determine whether there are any arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) After a preliminary review of the record, we requested briefing on whether the matter should be remanded to the juvenile court for a determination of the maximum term of confinement pursuant to Welfare and Institutions Code, section 731, subdivision (b). We are convinced that remand is required.

## BACKGROUND

Defendant has been a ward of the court since 2000, when he was not quite 13 years old and arrested for auto burglary. In July 2000, he admitted the burglary allegation of a petition filed under Welfare and Institutions Code section 602.<sup>1</sup> He was put on probation and kept at home with his mother. Later that year, defendant admitted a new offense of theft of retail merchandise, and he was continued on home supervision. Subsequently, he was arrested on new charges of theft and trespass, but no subsequent section 602 petition was filed on those charges. In December 2000, defendant admitted a new charge of possessing cocaine, and he was again kept in his mother's home under electronic monitoring. Defendant's school attendance was poor, and he faced school discipline for vandalism.

In August 2001 a supplemental petition under section 777 for a more restrictive placement was filed, and defendant admitted the new allegation that he had remained away from home without permission. Defendant was removed from his mother's home and placed at Nettle's Place, a group home.

Over the ensuing years defendant failed at numerous successive placements. He was terminated from Nettle's Place because of an incident at school and returned to juvenile hall to await a new placement. He was then placed in Unity Care in Santa Clara County, but he was terminated from that program because of an alleged battery and terrorist threats. No charges were filed, but defendant was returned to juvenile hall for a new placement. In March 2002 he was placed at Potter's House, but he was removed from that home after two weeks because he was disruptive and absent without leave. Defendant next went to Environmental Alternatives-Warner Mountain in Modoc County. He was terminated within a month because of an arrest for criminal threats against a teacher. In July 2002 he was sent to Aaron's Boys' Home, but he left the home without

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

permission. A section 777 petition was filed, and defendant admitted the absence without leave.

Defendant was then placed with Pathways for Change under a structured program with release to his mother's custody. In December 2002 a supplemental section 777 petition was filed alleging that defendant left his mother's home without permission and his whereabouts were unknown. In February 2003 a subsequent section 602 petition was filed alleging cocaine possession. Defendant admitted the drug offense, and the section 777 petition was dismissed. Defendant was sent to Camp Sweeney in April 2003. By June 2003 he had escaped, and a subsequent section 602 petition was filed alleging the escape (in violation of Penal Code section 871). Defendant admitted the allegation, and he was returned to Camp Sweeney.

In September 2003 defendant was terminated from Camp Sweeney for failing to return to camp on time after the Labor Day weekend. He was returned to juvenile hall, and a supplemental section 777 petition was filed. Defendant admitted the allegation of the petition, and defendant was eventually placed at Northern California Boys to Men, a group home in Richmond. Defendant proved difficult to place because he refused to enter a program that would require him to cut off his dreadlocks. In March 2004 defendant left the group home without permission. He was eventually arrested for possession of drugs for sale, but no charges were filed. A supplemental section 777 petition was filed, and defendant admitted the allegation of his absence from Northern California Boys to Men. Defendant was sent to Rites of Passage, a private institution, on April 29, 2004.

Just over a week later, defendant was terminated from Rites of Passage and returned to juvenile hall for refusing to cut his hair in compliance with the rules of the program. On May 20, 2004, a supplemental section 777 petition was filed, which is the subject of this appeal. Defendant, by this time nearly 17 years old, admitted that he

refused to comply with the haircut directive.<sup>2</sup> The juvenile court committed defendant to the California Youth Authority with a maximum term of confinement of 4 years, 6 months.

## DISCUSSION

Section 731 of the Welfare and Institutions Code limits the time that a minor can be physically confined in the Youth Authority. Previously, section 731 set that limit at “the maximum period of imprisonment which could be imposed upon an adult convicted of the offense . . . .” Operative January 1, 2004, section 731 was amended to change the limit to “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.)

Two published cases have considered the new language and have concluded that the amendment gives discretion to the juvenile court to set a term of confinement in the California Youth Authority at less than the maximum period of adult confinement. (*In re Sean W.* (2005) 127 Cal.App.4th 1177; *In re Carlos E.* (2005) 127 Cal.App.4th 1529.) The Attorney General concedes the point.

In the present case, the juvenile court simply set the maximum term of confinement without any apparent awareness that it had discretion to set a different term. The juvenile court’s failure to exercise discretion is not waived by the defendant’s failure to object below. (*In re Sean W., supra*, 127 Cal.App.4th at pp. 1181-1182.) The remedy is to remand the matter to the juvenile court for a new setting of the maximum term of confinement based upon the facts and circumstances that brought the defendant to the juvenile court. (*Id.* at p. 1189; *In re Carlos E., supra*, 127 Cal.App.4th at p. 1543.)

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<sup>2</sup> The section 777 petition also alleged that defendant had failed to follow program restrictions, but the petition was later amended to delete that language after the juvenile court found it too vague to give adequate notice of the charges.

The record suggests that the juvenile court might have exercised its discretion to set a term lower than the maximum. The juvenile court inquired of all parties whether there were any options available other than the Youth Authority, but no reasonable alternatives were proffered. Camp Sweeney and Rites of Passage both declined to take defendant back. Defense counsel suggested that defendant be returned to his mother's home, but the juvenile court did not find that a viable alternative. At the end of the hearing, the juvenile court asked defense counsel to keep in touch with defendant, apparently with the expectation that the court would entertain a request for a less restrictive placement should any options appear. We express no opinion on how the juvenile court should exercise its discretion.

#### DISPOSITION

The matter is remanded to the juvenile court with directions to set a maximum term of confinement in the California Youth Authority based on the facts and circumstances that brought defendant before the juvenile court. In all other respects, the judgment is affirmed.

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GEMELLO, J.

We concur.

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JONES, P.J.

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SIMONS, J.