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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re JERMAINE T., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

JERMAINE T.,
Defendant and Appellant.

A131668

(Alameda County
Super. Ct. No. SJ-10014738-02)

I.

INTRODUCTION

The minor in this juvenile delinquency case was eligible for deferred entry of judgment (DEJ), but there is no indication in the record that he, his mother, or his counsel were ever given notice of that fact. The applicable statutes and rules require the juvenile court to give such notice, and to consider the minor’s suitability for DEJ before entering a dispositional order. Because these requirements were not followed in this case, we vacate the juvenile court’s dispositional order, and remand for further proceedings.

II.

FACTUAL AND PROCEDURAL BACKGROUNDS

On March 10, 2011, Jermaine T. (Jermaine), then age 15, was searched at his high school, and found to be in possession of a concealed, loaded semiautomatic pistol (the gun). Jermaine was then arrested. He consented to a search of his home, where officers

found ammunition, extra magazines, and a Laser point attachment for the gun in his bedroom.

Jermaine had been arrested in March 2010 for possession of marijuana for sale. He was found to have possessed less than an ounce of marijuana (Health & Saf. Code, § 11357, subd. (c)), a misdemeanor, and was placed on probation for six months in his mother's custody.

Jermaine was not known to have been involved in any crimes involving theft or violence. Two of his friends had been killed shortly before he was apprehended with the gun, and he had witnessed one of the killings. As a result, he was suffering symptoms of posttraumatic stress syndrome, such as insomnia, flashbacks, and nightmares. Jermaine said he had found the gun and ammunition in a backpack at a bus stop, and kept them because they made him feel safer.

On March 11, 2011, the Alameda County District Attorney filed a delinquency petition regarding Jermaine under Welfare and Institutions Code section 602, subdivision (a). The petition alleged that Jermaine possessed a firearm in a school safety zone (Pen. Code, § 626.9, subd. (b)¹); carried a concealed weapon (former² § 12025, subd. (a)(2)); carried a loaded firearm in a public place (former § 12031, subd. (a)(1)); and possessed live ammunition (former § 12101, subd. (b)(1)).

The same day the petition was filed, the prosecutor filed a form (form JV-750) indicating that Jermaine was eligible for DEJ under Welfare and Institutions Code sections 790 et seq. In connection with Jermaine's earlier marijuana possession case, the

¹ All further undesignated statutory references are to the Penal Code.

² The former Penal Code sections under which Jermaine was charged have been repealed and reenacted under different section numbers, pursuant to legislation enacted in 2010, operative January 1, 2012, that "reorganize[d] without substantive change the provisions of the Penal Code relating to deadly weapons." (Legis. Counsel's Dig., Sen. Bill No. 1080, 10 Stats. 2010 (2009-2010 Reg. Sess.) Summary Dig., pp. 4137-4138.) The statutory reorganization has no bearing on the issues raised by this appeal.

prosecutor had also filed a form JV-750 (the 2010 form JV-750), indicating that Jermaine was eligible for DEJ in that case, but for reasons not appearing in the record prepared for this appeal,³ Jermaine was not granted DEJ in that case.

If a minor is found eligible for DEJ, there is a Judicial Council form, form JV-751, that is used to notify the minor and his or her parent or guardian. There is a box to check on the JV-750 form indicating that the JV-751 form is attached. In the present case, neither the 2010 form JV-750, nor the form JV-750 filed in connection with the firearm possession petition, had a check in that box, and no form JV-751 appears in the clerk's transcript prepared for this appeal. Nor does the clerk's record contain any proof that either form JV-750 or form JV-751 was served, in either of minor's cases, on minor, his mother, or his counsel.

The juvenile court held a detention hearing on March 14, 2011. At the outset of the hearing, Jermaine's counsel announced to the court that "[t]here's going to be a resolution regarding this matter," explaining that Jermaine would admit to the felony charge of carrying a concealed weapon (former § 12025, subd. (a)(2)), and the remaining counts would be dismissed. Jermaine's counsel explained to Jermaine the procedural rights he would be waiving by agreeing to admit the charge. Jermaine then admitted having possessed a concealed weapon, and counsel stipulated that there was a factual basis for the admission. After hearing arguments of counsel regarding detention, the

³ In the marijuana case, Jermaine admitted misdemeanor marijuana possession at a pretrial hearing, and the felony charges were dropped. Juveniles who commit misdemeanors are not entitled to DEJ. (See *In re Spencer S.* (2009) 176 Cal.App.4th 1315 [limitation of availability of DEJ to felons does not violate equal protection].) This is the most likely reason DEJ was not considered in Jermaine's earlier case. For that reason, we are not persuaded by respondent's argument that Jermaine may have been informed of his DEJ eligibility during the course of the proceedings in the marijuana case. Moreover, even if he was, he would not necessarily have been aware that he remained eligible for DEJ even after being arrested for weapon possession.

juvenile court ordered that Jermaine remain detained, and not return home pending disposition. At no point in the hearing did anyone mention Jermaine's eligibility for DEJ.

The disposition hearing occurred on March 28, 2011. The juvenile court judge indicated that he had reviewed the probation report, as well as letters from Jermaine and his counsel. Jermaine's counsel offered to produce character witnesses who would testify that the gun possession offense was an "isolated incident," but the judge said he had "heard that already." Jermaine's counsel asked if that meant "the court will not entertain a contested . . . ," and the judge interrupted, saying that he "did entertain it" but did not think it was "appropriate." The court ordered Jermaine removed from his home and placed in a family or group home under standard probation conditions, as recommended by the probation officer. This timely appeal ensued.

III.

DISCUSSION

Jermaine's principal contention on appeal is that the juvenile court failed to fulfill its statutory duty to determine, in the exercise of its discretion, whether to offer Jermaine the option of DEJ. Respondent does not dispute that the trial court failed to determine whether DEJ would be a suitable disposition for Jermaine, but argues that no such determination was required in the present case.

As respondent correctly points out, the statutory scheme requires DEJ-eligible minors to admit the allegations of the petition in order to be entitled to consideration for DEJ by the juvenile court. (*In re Kenneth J.* (2008) 158 Cal.App.4th 973 (*Kenneth J.*); *In re Usef S.* (2008) 160 Cal.App.4th 276 (*Usef S.*)) Respondent argues that DEJ was therefore not available to Jermaine, because he admitted only *some* of the allegations of the initial petition, pursuant to a negotiated resolution. Jermaine's position is that DEJ remains available to a DEJ-eligible minor who admits the allegations of a petition that has been amended, pursuant to a negotiated resolution, to reduce or eliminate some charges. In support of this position, Jermaine relies on *In re Joshua S.* (2011) 192

Cal.App.4th 670 (*Joshua S.*), a later decision by the same panel from Division Two of this district that decided *Kenneth J.* Respondent argues that *Joshua S.* is distinguishable, and that it was wrongly decided. We are not persuaded by respondent's arguments on either point.

In *Joshua S.*, *supra*, 192 Cal.App.4th 670, the minor was the subject of several petitions in different Bay Area counties, and found eligible for DEJ by the prosecution in each case. In two of the cases, the minor denied the allegations of the petition, and filed motions to suppress, one of which was denied, and the other of which was never heard. The petitions in both of these cases were amended, and the minor admitted the allegations of the respective petitions as amended. The cases were then transferred to a single county and consolidated for disposition. The juvenile court committed the minor to a youth facility, without considering whether DEJ was an appropriate disposition. (*Id.* at pp. 674-675.)

On appeal, the minor argued that he was entitled to an exercise of the juvenile court's discretion in determining whether he was suitable for DEJ, and that the court's failure to exercise that discretion warranted a reversal of its order. (See *Joshua S.*, *supra*, 192 Cal.App.4th at p. 675.) Respondent's contention was that a juvenile court is not required to consider DEJ unless the minor admits the allegations of the petition, as was held in *Kenneth J.*, *supra*, 158 Cal.App.4th 973 and *Usef S.*, *supra*, 160 Cal.App.4th 276.

Joshua S. found both *Kenneth J.* and *Usef S.* distinguishable, and reversed. The court acknowledged that the minor "did not initially admit the allegations of the petition," but noted that "neither did he insist on a jurisdictional hearing. Rather, he filed a motion to suppress evidence and, after it was denied, admitted a reduced charge." (*Joshua S.*, *supra*, 192 Cal.App.4th at p. 679.) The court was "not persuaded by respondent's assertion that the DEJ procedures require the minor to admit the charge initially alleged in the petition rather than a reduced one, as long as the admission *precedes* a contested jurisdictional hearing." (*Id.* at p. 680, original italics.) In so holding, the court followed

an earlier appellate decision, *In re A.I.* (2009) 176 Cal.App.4th 1426, which reversed a juvenile court's disposition based on the court's failure to consider DEJ when the minor agreed to admit the allegations of the petition immediately after the his motion to suppress was denied, and before the court proceeded to the contested jurisdictional hearing that had been scheduled to follow the hearing on the motion.

The rationale of *Joshua S.* was that although the applicable statute, Welfare and Institutions Code section 791, subdivision (a)(3), requires a minor, in order to be considered for DEJ, to “ ‘admit[] each allegation contained in the petition’ ” prior to the jurisdictional hearing, the statute “does not specify that the petition cannot be amended where . . . the amendment does not follow and is not the consequence of the minor contesting one or more of the allegations of the initial petition. [Citation.]” (*Joshua S.*, *supra*, 192 Cal.App.4th at p. 681.) Permitting a minor to admit the allegations of a petition amended under these circumstances is “consistent with the goal of expediting juvenile wardship proceedings and avoiding contested jurisdictional hearings,” whereas “making DEJ unavailable to a minor who admits an amended petition without contesting the allegations of the initial petition would not serve the [stated statutory] goal of increasing rehabilitation for first-time nonviolent offenders.” (*Ibid.*) We find this rationale persuasive, and therefore reject respondent's argument that *Joshua S.* was wrongly decided. Moreover, the holding and rationale of *Joshua S.* apply with even stronger force in the present case. Here, Jermaine admitted the allegations of the amended petition without contesting the original petition in any way, even by means of a motion to suppress.

We note also that in the cases on which respondent relies, the minors were given notice that they were eligible for DEJ, but would be considered for it only if they admitted the allegations of the petition. (See *Kenneth J.*, *supra*, 158 Cal.App.4th at pp. 978-980; *Usef S.*, *supra*, 160 Cal.App.4th at pp. 283-284, 286.) Thus, *Kenneth J.* and *Usef S.* stand for the proposition that a juvenile court is excused from its statutory duty to

determine a DEJ-eligible minor's suitability for DEJ if the minor—after receiving notice of his eligibility for DEJ—nonetheless rejects the possibility of DEJ by contesting the charges. Here, there is no evidence whatsoever in the record on appeal that Jermaine was ever advised of his eligibility for DEJ at any point in the proceedings. It cannot be said that Jermaine chose not to pursue DEJ when there is no indication that he was aware of his eligibility for it. Consequently, the juvenile court in this case was not excused from its mandatory statutory duty to consider whether Jermaine was suitable for DEJ. For the same reason, we are not persuaded by respondent's argument that by agreeing to a negotiated disposition other than DEJ, Jermaine effectively waived his right to have the juvenile court consider his suitability for DEJ.

Alternatively, respondent argues that because there is no affirmative evidence in the record that Jermaine did *not* receive such notice of his DEJ eligibility, he must be presumed to have received such notice. In support of that proposition, respondent cites the statutory presumption "that official duty has been regularly performed" (Evid. Code, § 664), and the maxim that a lower court's orders are presumed correct as to matters on which the record is silent. (See, e.g., *In re Julian R.* (2009) 47 Cal.4th 487, 498-499 [where record does not expressly reflect juvenile court's consideration whether minor should be sentenced to lower maximum term than authorized for adults, appellate court should presume that juvenile court followed law requiring such consideration].)

Here, however, we do not have a completely silent record. Rather, the record affirmatively reflects that *no* citation and notification regarding DEJ (form JV-751) was attached to the form JV-750 prepared by the prosecutor in *either* of Jermaine's cases. Moreover, no form JV-751 appears in the record, nor is there any evidence that the juvenile court served Jermaine or his mother with such a form, as by California Rules of Court, rule 5.800(c). In our view, the existence of these omissions, in the context of an otherwise complete record, is sufficient to rebut the presumption that Jermaine was properly advised of his DEJ eligibility either by the prosecutor or by the juvenile court.

(Cf. *People v. Sullivan* (2007) 151 Cal.App.4th 524, 548-551 (*Sullivan*) [where transcript of municipal court hearing on criminal defendant's self-representation motion was missing from record, appellate court presumed court gave defendant required advisements, but where record of superior court hearing was otherwise complete, and did not show defendant was readvised regarding self-representation by superior court, presumption did not apply].)

Respondent also notes that Jermaine was represented by counsel by the time of the detention hearing. Based on this fact, respondent argues we must presume that Jermaine's counsel was aware, and informed Jermaine, that the prosecutor had determined Jermaine was DEJ-eligible. (See *Sullivan, supra*, 151 Cal.App.4th at p. 549 [“ ‘Court and counsel are presumed to have done their duty in the absence of proof to the contrary’ ”].)

As respondent implicitly acknowledges, however, if Jermaine's trial counsel did *not* advise him regarding his eligibility for DEJ before Jermaine accepted the negotiated resolution to which he agreed, that omission could constitute grounds for a habeas corpus petition asserting ineffective assistance of counsel. In the interest of judicial economy, therefore, it is both appropriate and preferable for us to consider the matter on this direct appeal. (Cf. *In re Spencer S., supra*, 176 Cal.App.4th at p. 1323 [minor's equal protection claim should be addressed on merits, even though not raised in juvenile court, because otherwise it could “return as a habeas corpus petition alleging ineffective assistance of counsel”].)

In short, because the juvenile court did not conduct the necessary inquiry in to Jermaine's suitability for DEJ, we will set aside its findings and dispositional order, and remand the case for further proceedings in compliance with the statutory scheme. (See *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123-1124.) This result makes it unnecessary for us to address the other contentions Jermaine raises on appeal. (*Id.* at p. 1124, fn. 4.)

IV.
DISPOSITION

The juvenile court's findings regarding disposition, and the dispositional order, are VACATED. The matter is remanded for further proceedings, including notice to the minor of his eligibility for deferred entry of judgment, as required by Welfare and Institutions Code section 791, and, if the minor so requests, for exercise of the trial court's discretion regarding whether or not to grant the minor deferred entry of judgment.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.