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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.P., a Person Coming under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.P.,

Defendant and Appellant.

A132245

(Contra Costa County
Super. Ct. No. J11-00630)

Appellant E.P. was adjudged a ward of the court after entering a plea of no contest to a charge that he was a minor in possession of a handgun. On appeal, he contends the juvenile court erred in denying his motion to suppress, failed to follow statutorily mandated procedures for determining his suitability for deferred entry of judgment, imposed gang-related conditions of probation that are unconstitutionally overbroad and vague, and failed to calculate his maximum term of confinement and award predisposition custody credit. We conclude the motion to suppress was properly denied but agree with appellant that the matter must be remanded for the juvenile court to conduct a hearing to consider appellant’s suitability for deferred entry of judgment.

PROCEDURAL BACKGROUND

The Contra Costa County District Attorney filed a juvenile wardship petition pursuant to Welfare and Institutions Code¹ section 602 on April 12, 2011, charging appellant with

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

being a minor in possession of a firearm (Pen. Code, former § 12101, subd. (a)(1), as amended by Stats. 2008, ch. 698) and carrying a loaded firearm not registered to appellant (Pen. Code, former § 12031, subd. (a)(2)(F), as amended by Stats. 2009, ch. 288, § 1). The district attorney also filed Judicial Council Form JV-750, which reflected that appellant satisfied the eligibility criteria to be considered for deferred entry of judgment (hereafter DEJ) pursuant to section 790 et seq.

At a pretrial hearing on April 20, 2011, appellant's counsel requested to have appellant screened for DEJ and also asked to set the matter for a suppression hearing. The court denied the request to screen for DEJ. The court set the matter for a further hearing on May 5 to consider appellant's suppression motion and to conduct a contested jurisdictional hearing.

The court denied the motion to suppress following a hearing on May 5, 2011. Appellant then pleaded no contest to the charge of being a minor in possession of a firearm. The court dismissed the remaining charge on the prosecutor's motion.

At the disposition hearing, the juvenile court adjudged appellant a ward of the court and committed him to the Orin Allen Youth Rehabilitation Facility for a six-month regular program plus an additional 90-day conditional release period. The court imposed gang-related conditions of probation in addition to other probationary conditions. Appellant filed a timely notice of appeal.

DISCUSSION

1. *Motion to Suppress*

Appellant contends the juvenile court erred in denying his motion to suppress. For the reasons that follow, we conclude the juvenile court did not err.

A. *Evidence Introduced at Suppression Hearing*

The evidence considered by the juvenile court in ruling on appellant's suppression motion consisted of the testimony of Richmond police officer Matthew Stonebraker. He testified he was part of the Violence Suppression Unit that was formed following a rash of shootings. He was assigned to patrol high crime areas, which he said were "normally" apartment complexes. For the previous two years, Officer Stonebraker's beat had included the large Barrett Apartment Complex (complex), which was an enclosed apartment complex with locked gates. Officer Stonebraker testified that he had previously "made a gun arrest

around [the complex].” He also testified that “gang-affiliated guys” walked through the complex “all the time,” and that a shooting had occurred nearby a couple of weeks earlier.

Each week, Officer Stonebraker met with the complex’s property manager, who told him she had a lot of problems with loitering issues and “people and young kids that do not live in the complex.” She asked the officer “to do security checks throughout the apartment area” in order to identify trespassers and escort them from the property. Officer Stonebraker explained that the complex had a strict policy requiring nonresidents to be accompanied by a resident of the complex.

At around 6:00 p.m. on April 8, 2011, while it was still daylight, Officer Stonebraker and his partner were conducting a foot patrol at the complex. The officers were in full uniform. Officer Stonebraker observed a group of people attending a party. He also saw two African-American males described as juveniles standing in a grassy area inside the gated area of the complex at least 50 feet from the partygoers. Based on the pair’s distance from the party and the fact they were not communicating with anyone from the party, Officer Stonebraker concluded they were not associated with the partygoers. The youths were standing “just on the other side” of where a shooting had taken place a “couple” weeks earlier.² One of the youths was appellant, who appeared to be approximately 5’6” tall and weighed about 300 pounds.

The two individuals caught Officer Stonebraker’s attention because they “immediately turned in the opposite direction and began to walk away” after making eye contact with the officers. Officer Stonebraker also said that their “baggy” or “bulky” clothing attracted his attention. Appellant was wearing a long, multi-colored, loose-fitting polo shirt that covered the waistband of his jeans. Officer Stonebraker was concerned because of “gun-related issues” and because “you can conceal a weapon with baggier clothes.”

When Officer Stonebraker’s partner was within about 15 feet of the youths, he called out, “Hey, do you guys live here?” Appellant and his companion turned around and replied,

² Officer Stonebraker clarified that the shooting took place on the “front of the 400 block of 8th Street,” whereas the youths were standing in an area “just at the rear of the 400 block, 8th Street.”

“No.” Appellant claimed to be visiting his cousin. However, appellant was not with his cousin.

Officer Stonebraker’s partner asked the youths to have a seat and told them they were being investigated for trespassing. Neither officer drew his weapon or yelled at the youths, although Officer Stonebraker’s partner used a firm tone of voice when he instructed them for a second time to sit down. Appellant and his companion complied and sat down. Once the youths were seated, Officer Stonebraker pat-searched appellant for weapons, while his partner pat-searched the companion. Officer Stonebraker testified that he pat-searched appellant because “[a]t that point he’s in violation of trespassing.” While patting appellant down on his right side, Officer Stonebraker said he felt “a hard object in [appellant’s] right-front pant pocket.” After he got a better grip on the object, he could tell it was a firearm and removed it from the pocket.

The juvenile court denied the motion to suppress after hearing argument from counsel. The court reasoned the initial contact was fine but that “the crux of the issue” was whether the pat search was justified. Pointing out that the minors were detained in a high-crime area and that appellant was wearing a shirt that covered his waistband, the court concluded the pat search was lawful. The court also focused on the minors’ “furtive movement” after they made eye contact with the officers.

B. Analysis

A minor may move to suppress evidence obtained as a result of an unlawful search or seizure. (§ 700.1.) In reviewing a ruling on a motion to suppress, we “ ‘review[] the evidence in a light favorable to the trial court’s ruling. [Citation.] We must uphold those express or implied findings of fact by the trial court which are supported by substantial evidence and independently determine whether the facts support the court’s legal conclusions.’ [Citation.]” (*In re William V.* (2003) 111 Cal.App.4th 1464, 1468; accord *People v. Maury* (2003) 30 Cal.4th 342, 384.)

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel. (U.S. Const., 4th Amend.; *Terry v. Ohio* (1968) 392 U.S. 1, 8-9 (*Terry*); *People v. Maury, supra*, 30 Cal.4th at p. 384.) However, an officer may stop and briefly detain a person for investigative purposes if the officer has a reasonable

suspicion, supported by specific and articulable facts, that criminal activity is afoot and that the person to be stopped is engaged in that activity, even if the officer lacks probable cause to arrest. (*Terry, supra*, 392 U.S. at pp. 21-22; *Illinois v. Wardlow* (2000) 528 U.S. 119, 123.)

In addition, when an officer detains an individual, the officer may conduct a pat search of the person's outer clothing if the officer has an objectively reasonable suspicion that the person is armed and dangerous, regardless of whether the officer has probable cause to arrest. (*Terry, supra*, 392 U.S. at pp. 27, 30; *People v. Lopez* (2004) 119 Cal.App.4th 132, 135-136.) The test for a pat search is whether "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger. [Citations.]" (*Terry, supra*, 392 U.S. at p. 27.) It is unnecessary for the officer to be "absolutely certain" the individual is armed. (*Ibid.*) The determination whether an officer had reasonable suspicion to frisk for weapons is based on the totality of the circumstances. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.)

Here, appellant does not challenge the propriety of the detention to investigate a possible trespass. Rather, he claims the officer's reasonable suspicion he was trespassing, while sufficient to justify a brief investigatory detention, did not justify the pat search. According to appellant, the totality of the circumstances did not support a reasonable suspicion he was armed and dangerous. We disagree.

The analysis in *In re H.M.* (2008) 167 Cal.App.4th 136 is instructive. There, a Los Angeles police officer assigned to a gang detail was patrolling a high crime area where an apparent gang-related shooting had occurred the previous day. The area was considered a gang stronghold. The officer observed 14-year-old H.M. run across the street through heavy traffic. H.M. was "sweating profusely and kept 'looking back.'" (*Id.* at p. 140.) He looked nervous and confused and appeared to be "'trying to get away from something.'" (*Ibid.*) The officer "immediately detained [the minor] for crossing the street illegally, but was 'more concerned' about why [he] was running." (*Id.* at p. 141.) Although the detaining officer had no prior contacts with the minor, another officer mentioned H.M.'s name in a conversational tone while H.M. was running, allowing the detaining officer to conclude the other officer had contacts with H.M. in the past. The officer who detained H.M. for the traffic violation

conducted a pat search and found a semiautomatic handgun in the minor's front pocket. (*Ibid.*)

The appellate court in *In re H.M.* concluded the initial detention was clearly lawful. (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 142.) Nevertheless, much like appellant in this case, H.M. contended the subsequent pat search violated the Fourth Amendment, arguing that the stop for a traffic infraction justified no more than being told why he was stopped and being issued a citation before being allowed to leave. (*Ibid.*) The Court of Appeal disagreed, concluding that “specific, articulable facts supported the detective’s reasonable belief that H.M. had been involved in a crime, and was likely armed.” (*Id.* at p. 148.) As the court observed, H.M. was stopped because of his unusual and suspicious behavior, and not merely because he had committed a minor traffic violation. (*Id.* at p. 144.) Further, the court noted the stop occurred in a high crime area known to be a gang stronghold. (*Id.* at p. 145.) The court found the location “an especially significant factor,” observing that “[o]fficers in an area plagued by violent gang activity need not ignore the reality that persons who commit crimes there are likely to be armed.” (*Id.* at p. 146.) According to the court, “[w]hen an officer observes conduct giving rise to a reasonable suspicion an individual is involved in criminal activity, and that activity occurs in an area known for recent, violent gang crime, these facts together go a long way toward establishing reasonable suspicion the individual is armed.” (*Id.* at p. 147.)

In this case, appellant was lawfully detained in a high crime area known to be frequented by gang members, where a shooting had taken place nearby just a few weeks earlier. “To be sure, the mere fact a person is located in a high crime area when stopped by police does not, by itself, give rise to a reasonable suspicion that the individual is armed. [Citations.]” (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 145.) However, it is well settled that the locale of the detention is a relevant consideration in assessing the totality of the circumstances supporting an officer’s reasonable suspicion. (*Ibid.*; *Illinois v. Wardlaw*, *supra*, 528 U.S. at p. 124.) The concern about the locale being a high crime area was amplified by the facts that there had been a recent shooting and that gang members frequented the area.

Appellant argues that trespassing is not the kind of crime in which an offender would likely be armed. The same could be said for the minor jaywalking offense that triggered a detention and pat search in *In re H.M.* Just as in that case, it is the totality of the circumstances surrounding the violation of the law, and not the violation itself, that justified a pat search. The officer suspected appellant of trespassing in a gated community frequented by gang members and located in a high crime area. Despite appellant's claim he was visiting his cousin, he was not accompanied by his cousin. Further, there is no indication he was either on his way to, or coming from, his cousin's apartment. Instead, he and his companion were standing in a grassy area that permitted them to observe partygoers nearby.³ The issue was not simply that they were committing a relatively inconsequential property rights violation by trespassing on the complex grounds. There was plainly a concern about why they were there and what they intended to do.

In addition, when the minors made eye contact with the police officers, they immediately turned and walked away. When considered along with all of the other circumstances presented here, this immediate reaction gives rise to an inference that appellant and his companion had some concern about an encounter with the police. While their actions may have simply reflected a desire to avoid the police, they also could have been interpreted to reflect a desire to avoid exposing evidence of criminality. Appellant argues this behavior does not create a reasonable suspicion that he and his companion were armed, citing authority for the proposition that individuals are free to ignore or walk away from police. (See *People v. Bower* (1979) 24 Cal.3d 638, 647-649; see also *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 234.) We do not suggest the minors' furtive behavior, by itself, justified the detention or subsequent pat search. Nervous or evasive behavior, without more, may not justify a detention or a pat search, but it is a pertinent factor to be considered in assessing reasonable suspicion. (*In re H.M.*, *supra*, 167 Cal.App.4th at p. 144; accord *Illinois v. Wardlow*, *supra*, 528 U.S. at p. 124.)

³ As appellant points out, the officer who testified at the suppression hearing did not say he observed appellant and his companion surveilling or watching the partygoers, despite claims to the contrary in the Attorney General's brief.

The officer who conducted the pat search also expressed a concern that appellant and his companion wore baggy, loose-fitting clothing in which a gun might be concealed. Although police do not have “carte blanche to pat down anyone wearing baggy clothing,” the wearing of baggy clothing coupled with other suspicious circumstances may justify a protective pat search. (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1377, fn. 1.) Appellant contends there was nothing unusual about his attire or the fact his shirt was untucked, particularly in light of his girth. While that may be true, the officer was not constrained to disregard possible risks simply because appellant may have elected to wear baggy clothing as a popular fashion choice or to accommodate his size. Under the circumstances here, appellant’s loose-fitting clothing gave rise to a reasonable suspicion that he may have been concealing a weapon, particularly in light of the officer’s concern about gun violence and gang activity in the neighborhood.

Appellant argues the officer conducted the pat search “as a matter of routine,” and without reasonable, individualized suspicion that appellant was armed. He claims the officer said nothing during the suppression hearing that suggested appellant was armed with a weapon. To the contrary, Officer Stonebraker specifically expressed a concern that appellant and his companion were wearing loose-fitting clothing that could be used to conceal a weapon, a concern that was particularly acute in light of a recent, nearby shooting and the presence of gang members in the neighborhood. While it is true the officer responded that he searched appellant because “he’s in violation of trespassing,” the entirety of his testimony establishes that he had a reasonable belief appellant and his companion may have been armed and presented a potential risk to the safety of the officers.

When considered in their totality, the circumstances support the officer’s reasonable suspicion that appellant was likely armed. In reaching this conclusion, we are mindful that “[t]he judiciary should not lightly second-guess a police officer’s decision to perform a pat-down search for officer safety.” (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) The Fourth Amendment cannot be interpreted “to require that police officers take unnecessary risks in the performance of their duties.” (*Terry, supra*, 392 U.S. at p. 23.) The pat search here was properly limited in scope to the protective purpose of allowing the officer to pursue his investigation without fear of violence. (See *Adams v. Williams* (1972) 407 U.S. 143,

146.) Accordingly, we conclude the juvenile court did not err in denying appellant's motion to suppress.

2. *Deferred Entry of Judgment*

Appellant contends the juvenile court erred in refusing to screen him for DEJ, a refusal that amounted to a summary denial of DEJ without a suitability hearing. As we explain, we agree with appellant that the matter must be remanded to allow the juvenile court to conduct a hearing on appellant's suitability for DEJ.

A. *Procedural Background*

At the time the wardship petition was filed on April 12, 2011, the district attorney also filed Judicial Council form JV-750, which addresses a juvenile's eligibility for DEJ. The district attorney checked all of the boxes on the form supporting a finding that appellant was statutorily eligible for DEJ. (See § 790, subd. (a).) Although the district attorney failed to check the box on the form indicating that appellant was eligible for DEJ—and likewise failed to check the box indicating he was ineligible—there appears to be no dispute that appellant was statutorily eligible for DEJ.

On April 13, 2011, the juvenile court ordered appellant detained and set the matter for a further hearing on April 20. At the pretrial hearing conducted on April 20, appellant's attorney began by asking the court for two things—(1) to have appellant screened for DEJ and (2) to set the matter for a suppression hearing. The following colloquy ensued:

“THE COURT: Are guns allowed to be screened for deferred entry of judgment?”

“[PROBATION OFFICER]: It would not be. I was looking to see if we had already done that. But I know that the [Probation] Department would not recommend that, your Honor.

“[PROSECUTOR]: I believe that they can be screened. They are not statutorily excluded but - -

“THE COURT: I want you to know that I would feel too limited in whatever rehabilitation I could do for this minor on deferred entry of judgment. If I felt that there's some custody time, I would be prohibited from that. And given the seriousness of these charges, a loaded gun, I am not going to have him screened for deferred entry of judgment.”

After the court denied the request to screen for DEJ, no further mention was made of DEJ until appellant filed his notice of appeal, in which he listed “[d]enial of request for DEJ screening” as one of the orders from which he was appealing.

B. Analysis

The statutory framework for DEJ, found in section 790 et seq., was enacted in March 2000 as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558 (*Martha C.*)) Under the DEJ scheme, a minor who meets certain requirements may, “in lieu of jurisdictional and dispositional hearings, . . . admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)” (*Martha C., supra*, at p. 558.)

As reflected in a non-codified “Findings and Declarations” section of Proposition 21, the DEJ scheme is intended to give first-time, non-violent juvenile felons the opportunity to admit guilt and be held accountable but also demonstrate through good conduct and compliance with court-monitored treatment programs that the record of the offense should be expunged. (*Martha C., supra*, 108 Cal.App.4th at p. 561.) These findings “express not only a strong preference for rehabilitation of first time non-violent juvenile offenders but suggest that under appropriate circumstances DEJ is required. This strong preference for rehabilitation and the limitation on the court’s power to deny delayed entry of judgment are reflected in the procedures used in considering DEJ.” (*Ibid.*; see also *In re Joshua S.* (2011) 192 Cal.App.4th 670, 675-676; *In re A.I.* (2009) 176 Cal.App.4th 1426, 1432.)

A minor may not be considered for DEJ unless he or she satisfies the eligibility criteria contained in section 790, subdivision (a). (See *Martha C., supra*, 108 Cal.App.4th at p. 560.)

As a general matter, in order to be eligible for DEJ, a minor must be a first-time felony offender and must be charged with a nonviolent felony offense.⁴

The district attorney makes the initial determination concerning a minor's eligibility for DEJ. (See § 790, subd. (b); Cal. Rules of Court,⁵ rule 5.800(b)(1); *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1122.) The district attorney is required to review the minor's file to assess eligibility for DEJ before filing a wardship petition charging a felony, or as soon as possible after filing. (Rule 5.800(b)(1); see § 790, subd. (b).) If the minor meets the requirements of section 790, subdivision (a), the district attorney must give notice of the minor's eligibility by filing Judicial Council form JV-750 along with the wardship petition.⁶ (Rule 5.800(b)(1); see § 790, subd. (b).)

An eligibility determination does not automatically entitle a minor to be admitted to the DEJ program. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 605; see also *Martha C.*, *supra*, 108 Cal.App.4th at p. 560.) It remains for the juvenile court to exercise its discretion to determine whether an eligible minor is also suitable for DEJ. (§ 790, subd. (b); Rule 5.800(b)(2), (d).)

The trial court “has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of the factors specified in [rule 5.800(d)(3)] and section 791, subdivision (b), and based upon the ‘standard of whether the minor will derive benefit from ‘education, treatment, and rehabilitation’ rather than a more restrictive commitment. [Citations.]” ’ [Citation.]” (*In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) “The court

⁴ Subdivision (a) of section 790 provides that a minor is eligible for DEJ if charged with a felony offense and all of the following circumstances exist: “(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.”

⁵ All further rule references are to the California Rules of Court.

⁶ The district attorney must also file form JV-750 if it is determined the minor is ineligible for DEJ. (Rule 5.800(e).)

may grant DEJ to the minor summarily under appropriate circumstances ([rule 5.800(d)]), and if not must conduct a hearing at which ‘the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.’ [Citation.]” (*In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) Although the court retains discretion to deny DEJ to an eligible minor, it has a mandatory duty “to either summarily grant DEJ or examine the record, conduct a hearing, and make ‘the final determination regarding education, treatment, and rehabilitation’ [Citations.]” (*Ibid.*) “The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold eligibility determination is made. [Citation.]” (*Ibid.*)

The minor must enter an admission to the charges in the petition before being admitted to DEJ. (§ 791, subd. (b); rule 5.800(f)(1).) A minor may not be admitted to DEJ if he or she pleads no contest. (See rule 5.800(f)(1).)

Although a court may offer to hold a hearing to consider a minor’s suitability for DEJ, it cannot impose DEJ upon a minor who does not consent. (*In re Kenneth J.* (2008) 158 Cal.App.4th 973, 979 [“some measure of consent” required].) Conversely, the juvenile court is not required to conduct a DEJ suitability hearing if the minor “evinces no interest whatsoever in that option.” (*Id.* at p. 980.) A minor cannot insist upon a jurisdictional contest and then, upon appeal from an unfavorable ruling, insist that the court should have considered the minor for DEJ. (*Ibid.*; see also *In re Usef S.* (2008) 160 Cal.App.4th 276, 285-286.) Because one goal of DEJ is to channel “certain first-time offenders away from the full panoply of a contested delinquency proceeding,” that goal would be frustrated by allowing a minor to exercise every procedural protection and then fault the court for not permitting the minor to do so. (*In re Kenneth J.*, *supra*, 158 Cal.App.4th at p. 980.) A caveat to this principle is that a minor may pursue a motion to suppress and accept DEJ after the suppression motion is denied. (*In re Joshua S.*, *supra*, 192 Cal.App.4th at pp. 680-681; *In re A.I.*, *supra*, 176 Cal.App.4th at p. 1434.)

In this case, there appears to be no dispute that appellant was statutorily eligible for DEJ. Although a minor charged with various felonies or enhancements associated with the

use of a firearm is ineligible to be considered for DEJ (see § 790, subd. (a)(2); see also § 707, subd. (b)(15), (17), (28)), an offense charging mere *possession* of a firearm does not render a minor who otherwise satisfies the statutory requirements ineligible for DEJ.

Appellant sought two things—to pursue a suppression motion and to be considered for DEJ if the motion were denied. By pursuing the motion to suppress, appellant did not waive his right to be considered for DEJ. (*In re A.I.*, *supra*, 176 Cal.App.4th at p. 1434.) Nevertheless, the court refused to screen appellant for DEJ, reasoning that its rehabilitation options would be too limited. According to appellant, the court’s ruling amounted to a summary denial of DEJ without a hearing.

In the case of a minor who seeks to be considered for DEJ, or who otherwise consents to DEJ, the juvenile court has two choices. It can either summarily grant DEJ, or it can set the matter for a hearing to consider the minor’s suitability. (§ 791, subd. (b); rule 5.800(d); *In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) If the court chooses to set a hearing, it has discretion whether to order the probation department to prepare a report in advance of the hearing. (See § 791, subd. (b); rule 5.800(d)(3).) However, regardless of whether the court directs preparation of a report, it “must conduct a hearing at which ‘the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.’ [Citation.]” (*In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123; see rule 5.800(f).)

Because the juvenile court was not obligated to direct the probation department to prepare a report, we might be tempted to conclude the court acted within its discretion in denying the request to “screen” appellant for DEJ, to the extent “screening” refers solely to the function performed by the probation department. However, the court did not merely deny a request to prepare a report. Rather, the court effectively ruled that it would not consider appellant for DEJ. Indeed, the Attorney General agrees the court denied DEJ and does not suggest the ruling was limited to report preparation.

The Attorney General contends the court properly exercised its discretion in denying DEJ at the pre-trial hearing, pointing to the court’s reference to the lack of rehabilitation options in DEJ. We disagree. The DEJ procedure plainly contemplates that the court will set

a hearing at which it must consider all “relevant material” provided by the prosecutor, the probation department, the minor, and any other interested parties. (Rule 5.800(f).) In addition, the statutory scheme requires the court to provide notification of the suitability hearing and direct the custodial parent, guardian, or foster parent of the minor to appear.⁷ (§ 792.) In ruling on a minor’s suitability, the court must base its exercise of discretion on whether the minor will derive benefit from “education, treatment, and rehabilitation efforts” available in DEJ rather than a more restrictive commitment. (§ 791, subd. (b); rule 5.800(g)(2); *In re Sergio R.*, *supra*, 106 Cal.App.4th at p. 607; *Martha C.*, *supra*, 108 Cal.App.4th at p. 562.)

The brief colloquy that followed the request for DEJ screening did not satisfy the court’s obligation to conduct the hearing contemplated by the DEJ statutory scheme. The court summarily denied the request without considering the educational, treatment, and rehabilitation options that were available to appellant. Although the court referred briefly to inadequate rehabilitation options in DEJ, there is no indication what those options were or what the court considered. Further, at that point in the proceedings, it was unclear what the court knew about the case beyond the allegations in the wardship petition. There is no indication the probation department submitted anything to the court before the hearing, and the court acknowledged it did not know all the facts. Likewise, the prosecutor—who was not give the opportunity to state a position on whether DEJ was appropriate—admitted she had not read all the reports. While the circumstances of a crime may indicate a minor is not amenable to rehabilitation (*Martha C.*, *supra*, 108 Cal.App.4th at p. 562), there is nothing to suggest the court was fully aware of either the circumstances of the crime, appellant’s social history, or the available treatment options at the time it denied DEJ. A fair reading of the court’s ruling suggests the court believed minors charged with firearm possession offenses are unsuitable for DEJ. While we do not suggest a juvenile court should grant DEJ to a minor charged with a firearm possession offense, we are in no position to say that minors charged with such offenses are categorically unsuitable for DEJ. There may be cases in which the

⁷ Judicial Council form JV-751 serves the purpose of setting a hearing on a minor’s suitability for DEJ and notifying interested parties of their right to participate.

facts of the possession offense, taken together with the minor's social history and available treatment options, make DEJ an appropriate disposition.

The Attorney General contends appellant was not suitable for DEJ because he had not admitted the allegations of the petition. The Attorney General also argues that appellant effectively rejected DEJ by requesting a suppression hearing combined with a contested jurisdictional hearing. These arguments lack merit.

A minor must admit the allegations of the petition before a court may summarily grant DEJ. (§ 791, subd. (b).) In addition, if a hearing is conducted and the minor is found suitable for DEJ, the minor must admit the allegations before the court may order DEJ. (Rule 5.800(f)(1).) However, there is no requirement that a minor must admit the allegations of the petition before being considered for DEJ.⁸ (See, e.g., *In re Sergio R.*, *supra*, 106 Cal.App.4th at p. 600 [minor admitted allegations only after being found unsuitable for DEJ].) Further, the court did not premise its denial of DEJ on appellant's failure to admit the allegations. In any event, appellant could not be expected to admit the allegations before the court had even considered his suppression motion.

As for the contention that appellant effectively rejected DEJ by insisting on a combined suppression and contested jurisdictional hearing, the argument is incorrect as both a factual and legal matter. It was only after the court denied DEJ that it set the matter for a combined hearing. Further, it was the court and the prosecutor who insisted upon the combined hearing, despite the expressed preference of appellant's counsel to set the matter for a suppression hearing only. Appellant's counsel believed a contested jurisdictional hearing was unnecessary because his client would likely enter a dispositive plea if the suppression motion were denied. The Attorney General correctly notes that a minor cannot take advantage of DEJ if the minor expresses no interest in DEJ and insists upon a contested jurisdictional hearing. (*In re Usef S.*, *supra*, 160 Cal.App.4th at pp. 285-286, *In re Kenneth J.*, *supra*, 158 Cal.App.4th at p. 980.) Here, however, appellant's counsel clearly expressed his client's interest in DEJ. In addition, he did not insist on a contested jurisdictional hearing.

⁸ In *Martha C.*, *supra*, 108 Cal.App.4th at p. 559, the minor admitted the allegations before the suitability hearing with the understanding she could withdraw her admissions if the court found her unsuitable for DEJ.

Even if he had requested a combined suppression and contested jurisdictional hearing, he still would have been entitled to pursue DEJ as an option if he had made a request for that disposition after denial of the suppression motion but before commencement of the jurisdictional hearing. (See *In re A.I.*, *supra*, 176 Cal.App.4th at p. 1436.)

It is of no consequence that appellant failed to renew his request for DEJ after the court denied his suppression motion. Because the court had already denied the request for DEJ, it would have been futile to renew the request or make further objection. (Cf. *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177.) Moreover, appellant's no contest plea did not constitute a waiver of his right to be considered for DEJ, because he entered the plea *after* the court had already denied DEJ.⁹ (Cf. rule 5.800(f)(1) [DEJ requires admission; no contest plea is unacceptable].)

Under the circumstances presented here, we conclude it was an abuse of discretion to summarily deny DEJ. We are mindful that the record strongly suggests the juvenile court would be inclined to deny DEJ, even after a full and fair hearing on the issue. Nevertheless, the court's failure to hold a hearing is not subject to a harmless error analysis. When a minor is deprived of the opportunity for a hearing and deprived of fundamental procedural rights, reversal is compelled. (*Adoption of Baby Girl B.* (1999) 74 Cal.App.4th 43, 55; see also *In re Ronnie P.* (1992) 10 Cal.App.4th 1079, 1091.) The proper remedy is to vacate the jurisdictional and dispositional orders with directions to conduct a hearing and consider appellant's suitability for DEJ. (See *In re Joshua S.* *supra*, 192 Cal.App.4th at p. 682; *In re A.I.*, *supra*, 176 Cal.App.4th at p. 1437.) If, upon remand, the court denies DEJ, it shall

⁹ Unlike an appeal following a plea in an adult criminal case, where the issues on appeal are generally limited to matters occurring after the plea unless the appellant secures a certificate of probable cause, there is no such requirement to obtain a certificate of probable cause in a juvenile case. (*In re Joseph B.* (1983) 34 Cal.3d 952, 959-960.) Appellant's challenge to the denial of DEJ is properly before us even though appellant subsequently entered a no contest plea.

reinstate the jurisdictional and dispositional orders.¹⁰ (*In re Luis B.*, *supra*, 142 Cal.App.4th at pp. 1123-1124.)

In light of our disposition of the DEJ issue, is it technically unnecessary to address appellant's remaining contentions, which would be rendered moot if the court grants DEJ. (*In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1124.) Nevertheless, because the court has the option to reinstate the jurisdictional and dispositional orders, we address them briefly below to avoid the need for any further appeal of those matters if the court reinstates the orders.

3. *Gang-Related Probation Conditions*

Appellant contends that probation conditions prohibiting him from wearing gang clothing or gang colors, associating with gang members, and participating in gang activities are unconstitutionally vague because they lack a "knowledge" requirement and do not define precisely what is prohibited. He also asserts the conditions are unconstitutionally overbroad because they impermissibly restrict his due process right to choose his clothing and personal appearance.

Section 730, subdivision (b) provides that the court may impose "any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." A juvenile court has broader discretion than an adult court in fashioning appropriate probation conditions. However, that discretion is not boundless. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "Under the void for vagueness doctrine, based on the due process concept of fair warning, an order "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' [Citation.]" (*Ibid.*) "In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.]" (*Ibid.*)

¹⁰ The direction to reinstate the jurisdictional and dispositional orders does not preclude the juvenile court from modifying the dispositional order upon a showing of changed circumstances or new evidence. (See § 778.)

Here, the probation officer reported that appellant admitted to juvenile hall staff that he associates with the “Deep C” gang in Central Richmond. Although appellant denied gang affiliation when interviewed by his probation officer, the officer researched appellant’s Facebook page and found pictures of appellant, some of which had the words “Deep C” written across them or identified appellant as “Assassin.” The probation officer recommended the imposition of gang-related conditions of probation, the text of which the officer included in the probation report. The court adopted the recommendation and read into the record the gang-related conditions proposed by the probation officer.

Appellant identifies three gang-related probation conditions he claims are vague or overbroad. First, he cites the following preprinted condition contained in the juvenile court’s minute order: “No gang associations, colors, clothing, insignias, signs, paraphernalia or activities.” He claims the condition is vague because it does not contain a knowledge requirement. In other words, he could violate probation even if he does not know an individual he is associating with is a gang member or a color he is wearing is claimed by a gang.

Although appellant’s concern is valid, the problem is easily resolved. The preprinted condition in the minute order is followed by handwriting, which reads: “(As stated on the record[.])” Thus, the gang condition in the minute order was not intended to be a separate condition of probation but was intended to refer to the gang-related conditions of probation stated on the record during the dispositional hearing. In any event, to the extent the minute order deviates from the language as orally pronounced by the court, the oral pronouncement takes precedence. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.) To avoid confusion, the language in the minute order that refers to “gang associations, colors, clothing, insignias, signs, paraphernalia or activities” should be stricken. The gang-related conditions of probation imposed by the court are more precisely contained in the probation report’s recommendations, as stated on the record at the dispositional hearing.

Appellant also objects to a probation condition stated on the record during the dispositional hearing, as follows: “*Minor shall not participate in any gang activity and shall not visit or remain in a specific location known to him to be, or that the Deputy Probation Officer informs him to be, an area of gang-related activity.*” (Italics added.) Appellant

focuses on the italicized language, contending it does not contain a knowledge requirement. He also argues “activity” is a vague term, asserting that it is not clear whether he is prohibited from only gang-related *criminal* activities or from legal activities, such as sporting events or religious services, in which gang members may choose to participate.

When considering an objection to a probation condition on the ground it is unconstitutionally vague, the challenged language must be considered in context. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116-1117.) During the dispositional hearing, the court defined “gang” and “gang-related” for purposes of the probation conditions to mean criminal street gang as defined in section 186.22, subdivision (f) of the Penal Code. With that definition in mind, the term “gang activity” may be reasonably understood in context to encompass any activity conducted for the benefit of, at the direction of, or in association with a *criminal* street gang, “whose members individually or collectively engage in or have engaged in a pattern of *criminal gang activity*.” (Pen. Code, § 186.22, subd. (f), italics added; see also § 186.22, subd. (b)(1) [focusing on acts done “for the benefit of, at the direction of, or in association with any criminal street gang”].) The focus of the statute supplying the definition of “gang” is on an organization involved in *criminal* activity. (See § 186.22, subd. (e) [listing crimes that may constitute a “pattern of criminal gang activity”].) When considered in context, it is apparent that “gang activity” refers to activities that facilitate or otherwise involve the commission of crimes. The term is not reasonably susceptible to an interpretation that includes religious services, sporting events, or other lawful activities that merely happen to have gang members in attendance.

As for the lack of a knowledge requirement, it is difficult to conceive how appellant could unwittingly “participate” in an activity facilitating the commission of a crime that is conducted for, at the direction of, or in association with a criminal street gang. “Participation” implies some level of purposeful involvement. Thus, modifying “participate” with “knowingly” would add nothing to the condition. Indeed, in various decisions that have modified gang-related conditions of probation similar to the one at issue here, the Courts of Appeal have left undisturbed the clause specifying that the minor “shall not participate in any gang activity.” (See *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1145; *In re Victor L.*, *supra*, 182 Cal.App.4th at p. 932; see also *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072

[focusing on vagueness of prohibition against “ ‘frequent[ing] any areas of gang related activity’ ” without discussing clause in same condition requiring that minor “not participate in any gang activity”].) We conclude the challenged condition is sufficiently precise to pass constitutional muster.

The third probation condition to which appellant objects was stated on the record during the disposition hearing, as follows: “Minor shall not knowingly display any insignia, *clothing*, logos, emblems, badges, or buttons or display any gang sign or gestures that he knows to be . . . gang-related.” (Italics added.) Appellant specifically objects to the clothing prohibition. He contends he must “guess at what specific clothing items are prohibited,” and further argues the condition is overbroad and violates his liberty interest in being allowed to choose his own clothing.

Because the challenged condition contains a knowledge requirement, it is not unconstitutionally vague. To be in violation of the condition, appellant must “knowingly” wear clothing “that he knows to be . . . gang-related.” Thus, appellant need not guess at which clothing items are prohibited. Similar probation conditions prohibiting a probationer from possessing or wearing clothing known to be gang-related have been approved in other cases. (See *In re Shaun R.*, *supra*, 188 Cal.App.4th at p. 1145; *People v. Leon* (2010) 181 Cal.App.4th 943, 954; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247; *People v. Lopez* (1998) 66 Cal.App.4th 615, 638.)

Appellant’s overbreadth argument likewise fails. The challenged condition does not prohibit him from wearing *any* clothing that *might* be associated with gang members. Rather, the condition is limited to clothing appellant *knows to be gang-related*. There is no reason to believe appellant knows what gang members wear in Southern California or even in neighboring counties. Further, he is in the best position to know what clothing is worn by the Deep C gang, with which he is purportedly affiliated. It seems unlikely he would voluntarily wear clothing associated with rival gangs, but in any event, the condition is not overbroad to the extent it encompasses clothing worn by other gangs known to appellant. The condition serves the purpose of discouraging him from becoming involved with any criminal street gang known to him, not just the Deep C gang. (See *People v. Leon*, *supra*, 181 Cal.App.4th at p. 951 [declining to specify that clothing and paraphernalia prohibition had to identify

specific gang].) Accordingly, we reject appellant’s challenge to the probation condition prohibiting him from wearing clothing known by him to be gang-related.

As set forth above, if the court rejects DEJ as a dispositional option and reinstates its jurisdictional and dispositional orders, the court’s minute order must be modified to strike the pre-printed probation condition relating to gangs. Appellant will continue to be subject to the gang-related conditions of probation as stated on the record by the juvenile court.

4. *Maximum Term of Confinement and Predisposition Custody Credit*

Appellant claims the juvenile court erred by failing to specify his maximum confinement time and by failing to calculate his predisposition custody credit. The Attorney General concedes the claims have merit.

“When a juvenile court sustains criminal violations resulting in an order of wardship ([§ 602]) and removes a youth from the physical custody of his parent or custodian, it must specify the maximum confinement term, i.e., the maximum term of imprisonment an adult would receive for the same offense. [Citation.]” (*In re David H.* (2003) 106 Cal.App.4th 1131, 1133; see also § 726; rule 5.795(b).) “[A] minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.]” (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) The juvenile court may not delegate the duty to calculate a ward’s predisposition custody credit. (*Ibid.*)

Here, the probation report reflects an “aggregate custody time” of three years and credit for 43 days for time spent in juvenile hall from April 8 to May 20, 2011. Appellant and the Attorney General agree that the probation officer’s calculations are correct. Nevertheless, nowhere in the court’s statements at the dispositional hearing or in its minute order did the court specify the maximum term of confinement or the amount of predisposition custody credit. (See rule 5.795(b) [court “must specify and note in the minutes the maximum period of confinement under section 726”].) Accordingly, if the court rejects DEJ as an option and reinstates the jurisdictional and dispositional orders, the dispositional order must be amended to reflect that the maximum term of confinement is three years and that appellant is entitled to 43 days of predisposition custody credit.

DISPOSITION

The jurisdictional and dispositional orders are vacated, and the matter is remanded to the juvenile court with directions to consider appellant’s suitability for DEJ in compliance with section 790 et seq. and rule 5.800. If the juvenile court denies DEJ to appellant, it shall reinstate its jurisdictional and dispositional orders, with the dispositional order modified as follows: (1) The gang-related conditions of probation orally announced by the court at the dispositional hearing shall remain in effect, but the following condition of probation contained in the court’s written minute order shall be stricken—“No gang associations, colors, clothing, insignias, signs, paraphernalia or activities”; (2) the maximum term of confinement is three years; and (3) appellant is entitled to 43 days of predisposition custody credit.

McGuinness, P.J.

We concur:

Pollak, J.

Siggins, J.