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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re BRETT J., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT J.,

Defendant and Appellant.

A133215

(Sonoma County
Super. Ct. No. 36966-J)

Sixteen-year-old Brett J. appeals from the dispositional order of the Sonoma County Juvenile Court committing him to the Division of Juvenile Justice (DJJ) for a period not to exceed five years. We conclude that none of the purported defects in the committal asserted by the minor has merit. We therefore affirm.

BACKGROUND

On June 11, 2011, the minor was one of a group of youths who stole items from a liquor store. This dry conclusion hardly conveys the dimensions of what the victims endured. The owner and an employee of the store caught three youths stealing beer and sundries and, after being pushed by the youths, chased them out to the street. The youths were joined by others, who taunted the owner and the employee. When the gang began running at them, the owner and the employee barricaded themselves in the store. While attempting to force entry, one of the attackers smashed the store door with a baseball bat.

One month later, on July 11, the minor admitted allegations that he committed robbery (Pen. Code, § 211) and was an active participant in a criminal street gang (Pen. Code, § 186.22, subd. (a)). With respect to the robbery allegation, the minor acknowledged that it was “charged as a five-year felony” and was “a serious felony under Penal Code section 1192.7, so it could be considered a strike if you ever had a felony offense as an adult,” and thus had “lifelong implications.” Additional allegations of commercial burglary and vandalism were dismissed, with the proviso that they could be considered at disposition.

The dispositional hearing was held on July 25. It opened with the minor’s admissions being modified: because of concern that admitting to a violation of Penal Code section 186.22 might constitute admitting to a second strike, the parties and court agreed that the minor would withdraw his admission to the “stand-alone violation of Penal Code section 186.22,” but enter a new admission of gang participation as an enhancement to the robbery allegation (Pen. Code, § 186.22, subd. (b)(1)(C)) even though this would “substantially increase his exposure time.” An amended wardship petition was immediately filed to reflect the shift of the gang participation from a substantive count to an enhancement allegation.

The next day, July 26, the minor admitted the robbery count and the gang enhancement as set out in the amended petition. The minor was cautioned by the court that the robbery “is a serious felony within the meaning of Welfare and Institutions Code 707(b), which means that the court could send you to the Division of Juvenile Justice and also it’s a serious felony within the meaning of [Penal Code section] 1192.7(c) and a violent felony under Penal Code Section 667.5(c), that relates to it being used as a strike.” The parties agreed with the court’s suggestion that they proceed immediately to disposition and consideration of the probation officer’s recommendation of probation.

The prosecutor concurred with that recommendation, with the proviso that “we would like it to be made extremely clear that . . . if Brett decides to run away from camp or continues to have any sort of gang activity then we will not hesitate to come back and argue for a DJJ commitment.” The court then warned the minor that he was at a crucial

juncture in his life: “You’ve still got a chance. You still have time, but you’d better make some better decisions.” The court then declared the minor to be a ward and placed him with the Probation Department’s camp program, and fixed the maximum time of confinement at “15 years, minus the credit for time served, which would be 46 days.”

On August 2, while at juvenile hall awaiting transportation to the camp, the minor attacked another minor, an attack that might have been gang-related. This led the prosecutor to file a motion asking the court to modify its placement order because of this violation of the terms of the minor’s probation.

On August 17, the minor admitted that he violated his probation by the charged assault. When the court indicated that “I’m going to refer this to probation for a disposition report,” the prosecutor asked “that the minor be screened for DJJ.” After noting “There is no screening for DJJ” and “I will decide whether he goes to DJJ,” the court told objecting defense counsel that a DJJ commitment was merely one of the “options . . . on the table.”

The disposition hearing was held on September 1 to consider the probation officer’s recommendation that the minor be readmitted to probation and allowed to go ahead with the camp program. The court announced at the outset that “I am disinclined to follow probation’s recommendation. As I told Brett at [the July 26 hearing,] the underlying offense . . . was reprehensible. It was serious and, frankly, terrorized the two individuals At that time I told him I was taking an extraordinary chance in sending him to probation camp rather than the Division of Juvenile Justice. He chose not to accept that. And it is my inclination today to send him to the Division of Juvenile Justice for a period of five years.”

After hearing briefly from the probation officer and the prosecutor, the court turned to defense counsel:

“THE COURT: All right. Ms. DuBois.

“MS. DUBOIS: Your Honor, would I be entitled to—or would Mr.—would Brett be entitled to a formal hearing on the court’s decision?”

“THE COURT: That is what we are here to do today. That is this morning’s proceeding.

“MS. DUBOIS: Okay. Well, then I’m just going to ask the court to hear from me.

“THE COURT: Yes. That’s what we’re here to do today

“MS. DUBOIS: All right.”

Counsel then reviewed the underlying robbery and while “I’m not saying this is not in any way anything but reprehensible, but I have seen worse.” Counsel then argued that the minor “had great insight into his behavior,” and therefore “is somebody who could really benefit from camp.”

“THE COURT: Thank you. The court disagrees. And the court is going to follow through with the sentence as announced.

“MS. DUBOIS: Could the court consider a 90-day diagnostic?

“THE COURT: The court has considered that. This court went out on a limb and gave him an opportunity. What he did was to turn around and saw that limb off from behind the Court.

“If you want to run with the gangs, you suffer the consequences of the gangs. The Legislature and the people of the State of California have spoken that they consider the gangs to be a cancer in their community and they want them cut out.

“And frankly, given his behaviors, I think that community safety speaks to being protected against this kind of behavior.

“So the court is going to find that the minor comes within the provisions of sections 602 and 707 of the Welfare and Institutions Code and is eligible for a commitment to the California Division of Juvenile Justice. The minor’s previous disposition has not been effective in the rehabilitation of the minor. . . . [¶] . . . [¶] . . . The mental and physical condition and qualifications of this youth render it probable that he will benefit from the reformatory discipline or other treatment provided by the California Division of Juvenile Justice.”

The court committed the minor to DJJ for a period not to exceed five years and gave 83 days of custody credits.

REVIEW

The Disposition Hearing Was Properly Timed

The minor's initial contention equates his counsel's inquiries about "a formal hearing on the court's decision" and "I'm just going to ask the court to hear from me" as a request for a continuance, and the presumed denial of that request as an abuse of the court's discretion. Counsel's remarks were quoted verbatim to establish that they cannot be read as a request for a continuance. "[A] judgment will not be reversed on appeal because of the failure of the lower court to grant relief . . . which it was not asked to give, that is, in effect, an error which the trial court did not make." (*Buck v. Canty* (1912) 162 Cal. 226, 238; accord, *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603 ["A party on appeal cannot successfully complain because the trial court failed to do something which it was not asked to do"].) Even assuming that this was counsel's intent, her remarks cannot be fairly read as being in the form and accompanied by the showing of good cause required by statute and rule. (Welf. & Inst. Code, § 682; Cal. Rules of Court, rule 5.550.)

Nor can counsel's decision not to seek a continuance be framed as constitutional incompetence. The minor asserts that a continuance would have allowed counsel "to present alternative placements . . . [or] other dispositions to the juvenile court." However, the court made clear at the start of the September 1 hearing that it was "disinclined to follow probation's recommendation" that Brett should be allowed another chance at the camp program, and was instead inclined "to send him to the Division of Juvenile Justice for a period of five years." With no indication that there was a third option—that is, a placement more restrictive than the camp and yet less restrictive than DJJ—the choice for counsel reduced itself to arguing the court out of its "inclination" for a DJJ commitment. Counsel could make a reasonable tactical decision to stand that ground without a continuance, because the argument for the alternative of another placement with the camp program was already being made by the probation officer. Because that decision was tactically reasonable, and because there is no reasonable likelihood of a more favorable result, trial counsel's alleged incompetency has not been

demonstrated. (*In re Edward S.* (2009) 173 Cal.App.4th 387, 406-407; *In re Angel R.* (2008) 163 Cal.App.4th 905, 910.)

The Commitment Was Not An Abuse Of Discretion

DJJ commitments are reviewed according to the deferential abuse of discretion standard. (*In re Eddie M.* (2003) 31 Cal.4th 480, 507; *In re Carl N.* (2008) 160 Cal.App.4th 423, 431-432.) The minor's primary contention is that his commitment cannot satisfy this standard because the juvenile court acted without substantial evidence that the minor would benefit by the commitment, failing to conduct "an individualized disposition," but instead "imposing a predetermined disposition."

"A juvenile court must determine if the record supports a finding that it is *probable* the minor will benefit from being committed to DJJ. . . . There is no requirement that the court find exactly how a minor will benefit from being committed to DJJ. . . . The court is only required to find if it is probable a minor will benefit from being committed" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486.) This court has endorsed the following: "By statutory mandate, the juvenile court *must* find [a DJJ] commitment to be a probable benefit to the minor. (Welf. & Inst. Code, § 734.) However, the specific reasons need not be stated in the record. Rather that determination must be supported by substantial evidence contained within the record." (*In re Robert D.* (1979) 95 Cal.App.3d 767, 773; accord, *In re Jose R.* (1983) 148 Cal.App.3d 55, 59.)

But the minor's exclusive focus on his needs is too narrow. As Division Three of this District noted: "A fundamental premise of delinquency adjudication is that the court must focus on the dual concerns of the best interests of the minor and public protection. [Welfare and Institutions Code s]ection 202 provides: '(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. . . . [¶] (b) . . . Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection,

receive care, treatment and guidance which is consistent with their best interest, which holds them accountable for their behavior, and which is appropriate for their circumstances. . . . [¶] . . . [¶] (d) Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the safety and protection of the public and the best interests of the minor in all deliberations pursuant to this chapter.’ In terms of the information to be considered in arriving at a disposition, the juvenile court is mandated to consider the broadest range of information available. [Welfare and Institutions Code s]ection 706 provides that after a wardship finding is made, ‘. . . the court shall hear evidence on the question of the proper disposition to be made of the minor. The court shall receive in evidence the social study of the minor made by the probation officer and any other relevant and material evidence that may be offered’ [Citations.] Finally, with respect to a commitment to the Youth Authority [now the DJJ], the court must be ‘fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority.’ ([Welf. & Inst. Code,] § 734.) These statutory mandates make clear that the broadest range of information pertinent to the ward, especially his past behavior and performance while a ward, must be considered and evaluated in deciding the level of ‘physical confinement’ to be imposed pursuant to [Welfare and Institutions Code] section 726.’ (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684-1685; accord, *In re Calvin S.* (2007) 150 Cal.App.4th 443, 449; *In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615.)

There is no rigid test for determining whether a commitment to the DJJ would benefit a minor. (See, e.g., *In re Martin L.* (1986) 187 Cal.App.3d 534, 543–544.) Instead, the court must consider the individual circumstances in light of the potential reformatory, educational, rehabilitative, treatment, and disciplinary benefits the DJJ may provide to the minor. (See Welf. & Inst. Code, §§ 202, 734; *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258–1259.) Factors include the minor’s age, the seriousness of the minor’s criminal conduct, the minor’s mental and physical needs, the minor’s prior

record, the extent of the minor's need for a controlled environment, the threat the minor poses to the community, and the efficacy of prior dispositions in rehabilitating the minor. (See Welf. & Inst. Code, §§ 202, 734; *In re Gerardo B.*, *supra*, at pp. 1258–1259; *In re Anthony M.* (1981) 116 Cal.App.3d 491, 503–505.) With respect to this last factor, there is no requirement that a DJJ commitment is proper only if less restrictive placements have been tried and found ineffective. (*In re Eddie M.*, *supra*, 31 Cal.4th 480, 507; *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) In determining whether a DJJ commitment would benefit the minor, the court may also consider “punishment as a rehabilitative tool”; however, a minor should not be committed to the DJJ solely on retributive grounds. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396; Welf. & Inst. Code, § 202, subd. (e)(5).) Rather, as the *In re Jimmy P.* court noted, the juvenile court must focus on both the need for public protection and the best interests of the minor. (*In re Jimmy P.*, *supra*, 50 Cal.App.4th 1679, 1684-1685.)

The circumstances here begin with the court’s dubious attitude that the minor could benefit from placement other than DJJ. As evidenced by its comments at the first dispositional hearing on July 26, the court was already seriously concerned about the minor’s involvement with criminal street gangs. The court had apparently already concluded that the minor’s chronic absenteeism from school and growing use of illegal substances required a placement with substantial structure. Although the court was persuaded to set aside its misgivings with the initial commitment to the camp program, the court was amply justified in concluding that its misgivings had been vindicated. Even before the minor was put on the bus to the camp, he was involved in another altercation with gang overtones. From this the court would be entitled to conclude that the minor was unable to control his violent impulses—particularly if there was a gang-related dimension—within the camp program context. This was certainly substantial evidence to support the juvenile court’s determination that “The minor’s previous disposition has not been effective in the rehabilitation of the minor.”

The minor had already been a participant in the attack on the liquor store that the court equated with “terrorizing” the store’s occupants. Even the probation office panel

considering what to recommend for the court's initial disposition conceded that a DJJ commitment "for this brazen robbery in concert with other gangsters could certainly be justified." Then followed the minor's attack on the other youth at juvenile hall. This is substantial evidence to support the juvenile court's determination that "given his behaviors, I think that community safety speaks to being protected against this kind of behavior."

Mention has already been made that the minor's scholastic progress was impaired by nonattendance and growing drug use. The juvenile court could conclude that this trend could be reversed if the minor was placed in a setting where these problems could be minimized. This is substantial evidence to support the juvenile court's determination that "The mental and physical condition and qualifications of this youth render it probable that he will benefit from the reformatory discipline or other treatment provided by the California Division of Juvenile Justice." (*In re Jonathan T.*, *supra*, 166 Cal.App.4th 474, 486; *In re Jose R.*, *supra*, 148 Cal.App.3d 55, 59.)

All of these findings were made in the context of an individualized assessment of the minor's needs. Giving the minor one chance but not a second hardly looks like what the minor calls it—the juvenile court's failure to exercise any discretion because the court was "imposing a predetermined disposition." We cannot conclude that the ultimate assessment of the necessity or utility of committing the minor to the DJJ amounts to an abuse of discretion. (*In re Eddie M.*, *supra*, 31 Cal.4th 480, 507; *In re Carl N.*, *supra*, 160 Cal.App.4th 423, 431-432.)

The Commitment Order Is Procedurally Proper

The minor concludes with two arguments directed at the procedural regularity of the commitment order.

"A juvenile is entitled to credit against his maximum period of physical confinement for any time he spends in actual custody prior to disposition." (*In re Stephon L.* (2010) 181 Cal.App.4th 1227, 1231-1232.) The minor claims he was not awarded the custody credits required by Welfare and Institutions Code section 726. This claim may be entertained notwithstanding failure to raise at the disposition hearing. (*In*

re Antwon R. (2001) 87 Cal.App.4th 348, 350-353.) Here, it is particularly appropriate not to treat the issue as forfeited by inaction because the subject of precommitment credits was not mentioned at the hearing. However, the minor will not prevail on the merits because the commitment order does specify that “The youth has credit for 83 days in secure custody,” and defendant does not challenge the accuracy of the figure, which he saw in the probation officer’s supplemental disposition report prior to the hearing.

The minor contends the court incorrectly calculated his maximum term of commitment of 177 months and seven days (60 months for the robbery plus 120 months for the gang enhancement minus 83 days of custody credits). The minor reasons that the ten years for the gang enhancement must be excluded because when he admitted that allegation he only admitted to a *serious* felony, but not a *violent* one. This is irrelevant.

In general, a juvenile must receive the same admonitions as an adult prior to admitting allegations of a wardship petition. (*In re Ronald E.* (1977) 19 Cal.3d 315, 321.) With respect to the constitutional rights required by *Boykin/Tahl*, the validity of an adult admission of an enhancement allegation is determined according to whether it is voluntarily and intelligently made in the totality of the circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353, 356; *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) With respect to the *Yurko* admonitions concerning the consequences of admitting an enhancement allegation, prejudice must be established to secure reversal. (*In re Ronald E., supra*, at p. 321.)

As previously shown, the minor was admonished on July 26 before admitting the robbery count and the gang enhancement as set out in the amended petition, that the robbery “is a serious felony within the meaning of Welfare and Institutions Code 707(b), which means that the court could send you to the Division of Juvenile Justice and it’s a serious felony within the meaning of [Penal Code section] 1192.7(c) *and a violent felony* under Penal Code Section 667.5(c), that relates to it being used as a strike.” (Italics added.) The minor was then admonished that admitting the gang enhancement allegation “could add 10 years to any sentence. Do you understand that?”, to which the minor responded “Yes.”

The minor was admitting an enhancement allegation. An enhancement is not a separate offense or a substantive crime, but an appendage to a crime; the prospect of additional incarceration is dependent upon being guilty of the substantive offense. (See *People v. Dennis* (1998) 17 Cal.4th 468, 500-502.) This relationship was made clear by the court. It is therefore logically impossible to conceive of the gang enhancement as either a violent or a serious felony, because it is no felony at all. There is consequently no possibility of prejudice. (*In re Ronald E.*, *supra*, 19 Cal.3d 315, 321.)

DISPOSITION

The committal order is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.