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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re Oscar N., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

Oscar N.,

Defendant and Appellant.

A134786

(Sonoma County
Super. Ct. No. J-36598)

After participating in a gang-related attack, defendant Oscar N. was adjudged a ward of the juvenile court. An unsuccessful stint at probation camp caused the court to authorize his incarceration in adult jail after his 18th birthday. He appealed from this disposition. Subsequently, he was placed in jail but has since been returned to juvenile hall, mooting his appeal. However, we remand the matter to the juvenile court so that it may declare the character of defendant's gang offense in accord with Welfare and Institutions Code section 702.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 11, 2011, A.M. was accosted by a group of approximately seven males and two females. Defendant initiated the confrontation, asking A.M. if he "banged." A.M. responded, "Does it look like it?" and defendant answered, "Yeah, you look like a Scrap" (meaning a Sureño gang member). Defendant then instructed A.M. to lift up his shirt and show him his belt. The belt was blue, and defendant asked why he was wearing a blue belt. He then called A.M. a "Nigga" and a "Scrap," and said, "Shut up before we

all jump you.” A.M. crossed the street to his father’s waiting car and told him what was happening. His father asked the group if they had a problem with his son. At that point, one of the males kicked the driver’s side door and punched A.M.’s father in the face when he tried to exit the vehicle. When A.M. got out of the car, defendant and some of the other males began throwing punches at him. A.M.’s father sustained serious injuries.

On August 12, 2011, a wardship petition (Welf. & Inst. Code, § 602) was filed alleging that defendant had committed one count of battery for the benefit of a criminal street gang (Pen. Code, §§ 242, 186.22, subd. (d)).¹

On August 29, 2011, defendant admitted the petition.

On September 28, 2011, the juvenile court re-established wardship. It ordered defendant detained 700 to 1,050 days in a penal institution, with the exact duration of that custody time to be determined by the director of juvenile hall. The court provided that once defendant turned 18 years old he could be transferred to an adult detention facility, such as jail, to serve the remainder of the term because he had “exhausted the rehabilitative programming of the juvenile hall.” The court ordered that upon completion of the detention term, probation was to be revoked, and all proceedings were to be dismissed. Defendant was also ordered to submit a DNA sample.

On November 8, 2011, the juvenile court acted on defendant’s request for modification and referred him to the probation screening committee for possible camp commitment.

On December 6, 2011, the juvenile court suspended the remainder of the detention term, and committed defendant to probation camp.

On January 30, 2012, the probation officer filed a Welfare and Institutions Code section 777 probation violation notice alleging defendant had run away from camp the previous day.

On February 2, 2012, defendant admitted the probation violation. He turned 18 on February 19, 2012.

¹ All further statutory references are to the Penal Code except as otherwise indicated.

On February 22, 2012, the juvenile court vacated the camp commitment and ordered defendant to serve the remainder of his time in a detention facility. The court was perhaps excessively stern, finding that he had blown any chances of leniency. The court indicted he could be sent to jail, and, in fact, he was eventually placed in the county jail with other adults.

On February 23, 2012, defendant filed his notice of appeal.

On June 21, 2012, defendant filed a motion to obtain a transfer from jail to juvenile hall to serve the remainder of his term.

On June 25, 2012, the juvenile court ordered defendant's immediate return to juvenile hall. The order was in effect by June 27, 2012.

DISCUSSION

I. Claim of Erroneous Commitment to Jail is Moot

Defendant's first argument on appeal is that the February 22, 2012 dispositional order was unauthorized, and that the juvenile court must be instructed to enter an order transferring him from jail to juvenile hall to serve the remainder of his detention term.² On July 17, 2012, we granted the People's motion to take judicial notice of the fact that defendant had already successfully petitioned the juvenile court to be allowed to serve the remainder of his time in juvenile hall, and not in adult jail.

Our court is to review actual controversies. We will not proceed with appellate review if the problem complained of has already been addressed. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.) As defendant has already received the relief he seeks on appeal, we will dismiss his claim as moot. (See *In re Ramon M.*, *supra*, 178 Cal.App.4th 665, 675; *In re Katherine R.* (1970) 6 Cal.App.3d 354, 356–357.) In his reply brief, defendant claims the issue is not moot because there is the potential for a re-commitment to county jail in the future, with its related consequences. None of his fears are truly

² Welfare and Institutions Code section 202, subdivision (e), does not permit a county jail commitment at disposition. (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 674.) Only after a ward turns 19 can a juvenile court, upon the recommendation of the probation officer, transfer the ward to the custody of the sheriff. (Welf. & Inst. Code, § 208.5; *In re Charles G.* (2004) 115 Cal.App.4th 608, 618–619.)

before us and it is not our duty to guess as to whether they will transpire in the future. Defendant merely speculates that they could conceivably come to pass. This is not enough to justify review in this instance.

II. Declaration of Offense as Felony or Misdemeanor

Defendant contends remand is required because the record fails to disclose the juvenile court recognized its discretion to declare the battery offense to be a misdemeanor. The People concede the issue.

The offense of battery is ordinarily a misdemeanor (§ 242). It may, in the sentencing court's discretion, be treated as a felony "for sentencing purposes under [section 186.22, subdivision (d), (§ 186.22(d))]" where, as here, the offense is committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444.)

We note that section 186.22(d) is not a sentencing enhancement: "By definition, a sentence enhancement is 'an additional term of imprisonment added to the base term.' [Citations.] Section 186.22(d) is not a sentence enhancement because it does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence when it is proven that the underlying offense has been committed for the benefit of, or in association with, a criminal street gang. Neither is it a substantive offense because it does not define or set forth elements of a new crime." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898–899.) Section 186.22(d) is a so-called "wobbler" because it alternatively provides for "imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years"

Welfare and Institutions Code section 702 states, in pertinent part: "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." In *In re Manzy W.* (1997) 14 Cal.4th 1199, the juvenile court failed to formally declare whether the offense was a misdemeanor or a felony. (*Id.* at pp. 1203–1204.) The Supreme Court held that remand for compliance with Welfare and

Institutions Code section 702 is required where the juvenile court fails to make the required felony/misdemeanor declaration of a wobbler offense and the record fails to show the court was aware of its discretion to impose a misdemeanor sentence. (*Manzy W.*, *supra*, at pp. 1206–1209.)

Here, although the petition, minute order, and felony-level periods of confinement all indicate the juvenile court intended to treat defendant’s offense as a felony, the court neither expressly nor impliedly acknowledged its ability to reduce the offense to a misdemeanor. In particular, at the August 29, 2011 hearing in which defendant admitted the petition, the court stated: “It’s further alleged pursuant to Penal Code section 186.22(d) that that offense, that assault, which is usually a misdemeanor, is actually a felony in this case because it was committed for the benefit of or at the direction of or in association with a criminal street gang, alleged to be the Norteños, with the specific intent to promote, further and assist in criminal conduct by gang members. So that would constitute a violation of 186.22(d) of the Penal Code, making this a three-year felony.”

Because defendant committed the battery for the benefit of a street gang within the meaning of section 186.22(d), the juvenile court had discretion to treat it as a felony or a misdemeanor. Further, pursuant to Welfare and Institutions Code section 702, the court was required to declare the character of this offense. However, it appears from the court’s comments at the August 29, 2011 hearing that it did not comply with this section because the court erroneously believed it was required to treat defendant’s offense as a felony. Thus, in accord with *Manzy W.*, we will remand this matter to the court for it to determine the character of defendant’s battery.

DISPOSITION

The matter is remanded to the juvenile court so that it may declare the character of defendant’s gang offense in accord with Welfare and Institutions Code section 702. The order requiring defendant to provide DNA samples is stayed pending the court’s determination. If the court declares the offense to be a felony, it shall lift the stay; if it

declares it to be a misdemeanor, it shall strike the order. In all other respects, the judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P. J.

Banke, J.