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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re Alexander L., a Person Coming
Under the Juvenile Court Law.**

THE PEOPLE,

Plaintiff and Respondent,

v.

Alexander L.,

Defendant and Appellant.

A135213

**(Contra Costa County
Super. Ct. No. J06-02298)**

In 2007, Alexander L. (appellant) was declared a ward pursuant to Welfare and Institutions Code section 602¹ after he admitted to having committed two sexual offenses. In 2010, he was charged with a probation violation, a violation the juvenile court sustained. He appealed from the resulting dispositional order, claiming there was insufficient evidence to support the finding of violation. In an opinion issued in June 2012, we agreed and reversed the dispositional order. (*In re Alexander L.* (June 14, 2012, A132129) [nonpub. opn.] (*Alexander L. I.*))

Before we issued our opinion in *Alexander L. I.*, however, the juvenile court recalled appellant’s commitment based on a recent decision of the California Supreme Court, and after a new dispositional hearing, the juvenile court recommitted appellant. He now appeals from the second dispositional order, which directed that he be

¹ All further undesignated statutory references are to the Welfare and Institutions Code.

temporarily housed at the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). Appellant contends this second dispositional order must be set aside because it is based on the same finding of probation violation we reversed in *Alexander L. I.* He also raises numerous other challenges to the order.

We agree with appellant that the second dispositional order must be reversed because it is grounded upon the same probation violation as the first. Because we previously concluded that there was insufficient evidence to support the juvenile court's determination that appellant violated his probation, it necessarily follows that he cannot be recommitted based on that determination. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

An understanding of the issues raised in the current appeal requires us to recapitulate the facts of *Alexander L. I.* We draw much of the following factual statement from our prior unpublished opinion in that case.

Original Offenses and Placements

In December 2006, the six-year-old victim told his mother that, during the preceding month, appellant had sodomized and orally copulated him and forced him to orally copulate appellant. In February 2007, pursuant to a negotiated disposition, appellant pled no contest to committing a lewd act on a child under age 14 (Pen. Code, § 288, subd. (a)) and sodomy of a person under age 18 (Pen. Code, § 286, subd. (b)(1).)² Two additional sex offense counts were dismissed.

On February 27, 2007, the court declared appellant a ward of the court (§ 602) and ordered him detained in juvenile hall pending placement in a court-approved home or institution. The court imposed standard probation conditions, including that he “attend/participate” in individual counseling. The court’s oral statement of probation conditions included “Counseling as directed.”

² Both of these offenses are listed in Penal Code section 290.008, subdivision (c) (Penal Code section 290.008(c)), but they are not listed in section 707, subdivision (b) (section 707(b)).

Appellant was placed at the Mathiot Group Home Program in Sacramento on May 2, 2007, and was terminated therefrom on July 12 based on repeated disruptive behavior. As a result, he was found to have violated his probation.

On August 10, 2007, appellant was placed at Children's Therapeutic Community in Riverside. He was removed from that program on September 25, 2008. A notice of probation violation was filed alleging that appellant was "displaying inappropriate sex acts with group home peers." That notice of probation violation was later dismissed.

On November 21, 2008, appellant was placed at Breaking the Cycle Residential Treatment Center (BTC) in Sacramento. The probation department's January 13, 2009 placement review report's "assessment" section stated, "Minor needs to complete a juvenile sex offender treatment program prior to returning home."

The Notice of Probation Violation

On April 19, 2010, the probation department filed a notice of probation violation (§ 777) which alleged the following: "On April 12, 2010, [appellant] was terminated from [BTC], a court-ordered placement for failure to progress in treatment."³

A contested probation violation hearing was held on September 20, 2010. Appellant's probation officer was the sole witness at that hearing, and her testimony was the only evidence received. She testified she knew appellant had been placed at BTC on November 21, 2008. On April 12, 2010, the probation officer went to BTC to arrest appellant for violating probation for "failing to progress." Over defense counsel's hearsay and lack of foundation objections, the probation officer further stated that appellant's "treatment providers explained to [her] that he is failing to progress in treatment" and an employee of BTC had told the probation officer that appellant was "not using the interventions or the therapy to his advantage" Again over defense counsel's hearsay and lack of foundation objections, the probation officer testified that

³ At the subsequent probation revocation hearing, due to hearsay concerns, and at the prosecutor's request, the court struck from the section 777 notice the additional allegation that appellant was terminated from BTC for "failure to follow program rules by sexually acting out with other residents."

she was familiar with the phases of treatment offered at BTC, and she testified about her understanding of appellant's performance in treatment.

The juvenile court sustained the violation of probation because appellant was not progressing in treatment at an appropriate pace. The court ordered that appellant continue to be detained pending the dispositional hearing. The court's minute order from the September 20, 2010 probation violation hearing notes that the court sustained the probation violation alleged in the probation department's April 19 section 777 notice.

At the April 4, 2011 dispositional hearing, the court found by clear and convincing evidence that appellant failed to reform while placed in residential treatment programs and imposed a DJF commitment. Appellant then appealed from the April 4, 2011 commitment order. That appeal was docketed in this court as No. A132129.

In re C.H.

During the pendency of the appeal in *Alexander L. I*, the California Supreme Court decided *In re C.H.* (2011) 53 Cal.4th 94, which held that "a juvenile court lacks authority to commit a ward to the DJF under section 731[, subdivision] (a)(4) [(section 731(a)(4))] if that ward has never been adjudged to have committed an offense described in section 707(b), even if his or her most recent offense alleged in a petition and admitted or found true by the juvenile court is a sex offense set forth in Penal Code section 290.008(c) as referenced in section 733[, subdivision] (c) [(section 733(c))]." (*In re C.H.*, at pp. 97-98.) The high court went on to explain that "the class of wards who may be committed to the DJF [are] those wards who (1) have committed an offense described in section 707(b) and (2) whose most recent offense alleged in any petition and admitted or found to be true by the court is listed either in section 707(b) or Penal Code section 290.008(c)." (*In re C.H.*, at p. 102.)

Assembly Bill No. 324

After the decision in *In re C.H.*, the Legislature enacted Assembly Bill No. 324 (2011-2012 Reg. Sess.) (Stats. 2012, ch. 7, eff. Feb. 29, 2012; hereafter Assembly Bill No. 324). "[T]he intent of the Legislature in enacting this act [was] to address the California Supreme Court's ruling in *In re C.H.* [, *supra*,] 53 Cal.4th 94." (Stats. 2012,

ch. 7, § 3, codified at section 1752.16, subd. (b), italics added.) Assembly Bill No. 324 “expand[ed] the class of persons who may be committed to the [DJF] to include a ward who has committed a specified sex offense, or who was previously found to have committed a specified serious or violent offense or a specified sex offense.” (Legis. Counsel’s Dig., Assem. Bill No. 324 (2011-2012 Reg. Sess.)) The Legislature deemed the bill “an urgency statute” and explained that “[i]n order to protect the public by preventing the possible release of juvenile offenders who committed serious or violent offenses or sex offenses, it is necessary that this act take effect immediately.” (Stats. 2012, ch. 7, § 4.)

Assembly Bill No. 324 amended sections 731(a)(4) and 733(c). (See Stats. 2012, ch. 7, §§ 1, 2.) Subdivision (a) of section 731 authorizes the juvenile court to order specified types of treatment and to make orders and commitments for juveniles who are adjudged wards of the court. (§ 731(a)(1)-(4); *In re C.H.*, *supra*, 53 Cal.4th at p. 100.) The legislation amended section 731(a)(4) to permit the juvenile court to “[c]ommit the ward to the [DJF] if the ward has committed an offense described in subdivision (b) of Section 707 or subdivision (c) of Section 290.008 of the Penal Code, and is not otherwise ineligible for commitment to the division under Section 733.” (Stats. 2012, ch. 7, § 1 [additions underscored].) Assembly Bill No. 324 also amended section 733(c) as follows: “The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, ~~unless the offense is a sex offense set forth in~~ or subdivision (c) of Section 290.008 of the Penal Code. This subdivision shall be effective on and after September 1, 2007.” (Compare Stats. 2008, ch. 699, § 28, p. 4863 with Stats. 2012, ch. 7, § 2 [deletions in strikethrough, additions underscored].)

The legislation also added section 1752.16 to the Welfare and Institutions Code: “(a) The Chief of [DJF], with approval of the Director of Finance, may enter into contracts with any county of this state for [DJF] to furnish housing to a ward who was in the custody of [DJF] on December 12, 2011, and whose commitment was recalled based

on both of the following: [¶] (1) The ward was committed to [DJF] for the commission of an offense described in subdivision (c) of Section 290.008 of the Penal Code. [¶] (2) The ward has not been adjudged a ward of the court pursuant to Section 602 for commission of an offense described in subdivision (b) of Section 707. [¶] (b) It is the intent of the Legislature in enacting this act to address the California Supreme Court’s ruling in *In re C.H.*[, *supra*,] 53 Cal.4th 94.” (Stats. 2012, ch. 7, § 3, italics added.)⁴

Recall of DJF Commitment and Recommitment

On March 6, 2012, the juvenile court ordered the parties to submit briefs on *In re C.H.* and Assembly Bill No. 324. On March 22, 2012, appellant’s trial counsel filed a motion to recall the DJF commitment. Counsel argued that appellant had never sustained an offense described in section 707(b), and thus the juvenile court did not have the authority to commit him to the DJF. The People responded by conceding that appellant’s commitment to DJF would have to be vacated. The deputy district attorney opined that “it may be necessary to set the matter for a recall disposition per . . . section 731.1 in order to make a dispositional order that is appropriate under all the circumstances of the case.” He suggested, however, that the court could commit appellant to DJF under the new section 1752.16.

The probation department prepared a report, which noted that appellant had been committed to DJF on April 4, 2011, as a consequence of a sustained notice of violation under section 777. In light of the decision in *In re C.H.*, the department recommended that (1) wardship be continued, (2) the April 4, 2011 commitment be set aside, and (3) appellant be “temporarily housed at DJF, pursuant to [section] 1752.16, for the purposes of participation in DJF’s Sexual Behavior Treatment Program.” The department also recommended imposition of a number of probation conditions.

The juvenile court held a hearing on the matter on April 9, 2012. After argument from counsel, the court announced it would follow the probation department’s

⁴ Section 1752.16 was subsequently amended, but that amendment is not relevant to the issues raised in this case. (See Stats. 2012, ch. 41, § 99.)

recommendations. It continued appellant's wardship but set aside its earlier commitment order in response to *In re C.H.* It ruled that "the most appropriate program . . . in terms of placement, is the program that they have available at the DJF that the county will have to contract for to obtain. . . . [¶] So I'm going to order that [appellant] be temporarily housed and given access to the DJF sex behavior treatment program pursuant to . . . section 1752.16, and he can be returned to the county when he satisfactorily completes that program."⁵ The court adopted the probation department's recommendations, including its proposed probation conditions. A handwritten notation on the court's order requests that appellant be transported "back to [DJF]."⁶

On April 13, 2012, appellant filed a notice of appeal from the April 9, 2012 order.

Alexander L. I

On June 14, 2012, we issued our opinion in appellant's appeal from the juvenile court's April 4, 2011 dispositional order. We reversed the juvenile court because "[w]e conclude[d] that the court's finding that appellant violated his probation was based solely

⁵ The trial court thus accepted the People's argument that appellant could be committed to DJF under the authority of section 1752.16. Although the parties agree that the offenses to which appellant admitted in February 2007 are listed in Penal Code section 290.008(c), the trial court does not appear to have considered whether it was authorized to commit appellant to the DJF under the amended version of section 731(a)(4), which now permits the juvenile court to commit a ward to the DJF "if the ward has committed an offense described in . . . subdivision (c) of Section 290.008 of the Penal Code, and is not otherwise ineligible for commitment to the division under Section 733."

⁶ By letter dated April 11, 2013, we asked counsel to address a number of questions at oral argument, including whether the trial court had jurisdiction to enter a new dispositional order while the appeal in *Alexander L. I* was pending. (See *Agnew v. Superior Court* (1953) 118 Cal.App.2d 230, 234.) Since it appears undisputed that the California Supreme Court's opinion in *In re C.H.* required that appellant's commitment be recalled, it does not appear the trial court lacked subject matter jurisdiction when it entered the dispositional order at issue in this appeal. (Cf. *People v. Cunningham* (2001) 25 Cal.4th 926, 1044 [trial court may correct unauthorized sentence despite pendency of an appeal].) Our conclusion is limited to the particular circumstances before us, and we express no view on whether the trial court generally has jurisdiction to enter a new dispositional order during the pendency of an appeal from an earlier one.

on inadmissible hearsay evidence” Since the hearsay testimony at issue was the sole evidence on which the juvenile court based its finding that appellant had violated his probation, we held that the error in its admission was not harmless beyond a reasonable doubt, reversed the order, and remanded for a new section 777 hearing.

DISCUSSION

Appellant raises a number of issues in his opening brief, but we conclude we need reach only the first. He contends our prior reversal of the juvenile court’s April 4, 2011 finding that he violated his probation also requires reversal of the juvenile court’s April 9, 2012 dispositional order, since the latter order was based on the same defective finding. We agree.⁷

I. *The Issue Is Not Moot.*

The Attorney General does not appear to dispute appellant’s assertion that the April 9, 2012 dispositional order was based on the same facts as the April 4, 2011 dispositional order. She contends, however, that the juvenile court’s recall of appellant’s April 4, 2011 commitment renders moot his claim that the April 9, 2012 dispositional order must be reversed. She argues that our decision in *Alexander L. I* had the effect of returning appellant “to the status of a probationer awaiting placement,” which is precisely the same status he had since his commitment was set aside on April 9, 2012. In the Attorney General’s view, a reversal of the April 9, 2012 dispositional order can offer appellant no effectual relief, and this issue is therefore moot. (See, e.g., *In re Katherine R.* (1970) 6 Cal.App.3d 354, 357.) We cannot agree.

In *Alexander L. I*, we reversed the juvenile court’s finding that appellant had violated the terms of his probation because we concluded there was insufficient evidence to support that finding. Once we held that the finding of a violation lacked any valid factual basis, the dispositional order based on that finding was necessarily rendered invalid. (See *In re Ruben A.* (1981) 121 Cal.App.3d 671, 674 [juvenile court’s failure to

⁷ We note that in addition to the briefs filed by the parties in this case, we permitted the Pacific Juvenile Defender Center to file an amicus curiae brief in support of appellant.

make required factual findings under § 777 requires reversal of dispositional order].) Because the People had not proved appellant violated the terms of his probation, no penalty—be it commitment to DJF or anything else—could be imposed on him until the People presented sufficient evidence to the juvenile court that a violation had occurred, and the court made the required findings.

We therefore disagree with the Attorney General’s characterization of the effect of our decision in *Alexander L. I.* After that decision, appellant was returned to the status of a ward against whom no current violation of probation had been proven. As noted above, this meant he was ineligible for punishment based on the alleged, but unproven, violation. Pending decision of the appeal in *Alexander L. I.*, the juvenile court recalled appellant’s commitment and entered the April 9, 2012 dispositional order. Appellant asks us to reverse that dispositional order because it was based on the same probation violation finding we subsequently reversed in *Alexander L. I.* Simply put, appellant contends the April 9, 2012 dispositional order is invalid for the same reason the April 4, 2011 dispositional order was. Appellant is entitled to have this argument reviewed on appeal. (See *In re Mary D.* (1979) 95 Cal.App.3d 34, 36.)

Reversal of the order from which this appeal is taken will certainly grant appellant effectual relief, because just as in *Alexander L. I.*, it will reverse appellant’s current commitment and require the juvenile court to reconsider the matter, if the People elect to pursue the probation violation following remand. We therefore reject the Attorney General’s mootness argument.

II. *The April 9, 2012 Dispositional Order Must Be Reversed.*

As explained above, appellant asserts that our decision in *Alexander L. I.* requires us to reverse the April 9, 2012 dispositional order because it is based on the same probation violation finding we reversed in that case. The Attorney General does not contest appellant’s claim that the current dispositional order is based on the very same evidence we found insufficient in the prior appeal.

Our conclusion that there was insufficient evidence to support the juvenile court’s finding that appellant violated his probation necessitated reversal of the dispositional

order based on that finding. (*In re Ruben A.*, *supra*, 121 Cal.App.3d at p. 674.) Since it appears undisputed that the juvenile court’s second dispositional order rested on the same unproven facts, it is likewise invalid and must be reversed. (Cf. *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1090-1091 [reversing second dispositional order because it was based on invalid prior dispositional order].) Accordingly, we will reverse the April 9, 2012 dispositional order and, as before, remand the matter for the new section 777 hearing required by our disposition in *Alexander L. I.*⁸

III. *Appellant’s Other Arguments Are Not Ripe for Adjudication.*

Appellant’s opening brief concedes that if we agree the April 9, 2012 dispositional order must be reversed, we “need not reach the remaining issues which are included partly to forestall forfeiture of the claims.” Nevertheless, appellant urges us to take further action on the appeal. He contends that at a new dispositional hearing, “there is at least *a theoretical possibility* that the trial court would reimpose the terms of April 9, 2012 dispositional order.” (Italics added.) He therefore invites us to address a host of other issues he believes to be of broad public interest. These include “matters of first impression regarding the constitutionality, applicability, and meaning of . . . [Assembly Bill No.] 324” We decline appellant’s invitation.

First, because we have reversed the dispositional order, there is no need to reach appellant’s other arguments. (See *People v. Zaring* (1992) 8 Cal.App.4th 362, 379 [no need to address appellant’s other contentions after Court of Appeal concluded finding that she had violated her probation was unsupported by the evidence].) Our reversal affords appellant the relief he has requested, and he agrees this renders any decision on his other arguments unnecessary.

⁸ Our reversal of the dispositional order renders moot appellant’s claim that he received ineffective assistance of counsel at the dispositional hearing. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1341.) The same is true of appellant’s claim that the juvenile court abused its discretion by failing to consider less restrictive alternatives to DJF commitment.

Second, most of appellant's arguments are based on what he admits is the mere theoretical possibility that any new dispositional order will be identical to the present one. But we cannot predict the result of any future dispositional hearing, and thus appellant's arguments about the terms of a possible future dispositional order are not ripe. (See *People v. Ybarra* (1988) 206 Cal.App.3d 546, 549-550 [refusing to decide issue relating to legal effect of current conviction on possible punishment for a future offense].) There is no way to anticipate whether such issues will be ripe after a future dispositional hearing is held.⁹ (See *People v. Johnson* (2006) 142 Cal.App.4th 776, 789, fn. 4 [appellate court declined to address defendant's other contentions after it reversed conviction and ordered retrial because issues were not ripe]; *People v. Barnett* (1995) 35 Cal.App.4th 1, 3 [determination of validity of interim sentence would be premature because there would be another sentencing hearing at which court might modify sentence or dismiss charges].) We see no reason to address issues based upon appellant's conjecture about what may happen in a future proceeding. (See *In re Danny H.* (2002) 104 Cal.App.4th 92, 106 [court would not decide issue of ward's maximum theoretical period of confinement].)

Third, a number of appellant's claims are constitutional challenges either to Assembly Bill No. 324 or to conditions of probation that were part of the April 9, 2012 dispositional order. We will not decide constitutional questions unless it is absolutely necessary to dispose of the matter before us. (*People v. Duarte* (2000) 24 Cal.4th 603, 610.) Since appellant admits our reversal of the dispositional order makes it unnecessary for us to decide the other issues he presents, it follows that we should not address the constitutional issues he raises.

⁹ On April 8, 2013, appellant's counsel informed us by letter that on February 15, 2013, the trial court held a new section 777 hearing, found appellant in violation of probation, and entered a new dispositional order. An appeal from that order has been docketed in this court as No. A138050, but the record on appeal is not yet complete. As the record in that case will be prepared in due course, we deny the People's April 15, 2013 request that we take judicial notice in this appeal of the record of the February 15, 2013 dispositional hearing.

IV. *Miscellaneous Issues*

For the guidance of the juvenile court on remand, we note that the Attorney General agrees with appellant that probation conditions 17 and 21 should be modified to include a knowledge requirement.¹⁰ The Attorney General further agrees with appellant that his custody credits must be corrected to add the 372 days he spent at the DJF between April 4, 2011 and April 9, 2012. We therefore direct the juvenile court to recalculate appellant’s custody credits accordingly.

DISPOSITION

The April 9, 2012 dispositional order is reversed and the matter is remanded for a new section 777 hearing.

Jones, P.J.

We concur:

Simons, J.

Needham, J.

¹⁰ Those conditions provided, inter alia, that appellant “[s]hall not possess at any time any type of pornography, including written pornography, pictures videotapes, or electronic computer applications or telecommunications access to such applications” and that appellant “cannot possess or use any encrypted data, files, encrypted whole disk, and encrypted volumes.”