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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re ZACHARY M., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ZACHARY M.,

Defendant and Appellant.

A135232

(Sonoma County
Super. Ct. No. 37247-J)

Defendant Zachary M. appeals from a dispositional order that he serve 365 to 540 days in juvenile hall or “any penal institution” after he admitted allegations of committing an assault for the benefit of a criminal street gang (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (d)), and battery (Pen. Code, § 242). The main issues are whether the court abused its discretion when it ordered defendant removed from his mother’s custody, and whether it properly considered less restrictive placements. There was no error on either point. Defendant’s other arguments are either moot or conceded. We remand for specification of the maximum term of confinement, but otherwise affirm the dispositional order.

BACKGROUND

According to the probation report, the assault occurred when defendant and two other individuals attacked Omar A. and Angelica S. in a supermarket on February 20, 2012. Omar A. said he knew the assailants from high school and believed he was

attacked because he had disassociated himself from the VSL Sureño gang. The assailants yelled “VSL gang,” took bottles from the shelves, and threw them at Omar A. and Angelica S., who was in a wheelchair. Omar A. had a visible lump on the back of his head, and what appeared to be blood on his face, after the attack.

The battery allegation resulted from a March 13, 2012 incident in a classroom at juvenile hall. Defendant began punching Eric E. in the face, and Eric E. punched back. The fight stopped only after responding juvenile hall staff applied pepper spray for the third time. Defendant denied knowing that Eric E. was an affiliate of a rival Sureño sect. Defendant fractured his right hand during the fight.

When he was interviewed by the probation officer, defendant admitted associating with the VSL and hoping to be “jumped in” the gang. He was “not interested in severing his gang ties,” and called his gang friends “my only family.” Defendant’s mother reported that his behavior at home had been “out of control for approximately the past seven months.” She said that he left home and did not return for two weeks at the beginning of the school year. She “confidently stated there is no way [he] can return home, or remain in this community and be successful. She believes he needs to be completely removed from the area, as he is too enmeshed in the local gang culture to distance himself.” She hoped that the court would allow him to return to his original home State of Indiana, where he could live with grandparents and would have support from extended family.

Defendant was first referred to the probation department in November 2010 for a drug offense (Health & Saf. Code, § 11357, subd. (b)), and the charge was dismissed after he completed a substance abuse program. He was referred again in November 2011 for theft and gang-related felonies (Pen. Code, §§ 496d, subd. (a), 186.22, subds. (a), (b)(1)(A)), but the charges were dropped for insufficient evidence. In her report related to the current allegations, the probation officer recommended that defendant be referred for a psychological evaluation.

At the outset of the dispositional hearing, the court rejected a psychological evaluation. Defendant’s problem was that he “has completely enmeshed himself in the

Sureño gang lifestyle” The court stated: “I’m simply inclined to give him a year from today’s date, all proceedings to be dismissed. And he can then go back and join his Sureño family. Or, if he wises up, maybe he’ll go to Indiana and join that family. But I don’t see any great mystery here as to what’s hindering his success. He wants to be a gang member. Well, gang members either end up dead or in jail. I can help him with one of those. I’ll keep him in juvenile hall for the next year.”

Defendant’s counsel agreed that a psychological evaluation was unnecessary, but argued for a camp commitment or investigation of defendant’s possible placement with family in Indiana.

The court declared defendant a ward of the court, and stated: “In addition to the time that he has served in juvenile hall, the court imposes 365 to 540 days in any penal institution, to include the Main Adult Detention Facility. All proceedings will be dismissed upon the completion of his time in the hall or at the Main Adult Detention facility. [¶] . . . [¶] . . . No good time, no early release.”

DISCUSSION

1. Removal From the Mother’s Custody

Defendant contends the court abused its discretion when it removed him from his mother’s custody on his first sustained juvenile petition. (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330 [scope of review].) Welfare and Institutions Code section 726, subdivision (a)(3) provides: “. . . no ward or dependent child shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts: [¶] . . . [¶] (3) That the welfare of the minor requires that custody be taken from the minor’s parent or guardian.” (See also Cal. Rules of Court, rule 5.790(d)(3).) Defendant was removed from his mother’s home for his own welfare.

Defendant observes that the court made no express finding that his welfare required that he be removed from his mother’s custody. However, the court must have been mindful of the issue because no one, including the mother and defendant’s counsel, thought that defendant’s best interests would be served by returning him to her home. The record showed that she was unable to ensure that he went to school or deter his gang

involvement. As the People put it, “[t]here was no question the court was going to remove [defendant] from his mother’s custody.” Thus, any error in failing to make an express finding under Welfare and Institutions Code section 726, subdivision (a)(3) was harmless. (*In re Clyde H.* (1979) 92 Cal.App.3d 338, 346-347 [different outcome was not reasonably probable]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 408-409 [same].)

Defendant contends that removal from his mother’s custody contravened “the societal interest in keeping families together,” but the court could reasonably find that this societal interest was outweighed here by what was best for defendant’s welfare. (See Welf. & Inst. Code, § 202, subd. (a) [providing for removal of a minor from parental custody “when necessary for his . . . welfare”]; § 202, subd. (b) [family preservation and reunification are appropriate goals when they are “consistent with [a delinquent minor’s] best interests”].)

2. Less Restrictive Alternatives

Defendant contends that the court did not give “proper consideration of less restrictive or more rehabilitative alternatives” before ordering his detention in juvenile hall. However, there is no reason to believe that the court disregarded defense counsel’s arguments for a camp commitment or a family placement. This court “cannot assume that the superior court judge, who presided over the dispositional hearing and heard appellant’s counsel’s arguments, gave them no consideration” (*In re Ricky H.* (1981) 30 Cal.3d 176, 183-184.) “[I]f there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record his consideration of those alternatives and reasons for rejecting them will not result in a reversal.” (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577.)

There need be only “some evidence to support the judge’s implied determination that he sub silentio considered and rejected reasonable alternative dispositions.” (*In re Teofilio A., supra*, 210 Cal.App.3d at p. 577.) A court at disposition “shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor’s previous delinquent history.” (Welf. & Inst. Code, § 725.5.) The offenses here were

violent, and both were apparently gang-related. One was committed while defendant was in juvenile hall. The court could reasonably reject the less restrictive dispositional alternatives to juvenile hall based on the gravity and circumstances of the offenses, including defendant's lack of remorse and professed determination to continue his gang association. While "juvenile proceedings are primarily 'rehabilitative' [citation], and punishment in the form of 'retribution' is disallowed [citation,] . . . the court has broad discretion to choose . . . various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public." (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.) We find no abuse of that broad discretion here.

Nor is there merit to defendant's claim that a camp commitment was required under Welfare and Institutions Code section 730, subdivision (a). This statute provides: "When a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may order any of the types of treatment referred to in Section 727, and as an additional alternative, may commit the minor to a juvenile home, ranch, camp, or forestry camp. *If there is no county juvenile home, ranch, camp, or forestry camp within the county, the court may commit the minor to the county juvenile hall.*" (Italics added.) Defendant reads the italicized language to preclude a juvenile hall commitment where, as here, a camp is available in the county, but he cites no case that has so held. In our view, the statute does not require any particular disposition. It simply permits a commitment to juvenile hall, even when a commitment to one of the other facilities would be most appropriate, if such other facility is not available in the county. This conclusion is consistent with the rule that "juvenile placements need not follow any particular order . . . including from the least to the most restrictive." (*In re Eddie M.*, *supra*, 31 Cal.4th at p. 507 [most restrictive alternative may be ordered before other options are tried].)

3. Long-Term Detention in Juvenile Hall

Defendant also argues that a court lacks authority to order a long-term juvenile hall commitment like the one imposed here. Again, defendant identifies no case that so holds. He supports his argument with Welfare and Institutions Code section 851's

directive that juvenile hall “shall not be deemed to be, nor treated as, a penal institution,” which he interprets to “remove[] juvenile hall from the realm of long-term post-dispositional commitment options.” He also notes that California Code of Regulations, title 15, section 1302 defines “juvenile hall” as a “facility designed for the reception and *temporary* care of minors” (Italics added.) However, Welfare and Institutions Code section 202, subdivision (e)(4) allows commitment “to a local detention or treatment facility, such as a juvenile hall, camp, or ranch” and imposes no limitation on the length of the commitment. Neither the statute nor the regulation defendant relies upon purport to impose the limitation he posits and we are not persuaded by his argument.

In any event, the length of the juvenile hall commitment ordered here is moot. Defendant did not come close to serving the one-year minimum term that was imposed at the April 4, 2012 dispositional hearing. We grant, in part, the People’s request for judicial notice, and take judicial notice that on August 1, 2012, the probation department filed a request that defendant, then age 18, be transferred to county jail, and that the court ordered the requested transfer. (Evid. Code, §§ 452, subd. (d), 459; *In re Karen G.* (2004) 121 Cal.App.4th 1384, 1390.) Defendant was thus detained in juvenile hall for only a few months, not for the longer term the court ordered.

4. Confinement in “Any Penal Institution”

Defendant contends the court erred insofar as it ordered service of “365 to 540 days in any penal institution, to include the Main Adult Detention Facility [county jail].” Defendant argues that the order was an improper “de facto county jail commitment.” This argument rests on the assumptions that he will still be confined at juvenile hall when he turns age 19 in July 2013, two months before his maximum 540-day term expires, and that he will be transferred to jail at that time. (Welf. & Inst. Code, § 208, subd. (a) [a ward who turns 19 must be delivered to custody of the sheriff upon recommendation of the probation officer, unless the court orders continued detention in a juvenile facility].)

Defendant was 17 years old at the time of disposition, and it is settled that the court cannot order even 18-year-old juveniles directly to county jail. (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 674.) However, the court did not order defendant directly

to jail. It ordered that he be kept in juvenile hall “for the next year.” The facts we have judicially noticed establish that defendant was housed in juvenile hall, and transferred to jail only upon application of the probation department when he reached age 18. His concern that the challenged dispositional order might have resulted in an improper transfer to jail when he reached age 19 did not materialize. Accordingly, this possible effect of the order is also moot.

5. Maximum Term of Confinement

It is undisputed that the court erred in failing to specify the maximum term of confinement. (Welf. & Inst. Code, § 726, subd. (d); Cal. Rules of Court, rule 5.795(b).) In so doing, the court must determine on the record whether the Penal Code section 245, subdivision (a)(1) offense is a felony or a misdemeanor. (Welf. & Inst. Code, § 702; Cal. Rules of Court, rule 5.795(a); *In re Ramon M.*, *supra*, 178 Cal.App.4th at pp. 675-676.) The court must also award defendant 45 days of credit against the maximum term for his time in custody before the dispositional hearing. (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

DISPOSITION

The case is remanded for specification of the maximum term of confinement in accordance with this opinion. In all other respects, the dispositional order is affirmed.

Siggins, J.

We concur:

McGuinness, P. J.

Jenkins, J.