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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re E.H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

E.H.,

Defendant and Appellant.

A143771

(San Francisco County
Super. Ct. No. JW146164)

E.H. appeals from a juvenile court order committing him to the custody of the probation department for out-of-home placement after he admitted to willfully and unlawfully possessing a concealable firearm. He contends the court erred under Welfare and Institutions Code¹ section 702 by not declaring whether the offense was a felony or misdemeanor and erred under section 726 by not specifying the maximum period of physical confinement or calculating his predisposition custody credits. We agree that remand is necessary for the juvenile court to exercise its discretion to determine whether the offense was a felony or misdemeanor, but we otherwise affirm.

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

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In June 2014, two San Francisco police officers responding to a ShotSpotter alert found 15-year-old E.H. in possession of a pistol. The San Francisco District Attorney's Office filed a juvenile wardship petition under section 602 alleging that E.H. had committed three felony offenses by (1) willfully and unlawfully possessing a concealable firearm; (2) unlawfully carrying a loaded firearm in public; and (3) unlawfully carrying a concealed firearm upon his person.² In July, the petition was amended to add an allegation that E.H. had committed a misdemeanor offense by possessing live ammunition.³

At the jurisdictional hearing, E.H. admitted to the first count of unlawfully possessing a concealable firearm. After advising E.H. of his rights, the juvenile court asked him if he admitted to count one of the amended petition, which alleged that he "committed a felony because [he] . . . willfully [and] unlawfully . . . had in [his] possession a concealable firearm . . . without the written permission of [his] parent." E.H. responded, "Yes." The court found the allegation true and granted the People's motion to dismiss the remaining allegations.

At the dispositional hearing, the juvenile court declared E.H. a ward of the court and ordered him removed from his parents' physical custody. He was then committed to the probation department's custody for out-of-home placement.

² The allegations were made under Penal Code sections 29610 (possession of concealable firearm), 25850, subdivision (a) (carrying loaded firearm in public), and 25400, subdivision (a)(2) (carrying concealable firearm on person).

³ The new allegation was made under Penal Code section 29650.

II. DISCUSSION

A. *Remand Is Necessary for the Juvenile Court to Exercise Its Discretion to Determine Whether the Offense Was a Felony or a Misdemeanor.*

E.H. argues that the juvenile court improperly failed to declare whether his offense was a felony or misdemeanor. We agree.

Section 702 provides that if a 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.” The parties agree that section 702 applies because E.H.’s offense, a violation of Penal Code section 29610, “is a wobbler, punishable ‘[b]y imprisonment pursuant to subdivision (h) of [Penal Code] section 1170 or in a county jail.’ ” (*In re D.D.* (2015) 234 Cal.App.4th 824, 829, quoting Pen. Code, § 29700, subd. (a).)

“The requirement of a declaration by the juvenile court . . . facilitat[es] the determination of the limits on any present or future commitment to physical confinement for a so-called ‘wobbler’ offense.” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1206 (*Manzy W.*.) It “also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion.” (*Id.* at p. 1207.) The denomination of an offense as a felony in a pleading or minute order or the setting of a felony-level period of physical confinement does not substitute for a declaration by the court. (*Id.* at p. 1208; see also *In re Kenneth H.* (1983) 33 Cal.3d 616, 619-620.) “The key issue is whether the record as a whole” shows that the court was “aware of its discretion” to treat the offense as a felony or misdemeanor. (*Manzy W.*, at p. 1209.)

Remand is not automatic every time a juvenile court fails to make a formal declaration under section 702. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) If the record as a whole shows that the court was aware of and exercised its discretion to determine the nature of an offense, “remand would be merely redundant” and “failure to comply with the statute would amount to harmless error.” (*Ibid.*) For example, in *In re Michael S.* (1983) 141 Cal.App.3d 814, the dispositional order indicated that the offense was a

felony but would be reduced to a misdemeanor if the minor performed well on probation. (*Id.* at pp. 818-819.) The order was affirmed because, even though the juvenile court did not make an explicit declaration, the record as a whole demonstrated that the court was aware of its discretion under section 702. (*Michael S.*, at pp. 818-819.)

The Attorney General argues that the signed jurisdictional-hearing and dispositional-hearing minute orders, which both designate E.H.'s offense as a felony, establish that the juvenile court complied with section 702. In particular, the former minute order noted that E.H. had admitted to "Count 1 - 29610 PC of 7/8/14 a felony" and that the court had found count one's allegations true, and in the portion of the latter minute order listing the court's findings, the box indicating the offense was found to be a felony was checked instead of the box indicating it was found to be a misdemeanor. We disagree that these minute orders establish compliance because they do not show that the court was aware of its discretion to declare the offense a felony or misdemeanor. (*Manzy W.*, *supra*, 14 Cal.4th at pp. 1207-1208.) As in *Manzy W.*, neither the probation department nor the parties indicated to the court that the offense was a wobbler. (*Id.* at p. 1210.) Nor did the court make any express declaration of the status of the offense at either hearing. (See *ibid.*) Based on the minute orders alone, "[i]t is entirely possible that the judge simply sentenced [E.H.] as a felon without considering the possibility of sentencing him as a misdemeanant." (*In re Dennis C.* (1980) 104 Cal.App.3d 16, 23.)

The Attorney General also argues that "the [juvenile] court's discretion was circumscribed by the apparent agreement of the parties that [E.H.] would admit count one as a felony in exchange for the dismissal of the remaining counts." But the juvenile court is required to declare whether the offense is a felony or a misdemeanor whenever a minor enters a plea of no contest. (Cal. Rules of Court, rule 5.778(f)(9); see *Manzy W.*, *supra*, 14 Cal.4th at pp. 1202, 1204 [failure to make declaration under section 702 required reversal where minor admitted to allegation that offense was a felony].) The Attorney General provides no authority for the position that a plea agreement supersedes a court's discretion under section 702. We conclude that remand is required because the record does not show that the court understood or exercised its discretion under section 702.

B. E.H.'s Remaining Claims Fail Because His Placement Did Not Constitute Physical Confinement.

E.H. also argues that the juvenile court failed to specify the maximum period of physical confinement and calculate his predisposition custody credits. We are not persuaded.

1. E.H. has not demonstrated any prejudice from the juvenile court's failure to specify a maximum term of physical confinement.

“If [a] minor is removed from the physical custody of his or her parent . . . , the [dispositional] order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense” (§ 726, subd. (d)(1).) “ ‘Physical confinement’ means placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to Section 730, or in any institution operated by the Department of Corrections and Rehabilitation, Division of Juvenile Justice.” (*Id.*, subd. (d)(5).)

E.H. argues that the dispositional order was required to specify the maximum term of physical confinement, regardless of whether his placement actually constituted physical confinement, because by its plain terms section 726 is triggered by a minor's removal from parental custody. The Attorney General responds that the order did not need to specify the maximum term of physical confinement because E.H.'s placement did not constitute physical confinement.

We begin by agreeing with the Attorney General that E.H.'s placement did not constitute physical confinement. E.H. was put in the probation department's custody for out-of-home placement, and various remarks at the dispositional hearing made it clear that the juvenile court and parties contemplated he would enter a group home. Thus, the court committed E.H. to the probation department's custody under section 727, not to one of the specified types of facilities “pursuant to [s]ection 730” or to an institution operated by the Division of Juvenile Justice. (§§ 726, subd. (d)(5), 727, subd. (a)(3), 730; see also *In re Harm R.* (1979) 88 Cal.App.3d 438, 441-442.)

E.H. is correct in pointing out that a literal reading of section 726 would seem to require a juvenile court to specify the maximum term of physical confinement every time a minor is removed from a parent's custody, even when the minor's placement does not constitute physical confinement. But he does not explain how he possibly could have been prejudiced by the juvenile court's failure to specify the maximum term since he was not ordered into physical confinement.⁴ If he ever is ordered into physical confinement for his offense, the court will be able at that time to specify the maximum term. (See *Manzy W.*, *supra*, 14 Cal.4th at pp. 1206-1207 [where probation imposed, section 702's requirement to specify wobbler's nature in dispositional order "constitute[s] a record, for the purposes of determining the maximum term of physical confinement *in a subsequent adjudication*, whether the prior offense was a misdemeanor or a felony"], italics in original.) Because he can show no prejudice, E.H. is not entitled to relief on this claim.

2. The juvenile court was not required to calculate E.H.'s predisposition custody credits.

Section 726 does not require the calculation of predisposition custody credits, "but the statute does state that a minor's maximum term of physical confinement cannot exceed 'the maximum term of imprisonment which could be imposed upon an adult convicted' of the offense[].' Since an adult's term is reduced by credit for preconviction custody, section 726 should be interpreted as entitling a minor to credit for time . . . spent in physical confinement [before the dispositional hearing] when physical confinement is subsequently selected as a disposition." (*In re Randy J.* (1994) 22 Cal.App.4th 1497, 1503, italics omitted.) The juvenile court may not delegate its duty to calculate such credits. (*In re A.M.* (2014) 225 Cal.App.4th 1075, 1085.)

E.H. spent some time at juvenile hall before the dispositional hearing. As a result, he is entitled to predisposition custody credits if and when he is ordered into physical confinement. (See *In re Randy J.*, *supra*, 22 Cal.App.4th at p. 1503.) But he is not entitled to an abstract calculation of these credits without being placed in physical

⁴ The juvenile court advised E.H. before he entered his plea that the maximum term of physical confinement was three years.

confinement. E.H. identifies no authority for his position that the nature of his current placement is “irrelevant” to whether the juvenile court must calculate predisposition custody credits, and he again does not explain how the court’s omission was prejudicial. As a result, we conclude that this claim fails as well.

III.
DISPOSITION

The matter is remanded to the juvenile court for it to exercise its discretion under section 702 to determine whether E.H.’s offense was a felony or misdemeanor. The judgment is otherwise affirmed.

Humes, P.J.

We concur:

Margulies, J.

Banke, J.