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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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

THE PEOPLE,

Plaintiff and Respondent,

v.

E.N.,

Defendant and Appellant.

A145623

(Solano County
Super. Ct. No. JV41321)

E.N. appeals from an order terminating “unsuccessfully” the jurisdiction over him of the juvenile court and a related order for victim restitution. He contends that he is entitled to have termination deemed “successful” and that the amount of restitution he has been ordered to pay is excessive for several reasons. Because the “unsuccessful” label is not tied to any of several potentially applicable standards, we conclude that the determination should be set aside and the matter remanded to determine whether E.N. satisfactorily completed his probation within the meaning of Welfare and Institutions Code section 786. We agree with the minor and the Attorney General that the matter must also be remanded for a redetermination of the amount of restitution and for correction of other minor discrepancies in the record.

Background

In May 2008, based on the then 13-year-old minor’s admission to two counts of misdemeanor oral copulation with a person under 18 years of age (Pen. Code, § 288a,

subd. (b)(1)), the Napa County juvenile court sustained a juvenile wardship petition, adjudged minor a ward of the court, and placed him in a residential treatment facility. E.N. was placed at Remi Vista Inc., in Redding, California, where he successfully completed sex offender treatment. In December 2011, his wardship was continued but he was returned to his mother's care.

In August 2012, based on E.N.'s admission to one count of felony lewd conduct with a minor occurring in February 2012 (Pen. Code, § 288, subd. (a)), the Solano County juvenile court sustained a second juvenile wardship petition and committed E.N. to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF).¹ The court ordered the minor to register as a sex offender upon release, and imposed victim restitution in the amount of \$1,782 to reimburse the restitution fund for mental health expenses for the victim and her guardian. In October 2012, Solano County accepted transfer of minor's Napa County wardship

On March 4, 2015, E.N. was discharged from DJF and returned to Solano County due to the statutory requirement that transitional services be provided prior to the upcoming expiration of the court's jurisdiction when E.N. would reach 21 years of age. The juvenile court terminated DJF jurisdiction, transferred jurisdiction to Solano County, placed minor on probation, and ordered E.N. to enroll in sex offender treatment and attend counseling, in addition to other conditions of probation. The court also ordered victim restitution in the amount of \$10,530, without prejudice. E.N. was placed at Buddy's House group home in Marysville and timely enrolled in sex offender treatment at New Beginnings.

On June 24, 2015, the probation department recommended that E.N.'s probation be terminated unsuccessfully because he had not been able to complete sex offender treatment or pay off the victim restitution order prior to the expiration of juvenile court jurisdiction. The court followed the recommendation and terminated jurisdiction, checking the box on the preprinted order form that jurisdiction over the minor was

¹ The DJF is sometimes referred to in the record as the Division of Juvenile Justice (DJJ).

terminated “unsuccessfully.” The court also ordered victim restitution in the amount of \$10,530.

E.N. filed a timely notice of appeal, challenging the designation of the termination of juvenile court jurisdiction as unsuccessful and the increased amount of restitution he has been ordered to pay.

Discussion

1. Termination of jurisdiction “unsuccessfully”

(a) The record

E.N. contends the court erred in terminating juvenile court jurisdiction over him “unsuccessfully.” The record reflects the following concerning E.N.’s early years and the course of his treatment and behavior while a ward of the court. Minor had a difficult childhood. He was diagnosed with autism, Asperger’s Syndrome, attention deficit hyperactivity disorder, obsessive compulsive disorder, had an individualized education program, and was prescribed psychotropic medication. He was raised in part by his grandmother, who died when he was young, and by his mother who has mental health problems of her own. At the age of 11, he was himself molested by an older neighbor.

Following E.N.’s initial entry into the juvenile justice system in 2008 for orally copulating two minors when he was age 13, E.N. was placed in a residential sex offender treatment program at Remi Vista, where he completed the program and was returned to his mother’s care in December 2011, when he was age 17. The December 28, 2011 order finds that he had made substantial progress toward alleviating or mitigating the causes necessitating his placement and that his return to his mother’s home was appropriate.²

² The report from the probation department that preceded entry of the order stated more fully: “The minor has struggled with anger and control issues during the past several months [¶] Although the minor has struggled the past several months, he has also made considerable progress in his treatment while at Remi Vista, having completed 50 out of 50 of his juvenile sexual offender milestones, individual and group therapy, learned relapse prevention skills, and developed a safety plan for situations that might place him or others at risk. The minor will continue to be intensively supervised by the probation department and will need to enroll and participate in a community based sexual offender aftercare program designed for youth coming out of placement and returning home.”

However, in early February 2012, E.N. committed another offense upon a five-year-old victim, as a result of which he received treatment at DJF from April 2013 until March 4, 2015.³

E.N.'s annual case review prepared in September 2013 reported that his "progress in his treatment goals can be rated positive. From the very beginning, [E.N.] has tried to take his treatment serious. [E.N.] has been honest and open about his commitment offense. There have been points of confusion and frustration, however, [E.N.] has remained committed and determined to work on treatment. In addition to this, [E.N.] has completed five resource groups and attends all mandated treatment groups on a regular basis. [E.N.] has been self motivated and his transition to [the sexual behavior treatment program] has gone well. . . . [¶] . . . [E.N.]'s case is rare in the fact that he has previously gone through treatment in the community and was under supervision when he re-offended sexually and subsequently [was] assigned to DJJ. This places him in a very small percentage of adolescents who have re-offended five weeks following a treatment program completion. Dr. Park feels that [E.N.] has made some serious breakthrough in treatment and has done very well this annual reporting period. [E.N.] has sufficient time left before his [parole board date] to develop insight into the contributing factors surrounding his sexual offenses, and to come to grips with complexities of his actions that lead to his commitment to DJJ. After a good start, the treatment team expects [E.N.] to complete his [program] with sufficient time to complete the re-entry process."

E.N.'s annual review in November 2014 reported, in part, that he "will have to work very hard to complete [the treatment program] stage work before discharge. [E.N.] has struggled with accepting feedback from staff. [E.N.] has issues with sarcasm and passive aggression. . . . Staff have expressed concern over [E.N.]'s struggle with his sexual urges. [E.N.] needs to work on a more comprehensive relapse prevention plan."

³ Although E.N. was committed to DJF on August 22, 2012, because of administrative delays beyond minor's control, he was not transported to DJF until November 6, 2012, and was not placed in the sexual behavior treatment program until April 22, 2013.

The DJF “Discharge Consideration Hearing Order” prepared shortly before E.N.’s discharge from DJF in March 2015 describes his condition and reasons for his discharge as follows: “[E.N.] is being discharged by the board today solely based on the requirement in statute that mandates youth be discharged from DJJ 90-120 days prior to the expiration of their available confinement time. In this case, [E.N.] has not completed the sex behavior treatment program that he was ordered by the court to complete. [E.N.] is on Stage 4 of 7 and because of his mandated discharge, does not have time to complete the program. . . . He admits to being immature when he went to the residential treatment facility and he did not engage in the treatment and saw it as ‘summer camp.’ Once he came to DJJ, he struggled in the sex behavior treatment program taking a long time [to complete] some of the difficult, but essential, components of the program. [¶] [E.N.] said that since he has been in DJJ, he has matured and opened himself up to learn why he committed his crimes. He says that a lot of his anger and abuse of others is directed toward the person who abused him but he has learned that he has to forgive his abuser so that he does not abuse anyone else in the future. He says he is ‘smart enough’ to not re-offend since he now weighs the consequences of his actions. [¶] The treatment team describe [E.N.] as . . . putting forth average effort in his treatment, but he does take it seriously. He has not been a discipline problem, but exhibits passive aggressive behaviors and still struggles with anger and sarcasm. He has been trying to implement coping skills that he learned in his treatment. [E.N.] says that he has become more open and honest about his feelings and implements tools such as positive visualization and self-talk to re-focus. [E.N.] also discussed situations in which he manipulated the rules in DJJ by appealing disciplinary write-ups on technicalities even though he did engage in the behaviors for which he was accused. There was also an instance in which he made sexually inflammatory comments in an admitted attempt to sexually assault another peer because he was ‘stressed out’ and wanted his sexual needs met. This is of grave concern to the board as it indicates that less than a year ago he chose to act out sexually to deal with his stress. [¶] [E.N.] is being discharged from DJJ solely because the law mandates the board to do so. The amount of confinement time he was given was not sufficient to

complete his needed treatment. He has not completed his sex-offender treatment and has continued to engage in risky behaviors. The board would not release [E.N.] if not mandated by [Assembly Bill No.] 1053 to do so, but unfortunately the board has no discretion and he must be discharged pursuant to the law.”

At a re-entry hearing on March 4, 2015, the juvenile court vacated DJJ jurisdiction, reinstated Solano County jurisdiction, maintained appellant as a ward and placed him on probation in the custody of the probation officer for delivery to Buddy’s House, a transitional living program for Penal Code section 290 registrants. Among a lengthy list of probation conditions, E.N. was ordered to attend counseling and “enroll in sex offender treatment within 5 working days.” He was ordered to pay \$10,530 in restitution.

In a June 18, 2015 memorandum to the court, the probation department “recommended that wardship for former minor, [E.N.], be unsuccessfully terminated at this time. [The minor] was not able to complete sex offender treatment or pay off his victim restitution prior to the expiration of his probation grant.” The memorandum also reported that E.R. had “performed well on GPS and he was seen weekly in [the Yuba County probation office]. There were no reported behavior issues during his stay at Buddy’s House” and his participation “has been marginal with perfect attendance.” Also, “the family has not made any payments towards the victim restitution account.” The attached June 16 progress report from New Beginnings stated that E.N. “appears to be meeting all program requirements at this time,” but rated his participation in the treatment program as “marginal.”⁴

At the June 24, 2015 hearing at which E.N.’s probation was terminated, his attorney argued that the termination should be deemed successful. Counsel argued: “[R]egarding the [New Beginnings] progress report, they had indicated to me that the

⁴ The therapist comments in the progress report stated: “[E.N.] appears to be making marginal progress in treatment. He has only attempted to read two drafts of his accountability paper in the last three months. He is expected to read a draft every two weeks and pass on average one paper per month. He does report prosocial coping skills such as riding his bike, music, reading, cooking, etc. He does participate in feedback to others.”

reason for . . . the comments . . . is that their program is designed for a three-year probation grant So it's designed to be completed in three years, which obviously was not the time frame that [E.N.] had, so that would have been impossible for him to complete. . . . So I would argue that he did all the counseling asked at DJJ and all the counseling at the group home before DJJ; that . . . he's done everything that the court has ordered him to do. And it would not be fair to terminate him unsuccessfully . . . just given the effort that he's done and . . . given that the restitution — there's no, really, willful failure to pay. . . . [F]rom what his probation officer and the therapist informed me, that he was doing all his assignments, he was meeting with them, and has had perfect attendance. I think that merits a successful termination. And if not, then, since jurisdiction is expiring, that's really the time crunch here, so I'd ask the court just terminate it, but not put that 'unsuccessful' label on it.”

The court then responded: “Well, yes, he's going to be 21 tomorrow. And so we're out of time. And here we are. And the request being made by [E.N.'s attorney] is that I successfully terminate him. I don't see how I can possibly do that. He has not completed the terms of his probation, either in the payment of the amount of restitution or in his participation in the sex offender program. As a result, I'm going to follow the recommendation of the probation department and unsuccessfully terminate his wardship.”

(b) Analysis

The determination that jurisdiction, or probation, is terminated “unsuccessfully,” in the abstract, is ambiguous. Standing alone, the term “unsuccessfully” does not indicate the purpose for which the determination has been made or the criteria by which success or lack of success has been judged. There are different purposes for which such a determination is necessary, for some of which the failure to complete all conditions of probation is relevant and for some of which it is not. Under one criterion for obtaining exclusion of a sex offender from the Internet web site, the offender must have “successfully completed probation” (Pen. Code, § 290.46, subd. (e)(2)(D)(i)), and for that purpose, the statute defines the phrase to mean “that during the period of probation the offender neither received additional county jail or state prison time for a violation of

probation nor was convicted of another offense resulting in a sentence to county jail or state prison.” (*Id.*, subd. (e)(2)(D)(iv).)

In *In re Timothy N.* (2013) 216 Cal.App.4th 725, a minor whose juvenile probation had been terminated sought to enforce a plea agreement to dismiss an additional charge and reduce his offense to a misdemeanor if he “successfully complete[d] probation.” The prosecutor contended that because the minor had not yet satisfied his restitution obligation, probation had not been successfully completed. The Court of Appeal recognized that the phrase “successfully complete probation . . . appears to have no standard meaning and is ambiguous,” and held that the minor “would have reasonably believed that he would be deemed to have ‘successfully complete[d] probation’ if he completed his term of probation without having engaged in conduct that provided a basis for the court to revoke his probation.” (*Id.* at p. 735.) The court also held “that an individual’s inability to fulfill the restitution obligation does not provide a basis for revoking that individual’s probation.” (*Id.* at p. 736; italics omitted.) In a footnote, the court referred to the definition of “successfully complete probation” in Penal Code section 290.46, subdivision (e)(2)(D)(iv) because that definition “demonstrates an instance in which an individual may be found to have successfully completed probation even if the person may not have fully complied with each and every condition of that probation.” (*Id.* at p. 736, fn. 8.)

Welfare and Institutions Code section 786, subdivision (a)⁵ provides in part: “If a minor satisfactorily completes . . . a term of probation for any offense, the court shall order the petition dismissed . . . [and] shall order sealed all records pertaining to that dismissed petition” When terminating jurisdiction over E.N. in June 2015, the court gave no indication that it was considering possible application of section 786 or considering whether the “unsuccessful” termination that it ordered was the opposite of, or precluded, “satisfactory completion” under section 786. The minor made no request for

⁵ All subsequent statutory references are to the Welfare and Institutions Code unless otherwise indicated.

the entry of a sealing order under section 786. Section 786 has subsequently been amended to add, among other provisions, subdivisions (c), which reads in part: “(1) For purposes of this section, satisfactory completion . . . shall be deemed to have occurred if the person has no new findings of wardship or conviction for a felony offense or a misdemeanor involving moral turpitude during the period of supervision or probation and if he or she has not failed to substantially comply with the reasonable orders of supervision or probation that are within his or her capacity to perform. . . . [¶] (2) An unfulfilled order or condition of restitution, including a restitution fine that can be converted to a civil judgment under Section 730.6 or an unpaid restitution fee shall not be deemed to constitute unsatisfactory completion of supervision or probation under this section.” (Stats. 2015, chs. 368, § 1, 375, § 1.5.)⁶ For this purpose, “satisfactory completion”—seemingly but not necessarily synonymous with “successful” completion⁷—thus requires only substantial compliance with the terms of probation that the individual is capable of performing. And the minor’s failure to make complete restitution does not preclude “satisfactory completion.”

The determination that jurisdiction over E.N. was terminated “unsuccessfully” is tied to no similar statutory provision.⁸ The Attorney General has acknowledged in a supplemental letter brief requested by the court that “From the record of the proceedings, there is no indication that the juvenile court’s finding of ‘unsuccessful’ termination of

⁶ Compare section 793, subdivision (c) [dismissal of wardship petition if court deferred entry of judgment and “minor has performed satisfactorily”].

⁷ See *People v. Martinsen* (1987) 193 Cal.App.3d 843, 848, 850 [trial court did not err in “equating a completion of probation with a ‘successful’ or ‘satisfactory’ completion of probation” under Penal Code section 1000, subdivision (a)(4) for purpose of determining right to diversion of drug offense; Court of Appeal did “not here define the parameters of a successful or satisfactory termination” but held “simply that the termination which occurred in this case did not satisfy the prerequisites of the diversion statute”].

⁸ Although the preprinted juvenile court minute order contains boxes to be checked indicating whether jurisdiction has been terminated successfully or unsuccessfully, no statutory provision calls for such a determination. It may well be appropriate to consider modifying the preprinted order to require a determination whether probation has or has not been completed satisfactorily, to clearly synchronize with the terms of section 786.

wardship carried any direct legal consequence. The court and the parties never referenced statutory authority related to that finding or discussed the consequences that would follow from that finding. At most, the labeling of the wardship’s termination as “unsuccessful” appeared to serve the purpose of informing appellant of his shortfalls while on probation and that he still needed to work on his rehabilitation.”

Although E.N. did not request the juvenile court to enter an order under section 786, he may well be entitled to the entry of such an order.⁹ Since the order reciting that jurisdiction was terminated unsuccessfully is tied to no statutory provision, and might well be misunderstood if the issue should arise in another context,¹⁰ we believe the most advisable course is to strike the determination from the present order, and to remand the matter to the juvenile court to determine whether E.N.’s probation was satisfactorily completed within the meaning of section 786.

2. Restitution

E.R. appeals on several grounds from the order requiring him to pay \$10,350 in restitution. The Attorney General agrees in part with his objections and disagrees as to

⁹ E.N. has submitted a supplemental opening brief on appeal, bringing to the court’s attention that enactment in February 2016 of the federal International Megan’s Law to prevent child exploitation and other sexual crimes through advanced notification of traveling sex offenders (18 U.S.C. § 2250). E.N. describes the new federal consequences of registration as a sex offender and suggests that the statute may be unconstitutional on various grounds, and implicitly that the statute may bear on the validity of California’s registration requirement. However, contrary to what is stated in respondent’s brief, E.N. is not appealing the juvenile court’s order requiring him to register as a sex offender, nor is he requesting this court to declare the federal statute unconstitutional. E.N.’s only point in this regard, as we understand it, is that especially in light of the new federal provisions, the court should “exercise the utmost caution before terminating probation unsuccessfully” because of “the implications of an unsuccessful termination of probation” and that his probation “should be terminated satisfactorily.”

¹⁰ Should E.N. ever be convicted of another criminal offense, prior unsatisfactory performance on probation would be a factor in aggravation for the purpose of sentencing. (Cal. Rules of Court, rule 4.421(b)(5).) Whether E.N.’s failure to complete his treatment program in the time that was available should be considered a circumstance justifying increased criminal punishment in the future, should the situation arise, is at most an academic question at this point which neither the parties nor the court has had any reason to consider.

other objections.

The Attorney General acknowledges that the juvenile court erred in increasing the amount of restitution from the amount awarded in 2012, \$1,782, to \$10,350 based solely on a one-page request for an amended restitution order from the California Victim Compensation and Government Claims Board without any supporting documentation. Penal Code section 1202.4, subdivision (f)(4)(B) requires specific documentation, and counsel timely objected to its absence. Moreover, the increased amount that was ordered does not credit minor for amounts previously paid to reduce the \$1,782 obligation originally ordered. Therefore, the Attorney General asserts, and we agree, the matter must be remanded for a new restitution hearing.

E.N. also contends that the restitution order should be vacated and stricken, without the need for a remand, because the restitution has been ordered to reimburse the restitution fund solely for mental health expenses of the victim and of the victim's guardian, none of which he argues is authorized. The minor argues that unlike the authorization for adult restitution orders in Penal Code section 1202.4, subdivision (f)(3)(C), the authorization for juvenile restitution in Welfare and Institutions Code section 730.6, subdivision (h) does not encompass restitution for mental health expenses or for expenses incurred by a derivative victim. E.H. acknowledges that these contentions have been rejected in *In re M.W.* (2008) 169 Cal.App.4th 1 and *In re Scott H.* (2013) 221 Cal.App.4th 515, but argues that both cases "were wrongly decided as to the scope of restitution in juvenile cases." Counsel provides a lengthy and thoughtful argument as to why the conclusions in those cases should be rejected, and also asserted at oral argument that a recent amendment to section 730.6, subdivision (j) (Stats. 2015, ch. 131, § 1) precludes awarding restitution to E.N.'s guardian as a derivative victim. Unless and until the Supreme Court declares otherwise, we adhere to the view that mental health services "are direct costs to the victim and are recoverable under the statutory authority providing for full recovery of all economic losses." (*In re M.W.*, *supra*, 169 Cal.App.4th at p. 6.) In view of the recent statutory amendment to section 730.6, on remand the juvenile court should consider whether restitution may be awarded to reimburse the cost of mental

health services to E.N.'s guardian. The minor is entitled "to a hearing before a judge to dispute the determination of the amount of restitution." (§ 730.6, subd. (h)(2).)

3. Correction of errors in the record

E.N. points to several factual errors in documents in the record, and the Attorney General agrees they should be corrected. We agree that the juvenile detention dispositional report (clerk's transcript, page 335), that incorrectly refers to minor's two 2012 offenses under Penal Code section 288a, subd. (b)(1) as felonies and should be corrected to indicate that the offenses were misdemeanors. That document is a court document prepared by the clerk of the court and is appropriately ordered corrected. However, it is not appropriate to order the clerk to correct the same error appearing in the probation department intake worksheet (clerk's transcript, page 7) or the errors concerning minor's age as 16 rather than 13 appearing in two wardship petitions (clerk's transcript, pages 1, 388). Although these entries admittedly are incorrect, the authority to correct the record recognized in cases such as *People v. Mitchell* (2001) 26 Cal.4th 181 does not extend to correcting errors in papers filed by parties to the litigation.

Disposition

The orders on appeal are reversed to the following extent: the designation of the termination of jurisdiction over E.N. as unsuccessful shall be stricken, without prejudice to a determination of whether E.N. satisfactorily completed probation within the meaning of section 786; the amount of restitution E.N. is ordered to pay is vacated subject to a redetermination upon proper notice and hearing; the juvenile detention dispositional report shall be corrected to show that minor's two 2012 offenses under Penal Code section 288a, subdivision (b)(1) were misdemeanors. The matter is remanded to the juvenile court for the purposes specified herein and in all other respects the orders are affirmed.

Pollak, J.

We concur:

McGuinness, P.J.

Jenkins, J.