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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re MICHAEL P., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

MICHAEL P.,
Defendant and Appellant.

A147700

(Sonoma County
Super. Ct. No. 38424-J)

Michael P. admitted to committing a misdemeanor drug-possession offense and was placed on probation. Although in its dispositional report the probation department raised a concern about his possible gang affiliation, the department decided not to request gang-related probation conditions, and none were imposed. Within a few weeks, however, a probation officer discovered gang-related paraphernalia in Michael P.’s possession, and the department filed a petition under Welfare and Institutions Code¹ section 778 to modify his probation to include gang-related conditions. The juvenile court granted the petition and imposed such conditions.

On appeal, Michael P. contends that the juvenile court abused its discretion by granting the section 778 petition because the statutory requirement of either a “change of

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

circumstance” or “new evidence” was not established. (§ 778, subd. (a)(1).) We conclude that the material the probation officer discovered constituted new evidence on which the court could rely to modify its original order, and we therefore affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

In September 2015, students at Michael P.’s Santa Rosa high school reported that they had seen another student buy cocaine from Michael P., who was then almost 17 years old.² A search of Michael P.’s pockets revealed a small box containing a rolled-up dollar bill and a bundle of a white substance later determined to be 1.4 grams of cocaine.

The following month, the Sonoma County District Attorney filed a petition under section 602, subdivision (a) seeking to have Michael P. declared a ward of the court. The petition alleged one misdemeanor count of unlawful possession of a controlled substance, and Michael P. admitted to the allegation.³

In its dispositional report, the probation department addressed the evidence that Michael P. might be involved with a gang even though he denied any gang affiliation. The department noted that when arrested he was “wearing clothing indicative [of] Norteño gang affiliation,” consisting of “a black and white ball cap, a black ‘hoodie’ with a red t-shirt underneath which was just visible above the ‘hoodie’s’ collar[, and] . . . a red belt and red sneakers.” When asked about his knowledge of gangs, Michael P. was able to list five gangs and gang subsets, and he also admitted that he had one friend who was “at probation camp and . . . a known Norteño affiliate.” In addition, his father admitted to having associated with Norteño gang members but had “left that lifestyle . . . before [Michael P.] was born.” Finally, the department stated that “a search on social media” had revealed that Michael P. “had several types of pictures which could be considered gang-related.”

² The facts in this paragraph are drawn from the dispositional report, which summarized the police report of the incident.

³ The allegation was made under Health and Safety Code section 11350.

Despite this evidence, the probation department indicated that it “ultimately . . . did not feel [that] the images were specific enough to request gang conditions[.]” Although the department did not recommend that gang-related probation conditions be imposed, the report contained a warning that “[the] department has . . . zero tolerance for any type of gang affiliation or possession of gang-related paraphernalia. Should this become an issue in the future or if at any time [the department] feel[s] that [Michael P.’s] safety is in jeopardy due to suspected gang issues, [the department] will not hesitate to request gang conditions.”

At the December 2015 dispositional hearing, the juvenile court declared Michael P. a ward of the court. After indicating that it would generally follow the probation department’s recommendations, the court placed him on probation and did not impose gang-related conditions.

Less than two weeks after the dispositional hearing, Michael P.’s probation officer submitted a petition under section 778 seeking modification of the dispositional order to add gang-related probation conditions. In support of the petition, the officer stated that five days after the hearing, she “observed Michael in possession of gang[-]related paraphernalia. On his backpack were gang-related writings[,] including . . . ‘707,’ ‘14,’ and ‘Santa Rosa 707’ in red ink.” Three days after that, “a room search yielded a black iPhone, which [Michael P.] advised was his previous phone. On the phone were photographs depicting gang-related paraphernalia.” The officer attached photographs of the backpack writing and three images from the iPhone: an outline of a Huelga bird with a script “N” inside and the phrase “It’s Not A Way of Life . . . It’s A Way of Livin” underneath; a Huelga bird graphic with the phrase “NORTE OVA BITCHEZ” underneath; and a graphic of a skull wearing a bandanna and a baseball hat with the letter “N” on it and two hands holding guns.⁴

⁴ This court granted Michael P.’s request to augment the record with black-and-white copies of these photographs and images. The probation officer’s submission also contained a photograph of Michael P. that was not included in his motion to augment and does not appear in our record.

At the hearing on the section 778 petition, Michael P. objected that a “sufficient change of circumstances” had not been established. He asked the juvenile court to delay ruling on the petition, indicating that he would not object to the imposition of gang-related probation conditions if he were to do anything else that would be prohibited by such conditions. The prosecutor responded that had the department “been aware of the articles that [Michael P.] was found with at the time of the [dispositional] report, [it] would have asked for gang terms at that time. So the change in circumstance is, not only did [the department] have some of the gang information at the time of the . . . report, but now the new information is that [the department] see[s] that he has these articles that associate him with a gang.” The court observed that since preparing the dispositional report, the department had “found additional information to demonstrate at least [gang] association,” and it granted the petition and imposed gang-related conditions.

II. DISCUSSION

A. *General Legal Standards.*

Section 778 authorizes a “person having an interest in a child who is a ward of the juvenile court” to, “upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of [the] court previously made[.]” (§ 778, subd. (a)(1).) “If it appears that the best interests of the child may be promoted by the proposed change of order,” the court must hold a noticed hearing to determine whether the petition should be granted. (§ 778, subd. (a)(2).)

The juvenile court may grant the petition after a hearing if the petition (1) “states a change of circumstance *or* new evidence” and (2) “it appears that the best interest of the child . . . may be promoted by the proposed change of order[.]” (Cal. Rules of Court,⁵ rule 5.570(e)(1), italics added.) The party requesting a modification has the burden of “proving by a preponderance of the evidence that the ward’s welfare requires the modification.” (Rule 5.570(i)(1).) In making its ruling, the court “must necessarily

⁵ All further rule references are to the California Rules of Court.

consider the matters which formed the basis of the order previously made . . . to ascertain whether there has been a ‘change of circumstance’ or ‘new evidence’ warranting a . . . modification . . . of such previous order.” (*In re Corey* (1964) 230 Cal.App.2d 813, 831.)

We review the grant of a section 778 petition for an abuse of discretion. (*Ibid.*)

B. The Probation Department Presented New Evidence that Supported Modification of the Dispositional Order.

Michael P. claims that the juvenile court abused its discretion by granting the section 778 petition because the probation department failed to either establish a “change of circumstance” or present “new evidence” to support the requested modification. We disagree.

As an initial matter, we question Michael P.’s assumption that the juvenile court’s ruling was based on a change of circumstance as opposed to new evidence. The petition did not identify which of these two grounds it relied on, and the court’s only explanation of its ruling was that the probation department had “found additional information” indicating gang association. Because, as we explain below, we conclude that the department presented satisfactory new evidence, we need not address whether the court’s ruling could also be upheld on the theory that a sufficient change of circumstance was established. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [correct ruling may be affirmed on different theory than that relied on by lower court].)

Michael P. contends that “[a]lthough section 778 does not define ‘new evidence,’ ” the meaning of that term is contained in case law interpreting section 388, which governs petitions to modify dependency court orders and contains similar operative language. (See §§ 388, 778; rule 5.570(e)(1) [same standard governs whether to grant section 388 or section 778 petition]; *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485 [characterizing section 778 as “parallel” to section 388].) Relying on *In re H.S.* (2010) 188 Cal.App.4th 103, which addressed a section 388 petition, he argues that the definition of “ ‘new evidence’ is ‘material evidence that, with due diligence, the party could not have presented at the . . . proceeding at which the order . . . sought to be modified . . . was entered.’ ” (Quoting *H.S.*, at p. 105.) The Attorney

General agrees that the term refers to evidence that “could not have been discovered by the exercise of reasonable diligence,” and we will assume without deciding that *H.S.*’s definition applies here.

Michael P. argues that the backpack writing and the iPhone images do not meet the definition of “new evidence” under *In re H.S., supra*, 188 Cal.App.4th 103 because “[t]he record fails to establish that the backpack and/or the iPhone were unavailable to the probation officer at the time of the dispositional hearing.” (Italics omitted.) Specifically, he contends that the backpack writing and the iPhone images already existed at the time of the hearing because the backpack appears well-worn in the photographs and he told his probation officer that the iPhone was his previous cell phone. According to him, this existing evidence would have been easily obtainable earlier because “the probation officer could have *asked* [him] (or his parents) during the pre-disposition interview” whether he had any gang-related writing or electronic images and indeed, had every reason to ask such questions because of the potentially gang-related material already discovered on social media. (Italics in original.) Based on a statement in the dispositional report that Michael P. “provided enough information to complete a thorough report,” he claims that he “would have answered such questions honestly.”

We are satisfied, however, that the record sufficiently establishes that the probation department could not have with reasonable diligence obtained the evidence before the dispositional hearing. Although we do not know the exact questions asked during the pre-disposition interview, it is apparent based on the summary of information under the heading “GANG ACTIVITY” in the dispositional report that the probation officer who conducted that interview thoroughly questioned both Michael P. and his parents about the extent of Michael P.’s involvement with gangs, and they all denied that Michael P. was a gang member. In addition, although that officer indicated that Michael P. was sufficiently forthcoming for purposes of preparing the report, she also observed that “he spent the majority of the interview slouched in his chair with his arms folded,” provided information “only after [she] prompted him several times,” and “portrayed somewhat of a careless and self-righteous attitude.” Given this description of his

demeanor and the fact that he was on notice of the department's concern about his involvement with gangs, there is no basis to assume that he would have volunteered information about his possession of gang-related paraphernalia had he been asked more specific questions. Indeed, his probation officer did not discover the backpack writing and the iPhone images until after Michael P. was placed on probation and she could monitor his activities and conduct warrantless searches. The department could not have been reasonably expected to uncover this evidence before the hearing.

Michael P. also suggests that the record does not establish the existence of "new evidence" because "[n]othing in the record forecloses [the] possibility" that the backpack writing and the iPhone images were discovered in the search of social media. Although it is true that the specific information uncovered by that search is not in the record, it cannot be reasonably inferred that the department knew of the writing and images when the dispositional report was prepared. There is no reason the department would have concluded that the writing and images were not "specific enough" to justify gang-related conditions when seen on social media but would have so quickly reversed course and argued for such conditions merely because the same content was discovered on the backpack and iPhone. In sum, the department presented "new evidence" under section 778, and Michael P. has therefore failed to establish that the juvenile court abused its discretion by granting the petition.

III. DISPOSITION

The order granting the probation department's section 778 petition and imposing gang-related probation conditions is affirmed.

Humes, P.J.

We concur:

Margulies, J.

Banke, J.

In re Michael P. (A147700)