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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DESHAWN S., a Person Coming
Under the Juvenile Court Law.

B233158
(Los Angeles County
Super. Ct. No. VJ39037)

THE PEOPLE,

Plaintiff and Respondent,

v.

DESHAWN S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Fumiko Hachiya Wasserman, Judge. Affirmed as modified.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Blythe J.
Leszkay and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Deshawn S. appeals from the juvenile court's order declaring him a ward of the court and directing him into a six-month placement in a camp-community program after sustaining petitions pursuant to Welfare and Institutions Code section 602¹ alleging he had committed three counts of burglary and one count of petty theft. Deshawn contends the court erred by calculating his maximum period of physical confinement by including the related petty theft charge in violation of Penal Code section 654. We remand the matter for a new disposition hearing.

FACTUAL AND PROCEDURAL BACKGROUND

In early July 2010, police detained Deshawn, then 14 years old, after he took candy from a small market in Long Beach without paying for it. On September 24, 2010, the People filed a section 602 petition alleging Deshawn had committed felony second degree burglary and petty theft. Following a jurisdiction hearing, the juvenile court sustained both counts and declared the burglary to be a misdemeanor. The court transferred the matter to another court for disposition.

In early April 2011, police detained Deshawn after he took items from two clothing stores in Downey without paying for them. A second section 602 petition was filed on April 7, 2011, alleging Deshawn had committed two counts of felony second degree burglary.

Before the second petition could be adjudicated, a third section 602 petition was filed on April 26, 2011, alleging Deshawn had committed one count of felony second degree burglary in March 2011 at a fast food restaurant in Lakewood.

The three petitions were consolidated for a negotiated resolution before a different bench officer. At the hearing on May 13, 2011, Deshawn admitted the offense of felony second degree burglary, a felony, as alleged in count 1 of the second petition and in the third petition. On the People's motion, the court dismissed the remaining burglary count

¹ Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

as alleged in the second petition. The juvenile court adjudicated Deshawn a continuing ward of the court, subject to certain terms and conditions of probation, and ordered him into a six-month camp program. Deshawn's maximum period of physical confinement was calculated as four years two months: the three-year upper term for the second degree burglary sustained in count 1 of the second petition, plus eight months (one-third the two-year middle term) for the second degree burglary sustained in the third petition, plus four months (one-third the one-year term) for the misdemeanor burglary and two months (one-third the six-month term) for the petty theft sustained in the first petition.

DISCUSSION

Deshawn's sole contention on appeal is the juvenile court calculated his maximum term of confinement in violation of Penal Code section 654 by including the sentence for petty theft.

1. Maximum Term of Confinement

In a juvenile case, the maximum term of confinement is defined as "the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (§ 726, subd. (c).) "After a new petition is sustained under section 602, . . . the court may consider the juvenile's entire record before exercising its discretion at the dispositional hearing and may rely on prior sustained section 602 petitions in determining the proper disposition and maximum period of confinement." [Citation.] Section 726 permits the juvenile court to aggregate terms on the basis of previously sustained section 602 petitions in computing the maximum period of confinement. [Citation.] "Thus, section 726 authorizes the court in a section 602 proceeding to "aggregate the period of physical confinement on multiple counts, or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602" [Citation.] Aggregation is not mandatory or automatic, but rests within the sound discretion of the juvenile court. [Citation.]" (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.)

2. Penal Code section 654

Penal Code section 654² prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; see *Latimer, supra*, 5 Cal.4th at p. 1208.) On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he or she “may be punished for each statutory violation committed in pursuit of each objective” even though the violations were otherwise part of an indivisible course of conduct. (*Harrison, supra*, 48 Cal.3d at p. 335.) “‘The principal part of an inquiry in each case is whether the defendant’s criminal *intent* and *objective* were single or multiple.’ [Citation.] ‘A defendant’s criminal objective is “determined from all the circumstances. . . .”’” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469; italics added.)

Whether Penal Code section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Hutchins, supra*, 90 Cal.App.4th at p. 1312; *Herrera, supra*, 70 Cal.App.4th at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) “We

² Penal Code section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "separate intents" reviewed for sufficient evidence in light most favorable to the judgment].)

3. The Juvenile Court Erred in Calculating the Maximum Term of Physical Confinement by Including the Petty Theft from the First Petition

Neither bench officer in this matter made an express finding regarding Deshawn's intent with respect to the petty theft and misdemeanor burglary of the small market in Long Beach. However, a finding that each offense was a separate act with a separate criminal intent can be implied from the calculation of the maximum term of physical confinement, which included separate terms for those two offenses. Although we will sustain that implied finding if supported by substantial evidence (see *People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Blake* (1998) 68 Cal.App.4th 509, 512), as the People acknowledge, a defendant cannot be punished for both burglary and theft where, as here, it is undisputed that the burglary was based on entry to commit theft. (*In re Jose P.*, *supra*, 106 Cal.App.4th at p. 469.) Accordingly, the separate term for the misdemeanor petty theft should not have been included in the juvenile court's calculation of the maximum term of confinement.

Contrary to the People's argument, *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*) and *In re Giovanni M.* (2000) 81 Cal.App.4th 1061 (*Giovanni M.*) do not dictate a different result. Because neither case supports the People's proposition that "where the minor enters into a plea bargain, the minor waives the right to challenge the maximum term of confinement for the first time on appeal, *even where the maximum term of confinement is not an explicit term of the plea bargain*," (original emphasis), they are readily distinguishable. *Hester* held a defendant's acceptance of a plea agreement that includes a *specified* sentence constitutes an implicit waiver of his or her right to contend the sentence imposed violates Penal Code section 654. (*Hester*, *supra*, 22 Cal.4th at p. 295.) *Giovanni M.* held a minor who admits the allegations of a petition in return for a

more lenient and *specified* maximum term of confinement similarly waives any challenge under Penal Code section 654. (*Giovani M., supra*, 81 Cal.App.4th at p. 1066.) By contrast, while Deshawn was advised of and acknowledged the maximum term of confinement that could be imposed based on the allegations in all three petitions (four years ten months), he never agreed to a specified maximum term of confinement as part of the negotiated resolution. Instead, the negotiated resolution called for Deshawn to admit two of the three felony burglary allegations, in exchange for a dismissal of the remaining burglary allegation and placement in a six-month community camp program. No mention was made of the four-year two-month maximum term of confinement until the disposition portion of the consolidated hearing. Deshawn did not waive or forfeit his Penal Code section 654 challenge for having failed to raise it in juvenile court, because the failure to stay the term for petty theft constitutes an unauthorized sentence, which may be addressed for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

DISPOSITION

The disposition order of May 13, 2011, is ordered modified to reduce the maximum term of confinement to four years, and to stay the sentence on the petty theft. As modified the order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.