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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re JERRY W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JERRY W., Defendant and Appellant.	C067729 (Super. Ct. No. JV129039)

The juvenile court found true allegations that defendant Jerry W. (the minor) committed two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and allowed gunfire from his motor vehicle (§ 12034, subd. (b).) The minor was thereafter declared a ward of the court and committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice.

On appeal, the minor contends the matter must be remanded for the juvenile court to make a conscious determination of whether the offenses were felonies or misdemeanors, as required by Welfare and Institutions Code section 702.[1] We agree, and shall remand to the Fresno County Juvenile Court so it may exercise its discretion under section 702.

BACKGROUND

In light of the nature of the contention on appeal, we do not summarize at length the facts of the underlying drive-by shooting offense. It suffices to say witnesses saw or heard shots fired from a green car on Lee Avenue in Fresno toward a group of teenagers walking down the street. After responding, police located a vehicle matching the suspects' car; the minor was apprehended and interrogated.

The minor admitted he drove the stolen car used in the shooting, and was directed where to drive by the other passengers in the car. The minor knew that at least two passengers had guns, what kind of guns they had, and that they intended to shoot from the car at someone.[2]

A juvenile wardship petition was filed, alleging the minor had committed two counts of felony assault with a firearm (Pen. Code, § 245, subd. (a)(2) -- counts 1 and 2); permitting a

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[1] Further unspecified statutory references are to the Welfare and Institutions Code.

[2] The minor was then 14 years old. When he was 12, the minor was adjudged a ward of the court for a felony theft offense.

person to shoot from the car he was driving, a felony (Pen. Code, § 12034, subd. (b) -- count 3); and felony receipt of stolen property (the car) (Pen. Code, § 496d, subd. (a) -- count 4).

Following a contested jurisdictional hearing, the court (by Fresno Superior Court Judge Arax), in Fresno County Juvenile Court case No. 08CEJ600049-4, found the charges “true as alleged” in counts 1, 2 and 3 of the petition.

The matter was transferred to Sacramento County for disposition.

At the contested disposition hearing in Sacramento County, the court (by Sacramento Superior Court Judge Eurie) stated: “So the record is clear . . . we are here today on two counts of felony violations of Penal Code section 245[, subdivision] (a)(2)(f), and Penal Code section 12034[,] subdivision (b) following a jurisdictional hearing in Fresno County where that court found those allegations to be true and sustained the petition as such.” The minor was then committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice.

DISCUSSION

The minor contends on appeal that neither juvenile court evidenced awareness that the violations were so-called “wobbler” offenses, acknowledged their discretion to declare the offenses to be misdemeanors, rather than felonies, nor formally declared whether the offenses were felonies or misdemeanors, as required

by section 702, so remand is required. His claim of error has merit.

Section 702 provides that when a minor is declared a ward under section 602, "[i]f the 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." (See also Cal. Rules of Court, rules 5.780(e)(5), 5.795(a).)

Section 702 "requires an explicit declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204 (*Manzy W*.).) In *Manzy W.*, the California Supreme Court determined that the juvenile court's duty to designate a "wobbler" offense as either a misdemeanor or felony is mandatory. (*Id*. at p. 1205, fn. 3.) Citing its own earlier decisions, the Supreme Court rejected arguments that the determination may be implied from the length of the sentence or that a trial court may simply be presumed to have fulfilled its official duty. (*Id*. at pp. 1207, 1209.) The requirement for an explicit determination, said the court, "serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion . . . ." (*Id*. at p. 1207, citing *People v. McGee* (1977) 19 Cal.3d 948, 963.) The designation is important because of its effect on a minor's future and not just for determining sentencing options for a present offense. (*Manzy W.*, *supra*, 14 Cal.4th at pp. 1208-1209, citing and explaining *In re Kenneth H*. (1983) 33 Cal.3d 616, 619, fn. 3.)

In particular, the designation may determine whether the current offense may be used for impeachment or for enhancement of a sentence for a later offense, for determination of whether a future offense constitutes a strike, and whether the offender's character is blighted by the record. (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.)

Hence, although not "'automatic,'" remand is required for "strict compliance" with section 702 if the juvenile court fails to expressly make a formal declaration, unless the record shows "that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion . . . ." (*Manzy W., supra*, 14 Cal.4th at pp. 1204, 1209.) "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion . . . ." (*Id*. at p. 1209.)

The charges of assault with a firearm and permitting a person to shoot from one's car can be treated either as a felony or a misdemeanor, and are therefore "wobbler" offenses.

The People insist the juvenile court's mandatory duty under section 702 was satisfied by the Fresno County Juvenile Court's statement at the jurisdictional hearing that it found the charges as to counts 1, 2 and 3 "true as alleged," i.e., as felonies, and the Sacramento County Juvenile Court's statement at the dispositional hearing that "we are here today on . . . felony violations" found true in the jurisdictional hearing.

We must concur with the minor that, under the circumstances, this is not enough. We cannot credit the Fresno County Juvenile Court's references to the charges "as alleged,"

because we may not substitute pleadings, minute orders, or even the imposition of a felony term of confinement for an express declaration by the juvenile court. (See *Manzy W., supra*, 14 Cal.4th at p. 1208.) Moreover, the Sacramento County court's statement does not suggest an exercise of discretion and may, as the minor suggests, reflect a "mistaken premise" that the Fresno County court had declared the offenses to be felonies when, in fact, it never did so.

Because there is no basis for concluding that either juvenile court was aware of its discretion to declare the offenses to be misdemeanors or felonies (*Manzy W., supra*, 14 Cal.4th at p. 1207), remand is required.

We remand the matter to the Fresno County Juvenile Court. The California Rules of Court state that determining the degree of the offense, and whether it would be a misdemeanor or a felony had the offense been committed by an adult, "must" be done by the judge presiding over the contested juvenile jurisdictional hearing (Cal. Rules of Court, rule 5.780(e)(5) ["If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and expressly declare on the record that it has made such consideration, and must state its determination as to whether the offense is a misdemeanor or a felony."]). If, however, "the court has not previously considered whether any offense is a misdemeanor or felony, the court must do so" during the dispositional hearing, and must "state its finding on the record" (Cal. Rules of Court, rule 5.790(a)(1)). When the same

judge conducts both the jurisdictional and dispositional hearings, it makes little difference whether the declaration is made at the jurisdictional or dispositional hearing. But where, as here, neither judge has made the required declaration, it makes more sense to remand to the juvenile court that conducted the contested jurisdictional hearing, and heard the evidence regarding the offenses. In this case, the Fresno County Juvenile Court is in the best position to determine whether, as to each offense, "it would be a misdemeanor or a felony had the offense been committed by an adult." (Cal. Rules of Court, rule 5.780(e)(5).)

DISPOSITION

The true findings on the charges alleged in the petition are affirmed. The matter is remanded to the Fresno County Juvenile Court to determine in its discretion under section 702 whether the offenses are felonies or misdemeanors.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

HOCH, J.