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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re A.C., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.C.,

Defendant and Appellant.

C068634

(Super. Ct. No. 68698)

The minor A.C. entered an admission to one of four allegations in a petition, was adjudged a ward of the court within the meaning of Welfare and Institutions Code section 602,¹ and was granted probation. He appeals. He contends that the matter must be reversed and remanded because the juvenile court failed to conduct a hearing on his suitability for deferred entry of judgment (DEJ). He also challenges the \$227.50 in

¹ Undesignated statutory references are to the Welfare and Institutions Code.

penalty assessments as unauthorized and the 10 percent collection fee as having not been orally imposed but added by the clerk. We conclude that the minor's conduct effectively rejected DEJ and that the juvenile court was excused from making a suitability determination. The minor's contentions with respect to the assessments and fee are also rejected.

FACTUAL AND PROCEDURAL BACKGROUND

A petition filed May 26, 2011, alleged that the minor came within the provisions of section 602 in that on May 24, 2011, he possessed a firearm, a felony (count 1) and possessed ammunition, a misdemeanor (count 2), and that on December 28, 2010, the minor trespassed by entering and occupying, a misdemeanor (count 3). A form "Determination of Eligibility-Deferred Entry of Judgment-Juvenile," filed the same day as the petition, reflected that the prosecutor had determined that the minor was eligible for DEJ. A form "Citation and Written Notification for Deferred Entry of Judgment-Juvenile," also filed the same day, gave the minor and his parents written notice of DEJ procedures and the hearing on eligibility.²

At the detention hearing at 1:30 p.m. on May 27, 2011, the minor appeared with both parents. The court appointed counsel for the minor. Counsel noted that she had discussed the

² The "Citation" form reflects clerical errors, referring to the petition as having been filed on "11/26/11" (instead of May 26, 2011) and a hearing which was scheduled for "11/27/11" at 1:30 p.m. rather than the hearing which was held on May 27, 2011, at 1:30 p.m. at which the minor and both parents appeared.

allegations in the petition with the minor who understood the nature of the charges and waived further reading, arraignment and advisement of rights. Counsel sought the minor's release, commenting the family wanted him home, the minor was almost 18 years of age, and the minor had not previously been in trouble. The prosecutor objected in light of the charges, including a loaded firearm, his plan to add an additional charge of resisting a peace officer, and the fact that the minor was a documented Sureno gang member. The court denied the minor's request for release. Counsel denied the allegations, refused to waive time, and sought to set the next hearing on jurisdiction as soon as possible. The court set the next hearing on jurisdiction for June 1, 2011. No one mentioned DEJ. The minutes of the hearing, however, reflect that the DEJ form was in the court file and that the minor was eligible.

On June 1, 2011, the prosecutor offered to settle the matter for the minor's admission to count 1 (possession of a firearm). Instead, counsel refused to waive time and sought to set the jurisdictional hearing and a suppression motion, stating that a confirmation hearing was not required. The jurisdictional hearing was set for June 16, 2011.

On June 3, 2011, counsel filed a declaration of prejudice against Judge Urie.

On June 6, 2011, counsel filed a motion to suppress with respect to the evidence seized on May 24, 2011, including the firearm and the ammunition.

An amended petition filed June 8, 2011, added an allegation that on May 24, 2011, the minor resisted, obstructed, and delayed a peace officer, a misdemeanor (count 3). The December 2010 trespassing allegation was renumbered as count 4 in the amended petition.

On June 10, 2011, the minor waived formal arraignment and advisement of rights. There is no reporter's transcript on appeal for this proceeding.

At the June 16, 2011 hearing on the minor's suppression motion, to be immediately followed by the contested jurisdictional hearing, counsel challenged the minor's detention, the search and his arrest. About 7:30 p.m. on May 24, 2011, Lodi Police officers were patrolling a high gang area where gang shootings had been reported earlier that day. The minor was standing in an alley. The minor gave his name and date of birth but when asked if he had anything illegal, he turned and started to run away. An officer tackled the minor who reached for a loaded handgun in his waistband. According to the minor, the officer asked if he was on probation and would consent to a search. The minor claimed he did not agree to a search, walked away, and ran when one officer grabbed him.

The court denied the minor's suppression motion. The court noted that the contested jurisdictional hearing would have to be continued because there was no more time that day. Counsel stated that she had numerous cases the next morning and then was scheduled to leave town for a week. She requested that the

minor be released on the electronic monitoring program pending the continued jurisdictional hearing so that he could care for his siblings. The court declined to release the minor and suggested that the matter be heard the following day at 11:00 a.m. if there was time after the court finished its calendar. Counsel requested time to speak to the minor. After a pause in the proceedings, the prosecutor advised counsel that the original offer-admission to count 1-was still open. Counsel advised the court that the minor was prepared to admit count 1, possession of a firearm, a felony. The court obtained the minor's waiver of his constitutional rights and his admission to count 1. The remaining counts were then dismissed in the interest of justice. Counsel refused to waive time for the dispositional hearing, which was then set for June 29, 2011. The court ordered the minor to remain detained in juvenile hall.

At the dispositional hearing on June 29, 2011, the parties submitted on the probation officer's report. The court granted probation with a maximum confinement time of three years and subject to certain terms and conditions including 60 days in juvenile hall with 30 days of credit for time served, an additional 30 days suspended pending school review, 45 days on electronic monitoring after the minor was released, and an order that the minor participate in the work project while at juvenile hall. The court ordered the minor to pay a \$100 restitution fine (\$ 730.6, subd. (b)(1)) with a 10 percent collection fee (\$ 730.6, subd. (q)) and a \$100 fine for deposit in the county's

general fund (§ 731, subd. (a)(1)) plus assessments totaling \$227.50.

DISCUSSION

I. Hearing on Suitability for DEJ

The DEJ procedure has been succinctly summarized in *Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556 at pages 558 to 559 as follows:

"The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)

"Section 790 makes a minor eligible for DEJ if all the following circumstances exist:

"(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense.

"(2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707.

"(3) The minor has not previously been committed to the custody of the Youth Authority.^[3]

"(4) The minor's record does not indicate that probation has ever been revoked without being completed.

"(5) The minor is at least 14 years of age at the time of the hearing.

"(6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.' (§ 790, subd. (a)(1)-(6).)

"If the minor waives the right to a speedy jurisdictional hearing, admits the charges in the petition and waives time for pronouncement of judgment, the court may summarily grant DEJ or refer the matter to the probation department for further investigation. The department is required to take into consideration 'the defendant's age, maturity, educational background, family relationship, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors in determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation.' (§ 791, subd. (b).) The trial court makes 'the final determination regarding education, treatment, and rehabilitation

³ California Youth Authority is now known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (§ 1710, subd. (a).)

of the minor.'" (Accord, *In re Kenneth J.* (2008)
158 Cal.App.4th 973, 976-977 (*Kenneth J.*).

For the first time on appeal, the minor contends the juvenile court failed to either summarily grant DEJ or conduct a hearing on his suitability for DEJ, requiring reversal and remand. The People respond that the minor has forfeited any entitlement to DEJ by failing to raise it below, the minor was not eligible for DEJ because he did not admit each allegation of the wardship petition, and the minor did not consent to DEJ because the matter proceeded to a dispositional hearing and he did not waive time for entry of judgment. In reply, the minor claims he did not forfeit or waive a DEJ determination because the record fails to demonstrate that personal notice was provided. The minor also argues it is not his obligation to initiate the DEJ process.

We conclude the minor has failed to demonstrate that he did not receive notice of his eligibility for DEJ. We also conclude that the minor effectively rejected DEJ by his conduct of refusing to waive time for the jurisdictional hearing, by admitting only one of four allegations of the amended wardship petition, and by refusing to waive time for the dispositional hearing.

In determining that the minor was eligible for DEJ and providing the written notification required by section 791, the prosecutor complied with the requirements of section 790,

subdivision (b) and California Rules of Court, rule 5.800(b).⁴ The record contains both the "Determination of Eligibility" form and the "Citation and Written Notification" form. In his reply brief, the minor claims the record does not demonstrate that he or his parents had notice of his DEJ eligibility. He argues there is no proof of service in the record on appeal demonstrating that the "Citation" form was served on him or his parents.

Welfare and Institutions Code section 790, subdivision (b) provides that the prosecutor "shall make this information [about the minor's eligibility for DEJ] available to the minor and his or her attorney."⁵ Welfare and Institutions Code section 792 and rule 5.800(c) provide that the court is required to have the "Citation" form personally served on the parents. The fact that a proof of service is not included in the clerk's transcript does not prove there is no proof of service. Rule 8.407(a) does not require that a proof of service be included in the clerk's transcript on appeal. The minor did not seek to augment the record to demonstrate that a proof of service does not exist. It is the minor's "burden to provide this court with a complete record on appeal." (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 681, fn. 7 (*Joshua S.*)). Absent a contrary showing, we presume

⁴ Further rule references are to the California Rules of Court.

⁵ The minor misplaces his reliance upon *In re Luis B.* (2006) 142 Cal.App.4th 1117. Unlike *Luis B.*, the prosecutor here determined that the minor was eligible. (See *Kenneth J.*, *supra*, 158 Cal.App.4th at p. 980.)

that official duty is regularly performed. (Evid. Code, § 664.) In rebuttal, the minor offers that DEJ forms were not mentioned at the detention hearing and counsel did not acknowledge receipt of the notice of the minor's eligibility. Although not orally mentioned, the minutes reflect the clerk's notation that the DEJ form was in the court's file. The minor was represented by counsel who presumably knows the law and thus would have known about DEJ procedures. The minor does not raise an ineffective assistance of counsel claim on appeal. The minor was present at the detention hearing as were his parents. On this record, we conclude that the minor has failed to demonstrate that he did not receive notice of his eligibility for DEJ.

With DEJ, a suitability determination would require the court to consider the prosecutor's declaration, probation's report and recommendation, and any other material provided by the minor and interested parties. The minor would have to consent and waive his right to a speedy jurisdictional hearing. (§ 791, subd. (b).) The minor's conduct, here, effectively rejected DEJ. Every step of the way, the minor's counsel was pushing the matter in order to obtain the minor's release from custody. The minor did not waive his right to a speedy jurisdictional hearing. In fact, at every hearing, counsel refused to waive time. At the combined hearing on the suppression motion and jurisdictional hearing, when it became necessary to continue the jurisdictional portion of the hearing due to the lack of time remaining on the court's calendar, the

minor chose instead to enter an admission and then to only one out of the four counts alleged against him. The transcript of the hearing on the suppression motion reflects that the prosecution had ample evidence to prove the other related counts.⁶ The minor's conduct reflects that he did not consent to DEJ procedures. Indeed, he never requested DEJ. (Cf. *In re A.I.* (2009) 176 Cal.App.4th 1426, 1429-1432, 1435.)

Kenneth J., *supra*, 158 Cal.App.4th 973 is instructive. "Kenneth's approach erroneously assumes that a juvenile court can start the DEJ process in the teeth of the minor's opposition—in effect, that the DEJ procedure can be forced on an unwilling minor. That is clearly illogical, as there is nothing in the statutory language of section 791 or California Rules of Court, rule 5.800 which suggests that a minor can be compelled to accept DEJ. Or to put it conversely, the language in the statute and rule 5.800 requires some measure of consent. [¶] It is perhaps true the DEJ statutes make no express provision for a minor in Kenneth's position, one who is advised of his DEJ eligibility, who does not admit the charges in the petition or waive a jurisdictional hearing, and who does not show the least interest in probation, but who insists on a jurisdictional hearing in order to contest the charges. But the DEJ is clearly intended to provide an expedited mechanism for channeling

⁶ The suppression motion covered only the evidence seized on May 24, 2011, and related to counts 1 (firearm), 2 (ammunition), and 3 (resisting a peace officer). Count 4 (trespassing) was alleged to have occurred on December 28, 2010.

certain first-time offenders away from the full panoply of a contested delinquency proceeding. That goal could not coexist with a minor who insists on exercising every procedural protection offered, and who then on appeal faults the juvenile court for not intervening and short[-]circuiting those very protections. This would place a juvenile court in an impossible 'Heads he wins, tails I lose' situation—not to mention apparently compelling a juvenile court to hold a hearing to consider DEJ for a minor who evinces no interest whatsoever in that option. We decline to adopt such a mischievous, if not self-defeating, construction." (*Kenneth J.*, at pp. 979-980; see also *In re Usef S.* (2008) 160 Cal.App.4th 276, 285-286.) Like *Kenneth J.*, the minor here "evinced no interest whatsoever" in DEJ. (*Kenneth J.*, at p. 980.)

The minor misplaces his reliance upon *Joshua S.*, *supra*, 192 Cal.App.4th 670 where the minor never attempted to litigate the petitions, never requested a jurisdictional hearing, and admitted the allegations of the amended wardship petitions which reduced the charges. (*Id.* at pp. 674, 679, 681.) Here, the minor insisted on a jurisdictional hearing from the very beginning, which would have proceeded but for the lack of time after the court heard the suppression motion. Moreover, the minor did not admit all the counts; he admitted only one of the four counts of the amended petition. The charge was not reduced. After the minor entered his admission, the remaining counts were dismissed in the interest of justice. The minor

refused to waive time for the dispositional hearing. In this situation, the juvenile court was not required to determine the minor's suitability for DEJ because the minor's actions "were tantamount to a rejection of DEJ." (*Kenneth J., supra*, 158 Cal.App.4th at p. 980.)

II. Penalty Assessments

The minor contends the order that he pay \$227.50 in penalty assessments was unauthorized. We reject this claim. His entire argument is based on a faulty premise, that is, the court imposed two \$100 restitution fines.

While the court imposed a \$100 restitution fine pursuant to section 730.6, subdivision (b)(1), the court also imposed a \$100 general fund fine pursuant to section 731, subdivision (a)(1). The \$100 general fund fine is not a restitution fine. Instead, it is more akin to a crime fine. The \$227.50 in penalty assessments attached to the \$100 general fund fine, not the \$100 restitution fine. The penalty assessments on the general fund fine were recommended and broken down in the dispositional report. At the disposition hearing, the parties submitted on the dispositional report. The court adopted the recommendations of probation, incorporating them by reference, and ordered the penalty assessments of \$227.50 as broken down in the report.⁷ We find no error.

⁷ In a footnote, the minor complains that the statutory basis for the penalty assessments as set forth in the minute order was not specified as required by *People v. High* (2004)

III. Collection Fee

Finally, the minor challenges a 10 percent collection fee imposed pursuant to section 730.6, subdivision (q). We reject the minor's contention that the clerk added the fee out of whole cloth. Although the 10 percent collection fee was not specifically cited by the court when it ordered the restitution fine, the dispositional report specifically recommended the collection fee, the court adopted the recommendations in the report, incorporating them by reference, and the minor submitted on the dispositional report. Under the circumstances, we find no error.

119 Cal.App.4th 1192. *High* involved the statutory bases of fines, fees, and assessments on an abstract of judgment in a criminal matter and noted that the abstract was used by the Department of Corrections and Rehabilitation to "fulfill its statutory duty to collect and forward deductions from prisoner wages to the appropriate agency." (*Id.* at p. 1200.) In this delinquency matter, the minor was granted probation and there is no abstract of judgment. We fail to see *High's* application here but do not need to decide the matter. The minor merely raises this new issue in a footnote in his opening brief, which constitutes forfeiture. (Rules 8.204(a)(1)(B), 8.412(a)(2); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830-1831, fn. 4.) In any event, although the minutes of the dispositional hearing reflect that the court imposed "\$227.50 per P[enal] C[ode] [section] 1464, et al.," the minor ignores the dispositional report, which sets forth the statutory basis for the penalty assessments, and also ignores the court's recitation on the record incorporating the report by reference.

DISPOSITION

The adjudication and orders of the juvenile court are affirmed.

_____ BUTZ _____, J.

We concur:

_____ ROBIE _____, Acting P. J.

_____ MURRAY _____, J.