Filed 12/19/12 In re J.B. CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| In re J.B., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>J.B.,<br><br>Defendant and Appellant. | C069301<br><br>(Super. Ct. No. JV132141) |

J.B. (hereafter the minor) appeals from an order of the Sacramento County Superior Court placing him in a group home. He contends the commitment order was an abuse of discretion by the court because (1) the evidence was insufficient to demonstrate a probable benefit to him from the commitment, and (2) the court failed to consider proposed changes that would permit him to remain in his home. He also contends, and the People agree, that remand is required because the court failed to award him prior custody credit. We reject defendant's initial contention and, like the People, agree with his custody credit claim.

## PROCEDURAL HISTORY

On April 4, 2011, pursuant to a plea bargain, the minor admitted one count of receiving stolen property (Pen. Code, § 496, subd. (a)). He was granted deferred entry of judgment and placed in custody of his mother under supervision by the probation officer.

On July 19, 2011, the minor was charged with one count of robbery (Pen. Code, § 211) with an armed allegation (Pen. Code, § 12022, subd. (d)). On August 23, 2011, following a contested jurisdictional hearing, the juvenile court sustained the robbery charge but not the firearm enhancement allegation. On September 19, 2011, the court ordered the minor removed from his mother's custody and ordered him placed in a "level A group home."

## DISCUSSION

### I

Citing *In re Jonathan T.* (2008) 166 Cal.App.4th 474 (*Jonathan T.*), and *In re Angela M.* (2003) 111 Cal.App.4th 1392 (*Angela M.*), the minor contends his group home placement must be reversed because the record fails to demonstrate that he would likely benefit from the placement. We reject the contention because there is no such requirement for a group home commitment.

*Jonathon T.* and *Angela M.* stand for the proposition that when a minor is committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF; formerly California Youth Authority (CYA)), that in addition to the factors which the court must consider under Welfare and Institutions Code section 725.5,[1] the record must show that, pursuant to section 734, it is probably likely that he or she will benefit from the commitment.[2] Specifically, in discussing commitments to DJF,

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[1] References to undesignated sections are to the Welfare and Institutions Code.

[2] Section 725.5 provides: "In determining the judgment and order to be made in any case in which the minor is found to be a person described in Section 602, the court shall

*Jonathan T.* stated: "When determining the appropriate disposition in a delinquency proceeding, the juvenile courts are required to consider [section 725.5]. [Citations.] *Additionally*, 'there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJF] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives.' (*In re Angela M*. (2003) 111 Cal.App.4th 1392, 1396.)" (*Jonathan T., supra,* at pp. 484-485, italics added.)

Similarly, the court in *In re Jose T.* (2010) 191 Cal.App.4th 1142, stated, "When the court evaluates the minor after a section 777 petition [probation revocation] is filed, it must make required findings that the previous disposition has not been effective in the rehabilitation or protection of the minor, *and, if the court chooses a [DJF] commitment*, the court must be fully satisfied, pursuant to Welfare and Institutions Code section 734, that the mental and physical condition and qualifications of the ward render it probable that the ward will be benefited by the commitment." (*Id*. at. p. 1147, italics added.)

Because the minor was not committed to the DJF, the requirements of section 734 are not relevant to a review of appropriateness of his group home placement.[3]

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consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history.

Section 734 provides: "No ward of the juvenile court shall be committed to the Youth Authority [now DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."

[3] The minor also cites *In re Robert H.* (2002) 96 Cal.App.4th 1317, in support of his contention that the record of the court's disposition must contain evidence of probable benefit to the minor. *Robert H.* is not on point because it involves a camp placement order and has nothing to do with the requirements of section 734.

II

The minor contends he was prejudiced by the juvenile court's failure to consider "proposed changes" urged by his counsel that would have permitted the minor to remain on home probation. The record does not support the claim.

An appellate court "review[s] a juvenile court's commitment decision for abuse of discretion, indulging all reasonable inferences to support its decision. [Citations.]" (*In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1320.)

The "proposed changes" urged by counsel were that the minor would enroll in either an educational program called "The Met" that was more rigorous than the independent study program he was in or in the Elinor Hickey program which emphasized the trades. When the minor was not in school, his time would be filled with after-school church activities, the possibility of joining a youth football league in which his cousins participated, and his uncle had offered him a part-time job. Additionally, removal of the minor from his home would weaken his family support, which was one of his "strong suits."

The minor claims "the court gave no consideration" to his proposed changes, but offers no basis whatsoever for this conclusion. Not only were the proposed changes expressly argued to the court, but the general rule is that in the absence of evidence to the contrary a court is presumed to have been aware of and followed the applicable law, which in this case was section 725.5. (Evid. Code, § 664; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) The fact that the minor did not obtain the result he wanted, does not rebut the presumption.

Moreover, in making its decision the court explained that the minor's behavior inside the home is in "stark" contrast to what he does outside the home. The court

emphasized that "armed robbery" is a "very dangerous offense," and the "public safe[ty]" required that he gain the tools and understanding which he was not obtaining at home.[4]

Consequently, the court did not abuse its discretion in ordering the group home placement.

III

The minor contends, and the People concede, that remand is required for the juvenile court to calculate and award the minor predisposition custody credits. We agree that remand is required for this purpose, however, additional work needs to be done.

On August 31, 2011, the court ordered the minor placed into a "level A" setting, but noted the order could not be finalized until it was determined that the Indian Child Welfare Act (ICWA; 25 U.S.C., § 1901 et. seq.) was inapplicable.[5] Aggregating the robbery and receiving stolen property petitions, the court determined the minor's maximum period of confinement was six years -- three years for the second degree robbery plus three years for the receiving stolen property. This calculation was based upon the court's belief that it "has the ability to make the appropriate determination that's not strictly limited to the triad." In these circumstances, the court has no such "ability" or discretion.

Where the commitment is out-of-home but less than DJF, the court is required to select the longest term of the sentencing triad. (*In re Eddie L.* (2009) 175 Cal.App.4th 809, 813-814 [section 726, subdivision (c), "says 'the longest' term, not 'the most appropriate' term . . . is to be computed . . . ."].) And if the court elects to aggregate multiple counts or previously sustained petitions, the court is to follow the procedure set

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[4] Protection and safety of the public is a proper consideration of the juvenile court in fashioning a dispositional order. (§ 202, subd. (b).)

[5] On September 19, 2011, the court determined the ICWA did not apply and reaffirmed its level A placement order.

forth in Penal Code section 1170.1, subdivision (a),[6] to wit, the longest term (principal term) to which is added one-third of the middle term of other petitions or counts (subordinate term(s)). Second degree robbery is punishable by two, three, or five years (Pen. Code, § 213, subd. (a)(2)); the punishment for felony receiving stolen property is 16 months, two, or three years (Pen. Code, § 496, subd. (a)). Thus, if on remand the court chooses to aggregate the petitions, the maximum period of confinement is five years eight months.

The court is also required to determine and award against the maximum period of confinement any predisposition custody credits a minor has served. (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

DISPOSITION

The juvenile court's order that the minor's maximum period of confinement is six years is vacated. The matter is remanded to the Sacramento County Superior Court with directions to recalculate the minor's maximum period of confinement and to award him predisposition custody credits as are applicable.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.

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[6] In relevant part, section 726, subdivision (c), provides: "If the court elects 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, the 'maximum term of imprisonment' shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code, which includes any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1 of the Penal Code, and Section 11370.2 of the Health and Safety Code."