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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re JOSE G., a Person Coming Under the Juvenile
Court Law.

C076503

THE PEOPLE,

(Super. Ct. No. JV133582)

Plaintiff and Respondent,

v.

JOSE G.,

Defendant and Appellant.

The juvenile court found Jose G. to be a delinquent minor following his admissions in two separate cases to (misdemeanor) petty theft and (felony) committing a lewd act. The minor appeals from the dispositional order, contending the juvenile court failed to make findings regarding special educational needs, and improperly ordered him to pay for drug testing as a probation condition. We agree with the latter contention, modify the dispositional order, and affirm as modified.

PROCEDURAL BACKGROUND

The minor, born in June 1997, was charged with distribution of marijuana and petty theft of a bicycle, offenses occurring on November 7, 2011. On April 4, 2012, pursuant to an agreement to reduce the drug charge and dismiss an infraction, the minor admitted two misdemeanor thefts and was placed on probation.

On August 14, 2012, the minor was charged in a new petition with five sexual offenses, lewd acts and sodomy, allegedly committed within the prior two weeks against his niece, who was nine years old and lived in the same house. The next day, he was ordered detained and his probation was revoked. On March 1, 2013, the minor admitted one count of lewd conduct and the other counts were dismissed.

A violation of probation petition (VOP) was filed alleging, inter alia, that on or about June 14, 2013, the minor failed to enroll in a sex offender treatment program and was in the presence of children under 13 without supervision. On August 29, 2013, he admitted failing to enroll in the treatment program and the other allegations were dismissed. The minor was ordered to juvenile hall for 77 days and then to his mother's custody under the supervision of the probation department.

Another VOP was filed on March 7, 2014, alleging absence or tardiness at school, failure to complete the treatment program, and other counts. The juvenile court ordered the minor detained. After a contested hearing, probation was revoked and reinstated and the minor was ordered into level "A" placement. He timely filed this appeal.

DISCUSSION

I

Special Educational Needs

On appeal, the minor contends the trial court was obliged to make a finding that the minor had exceptional educational needs. The contention is forfeited.

A. Evidence and Findings in the Juvenile Court

The probation report regarding the first petition reflects the minor's mother's statements (via an interpreter) that he was sometimes " 'hyper-active' " but that he did not take prescription medication, had been receiving passing grades and "is *not* a special education student." (Italics added.) The report regarding the minor's sexual crimes against his niece reflects his statements that he had been diagnosed three years previously with ADHD and had been taking prescribed medication until his mother could no longer afford the drugs. A further report stated he had "an Individualized Education Plan [IEP]" and was enrolled "50% in Special Education classes."

Dr. Eugene Roeder, who prepared a Penal Code section 288.1 report, wrote that the minor had always been in special education classes due to "problems with focus," and that he reported taking medication for this problem when he lived in Mexico, but stopped when his mother could not afford the drugs. His mother reported that the minor was " 'a totally different person' " when on medication, and was more " 'peaceful.' " Doctor Roeder reported: "At the age of ten, [the minor] was determined to be eligible for specialized academic instruction due to an intellectual disability with impaired adaptive functioning, but over the next several years he was reclassified to having a specific learning disability." The minor spoke English "very well" but at times needed assistance via an interpreter. Dr. Roeder had reviewed several IEP reports from the school in preparing his own report to the juvenile court.

A later social study reported "ESL" (English as a Second Language) as the minor's only identified educational need. An educational needs order reflects he was receiving services via an IEP. In a progress report filed February 21, 2014, the probation officer reported the minor had missed school, and been disciplined "for habitual profanity towards his teachers, defiance, classroom disruption and gang agitation." However, "school staff has taken an interest in helping Jose improve his grades and behavior to avoid transfer to an alternative educational program."

At the hearing on the last VOP, a probation officer authenticated the minor's school records and detailed his class cuts and absences, as well as disciplinary actions against him. The minor had been terminated from the sex offender treatment program for lack of participation, despite efforts to keep him on track.

At the final dispositional hearing, the juvenile court in part found: "An individual education program has not been established. Therefore, the Court finds that the minor is not an individual with exceptional needs." This finding was recommended by the probation department. No objection to this finding was interposed.

B. *Analysis*

Despite the various descriptions of the minor's educational needs in prior reports, no objection was lodged at the dispositional hearing to the trial court's finding that the minor was *not* an individual with exceptional needs. Accordingly, the belated claim on appeal is forfeited. (See *In re Brian K.* (2002) 103 Cal.App.4th 39, 42 [belated due process claim to imposition of juvenile fine deemed forfeited on appeal].) Contrary to the minor's claim, a timely objection was necessary to alert the trial court to the issue, if the minor wanted to challenge the trial court's finding.

II

Costs of Drug Testing

The minor contends he should not have been ordered to pay for drug testing as a condition of probation. The People contend this contention is forfeited and in any event lacks merit. We agree with the minor.

Among the General Conditions of probation imposed after the *first* petition was sustained--for petty theft--was one providing that the minor "k. Submit to chemical testing of the blood, breath, or urine as directed by the Probation Officer. Pay the costs associated with drug testing (\$20.00 per urinalysis)." No objection was lodged. This condition was reimposed in subsequent orders, always without objection, including the dispositional order currently on appeal.

The People argue forfeiture, based on cases such as *People v. Valtakis* (2003) 105 Cal.App.4th 1066, where a \$250 probation supervision fee was imposed as a condition of probation, and the defendant's failure to interpose an objection forfeited an appellate challenge thereto. (*Id.* at pp. 1068-1076.) In this case, however, the minor is raising a facial challenge to this condition, arguing payment of the costs should not be a condition of probation, and therefore no objection was necessary to preserve the claim. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 885-889.) We agree.

We have previously held that the costs of probation cannot be made a probation condition (see *People v. Hart* (1998) 65 Cal.App.4th 902, 906-907; see also *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068 ["any order for payment of probation costs should be imposed not as a condition of probation but rather as a separate order"]), and we see no reason why the same rule would not apply regarding the costs of drug testing as required by the probation officer.

We first consider the order itself.

"If a minor is found to be a person described in Section 602 by reason of the commission of an offense involving the unlawful possession, use, sale, or other furnishing of a controlled substance . . . unless it makes a finding that this condition would not serve the interests of justice, the court, when recommended by the probation officer, shall require, as a condition of probation . . . that the minor . . . submit to drug and substance abuse testing as directed by the probation officer. If the minor is required to submit to testing and has the financial ability to pay all or part of the costs . . . the court shall order the minor to pay a reasonable fee, which shall not exceed the actual cost of the testing." (Welf. & Inst. Code, § 729.9.)

One of the minor's petty theft adjudications was based on the minor's theft of marijuana from another student, for which minor's counsel agreed an alcohol/drug assessment would be required, among other conditions. Thus, although the count alleging distribution of marijuana (Health & Saf. Code, § 11360) was reduced to the

purportedly reasonably related charge of petty theft, the original offense was an offense that involved the unlawful possession of drugs as contemplated by Welfare and Institutions Code section 729.9, quoted above.

Thus the drug *testing* was properly ordered as a condition of probation, under the first part of Welfare and Institutions Code section 729.9. However, the second part states that the payment of *costs* of such testing shall be a court order without reference to conditions of probation. Because the Legislature used different language regarding drug *testing* and the payment of *costs* therefor, we presume it did not intend the costs to be a probation condition, but instead to be imposed as a separate order. (See *People v. O'Connell, supra*, 107 Cal.App.4th at p. 1068.)

Accordingly, we modify the probation condition at issue to strike reference to payment of costs, and add a dispositional order reflecting the payment of costs as a separate court order, not as a condition of probation. To the extent that the language contained in the probation condition at issue appears to be standardized, the juvenile court should modify that standard language so that this error is not repeated.

DISPOSITION

The dispositional order is affirmed as modified herein. The juvenile court is directed to prepare a new dispositional order reflecting these modifications.

DUARTE, J.

We concur:

ROBIE, Acting P. J.

MAURO, J.