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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re O.H., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

O.H.,

Defendant and Appellant.

D058880

(Super. Ct. No. J216347)

APPEAL from a judgment of the Superior Court of San Diego County, Browder A. Willis III, Judge. Reversed and remanded, with directions.

In July 2007 the San Diego County District Attorney filed a wardship petition alleging that O.H. fell within the court's jurisdiction under Welfare and Institutions Code section 602 based upon his battery of a police officer causing injury (Pen. Code, § 243, subd. (c)(1) [all further undesignated statutory references are to the Penal Code]) and resisting a police officer (§ 148, subd. (a)(1)). The court made a true finding on the battery count, dismissed the remaining count, and placed O.H. on probation.

In October 2008 the San Diego County District Attorney filed a wardship petition against O.H., alleging he wrote graffiti (§ 594, subs. (a) & (b)(2)(A)); that he did it to promote, further, and assist criminal conduct by gang members (§ 186.22, subd. (d)); and that he possessed various tools with the intent to commit vandalism (§ 594.2, subd. (a)). The court sustained a true finding as to the vandalism charge as a misdemeanor.

In February 2010 the San Diego County District Attorney filed a wardship petition alleging that O.H. committed two counts of lewd acts upon a child under the age of 14 (§ 288, subd. (a)). O.H. admitted the first count, and the court dismissed the other count in the interest of justice.

In September 2010 the Riverside County District Attorney filed a petition alleging that O.H. committed an assault by means of force likely to produce great bodily injury (§ 245, subd. (a)) and a battery causing serious bodily injury (§ 243, subd. (d)). O.H. admitted count 1, and the court dismissed count 2 on the People's motion. The matter was transferred to San Diego County for disposition.

In December 2010, at the disposition hearing for his most current offense, the juvenile court aggregated O.H.'s prior petitions with his current petition and committed him to the California Department of Corrections and Rehabilitation, Department of Juvenile Justice (DJJ), based upon the four previously sustained petitions. The court set the maximum term of confinement at 10 years.

On appeal, O.H. asserts (1) his trial counsel rendered ineffective assistance of counsel by failing to move the court not to aggregate his prior petition under section 288, subdivision (a) for committing a lewd act upon a child under the age of 14, because such

failure resulted in a lifetime sex offender registration; and (2) the court erred in failing to expressly find whether the 2007 finding he violated section 243, subdivision (c)(1) constituted a misdemeanor or a felony.

We conclude we must reverse and remand to allow the trial court to exercise its discretion whether to aggregate O.H.'s prior petition for violation of section 288, subdivision (a) for the purposes of his DJJ commitment. We also order that the trial court designate the 2007 violation of section 243, subdivision (c)(1) as a felony.

RELEVANT FACTUAL BACKGROUND¹

A. The 2010 Lewd Act

When O.H. was 16 years old, he put his penis in his 5-year-old cousin's mouth and made her orally copulate him.

A. The 2010 Assault

O.H. and the victim, John Doe, were participating in an anger management course in a group home when they began arguing. Both stood up, and O.H. punched the victim. The victim fell to the ground, unconscious. O.H. punched Doe in the face several more times, until he was pulled off the victim. Doe suffered several fractures to his face and a perforated ear drum.

¹ Because O.H. admitted the relevant violations, we take the factual background from a detention hearing report and a social study.

DISCUSSION

I. *Ineffective Assistance of Counsel Claim*

A. *Applicable Legal Principles*

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below a standard of reasonable competence and that there is a reasonable probability the result would have been more favorable to the defense in the absence of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) The defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. (*People v. Mincey* (1992) 2 Cal.4th 408, 449.)

B. *Background*

In the probation department's social study for O.H. dated September 27, 2010, it was recommended to the court that "[a]ll true findings during this wardship have been aggregated pursuant to [Welfare & Institutions Code section] 726 and [Penal Code section] 1170.1[, subdivision] (a)" and noted that "the most serious offense is [Penal Code section] 288[, subdivision] (a) a category 2 offense."

At the disposition hearing on December 15, 2010, O.H.'s counsel argued that the hearing should be continued a month to allow an out-of-state group home option that had accepted O.H.'s placement there to be certified by the State of California. Counsel argued that commitment to the DJJ was not appropriate because, among other things, it would necessarily result in a lifetime sex offender registration. Specifically, counsel stated, "As the court probably knows here, we're talking about a DJJ commit[ment

which] would render [O.H.] registering as a sex offender for the rest of his life. This is going to have lifetime consequences should he be sent to DJJ." Later in the hearing, counsel twice again reiterated that sex registration was mandatory if the minor was committed to DJJ.

The prosecution argued that the hearing should not be continued, O.H. should be committed to DJJ, and that sex registration was simply a statutory consequence required under section 290.

The court commented that "[t]he fact that there is the factor of lifetime registration is unfortunate. But there was a 5-year-old victim, who was a victim of a sexual assault, *and that is just the legal consequences for the behavior that occurred.* Whether or not that occurs again in the future—*and according to the professionals, not likely, because you're not a predator.* But it was an impulsive crime of opportunity—a vulnerable victim. And that has to be part of the equation also." (Italics added.)

During the disposition hearing wherein O.H. admitted a violation of section 288, subdivision (a), the court considered a report written by Dr. Alan Flitton, a specialist in evaluating juvenile sexual offenders, that was included in the probation officer's social study of the minor. O.H.'s counsel and the court also referred to that report at the December 15 disposition hearing.

Relevant to this appeal, Dr. Flitton found "[t]he minor does not appear to be a sexual predator," "has not reportedly engaged in inappropriate sexual behavior with more than one person," and "no reports were made suggesting that he used excessive coercion, force, or weapons." Dr. Flitton also found that the minor "may not present a direct risk to

the community regarding sexual offending behavior and he does not appear to be a sexual predator (e.g., he would not seek out a child or peer for the purposes of sexual assault). However, he is at risk for future delinquent and conduct disordered behavior, substance use/abuse, and gang involvement, despite the prohibitions against him having contact with gang members." However, Dr. Flitton also observed that O.H. "is likely to take advantage of a situation to gratify his sexual impulse."

The court committed O.H. to the DJJ and accepted the probation department's recommendation that his prior petitions be aggregated. In ordering the commitment, the court noted it had discretion with regard to setting the maximum term, but did not state anything on the record regarding its discretion not to aggregate the prior petitions.

C. Analysis

Welfare and Institutions Code section 726, subdivision (c) provides in part: "*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 [Welfare and Institutions Code] 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.*" (Italics added.)

In *In re Alex N.* (2005) 132 Cal.App.4th 18, the minor was found to have committed first degree burglary. (*Id.* at pp. 20-21.) In a prior case, the minor admitted committing a lewd act with a minor and oral copulation with a minor, among other crimes. (*Ibid.*) In the burglary case, the minor requested the court not aggregate his prior sex offense and commit him to DJJ based only upon his most recent offense, in order for

the minor to avoid having to register as a sex offender. (*Id.* at pp. 21-22.) The trial court concluded that it did not have the authority to choose not to aggregate minor's previous crimes under Welfare and Institutions Code section 726; however, the trial court indicated that it might be inclined not to aggregate the minor's prior sustained petitions, if it had the discretionary power to do so. (*In re Alex N.*, at p. 22.)

The Court of Appeal concluded that under Welfare and Institutions Code section 726 the juvenile court does have the authority not to aggregate previously sustained petitions, as well as the authority "to modify the prior disposition for a previously sustained petition and impose any appropriate disposition." (*In re Alex N.*, *supra*, 132 Cal.App.4th at p. 25.) Accordingly, the appellate court "remand[ed] the matter to the juvenile court to give it the opportunity to exercise its discretion to not aggregate." (*Ibid.*)

Here, the record shows, based upon comments made by defense counsel, the court, and the prosecution, that defense counsel and the court did not consider the fact the court had the discretion not to aggregate the prior section 288 petition, thereby requiring a lifetime registration for O.H. as a sex offender. Further, there could be no conceivable tactical reason not to raise that issue with the court, and therefore defense counsel's performance was deficient. Lifetime sex offender registration is a grave consequence that imposes a "substantial" and "onerous" burden. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197; *In re Birch* (1973) 10 Cal.3d 314, 322.)

Indeed, the People do not contend that defense counsel's representation in this regard was not deficient. Rather, the People argue that, "[b]ased on the age and

vulnerability of [O.H.'s] victim, there is no reason to believe that the trial court would have reached a different result even if trial counsel had made an appropriate objection"; i.e., that O.H. cannot show that he was prejudiced by counsel's deficient performance. However, this contention is belied by the facts.

To demonstrate prejudice, O.H. must demonstrate that there is a reasonable probability that, but for counsel's errors, he would have received a more favorable result. (*In re Ross* (1995) 10 Cal.4th 184, 201.) Here, the court characterized the lifetime registration as "unfortunate," noted that he was unlikely to commit another sexual crime, and that he was not a sexual predator. It is likely the court, had it been apprised of its discretion not to aggregate the prior petition to avoid the lifetime registration, would have given serious thought to such a disposition. One of the primary purposes of sex offender registration is to allow the monitoring of individuals likely to commit sex crimes. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1197.) Thus, the court's comments indicate that it believed this was probably not an appropriate case for registration, but it was constrained by what it believed the law to be.

Citing *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264, the People assert that "absent a showing to the contrary, the trial court is presumed to have known and followed the applicable law and to have properly exercised its discretion." However, the record affirmatively shows that all parties—the court, defense counsel, and the prosecution—did not consider the fact the court had the discretion not to aggregate the prior petition sex offense petition.

Because the record discloses that defense counsel's performance was ineffective and O.H. was prejudiced thereby, we reverse and remand to allow the court to exercise its discretion whether to aggregate O.H.'s prior section 288, subdivision (a) petition.²

II. *COURT'S FAILURE TO DESIGNATE FINDING AS FELONY OR MISDEMEANOR*

O.H. contends, and the People agree, that the court erred in failing to designate the prior true finding for violation of section 243, subdivision (c)(1), as a felony or a misdemeanor.

Here, on the petition for violation of section 243, subdivision (c)(1), O.H. was charged with a felony, he admitted that violation as a felony, and the minute order stated that it was a felony. However, while the court understood the offense should be treated as a felony, and O.H. admitted a felony violation, the court never made an express finding on the record that this violation constituted a felony.

Accordingly, we remand this matter to the trial court and order that the court designate the 2007 violation of section 243, subdivision (c)(1) as a felony.

² We take no position on the issue of, on remand, how the court should exercise its discretion.

DISPOSITION

We reverse and remand to allow the court to exercise its discretion whether to aggregate O.H.'s prior petition under section 288, subdivision (a) for the purpose of his DJJ commitment. We also order that the court designate the 2007 violation of section 243, subdivision (c)(1) as a felony.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.