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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.J., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

M.J.,

Defendant and Appellant.

E057262

(Super.Ct.No. SWJ1100720)

OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III,
Judge. Affirmed as modified with directions.

Jesse W.J. Male, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Christine
Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

The Riverside County District Attorney filed a juvenile wardship petition alleging that defendant and appellant M.J. (minor)¹ resisted an executive peace officer during the performance of his duties (Pen. Code, § 69, paragraph 1),² committed battery on a peace officer during the performance of his duties (§ 243, subd. (c)(2), paragraph 2), and committed a battery on school property (§ 243.2, subd. (a)(1), paragraph 3). A juvenile court dismissed the allegation in paragraph 3, on motion of the People. At a contested jurisdictional hearing, the court found true the allegation in paragraph 1. (§ 69.) With respect to the allegation in paragraph 2, the court did not find the charged offense true, but instead found the lesser included offense of misdemeanor battery against a peace officer (§ 243, subd. (b)) to be true. The court declared minor a ward, set the maximum term of confinement at three years eight months, committed him to juvenile hall for 30 to 60 days, and placed him on probation under the terms recommended by the probation department.

On appeal, minor contends that: (1) the matter should be remanded for the court to consider and declare whether the violation of section 69 was a felony or a misdemeanor; (2) the maximum term of confinement should be reduced; and (3) two of his probation conditions should be modified since they are unconstitutionally overbroad. The People concede, and we agree, that the matter should be remanded for the court to

¹ M.J. turned 18 in February 2012. Although he is legally an adult, he is under the continuing jurisdiction of the juvenile court. (Welf. & Inst. Code, § 607.) For the sake of consistency, we will refer to him as “minor” in this opinion.

² All further statutory references will be to the Penal Code, unless otherwise noted.

declare whether the wobbler offense was a felony or a misdemeanor, and that the maximum term of confinement should be reduced. We further agree that the two probation conditions should be modified. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

On October 13, 2011, minor was in class at school, and the student sitting behind him was pushing his chair. Minor “just snapped” and punched the student in the head. Minor was sent to the office. A school resource officer, Officer Ontario Williams, was waiting there. As minor was explaining what happened to the dean of students (the dean), his behavior became increasingly aggressive. The dean told minor he would be suspended for five days. Officer Williams then told minor he was going to handcuff him, take him to the police station, give him a ticket, and release him to his parents. Officer Williams asked minor to turn around and put his hands behind his back. Minor complied, but when Officer Williams placed one cuff on his wrist, he jerked his arms away and turned around. Minor was visibly upset and used profanity. Officer Williams grabbed his arm, and minor jerked it away. When Officer Williams attempted to grab it again, minor hit the officer’s arm away. Officer Williams grabbed minor’s arm again, and tried to pull him down to the ground. The officer yelled for him to get on the ground. Minor stiffened up his body and refused to go down. Officer Williams then pushed him to try to get him off balance. Minor stumbled, but when Officer Williams tried to pull him to the ground, minor again made his body rigid. Officer Williams and minor shoved each other. Then Officer Williams felt a blow to his face and believed that minor had punched him. Officer Williams punched minor in the face to overcome his resistance. Officer Williams

struggled with minor and was finally able to push him up against the wall and handcuff him.

ANALYSIS

I. Remand Is Required to Direct the Juvenile Court to Declare Whether the Offense of Resisting an Officer Was a Felony or a Misdemeanor

Minor contends that the matter must be remanded to require the juvenile court to expressly declare whether the violation of section 69 was a felony or a misdemeanor. The People correctly concede.

Welfare and Institutions Code section 702 requires the juvenile court to make an express determination whether a wobbler offense shall be designated as a felony or as a misdemeanor. The determination must be made explicitly. Neither the court's recitation of a felony charge as made in the petition, nor the imposition of a maximum felony-length commitment term, is sufficient to satisfy the statutory mandate. (*In re Ricky H.* (1981) 30 Cal.3d 176, 191 (*Ricky H.*), superseded by statute on other grounds, as stated in *In re Michael D.* (1987) 188 Cal.App.3d 1392; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*In re Manzy W.*, at p. 1209.)

Here, the record does indicate that the offense was described as a felony in the Welfare and Institutions Code section 602 petition, and that the court found "beyond a reasonable doubt that the charge in Paragraph 1, to wit, a violation of Penal Code Section 69, as a felony, is true, and has been committed." However, we note that "the preparation

of a petition is in the hands of the prosecutor, not the court.” (*Ricky H.*, *supra*, 30 Cal.3d at p. 191.) The court here simply recited the charge as made in the petition. Moreover, the court’s finding indicates a belief that the section 69 offense *was* a felony. It does not clearly indicate that the court was aware of its discretion to treat the offense as a misdemeanor. (See *In re Jacob M.* (1987) 195 Cal.App.3d 58, 65.)

Therefore, the matter must be remanded for the juvenile court to make an explicit finding on the record as to the felony or misdemeanor character of the section 69 offense.

II. The Maximum Term of Confinement Should Be Reduced

The court set minor’s maximum confinement time at three years eight months. Minor contends that this term should be reduced pursuant to section 654. He further asserts that the court neglected to award him credit for two days he spent in juvenile hall. The People correctly concede.

Penal Code section 654 provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, *but in no case shall the act or omission be punished under more than one provision.*” (Pen. Code, § 654, subd. (a), italics added.) Penal Code section 654 applies to juvenile court sentencing. (*In re Michael B.* (1980) 28 Cal.3d 548, 556, fn 3.) A “minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought . . . the minor under the jurisdiction of the juvenile court.” (Welf. & Inst. Code § 726, subd. (d).)

Here, minor engaged in a physical altercation with Officer Williams when the officer tried to handcuff him. Based on this single incident, the court found that minor resisted a peace officer (§ 69) and committed misdemeanor battery upon an officer (§ 243, subd. (b)). We agree with minor that his sole objective in both resisting the officer and committing battery was to prevent himself from being handcuffed. Thus, section 654 applies. (See *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

Furthermore, violations of section 69 are punishable as misdemeanors up to one year in county jail, or as felonies with a maximum of three years in county jail. (§§ 69 & 1170, subd. (h)(1).) Violations of section 243, subdivision (b), are punishable up to one year in county jail. (§ 243, subd. (b).) Since both offenses arose from a single transaction, minor's maximum term of confinement could not exceed the maximum term for a violation of section 69. (§ 654, subd. (a).)

Additionally, "a minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.]" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) Minor spent two days in juvenile hall. The court here apparently erred in failing to award minor credit for time served.

Therefore, when the matter is remanded for the court to determine if the violation of section 69 was a misdemeanor or a felony, the court should recalculate the maximum term of confinement, applying section 654, and award minor credit for the two days he spent in juvenile hall.

III. The Probation Conditions Should Be Modified

Minor contends that the “controlled substances” probation condition, term i., is overbroad because it prohibits the use of prescription medications. In a related argument, he contends that the “controlled substances” reference in term k. is also overbroad because it prohibits him from associating with people legally possessing, selling or using any controlled substance (i.e., pharmacists). The People contend that the conditions should be upheld as written. We conclude that the contested probation conditions should be modified.

At the outset, we note that the juvenile court “has wide discretion to select appropriate conditions and may impose “any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’” [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) A “condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Id.* at p. 890.)

Term i. states that minor shall “[n]ot knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other controlled substances, poisons, illegal drugs, including marijuana, nor possess related paraphernalia.” Term k. states that minor shall “[n]ot associate with anyone known to the minor to be in possession of, sells, or uses any controlled substances or any related paraphernalia.” Minor argues that these two conditions are overbroad because they would prohibit him from using commonly prescribed medications, and would prohibit him from associating

with pharmacists or persons using medically necessary prescriptions. The People claim that “the concept of illegality is implied” in the probation conditions at issue. The People further assert that the “only reasonable construction of ‘controlled substances’ is illegal substances,” and that it is unlikely that the term would be commonly misunderstood.

The conditions at issue have the apparent purpose of protecting minor from drug abuse and the influence of drug dealers and abusers. However, they include the term “controlled substances,” which is very broad. Controlled substances are defined and listed in Health and Safety Code sections 11054-11058. The lists include not only illegal substances like heroin and marijuana (Health & Saf. Code, § 11054, subs. (c)(11), (d)(13)), but many commonly prescribed medications. Thus, the probation conditions, as written, may prohibit minor from possessing or using prescription medication, or associating with persons using or selling prescription medication. We ascertain no rehabilitative purpose in such restrictions. “‘California Courts have traditionally been wary of using the probation system for any nonrehabilitative purpose, no matter how superficially rational.’ [Citation.]” (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1444, superseded by statute on other grounds, as stated in *People v. Moret* (2009) 180 Cal.App.4th 839, 853, fn. 12.) We conclude that term i. and term k. should be modified.

Therefore, we shall modify the probation conditions to include the concept of the illegality of the controlled substances. Term i. shall be modified to read: “Not knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other illegal controlled substances, poisons, or illegal drugs, including marijuana, nor possess related paraphernalia.” Term k. shall be modified to read: “Not

associate with anyone known to the minor to be in possession of, sells, or uses any illegal controlled substances or any related paraphernalia.”

DISPOSITION

The matter is remanded for the juvenile court to designate the section 69 offense as a felony or misdemeanor, to recalculate the maximum term of confinement pursuant to section 654, and to award minor credit for the two days he spent in juvenile hall.

Furthermore, minor’s probation terms are modified as followed:

Probation condition i. is modified to read: “Not knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other illegal controlled substances, poisons, or illegal drugs, including marijuana, nor possess related paraphernalia.”

Probation condition k. is modified to read: “Not associate with anyone known to the minor to be in possession of, sells, or uses any illegal controlled substances or any related paraphernalia.”

In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.