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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

THE PEOPLE,

Plaintiff and Respondent,

v.

O.E.,

Defendant and Appellant.

E058049

(Super.Ct.No. RIJ1200635)

**OPINION**

APPEAL from the Superior Court of Riverside County. Tamara L. Wagner,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Paul J. Katz, 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, Senior Assistant Attorney General, Eric A. Swenson, and  
Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

O.E., a minor, possessed less than 3.6 grams of marijuana packaged in five small baggies in his backpack at school. Although O.E. was eligible for deferred entry of judgment (DEJ) pursuant to Welfare and Institutions Code section 790, et. seq., the prosecutor did not inform O.E. in writing or orally of his rights. After a contested jurisdictional hearing, O.E. was adjudged a ward of the court pursuant to Welfare and Institutions Code section 602, subdivision (a) for possession of marijuana for purposes of sales and misdemeanor possession of paraphernalia. O.E. has successfully completed probation.

O.E. now claims on appeal as follows:

1. Reversal is required because the prosecutor failed to notify him of his DEJ eligibility prior to the jurisdictional hearing.
2. The DEJ statutory scheme violates due process and equal protection because a minor is ineligible if he exercises his constitutional right to adjudication.
3. There was no substantial evidence of his intent to sell marijuana.

We reverse the jurisdictional and dispositional findings based on the error committed by the prosecutor by failing to comply with the DEJ statute requiring notice to O.E. of his eligibility prior to the jurisdictional hearing. We remand with directions to the juvenile court in order for it to enter DEJ and dismiss the case.

## I

### PROCEDURAL AND FACTUAL BACKGROUNDS

On June 21, 2012, a petition was filed by the Riverside County District Attorney's Office seeking to have O.E. adjudged a ward of the court (Welf. & Inst. Code, § 602,

subd. (a)) alleging that on May 15, 2012, he willfully and unlawfully possessed marijuana for sale (Health & Saf. Code, § 11359) and a misdemeanor charge of possession of paraphernalia used to smoke a controlled substance (Pen. Code, § 308, subd. (b)). O.E. was born on October 28, 1995.

At the first hearing conducted on July 12, 2012, minor appeared with his parents. He denied the allegations in the petition. The matter was set for a contested jurisdictional hearing. The clerk's transcript does not include notice to O.E. in writing by way of a Determination of Eligibility form JV-750 or Written Notification for Deferred Entry of Judgment form JV-751 informing him that he was eligible for DEJ. (Cal. Rules of Court rule 5.800(b) & (c).) Moreover, there was no oral notification prior to the jurisdictional hearing.

The matter proceeded to the jurisdictional hearing.<sup>1</sup> The facts at the jurisdiction hearing showed that on May 15, 2012, O.E.'s teacher, at a school located in Moreno Valley, smelled marijuana coming from him. She also observed him going into his backpack several times and looking at another student and her. O.E. was sent to the principal's office. Once in the principal's office, O.E. admitted he had marijuana in his backpack. A search of his backpack revealed a pill bottle containing five small baggies of marijuana.<sup>2</sup> A pen cap that was fashioned to be used as a pipe for smoking marijuana

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<sup>1</sup> Because the facts are not directly relevant to the errors addressed on appeal, we include only a brief description of the event underlying this case.

<sup>2</sup> The parties stipulated that the substance found in O.E.'s backpack was marijuana.

was also found in his backpack. The pen cap had burned marijuana residue on it. Each of the baggies weighed approximately .72 grams. An expert testified that the way the marijuana was packaged was indicative of sales. O.E. testified in his defense he possessed the marijuana only for personal use and the marijuana was already divided into baggies when he bought it for his own use.

The juvenile court found the allegations in the petition true and that minor came within the meaning of Welfare and Institutions code section 602. The probation report stated, “[a]s the allegations have already been found true and denials were entered, it is respectfully recommended [minor] be declared a ward of the Court. However, if the Court decided to change the decision to denying 654/790 WIC without prejudice, this officer believes Deferred Entry of Judgment is more appropriate.”<sup>3</sup>

The dispositional hearing was held on September 20, 2012. The juvenile court noted it had read the probation report. O.E.’s counsel asked that the juvenile court consider DEJ even though he had a trial. The prosecutor argued that DEJ was not appropriate based on O.E.’s testimony at trial and he was not doing well in school.

The juvenile court noted that it had reviewed the trial transcript. It found O.E. was suitable for DEJ. The juvenile court granted DEJ for a period not to exceed three years. Various terms and conditions were imposed.

On February 1, 2013, O.E.’s counsel filed a motion to continue the DEJ, or in the alternative, to dismiss pursuant to Welfare and Institutions Code section 782 in the

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<sup>3</sup> There is nothing in the record to support the trial court made any determination as to DEJ.

interests of justice. O.E.'s counsel averred that O.E. had completed all the terms and conditions of DEJ. O.E.'s counsel noted that the juvenile court was considering terminating the prior order granting the DEJ based on O.E.'s decision to go to trial. O.E.'s counsel argued that if the juvenile court determined that minor could not benefit from the DEJ because he chose to go to trial it would violate his federal constitutional rights to due process and equal protection. It was unfair to require a minor to admit the truth of an allegation in order to receive the benefit of DEJ.

O.E.'s counsel attached documentation that O.E. had completed an "Insight-ATOD" program, ten counseling sessions, completed 50 hours of community service, and had completed an essay about wanting to become a psychiatric technician. The probation department recommended termination of DEJ and O.E. placed on probation.

A hearing was conducted on February 1, 2013. The juvenile court noted it had called for the hearing when it realized that granting DEJ to O.E. after the contested hearing was an illegal sentence. O.E.'s counsel argued his federal constitutional rights were implicated if he was denied DEJ based on his decision to have a contested hearing. O.E.'s counsel asked that the case be dismissed. At no time did the parties mention the lack of notice of DEJ at the beginning of the case.

At the conclusion of the hearing, the juvenile court struck the previous DEJ finding. It placed minor on probation for a term deemed necessary by the probation department and O.E. was made a ward of the court. O.E. remained in the custody of his parents. The juvenile court agreed that it would consider sealing the records when the wardship was terminated.

O.E. filed a notice of appeal on February 7, 2013. On August 7, 2013, the probation department filed an ex parte application to terminate wardship under Welfare and Institutions Code section 602. Minor was regularly attending school and counseling, and he had no violations of probation. On November 8, 2013, the juvenile court ordered that the “[w]ardship is terminated.” There is no indication of dismissal or that the records were ordered sealed.

## II

### MANDATORY ADVISAL OF DEJ ELIGIBILITY

O.E. contends the prosecutor failed to comply with his statutory requirement to determine whether he was eligible for DEJ and to advise him of his eligibility prior to the jurisdictional hearing.

“‘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 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. [Citation.]’” (*In re Kenneth J.* (2008) 158 Cal.App.4th 973, 976.)

“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. [¶] (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.” [Citation.]” (*In re Kenneth J.*, *supra*, 158 Cal.App.4th at pp. 976-977, fn. omitted.) There is no dispute that O.E. was eligible for DEJ.

If the prosecutor determines the minor is eligible for DEJ, the prosecutor “shall file a declaration in writing with the court or state for the record the grounds upon which the determination is based, and shall make this information available to the minor and his or her attorney.’ [Citation.]” (*In re C.W.* (2012) 208 Cal.App.4th 654, 659 (*C.W.*)) This notice shall also include “[a] full description of the procedures for deferred entry of judgment’ [citation] and ‘[a] clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment’ [citation].” (*C.W.*, at p. 660.)

Once a minor is determined to be eligible for DEJ, “[i]t is the mandatory duty of the juvenile court to either grant DEJ summarily or examine the record, conduct a

hearing, and determine whether the minor is suitable for DEJ, based upon whether the minor will derive benefit from ‘education, treatment, and rehabilitation.’ [Citations.]” (*In re D.L.* (2012) 206 Cal.App.4th 1240, 1243-1244, fn. omitted.)

In *C.W.*, the prosecutor determined the minor was eligible for DEJ and did file a form JV-750, but failed to complete or serve form JV-751 advising the parents of the minor of his eligibility for DEJ. (*C.W.*, *supra*, 208 Cal.App.4th at p. 660.) The minor denied the allegations in the petition and requested a contested hearing. On appeal, the minor complained about the prosecutor’s failure to give the requisite notice of his eligibility for DEJ, and the court’s failure to determine his suitability. The appellate court agreed and remanded the matter for further proceedings pursuant to Welfare and Institutions Code section 790, given the prosecutor’s failure to comply with notice in a case where the minor was eligible for DEJ. (*C.W.*, at pp. 660-662.)

In *In re Luis B.* (2006) 142 Cal.App.4th 1117, the prosecutor, like the prosecutor here, failed to determine whether the minor was eligible for DEJ, never completed a form JV-750, and never provided any type of notice to the minor. (*Id.* at pp. 1121-1123.) The court concluded, “[h]ere, the prosecuting attorney did not satisfy the statutory requirements to determine eligibility and provide notice, and the trial court failed to conduct the necessary inquiry and exercise discretion to determine whether defendant will derive benefit from education, treatment, and rehabilitation rather than a more restrictive commitment. Therefore, error was committed.” (*Id.* at p. 1123.)

Here, O.E. was never notified that he was eligible for DEJ by the prosecutor and the juvenile court never considered his suitability for DEJ prior to the contested hearing.

It was clear that O.E. was suitable as the juvenile court concluded as such after the jurisdictional hearing. Respondent's position that it can be presumed he received proper notice is not supported by the record. We reverse the findings and dispositional orders and remand with directions.

As stated, *ante*, defendant raised two other issues in his opening brief. He claimed that the DEJ statutory scheme violates due process because it requires a minor to admit the allegations in the petition in violation of a minor's right to adjudication. He also insists that there was insufficient evidence that he possessed marijuana with the intent to sell. Defendant asserted at oral argument that this court should decide his remaining issues despite granting him his requested relief. We need not address defendant's additional claims. “‘A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.’ [Citation]” (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231; see also *People v. Douglas M.* (2013) 220 Cal.App.4th 1068, 1078, fn. 6.) In this case, we have granted defendant's request for DEJ, his record will be sealed, and there will be no record of his conviction. This makes it unnecessary to resolve the constitutional issue and also makes a determination of the sufficiency of the evidence against him a futile exercise.

III

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are vacated. We remand the case in order for the juvenile court to enter DEJ (without any further finding of suitability) after an on-the-record admission by O.E. of the offenses charged in the petition in accordance with Welfare and Institutions Code section 791, subdivision (3). Since minor has successfully completed his probation, upon admission of the charges by O.E., and the entry of DEJ, the juvenile court shall dismiss the case, the arrest upon which the judgment was deferred shall be deemed never to have occurred, and the records in this case shall be ordered sealed by the juvenile court. (Welf. & Inst. Code, § 793, subd. (c).)

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.