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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT M.,

Defendant and Appellant.

F060094

(Super. Ct. No. 512000)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Susan D. Siefkin, Judge.

John K. Cotter, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

Welfare and Institutions Code section 731 sets forth orders a court may issue when a minor is adjudged a ward of the court including an order to commit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). At the time the minor here was committed to DJF, subdivision (a)(4) of that section stated that such a commitment was allowed “if the ward ... committed an offense described in subdivision (b) of Section 707 and [was] not otherwise ineligible for commitment to the division under Section 733.” (Welf. & Inst. Code, § 731, subd. (a)(4).)<sup>1</sup> Subdivision (c) of section 733 provided that certain categories of wards were to be excluded from a commitment to the DJF unless they had committed a section 707, subdivision (b) offense or a sex offense listed in subdivision (c) of section 290.008 of the Penal Code.

Appellant, minor Robert M., committed an offense listed in Penal Code section 290.008, but not listed in section 707. We previously held that Robert M.’s commitment to DJF was proper. The California Supreme Court granted review and has now directed us to vacate our prior decision and reconsider this cause in light of *In re C.H.* (2011) 53 Cal.4th 94. In *In re C.H.*, the California Supreme Court held that “a juvenile court lacks authority to commit a ward to the DJF under section 731(a)(4) if that ward has never been adjudged to have committed an offense described in section 707(b), even if his or her most recent offense alleged in a petition and admitted or found true by the juvenile court is a sex offense set forth in Penal Code section 290.008(c) as referenced in section 733(c).” (*Id.* at pp. 97-98.) Pursuant to *In re C.H.*, Robert M. was erroneously committed to DJF.<sup>2</sup>

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<sup>1</sup> All future code references are to the Welfare and Institutions Code unless otherwise noted.

<sup>2</sup> The Legislature passed emergency legislation effective February 29, 2012, in response to the decision in *In re C.H.*, amending sections 731 and 733 so that a minor may be committed to DJF if the most recent offense is described in either subdivision (b) of section 707 or subdivision (c) of Penal Code section 290.008.

## **PROCEDURAL AND FACTUAL HISTORY**

The father of Robert M.'s three-year-old sister found her and 17-year-old Robert M. in bed together. They were both naked and Robert M. was on top of her. When questioned by authorities Robert M. admitted he placed his finger in his sister's vagina.

A section 602 petition was filed accusing Robert M. of committing a lewd and lascivious act with a child under the age of 14 (Pen. Code, § 288, subd. (a)) and sexual penetration of a person who is under 14 years of age and who is more than 10 years younger than the perpetrator (Pen. Code, § 289, subd. (j)).

Robert M. admitted the allegations in the petition. Robert M.'s counsel argued Robert M. could not be committed to the DJF because he had not committed a section 707, subdivision (b) offense. The court disagreed and committed Robert M. to the DJF for a maximum term of 96 months.

## **DISCUSSION**

Before September 2007, when a minor was adjudged a ward of the court on the ground he had violated the criminal law, the court could consider as an option committing the minor to the Department of the Youth Authority (now the DJF) based on any offense unless the minor was under the age of 11 years or the minor suffered from any contagious infections or other disease which would probably endanger the lives or health of the other inmates. (Former §§ 731 & 733.)

On September 1, 2007, sections 731 and 733 were amended. (Stats. 2007, ch. 175, §§ 19, 22, 37.) "The amendments were enacted as part of chapter 175 of the Statutes of 2007 in order to make 'necessary statutory changes to implement the Budget Act of 2007....' (Stats. 2007, ch. 175, § 38.)" (*In re N.D.* (2008) 167 Cal.App.4th 885, 891.) "[I]n 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders." (*Ibid.*) These two sections were amended

as part of the realignment legislation to “limit the offenses for which juvenile courts can commit wards to state authorities.” (*In re N.D.*, *supra*, 167 Cal.App.4th at p. 892.)

Section 731 was amended to state that the court could commit a ward to the DJF, “if the ward ... committed an offense described in subdivision (b) of Section 707 and [was] not otherwise ineligible for commitment to the division under Section 733.” (§ 731,

subd. (a)(4).) Section 733 was amended to provide, in pertinent part: “A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] ... [¶] (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code.”

Robert M.’s two sexual offenses were not listed in section 707, subdivision (b), but his violation of Penal Code section 288, subdivision (a) was an offense set forth in subdivision (c) of Penal Code section 290.008. Thus, looking at the sections in effect at the time of his commitment, Robert M.’s offense did not meet the criteria of wards who could be committed to the DJF in the inclusionary language of section 731, subdivision (a)(4), and his sexual offense was exempted from the exclusionary criteria of section 733. Robert M. argued on appeal that, pursuant to section 731, subdivision (a)(4), he could not be committed to the DJF because he was not found to have committed an offense contained in section 707, subdivision (b). As previously set forth, the California Supreme Court agreed with Robert M.’s position. (*In re C.H.*, *supra*, 53 Cal.4th 94.) The juvenile court lacked authority to commit Robert M. to DJF. We, therefore, recall that commitment.

In light of our holding that Robert M.’s commitment to DJF for the underlying offenses must be recalled, his second argument, that the trial court erred in committing him to DJF because it did so without first considering the less restrictive alternative of

placement in a group home, is moot. Robert M. is not precluded on remand from making any arguments regarding his placement and/or his housing.<sup>3</sup>

### DISPOSITION

Our prior decision in this case, filed on January 28, 2011, is vacated. The order of the juvenile court committing Robert M. to DJF is reversed. In all other respects the orders of the juvenile court are affirmed. The matter is remanded to the juvenile court for further proceedings regarding Robert M.'s placement including consideration of whether he should remain housed at DJF pursuant to section 1752.16.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.

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<sup>3</sup> On February 29, 2012, as part of the emergency legislation passed by the Legislature in response to the *In re C.H.* decision, section 1752.16 was added to the Welfare and Institutions Code. That section provides: “(a) The chief of the Division of Juvenile Facilities, with approval of the Director of Finance, may enter into contracts with any county of this state for the Division of Juvenile Facilities to furnish housing to a ward who was in the custody of the Division of Juvenile Facilities on December 12, 2011, and whose commitment was recalled based on both of the following: [¶] (1) The ward was committed to the Division of Juvenile Facilities for the commission of an offense described in subdivision (c) of Section 290.008 of the Penal Code. [¶] (2) The ward has not been adjudged a ward of the court pursuant to Section 602 for commission of an offense described in subdivision (b) of Section 707. [¶] (b) It is the intent of the Legislature in enacting this act to address the California Supreme Court’s ruling in *In re C.H.* (2011) 53 Cal.4th 94.”