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

In re TONY Y., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY Y.,

Defendant and Appellant.

F061540

(Super. Ct. No. JJD063121)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Shannon Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Poochigian, J., and Detjen, J.

It was alleged in a juvenile wardship petition (Welf. & Inst. Code, § 602) filed September 2, 2010,¹ that appellant, Tony Y., a minor, committed vandalism resulting in damage of less than \$400 (Pen. Code, § 594, subd. (b)(2)(B);² count 1) and possession of vandalism tools (§ 594.2, subd. (a); count 2), and that he committed the former offense for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (d) (section 186.22(d)). On October 12, appellant admitted the allegations of the petition and the juvenile court declared the count 1 offense to be a felony. On November 24, at the disposition hearing, the juvenile court continued appellant as a ward of the court,³ continued him on probation, ordered that he serve 365 days in the Tulare County Youth Facility, and declared a maximum term of physical confinement (MTPC) for the two instant offenses of three years two months, consisting, presumably, of three years on count 1 and two months on count 2.⁴

¹ Except as otherwise indicated, all references to dates of events are to dates in 2010.

² Except as otherwise indicated, all statutory references are to the Penal Code.

³ Appellant was initially adjudged a ward of the court in February 2009, following his admission that he committed battery with the infliction of serious bodily injury (§ 243, subd. (d)).

⁴ A minor's MTPC for multiple counts "shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code" (Welf. & Inst. Code, § 726, subd. (c).) Under section 1170.1, an aggregate sentence comprises a principal term, consisting of the greatest term of imprisonment imposed by the court for any of the crimes, and a subordinate term, which, for a misdemeanor is calculated as one-third of the maximum term for such offenses. (§ 1170.1, subd. (a); *In re Eric J.* (1979) 25 Cal.3d 522, 536-538.) The maximum term for appellant's count 1 vandalism, under section 186.22(d) is three years, and one-third of the six-month maximum for his count 2 misdemeanor is two months. (§§ 186.22(d), 594.2, subd. (a).)

On appeal, appellant contends the instant adjudication cannot stand because (1) he did not admit the allegations of the petition, and (2) the record does not establish that the court advised appellant of his constitutional rights, as it was required to do before taking his admissions. Alternatively, appellant argues that if the record shows he admitted the allegations of the petition, the court erred in finding the count 1 offense was a felony. Finally, he argues that the court erred in failing to declare that offense to be a felony or a misdemeanor.

DISCUSSION

Admission of the Allegations of the Petition

Appellant contends he never admitted the allegations of the instant petition. There is no merit to this contention. Appellant entered his admissions at a hearing on October 12.⁵

Required Advisements and Waivers

Boykin v. Alabama (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122 established what has come to be called the *Boykin-Tahl* rule, i.e., the rule that in a criminal proceeding “a guilty plea is not valid unless the record reflects ... the defendant had been advised of and waived his right to a jury trial, to confront and cross-examine witnesses, and against self-incrimination” (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 746.) The *Boykin-Tahl* protections afforded to criminal defendants, other than the right to a trial by jury, are also afforded to juvenile offenders. (*In re Ronald E.* (1977) 19 Cal.3d 315, 321.)

⁵ The record on appeal did not originally include a reporter’s transcript of the October 12 hearing. The record was augmented to include this transcript *after* appellant filed his opening brief. Appellant did not file a reply brief.

The protections applicable to juveniles are set forth in California Rules of Court, rule 5.778,⁶ which provides that before accepting a minor’s admission of allegations in a delinquency petition, the juvenile court must advise the minor that he or she has the following rights: to a hearing by the court on the issues raised by the petition; to assert the privilege against self-incrimination; to confront and cross-examine any witness called to testify against the minor; and to use the process of the court to compel the attendance of witnesses on the minor’s behalf. (Rule 5.778(b).) When the minor admits the allegations, the court must make certain findings, including that the minor understands and waives the rights enumerated. (Rule 5.778(c).)

Appellant contends the juvenile court failed to comply with the *Boykin-Tahl* rule and rule 5.778. This contention, too, is without merit. At the October 12 hearing, the court gave the required advisements and appellant affirmed that he understood and waived the rights enumerated.

Juvenile Court’s Finding that the Count 1 Offense was a Felony

Although the offense of which appellant stands adjudicated in count 1—vandalism with damage of less than \$400 in violation of section 594, subdivision (b)(2)(B)—is ordinarily a misdemeanor, it may, in the sentencing court’s discretion, be treated as a felony “for *sentencing* purposes” under section 186.22(d) where, as here, the offense is committed for the benefit of, at the direction of or in association with a criminal street gang, with the specific intent to promote, further or assist in criminal conduct by gang members. (*People v. Arroyas* (2002) 96 Cal.App.4th 1439, 1444 (*Arroyas*), italics added.)

⁶ All rule references, with the exception of references to the *Boykin-Tahl* rule, are to the California Rules of Court.

Appellant contends the juvenile court “incorrectly found the [count 1 offense] to be a felony.” As best we can determine, this claim is based, in turn, on the claim that the court found the count 1 offense to be a felony for some purpose other than “sentencing.” (*Arroyas, supra*, 96 Cal.App.4th at p. 1444.) As legal authority for this argument, appellant cites to a passage in *People v. Ulloa* (2009) 175 Cal.App.4th 405 (*Ulloa*) in which the court stated that although section 186.22(d) “grants the trial court discretion to treat a misdemeanor offense as a felony for the purpose of imposing sentence for that offense,” “a misdemeanor that is treated as a felony for sentencing purposes under subdivision (d) is not treated as a felony *for every purpose*.” (*Ulloa*, at p. 411, italics added.) Consistent with this principle, the *Ulloa* court held that “the section 1192.7, subdivision (c)(28), definition of a serious felony as a ‘felony offense, which would also constitute a felony violation of Section 186.22’ does not include a misdemeanor punished as a felony pursuant to section 186.22, subdivision (d).” (*Id.* at p. 413.)

Here, the juvenile court declared a maximum period of physical confinement that included, for the count 1 offense, three years, which is the maximum time allowable for a misdemeanor found to be a felony under section 186.22(d). Thus, the court demonstrated that it found the count 1 offense to be a felony for the purpose of “sentencing,” i.e., determining appellant’s MTPC. There is nothing in the record to suggest that the juvenile found the count 1 offense to be a felony for any impermissible purpose. Appellant’s claim of error is therefore rejected.

Claim of Failure to Declare Whether the Count 1 Offense Was a Felony or a Misdemeanor

Appellant contends the court failed to declare whether the count 1 offense was a felony or misdemeanor, thereby violating Welfare and Institutions Code section 702 and rules 5.778 and/or 5.790.

Governing Legal Principles

As indicated above, the offense of vandalism with damage of less than \$400 is ordinarily a misdemeanor (§ 594, subd. (b)(2)(A)), but it may become a felony under section 186.22, subdivision (d).

Welfare and Institutions Code section 702 provides, in relevant part: “If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.” Such an offense is commonly called a “wobbler.” (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1201 (*Manzy W.*)) The purpose of Welfare and Institutions Code section 702 is two-fold: (1) to “provid[e] a record from which the maximum term of physical confinement for an offense can be determined, particularly in the event of future adjudications” (*Manzy W.*, at p. 1205), and (2) to “ensur[e] that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702” (*id.* at p. 1207).

“The language of [Welfare and Institutions Code section 702] is unambiguous. It requires an *explicit* declaration by the juvenile court whether an offense would be a felony or misdemeanor in the case of an adult.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204, italics added; accord, *In re Kenneth H.* (1983) 33 Cal.3d 616, 619 [“[Welfare and Institutions Code] section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor”].)

In addition, rule 5.778(f) provides, in relevant part: “(f) Findings of the court (§ 702) [¶] On an admission or plea of no contest, the court must make the following findings noted in the minutes of the court: [¶] ... [¶] (9) In a section 602 matter, the degree of the offense and whether it would be a misdemeanor or felony had the offense been committed by an adult. If any offense may be found to be either a felony or misdemeanor, the court must consider which description applies and expressly declare on

the record that it has made such consideration and must state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing.” And rule 5.790(a) provides in relevant part: “At the disposition hearing: [¶] (1) If the court has not previously considered whether any offense is a misdemeanor or felony, the court must do so at this time and state its finding on the record. If the offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and must expressly declare on the record that it has made such consideration and must state its finding as to whether the offense is a misdemeanor or a felony.” (Rule 5.790(a).)

Analysis

After taking appellant’s admissions at the October 12 hearing, the court stated: “The offense charged in Count 1 is a felony and Count 2 is a misdemeanor.” Thus, the court complied with the mandate of Welfare and Institutions Code section 702 by explicitly designating the count 1 offense a felony. Under the statute, no more is required.

However, as indicated above, the rules of court contain an additional requirement, viz., that at the disposition hearing, the court must “consider[] whether any offense is a misdemeanor or a felony” and state its “finding on the record.” (Rule 5.790(a)(1).) An examination of the transcript of the disposition hearing and the proceeding at which appellant entered his admissions reveals that the court did not comply with this requirement.

However, the record contains a written order, dated October 12, on a pre-printed form, consisting of a series of statements, some of which contain a blank to be filled in as appropriate, and all of which are preceded by a box in which it can be indicated by a check mark or some other notation that the statement is part of the order. There is an “x” in the box preceding the statement, “The following counts may be considered a

misdemeanor or a felony. The court finds the child’s violation” There follows a list of two offenses, one of which is identified with the notation, “PC 594(a).” This notation is followed by two boxes, one labeled “Misdemeanor” and one labeled “Felony.” There is an “x” in the box labeled “Felony.” The order is signed by the court.

This order thus contains (1) an explicit statement that the count 1 offense can be punished as either a misdemeanor or a felony, and (2) an express finding that the offense is a felony. But although the order clearly *implies* that the court made the required consideration at the disposition hearing, it stops short of being a stated finding on the record.

Nonetheless, as indicated above, one of the purposes of Welfare and Institutions Code section 702—and also, presumably, of the rules of court discussed here—is to “ensur[e] that the juvenile court is aware of, and actually exercises, its discretion under ... section 702.” (*Manzy W., supra*, 14 Cal.4th at p. 1207.) Because the October 12 order clearly, and, indeed, unmistakably, implies that the court was aware of, and actually exercised, its discretion under the statute, any error was harmless.

DISPOSITION

The judgment is affirmed.