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

In re R.A., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R.A.,

Defendant and Appellant.

F062429

(Super. Ct. No. 11CEJ600040)

OPINION

APPEAL from an order of the Superior Court of Fresno County. David C. Kalemkarian, Judge, and Martin Suits, Temporary Judge (pursuant to Cal. Const., art. VI, § 21).*

Eric Cioffi, 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, Michael A. Canzoneri and Sean M. McCoy, Deputy Attorney Generals, for Plaintiff and Respondent.

* At the jurisdiction hearing, Judge Kalemkarian accepted R.A.'s admission; at the disposition hearing, Judge Suits entered the order at issue here.

-ooOoo-

At his juvenile court jurisdiction hearing, R.A. admitted, pursuant to a negotiated settlement, a felony and a misdemeanor in exchange for the dismissal of another felony.¹ At his disposition hearing, a different judge found him to be a ward of the juvenile court and ordered out-of-home placement for one year before probationary at-home placement with his mother. His request for a new disposition hearing before the judge who accepted his admission was denied. On appeal, he argues he is entitled to a remand for the hearing he was denied below. We agree.

BACKGROUND

On January 18, 2011, a juvenile wardship petition alleged that R.A. committed three felonies on December 16, 2010 – a battery with serious injury (count 1; Pen. Code, § 243, subd. (d)),² a criminal threat (count 2; § 422), and a witness dissuasion by force or threat (count 3; § 136.1, subd. (c)(1)). On January 19, 2011, the juvenile court ordered him detained on the petition.

On January 27, 2011, pursuant to a negotiated disposition, R.A. admitted count 1 as a felony and count 2 as a misdemeanor in exchange for the dismissal of count 3. On March 1, 2011, the juvenile court entered a disposition order declaring him to be a ward of the juvenile court and committing him to the New Horizons program for 365 days. On April 27, 2011, the court denied his request for a new disposition hearing.

DISCUSSION

The parties agree that the “general principle” of law applicable here is that “whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge.

¹ In the absence of any challenge to the substantive offenses, we omit mention of the facts.

² Later statutory references are to the Penal Code.

Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea." (*People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757 (*Arbuckle*)). Later cases expressly recognize that the general principle of law in *Arbuckle* applies to juvenile cases. (See, e.g., *In re Mark L.* (1983) 34 Cal.3d 171, 177 (*Mark L.*)).

At the jurisdiction hearing, the judge who accepted R.A.'s admission used a personal pronoun to emphasize to the mother, "*I* need mom to contact the Probation Department within two days so you can participate in the disposition report." (Italics added.) The court calendared the disposition hearing "for February 10th, at 8 o'clock *in this department.*" (Italics added.) At the conclusion of the jurisdiction hearing, the court used a personal pronoun to advise R.A., "*We* will see you in two weeks. All right?," to which he replied, "All right, sir." (Italics added.)

Two weeks later, after acknowledging having "received, read and considered Probation's report and recommendation," the judge who accepted R.A.'s admission granted R.A.'s attorney's request for a continuance to get "some character references" together. After both attorneys and both of R.A.'s parents agreed to a specific date, the court stated, "*We'll* set the matter over to March 1st. That would be at 8 o'clock *in this department.*" (Italics added.)

The sole disagreement between the parties is whether, on that record, "an implied term of the bargain" was that the judge who accepted R.A.'s admission was to preside over his disposition hearing. (*Arbuckle, supra*, 22 Cal.3d at pp. 756-757.) R.A. argues that that record shows that the judge who accepted his admission "created a reasonable expectation that he would preside" over the disposition hearing and, in addition, that R.A. "reasonably expected the judge that personally reviewed the probation report to preside over the disposition hearing." The Attorney General argues that R.A.'s failure to object at the disposition hearing suggests there is "nothing in the record which would support

the existence of any reasonable expectation by [him] that his disposition hearing was to be held before [the judge who accepted his admission].”

In our view, the Attorney General’s argument depends too little on two colloquies in the record – the first one when the judge accepted R.A.’s admission and the second one when the same judge acknowledged having “received, read and considered” the probation report before granting the continuance – and too much on R.A.’s failure to object at the disposition hearing. In *People v. Horn* (1989) 213 Cal.App.3d 701 (*Horn*), we held that “the failure to object does not waive a defendant’s right to enforce the implied [*Arbuckle*] term.” (*Id.* at p. 709.) Here, as in *Horn*, “silence at the time of sentencing is insufficient to constitute a waiver of the right to enforce the implied [*Arbuckle*] term.” (*Ibid.*)

In *Arbuckle*, our Supreme Court expressly relied on “the judge’s repeated use of the personal pronoun when referring to sentencing in the proceeding in which the plea bargain was accepted” to conclude that the plea bargain “was entered in expectation of and in reliance upon sentence being imposed by the same judge.” (*Arbuckle, supra*, 22 Cal.3d at p. 756.) Although “this factor was initially discounted by a number of appellate courts,” our Supreme Court “later reaffirmed its importance and discussed other similar factors.” (*Horn, supra*, 213 Cal.App.3d at p. 706, citing *Mark L., supra*, 34 Cal.3d at p. 177.) The record here is analogous to those in *Arbuckle* and *Mark L.* R.A. is entitled to a new disposition hearing before the judge who accepted his admission.³

³ In deference to the common law doctrine of ripeness, we do not address R.A.’s requests for a remand on other grounds (the absence of an evaluation of special needs, the absence of specific reunification findings, and the absence of a showing of an exercise of the court’s discretion to treat the battery as a felony). (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722; *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 22; see *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 65, fn. 6.) If any of those issues were to ripen after remand, the parties have the right on appeal from the ensuing judgment to incorporate by reference briefing now on file on any of those issues and to seek concurrent adjudication of new issues, if any, that might arise from proceedings after remand. (See Cal. Rules of Court, rule 1.5(a) [“The rules and standards of the California Rules of Court must be

DISPOSITION

The judgment (disposition order) is reversed.

Gomes, Acting P.J.

WE CONCUR:

Detjen, J.

Franson, J.

liberally construed to ensure the just and speedy determination of the proceedings that they govern.”].)