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

In re D.G., a Person Coming Under the Juvenile
Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.G.,

Defendant and Appellant.

F062561

(Super. Ct. No. 10CEJ601061-1)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell III, Judge.

Suzanne M. Morris, 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, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Dawson, Acting P.J., Kane, J. and Franson, J.

Following a contested jurisdictional hearing, the juvenile court found true the allegation that D.G., a minor, possessed marijuana for sale. The court adjudged D.G. a ward of the court and placed her on probation. On appeal, D.G. contends (1) the prosecutor and the court failed to notify D.G. and her mother of D.G.'s eligibility for Deferred Entry of Judgment (DEJ); (2) the court failed to consider whether D.G. was suitable for DEJ; and (3) D.G.'s written statement was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. We agree with D.G.'s first two contentions and will remand to allow the juvenile court to consider whether D.G. is suitable for DEJ.

FACTUAL AND PROCEDURAL SUMMARY

Because we remand on the DEJ issue, we only briefly summarize the facts of the offense. On October 1, 2010, a campus assistant at Fresno High School observed D.G. take a baggie out of her pocket and show it to another student. The campus assistant was suspicious and he directed D.G. to empty her pockets. She pulled out the baggie of what appeared to be marijuana.

D.G. was taken to the vice principals' office and then to the campus police office, where she filled out a written incident form, admitting she had marijuana and sold some of it. After being advised of her rights, she confessed to an officer.

On October 4, 2010, the Fresno County District Attorney filed a juvenile wardship petition pursuant to Welfare and Institutions Code section 602, subdivision (a),¹ alleging D.G. had committed the felony offense of possessing marijuana for sale (Health & Saf. Code, § 11359). At the same time, the district attorney also filed a "Determination of Eligibility" stating D.G. was eligible for DEJ.

At the jurisdictional hearing, the juvenile court found the petition's allegation true. The court declared D.G. a ward of the court, placed her on formal probation for one year,

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

and ordered her to reside in her mother's home and attend the Day Reporting Center program for 180 days.

DISCUSSION

D.G. contends the prosecutor and the juvenile court failed to provide the statutorily required notice of her DEJ eligibility, and then the court failed to consider whether she was suitable for DEJ. The People maintain notice of D.G.'s eligibility was given, and the juvenile court was not required to address D.G.'s suitability because she contested jurisdiction. We are not persuaded by the People's interpretation of the record.

Under the DEJ provisions of section 790 et seq., "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 the 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. (§§ 791, subd. (a)(3), 793, subd. (c).)" (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558.)

There are "two distinct essential elements of the deferred entry of judgment program: the first, eligibility, which is found if all of 'circumstances' listed in section 790, subdivision (a) are present; and the second, suitability, which requires a finding by the court that the minor will benefit from 'education, treatment, and rehabilitation.'" (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 607, fn. 10, italics omitted.)

It is the duty of the prosecutor to assess the minor's eligibility for DEJ. (§ 790, subd. (b).) "If the minor is found eligible for deferred entry of judgment, the prosecuting attorney 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.” (*Ibid.*) The prosecutor must file a “Determination of Eligibility—Deferred Entry of Judgment—Juvenile” (form JV-750) with the section 602 petition. (Cal. Rules of Court, rule 5.800(b)(1), italics omitted.) In addition, a “Citation and Written Notification for Deferred Entry of Judgment—Juvenile” (form JV-751) must be issued to the minor’s custodial parent, guardian, or foster parent. (Cal. Rules of Court, rule 5.800(c), italics omitted.) “The form must be personally served on the custodial adult at least 24 hours before the time set for the appearance hearing.” (*Ibid.*)

After the threshold determination of eligibility is made, the juvenile court “has the ultimate discretion to rule on the suitability of the minor for DEJ” (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123 (*Luis B.*).

D.G. first argues that although the record establishes that the prosecutor provided the court with notice of her DEJ eligibility by filing forms JV-750 and JV-751, the record does not demonstrate that the prosecutor provided D.G. with the required notice. D.G. notes that the record contains no written proof of service. The People respond that the lack of proof of service does not suggest D.G. was not notified of her eligibility. The People argue that the petition was also not accompanied by proof of service and “yet we can have no doubt that [D.G.] received it.”

Our review of the record shows that the prosecutor determined D.G. was eligible for DEJ, and he prepared forms JV-750 and JV-751. Form JV-750 was date stamped by the court at 3:06 p.m. on October 4, 2010, and the petition and form JV-751 were date stamped during the next minute. However, there is no proof of service in the record demonstrating that D.G. was served either of the DEJ forms.

Furthermore, as D.G. points out, there was no mention of DEJ during any of the hearings in this case, and therefore nothing to suggest that the court provided D.G.’s mother with notice. On October 6, 2010, D.G. appeared with counsel for the initial appearance and detention hearing before the juvenile court. D.G.’s counsel

acknowledged receipt of the petition, waived an advisement of D.G.'s rights, and entered a denial. However, D.G.'s counsel did not acknowledge receipt of notice of eligibility for DEJ (i.e., form JV-750). Instead counsel stipulated to a prima facie showing and submitted on the probation officer's request for supervised home detention. In subsequent hearings, DEJ was not mentioned, and nothing in the record shows the juvenile court ever considered whether D.G. was suitable for DEJ.

Relying on *In re Kenneth J.* (2008) 158 Cal.App.4th 973 (*Kenneth J.*) and *In re Usef S.* (2008) 160 Cal.App.4th 276 (*Usef S.*), the People argue that by contesting jurisdiction from the outset, D.G. was ineligible for DEJ. *Kenneth J.* and *Usef S.*, however, are both distinguishable from the present case because after the minors in those cases were found eligible for DEJ, they were *notified* of their eligibility. The minors then denied the allegations of the wardship petitions and requested contested jurisdictional hearings. (*Kenneth J.*, *supra*, at pp. 976-978; *Usef S.*, *supra*, at pp. 281-283.) In *Kenneth J.*, the court held the juvenile court was not required to conduct a suitability hearing for a minor "who is advised of his DEJ eligibility, who does not admit the charges in the petition or waive a jurisdictional hearing, and who does not show the least interest in probation, but who insists on a jurisdictional hearing in order to contest the charges." (*Kenneth J.*, *supra*, at pp. 979-980.) The court found the minor's actions "were tantamount to a rejection of DEJ." (*Id.* at p. 980.) Similarly, in *Usef S.*, the court held the minor "effectively rejected DEJ consideration when he denied the allegations against him and insisted on a contested jurisdictional hearing." (*Usef S.*, *supra*, at p. 286, fn. 3.) Thus, *Kenneth J.* and *Usef S.* stand for the proposition that a juvenile court is excused from its statutory duty to determine a minor's suitability for DEJ if the minor—*after receiving notice of his eligibility for DEJ*—nonetheless rejects DEJ consideration by contesting the charges.

In this case, as we have explained, the record does not demonstrate that D.G. received notice she was eligible for DEJ. It cannot be said that she rejected DEJ

consideration if she was not even aware of her eligibility for it. Consequently, the juvenile court was not excused from its duty to consider whether D.G. was suitable for DEJ.

Because the juvenile court did not conduct the necessary inquiry, we will set aside the findings and dispositional orders, and remand the case to allow the court to exercise its discretion to determine D.G.'s suitability for DEJ. (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 682; *Luis B., supra*, 142 Cal.App.4th at p. 1123.) If, as a result of the proceedings on remand, the juvenile court grants DEJ, it shall issue an order vacating the findings and orders. If the juvenile court denies DEJ, it shall order that the orders remain in effect, in which case D.G. will be entitled to appeal from the denial of DEJ and the finding and orders. (*Luis B., supra*, at pp. 1123–1124.) Accordingly, we need not address the remaining issue raised by D.G., as we do not yet know whether the juvenile court's findings and orders will stand. (*Id.* at p. 1124, fn. 4.)

DISPOSITION

The juvenile court's orders are set aside, and the matter is remanded to the juvenile court for exercise of its discretion to determine whether D.G. should be granted DEJ, and to conduct any further proceedings as may be necessary after making that determination.