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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMIRO E.,

Defendant and Appellant.

F062939

(Super. Ct. No. JJD065486)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Hugo J. Loza, Commissioner.

Michael Allen, 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 Cornell, Acting P.J., Gomes, J., and Franson, J.

In a juvenile wardship petition (Welf. & Inst. Code, § 602),<sup>1</sup> it was alleged that appellant, Ramiro E., a minor, committed first degree burglary (Pen. Code, §§ 459, 460, subd. (a)). Appellant admitted the allegation, and the court set a hearing for determination of whether appellant would be granted deferred entry of judgment (DEJ) under section 790 et seq. Following that hearing, the court found appellant unsuitable for DEJ; adjudged him a ward of the court, declared the instant offense to be a felony, placed appellant on probation, ordered that he reside with his mother, and released him on the electronic monitoring program.

On appeal, appellant contends the court abused its discretion in finding him unsuitable for DEJ. We will remand for further proceedings.

## **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

### ***The Instant Offense***

On May 29, 2011, a neighbor of the victim told the victim's son, O.M., that she found a stereo system in her house and believed that her son and some of his friends had broken into the victim's house and stolen it. O.M. recognized the stereo as belonging to his mother. Thereafter, investigating police discovered that the front door of the victim's house had been kicked in, and O.M. informed the officers that other items, including a television and camera were missing, and that he knew "several of the suspects."

A police officer went to appellant's house and asked him about the burglary. Appellant initially "denied any involvement," but later, after being transported to the police station, he admitted he was "involved." He told the officer that after "someone

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<sup>1</sup> Except as otherwise indicated, all statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Information in this section is taken from the report of the probation officer, filed July 12, 2011.

climbed through the window ... and then opened the front door,” he (appellant) “carried a large speaker” to another boy’s house.

### ***Additional Background***

Prior to the instant offense, appellant had had two previous contacts with the juvenile justice system. In the first, in May 2010, it was alleged he committed grand theft (Pen. Code, § 487). He completed the “Neighborhood Accountability Board” program, and the case was dismissed. In January 2011, he was accused of committing misdemeanor possession of marijuana on school grounds (Health & Saf. Code, § 11357, subd. (e)). The matter was “Closed” with an “Admonishment letter.”

Appellant was in the tenth grade but was “[n]ot [a]ttending” school. According to school records, his most recent grades were F’s in “English, ELD Reading Improvement, World History/Geography, Biology, and Algebra 1” and a C in physical education. School records also showed that he was “present” seven days and had 134 “unexcused absences.” Appellant’s mother told the probation officer that appellant ran away from home in late January 2011, he returned in late April of that year, and during the time he was away from home, he did not attend school.

In 2005, appellant was diagnosed with attention deficit hyperactivity disorder. He had been prescribed various medications and has “received mental health services.” His mother reported that he had “began to be defiant and refused to take [his] medications.” She also reported that since returning home, appellant has not “attend[ed] his counseling.”

Appellant “admitted to smoking marijuana six ... times a week to sleep.”

The probation officer noted that the probation department had been directed by the court to “determine [appellant’s] suitability to participate in the [DEJ],” and listed the following “mitigating circumstances”: appellant has never been placed on formal probation; he completed informal probation satisfactorily; he does not “‘claim’ any gang

structured affiliation”; and he was “remorseful for his actions.” (Emphasis and unnecessary capitalization omitted.) As “aggravating circumstances,” the officer listed the following: appellant ran away from home and “was unsupervised by his mother for more than three months”; since running away in January 2011, he had not attended school; as a result of running away, he had not been attending his mental health counseling and taking his prescribed medications; and he admitted to smoking marijuana six times per week. (Emphasis and unnecessary capitalization omitted.)

Appellant told the probation officer he was “motivate[ed] to successfully complete” the DEJ program. The officer concluded appellant was “suitable” for, and recommended, DEJ.

At the hearing on July 15, 2011, after the court heard initial argument from both counsel regarding appellant’s suitability for DEJ, the following colloquy occurred:

“THE COURT: See, my concern is he ran away from home for about three months so he didn’t go to school at all. The school history is absolutely terrible. Basically all Fs. 134 days of absence and I think 7 of attendance. [¶] He’s using marijuana on a daily basis. [¶] He’s been diagnosed with ADHD and I think that’s the reason why he’s using marijuana on a daily basis. [¶] But really there’s very little in terms of the information in the report that indicates to me that he’ll be successful on DEJ. And so I just, I mean, I don’t know. I just can’t see how he’s suitable for this.

“MS. BOURN [appellant’s counsel]: Your Honor, the thing is it’s just a chance. If he makes it, fine. If he doesn’t make it we’re right back here where we were.

“THE COURT: I don’t mind taking chances and I do quite a bit on DEJs, but the problem is when I take a chance there’s always, like, something. A glimmer of hope that I can point to that gives me some hope, but in this case I don’t see the glimmer of hope because I think he’s going -- he’s been using marijuana on a regular basis. Unless he’s supervised closely and tested -- he’s not going to school at all. The run away history is of

great concern, and I'll bet you that if you talk to the mom that she will tell you that she has a great deal of concern too about this."

At that point, appellant's mother indicated, in response to a question by the court, that appellant "ha[d] been beyond [her] control for quite awhile."

The court continued: "So I just don't see this being a suitability case. If he wants to withdraw his plea we can do that. I would place him on standard terms and conditions of probation. Make sure he tests on a regular basis. Make sure we have a probation officer supervising him, but there's a reason why he's in custody and there's a reason why this report indicates that he's just not doing well at all."

After further argument by appellant's counsel, the court stated: "All right. Well, I just don't think he's suitable so if he wishes to withdraw [his admission to the allegation of the petition] we can do that or we'll have a review in about a month to see how he's doing. If he's not, then we'll see what needs to be done. [¶] I think the mom has little or no control over this minor. As I said before, he's doing terrible in school. He's using marijuana on a daily basis. He has a runaway history. To place him on DEJ would be totally inappropriate and we would not be doing him any favors by doing that."

Later in the hearing, the court told appellant: "So you understand that the whole purpose of this is to make sure that you get enrolled in counseling, that you do all the things you need to do .... [¶] ... [¶] ... You have a lot of things you need to work on. Drug and alcohol counseling is one of them. You have serious problems."

The court placed appellant on the electronic monitoring program (EMP), set a hearing date for August 17, 2011, and told appellant he would be released from the EMP if he obeyed the EMP rules.

## **DISCUSSION**

Appellant argues that the court abused its discretion in finding appellant "unsuitable" for DEJ.

## ***Governing Law***

The DEJ provisions have been explained as follows: “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 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 (*Martha C.*).

Proposition 21 contains a noncodified section entitled Findings and Declarations; subdivision (j) of those findings states: “Juvenile court resources are spent disproportionately on violent offenders with little chance to be rehabilitated. If California is going to avoid the predicted wave of juvenile crime in the next decade, greater resources, attention, and accountability must be focused on less serious offenders, such as burglars, car thieves, and first time non-violent felons who have potential for rehabilitation. This act must form part of a comprehensive juvenile justice reform package which incorporates major commitments to already commenced ‘at-risk’ youth early intervention programs and expanded informal juvenile court alternatives for low-level offenders. These efforts, which emphasize rehabilitative protocols over incarceration, must be expanded as well under the provisions of this act, which requires first time, non-violent juvenile felons to appear in court, admit guilt for their offenses, and be held accountable, but also be given a non-custodial opportunity to demonstrate

through good conduct and compliance with a court-monitored treatment and supervision program that the record of the juvenile’s offense should justly be expunged.”

The determination of whether to grant DEJ requires consideration of “two distinct essential elements of the DEJ program,” viz., “*eligibility*” and “*suitability*.” (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 607, fn. 10 (*Sergio R.*)) A minor is eligible for DEJ under section 790 if he or she is accused in a juvenile wardship proceeding of committing a felony offense and all of the following circumstances apply: “(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.” (§ 790, subd. (a)(1)-(6).)<sup>3</sup>

After eligibility is determined, “[t]he trial court ... has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of the factors specified in [California Rules of Court, rule 5.800] and section 791, subdivision (b), and based upon the “‘standard of whether the minor will derive benefit from ‘education, treatment, and rehabilitation’ rather than a more restrictive commitment. [Citations.]”” (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123 (*Luis B.*)) The factors set forth in section 791, subdivision (b) are: “[the minor’s] age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors ....” California Rules of Court, rule 5.800(d)(3) identifies those factors, in virtually identical language, as “The child’s age, maturity, educational

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<sup>3</sup> There is no dispute that appellant was eligible for DEJ.

background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the child would derive from education, treatment, and rehabilitation efforts.” (Cal. Rules of Court, rule 5.800(d)(3)(A)(i).) A court may deny DEJ to an eligible minor “only if [the court] determines the minor would not benefit from the education, treatment or rehabilitation available through the [DEJ] program.” (*Martha C.*, *supra*, 108 Cal.App.4th at p. 560.)

The determination to grant or deny DEJ may be reversed only upon a showing of abuse of discretion. (*Sergio R.*, *supra*, 106 Cal.App.4th at p. 607.) Judicial discretion is abused only if it results in an arbitrary or capricious disposition, or implies whimsical thinking, and “exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72, citations omitted.)

### ***Analysis***

Appellant argues that when, as in the instant case, the juvenile court places a DEJ-eligible minor on probation and orders that the minor reside at home, and thus does not place the minor in a custodial setting, implicit in such an order is the finding that appellant would benefit from the education, treatment, and rehabilitation available under DEJ rather than a more restrictive commitment. Appellant bases this argument on section 794, which, as he correctly notes, provides that (1) the conditions of probation that a court may impose on a minor on the DEJ program are no different than the conditions that can be imposed in connection with a grant of regular probation, and (2) that drug testing, which the court indicated was necessary for appellant, is specifically authorized for minors in DEJ.<sup>4</sup> As a result, appellant argues, for a minor not placed in custody,

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<sup>4</sup> Section 794 provides: “When a minor is permitted to participate in a deferred entry of judgment procedure, the judge shall impose, as a condition of probation, the requirement that the minor be subject to warrantless searches of his or her person, residence, or property under his or her control, upon the request of a probation officer or peace officer. *The court shall also consider whether imposing random drug or alcohol*

regular probation is no more restrictive than probation under DEJ, and therefore a finding that a DEJ-eligible minor may be placed in a non-custodial setting is, in effect, a finding that the minor is suitable for DEJ. Under these circumstances, appellant argues, denial of DEJ is an abuse of discretion.

The People counter that this argument ignores the nature of “the DEJ program *as it [is] constituted in Tulare County.*” (Italics added.) !(RB 8)! In Tulare County, the People assert, a minor on regular probation receives closer supervision than does a minor on probation under the DEJ program, and therefore regular probation is a more restrictive commitment than probation under DEJ, notwithstanding that the conditions of probation may be the same under regular probation and DEJ probation. Further, the People argue, the juvenile court found that appellant needed the close supervision available to a minor on regular probation; this finding is supported by the record; and therefore the court did not abuse its discretion in finding appellant unsuitable for DEJ.

The parties appear to agree, as do we, to the following propositions: First, the evidence of appellant’s drug use, poor grades, poor record of school attendance, and his mother’s admission that he is beyond her control support the court’s implicit finding that appellant requires close supervision on probation, in order to receive rehabilitative benefit from probation. Second, the juvenile court believed that the Tulare County Probation Department provides closer supervision for wards on regular probation than minors placed on DEJ probation.

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*testing, or both, including urinalysis, would be an appropriate condition of probation. The judge shall also, when appropriate, require the minor to periodically establish compliance with curfew and school attendance requirements. The court may, in consultation with the probation department, impose any other term of probation authorized by this code that the judge believes would assist in the education, treatment, and rehabilitation of the minor and the prevention of criminal activity. The minor may also be required to pay restitution to the victim or victims pursuant to the provisions of this code.*” (Italics added.)

The parties, however, part company on the question of whether the evidence supports the court's conclusion that in Tulare County, DEJ probationers are supervised less closely than minors who have been adjudged wards of the court and placed on regular probation. The People argue, "*While nothing in the record details exactly what level of supervision DEJ can or cannot provide*, the clear inference is that in Tulare County the DEJ program provides a low level of supervision and that the court was aware that this was the level of supervision appellant was destined to receive if a DEJ disposition was chosen." (Italics added.) (RB 8) As the portion of this statement that we have italicized indicates, although the record supports the conclusion that the court believed wards on formal probation are more closely supervised than DEJ probationers, there is no information in the record, from the probation department or from any other source, regarding how the probation administers the DEJ program with regard to supervising minors on probation and how the supervision of DEJ probationers differs from the supervision of wards on regular probation. Therefore, we are unable, on this record, to determine whether regular probation is more restrictive than DEJ probation. And, as indicated above, that standard for determining whether a minor is suitable for DEJ is "whether the minor will derive benefit from 'education, treatment, and rehabilitation' *rather than a more restrictive commitment*. [Citations.]" (Luis B., *supra*, 142 Cal.App.4th at p. 1123, italics added.) Accordingly, we will remand the matter for further hearing, to allow the court to consider evidence from which it can determine whether placing appellant on regular probation is a more restrictive commitment than DEJ probation.<sup>5</sup>

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<sup>5</sup> We do not suggest that the level of probation supervision is the only variable bearing on the question of whether a disposition of wardship and regular probation is a more restrictive commitment than DEJ probation. We cannot rule out the possibility that other factors inherent in wardship would be relevant to the determination of whether a wardship-with-probation disposition is more restrictive than DEJ probation. For

Appellant suggests that remand for the consideration of such evidence would be pointless. He argues that “[t]he law requires” that minors on DEJ probation “receive more resources and more supervision, not less,” and that “[i]f Tulare County’s practice was to provide fewer resources [to DEJ probationers], this would be in direct conflict with the requirements of the law.” These requirements, appellant asserts, are set forth in the uncodified portion of Proposition 21 quoted above; specifically, appellant relies on the following passage: “If California is going to avoid the predicted wave of juvenile crime in the next decade, *greater resources, attention, and accountability must be focused* on less serious offenders, such as burglars, car thieves, and first time non-violent felons who have potential for rehabilitation.” (Prop. 21 (2000), subd. (j), italics added.) Thus, appellant’s argument, as we understand it, is that if the juvenile court were to deny DEJ because the Tulare County DEJ program provides less supervision than regular probation, the denial of DEJ would necessarily be contrary to the purpose of the DEJ program, and would therefore constitute an abuse of discretion.

We disagree. The fact, if it be a fact, that probationers in the Tulare County DEJ program are supervised less closely than minors on regular probation does not establish that Tulare County devotes inadequate resources and attention to DEJ probationers, contrary to the purpose of the law establishing DEJ. We understand the statement in the Findings and Declarations of Proposition 21 that “*greater resources, attention, and accountability must be focused*” on minors who qualify for DEJ to mean that the electorate intended that efforts to help such minors should be increased. However, there

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example, a minor on DEJ probation cannot be taken into custody as easily as a ward on regular probation. Under section 625, a ward may be taken into custody if a law enforcement officer has reasonable cause to believe he or she violated an order of the juvenile court, but other minors can only be taken into custody if the officer has reasonable cause to believe there are new grounds for wardship or in cases of medical need. (§§ 625, 777, subd. (d).)

is nothing in the record to support the claim that such an increase in efforts necessarily requires that DEJ probationers always receive closer supervision than regular probationers. On this record, we cannot say as a matter of law that if Tulare County operates a program that provides a lower level of supervision to DEJ probationers than to minors on regular probation, such a program would be contrary to law.

#### **DISPOSITION**

The matter is remanded to the juvenile court for determination of whether appellant is suitable for deferred entry of judgment. In making this determination, the court may consider evidence bearing on the question of whether placing appellant on regular probation is a more restrictive commitment than DEJ probation. The judgment is otherwise affirmed.