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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

O.O.,

Defendant and Appellant.

F064137

(Super. Ct. No. JJD065417)

OPINION

THE COURT*

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

Arthur L. Bowie, 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, Charles A. French and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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

Appellant, O.O., admitted allegations in a petition (Welf. & Inst. Code, § 602)¹ charging him with lewd and lascivious conduct with a child under the age of 14 years (Pen. Code, § 288, subd. (a)).

On December 22, 2011, the court found appellant unsuitable for deferred entry of judgment (DEJ) and placed him in the care of the probation officer pending placement with a suitable relative or in a foster or group home.

On appeal, appellant contends the court abused its discretion when it found him unsuitable for DEJ. We affirm.

FACTS

On April 25, 2011, the victim's mother told Tulare County sheriff's deputies that a week earlier, F.A. and another boy told her daughter that they had walked in on appellant while he sexually assaulted the six-year-old victim. Appellant reportedly asked the boys, "You want some of this too[?]"

On April 28, 2011, Laura Boland, a member of the district attorney's Child Abuse Response Team, interviewed the victim. During the interview, the victim stated that there was a mean boy at the apartment complex who hurt him. However, he denied being sexually assaulted and claimed that the boy only tripped him causing the victim to hurt his knee. When questioned about blood that was found in his underwear, the victim attributed it to the injury to his knee.

Boland also interviewed F.A., who told her that he had seen appellant do "sex" with the victim. According to F.A., he went into his apartment to use the bathroom and was followed by appellant and the victim. Upon exiting the bathroom, he saw the victim on a bed lying face down with his pants down. Although initially he claimed he only

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

heard the “sex” between appellant and the victim, eventually he told Boland that he saw appellant put his “weenie” in the victim’s “butt.”

On May 3, 2011, Deputy Martin interviewed appellant. Appellant told Martin that he had been playing “spin the bottle” in F.A.’s room when he asked the victim if he wanted to do “sex.” Appellant admitted that he put his “weenie” in and out of the victim’s “butt” once. Appellant also told Deputy Martin that when he was five or six years old and lived in Mexico, a boy had done the same thing to him and that it had hurt him. Appellant was taken into custody after the interview.

On May 5, 2011, the district attorney filed a wardship petition charging appellant with one count of lewd and lascivious conduct with a child under the age of 14 years.

On May 19, 2011, appellant was released on the electronic monitor to the custody of his father.

On October 18, 2011, appellant admitted the charged offense contingent on being placed on DEJ.²

Appellant lived with his mother and two younger siblings in the same apartment complex in Orosi as the victim when the assault occurred. His father lived in Dinuba. Appellant began living with his father on May 19, 2011, when he was released to his custody on the electric monitor.

During a detention report interview with the probation department, appellant’s mother stated that appellant was sometimes rebellious at home, did not like taking orders, and got mad when he did not get things his way. In a November 8, 2011, probation department interview, appellant’s mother stated that appellant believed he was playing a game with the victim and that she did not believe the offense was serious. She also stated

² One of the requirements for DEJ is that the juvenile be 14 years old. (§ 790, subd. (a)(5).) Appellant was 13 years old when he committed the underlying offense but had turned 14 by the time he entered his plea in this matter.

that when appellant was eight years old, something similar happened to appellant and he believed it was a game at the time. Although appellant's mother believed appellant needed counseling to help him deal with being molested himself and to understand that that type of behavior was unacceptable, she did not believe appellant needed to be punished for something that he did not know was wrong. She further stated that being a victim of molestation affected appellant negatively and that appellant now realized what he did was not a game and that he would not do it again.

In a probation department interview, appellant's father stated that appellant's mother had advised him that appellant was molested while living in Mexico. Appellant's father felt very bad and was shocked to learn that appellant had molested another child. He reported that he and appellant had a good relationship and that appellant had been respectful and abided by his rules since he began living with him. However, appellant angered easily and tended to throw chairs and other things when he was mad. Appellant's father would discipline appellant by suspending his privileges and grounding him.

Appellant's father also reported that he did not have a set work schedule and that appellant was usually out of school by 3:30 p.m. and alone at home until he came home from work. However, appellant would call him at work to get permission prior to leaving the house. Although appellant usually stayed outside the house in the front yard with friends, he had to return to the house by 8:00 p.m. or 9:30 p.m. if he went to a neighbor's house. In August 2011, appellant began attending hour-long counseling sessions three times a week. Appellant's father was willing to participate in therapy with appellant whenever he was able to miss work or adjust his work schedule.

In a probation department interview, appellant stated that he was playing with friends outside when F.A. told him to go inside his apartment and, after doing so, he found F.A. and the victim inside. F.A. told appellant to put his penis in the victim's

“butt.” Appellant could not explain why he complied but he felt very bad about his conduct and he claimed that it happened only once. He also claimed that the victim told him it was okay and did not tell him to stop. While appellant was detained, his brother purportedly was told that F.A. also molested the victim, but on a different day.

Appellant reported that he had a good relationship with his father. Appellant would call his father and get permission from him prior to leaving the house. His curfew was 9:30 p.m. and he would call his father if he was going to be late. Appellant admitted having a quick temper and that he got mad and threw things when he was not allowed to go outside.

Appellant’s probation report concluded that appellant needed “a higher level of supervision as well as [more] intensive sex offender treatment than would be available through [DEJ].” It also rejected a placement with his parents because appellant needed a more secure and structured environment with intensive counseling services, which his parents could not provide because appellant spent hours after school unsupervised due to his father’s work schedule and his mother minimized the seriousness of appellant’s conduct.

On December 22, 2011, at appellant’s disposition hearing, defense counsel argued that appellant did not need more supervision. She also noted that appellant’s father worked until 6:00 p.m. or 6:30 p.m. daily and she proposed that appellant could enroll in an after school program which lasted from 3:30 p.m. to 6:00 p.m. Appellant’s mother could then pick him up and wait with him until his father got out of work. The court, however, found appellant unsuitable for DEJ and in doing so stated:

“THE COURT: All right. [Appellant], this is a very difficult choice for the Court because I want to try to make everybody be in the right place again. Obviously we got some things that have happened that have put everybody in a really bad place. I am aware that you probably have a better understanding of that than anybody since you were in that same position.

“The problem is that a lot of times when I see kids in front of me who do this to other kids, a lot of times something has happened to them beforehand. And while that’s terrible, I can’t undue [*sic*] what happened to you, but I can’t let you do it to somebody else. I don’t know if you understand all the things that go into that and the problems that [happen] as a result of that. I don’t want this to keep going. In other words, you do it to somebody else and that somebody else does it to somebody else and that somebody else does it to somebody else. The only way the Court knows to prevent that is to make sure you get the help and the treatment you need so that you won’t do this again. So that you won’t be in this position again and that this won’t happen to anybody else.

“Based on what I have before me, I believe that what the probation officer is recommending is the most appropriate. So I don’t think that the amount of counseling and help that you can receive under the [DEJ] program will be enough to put you in a position where I’m confident that you have gotten to a point where this isn’t going to happen again, or that you are in a position where you need to be.

“So that’s what the court’s feeling, is that I think you need more than what the [DEJ] program has for it. I don’t think you are in a position to make you suitable for that program so that it will work and that we won’t have problems again.”

The court then advised appellant that he could withdraw his plea because it was contingent on a grant of DEJ, but appellant elected not to. Afterwards, the court ordered appellant placed in the custody of the probation officer for placement in the home of a suitable relative or a foster or group home and it allowed appellant to remain with his father pending such placement.

DISCUSSION

Appellant contends the court abused its discretion when it denied him DEJ because: 1) the juvenile court’s main concern at his disposition hearing was the supervision and structure given to appellant and these concerns had been resolved by the time of the hearing; 2) the record does not contain any facts which indicate that appellant would not benefit from a grant of DEJ; and 3) the court failed to consider the mitigating

circumstances and they outnumbered the aggravating circumstances. We will reject these contentions.

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.)

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.) 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).)

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 1495(d)(3) 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.) 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 “[t]he child’s age, maturity, educational 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).)

The determination to grant or deny DEJ may be reversed only upon a showing of abuse of discretion. (*In re 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.)

Appellant was 13 years old when he committed a serious sexual offense against a victim seven years his junior that apparently resulted in the victim suffering rectal bleeding. Further, appellant knew from his own experience as a victim of a similar assault that he would cause the victim substantial pain and discomfort. Although appellant admitted assaulting the victim and knowing his conduct was wrong, he attempted to minimize his culpability by claiming he was merely acting at the direction of another boy, that the other boy molested the victim on a different occasion, and that the victim consented to the assault and did not tell him to stop. These circumstances support

the court's implicit conclusion that appellant would not benefit from the three hours per week of counseling he would continue to receive under a grant of DEJ because he required more intensive sexual offender treatment.

Additionally, the court's adoption of the probation report's recommendation indicates that the court's concern with the structure and supervision appellant was receiving had not been resolved by the time of appellant's disposition hearing. Further, the record supports the court's implicit finding that appellant also would not benefit from a grant of DEJ because it would not provide him with the structure and discipline he needed to prevent him from reoffending. Under defense counsel's proposed DEJ plan, appellant would live with his father and he would be supervised by his mother when his father was at work and appellant was not in school. This would have required appellant's mother to supervise appellant on weekdays from the time appellant got out of school or out of the after school program until his father got out of work, all day whenever appellant missed school for any reason including illness or holidays, and possibly on weekends, if appellant's father worked those days.³ However, the court could reasonably find that appellant's mother was not an appropriate person to provide appellant with the structure and supervision he needed because she failed to appreciate the seriousness of appellant's offense and because allowing her to supervise appellant could put her two younger children at risk.

We also reject appellant's contention that the court did not consider the circumstances that he claims mitigated his conduct. These circumstances were contained in appellant's probation report and/or were brought to the court's attention through defense counsel's arguments. Obviously, the court considered them; it just did not find them persuasive.

³ The record is unclear whether appellant's father worked weekends.

Moreover, “‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.’ [Citation.] One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation].” (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) These principles apply equally to a juvenile court’s decision whether to grant a juvenile DEJ. Accordingly, we also reject appellant’s contention that the court abused its discretion in denying DEJ simply because the mitigating circumstances outnumbered the aggravating circumstances. Thus, we conclude that the court did not abuse its discretion when it found appellant unsuitable for DEJ.

DISPOSITION

The judgment is affirmed.