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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

O. M.,

Defendant and Appellant.

F064295

(Super. Ct. No. 512613)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Nan Cohan Jacobs, Judge.

Erick R. Beauchamp, 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, Stephen G. Herndon and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Levy, A.P.J., Poochigian, J. and Franson, J.

Appellant, O.M., appeals from the June 2011 juvenile adjudication finding he possessed heroin. His sole contention on appeal is that the juvenile court erred in failing to hold the required hearing to consider his eligibility for deferred entry of judgment (DEJ). We agree and shall reverse and remand.

FACTS¹

“According to [a] Modesto Police report ..., on June 8, 2011, at approximately 12:50 p.m., an officer conducted a traffic stop on a vehicle with two male occupants. The officer contacted the driver and asked the driver for his driver[']s license and vehicle registration. The officer noticed the driver’s speech was slow and his eyes were droopy. The officer thought the driver could be under the influence of narcotics and had him exit the vehicle. A second officer arrived at the location and evaluated the driver for being under the influence of drugs.

“As the driver was being evaluated the officer contacted the front seat passenger, who was identified as the minor. The officer had the minor exit the vehicle and step to the curb to speak to him. The officer observed the immediate area to be clean of debris and trash; however, there were leaves and brush in the gutter. The officer asked the minor to sit on the curb while he checked his information. As the minor sat down the officer’s attention was directed to a small round item wrapped in plastic laying on the ground next to the minor’s left leg. The officer reached down and picked the item up. The minor immediately denied the item[] was his although another officer saw it fall out of the minor’s pant leg as he sat down. The minor was handcuffed and seated in the rear seat of the patrol vehicle. The driver’s vehicle was searched by a K-9 unit and did not find any other contraband. The vehicle was towed and stored. The officer opened the plastic wrapped item and discovered it to be heroin. The officer tested the substance which was presumptive positive for heroin. The officer weighed the heroin which weighed 44 grams.”

¹ The facts are taken from the probation officer’s report.

PROCEDURAL HISTORY

A juvenile wardship petition (Welf. & Inst. Code, § 602)² filed June 10, 2011, alleged O.M., a minor, committed a violation of Health and Safety Code section 11350, subdivision (a) (possession of heroin). The district attorney also filed a Determination of Eligibility for Deferred Entry of Judgment, along with a citation and written notification for DEJ, finding O.M. was eligible for DEJ. (§ 790 et seq.) On June 13, 2011, O.M. denied the allegation in the petition.

On June 24, 2011, O.M. filed a motion to suppress. (§ 700.1.) The juvenile court heard the motion on January 10 and January 11, 2012. After the court denied the suppression motion, O.M. admitted the allegation in the petition. The court found a factual basis for the admission and set the matter for a disposition hearing.

At the disposition hearing on January 26, 2012, O.M. was declared a ward of the court and ordered to serve 58 days in juvenile hall with credit for time already served.

DISCUSSION

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

² All statutory references are to the Welfare and Institutions Code unless otherwise specified.

proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)” (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558.)

Under the DEJ statutory scheme, the prosecuting attorney has the initial duty to assess the eligibility of the minor for DEJ. Either before the filing of the wardship petition or as soon as possible thereafter, the prosecuting attorney must review the minor’s file and, if he or she determines the minor meets the DEJ eligibility requirements, notify the court of its determination (§ 790, subd. (b); Cal. Rules of Court, rule 5.800(b)(1); *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1122 (*Luis B.*)) and provide “written notification to the minor,” which must include, *inter alia* “[a] full description of the procedures for deferred entry of judgment” (§ 791, subd. (a)(1)) and “[a] clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment” (§ 791, subd. (a)(3)).

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.³ [¶] (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).)

³ Effective July 1, 2005, the Department of Youth Authority was renamed “the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.” (*In re Lemanuel C.* (2007) 41 Cal.4th 33, 37, fn. 2.)

If the prosecuting attorney finds the minor eligible, the separate question of the minor's "suitability" for DEJ remains. (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) "The trial court then has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of [certain] factors specified [by statute and rule of court], and based upon the "standard of whether the minor will derive benefit from 'education, treatment, and rehabilitation' rather than a more restrictive commitment. [Citations.]" [Citations.] The court may grant DEJ to the minor summarily under appropriate circumstances [citation], and if not must conduct a hearing at which 'the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.' [Citation.]" (*Ibid.*)

But, "While the court retains discretion to deny DEJ to an eligible minor, the duty of the prosecuting attorney to assess the eligibility of the minor for DEJ and furnish notice with the petition is mandatory, as is the duty of the juvenile court to either summarily grant DEJ or examine the record, conduct a hearing, and make 'the final determination regarding education, treatment, and rehabilitation' [Citations.] ... The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold eligibility determination is made. [Citation.]" (*Luis B.*, 142 Cal.App.4th at p. 1123.)

Here, it is undisputed the prosecuting attorney correctly determined O.M. is eligible for DEJ and complied with the mandatory notice provisions. The parties also agree that the juvenile court had a mandatory duty to hold a hearing to determine O.M.'s suitability for DEJ, and that the court did not conduct a hearing *specifically* addressing the issue. Respondent, however, contends the disposition hearing essentially constituted the required hearing because "[i]n adopting probation's recommendation and imposing the terms suggested by probation, the court *implicitly* adopted the probation officer's

finding that appellant would derive more benefit from wardship rather than DEJ.”⁴
(Italics added.)

We agree with O.M. that the juvenile court’s reference to the probation officer’s report at the disposition hearing was insufficient to establish the court fulfilled its duty to conduct a hearing to determine O.M.’s suitability for DEJ. Therefore, remand is required to allow the juvenile court to determine O.M.’s suitability for DEJ.

DISPOSITION

The judgment is reversed. The matter is remanded to the juvenile court. On remand, the juvenile court is directed to determine O.M.’s suitability for deferred entry of judgment (DEJ). The court, if it determines O.M. is not suitable for DEJ, shall reinstate the judgment.

⁴ At the disposition hearing, the juvenile court did not expressly address the issue of O.M.’s suitability for DEJ but stated it had “reviewed the Probation Department’s report and recommendation.” The probation officer’s report briefly addressed the DEJ issue as follows: “The minor is eligible for Deferred Entry of Judgment as he ... has admitted to the alleged charge in the petition. However, as the minor has admitted to a daily heroin habit, and prolonged period of non-attendance in school, the minor is not suitable for DEJ.”