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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

THE PEOPLE,

Plaintiff and Respondent,

v.

M.L.,

Defendant and Appellant.

F064666

(Super. Ct. No. JW126543-01)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

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, Kathleen A. McKenna and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a modified dispositional order in a Welfare and Institutions Code section 602 proceeding.¹ Appellant M.L. contends section 1752.16, which permitted the modified disposition in this case, violates constitutional prohibitions on ex post facto laws. We disagree and affirm the juvenile court's order.

HISTORY

On April 27, 2011, a few days short of his 14th birthday, appellant sexually molested his 11-year-old sister. When interviewed by the police, the victim said appellant and another brother had molested her on approximately seven occasions. A section 602 petition alleged one count of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)) and four additional counts of forcible sexual offenses. On September 13, 2011, the petition was amended to add count 6, a violation of Penal Code section 288, subdivision (a), nonforcible lewd and lascivious act with a child less than 14 years of age. Appellant admitted that count in return for dismissal of the five forcible sex-crime counts. On September 27, 2011, the juvenile court committed appellant to the California Department of Corrections and Rehabilitation – Division of Juvenile Justice (now called the Division of Juvenile Facilities (DJF)). The court determined appellant's maximum time of confinement was eight years. (See § 731, subd. (c).) While at DJF appellant began the sexual behavioral treatment program.

In December 2011, the Supreme Court held that a juvenile court is only permitted to commit a ward to DJF “if the ward has committed an offense listed in section 707[, subdivision] (b) and then only if the ward's most recent offense alleged in any petition and admitted or found to be true by the juvenile court is either an offense enumerated under section 707[, subdivision] (b) or a sex offense described in Penal Code section 290.008[, subdivision] (c).” (*In re C.H.* (2011) 53 Cal.4th 94, 108.)

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

On January 31, 2012, in response to the Supreme Court's decision in *In re C.H.*, *supra*, the juvenile court recalled appellant's commitment to DJF. On February 15, 2012, the court entered a modified dispositional order in which it placed appellant in the supervision and care of the probation officer. It ordered appellant to be housed at juvenile hall until a planned local in-custody sexual offender counseling program was ready to receive him. (The record on appeal is unclear about the details of the planned program.) Before that treatment program was implemented, section 1752.16 was enacted. In net effect, section 1752.16 permits counties to contract with DJF to house wards. Appellant's probation officer requested the juvenile court return appellant to DJF to resume the sexual behavioral treatment program as the local treatment program was not yet operational. At a further hearing on March 29, 2012, the juvenile court left in effect appellant's commitment to the Kern County Probation Department for sexual offender treatment, but modified it to allow temporary housing in DJF. Upon completion of the sexual behavioral treatment program, the juvenile court stated appellant could be detained in Juvenile Hall until placement.

DISCUSSION

Section 1752.16 was enacted on February 29, 2012, as urgency legislation "to address the California Supreme Court's ruling in *In re C.H.* (2011) 53 Cal.4th 94." (§ 1752.16, subd. (b); see Stats. 2012, ch. 7.) Section 1752.16, subdivision (a), provides that DJF "may enter into contracts with any county of this state for [DJF] to furnish housing to a ward who was in the custody" of DJF on the date *In re C.H.* was decided (Dec. 12, 2011) and who was committed to DJF for the commission of an offense listed in Penal Code section 290.008, subdivision (c), but who had not committed an offense listed in section 707, subdivision (b). Appellant is such a person.²

² Section 707, subdivision (b), lists 30 serious and violent crimes which, when committed by a minor 14 years of age or older, permit proceedings to determine whether the minor should be tried as an adult for the offense. (Other related provisions require

Appellant contends “a statute [enacted] with the purpose of having minors recommitted to a penal institution where their initial commitment was illegal at the time, is clearly an ex post facto law.”

The state and federal ex post facto laws have the same meaning. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171-172.) “[N]o statute falls within the ex post facto prohibition unless ‘two critical elements’ exist.” (*Id.* at p. 172.) “First, the law must be retroactive.” (*Ibid.*) Section 1752.16 is applicable to appellant solely because he was, prior to the effective date of that section, the subject of a section 602 petition charging a crime listed in Penal Code section 290.008, subdivision (c), and was committed to DJF on the date *In re C.H.*, *supra*, 53 Cal.4th 94 was decided. Accordingly, the first requirement for a prohibited ex post facto law is met.

The second requirement for a prohibited ex post facto law is that the law must have one or more of the following four effects: it makes criminal acts that were innocent

prosecution as an adult in some circumstances not relevant to the present case. (See *In re Eddie M.* (2003) 31 Cal.4th 480, 487, fn. 3.) Section 707, subdivision (b), serves an additional purpose, however: section 731, subdivision (a)(4), at the time of appellant’s offense, provided that a minor adjudged a ward pursuant to section 602 could be committed to DJF only if the minor had committed an offense described in section 707, subdivision (b). While forcible lewd or lascivious conduct, described in Penal Code section 288, subdivision (b), is listed in section 707, subdivision (b), nonforcible lewd or lascivious conduct, proscribed by Penal Code section 288, subdivision (a), is not. (See *In re C.H.*, *supra*, 53 Cal.4th at p. 99, fn. 3.)

Penal Code section 290.008, subdivision (c), contains a different listing of crimes. Subdivision (a) of that statute requires that any person who is discharged after he or she has been committed to DJF based on a section 602 petition alleging any of the offenses listed in Penal Code section 290.008, subdivision (c), shall register as a sex offender. All violations of Penal Code section 288 are included in the Penal Code section 290.008, subdivision (c) list.

Thus, while the section 602 petition as initially filed would have supported an order for commitment to DJF even after *In re C.H.*, the amended petition admitted by appellant did not, under *In re C.H.*, permit appellant’s commitment to DJF.

when done; it makes the crime greater or more aggravated than it was when committed; it inflicts a greater punishment for the crime than was available when the crime was committed; or it alters the rules of evidence or the required proof for conviction. (*John L. v. Superior Court, supra*, 33 Cal.4th at p. 172 & fn. 3.)

Appellant contends section 1752.16 violates the third of these prohibitions; that is, he contends section 1752.16 increases the punishment that could have been imposed upon him at the time he committed his section 602 offense.

Restrictions on a minor's liberty, whether local or through DJF, are defined by statute as "punishment." (See § 202, subd. (e).) Nevertheless, the statute permits imposition of punishment of various types only when "consistent with the rehabilitative objectives of this chapter." (*Id.*, subd. (b).) The question is whether section 1752.16 inflicts a type or degree of punishment greater than what could lawfully have been imposed on appellant at the time of his offense. We conclude it does not.

Both before and after the enactment of section 1752.16, a ward could be confined in a variety of juvenile institutions run by the county (§ 730, subd. (a)) and could be ordered to "participate in a program of professional counseling as arranged and directed by the probation officer as a condition of continued custody of the ward." (§ 731, subd. (a)(3).) In fact, in the present case, there was a brief period after appellant's DJF commitment was recalled pursuant to *In re C.H.*, and prior to enactment of section 1752.16, when the juvenile court ordered confinement of appellant until he successfully completed sexual behavioral treatment, with reconsideration of appellant's placement upon successful completion of the program. Those are precisely the same conditions of probation that the court imposed after enactment of section 1752.16, with the sole exception that the probation officer was permitted to use the sexual offender

program offered by DJF instead of the local program.³ In particular, the court reiterated that appellant's custody continued to be only for the purpose of sexual offender treatment. The mere fact that the state created an additional resource to provide sexual behavioral treatment, and that this resource was in a different location than existing local programs, does not constitute an increase in punishment. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 672, fn. 8 [serving sentence locally not lesser punishment than serving same length sentence in state prison for ex post facto purposes].)

For similar reasons, we reject appellant's argument that section 1752.16 is the Legislature's attempt to authorize punishment where none had been available previously, for the purpose of reinstating punishments declared unlawful in *In re C.H.* There are two important differences between a commitment to DJF and the housing order permitted by section 1752.16. First, a ward committed to DJF who has committed any of the wide variety of sex crimes listed in Penal Code section 290.008, subdivision (c), is required to register as a sex offender pursuant to Penal Code section 290, subdivision (b). (See *id.*, § 290.008, subd. (a).) There is no similar requirement for wards committed to the care of the probation officer for the same sexual offenses. (See *In re Crockett* (2008) 159 Cal.App.4th 751, 760 [Court accepted respondent's concession that "[j]uveniles adjudicated in California must register for a list of more serious sex offenses, and petitioner's offenses are among those requiring registration in California.... However, registration for one of the listed offenses is required only if the juvenile was also incarcerated at the California Youth Authority, now the Division of Juvenile Justice ... (DJJ)."]; see also *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 619-620 [former Pen. Code, § 290, subd. (d)].) Second, after a ward is committed to DJF, the decision to

³ In fact, in the February 15, 2012, order the juvenile court committed appellant to what was, in effect, dead time in juvenile hall until the county's local sexual offender treatment program became operational, which most likely increased the total time until appellant could be released on probation or placed in a foster home.

release the ward from custody resides with the Juvenile Parole Board, not with the juvenile court which made the commitment. (§§ 1766, 1769; see *In re Allen N.* (2000) 84 Cal.App.4th 513, 515-516.) By contrast, a section 1752.16 housing order leaves the decision concerning release of the ward from custody with the juvenile court judge. These two factors demonstrate that such a housing order is not merely a semantically different authorization of the same punishment declared impermissible in *In re C.H.* Instead, section 1752.16 provides an additional resource by which a juvenile court can accomplish treatment. Accordingly, there is no indication the Legislature acted with punitive intent in enacting section 1752.16. Section 1752.16 is not a prohibited ex post facto law.

Appellant also contends that if the order for DJF housing was legally permitted, the juvenile court erred in failing to adopt a plan for reunification of appellant with his parents. While appellant recognizes in his reply brief that the detailed requirements for a case plan set forth in section 706.5, upon which he relied in his opening brief, are inapplicable because the court has not placed him in foster care, he contends that housing at DJF “should be of no less significance and importance” than placement in foster care and the statutory requirements for a case plan should be applied by analogy. This complaint is premature. The juvenile court has, in effect, adopted a “phase one” case plan, namely, that appellant successfully complete a sexual behavioral treatment program. The court concluded that, in appellant’s case, this was likely to require an extended period of time. Under such circumstances, no useful purpose would be served by directing the juvenile court to speculate about either appellant’s need for placement in foster care or his parents’ ability to successfully reunify with him; in the absence of an applicable statutory requirement, we decline appellant’s invitation to require the juvenile court to engage in such an exercise in this case.

DISPOSITION

The order of March 29, 2012, is affirmed.

DETJEN, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

FRANSON, J.