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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE R.,

Defendant and Appellant.

F065768

(Super. Ct. No. JJD065969)

OPINION

THE COURT*

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

Gabriel C. Vivas, 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, and Kathleen A. McKenna, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Kane, J.

It was alleged in a juvenile wardship petition (Welf. & Inst. Code, § 602)¹ filed January 25, 2012, that appellant, Jose R., a minor, committed two counts of violating Penal Code section 288, subdivision (a) (lewd or lascivious act upon a child under the age of 14). On March 19, 2012, the Tulare County District Attorney filed a notice stating appellant was eligible for deferred entry of judgment (DEJ) under section 790, et seq. That same day, appellant admitted the allegations of the petition, and the court found the allegations true and referred the matter to the Tulare County Probation Department for a report and recommendations. The probation officer's report (RPO) was filed on April 13, 2012, and on April 17, 2012, at a contested hearing, the court found appellant unsuitable for DEJ, adjudged him a ward of the court and placed him on formal probation.

On appeal, appellant's sole contention is that the court abused its discretion in finding appellant unsuitable for DEJ. We affirm.

BACKGROUND

The Instant Offenses²

Appellant admitted he committed the instant offenses between August 1, 2011, and November 15, 2011. He was 13 years old during that time frame. The two victims are appellant's nieces.

One of the victims (Victim No. 1) told an investigator that appellant touched her in the area of her rump and her vagina on approximately six occasions, and "each incident occurred when she had clothing on." In addition, appellant "would sometimes wipe his hands on her body." Through the use of a drawing of a naked girl, Victim No. 1 indicated that appellant "would sometimes wipe his hands" on her "abdomen, hand, legs

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

² Information in this section and in the following "Additional Factual Background" and "Probation Officer's Recommendation" sections, are taken from the RPO.

and back.” These incidents “usually occurred at night ... when people [were] asleep, including her.” Victim No. 1 “also reported [appellant] ha[d] put his tongue in her mouth.”

The other victim (Victim No. 2) told an investigator the following: Appellant “did the same thing to her that he had done to her sister.” On the first such occasion, which occurred when she was seven years old, she was asleep, but awoke when “she felt someone touching her.” She looked up and “saw [appellant] over her.” She went back to sleep. “She also revealed [appellant] touched her private area on top of her clothing.” The “same thing” occurred a second time when she was eight years old.

Appellant told the probation officer the following: On one occasion “he ... took [Victim No. 1’s] underwear and began to touch her.” [*Sic.*] On another occasion, while lying on a bed next to Victim No. 1, he “was getting ready to touch her under her clothes, but decided not to.” He could not remember “touching” Victim No. 2, but “it could have occurred” one to two years ago. Appellant stated he “began to wonder what women[’s] private parts look[ed] like,” and he “indicated he touched [the victims] on their vagina area because he was curious and did not have an adult male individual to talk to.”

Additional Factual Background

As “Mitigating Circumstances,” the probation officer listed the following: Appellant has no “prior record,” he “does not have substance abuse issues,” he “does not have gang issues,” he “appears to have no behavior or attendance issues at school,” and he “expressed remorse for his actions.”

As “Aggravating Circumstances,” the probation officer stated appellant “was an active participant” and that he “took advantage of the position of trust or confidence to commit the crime.”

The probation officer also stated the following: Appellant “appears to have age-appropriate developmental skills,” he and his mother reported appellant is “seeking

counseling at Tulare Youth Services Bureau,” and appellant “reported his motivation to successfully complete the [DEJ] Program is to have the [f]elony[] removed from his ... record.”

Probation Officer’s Recommendation

The probation officer stated: “The Probation Department is concerned that [appellant] admitted to touching the victims several times.... [¶] ... [¶] ... While considering [appellant’s] age, maturity, educational background, family relationships, demonstrable motivation, treatment history, and other mitigating and aggravating factors[,] the Probation Department determined the minor is not a suitable candidate for the [DEJ] Program. It is apparent [appellant] needs to receive services to address his issues, while in a highly supervised and structured environment, which would not be available by placing him on the [DEJ] Program.”

The probation officer also stated: “The Probation Department strongly considered recommending [appellant] be adjudged a Ward and placed in a Group Home, Foster Home, or in the Home of a Suitable Relative. However, [appellant’s] mother and family have expressed a willingness to ... provide a secure and structured environment for [appellant] and will be provided additional assistance and supervision by the assigned probation officer.”

Juvenile Court’s Ruling

In finding appellant unsuitable for DEJ, the court, addressing appellant, stated: “I do have an obligation to put you in the least restrictive environment in order for the Court is going to be successful in your rehabilitation. [Sic.] I have an obligation to the community for their safety, as well. [¶] I think that based on what the Court knows of the various programs available to you, I do believe that ... the structure of the probation would be certainly more likely to be successful ... in getting you so you are not going to offend again.”

DISCUSSION

Legal Background

The DEJ provisions have been explained as follows: “The DEJ provisions of sections 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).)³

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” (§ 791, subd. (b).) California Rules of Court, rule 5.800(d)(3) identifies those factors, in virtually identical language, as “The 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.)

Analysis

Appellant raises a number of challenges to the juvenile court’s finding that he was unsuitable for DEJ. First, he argues the court “*failed to consider* whether [appellant] is amenable to education, treatment and rehabilitation” It appears that appellant bases

³ There is no dispute that appellant was eligible for DEJ.

this contention, in turn, on claims that the court made no on-the-record finding that appellant would “derive benefit from ‘education, treatment, and rehabilitation’ rather than a more restrictive commitment,” the court’s remarks about rehabilitation were “vague and uncertain,” and the court “failed to address” on the record “the key issue of whether [appellant] would or would not benefit from rehabilitation efforts, or how they would be worsened if he were granted DEJ.”

Appellant has not established that the court failed to consider any relevant factor. The RPO contained information concerning appellant’s education and the treatment he was receiving, as well as other information relevant to the issue of rehabilitation. The absence of an on-the-record discussion of all information the court considered does not establish the court failed to consider relevant information. (Cf. *In re Ricky H.* (1981) 30 Cal.3d 176, 191 [where minor committed to California Youth Authority and there was evidence in record of possible less restrictive placements, juvenile court’s failure to state on the record its consideration of such placements did not establish failure to consider them].) Moreover, contrary to the implicit premise of appellant’s argument, there is no requirement of on-the-record findings, and we will not impose such a requirement by fiat.

Appellant also argues that “[t]he Court’s comments seem to suggest” that the court failed to consider that “the statutory DEJ scheme permits the juvenile court to impose the supervision it deems necessary for [appellant’s] rehabilitation.” The legal basis for this claim is section 794 which, as appellant asserts, allows the court to impose the same conditions of probation regardless of whether a minor receives DEJ probation or formal probation.⁴

⁴ 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

Although appellant correctly characterizes section 794, his claim that the record compels the conclusion that the court was unaware of its provisions is without merit. The implicit major premise of this claim appears to be that because there is no difference between DEJ probation and formal probation with respect to the conditions of probation that can be imposed, a minor for whom formal probation is appropriate, is necessarily suitable for DEJ. This premise is false. As indicated above, application of the standard for determining suitability for DEJ requires the court to determine whether a minor is in need of a ““more restrictive commitment”” than DEJ. (*Luis B., supra*, 142 Cal.App.4th at p. 1123.) It is not simply the conditions of probation that can be imposed that determine whether formal probation is more restrictive than DEJ. For example, under the DEJ program, a minor’s term of probation may extend no longer than 36 months “from the date of the minor’s referral to the program” (§ 791, subd. (a)(3)). By contrast, for a minor who, like appellant, is adjudged a ward of the court for an offense not listed in section 707, subdivision (b), the probationary period may extend “until the ward ... attains 21 years of age ...” (§ 607, subd. (a).) Thus, for appellant, who was 14 years old at the time of the DEJ hearing and is therefore potentially subject to the court’s jurisdiction for a far longer period than if the court had granted DEJ, formal probation is more restrictive. Accordingly, a finding that formal probation is appropriate does not lead necessarily, as appellant suggests, to the conclusion the minor is DEJ-suitable. For that reason, finding a minor unsuitable for DEJ, while at the same time placing the minor

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.)

on formal probation, does not give rise to a reasonable inference that a court making such an order is unaware of the scope of its authority under section 794. Nothing in the record here suggests the court was unaware of the provisions of section 794.

Appellant also argues that there was “no evidentiary support” for the court’s unsuitability finding. In this regard, appellant asserts that the RPO does not “explain[]” what “services” were available on formal probation but were not available on DEJ, “what issues specifically needed to be addressed,” “why appellant would not benefit from the services under the DEJ program,” and “why appellant was unsuitable for DEJ.”

We recognize that the RPO contains no information on the *specific* services available to a formal probationer but unavailable under DEJ. However, in the RPO the probation officer opined that appellant was in need of services in a “highly supervised and structured environment,” and stated that such services were not available under DEJ. In addition, it is reasonably inferable from the RPO that in the probation officer’s view, the probation department, in conjunction with appellant’s mother, could provide such services to appellant while appellant was on formal probation. In our view, despite the lack of detail and specificity in the RPO, the court could reasonably conclude, based on the content of the RPO, that the services appellant needed were not available under DEJ. Moreover, we note that appellant admitted to two counts of an offense—Penal Code section 288, subdivision (a)—serious enough to be classified as both a “violent” (Pen. Code, § 667.5, subd. (c)(6)) and “serious” (Pen. Code, § 1192.7, subd. (c)(6)) felony, and that the probation officer found two circumstances in aggravation, both of which are supported by the record. On this record, it was well within the court’s discretion for the court to conclude that appellant was unsuitable for DEJ because appellant was in need of services beyond the scope of those provided under DEJ, and because, given the seriousness and circumstances of the instant offenses, DEJ, with its three-year limit on

the length of the probationary period, was not adequate to provide for appellant's rehabilitation.

Finally, appellant argues the court abused its discretion because the court found appellant ineligible for DEJ based on certain "impermissible factors" viz., "public safety," the court's "personal view of the DEJ program," and the court's desire to "punish appellant more severely than provided by law based solely upon the personal reasons of the judicial officer" We disagree.

As indicated above, the determination of suitability for DEJ must be based upon the "standard of 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.) Nothing in the court's comments supports the claim that the court based its denial of DEJ on a desire to punish appellant, rather than an application of this standard.

In addition, public safety is not an improper consideration in a wardship proceeding. Appellant has come within the jurisdiction by virtue of his commission of the instant offenses (§ 602, subd. (a)), and section 202 provides, in relevant part, "Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of *public safety* and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances" (§ 202, subd. (b), italics added).

Finally, we reject appellant's contention that the court impermissibly based its finding of unsuitability for DEJ on the court's "personal view of the DEJ program." Appellant apparently bases this contention on the court's statement, "I think that based on what the Court knows of the various programs available to you, I do believe that ... the structure of the probation would be certainly more likely to be successful ... in getting

you so you are not going to offend again.” The “various programs” the court refers to here, it appears, are those the court believed were available under formal probation. We recognize there was no evidence presented concerning those programs, and that apparently the court was speaking based on its knowledge of how formal probation is conducted in Tulare County.

However, we do not interpret the court’s comments as a statement that the court relied exclusively on this outside-the-record information. As demonstrated above, the record contains ample support for the conclusion that given the seriousness and circumstances of the instant offenses; the probation officer’s statement, which the court reasonably could credit, that the services available under DEJ were not adequate to meet appellant’s needs; and the potential for extended supervision under formal probation, it cannot be said that the court’s finding of unsuitability exceeded the bounds of reason. Accordingly, we uphold the court’s determination.

DISPOSITION

The judgment is affirmed.