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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

F.E.,

Defendant and Appellant.

F065887

(Super. Ct. No. 08CEJ600356-1V)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Hassan Gorguinpour, 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 Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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

Appellant, F.E., appeals from a juvenile court disposition order in his Welfare and Institutions Code¹ section 602 proceeding. Appellant contends the order directing that he be housed at the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), pursuant to section 1752.16 violated constitutional ex post facto principles. We disagree and affirm.

BACKGROUND

In September 2008, appellant, who was then a minor, admitted an allegation set forth in a juvenile wardship petition (§ 602) that he committed a violation of Penal Code section 288, subdivision (a) (committing a lewd or lascivious act against a child under the age of 14). In October 2008, the juvenile court adjudged appellant a ward of the court and placed him under the supervision of the probation officer for suitable placement. Later that month, appellant was placed in a group home.

In January 2010, the probation officer filed a petition under section 777 alleging appellant violated probation by absconding from the group home. In February 2010, this petition was amended to add an allegation that appellant was in possession of a firearm, and appellant admitted both allegations. At the disposition hearing in March 2010, the court found that appellant had failed on formal probation, ordered him committed to DJF, and, in the exercise of its discretion under section 731, subdivision (c), set appellant's maximum term of physical confinement (MTPC) at six years.

In December 2011, our Supreme Court held, in *In re C.H.* (2011) 53 Cal.4th 94, that a juvenile court may only commit a ward to DJF “*if the ward ... 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 [was] either

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

an offense enumerated under section 707[, subdivision] (b) or a sex offense described in Penal Code section 290.008[, subdivision] (c).” (*Id.* at p. 108, italics added.)

A violation of Penal Code section 288, subdivision (a), the offense of which appellant stands adjudicated, was not at the time appellant was committed to DJF, and is not now, listed in section 707, subdivision (b) (hereafter, section 707(b)).

In February 2012, section 1752.16 was enacted as urgency legislation “to address the California Supreme Court’s ruling in *In re C.H.*[, *supra*,] 53 Cal.4th 94.” (§ 1752.16, subd. (b), italics added.) 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(b). Penal Code section 288, subdivision (a) is among the offenses listed in Penal Code section 290.008, subdivision (c).

On July 11, 2012, the juvenile court, in response to an ex parte application of the probation officer, set a hearing for July 19, 2012, for “Recall of DJF Commitment/ Alternative Disposition.” At that hearing, the court noted that the matter was before it for a new disposition hearing pursuant to *In re C.H.*, *supra*, 53 Cal.4th 94, found that appellant was improperly committed to DJF because the instant offense was not among the offenses listed in section 707(b), and vacated the previous disposition order. The court continued the disposition hearing to August 6, 2012, and on that date, adjudged appellant a ward of the court, placed him under the supervision of the probation officer until further order of the court with legal jurisdiction to end on June 5, 2014, set appellant’s MTPC at eight years, and ordered, pursuant to section 1752.16, that appellant

be housed at DJF for purposes of continued sex offender treatment. The instant appeal followed.²

DISCUSSION

As indicated above, appellant contends the court's order that he be housed at DJF for purposes of continuing his participation in the sex offender treatment program pursuant to section 1752.16 violates state and federal constitutional ex post facto principles.³

The state and federal ex post facto laws have the same meaning. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171-172 (*John L.*)) “[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 serving a commitment 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. (*In re Robert M.* (2013) 215 Cal.App.4th 1178, 1185-1186 (*Robert M.*))

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

² After briefing was completed, appellant's counsel informed this court that appellant had recently been released from DJF and returned to the custody of the County of Fresno Probation Department. Counsel submitted a supplemental brief in which he argues that even though appellant is no longer being housed at DJF, the issue raised on appeal is not moot because it is one of continuing public importance, which is capable of repetition, yet evading review, and asked that it be filed. We granted that request and invited briefing from respondent, who responded with a brief arguing that the issue is moot. We will assume without deciding that the issue is not moot, and discuss the merits.

³ There is no dispute that Fresno County has entered into a contract with DJF pursuant to section 1752.16 and that appellant is a person described in section 1752.16.

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.*, *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 the instant offense. We disagree. We held to the contrary in *Robert M.*, *supra*, 215 Cal.App.4th 1178, and we reaffirm that holding here. As we explained in *Robert M.*: “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).) The mere fact that the state created an additional resource to provide sexual offender treatment, and that this resource was in a different location than the existing local programs, does not constitute an increase in the punishment authorized for purposes of the ex post facto clauses. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 672, fn. 8 [serving sentence locally is not lesser punishment than serving same length sentence in state prison for ex post facto purposes].)

“In addition, for wards of minor’s age, section 208.5, both before and after the enactment of section 1752.16, permitted a ward who is committed to juvenile hall to be housed in the county jail. (See *In re Ramon M.* (2009) 178 Cal.App.4th 665, 673.) It cannot realistically be argued that housing at DJF for the limited purpose of successful completion of the sexual offender program is a greater punishment than a fixed term of commitment to juvenile hall, with housing at the county jail, where the ward has no ability to effectuate his release through completion of a counseling program.” (*Robert M.*, *supra*, 215 Cal.App.4th at p. 1186.) Accordingly, this court held: “Because it does

not authorize punishment of a type or duration greater than permitted before its enactment, section 1752.16 is not a prohibited ex post facto law.” (*Ibid.*)

Appellant asks that we reconsider this holding. Addressing the first of the reasons for the holding in *Robert M.* discussed above, he takes issue with this court’s conclusion that “[t]he mere fact that the state created an additional resource to provide sexual offender treatment, and that this resource was in a different location than the existing local programs, does not constitute an increase in the punishment authorized for purposes of the ex post facto clauses.” (*Robert M., supra*, 215 Cal.App.4th at p. 1186.) He argues that DJF “presents a greater level of punishment than the other placement resources available in the delinquency system” because in that system DJF “stands at the pinnacle as the most restrictive and most punitive option,” and housing a minor at DJF exposes the minor to “the most severe restrictions available under the Juvenile Court Law” and “the most hardened and serious juvenile offenders.”

We disagree. Our conclusion that a change in the place where appellant receives his sex offender treatment does not constitute a change in the level of punishment he receives is not affected by where DJF stands in the hierarchy of possible dispositions for juvenile offenders or the nature of the population at DJF. (But see *In re J.S.* (2013) 217 Cal.App.4th 924, 945, 946 [reversing order that minor be housed at DJF pursuant to section 1752.16 because evidence insufficient to establish existence of contract between county and DJF; declining to reach ex post facto claim; remanding for consideration of proper disposition; noting that “[t]he California Supreme Court has regularly noted that a DJF commitment is more restrictive than any other disposition available to the juvenile court,” and “nothing in section 1752.16 suggests that a juvenile ward who is ‘housed’ at DJF will have day-to-day conditions of detention that differ in any way from those who are committed to the custody of DJF”; and indicating that if the juvenile court found it necessary to decide the ex post facto question, “the question before it will be whether

detention at a DJF facility poses a significant risk of increasing the measure of punishment as compared to detention at a juvenile hall”].)

Appellant also challenges this court’s second reason for rejecting the ex post facto claim, i.e., that “[i]t cannot realistically be argued that housing at DJF for the limited purpose of successful completion of the sexual offender program is a greater punishment than a fixed term of commitment to juvenile hall, with housing at the county jail, where the ward has no ability to effectuate his release through completion of a counseling program.” (*Robert M.*, *supra*, 215 Cal.App.4th at p. 1186.) He raises two points in this regard. First, he argues that the commitment order in the instant case could be longer than a fixed-term commitment in county jail because to obtain release, he must satisfy DJF personnel that he has completed his sex offender treatment and thus “[t]he length of his confinement depends on the beliefs of others.” This factor notwithstanding, however, in our view, because appellant retains the ability to affect the date of his release, housing at DJF cannot be said to be an increase in punishment.

Second, he argues “it is not clear DJF is less restrictive than [county] jail” because county jail “houses lower-level offenders and individuals awaiting trial” whereas “DJF has long been seen as the most punitive option and the location of the most serious offenders.” We disagree. Again, the difference in population between county jail and DJF, if there be a difference, does not lead to the conclusion that housing at DJF for the purpose of completing sex offender treatment constitutes an increase in punishment.

Finally, appellant argues the instant case is distinguishable from *Robert M.*, because at appellant’s first disposition hearing in March 2010, the court set appellant’s MTPC at six years but the court’s August 2012 order included an MTPC of eight years. Appellant argues: “This retroactive increase in the maximum term of confinement is an increase in punishment within the meaning of the ex post facto clause.” There is no merit to this contention. The setting of the MTPC is governed by section 730.6. There has

been no change in this statute in the time since the commitment of the instant offense. The eight-year MTPC set in August 2012 would have been authorized by statute in 2010. Therefore, the setting of the MTPC at eight years was not a retroactive application of any statute and thus did not constitute an ex post facto violation.

DISPOSITION

The judgment is affirmed.