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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL M.,

Defendant and Appellant.

F067624

(Super. Ct. No. JJD065187)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone and Jennifer Conn Shirk, Judges.[†] Hugo J. Loza, Temporary Judge.[†] (Pursuant to Cal. Const., art. VI, § 21.)

Gabriel C. Vivas, under appointment by the Court of Appeal, for Defendant and Appellant.

* Before Levy, Acting P.J., Franson, J., and LaPorte, J.^{††}

[†] Judge Boccone presided over the disposition hearing in the second petition filed against appellant, which included the initial setting of the maximum term of confinement. Judge Shirk presided over the most recent proceedings. Judge Loza presided over the proceedings concerning the first petition filed against appellant.

^{††} Judge of the Superior Court of Kings County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant, Manuel M., contends the juvenile court erred during a disposition hearing in March 2012 when it found a maximum term of confinement based on aggregated counts that included an allegation for misdemeanor vandalism that should have been stayed pursuant to Penal Code section 654.¹ Appellant failed to appeal from that disposition order. At the conclusion of new proceedings in May 2013, the juvenile court incorporated the earlier finding concerning the maximum term of confinement that includes a count that should have been stayed.

Appellant contends the finding setting forth his maximum term of confinement must be reversed. Respondent replies that the claim is waived because appellant failed to file a timely notice of appeal from the original error in 2012. Because the order setting the maximum term of confinement would lead to an unauthorized commitment (an unauthorized sentence for an adult defendant), we do not apply waiver and reverse the juvenile court's order.

FACTS AND PROCEEDINGS

On January 28, 2011, a wardship petition was filed pursuant to Welfare and Institutions Code section 602 alleging that appellant committed felony burglary (§ 459) and misdemeanor vandalism (§ 594, subd. (a)). On March 4, 2011, appellant admitted

¹ Unless otherwise designated, all statutory references are to the Penal Code.

the allegations in the petition, contingent upon a grant of Deferred Entry of Judgment (DEJ).² Appellant was granted DEJ on April 6, 2011.

On December 2, 2011, after a contested jurisdiction hearing, the juvenile court found true new allegations that appellant committed second degree robbery (§ 211) and personally possessed a weapon (§ 12022, subd. (b)(1)). At the conclusion of a contested disposition hearing on March 14, 2012, appellant was placed on probation and ordered to serve 365 days at the Youth Facility Program. The juvenile court set appellant's maximum term of confinement at seven years eight months. The juvenile court calculated appellant's maximum term of commitment at one year four months on the new petition and six years four months on the first petition. The four-month term on the first petition was imposed on the misdemeanor vandalism count.

Although a third petition was filed on February 8, 2013, on March 14, 2013, the prosecutor filed a notice of probation violation. The prosecutor elected to dismiss the petition and proceed to the violation of probation. On May 16, 2013, appellant was reinstated on probation and ordered to serve 365 days in the custody of the probation department. The court found appellant's maximum term of confinement to be seven years eight months. Of this term, the probation department and the court attributed four months to be consecutively served for the count of misdemeanor vandalism.

² According to the probation officer's report, on the evening of October 31, 2010, Dinuba Police Officer Loredo was dispatched to a residence to investigate a burglary in progress. Appellant was located in an alley with several Play Station 2 games lying next to him. He was arrested. The homeowner reported he had left his residence earlier that evening and had secured all of the windows and doors prior to leaving. The reporting party indicated he was at a relative's house nearby when he heard the sound of glass breaking. When the reporting party went to the residence he saw a juvenile in the backyard and two other juveniles climbing out of the residence through a broken window. The reporting party detained appellant. The homeowner reported there had been no damage to the window prior to the burglary. When appellant admitted the vandalism allegation in March 2011, he admitted that he broke a window.

ERROR IN SETTING MAXIMUM TERM OF CONFINEMENT

Appellant contends the juvenile court erred in imposing a consecutive term of four months for misdemeanor vandalism because the vandalism occurred so appellant could effectuate a residential burglary. Appellant argues the juvenile court erred when it failed to stay his potential commitment time on this count pursuant to section 654.

There is no dispute surrounding the facts of appellant's original offense. Appellant, with his companions, broke a window to gain access to an occupied dwelling with the intent to steal items from the dwelling. There was a single criminal objective and intent in committing vandalism to effectuate the burglary and the juvenile court should have stayed the four-month term for vandalism pursuant to section 654. (*People v. Hester* (2000) 22 Cal.4th 290, 294-297 (*Hester*).)

Respondent contends that appellant failed to file an appeal from the juvenile court's original maximum term of commitment finding on December 2, 2011. Because we find that the failure to stay the misdemeanor allegation was an unauthorized sentence, we reject respondent's waiver argument.

An order granting DEJ is not an appealable order or judgment.³ (*In re Mario C.* (2004) 124 Cal.App.4th 1303, 1307-1308.) Appellant was removed from DEJ and the juvenile court placed appellant on probation on March 14, 2012, at the disposition hearing on the second petition. Also at that hearing, the juvenile court announced a maximum term of commitment that included four months for misdemeanor vandalism. Respondent argues those findings by the juvenile court were appealable and appellant's failure to appeal the orders leaves this court without jurisdiction to review the orders from the March 14, 2012, disposition hearing.

³ The parties agree that the juvenile court's initial grant of DEJ was not an appealable order.

Generally, the juvenile court's orders from a disposition hearing are appealable and a juvenile cannot seek appellate review of orders in which the time to file an appeal has lapsed. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1137-1138; also see *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1404-1405, fn. 2.) A court, however, acts in excess of its jurisdiction when it erroneously fails to stay execution of a sentence under section 654. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Cuevas* (2008) 44 Cal.4th 374, 380, fn. 3.) Such a sentence is unauthorized and can be corrected at any time, including on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852-854; also see *Hester*, *supra*, 22 Cal.4th at p. 295; *People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164-1165.)

We find that the juvenile court erred in imposing a consecutive sentence for the vandalism charge because the vandalism occurred to effectuate a burglary. The juvenile court should have stayed the four-month term it stated pursuant to section 654.⁴ We reverse the juvenile court's order setting the maximum term of commitment.

DISPOSITION

The juvenile court's order setting the maximum term of commitment to include an aggregate term of four months for misdemeanor vandalism is reversed. The case is remanded for the juvenile court to recalculate appellant's maximum term of commitment after staying the term for misdemeanor vandalism pursuant to Penal Code section 654. The remaining orders of the juvenile court are affirmed.

⁴ We further note that in announcing the maximum term of confinement in this case, the juvenile court did not order appellant's commitment to a state juvenile facility. In adult criminal cases, trial courts generally lose jurisdiction to resentence defendants once the sentence has commenced after the time to recall the sentence has passed. (See *People v. Gisbert* (2012) 205 Cal.App.4th 277, 280.) By parity of reasoning, the same should be true of a juvenile court that has announced a maximum term of confinement in a case in which the juvenile has not yet been committed. Appellant was not committed to or housed in a state correctional facility. Thus, it appears that the juvenile court here retained jurisdiction after March 14, 2012 to correct any error in its calculation of the maximum term of commitment.