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

In re DAKOTA W., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DAKOTA W.,

Defendant and Appellant.

F068916

(Super. Ct. No. JJD065651)

OPINION

THE COURT*

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

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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

Minor Dakota W. contends the juvenile court miscalculated the aggregated maximum term of confinement for all of his sustained petitions. The People concede and we agree the court erred. We will reverse the disposition orders and remand to the juvenile court for recalculation of the maximum term of confinement.

PROCEDURAL SUMMARY

Petition 1

On August 25, 2011, a juvenile petition was filed (Welf. & Inst. Code, § 602), alleging that 15-year-old Dakota committed first degree burglary (Pen. Code, § 459; count 1).¹ Dakota admitted the allegation and was granted Deferred Entry of Judgment.

Petition 2

On April 24, 2012, another petition was filed (Welf. & Inst. Code, § 602), alleging Dakota committed various crimes. In exchange for dismissal of three counts, Dakota admitted committing discharge of a firearm with gross negligence (§ 246.3, subd. (a); count 2), a felony, with the special allegation that he committed the offense for the benefit of a gang (§ 186.22, subd. (b)(1)(A)), and second degree robbery (§ 211; count 3), a serious and violent felony, with the special allegations that he was armed with a firearm (§ 12022, subd. (a)(1)) and that he committed the offense for the benefit of a gang (§ 186.22, subd. (b)(1)(C)).

In the probation officer's report filed on August 2, 2012, prepared for the disposition hearing, the officer listed the crimes from Petitions 1 and 2, the possible terms, and the terms to be imposed. The officer chose count 1, the burglary, as the principal term and made counts 2 and 3 subordinate terms as follows:

¹ All statutory references are to the Penal Code unless otherwise noted.

Count	Offense/Enhancmt.	Term	Imposed	Our Description
<i>Principal Term:</i>				
1	burglary	2, 4, 6 yrs.	6 yrs.	full upper term
<i>Subordinate Terms:</i>				
2	neg. discharge	16 mos., 2, 3 yrs.	8 mos.	one-third midterm
	186.22(b)(1)(A)	2, 3, 4 yrs.	1 yr.	one-third midterm
3	robbery	2, 3, 5 yrs.	1 yr.	one-third midterm
	186.22(b)(1)(C)	10 yrs.	10 yrs.	full term
	12022(a)(1)	1 yr.	1 yr.	full term
<i>Maximum Term of Confinement:</i>			19 yrs. 8 mos.	

At the disposition hearing on August 7, 2012, the juvenile court stated it was going to follow the report, and it pronounced a maximum term of confinement of 19 years 8 months, with credit for time served. The court terminated Deferred Entry of Judgment and imposed a term of 365 days in the youth facility.

Petition 3

On April 5, 2013, a notice of violation of probation was filed (Welf. & Inst. Code, § 777). Dakota admitted the violation.

In the probation officer's report filed on April 25, 2013, the same probation officer who prepared the previous report listed the same crimes from Petitions 1 and 2. The terms were the same, except for the gang enhancement on count 2, which was now a *four-year term*, the full upper term, rather than one-third the middle term, as follows:

Count	Offense/Enhancmt.	Term	Imposed	Our Description
<i>Principal Term:</i>				
1	burglary	2, 4, 6 yrs.	6 yrs.	full upper term
<i>Subordinate Terms:</i>				
2	neg. discharge 186.22(b)(1)(A)	16 mos., 2, 3 yrs. 2, 3, 4 yrs.	8 mos. 4 yr.	one-third midterm full upper term
3	robbery 186.22(b)(1)(C) 12022(a)(1)	2, 3, 5 yrs. 10 yrs. 1 yr.	1 yr. 10 yrs. 1 yr.	one-third midterm full term full term
<i>Maximum Term of Confinement:</i>			22 yrs. 8 mos.	

At the disposition hearing, the court followed the probation report and pronounced a maximum term of confinement of 22 years 8 months, with credit for time served. The court imposed a term of one to three months in the youth facility.

Petition 4

On August 28, 2013, another notice of violation of probation was filed (Welf. & Inst. Code, § 777). Dakota admitted the violation.

In the probation officer's report filed on November 22, 2013, a different probation officer listed the same crimes from Petitions 1 and 2. As in the previous probation report on Petition 3, the officer noted a four-year term for the gang enhancement attached to count 2, as follows:

Count	Offense/Enhancmt.	Term	Imposed	Our Description
<i>Principal Term:</i>				
1	burglary	2, 4, 6 yrs.	6 yrs.	full upper term
<i>Subordinate Terms:</i>				
2	neg. discharge 186.22(b)(1)(A)	16 mos., 2, 3 yrs. 2, 3, 4 yrs.	8 mos. 4 yr.	one-third midterm full upper term
3	robbery 186.22(b)(1)(C) 12022(a)(1)	2, 3, 5 yrs. 10 yrs. 1 yr.	1 yr. 10 yrs. 1 yr.	one-third midterm full term full term
<i>Maximum Term of Confinement:</i>			22 yrs. 8 mos.	

At the disposition hearing, the court followed the probation report and again stated that the maximum term of confinement was 22 years 8 months, with credit for time served. The court imposed a term of 240 to 365 days in the youth correctional center.

DISCUSSION

A juvenile court must specify the maximum term of confinement—that is, the maximum term of imprisonment that an adult would receive for the offense—when it sustains the allegations of a petition that results in an order of wardship that removes a youth from the physical custody of his parent or custodian. (Welf. & Inst. Code, § 726.) Under section 726 of the Welfare and Institutions Code, the juvenile court is vested with discretion to aggregate multiple counts as well as previously sustained petitions to compute the maximum term of confinement. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 454.) In doing so, the court uses the formula specified in section 1170.1, subdivision (a), namely, fixing the principal term as the longest term imposed for any of the offenses, including its enhancements, and adding to it the subordinate term(s)

(one-third of the middle term for each offense sentenced consecutively). (§ 1170.1, subd. (a);² see *In re Eric J.* (1979) 25 Cal.3d 522, 536.³) While a determination under Welfare and Institutions Code section 777 that the ward has violated probation does “not increase the maximum period of confinement for the original [Welfare and Institutions Code] section 602 offense[s]” (*In re Eddie M.* (2003) 31 Cal.4th 480, 508), a minor is entitled to credit for all predisposition time spent in custody when a court decides to aggregate a minor’s maximum term of confinement on multiple petitions. (See *In re Stephon L.* (2010) 181 Cal.App.4th 1227, 1231-1232.)

Here, we agree with the parties that the principal term should have been the robbery term plus its enhancements, which together amount to a greater sentence than the burglary term. (§ 1170.1, subd. (a).) And we agree that the subordinate terms should have been one-third the middle term. (*Ibid.*) We disagree, however, on the appropriate term for the gang enhancement attached to the negligent discharge count—which the juvenile court first imposed as one-third the middle term, then as the full upper term. Dakota argues the enhancement term should be one-third the *middle* term of four years (the middle term is three years; § 186.22, subd. (b)(1)(A) [“the person shall be punished by an additional term of two, three, or four years at the court’s discretion”]). The People, on the other hand, argue the enhancement term should be one-third the *upper* term of four years.

² Section 1170.1, subdivision (a) provides: “The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

³ When it aggregates subordinate misdemeanors, the court uses one-third of the maximum sentence of each misdemeanor to determine the maximum term of confinement. (*In re Eric J.*, *supra*, 25 Cal.3d at pp. 537-538.)

We are unable to determine the term. When an enhancement is punishable by one of three terms, the court has discretion in choosing the term. (§ 1170.1, subd. (d) [“If an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the interest of justice”].) When that enhancement and the offense to which it is attached are deemed subordinate to a principal term, the subordinate offense term becomes one-third the middle term, as explained above, and the term of its *enhancement* becomes one-third the term *imposed* on that enhancement. (§ 1170.1, subd. (a); *People v. Hill* (2004) 119 Cal.App.4th 85, 88-92.)

Thus, in this case, the juvenile court should have chosen two, three, or four years on the section 186.22, subdivision (b)(1)(A) gang enhancement. Then, because the term was subordinate, the court should have reduced it to one-third the term it selected. On this record, we cannot determine which term from the triad the juvenile court selected on the enhancement, and thus we remand for the court to choose a term and recalculate the maximum term of confinement based on the following formula:

Count	Offense/Enhancmt.	Term	Imposed	Our Description
<i>Principal Term:</i>				
3	robbery	2, 3, 5 yrs.	5 yrs.	full upper term
	186.22(b)(1)(C)	10 yrs.	10 yrs.	full term
	12022(a)(1)	1 yr.	1 yr.	full term
<i>Subordinate Terms:</i>				
1	burglary	2, 4, 6 yrs.	8 mos.	one-third midterm
2	neg. discharge	16 mos., 2, 3 yrs.	8 mos.	one-third midterm
	186.22(b)(1)(A)	2, 3, 4 yrs.	?	one-third 2, 3, or 4 yrs.
<i>Maximum Term of Confinement:</i>			?	

DISPOSITION

The disposition orders filed on August 10, 2012, May 20, 2013, and January 21, 2014, setting Dakota's maximum term of confinement, are reversed. The matter is remanded to the juvenile court for recalculation of the maximum term of confinement in a manner consistent with this opinion. The remaining orders of the juvenile court are affirmed.