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

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

THE PEOPLE,

Plaintiff and Respondent,

v.

ASHLEY W.,

Defendant and Appellant.

F069694

(Super. Ct. No. JJD067794)

OPINION

THE COURT*

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

Sara Coppin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephanie A. Mitchell and Sean M. McCoy, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Smith, J.

The court found that 17-year-old Ashley W. (appellant) was a person described in Welfare and Institutions Code section 602¹ after she admitted allegations charging her with resisting arrest (count 1/Pen. Code, § 148, subd. (a)(1)) and felony vandalism (count 2/Pen. Code, § 594, subd. (a)). On appeal, appellant contends the court abused its discretion by its failure to make a determination pursuant to section 241.1, whether section 300 or section 602 jurisdiction was appropriate for her. Alternatively, appellant contends she was denied the effective assistance of counsel by defense counsel's failure to ensure that the court made this determination. Appellant also contends the court erred in its award of predisposition custody credit. We find merit to this last contention. In all other respects, we affirm.

FACTS

Appellant's maternal grandparents adopted appellant in 2006, after her mother was murdered. In February 2013, appellant's grandmother passed away.

On March 2, 2014, at approximately 8:07 p.m., a Tulare police officer was dispatched to the home of appellant's grandfather, who reported that appellant became belligerent and began throwing and breaking glassware and broke two Nintendo DS gaming systems. After her grandfather asked her to leave the residence and walked her outside, appellant scratched an "X" on the hood of his vehicle. Appellant was transported to the police department where she was booked and released to the Tulare Regional Medical Center because she indicated she felt like cutting herself and requested to talk to a crisis counselor.

On March 23, 2014, a Tulare police officer was dispatched to an area where homes had recently been burglarized on a report that there were suspicious people on bicycles in the area. When the officer attempted to contact appellant and another person

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

with her, they rode past his patrol car. Appellant then stopped and told the officer she did not have anything illegal and did not need to talk to him. Appellant began pedaling away and ignored the officer's commands to stop until he threatened to use his taser on her. Appellant then stopped and was taken into custody for delaying or obstructing a police officer.

On March 25, 2014, the district attorney filed a petition charging appellant with resisting, delaying, or obstructing a police officer.

At a detention hearing on March 27, 2014, pursuant to defense counsel's request, the court ordered the probation department and Child Welfare Services to prepare a section 241.1 staffing report (241.1 report), mental health evaluation, and a Special Case Investigative Unit evaluation. The matter was continued until April 3, 2014.

On April 1, 2014, the 241.1 report and one evaluation were filed.² The 241.1 report concluded, "[t]he goal of providing [appellant] and family with additional services could be accomplished without a [dependency] petition being filed on behalf of [appellant]" and recommended the court grant appellant deferred entry of judgment (DEJ).

On April 1, 2014, the district attorney filed an amended petition that added a charge of felony vandalism.

On April 3, 2014, at the continued hearing, none of the parties or the court mentioned the section 241.1 report or the evaluation that had been filed. Instead, during the hearing, appellant admitted the petition allegations contingent on the court granting her DEJ.

On April 29, 2014, the court granted appellant DEJ and released her to the custody of her grandfather on certain terms and conditions.

² The other evaluation was filed on April 23, 2014.

On May 2, 2014, appellant stayed out all night and did not return home until the following day, which prompted her grandfather to file a missing persons report.

On May 5, 2014, during a visit with her probation officer, appellant tested positive for methamphetamine. On the following day, the probation officer filed a notice of non-compliance with the terms and conditions of DEJ.

On May 13, 2014, appellant failed to appear at a court hearing regarding the notice of non-compliance and the court issued a bench warrant for her arrest. She was arrested later that day.

On May 15, 2014, the court terminated appellant's DEJ after finding she was not in compliance with its terms and conditions and set the matter for disposition on May 30, 2014.

On June 5, 2014, the court set appellant's maximum term of confinement at three years four months and committed her to the Tulare County Youth Treatment Center Unit for 90 to 180 days.

DISCUSSION

The Section 241.1 Issue

Appellant contends the court failed to make a determination pursuant to section 241.1 whether dependent or wardship status would be more appropriate for her. She further contends that she and her grandfather would have benefited from the services available to minors determined to be dependents. Thus, according to appellant, she was prejudiced by the court's failure to comply with section 241.1 and the failure to do so was arbitrary and capricious and resulted in a miscarriage of justice. We will find that appellant forfeited her right to challenge the court's alleged failure to comply with section 241.1.

“Under section 300, a child who is neglected or abused falls within the juvenile court's protective jurisdiction as a “dependent child of the court.” [Citation.] As a dependent, the juvenile court may remove the minor from the home, or place the minor in alternative care that meets his

or her needs for custody, care and guidance. [Citation.] Alternatively, the juvenile court may take jurisdiction over a minor as a “ward of the court” when the child is habitually disobedient or truant,’ under section 601, or commits a crime, under section 602. [Citation.] When a minor is adjudged a ward of the court, the minor is subject to more-restrictive placements because of his or her criminal conduct and the court may commit the minor to a juvenile home, ranch, camp, forestry camp, or juvenile hall. [Citation.] The Legislature has declared that a minor cannot simultaneously be both a dependent and a ward of the juvenile court. [Citation.]

“Section 241.1 sets forth the procedure for handling cases with dual jurisdiction in which a minor [potentially] is both a dependent under section 300 and a ward under section 601 or 602. It requires the probation department and the welfare department to jointly develop a written protocol to determine which status will best serve the interests of the minor and the protection of society. Once completed, the report is presented to the juvenile court for a determination of the appropriate status for the minor.” (*In re Joey G.* (2012) 206 Cal.App.4th 343, 347.)

“[S]ection 241.1 does not require the juvenile court to conduct a hearing; instead, it requires [Child Welfare Services] and the probation department to prepare a joint assessment report and the juvenile court to make a finding whether to treat a minor as either a dependent child or delinquent ward. Even [California Rules of Court,] rule [5.512]³ does not mandate a hearing, providing ‘the court *may* set a hearing for a determination under section 241.1’ ([Cal. Rules of Court, rule 5.512(a)(4)].)” (*In re Henry S.* (2006) 140 Cal.App.4th 248, 257, italics added.) The court, however, must make a determination regarding the appropriate status of the minor and must state its reasons on the record or in a written order. (Cal. Rules of Court, rule 5.512(g).)

Additionally, in *In re M.V.* (2014) 225 Cal.App.4th 1495 (*M.V.*), the court held that a minor forfeits the right to complain about the court’s failure to follow the procedures outlined above by his or her failure to object. (*Id.* at p. 1508.) As explained there, “[T]he fact that section 241.1 imposes a ‘mandatory’ statutory duty does not preclude the application of the forfeiture rule. (See § 241.1, subd. (a) [§ 241.1

³ Formerly California Rules of Court, rule 1403.5, now rule 5.512.

recommendations ‘shall be presented to the juvenile court with the petition’]; see also § 15 [‘shall’ is mandatory].) Rather, courts have repeatedly held that a party’s failure to object forfeits appellate review of the adequacy of—or the failure to prepare—mandatory assessment reports in juvenile proceedings. [Citations.] Indeed, ‘[a]s some of these courts have noted, any other rule would permit a party to trifle with the courts. The party could deliberately stand by in silence and thereby permit the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable.’” (*M.V.*, *supra*, 225 Cal.App.4th at pp. 1508-1509.)

Here, at the March 27, 2014 hearing, the court ordered the probation department and Child Welfare Services to prepare a report pursuant to section 241.1. On April 1, 2014, a report pursuant to section 241.1 was filed that concluded that the goal of providing appellant and her family with additional services could be accomplished without a dependency petition being filed on behalf of appellant and that recommended the court grant appellant DEJ.

Presumably, the court read and considered this report prior to the April 3, 2014 hearing, as it was obligated to do pursuant to section 241.1. (Evid. Code, § 654 [it is presumed that official duty is regularly performed].) Thus, it can be inferred from the court’s failure to assert dependency jurisdiction over appellant that it implicitly rejected that option and instead followed the report’s recommendation that it grant her DEJ. Further, defense counsel did not object to the court’s failure to state reasons on the record or in writing for choosing wardship status for appellant. Accordingly, we conclude that appellant forfeited her right to complain about the court’s failure to do so and to challenge the court’s selection of wardship status for appellant based on this omission.

Appellant contends that she did not knowingly waive her right to challenge the court’s failure to comply with section 241.1 because a waiver must be knowingly and intelligently made and she was unaware that “accepting DEJ waiv[ed] her right to question the court’s compliance with section 241.1.” However, the doctrine at issue here

is forfeiture. “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” (*United States v. Olano* (1993) 507 U.S. 725, 733.) Thus, even if appellant was not aware that accepting DEJ precluded her from challenging on appeal the court’s compliance with section 241.1, appellant forfeited her right to do so by defense counsel’s failure to timely object to the procedure followed here.

The Ineffective Assistance of Counsel Claim

Alternatively, appellant contends that if she forfeited her right to challenge the court’s assertion of wardship status over her, she was denied the effective assistance of counsel by her defense counsel’s failure to preserve this issue on appeal by interjecting an appropriate objection. We disagree.

“To prevail on [an ineffective assistance of counsel claim], [a defendant] must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.” (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) “To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” (*Ibid.*) “In claiming ineffective assistance of counsel, defendant bears the burden, and proof must be a demonstrable reality and not speculation.” (*People v. Hunt* (1985) 174 Cal.App.3d 95, 105.)

Here, appellant’s counsel was not asked why he did not request a section 241.1 hearing or object to the court’s failure to conduct one or its failure to state reasons on the record or in writing why it chose wardship status over dependency status for appellant.

There could also be any number of reasons why counsel did not object, including that appellant and counsel concluded it would be futile to do so in light of the staff report's recommendation of DEJ or appellant may simply have preferred a grant of DEJ over being declared a dependent of the court. Thus, appellant has failed to show that defense counsel's representation was deficient.

Moreover, the section 241.1 report noted that in lieu of the court asserting dependency jurisdiction, the goal of providing appellant and her family additional services could be accomplished by appellant's grandfather contacting the Tulare County Adoption Assistance Program (AAP) and requesting an "MIT staffing." The report also recommended that rather than asserting dependency jurisdiction the court grant appellant DEJ. In view of the services available to appellant and her family through AAP and the report's recommendation of a grant of deferred entry of judgment, it is unlikely appellant would have received a more favorable result even if defense counsel had objected and the court had conducted a 241.1 hearing and stated, on the record or in writing, its reasons for asserting wardship jurisdiction over appellant. Thus, appellant has also failed to demonstrate that she was prejudiced by counsel's alleged deficient representation. Accordingly, we also reject appellant's ineffective assistance claim.

Appellant's Custody Credit

The court awarded appellant 61 days of predisposition custody credit. Appellant contends that she is entitled to 62 days. Respondent concedes and we agree.

Appellant is entitled to credit against her maximum term of confinement for all days she spent in custody prior to the disposition hearing. (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.) Further, she was in predisposition custody in this matter for 38 days from March 23, 2014, through April 29, 2014, and 24 days from May 13, 2014, through the date of her disposition hearing on June 5, 2014. Thus, appellant was entitled to 62 days of predisposition custody credit (38 days + 24 days = 62 days).

DISPOSITION

The judgment is modified to increase appellant's grant of predisposition custody credit from 61 days to 62 days. As modified, the judgment is affirmed.