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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CASEY I.,

Defendant and Appellant.

G045374

(Super. Ct. No. M13758)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Marion, Judge. Affirmed in part and reversed and remanded in part.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and Bradley Weinreb, Deputy Attorney General, for Plaintiff and Respondent.

## THE COURT:\*

Casey I. was declared a ward of the juvenile court in 2007. In 2011 a jury determined he would be physically dangerous to the public if released from custody. Casey would have been released in four months on his 21st birthday, but as a result of the jury's findings, the court issued a dispositional order committing him to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ)<sup>1</sup> for a period of two years. After the dispositional hearing, the Supreme Court decided *In re C.H.* (2011) 53 Cal.4th 94, which holds that a juvenile court may not commit a ward of the juvenile court to the DJF if the ward has never been adjudged to have committed an offense listed in subdivision (b) of Welfare and Institutions Code section 707. Because Casey has not been adjudged to have committed such an offense, the court's dispositional order is reversed.

## STATEMENT OF THE CASE

Casey I. was originally declared a ward of the juvenile court in 2007 after admitting five counts of committing lewd and lascivious acts with a child under the age of 14 in violation of Penal Code section 288, subdivision (a), and one count of continuous sexual abuse in violation of Penal Code section 288.5, subdivision (a). Based on the continuous sexual abuse allegation, Casey, who was 17 years old at the time of the dispositional hearing, was committed to the DJF for a maximum period of 16 years. Casey appealed, and the Attorney General conceded that subdivision (c) of Penal Code section 288.5 prevents an accused from being charged with continuous sexual abuse in

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\* Before Bedsworth, Acting P. J., Aronson, J., and Fybel, J.

<sup>1</sup> “[The Division of Juvenile Facilities] DJF is part of the Division of Juvenile Justice [DJJ], which in turn is part of the Department of Corrections and Rehabilitation. [Citations.]” (*In re D.J.* (2010) 185 Cal.App.4th 278, 280, fn. 1; Gov. Code, § 12838.3.) Although the minute order of the dispositional hearing in this case remanded Casey to the “care and custody of the [DJJ],” it is understood that Casey was ordered committed to the DJF, the correctional agency formerly known as the California Youth Authority (CYA). (Gov. Code, § 12838.5).

the same proceeding as the acts that underlie the charge. As a result, this court reversed the continuous sexual abuse allegation but still affirmed the commitment order despite Casey's claim that the juvenile court abused its discretion when it committed him to the DJF instead of a less restrictive placement.

On remand, the juvenile court dismissed the continuous sexual abuse allegation and again ordered Casey committed to the DJF for a maximum term of 16 years based on the five counts of lewd and lascivious acts committed in violation of subdivision (a) of Penal Code section 288. At a case conference during Casey's commitment, he described disturbing sexual fantasies, which triggered an evaluation under the Juvenile Extended Detention Act in Welfare and Institutions Code section 1800 et seq., to determine whether Casey satisfied the criteria for an extended civil commitment. After conflicting recommendations were received, the chief psychiatrist for the DJJ conducted an evaluation pursuant to Welfare and Institutions Code section 1800.5 and concluded Casey to be a danger if released.

Acting at the request of the Chief Deputy Secretary of DJJ, the Orange County District Attorney's office filed a petition for extended commitment approximately four months before Casey's 21st birthday, on which he was scheduled to be discharged pursuant to Welfare and Institutions Code section 1769. The petition alleged that if discharged, Casey "would be physically dangerous to the public because of his mental or physical deficiency, disorder or abnormality that causes [him] to have serious difficulty controlling his dangerous behavior." Following a trial, a jury concluded Casey's condition makes him physically dangerous to the public; Casey was "remanded to the care and custody of the [DJJ] commencing forthwith for a period of 2 years." The Attorney General concedes that at the time of the dispositional hearing in this case, Casey could not be committed to the DJF.

Casey appealed and subsequently filed a motion for summary reversal based on *In re C.H.*, *supra*, 53 Cal.4th 94. The Attorney General concedes the dispositional order should be reversed but argues the case should be remanded for a new dispositional hearing rather than ordering Casey's release.

## DISCUSSION

Prior to 2012,<sup>2</sup> section 733 of the Welfare and Institutions Code stated, “A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] . . . [¶] (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code . . . .”

Although subdivision (a) of Penal Code section 288 is an offense listed in Penal Code section 290.008, it is not an offense listed in subdivision (b) of Welfare and Institutions Code section 707. Eight months after the dispositional hearing in this case, the Supreme Court decided *In re C.H.*, *supra*, 53 Cal.4th 94, which holds that an offense described in Welfare and Institutions Code, section 707, subdivision (b), is a prerequisite to a DJF commitment.<sup>3</sup> Similar to Casey, the minor in *In re C.H.* had also been declared

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<sup>2</sup> Effective February 29, 2012, Welfare and Institutions Code sections 731 and 733 were amended so that a minor may be committed to the DJF if the most recent offense is described in either subdivision (b) of section 707 of the Welfare and Institutions Code or subdivision (c) of Penal Code section 290.008.

<sup>3</sup> The offenses listed in Welfare and Institutions section 707, subdivision (b) are: “(1) Murder. [¶] (2) Arson, as provided in subdivision (a) or (b) of Section 451 [arson causing great bodily injury or arson of inhabited structure]. [¶] (3) Robbery. [¶] (4) Rape with force, violence, or threat of great bodily harm. [¶] (5) Sodomy by force, violence, duress, menace or threat of great bodily harm. [¶] (6) A lewd or lascivious act as provided in subdivision (b) of Section 288 [lewd act upon body of child under the age of 14, by force, violence, duress, menace, or fear of immediate and unlawful bodily injury]. [¶] (7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm. [¶] (8) An offense specified in subdivision (a) of Section 289 [penetration by foreign object by force, violence, duress, menace, or fear of immediate bodily injury]. [¶] (9) Kidnapping for ransom. [¶] (10) Kidnapping for purposes of robbery. [¶]”

a ward of the court as a result of admitting a violation of subdivision (a) of Penal Code section 288. After violating his probation several times, C.H. was ordered committed to the DJF. *In re C.H.* states that when “[r]ead together, [Welfare and Institutions Code] sections 731(a)(4) and 733(c) limit the class of wards who may be committed to the DJF to those wards who (1) have committed an offense described in [Welfare and Institutions Code] section 707(b) and (2) whose most recent offense alleged in any petition and admitted or found to be true by the court is listed either in section 707(b) or Penal Code section 290.008(c).” (*In re C.H.*, *supra*, 53 Cal.4th at p. 102.)

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(11) Kidnapping with bodily harm. [¶] (12) Attempted murder. [¶] (13) Assault with a firearm or destructive device. [¶] (14) Assault by any means of force likely to produce great bodily injury. [¶] (15) Discharge of a firearm into an inhabited or occupied building. [¶] (16) An offense described in Section 1203.09 [crimes against elderly or disabled victim during commission of certain felonies]. [¶] (17) An offense described in Section 12022.5 [personal use of a firearm or assault weapon in commission or attempted commission of a felony] or 12022.53 [additional punishment for use or discharge of a firearm for specified felonies]. [¶] (18) A felony offense in which the minor personally used a weapon described in any provision in Section 16590 [prohibited firearms, knives, clubs, other weapons]. [¶] (19) A felony offense described in Sections 136.1 or 137 [preventing or dissuading a victim or witness, or inducing false testimony]. [¶] (20) Manufacturing, compounding, or selling one-half ounce or more of a salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code [certain depressants, including phencyclidine and similar substances]. [¶] (21) A violent felony, as defined in subdivision (c) of Section 667.5 . . . , which also would constitute a felony violation of subdivision (b) of Section 186.22 [criminal street gang activity]. [¶] (22) Escape, by the use of force or violence, from a county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of [Welfare and Institutions Code] section 871 if great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape. [¶] (23) Torture as described in Sections 206 and 206.1 [torture inflicting great bodily injury]. [¶] (24) Aggravated mayhem, as described in Section 205 . . . . [¶] (25) Carjacking, as described in Section 215 . . . while armed with a dangerous or deadly weapon. [¶] (26) Kidnapping for purposes of sexual assault, as punishable in subdivision (b) of section 209 . . . . [¶] (27) Kidnapping as punishable in Section 209.5 [kidnapping during carjacking]. [¶] (28) The offense described in subdivision (c) of Section 26100 [firing at pedestrian from a motor vehicle]. [¶] (29) The offense described in Section 18745 [exploding destructive device with intent to commit murder]. [¶] [and] (30) Voluntary manslaughter, as described in subdivision (a) of section 192 . . . .”

We agree with the Attorney General that this court should not order Casey's release. The holding in *In re C.H.* does not provide for release, but instead requires the dispositional order to be reversed only to the extent that it orders a ward of the juvenile court committed to the DJF. Once the commitment order is reversed, the juvenile court retains authority to consider placement alternatives to the DJF.<sup>4</sup>

#### DISPOSITION

The jury's true finding that Casey would be physically dangerous to the public if released is affirmed. The motion for summary reversal is granted. (*People v. Browning* (1978) 79 Cal.App.3d 320, 323.) The dispositional order entered April 26, 2011, committing Casey I. to the DJF is reversed, and the cause remanded for a new dispositional hearing in accordance with this court's opinion and *In re C.H.*, *supra*, 53 Cal.4th 94.

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<sup>4</sup> The Legislature's urgency legislation added section 1752.16 of the Welfare and Institutions Code, which states: "(a) The chief of the [DJF], with approval of the Director of Finance, may enter into contracts with any county of this state for the [DJF] to furnish housing to a ward who was in the custody of the [DJF] on December 12, 2011, and whose commitment was recalled based on both of the following: [¶] (1) The ward was committed to the [DJF] for the commission of an offense described in subdivision (c) of Section 290.008 of the Penal Code. [¶] (2) The ward has not been adjudged a ward of the court pursuant to Section 602 for commission of an offense described in subdivision (b) of Section 707. [¶] (b) It is the intent of the Legislature in enacting this act to address the California Supreme Court's ruling in *In re C.H.* [, *supra*,] 53 Cal.4th 94."