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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.D., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.D.,

Defendant and Appellant.

G048287

(Super. Ct. No. ST001275-001)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed in part, reversed in part, and remanded with directions.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In this wardship petition under Welfare and Institutions Code section 601, subdivision (b),¹ the court found it to be true that minor had missed 44 full school days without a valid excuse between September 5, 2012 and December 3, 2012, and that minor was, therefore, a habitual truant under Education Code section 48262. The court placed minor on a home supervision program (HSP) for 120 days and imposed several probation conditions, including a complete waiver of his Fourth Amendment rights against search and seizure, and that minor submit to regular drug testing. Minor appealed.

On appeal, minor contends the evidence used to prove his truancies was inadmissible, and thus we should reverse the court's wardship adjudication. He also disputes certain probation conditions. He contends the Fourth Amendment waiver was overbroad. He contends the HSP requirement was both overbroad and the terms were vague. And, finally, he contends the condition requiring drug testing should be restricted to urine testing.

The Attorney General agrees, as do we, the drug testing should be restricted to urine tests. We agree with minor that the court's justification for the Fourth Amendment waiver — officer safety — is not supported by the record, but find other facts would have supported a waiver. Thus we will remand for the court to reconsider the matter in light of our opinion. In all other respects, we affirm.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

FACTS

At trial the People submitted evidence that minor missed 44 full days of school between September 5, 2012 and December 3, 2012. The primary evidence was a printout of minor's attendance records from his high school, which was admitted over defendant's objection pursuant to a custodian of records declaration.

DISCUSSION

Minor's Attendance Record Was Admissible

Minor first contends his attendance record was inadmissible because the custodian of records failed to lay an adequate foundation under Evidence Code section 1271. We disagree.

Evidence Code section 1271 states, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." "A trial court has broad discretion in determining whether a sufficient foundation has been laid to qualify evidence as a business record. On appeal, we will reverse a trial court's ruling on such a foundational question only if the court clearly abused its discretion." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.)

Here, the declaration by the custodian of records stated in relevant part, "The copies provided are true copies of the records for this student. These records were prepared in the ordinary course of business at or near the time of the act, condition, or

event. School attendance records are kept daily, weekly and monthly, and put into our computer data base.” “The method of record keeping has been established to ensure the trustworthiness of the records. Only certain personnel at the school have access to the records contained in the documents. Our records are password protected and not available to all school personnel.” “The Student’s daily attendance, grades, SARB documents, notification of truancy, discipline, IEP, and other school related documents are kept in a student’s Cumulative file.”

Minor criticizes this declaration for its lack of details concerning who generates the records and how they are inputted into the relevant files or databases. We agree that this declaration is sparse on details, but find it is admissible. The declaration establishes when attendance is taken and how that information is stored and protected. While it does not indicate who takes attendance, it is common knowledge that teachers take attendance at the beginning of each class. As to who actually inputs the attendance data into the computer database, that detail would have been helpful but its omission is not fatal. The implication is that an employee of the school does so. The facts recited in the declaration, together with the court’s common sense, were sufficient to come within the court’s discretion to admit the records.

This bare-bones declaration, of course, does not establish beyond dispute that the records are accurate, only that they are *admissible*. Minor was free to critique the foundation laid for these records; he was also free to subpoena the custodian of records for cross-examination.

The Probation Condition Waiving Minor’s Fourth Amendment Rights Was Not Justified by Officer Safety Concerns

Next, minor contends the probation condition waiving minor’s Fourth Amendment rights against warrantless searches and seizures “is overbroad as it is not narrowly tailored to address the needs of the juvenile, i.e., to get him to school.” We

agree that the court's justification — officer safety concerns — was inadequate to support the condition. On the other hand, minor's drug use would have supported the condition, but the court did not reach that ground and thus never exercised its discretion in that regard. We will thus remand for the court to determine whether minor's drug use, or any other facts on the record before it, justify a full search and seizure waiver.

“Under Welfare and Institutions Code section 730, subdivision (b), the juvenile court, in placing a ward on probation, ‘may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’ [Citation.] Consistent with this mandate, the juvenile court is recognized as having “‘broad discretion in formulating conditions of probation’” [citation], and the juvenile court's imposition of any particular probation condition is reviewed for abuse of discretion [Citation].

“While adult criminal courts are also said to have ‘broad discretion’ in formulating conditions of probation [citation], the legal standards governing the two types of conditions are not identical. Because wards are thought to be more in need of guidance and supervision than adults and have more circumscribed constitutional rights, and because the juvenile court stands in the shoes of a parent when it asserts jurisdiction over a minor, juvenile conditions ‘may be broader than those pertaining to adult offenders.’ [Citation.] In [*In re Tyrell J.* (1994) 8 Cal.4th 68], the Supreme Court explained another aspect of the difference: ‘Although the goal of both types of probation is the rehabilitation of the offender, “[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.” [Citation.] . . . [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.

[Citations.] “ ‘Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile’” [Citation.]

“While broader than that of an adult criminal court, the juvenile court’s discretion in formulating probation conditions is not unlimited. [Citation.] Despite the differences between the two types of probation, it is consistently held that juvenile probation conditions must be judged by the same three-part standard applied to adult probation conditions under [*People v. Lent* (1975) 15 Cal.3d 481]: ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’” [Citation.]’ [Citations.] Further, as noted above, the Supreme Court instructed in *Tyrell J.* that while the juvenile court may impose a wider range of probation conditions, those conditions are permissible only if ““tailored specifically to meet the needs of the juvenile.””” (*In re D.G.* (2010) 187 Cal.App.4th 47, 52-53.)

Here, the court imposed the waiver due to concerns expressed by probation officers. The court stated, “The court does find that the statements made by probation previously that they do not want him on H.S.P. because they [would] feel unsafe . . . unless they have the ability to have full search and seizure has been heard loud and clear by this court, and, therefore, I will in his situation only allow full search and seizure over the objection of the public defender. That has been made very clear at this point for any appellate purposes. [¶] And the court does find that the reasoning behind this is that the probation officer indicated the minor is hanging out with gang members from Fullerton and they feel their safety is threatened if they’re trying to enforce H.S.P.”

With respect to officer safety, a report by minor’s HSP officer stated, “This case presents officer safety issues as the entrance to the apartment is obscured by a 7 foot fence surrounding the patio, which leads to the front door. This area is a known gang area (Fullerton Toker’s Town) and the minor’s [*sic*] on HSP appear to be regularly

associating with gang involved youth in and around their apartment.”² For that reason, the HSP officer recommended that minor *not* be placed on HSP.

There were two incidents in which an HSP officer approached minor associating with other juveniles who “appeared to be dressed in gang attire and appeared to have gang related tattoos.” In the first incident the officer found minor behind his apartment building and asked him to return home, but he refused. Apparently nothing further transpired. In the second incident, the officer found minor in the patio of his apartment with two other juveniles. When the officer determined those juveniles did not live in the residence, they “were asked to leave the residence.” “They complied without incident.” Further, minor’s mother, who had otherwise been forthcoming about his drug use and behavioral problems, “denied the minor’s involvement or association with any criminal street gangs or tagging crews.”

While we are sympathetic with the risks officers endure to protect the public, the fact that minor lives in a bad area of town and has a fence around his patio is not enough to justify a full Fourth Amendment waiver where, as in this case, the only crime at issue is truancy. There is nothing in the record suggesting minor is a member of a criminal street gang. There is nothing in the record suggesting minor owns any weapons. There is nothing in the record suggesting minor has acted aggressively towards officers. The extent of his aggression, as reflected by the record, is that he cusses at his mother when she asks him to do things he does not want to do.

Another problem with the Fourth Amendment waiver is that, unlike the HSP that the court relied on to justify the waiver, it is not limited in time. The court ordered HSP for 120 days starting on April 10, 2013. The Fourth Amendment waiver, however, is not limited to that time frame. Since the Fourth Amendment waiver was

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Minor’s older brother was also on HSP.

apparently motivated by officer safety concerns about entering the home for HSP, the waiver has outlived its justification.

On the other hand, the court could have justified the waiver based on minor's drug use. Minor disagrees stating, "It is true that the minor's mother and sister voiced their concerns about the minor's alleged drug and alcohol use. [Citations.] However, the court ordered a drug testing condition which was sufficient to address that particular need. [Citation.] Because a less alternative [*sic*] means to address the needs of the minor was imposed, imposing such a broad Fourth Amendment waiver was an abuse of discretion." The problem with this reasoning is that the minor, on multiple occasions, spurned the drug testing, stating he had no intention of complying.³ Given this attitude, and given the plausible inference that minor was missing school due to drug abuse, it would be within the court's discretion to impose a Fourth Amendment waiver to address minor's drug problem.

However, the court did not impose the condition on that basis and apparently never exercised its discretion on the issue. Accordingly, we will strike the Fourth Amendment waiver but remand to the trial court to determine, in its discretion, whether minor's drug use and refusal to regularly submit to testing, or any other facts before it, warrant a Fourth Amendment waiver.

Minor's Objections to the Home Supervision Program Are Moot

Next, minor contends the court's imposition of HSP was overbroad, and the terms were vague. As minor acknowledges, however, the HSP lasted 120 days and by now is moot since we cannot afford minor any effective relief. He requests on appeal that we exercise our discretion to consider the issue. We decline.

³ Minor apparently did comply with at least one drug test, which tested positive for marijuana use.

“[T]here are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court’s determination [citation].” (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479–480.)

Minor contends the first two exceptions apply: “First, confining an [*sic*] habitual truant to his home must be of great public concern as it interferes with his rights to travel, and his rights to freedom of association and assembly. Further, the issue is likely to recur without any recourse because ‘Home Supervision’ appears in the standard conditions of Form JV-624 of the Judicial Council Forms. (revised January 1, 2012) [¶] Second, the controversy between the parties is likely to recur because it was alleged that the minor violated the terms of his modified H.S.P. on more than one occasion, and because the juvenile court has jurisdiction over the minor until he is 21-years old.”⁴

We are not persuaded that these considerations warrant review of a moot issue. Whether HSP was proper on the facts of minor’s case is not an issue of broad public interest. And the fact that HSP appears as an optional term on an optional Judicial Council form is not compelling. Further, the fact that minor violated his HSP does not suggest to us the issue is likely to recur — it suggests the court is likely to move on to a different remedy. Accordingly, we decline to review minor’s objections to the HSP program.

Minor’s Drug Testing Should be Limited to Urine Tests

The court imposed the following probation term: “Minor to submit to drug testing as directed by the court/probation officer” “[S]ection 730, which permits the

⁴ Judicial Council form JV-624 is an optional form that lists numerous possible probation conditions the court can elect.

more invasive testing of blood, can be invoked only as to section 602 wards (when it is ‘reasonable’); for lesser offenders, only urine testing can be required.” (*In re P.A.* (2012) 211 Cal.App.4th 23, 36 [citing § 729.3].) Here, minor was declared a ward under section 601, not section 602. The Attorney General agrees. Accordingly, we will modify the probation condition to read: “Minor shall submit to urine drug and alcohol testing at the direction of a probation officer or the court.”

DISPOSITION

The Fourth Amendment waiver is stricken and the matter remanded to the court to reconsider the waiver in light of this opinion. The drug testing condition is modified as set forth above. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.