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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re L.G., a Person Coming Under the
Juvenile Court Law.

H042455
(Santa Clara County
Super. Ct. No. 3-13-JV-40371D, E)

THE PEOPLE,

Plaintiff and Respondent,

v.

L.G.,

Defendant and Appellant.

In this delinquency proceeding, L.G. (minor) appeals from the April 27, 2015 disposition orders on a noticed violation of probation and a sustained juvenile wardship petition. (Welf. & Inst. Code, §§ 602, 777, 800, subd. (a).)¹ The juvenile court had previously sustained three other wardship petitions against minor. In calculating the maximum period of physical confinement to which a ward can be subjected, a court may elect to aggregate the period of confinement on multiple petitions, including previously sustained petitions. (See § 726, subd. (d) (hereafter 726(d)).)

On appeal, minor asserts that the juvenile court erred by (1) failing to declare whether wobbler offenses were felonies or misdemeanors as required by section 702,

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

(2) miscalculating the maximum period of confinement under section 726(d), and
(3) failing to credit him with all predisposition days spent in juvenile hall. We conclude that the juvenile court must address these matters upon remand.

I.

Procedural History

A juvenile wardship petition was filed against minor on October 24, 2013. On October 25, 2013, minor admitted violating Penal Code section 415, subdivision (2) (“maliciously and willfully disturb[ing] another person by loud and unreasonable noise” (hereafter disturbing the peace)) on or about October 23, 2013.²

On November 7, 2013, a second juvenile wardship petition was filed. It alleged two offenses: a violation of Penal Code section 496d (buying, receiving, concealing, selling, or withholding a motor vehicle known to have been stolen (hereafter receiving a stolen vehicle)) on or about September 1, 2013 (count 1) and a violation of Business and Professions Code section 25662, subdivision (a) (possession of an alcoholic beverage in public place by person under 21 (hereafter possession of an alcoholic beverage)) on or about September 10, 2013 (count 2). The petition stated that petitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition.

On December 18, 2013, minor admitted the November 7, 2013 petition as filed. The court ordered deferred entry of judgment (§ 790). The court’s written jurisdiction order indicated, by the check of boxes, that the statutory violation of Penal Code section 496d (receiving a stolen vehicle) was a felony, that the violation of Business and

² This matter originated in Alameda County, and it was subsequently transferred from Alameda County to Santa Clara County. This first wardship petition originally alleged a violation of Penal Code section 148, subdivision (a) (resisting, delaying, obstructing a peace officer), but it was amended to state a violation of Penal Code section 415, subdivision (2).

Professions Code section 25662, subdivision (a) (possession of an alcoholic beverage) was a misdemeanor, and that “[t]he court has considered whether the above offense(s) should be felonies or misdemeanors.” But the form did *not* identify the violation of Penal Code section 496d as a wobbler or reflect that the court was aware of, and exercising, its discretion under section 702.

On July 9, 2014, the court found that minor had failed the deferred entry of judgment program, and it sustained the October 24, 2013 petition (as amended) and the November 7, 2014 petition (as filed). The court ordered a “WRAP referral.” It scheduled the disposition hearing.

On August 13, 2014, minor failed to appear, and the court issued a bench warrant. On August 28, 2014, minor was present, and the court recalled the bench warrant. The court rescheduled the disposition hearing.

On August 26, 2014, a third wardship petition was filed. It alleged that minor committed two offenses on or about August 21, 2014: second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) (count 1) and vandalism causing damage of \$400 or more (Pen. Code, § 594, subds. (a), (b)(1)) (count 2). The petition stated that petitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition.

At the hearing on September 24, 2014, minor admitted the petition’s allegations, and the court found that the allegations were true. The court stated on the record that both counts were felonies, which was consistent with the petition’s allegations. In its written jurisdiction order, by the check of boxes, the court indicated that both the second degree burglary and the vandalism offenses were felonies and that “[t]he court has considered whether the above offense(s) should be felonies or misdemeanors.” But the court did *not* indicate, in either its oral statements or written order, that it recognized that the admitted offenses were wobblers and that it was aware of, and exercising, its

discretion under section 702. The court scheduled the disposition hearing on all three petitions for October 9, 2014.

On October 9, 2014, the court declared minor a ward of the court on the three, previously sustained wardship petitions. The court advised minor that the maximum time to be served on the offenses would be four years five months. The court specified that minor was entitled to credit of 20 days. The court ordered minor returned to parental custody under the supervision of a probation officer on certain terms and conditions. Those conditions mandated, among other things, that “minor not be outside the family home between the hours of 10:00 p.m. to 6:00 a.m.,” and “minor not knowingly use, possess, or be under the influence of alcohol or any form of controlled or illegal substance without the legal right to do so and submit to drug and substance abuse testing as directed by the Probation Officer.” Minor was placed on home study while he was on the waiting list for Pine Hill.

On the court’s preprinted, written disposition orders, also filed October 9, 2014, the box next to the following language was checked: “The court previously sustained the following counts. Any charges which may be considered a misdemeanor or a felony for which the court has not previously specified the level of offense are now determined as follows.” The order listed the statutory violations admitted on the three previously sustained wardship petitions, and, by the check of boxes, it specified that the violations of Penal Code section 415, subdivision (2), (disturbing the peace) and Business and Professions Code section 25662, subdivision (a), (possession of an alcoholic beverage) were misdemeanors and the remaining offenses were felonies. But the order did *not* identify any statutory violation as a wobbler (or as a straight misdemeanor or felony) or reflect that the court was aware of, and exercising, its discretion under section 702.

On January 16, 2015, a notice of probation violation (§ 777) was filed against minor. It alleged that minor (1) failed to attend school regularly on January 5, 2015 through January 15, 2015, (2) used methamphetamines during January 2015, (3) used

controlled or illegal substances as indicated by positive urinalysis tests for marijuana, cocaine, amphetamines, and PCP (dated November 7, 2014, November 11, 2014, November 28, 2014, December 6, 2014, December 18, 2014, and January 9, 2015), (4) violated the court-ordered curfew on January 12, 2015 by failing to return home until an unknown time on January 13, 2015, and (5) violated the court-ordered curfew on January 13, 2015 by failing to return home until after midnight on January 13, 2015.

On February 3, 2015, the court determined that count 1 on the third wardship petition (second degree burglary) did not qualify under Proposition 47, approved by voters on November 4, 2014, for reduction from a felony to a misdemeanor because of the dollar amount of restitution. (See Prop. 47, § 8 [adding Pen. Code § 490.2].)

On March 2, 2015, minor admitted violating probation.

On March 11, 2015, a fourth wardship petition was filed against minor. It alleged that, on or about August 12, 2013, minor committed first degree burglary by entering an inhabited dwelling with the intent to commit theft (Pen. Code, §§ 459, 460, subd. (a)) (count 1). The petition stated that petitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition.

On April 22, 2015, minor filed a waiver form, in which he admitted the residential burglary alleged in the fourth wardship petition and acknowledged that, together with his prior offenses, his maximum custody time was eight years three months.

On April 22, 2015, the court conducted a disposition hearing on the violation of probation, a jurisdiction hearing on the fourth wardship petition, and a restitution setting hearing on the second and third wardship petitions. The court informed minor that, if he admitted that burglary, the maximum custody time would be eight years three months. Minor admitted the first degree burglary alleged in the fourth wardship petition. The court made preliminary orders for removing minor from parental custody and placing him at Tahoe Turning Point residential program with the understanding that the probation

officer would prepare comprehensive disposition orders for the court's signature. The court also made restitution orders pertaining to the second and third wardship petitions.

The preprinted, written orders, dated April 22, 2015, indicated, by the check of a box, that the first degree burglary (Pen. Code, §§ 459, 460, subd. (a)) allegation had been found true and was a felony. Even though first degree burglary is not a wobbler (Pen. Code, § 461, subd. (a)), the written order indicated, by the check of a box, that "[t]he court has considered whether the above offense(s) should be felonies or misdemeanors."

The probation officer's "Early Disposition Report," dated April 27, 2015, indicated that the maximum confinement time as of the last court hearing was eight years one month. It stated that minor was entitled to a total of 87 days credit, consisting of 67 days on the present offense plus 20 days credit for time served for prior offenses. It contained recommended disposition orders.

On April 27, 2015, the juvenile court adopted the recommended orders as amended. It continued minor as a ward of the court, and it committed minor to the probation officer's care, custody, and control for placement.

A probation report filed May 4, 2015 stated that minor had been placed in Tahoe Turning Point group home effective May 1, 2015.

A notice of appeal, filed June 4, 2015, indicated that minor was appealing from the restitution orders made on April 22, 2015 and from the disposition orders made on April 27, 2015. In this appeal, minor does not raise any error with regard to those restitution orders.

II

Discussion

A. Declaration that a Wobbler is a Felony or Misdemeanor

Minor asserts that the juvenile court failed to exercise its discretion under section 702 by designating each of the sustained wobblers as either a misdemeanor or

felony offense as required. Respondent essentially concedes the matter, stating that it did not oppose a remand because the court did not expressly declare whether each of the wobblers was a misdemeanor or a felony as required by *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy W.*).

Section 702 provides in pertinent part: “If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony.” Under the California Rules of Court, rules 5.780(e) and 5.795(a), this declaration may be made at either the jurisdiction hearing or at the disposition hearing.³

In *Manzy W.*, the California Supreme Court determined that the juvenile court’s “failure to make the mandatory express declaration requires remand of this matter for strict compliance with” section 702. (*Manzy W., supra*, 14 Cal.4th at p. 1204.) The mere fact that a pleading alleged that a statutory violation was a felony and the court found the allegation to be true does not demonstrate that the juvenile court exercised its discretion under section 702. (See *In re Kenneth H.* (1983) 33 Cal.3d 616, 619-620; *In re Ricky H.*

³ All further references to rules are to the California Rules of Court. Rule 5.780(e) provides in pertinent part: “If the court determines . . . by proof beyond a reasonable doubt in a section 602 matter . . . that the allegations of the petition are true, the court must make findings on each of the following, noted in the order: . . . [¶] (5) In a section 602 matter, the degree of the offense and whether it would be a misdemeanor or a felony had the offense been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration*, and must state its determination as to whether the offense is a misdemeanor or a felony. These determinations may be deferred until the disposition hearing.” (Italics added.) Rule 5.795(a) states: “Unless determined previously, the court must find and note in the minutes the degree of the offense committed by the youth, and whether it would be a felony or a misdemeanor had it been committed by an adult. If any offense may be found to be either a felony or a misdemeanor, the court must consider which description applies and *expressly declare on the record that it has made such consideration* and must state its determination as to whether the offense is a misdemeanor or a felony.” (Italics added.)

(1981) 30 Cal.3d 176, 191 (*Ricky H.*.) In *Manzy W.*, the court reiterated: “[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. (*In re Kenneth H.*, *supra*, 33 Cal.3d at pp. 619-620.) Instead, ‘the crucial fact is that the court did not state at any of the hearings that it found the [offense] to be a felony.’ (*Id.* at p. 620)” (*Manzy W.*, *supra*, at p. 1208, fn. omitted.)

A juvenile court’s designation of a so-called “wobbler” as a felony or a misdemeanor is “essential” “in order to establish the maximum period of physical confinement for the offense.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1206.) It “also serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion” under section 702. (*Manzy W.*, *supra*, at p. 1207.)

In deciding whether the matter must be remanded for a finding under section 702, “[t]he key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit.” (*Manzy W.*, *supra*, 14 Cal.4th at p. 1209.) A remand is unnecessary where the record shows “that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler.” (*Ibid.*) But the juvenile court’s “setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated.” (*Ibid.*) In general, an implied declaration will be insufficient. (See *id.* at p. 1207.)

Three offenses admitted by minor were wobblers: receiving a stolen vehicle (Pen. Code, § 496d)⁴; second degree burglary (Pen. § 461, subd. (b)); vandalism causing

⁴ Minor admitted receiving a stolen vehicle (a 2012 Volkswagen Passat) on or about September 1, 2013 (Pen. Code, § 496d) as alleged in the second wardship petition. In 2014, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014).); Cal. Const., art. II, (continued)

damage of \$400 or more (Pen. Code, 594, subds. (a), (b)(1).) Although the wobblers were identified as felonies by the court, that designation was merely consistent with the petitions' allegations. Nothing in the record affirmatively reflects that the juvenile court was aware that those particular offenses were in fact wobblers or that the court actually exercised its discretion under section 702. Such exercise of discretion impacts the calculation of the maximum period of confinement where the court elects to aggregate the period of physical confinement on multiple petitions. (See § 726, subd. (d)(3).)

We conclude that the matter must be remanded so that the juvenile court may exercise its discretion and comply with section 702's requirement of explicitly declaring whether a wobbler "offense would be a felony or misdemeanor in the case of an adult" (*Manzy W.*, *supra*, 14 Cal.4th at p. 1204).

B. Maximum Period of Physical Confinement under Section 726(d)

Minor contends that the court erred in declaring that his maximum period of confinement was eight years three months. He asserts that his maximum period of confinement, even assuming the court aggregates the four wardship petitions and finds the three wobblers to be felonies, is only eight years one month. This asserted maximum period of confinement is consistent with the probation officer's statement of the maximum confinement time. Minor's calculations are set forth in his appellate brief.

Respondent maintains, based on the same assumptions as those of minor, that the court's calculation of eight years three months was correct. But respondent does not

§ 10, subd. (a).) Among other things, Proposition 47 amended Penal Code section 496 (not Penal Code section 496d) (Prop. 47, § 9.) As amended, Penal Code section 496, subdivision (a) makes the offense of buying, receiving, concealing, selling, withholding property known to have been stolen a misdemeanor "if the value of the property does not exceed nine hundred fifty dollars (\$950)" and person "if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290." Minor has not raised any issue under Proposition 47.

show any calculations or demonstrate where minor's alleged miscalculation lies.

Respondent suggests that this matter be resolved on remand.

Section 726, subdivision (d)(1), states: "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (See rule 5.795(b) ["If the youth is declared a ward under section 602 and ordered removed from the physical custody of a parent or guardian, the court must specify and note in the minutes the maximum period of confinement under section 726."]) As used in section 726, subdivision (d)(2), "maximum term of imprisonment" "means the longest of the three time periods set forth in paragraph (3) of subdivision (a) of Section 1170 of the Penal Code, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code or to consider time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled."

"If the court elects to aggregate the period of physical confinement on multiple counts or multiple petitions, including previously sustained petitions adjudging the minor a ward within Section 602, the 'maximum term of imprisonment' shall be the aggregate term of imprisonment specified in subdivision (a) of Section 1170.1 of the Penal Code, which includes any additional term imposed pursuant to Section 667, 667.5, 667.6, or 12022.1 of the Penal Code, and Section 11370.2 of the Health and Safety Code." (§ 726, subd. (d)(3).) The "aggregation provisions of section 1170.1" are "applied whether the offenses committed by the minor are felonies or misdemeanors." (*In re Eric J.* (1979) 25 Cal.3d 522, 538 (*Eric J.*))

Assuming that the juvenile court aggregates the period of confinement on multiple petitions and declares all wobblers admitted by minor to be felonies under section 726(d),

it appears that the maximum confinement time upon the aggregated petitions would be a total of eight months 30 days.⁵ This sum would include a principle term of six years for first degree burglary (Pen. Code, § 461, subd. (a)), plus subordinate, consecutive terms calculated pursuant to Penal Code section 1170.1 subdivision (a): eight months for receiving a stolen motor vehicle (Pen. Code, § 496d [one-third of the midterm of two years]); eight months for second degree burglary (Pen. Code, § 461; Stats. 2014, ch. 26, § 16, p. 845, eff. June 20, 2014 [former Pen. Code, § 1170, subd. (h)] [one-third of the midterm of two years]); eight months for vandalism causing damage of \$400 or more (Pen. Code, § 594, subd. (b)(1); Stats. 2014, ch. 26, § 16, p. 845, eff. June 20, 2014 [former Pen. Code, § 1170, subd. (h)] [one-third of the midterm of two years]); and 30 days for disturbing the peace (Pen. Code, § 415 [one-third of the maximum punishment of 90 days]).

This matter is being remanded for the court to exercise its discretion under section 702 and explicitly declare whether each wobbler is a felony or misdemeanor, which will impact the court's calculation of the maximum period of confinement if it elects to aggregate the maximum period of confinement on multiple petitions. Upon remand, the juvenile court must calculate the maximum period of confinement pursuant to 726(d).

⁵ A violation of Business and Professions Code section 25662, subdivision (a), (possession of an alcoholic beverage) is not punished by physical confinement. A first offense constitutes a misdemeanor and is punished by a \$250 fine or at least 24 hours and no more than 32 hours of "community service during hours when the person is not employed or is not attending school." (Bus. & Prof. Code, § 25662, subd. (a).) A second or subsequent offense constitutes a misdemeanor and is punished by a fine of not more than \$500 or at least 36 hours and no more than 48 hours of "community service during hours when the person is not employed or is not attending school, or a combination of fine and community service as the court deems just." (Bus. & Prof. Code, § 25662, subd. (a).)

C. Credits

The juvenile court's April 27, 2015 disposition orders failed to state the number of predisposition days to be credited against the maximum period of confinement. Minor asserts that the probation report prepared for the disposition hearing on April 27, 2015, which indicated that he was entitled to a total of only 87 days credit for time served, was wrong and that, as of April 27, 2015, he was actually entitled to credit for 93 days spent in juvenile hall.

Respondent fails to address minor's claim. Without any citation to authority, respondent indicates that remand on the credit issue is necessary in any event because minor is entitled to credit for custody between April 27, 2015 and May 1, 2015, the date on which minor was transported from juvenile hall to the group home.

"The entitlement to credit for all days of actual precommitment confinement against a maximum confinement time was established for juveniles in *In re Eric J.* (1979) 25 Cal.3d 522, 536." (*Ricky H. supra*, 30 Cal.3d at p. 184.) "[W]hen a juvenile court elects to aggregate a minor's period of physical confinement on multiple petitions . . . , the court must also aggregate the predisposition custody credits attributable to those multiple petitions. (*Eric J., supra*, 25 Cal.3d 522.)" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067; see § 726, subd. (d)(3); *Eric J., supra*, at p. 536.) The postdisposition days a minor spends in custody in juvenile hall awaiting admission and transportation to a group home do count toward the maximum period of confinement. (See *In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.) But, in our view, the juvenile court cannot be expected to include postdisposition days of confinement in its credit calculation at the time of disposition because such period of custody has not yet occurred.

Although the probation report indicated that minor was entitled to total credit of 87 days, the juvenile court failed to award appellant any predisposition custody credits against the maximum period of physical confinement in its April 27, 2015 disposition orders. In light of the discrepancies between the probation officer's reports and minor's

claim regarding predisposition custody credits, the juvenile court must resolve the credit issue upon remand.

DISPOSITION

The April 27, 2015 disposition orders are reversed and the matter is remanded for limited purposes. Upon remand, the juvenile court shall (1) exercise its discretion and expressly declare on the record whether each of the wobblers in previously sustained petitions is a felony or a misdemeanor (§ 702), (2) calculate and specify the maximum period of confinement (§ 726(d)), and (3) determine the number of predisposition days of credit to which minor is entitled and amend its April 27, 2015 orders to accurately reflect credit for predisposition custody served through that date.

ELIA, ACTING P.J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.