

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re GREG F., a Person Coming Under  
the Juvenile Court Law.**

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**GREG F.,**

**Defendant and Appellant.**

**A127161**

**(Sonoma County  
Super. Ct. No. 35283J)**

A juvenile court’s authority to commit a minor to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), is a matter of statutory law. Pursuant to Welfare and Institutions Code section 733, subdivision (c)<sup>1</sup> (hereafter section 733(c)), “[a] ward of the juvenile court who meets any condition described below *shall not be committed to the [DJJ]: [¶] . . . [¶] (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.*” (Italics added.) In this case, after Greg F. (appellant) admitted a juvenile delinquency petition (§ 602) alleging an offense that was not DJJ

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<sup>1</sup> All undesignated section references are to the Welfare and Institutions Code.

Section 733 was enacted in 2007. (Stats. 2007, ch. 175, § 22, eff. Aug. 24, 2007, operative Sept. 1, 2007; amended by Stats. 2008, ch. 699, § 28.)

eligible under section 733(c), the juvenile court utilized section 782 to dismiss that petition in order to reach back to an earlier petition alleging a DJJ-eligible offense that appellant had admitted. The court did so in order to commit appellant to DJJ. Because we read section 733(c) to limit the court's authority to dismiss a petition under section 782, we reverse the disposition order.

## BACKGROUND

### *2008 Petition*

Appellant, born in July 1993, admitted the allegations of a September 18, 2008 juvenile delinquency petition that alleged he committed assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) with infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)) and for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C)). This offense is listed under section 707, subdivision (b) and, under section 733(c), may lead to a commitment to DJJ. The probation report reveals that on September 16, appellant and two other males exited a vehicle and threw rocks and shouted gang slogans at the 11-year-old victim, Joseph C., while the victim was riding his bicycle. Appellant then ran toward the victim and hit him on the head with a baseball bat, causing the victim to fall off his bicycle. As a result, the victim underwent surgery for an epidural hematoma and was hospitalized for approximately seven days. Appellant was declared a ward of the court (§ 602) on June 11, 2009.

### *2009 Petition*

On August 18, 2009, another juvenile delinquency petition (§ 602) was filed alleging that on August 16, appellant committed felony battery against three persons for the benefit of a criminal street gang (Pen. Code, §§ 242, 186.22, subd. (d)). According to the probation report, on August 16, while having dinner in juvenile hall, appellant and two others stood up and attacked three Sureño residents. All six minors began fighting and security staff eventually detained them.

At a hearing on August 19, 2009, defense counsel stated she and the prosecutor had agreed that appellant would admit the battery and gang enhancement, and a second count of knowing participation in a criminal street gang (Pen. Code, § 186.22, subd. (a))

would be dismissed. The court informed appellant that based on his admission the matter would be put over for disposition, at which time the court would decide the consequences for appellant's admission. The court accepted the admission, ordered appellant detained in juvenile hall pending a disposition hearing set for September 2, and referred the matter for a written dispositional report. On August 20, the court granted the prosecution's ex parte request to advance the matter to August 26 for a hearing on its "motion to withdraw plea." The request form indicated that appellant's counsel opposed the motion.

On August 24, 2009, the prosecution filed a notice of probation violation (§ 777) alleging appellant's gang-related August 16 battery.

At the August 26, 2009 hearing, the prosecutor urged the court to withdraw appellant's admission to the 2009 petition pursuant to *In re J.L.* (2008) 168 Cal.App.4th 43. The court stated the motion should be characterized as a motion to strike the 2009 petition and gave the prosecution leave to refile its motion. On August 28, the People filed a motion seeking to set aside appellant's admission to the 2009 petition, to dismiss that petition, and to commence proceedings on the section 777 notice of probation violation.

On October 23, 2009, the court granted the People's motion to dismiss the 2009 petition in the interests of justice and appellant's welfare. It also set a hearing on the section 777 probation violation for October 27. On October 27, appellant admitted the August 16 probation violation.

On February 3, 2010, appellant was committed to DJJ for a maximum term of confinement of 17 years, with credit for 352 days in custody. He filed a timely notice of appeal.

## DISCUSSION<sup>2</sup>

The offense alleged in the 2009 petition and admitted by appellant, i.e., felony battery against three persons for the benefit of a criminal street gang (Pen. Code, §§ 242,

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<sup>2</sup> This analysis is adapted from the unpublished opinion by Jenkins, J., in the Court of Appeal in *In re M.P.* (A123815). (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, fn. 9.)

186.22, subd. (d)) is not an offense “described in subdivision (b) of Section 707” or a sex offense set forth in Penal Code section 290.008. Thus, pursuant to section 733(c), it could not provide a legal basis for committing appellant to DJJ.

Pursuant to section 782<sup>3</sup> and *In re J.L., supra*, 168 Cal.App.4th 43, the prosecution requested that the court dismiss the 2009 petition, so that under section 733(c) “the most recent offense alleged in any petition and admitted or found to be true by the court” would be the felony assault with infliction of great bodily injury and for the benefit of a street gang (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a), 186.22, subd. (b)(1)(C)) alleged in the 2008 petition. This offense is one “described in subdivision (b) of Section 707,” and could support appellant’s DJJ commitment. In granting the request to dismiss the 2009 petition and appellant’s admission to it, the court stated it was doing so “in the interest of justice.”

Deciding appellant’s claim of error depends, in part, on resolving the apparent conflict between sections 733(c) and 782; two appellate decisions have reached inconsistent results on this issue. In *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455 (*V.C.*), the minor was charged in a section 602 petition filed in 2005 with a DJJ-eligible sex offense and was granted probation. While on probation, he was charged in a section 602 petition filed in 2007 with three new offenses, only one of which was DJJ-eligible. Pursuant to a plea bargain, the minor admitted the non-DJJ-eligible offense and the two DJJ-eligible offenses were dismissed, and he was continued on probation. (*V.C.*, at p. 1460.) Thereafter, the prosecution filed a section 777 notice of probation violation based on the minor’s commission of two non-DJJ-eligible offenses. As in our case, to avoid the bar of section 733(c), the prosecutor moved under section 782 to dismiss the 2007 petition so that it could seek a DJJ commitment on the DJJ-eligible offenses

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<sup>3</sup> Section 782 provides in relevant part: “A judge of the juvenile court in which a petition was filed, at any time before the minor reaches the age of 21 years, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation.”

charged in the 2005 petition. The juvenile court granted the motion and dismissed the 2007 petition pursuant to section 782. (V.C., at p. 1461.)

On a petition for writ of mandate the appellate court reversed, concluding the juvenile court abused its discretion under section 782 in dismissing the 2007 petition. (V.C., *supra*, 173 Cal.App.4th at pp. 1463-1469.) In considering whether the dismissal was “ ‘in the interests of justice,’ ” the court found Penal Code section 1385, the dismissal statute applicable to adult criminal proceedings, analogous to section 782. (V.C., at p. 1464.) V.C. noted that decisions interpreting Penal Code section 1385 have found that section “ ‘runs only in the immediate favor of a defendant, i.e., by cutting off an action or a part of an action against the defendant.’ [Citations.]” (V.C., at p. 1465, fn. 9.) Extending that reasoning to section 782, V.C. found it “troubling” that the court used its dismissal power under section 782 to increase the range of potential sanctions to which the minor defendant was subject if found in violation of his probation. (V.C., at p. 1465, fn. 9.) V.C. concluded that the dismissal of the 2007 petition was not “in the interests of justice” under section 782 because it was a violation of due process to deprive the minor of the benefit of the fully-executed plea bargain by dismissing the 2007 petition at the prosecution’s request in order to render the minor eligible for a DJJ commitment based on the 2005 petition. (V.C., at pp. 1465-1467.)

V.C. also concluded that the juvenile court’s dismissal was not in the interests of society, as expressed by the Legislature in section 733(c): “The language of section 733(c) allows commitment to [DJJ] only when ‘*the most recent offense* alleged in any petition and admitted or found to be true by the court’ . . . is an eligible offense. The statute does not focus on the overall or entire delinquent history of the minor or on whether the minor may be generally considered a serious, violent offender. The language looks to the minor’s ‘most recent offense.’ The Legislature has specifically determined it is the minor’s most recent offense that determines the minor’s eligibility for [DJJ] commitment. Dismissal of the most recent petition in order to reach back to an earlier petition containing a [DJJ] qualifying offense would be contrary to the unmistakable plain language of section 733(c). It would frustrate the legislative policy expressed by

the language of section 733(c). Such a dismissal cannot be in the interests of justice. [Citation.]” (*V.C.*, *supra*, 173 Cal.App.4th at p. 1468.) *V.C.* noted that, pursuant to the legislative history of section 733(c), its purpose is to “. . . stop the intake of youthful offenders adjudicated for non-violent, non-serious offenses . . . to the [DJJ] . . . .” [Citation.]” (*V.C.*, at p. 1468.) It also noted that section 733(c) was enacted in an effort to reduce state costs by limiting “. . . ‘. . . “the number of youth offenders housed in state facilities by . . . shift[ing] responsibility to the counties for all but the most serious youth offenders. . . .” [Citation.]’ [Citation.]” (*V.C.*, at p. 1469.) *V.C.* concluded that construing section 782 to permit the dismissal of a minor’s most recent petition with a non-DJJ-eligible offense to reach a prior petition with a DJJ-eligible offense would be inconsistent with the statutory purpose underlying section 733(c) because it “would not restrict the intake of juvenile offenders to [DJJ] to those who are currently serious or violent offenders.” (*V.C.*, at p. 1469.)<sup>4</sup>

In *In re J.L.*, *supra*, 168 Cal.App.4th 43, the minor admitted a March 2006 section 602 petition alleging a DJJ-eligible offense (felony assault) and was continued at an adolescent center placement. In August 2006, a section 777 notice of probation violation was filed alleging the minor failed to return to his placement. (*In re J.L.*, at pp. 49-50.) In December 2006, a section 602 petition was filed charging the minor with another DJJ-eligible offense (attempted second degree robbery while armed with a knife) and a misdemeanor. The minor admitted the attempted robbery with a knife allegation and the misdemeanor was dismissed. The minor also admitted the probation violation alleged in the August 2006 section 777 notice. At the disposition hearing, the court heard evidence

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<sup>4</sup> We note that in *V.C.*, unlike here, the minor had admitted to the most recent petition pursuant to a fully executed plea bargain in which he “was apparently placed in accordance with [the] order of disposition.” (*V.C.*, *supra*, 173 Cal.App.4th at p. 1466.) We conclude this distinction is not significant. Section 733(c) precludes a DJJ commitment where “the most recent offense alleged in any petition *and admitted* or found to be true by the court is” a non-DJJ eligible offense. (Italics added.) Prior to the prosecution’s motion in this case to dismiss the 2009 petition under section 782, appellant had “admitted” a non-DJJ eligible offense alleged in that petition. Nothing more is necessary to trigger the bar of section 733(c).

regarding the prosecutor's and probation department's recommendation that the minor be committed to DJJ, and continued the disposition hearing before making a dispositional ruling. (*In re J.L.*, at p. 50.) Thereafter, the minor sought to withdraw his admission to the weapon enhancement in the December 2006 petition, stating that the law had changed under section 733 after he admitted the enhancement, and asserting that if the enhancement were not found true, the attempted robbery would be a non-DJJ eligible offense under section 733(c). Thus, he argued he was unaware of the consequences of his plea when it was entered. The court granted the minor's motion to withdraw his admission to the weapon enhancement and set a contested hearing thereon. (*In re J.L.*, at pp. 50-51.) Subsequently, the prosecutor sought dismissal of the December 2006 petition under section 782 and a commitment of the minor to DJJ. (*In re J.L.*, at pp. 52-53.) Pursuant to section 782, the court granted the prosecution's motion to dismiss the December 2006 petition, set aside the minor's admission to it and all subsequent proceedings on that petition, found the minor had committed the charged probation violation and committed him to DJJ based on the original assault charge in the March 2006 petition. (*In re J.L.*, at pp. 53-54, 57.)

The minor appealed, arguing his most recent offense was a probation violation, not a section 707, subdivision (b) offense, and therefore he was ineligible for a DJJ commitment. (*In re J.L.*, *supra*, 168 Cal.App.4th at pp. 47, 57.) In affirming the dismissal of the December 2006 section 602 petition and DJJ commitment, the appellate court stated: “[S]ection 733 does not specifically authorize the dismissal of a petition containing the most recent offense admitted or found to be true. However, section 782 does authorize the juvenile court to set aside findings and to dismiss a petition ‘if the court finds that the interests of justice and the welfare of the minor require such dismissal’ . . . .” (*In re J.L.*, at p. 57.)<sup>5</sup>

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<sup>5</sup> The appellate court also held that a section 777 notice of probation violation “does not constitute an offense alleged in a ‘petition’ ” pursuant to section 733(c). (*In re J.L.*, *supra*, 168 Cal.App.4th at p. 61; accord, *In re M.B.* (2009) 174 Cal.App.4th 1472, 1477-1478.) Thus, the court concluded that “ ‘the [minor’s] most recent offense alleged in any

We agree with *V.C.* that the phrase “the most recent offense” in section 733(c) indicates the Legislature’s intent to limit DJJ commitments to minors who are *currently* serious or violent offenders, and to disallow a DJJ commitment for minors based on their overall juvenile history. We also agree with *V.C.* that utilizing section 782 to dismiss the most recent petition adjudicating a nonviolent, nonserious offense to reach back to an earlier petition adjudicating a violent or serious offense undermines section 733(c)’s prohibition against committing a minor to DJJ for any offense other than “the most recent offense alleged . . . and admitted or found true by the court.” This use of section 782 also undermines the budgetary purpose underlying section 733(c). (See *V.C.*, *supra*, 173 Cal.App.4th at pp. 1468-1469.)

We resolve the apparent conflict between sections 733(c) and 782 by relying on two principles of statutory construction. First, a later enacted statute, like section 733(c), ordinarily controls over an earlier enacted one. (*In re Michael G.* (1988) 44 Cal.3d 283, 293.) We are entitled to presume that, in 2007, when the Legislature enacted section 733(c), it was aware of the earlier enacted section 782, and could have clarified that section 782 remains available to the juvenile court to dismiss a petition containing the most recent offense, which is non-DJJ eligible, to reach back to an earlier petition containing a DJJ-eligible offense for purposes of committing the minor to DJJ. (*In re Michael G.*, at p. 293.) In the absence of any indication of such legislative intent, we will not assume such intent exists, particularly in light of section 733(c)’s clear substantive and temporal restrictions on committing minors to DJJ. The second principle of statutory construction we rely on is that more specific statutory provisions normally control as against more general provisions when both concern the same subject. (*In re Michael G.*, at p. 293.) Under this principle, section 733(c) would control over section 782, given that both statutes generally concern the disposition of juvenile matters, but section 733(c) is more narrowly concerned with commitments to DJJ.

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petition and admitted or found to be true by the court’ ” was not the probation violation, but the DJJ-eligible assault alleged in the original petition that the minor admitted. (*In re J.L.*, *supra*, 168 Cal.App.4th at p. 63.)

While juvenile courts have broad discretion under section 782 to dismiss petitions when required by the interests of justice and the minor's welfare (*Derek L. v. Superior Court* (1982) 137 Cal.App.3d 228, 232), absent a showing of legislative intent this discretion is not broad enough to trump the clear limits that section 733(c) places on the court's dispositional authority (see *People v. Hatch* (2000) 22 Cal.4th 260, 269 [§ 1385 does not permit dismissals in the interest of justice where the Legislature had clearly evidenced a contrary intent]).

We conclude the juvenile court lacked authority under section 782 to dismiss the 2009 petition for the purpose of reaching back to the 2008 petition containing a DJJ-eligible offense in order to support appellant's DJJ commitment.

The People assert that precluding dismissal under section 782 in the circumstances presented here "immunizes juvenile recidivism." Our response is two-fold. First, this situation would have been averted had the prosecutor filed a section 777 notice of probation violation rather than filing the 2009 petition.<sup>6</sup> (See *In re J.L.*, *supra*, 168 Cal.App.4th at p. 60; accord, *In re D.J.* (2010) 185 Cal.App.4th 278, 286-288.) Second, the argument that our analysis of the interplay between sections 733(c) and 782 immunizes recidivism is one that is more properly directed to the Legislature.

Given our conclusion that the court abused its discretion in dismissing the 2009 petition, we reverse the dispositional order and remand the matter for further consideration.<sup>7</sup>

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<sup>6</sup> The prosecutor apparently realized this and, soon after filing the 2009 petition, filed a section 777 notice of probation violation alleging the gang-related August 16, 2009 battery.

<sup>7</sup> In light of this determination we need not address appellant's claims that the evidence was insufficient to establish that he would probably benefit from a DJJ commitment and that the court violated his right to due process by relying on information it had received about DJJ from outside of the instant proceedings in determining that DJJ would probably benefit him.

DISPOSITION

The dispositional order is reversed and the matter remanded to the juvenile court for reconsideration of the disposition in light of this decision.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.

Superior Court of Sonoma County, No. 35283J, Raima H. Ballinger, Judge.

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