Filed 11/4/11 In re Daniel C. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re DANIEL C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DANIEL C., Defendant and Appellant.	F060916 (Super. Ct. No. JJD060401) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a contested hearing, Daniel C. (appellant) was committed to the Department of Juvenile Justice (DJJ)[1] for a maximum confinement time of nine years five months. On appeal, he contends the juvenile court both violated its authority and abused its discretion in committing him to the DJJ. He also contends that the juvenile court abused its discretion in setting his term of confinement. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

On December 27, 2005, appellant's mother called the police because appellant struck her while she was holding her three-year-old daughter. Appellant's mother told the officer that appellant had been violent with family members before, that he had been making threats of violence towards them, and that she could no longer control him. In a subsequent interview, appellant said he was upset with his mother over a sexual relationship she was having with one of his friends. He acknowledged pushing her aside, but he did not recall her holding his sister at the time as he had "blacked out."

A juvenile wardship petition filed in response to the incident alleged that appellant, who was then 14 years old, came within the jurisdiction of the juvenile court for committing a misdemeanor battery against his mother. (Welf. & Inst. Code, § 602;[2] Pen. Code, § 242.) Appellant, pursuant to an agreement with the district attorney, admitted a misdemeanor violation of disturbing the peace (Pen. Code, § 415) and was adjudged a ward of the juvenile court. Disposition was to take place on February 14, 2006, but was continued in light of a new offense committed by appellant.

Several days earlier, on February 10, 2006, appellant was called to the principal's office of his junior high school where he admitted he had brought a knife and marijuana

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[1]The California Youth Authority (CYA) was renamed California Department of Corrections and Rehabilitation, Juvenile Justice, effective July 1, 2005. The division of Juvenile Facilities (DJF) is part of the Division of Juvenile Justice (DJJ). (Gov. Code, §§ 12838, 12838.3, 12838.5, 12838.13.) In this opinion, we use the term DJJ whenever reference to the DJJ or DJF is appropriate.

[2]All statutory references are to the Welfare and Institutions Code unless otherwise stated.

with him to school. Appellant also had a small pipe in his pocket and two razor blades and two pornographic magazines in his backpack. Appellant stated that he usually carried a knife and that he had taken the marijuana from his brother.

On February 15, 2006, a second juvenile wardship petition was filed alleging that appellant brought a knife and marijuana onto school property, a felony and misdemeanor, respectively (Pen. Code, § 626.10, subd. (a); Health & Saf. Code, § 11357, subd. (e)). Appellant admitted the allegations in exchange for deferred entry of judgment, and the matter was set for disposition. But before disposition could take place, a third juvenile petition was filed.

The third juvenile wardship petition, filed April 20, 2006, alleged that, between January 1, 2005, and December 25, 2005, appellant sodomized his then seven-year-old sister by use of force or violence (Pen. Code, § 286, subd. (c)) and committed lewd acts upon her (*id.*, § 288, subd. (a)). According to appellant, on one occasion in 2005, he was interrupted by his mother's presence as he pulled down his sister's underpants and attempted to insert his penis into her anus. He did so because he was mad at her. In another incident, appellant came up behind his sister, grabbed her and placed her on the ground, put his penis in her "butt," and "kept going," moving his penis "back and forth" for two to three minutes. And on another occasion, this time at his uncle's home, appellant tried to insert his penis into his sister's anus and she told him it hurt and began to cry. Appellant acknowledged that what he was doing was wrong, but stated he was "'mad'" and taking "'matters into his own hands.'"

On June 28, 2006, appellant admitted to one felony count of sodomy without force or fear (Pen. Code, § 286, subd. (a)), and one count of committing a lewd act upon his sister (*id.*, § 288, subd. (a)). The juvenile court continued appellant as a ward of the court and found his maximum confinement exposure to be nine years five months on the three petitions combined as follows: 30 days for the misdemeanor battery, eight months for the felony weapon on the school grounds charge; eight months for the sexual battery, and

eight years for the felony lewd and lascivious act on a child. Appellant was removed from the custody of his parent and ordered to be placed in a group home, foster home, or home of a suitable relative.

From July of 2006 to the end of October of 2008, appellant resided in three group homes. By the time he was terminated from the last home, appellant had been written up for approximately 65 group home violations. The incidents included using profanity; making weapons; refusing to take his medications; injuring himself; damaging property; threatening to commit suicide; lying to, being disrespectful of, and manipulating staff; removing group home administrative log books; fighting at school; failing to complete school assignments; failing to follow staff directives; failing to complete program tasks; sneaking out of the group home at night; running away from school; possessing unknown drugs and contraband; pushing staff; refusing to eat; refusing to listen to directives; becoming overly upset by minor incidents; acting out in public and causing group outings to be terminated; and speaking aggressively and demandingly to peers. Most of the incidents took place in the last six months of his stay at the third group home.

During his therapy at the group home, appellant continued to work on his "sexual offense pattern and managing deviant sexual fantasies," but "had little understanding of his sexual offense pattern, sexual triggers, sexual relapse prevention plan, or abuse victimization affects." Psychological tests indicated that appellant was at a high risk to reoffend. He had a predatory mentality in his interactions with others, engaged in constant intimidation and created chaos in the group home, and tried to make the home environment unsafe for his peers.

Following termination from the last group home, appellant was detained in the Tulare County Juvenile Detention Facility. The probation officer then filed a violation of probation alleging appellant failed to comply with the condition of his probation that he "learn and obey the rules and regulations of the group home." He also alleged that appellant failed to make any progress during his placement. The probation officer

recommended appellant be committed to the DJJ, thinking appellant would benefit from a more structured sex offender treatment program.

In November of 2008, appellant admitted the probation violation allegation that he had failed to obey group home rules and group home officials, but asked that the allegation that he failed to make any progress be dismissed. On April 27, 2009, following three days of contested dispositional hearing, the juvenile court committed appellant to the DJJ, but suspended placement so that he could participate in a local program, the adolescent sexual responsibility program (ASRP). The court did so "[i]n order for me to, in my own mind, be satisfied that we have truly considered all options for a minor, we must exhaust all local possibilities. And one of the possibilities that has not been exhausted is the [ASRP]." At the hearing, appellant acknowledged that, if he did not comply with the program, the court had the option to reimpose his commitment to the DJJ. Before the court could conduct its first scheduled 90-day review, it received notice that appellant had been in an altercation and his anticipated release date was extended by two weeks to February of 2010.

In March of 2010, before appellant could be considered for release, the director of the ASRP reported that appellant was not ready for release and needed the sexual offender services provided by the DJJ. According to the report, appellant had informed the director that he was sexually attracted to prepubescent children of both sexes and fantasized to such sexual interactions while masturbating.

Also in March of 2010, the probation officer filed a second violation of probation based on appellant's failure to obey all rules and regulations of the youth correctional center unit program and the directives of the juvenile detention facility staff. The officer also stated that, while appellant was participating in sex offender counseling, it appeared that he was "in need of more intense counseling and a structured program."

At the contested jurisdictional hearing on July 15, 2010, the juvenile court found appellant had violated the terms and conditions of his probation. At the subsequent

July 29, 2010, disposition hearing, the court, after stating it had "truly exhausted every opportunity available and every resource available to it," committed appellant to the DJJ for a maximum confinement time of nine years five months.

On August 5, 2010, the superior court ordered that appellant, because he was now 18 and pursuant to section 707.1, subdivision (b)(1), be transferred to "an appropriate adult facility."

DISCUSSION

1. Did the juvenile court have authority to commit appellant to the DJJ?

Appellant contends that none of his commitment offenses qualify as offenses for which a ward may be committed to the DJJ because they are not listed in section 707, subdivision (b). We disagree.

Before September 2007, when a minor was adjudged a ward of the court on the ground he or she had violated the criminal law, the juvenile court could consider as an option committing the minor to the California Youth Authority (now the DJJ) based on any offense unless the minor was under the age of 11 or suffered from any contagious infections or other disease that would probably endanger the lives or health of the other inmates. (Former §§ 731, 733.)

Sections 731 and 733 were amended effective September 1, 2007. (Stats. 2007, ch. 175, §§ 19, 22, 37.) "The amendments were enacted as part of chapter 175 of the Statutes of 2007 in order to make 'necessary statutory changes to implement the Budget Act of 2007 ….' (Stats. 2007, ch. 175, § 38.)" (*In re N.D.* (2008) 167 Cal.App.4th 885, 891.) "'[I]n 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders.'" (*Ibid.*) "Amended sections 731 and 733 are the parts of this 'realignment legislation' that limit the offenses for which juvenile courts can commit wards to state authorities." (*In re N.D.*, *supra*, 167 Cal.App.4th at p. 892.)

As amended, section 731, subdivision (a) states that the court may commit a ward to the DJJ, "if the ward has committed an offense described in subdivision (b) of Section 707 and is not otherwise ineligible for commitment to the division under Section 733." (§ 731, subd. (a)(4).)

Section 733 was amended to add an additional category of wards that may not be committed to the DJJ beyond the previous age and disease related exclusions. Section 733 states in pertinent part, "[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."

Appellant admitted two sex offenses—one per subdivision (a) of Penal Code section 288 and one per subdivision (a) of Penal Code section 286—neither of which is listed in section 707, subdivision (b).[3] But both offenses are included in subdivision (c) of Penal Code section 290.008, which sets forth certain sexual offenses requiring juveniles to register. Thus, while appellant's sex offenses do not meet the criteria of wards who may be committed to the DJJ pursuant to the inclusionary language of section 731, subdivision (a)(4), the question arises how the exclusionary language of section 733 applies.

Appellant argues that the plain meanings of sections 731 and 733 are unambiguous and do not require analysis of the Legislature's intent: section 731, subdivision (a)(4) is an eligibility statute that empowers the juvenile court to send wards to the DJJ only if they commit a section 707, subdivision (b) offense. Section 733, he argues, is not a DJJ

[3]Relevant listed offenses in section 707, subdivision (b) include "(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm," and "(6) A lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code."

eligibility statute, but instead places further limits upon the type of offenders the juvenile court may send to the DJJ. As argued by appellant,

> "Section 733 provides that an otherwise DJJ eligible ward under section 731 will still be ineligible for placement at DJJ, unless his most recent offense was a '707(b)' crime or a sex offense enumerated in Penal Code section 290.008. If the ward is not DJJ eligible under section 731, subdivision (a)(4), section 733 never comes into play. Or, stated another way, if a ward is not already a candidate for DJJ under section 731, he cannot otherwise be committed to DJJ under section 733."

We disagree with appellant's contention that section 733 is clear—indeed, we think it a model of ambiguity. We have identified at least three interpretations to which the language of section 733 is susceptible. First, the section could mean (as respondent contends) that any sex offense listed in Penal Code section 290.008 is a DJJ eligible offense. Appellant concedes that both of his offenses are so listed. Second, the statute could mean (as appellant contends) that even a section 707, subdivision (b) offense is not DJJ eligible unless the offense is listed in 731, subdivision (a) and is the ward's most recent offense or a sex offense listed in Penal Code section 290.008. This interpretation would mean that section 731, subdivision (a) limits DJJ eligibility to section 707, subdivision (b) offenses and that section 733 does not expand but instead narrows DJJ eligibility. Yet a third possibility exists: that section 733 means that a section 707, subdivision (b) offense is not eligible for DJJ unless the offense is the ward's most recent offense or the most recent offense is a sex offense listed in Penal Code section 290.008. This would make offenses listed in Penal Code section 290.008 DJJ eligible, whether also listed in section 707 subdivision (b) or not, but only if the offense is the ward's most recent offense.

In circumstances of ambiguous statutory language, "[o]ur task is to ascertain legislative intent so we can 'effectuate the purpose of the law.' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1045-1046.) Several members of this court have already decided that the relevant statutory language manifests the Legislature's intent that violations of Penal Code sections 288, subdivision (a), and 286, subdivision (a), qualify

as offenses for which a ward may be committed to the DJJ because they are sex offenses listed in Penal Code section 290.008. (*In re Robert M.* (2011) 192 Cal.App.4th 329 (*Robert M.*), review granted Apr. 20, 2011, S191261.)[4] This case, like *Robert M.*, will be granted review by the Supreme Court. Under such circumstances, it would be a waste of our resources to engage in further analysis. We therefore follow the precedent already set by this court and reject appellant's argument that he was not eligible to be committed to DJJ.

Appellant makes a further argument that, because he committed his sexual offenses in 2005, before he committed his other offenses, the sex offenses do not qualify as his "most recent offense" under section 733. We reject this argument because, even under the narrow reading of the language of section 733, subdivision (c) for which he advocates, sex offenses listed under Penal Code section 290.008 do not qualify for section 733, subdivision (c)'s exclusion from DJJ commitment.

2. Did the juvenile court abuse its discretion in committing appellant to the DJJ?

Appellant also contends that the juvenile court abused its discretion in imposing a DJJ commitment because he would not benefit from such a commitment, and less restrictive commitments existed and were rejected. The record fails to support appellant's assertions.

We review a commitment decision for an abuse of discretion, "indulging all reasonable inferences to support the juvenile court's decision. [Citations.]" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) Under section 734, "[n]o ward of the juvenile court shall be committed to the [DJJ] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as

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[4]The Supreme Court granted review in *Robert M.* pending resolution of its previously granted review of *In re C.H.* (May 18, 2010, B214707) (nonpub. opn.). At the time of this writing, petitions for review are pending in two unpublished opinions from this court: *In re Joshua H.* (July 6, 2011, F060713) and *In re W.M.* (July 20, 2011, F060516).

to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ]." In making its judgment, the court must also consider the minor's age, the circumstances and gravity of the offense, and the minor's previous delinquent history. (§ 725.5.)

Commitment to the DJJ cannot be based solely on retribution. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.) Evidence must demonstrate (1) a probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate. (*Ibid.*) But, "when we assess the record in light of the purposes of the Juvenile Court Law [citation], we evaluate the exercise of discretion with punishment and public safety and protection in mind." (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58.) We will not disturb the juvenile court's findings if substantial evidence supports them. (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485.)

The juvenile court law contemplates a progressively restrictive and punitive series of dispositions, but there is no absolute rule that a minor must have attempted a less restrictive placement before the juvenile court may order a DJJ commitment. (*In re Ricky H.* (1981) 30 Cal.3d 176, 183.) Moreover, "[t]he new provisions [of the Juvenile Court Law] recognize[ ] punishment as a rehabilitative tool. [Citation.] Section 202 [setting forth the purpose of the Juvenile Court law] also shifted its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express 'protection and safety of the public' [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection. [Citation.]" (*In re Michael D., supra,* 188 Cal.App.3d at p. 1396.)

As we have explained in the past, "if there is evidence in the record to show a consideration of less restrictive placements was before the court, the fact the judge does not state on the record his consideration of those alternatives and reasons for rejecting them will not result in a reversal." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 577.)

Here, there was ample evidence that the juvenile court considered less restrictive placements.

Between September of 2006 and October of 2008, appellant was in three group homes and committed a multitude of violations. In November of 2008, appellant admitted the probation violation allegation that he had failed to obey group home rules and officials. On April 27, 2009, the juvenile court committed appellant to the DJJ, but suspended placement so that he could participate in a local program, the ASRP.

A year later, in May of 2010, after appellant committed other probation violations but before he was committed to the DJJ, the juvenile court ordered probation to investigate different placement options for appellant. The court specifically asked probation to investigate a "local option" proposed by the public defender, a group home called Little's House. The investigation determined that Little's House was a post-DJJ placement facility, and thus concluded that the DJJ was the only placement option left for appellant. The clinical director of the ASRP, Timothy Zavala, concurred with this assessment, based in part on the fact that appellant had, in the previous two months, "display[ed] and report[ed] risk factors that had not previously been an issue." Zavala opined that appellant remained at a moderate to high risk to reoffend and would require even more intensive sex offense specific treatment in a highly structured and supervised setting.

It was only after appellant failed in the ASRP that the juvenile court finally sent appellant to the DJJ. In making its determination, the juvenile court called appellant's sex offenses grave and serious and noted that they involved appellant's sister, who was at least six years younger than he. The court also noted that appellant committed the offenses out of anger and that he continued to show aggressive behavior in all of the group homes.

The juvenile court noted appellant's pattern of not taking responsibility for his own conduct and blaming others for his failures, despite being in many different

environments under many different techniques. The court found that the only constant was appellant's inability "to program and that he ha[d] demonstrated aggressive behavior."

The juvenile court also noted appellant's "mental and physical condition and his qualifications" and, taking everything into consideration, found that it was "probable that the minor will benefit by the reformatory educational discipline or other treatment provided by the [DJJ]." In so finding, the court stated, "This Court has truly exhausted every opportunity available and every resource available to it. And so the next resource that is available to the court is placement at the [DJJ]." In rejecting appellant's placement in the community, the court stated, "The reality is that he has not programmed in a controlled environment. I do not believe that he would program effectively in an environment where he would not be monitored or controlled."

And finally, in speaking to appellant directly, the court stated:

> "[L]et me just say one last thing to conclude. An argument was made that you are being punished because you opened up to your counselor. That did not even cross my mind. I have said on the record everything that I believe and the reasons that I am placing you in the [DJJ]. [¶] I tell you this because I do not want for you to walk away with the impression that, as your attorney said, that you are being punished for opening up."

Substantial evidence supports the juvenile court's finding that appellant could benefit from a DJJ commitment, and the court reasonably believed a less restrictive disposition would not be adequate to hold appellant accountable for the serious offenses he committed or to provide for the safety and protection of his victims or the public. The court did not abuse its discretion in ordering appellant committed to the DJJ.

3. Did the juvenile court abuse its discretion when it committed appellant to the maximum term of confinement?

Appellant contends that the juvenile court abused its discretion when it committed him to the maximum term of confinement of nine years five months. Specifically, appellant contends that a shorter period of confinement is warranted in his case due to the mitigating factors: (a) that he was physically and sexually abused as a child; (b) that he

was removed from his mother's home and became a dependent of the juvenile court when he was six; (c) that his only serious felony occurred when he was 14; (d) that he made some progress in various placements; (e) that he did not commit any new offenses while in the placements; and (f) that he did not engage in any form of sexual misconduct. We disagree.

Section 731, subdivision (c) provides that a minor committed to the DJJ not only may not be held for a period in excess of the maximum period of adult confinement for the same crime, but that in setting the term of confinement the court must consider the particular facts and circumstances of the matter that brought or continued the minor under its jurisdiction. (§ 731, as amended by Stats. 2007, ch. 175, § 19.) "'Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing … and thus requires reversal.'" (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.) On a silent record, this court will presume that a trial court was aware of its discretion and followed applicable law in performing its official duty. (Evid. Code, § 664; *People v. Burnett* (2004) 116 Cal.App.4th 257, 261; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) "This presumption is a logical extension of the rule 'concerning the presumption of regularity of judicial exercises of discretion apply[ing] to sentencing issues.'" (*People v. Burnett*, *supra*, at p. 261.) Section 731, subdivision (c) contains no provision specifying that a court must specifically state on the record that it is exercising the required discretion.

Here, the juvenile court, in sentencing appellant, stated that it would consider what appellant's maximum period of confinement should be pursuant to section 731, subdivision (c). In doing so, the court stated that it was familiar with the facts of appellant's case, it recounted the details of the disposition hearing, and while it took into consideration that appellant had grown up in an environment of physical, emotional, and sexual abuse, it found that the callousness of appellant's treatment of his sister was a more significant factor in aggravation, warranting the maximum term of confinement.

Contrary to the position taken by appellant, we conclude that the juvenile court adequately considered the particular facts and circumstances of appellant's case and did not abuse its discretion in setting the maximum term of confinement.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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GOMES, Acting P.J.

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DETJEN, J.