Filed 9/11/02 In re David F. CA5

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re DAVID F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. DAVID F., Defendant and Appellant.	F039230 (Super. Ct. No. F0098206-6) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Gene Gomes, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Robert P. Whitlock and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Buckley, A.P.J., Levy, J., and Cornell, J.

On February 22, 2001, the juvenile court found true an allegation in a petition filed pursuant to Welfare and Institutions Code section 602 that David F. committed a lewd act upon a child (Pen. Code, § 288, subd. (a)).[1] After the court's finding, David waived his constitutional rights and admitted a misdemeanor disturbance of the peace allegation (§ 415(3)) with a criminal street gang enhancement (§ 186.22, subd. (d)). David was committed to the California Youth Authority (CYA) for a maximum confinement period of eight years four months.[2]

On appeal, David contends the juvenile court erred in using section 186.22, subdivision (d) because, he argues, it only applies to felony or wobbler offenses, not to simple misdemeanor offenses. David also contends the juvenile court erred in committing him to CYA.

FACTS

On August 28, 2000, David was riding a school bus with an African American named Natasha. Natasha sat next to David in the last available seat. David told Natasha to sit elsewhere. The two knew each other and had been friends. At first, Natasha thought David was joking. David, however, began saying racial epithets and directing racially disparaging comments toward Natasha, including that he was going to hang her from a tree. A witness heard David call himself a skinhead and heard David singing a "Klan marching song." A police officer searched David's backpack and found a piece of paper in his wallet with the phrases "white power," "Sieg Heil," "SS," and "PWP"

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[1] All further statutory references are to the Penal Code.

[2] The juvenile court indicated it was imposing a consecutive sentence for the gang enhancement because the two underlying offenses involved different transactions and victims. The court made the violation of section 415(3) the subordinate term and chose a term of four months which is consistent with a misdemeanor sentence of one-third of one year for the gang enhancement. No term was imposed for disturbing the peace.

(preaching white power). When booked into custody, David claimed skinhead gang membership.

On October 2, 2000, David was living with his aunt and four-year-old cousin. The aunt went to the store, leaving David alone with his cousin. After David had his cousin remove clothing, David placed his penis inside his cousin's anus. The cousin explained this caused pain. The cousin reported the crime and was examined by a pediatrician. The pediatrician testified the cousin suffered from a rectal tear three to five millimeters deep, which the doctor described as a "large rectal tear." The pediatrician explained that because of the severity and length of the tear, it was unlikely to have been caused by a large stool. The rectal tear could have been caused by a male penis.[3]

GANG AFFILIATION ENHANCEMENT

David contends his admission to the gang enhancement in violation of section 186.22, subdivision (d) must be reversed as a matter of law.[4] David argues this provision requires the underlying offense to be a so-called wobbler offense which can be either a felony or a misdemeanor. David asserts his conviction for disturbing the peace

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3 David's medical expert testified the rectal tear was not abnormally large and could have been caused by a large stool. David's uncle testified he remembered that David's cousin had difficulty with bowel movements and was often constipated.

4 Penal Code section 186.22, subdivision (d) states: "*Any person who is convicted of a public offense punishable as a felony or a misdemeanor*, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in county jail." (Italics added.)

(§ 415(3)) is only a misdemeanor and, therefore, the gang enhancement of section 186.22, subdivision (d) cannot apply to his conviction for misdemeanor disturbance of the peace. Respondent argues a "public offense" as used in subdivision (d) of section 186.22 indicates that its provisions are not limited to wobblers.[5] We find merit to David's contention and will reverse the finding on the gang enhancement.

Subdivision (b)(1) of section 186.22 applies to any conviction of an offense which can be punished as a felony.[6] If the intent of the drafters of subdivision (d) of section 186.22 was to have it apply to misdemeanors, they could have described a qualifying subdivision (d) offense as being a misdemeanor. They did not do so. Instead, the drafters employed language that reads exactly like language used in typical wobbler statutes.

Subdivision (d) of section 186.22 describes a public offense as an offense which is "punishable as a felony or a misdemeanor." If the statutory drafters had intended this phrase to be read disjunctively, then it would be irrational to include felonies in subdivision (d) because felonies are already covered in subdivision (b)(1). Stated another way, had the statutory drafters intended to make felonies as one class of offenses, and, misdemeanors as a separate class of offenses, each punishable pursuant to subdivision (d), subdivision (b)(1) of the statute would be reduced to mere surplusage. The only

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5 A wobbler is any crime which may be punished as either a misdemeanor or a felony. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 291-292.) Section 17, subdivision (b) defines a wobbler as an offense which is punishable "in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail."

6 In relevant part, subdivision (b)(1) of section 186.22 provides: "any person who is convicted of a felony committed for the benefit of, or at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion . . . ."

rational distinguishing feature between subdivision (b)(1) felonies and subdivision (d) felonies is that subdivision (d) felonies are less serious felonies by virtue of their wobbler status. Reading the statute in this manner gives meaning to both subdivisions of the statute. Respondent's proposed statutory construction would render superfluous or inoperative the reference to felonies either in subdivision (d) or the entirety of subdivision (b)(1), violating a basic rule of statutory construction. (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269.)

Subdivision (d) of section 186.22 has another illuminating feature. The punishment scheme is slightly less than the punishment scheme under subdivision (b)(1). Also, the punishment scheme in subdivision (d) of this statute can be either a felony or a misdemeanor punishment depending on how the enhancement is treated. This parallels the manner in which wobbler offenses in general are punished. Thus, if subdivision (d) felonies are not wobbler felonies, then subdivision (b)(1) and subdivision (d) felonies are punished differently but are not otherwise distinguished in the statute. We do not believe the intent of the statutory drafters was to create an arbitrary sentencing scheme.

Thus, it appears the intent of the statutory drafters was for subdivision (d) to apply to offenses chargeable as either as felony or misdemeanors – wobbler offenses.[7] Had the statutory drafters intended to have subdivision (d) apply to simple misdemeanors, they only had to say so in the statute. They did not, but, instead, chose language that reads and sounds like phrazing used in wobbler offenses. Subdivision (d) does not apply to simple

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[7] We note that section 415 can be prosecuted as either a misdemeanor or as an infraction.

We further note that David admitted this offense as part of a plea agreement. Though a plea normally acts as an admission of all the elements of an offense, here David's admission to the gang enhancement is a legal impossibility because the underlying offense must be a wobbler and a violation of section 415 is only a misdemeanor or an infraction. Were a plea is to a legal impossibility, the court lacks jurisdiction to enter it. (See *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1094-1097.)

misdemeanors but only to penal provisions which can be prosecuted either as a felony or as a misdemeanor. We therefore find as a matter of law that the violation of section 415 does not qualify David for an enhancement pursuant to subdivision (d) of section 186.22.

COMMITMENT TO CYA

David contends the juvenile court abused its discretion in committing him to CYA because David did not have a serious prior juvenile record. David argues he was not among the most severely delinquent youths in California and that CYA commitments are reserved for such offenders.

It is clear that a commitment to CYA may be made in the first instance, without previous resort to less restrictive alternatives. (*In re Asean D*. (1993) 14 Cal.App.4th 467, 473; *In re Tyrone O*. (1989) 209 Cal.App.3d 145, 151.) The gravity of an offense, coupled with other relevant factors, is always a consideration. (*In re Samuel B*. (1986) 184 Cal.App.3d 1100, 1104.)

It is error for a juvenile court to fail to consider less restrictive alternatives to CYA commitment. (*In re Teofilio A*. (1989) 210 Cal.App.3d 571.) In *Teofilio A*., neither the juvenile court nor the probation report considered alternatives to CYA commitment. Though the only evidence in the record showed the juvenile was an unsuitable candidate for CYA, the court in *Teofilio A*. proceeded to commit the juvenile to CYA.

The probation officer here considered the possibility "of all less restrictive programs and forms of custody." The probation officer, however, concluded less restrictive dispositions were "inappropriate." In addition to the gravity of the violation of section 288, subdivision (a), the probation officer noted the victim was a four-year-old cousin and that David's behavior in juvenile hall did not make him amenable to any local program.

The juvenile court considered less restrictive alternatives but found they could not meet David's needs. The court found David's performance at the juvenile facility, coupled with the seriousness of the felony offense, and the absence of a definable local

program that could address the sex offender aspect of David's conduct, combined to make CYA the only viable disposition.

Here, in contrast to *Teofilio A*., the probation report and the juvenile court expressly considered alternatives to CYA. Given the gravity of David's offense, the juvenile court could rationally conclude that CYA was a better disposition for David than sending him to a local program.

We review a commitment decision only for abuse of discretion, indulging all reasonable inferences to support the decision of the juvenile court. (*In re Asean D*., *supra*, 14 Cal.App.4th 467, 473.) We find no abuse in the court's exercise of discretion in its order committing David to CYA.

DISPOSITION

The case is remanded to the juvenile court to expunge the true finding of the section 186.22, subdivision (d) gang enhancement, to reduce the maximum term of David's commitment by the term imposed for this enhancement, and to forward a corrected commitment order to CYA. The orders of the juvenile court are otherwise affirmed.