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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re L.L., a Person Coming Under the Juvenile Court Law.	B226214 (Los Angeles County Super. Ct. No. MJ14339)
THE PEOPLE, Plaintiff and Respondent, v. L.L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Robin Kessler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Vacated and remanded.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

L.L. (appellant) challenges an order by the juvenile court committing him to the Division of Juvenile Facilities (DJF).[1]

Appellant admitted that he had committed lewd acts upon a child (Pen. Code, § 288, subd. (a)) sometime between 2005 and 2006, and had threatened a witness in 2007 (Pen. Code, § 140, subd. (a)). The juvenile court initially placed appellant in a camp community program, but then committed appellant to DJF after appellant admitted to stealing food from a camp refrigerator. In a prior appeal, appellant argued that the juvenile court improperly committed him because the most recent admitted offense of threatening a witness did not qualify him for DJF commitment. (Welf. & Inst. Code, § 733, subd. (c).)[2] The People agreed, as did this court, and accordingly we vacated the commitment order and remanded the matter for proper disposition.

On remand, the juvenile court dismissed the petition that alleged appellant had committed the offense of threatening a witness, and withdrew appellant's admission to that offense. The juvenile court explicitly did this so that the offense of committing lewd

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[1] "Effective July 1, 2005, the correctional agency formerly known as the California Youth Authority (CYA) became known as the Division of Juvenile Facilities (DJF). DJF is part of the Division of Juvenile Justice, which in turn is part of the Department of Corrections and Rehabilitation. (Welf. & Inst. Code, § 1710, subd. (a); Pen. Code, § 6001; Gov. Code, §§ 12838, subd. (a), 12838.3, 12838.5, 12838.13.)" (*In re Jose T.* (2010) 191 Cal.App.4th 1142, 1145, fn. 1.)

[2] Welfare and Institutions Code section 733, subdivision (c) sets forth three categories of juvenile wards who are *ineligible* for commitment to DJF. As relevant here, the statute provides: "A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] . . . [¶] (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." (§ 733, subd. (c).)

All further statutory references are to the Welfare and Institutions Code unless otherwise specified. For brevity, we will hereinafter refer to section 733, subdivision (c) as "section 733(c)" and section 707, subdivision (b) as "section 707(b)."

acts upon a child, which is a DJF qualifying offense, would be appellant's most recent admitted offense. In the present appeal, appellant argues that this was an abuse of discretion. We agree and accordingly vacate the juvenile court's order committing appellant to DJF and remand the matter for proper disposition.

BACKGROUND[3]

In August 2006, appellant admitted that he committed assault with a deadly weapon (Pen. Code, §245, subd. (a)(1)) on or about April 5, 2006, and second degree commercial burglary (Pen. Code, § 459) on or about July 17, 2006. The juvenile court declared appellant a ward of the court under section 602, placed him home on probation, and set the maximum confinement period at five years eight months.

In November 2006, appellant admitted that he committed second degree robbery (Pen. Code, § 211) on or about October 14, 2006. The juvenile court ordered appellant to remain on home probation and set the maximum confinement period at six years eight months.

In December 2006, appellant admitted that he committed second degree robbery (Pen. Code, § 211) on or about September 23, 2006. The juvenile court ordered three months of short-term camp community placement and set the maximum confinement period at seven years eight months.

On October 22, 2007, the Los Angeles County District Attorney (district attorney) alleged in a section 602 petition that, on or about August 20, 2007, appellant: threatened a witness (count 1; Pen. Code, § 140, subd. (a)), and committed simple battery (count 2; Pen. Code, §§ 242, 243, subd. (a)).

Approximately a month later, on November 26, 2007, the district attorney alleged in a section 602 petition that, on or between August 1, 2005 and June 1, 2006, appellant: committed lewd acts upon a child (counts 1, 2 & 3; Pen. Code, § 288, subd. (a)),

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3 The following background mostly comes from our April 12, 2010 decision (B214599 [nonpub. opn.]). We have incorporated additional facts from the record as necessary for the present appeal.

committed oral copulation by threat of future retaliation (count 4; Pen. Code, § 288a, subd. (d)(2)), sodomized a person under 14 years of age (count 5; Pen. Code, § 286, subd. (c)(1)), and dissuaded a witness from reporting a crime (count 6; Pen. Code, § 136.1, subd. (b)(1)).

On December 21, 2007, the juvenile court approved a negotiated plea agreement under which appellant admitted count 1 (threatening a witness) of the October 2007 petition, and counts 1 and 2 (committing lewd acts upon a child) of the November 2007 petition. As part of this agreement, the juvenile court ordered nine months of long-term camp community placement, dismissed the remaining counts on both petitions, and set the maximum term of physical confinement at 14 years eight months.

In August 2008, appellant returned before the juvenile court based on allegations of probation violations contained in a section 777 petition.[4] The petition alleged that appellant had: pushed another minor, broken into a camp refrigerator to remove snacks and cookies, responded to a probation officer with profanity, made noises at bedtime by shouting profanity, and displayed defiance toward probation staff. In November 2008, at the hearing on the alleged probation violations, appellant admitted only to the allegation that he had broken into a camp refrigerator to remove snacks and cookies. The juvenile court stated that camp placement had failed to rehabilitate appellant, and that commitment to DJF would serve the best interests of appellant and the public by providing appellant with sexual offender counseling and "some element of punishment."

Appellant appealed the juvenile court's order committing him to DJF. Appellant argued that the most recent offense to which he admitted was the offense of threatening a witness, which was neither an offense described in section 707(b), nor a sex offense as set forth in Penal Code section 290.008, subdivision (c), as required by section 733(c). The People agreed with appellant's argument on appeal. We agreed, as well, stating in

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4 Section 777 provides authority for a probation officer and/or the People to seek an order changing or modifying a previous placement order if a violation of a condition of probation occurs.

our April 12, 2010 decision that: "'The language of section 733(c) allows commitment to DJF only when "*the most recent offense* alleged in any petition and admitted or found to be true by the court" (italics added) 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."' (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1468.)" We vacated the juvenile court's commitment order and remanded for proper disposition.

At the July 9, 2010 remand hearing, the juvenile court concluded that releasing appellant from DJF would hinder his rehabilitation and endanger the general public. Invoking section 782,[5] the juvenile court dismissed the petition alleging the offense of threatening a witness and withdrew appellant's admission to that offense. The juvenile court then found that appellant was eligible for DJF commitment based on his admission to the earlier offense of committing lewd acts upon a child.[6] Appellant timely appealed from that order.

ANALYSIS

Where, as here, "a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 602, the court may . . . [c]ommit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, if the ward

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[5] Section 782 provides: "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."

[6] Apparently, neither the juvenile court nor the parties realized at the time that the second most recent offense alleged and admitted to by appellant was the offense of robbery, which occurred on or about September 23, 2006. The lewd acts that appellant committed against a child occurred on or about August 1, 2005 and June 1, 2006. This oversight, however, is of no practical consequence for the present appeal because both offenses rendered appellant eligible for DJF commitment.

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).)

As noted earlier, section 733 provides: "A ward of the juvenile court who meets any condition described below shall *not* be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] . . . [¶] (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.)

"The language of section 733(c) allows commitment to DJF only when '*the most recent offense* alleged in any petition and admitted or found to be true by the court' (italics added) 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.'" (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1468.) "The Legislature has specifically determined it is the minor's most recent offense that determines the minor's eligibility for DJF commitment." (*Ibid*.)

The issue presented in this appeal is as follows: When the most recent offense alleged and admitted to be true is a nonqualifying DJF offense, is it an abuse of discretion for a juvenile court to dismiss, pursuant to section 782, the petition alleging that offense so that an earlier qualifying DJF offense can serve as the basis for committing a minor to DJF.

The Third District Court of Appeal's decision in *V.C. v. Superior Court*, *supra*, 173 Cal.App.4th 1455, is on point. In that case, the minor, V.C., admitted to oral copulation of a minor (Pen. Code, § 288a) in 2005. Although that offense qualified him for DJF commitment, the juvenile court elected to place him in a youth center. In 2007, as part of a negotiated plea agreement, V.C. admitted to misdemeanor indecent exposure, a nonqualifying DJF offense. When V.C. violated a term of his probation, the juvenile

court concluded that commitment to DJF was beneficial for both V.C. and the general public. Recognizing that the 2007 misdemeanor offense rendered V.C. ineligible for DJF commitment, the juvenile court dismissed the petition alleging that offense pursuant to section 782 so that the 2005 DJF qualifying offense would become the most recent offense. (173 Cal.App.4th at p. 1461.)

The Court of Appeal concluded the juvenile court had abused its discretion and reversed. The appellate court reasoned that under the plain language of section 733(c), "it is the minor's most recent offense that determines the minor's eligibility for DJF commitment," and *not* "the overall or entire delinquent history of the minor." (173 Cal.App.4th at p. 1468.) Thus, "[d]ismissal of the most recent petition in order to reach back to an earlier petition containing a DJF qualifying offense would be contrary to the unmistakable plain language of section 733(c)." (173 Cal.App.4th at p. 1468.)

Furthermore, the Court of Appeal explained, the legislative history of section 733(c) revealed two goals contemplated by the Legislature when it enacted the statute. First, "the Legislature intended only *currently* violent or serious juvenile offenders to be sent to DJF." (173 Cal.App.4th at p. 1468, italics added.) Second, the Legislature intended section 733(c) to help implement the Budget Act of 2007, which sought, in part, to reduce the number of youth offenders housed in state facilities such as DJF. Permitting a juvenile court "to dismiss a minor's most recently sustained petition for a noneligible offense so that it could have the option of committing the minor to DJF for an eligible offense in an earlier petition" obstructed both of the Legislature's goals.[7] (173 Cal.App.4th at p. 1469.)

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[7] An earlier case, *In re J.L.* (2008) 168 Cal.App.4th 43, reached a contrary result. In that case, the Court of Appeal concluded that it was *not* an abuse of discretion for the juvenile court to dismiss a petition alleging a nonqualifying DJF offense in order commit a minor based on an earlier qualifying DJF offense. We find the decision in *In re J.L.* unpersuasive because the appellate court in that case, unlike in *V.C. v. Superior Court*, reached its decision without considering either the plain language or legislative history of section 733(c). (*J.L.* at pp. 56-57.)

We find the Court of Appeal's reasoning in *V.C. v. Superior Court*, *supra*, 173 Cal.App.4th 1455, persuasive and squarely applicable to this case. Pursuant to section 733(c), appellant became ineligible for DJF commitment when he admitted to the offense of threatening a witness. The trial court's dismissal of the petition alleging that offense for the purpose of rendering appellant eligible for DJF commitment contravened both the plain language and legislative history of section 733(c).

DISPOSITION

The juvenile court's order committing appellant to DJF is vacated and the matter is remanded for proper disposition.[8]

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.

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[8] Appellant's motion to augment the record with a document that was previously lodged with the juvenile court is granted. (Cal. Rules of Court, rule 8.155(a)(1)(A).)