Filed 9/28/10 In re S.W. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re S.W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. S.W., Defendant and Appellant.	G042321 (Super. Ct. No. DL029114) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Donna L. Crandall, Judge. Affirmed.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

S.W. appeals from an order after the juvenile court ordered he serve eight years in the Department of Juvenile Justice for violating Penal Code section 288, subdivision (a). S.W. argues the juvenile court violated his federal constitutional rights by denying him local placement, the court erroneously denied him a continuance to obtain an updated social report, and the sex-offender registration requirement violates his federal constitutional rights. None of his contentions have merit, and we affirm the order.

FACTS

We take the facts of the offense from our prior nonpublished opinion *People v. S.W.* (April 1, 2009, GO40651). Below we provide additional facts as relevant to the issues to this appeal.

Facts of the Offense

C.H. had three biological children, N.N., J.N., and M.H. C.H. was S.W.'s guardian, and he moved in with her and her family in May 2006. S.W. was born on August 7, 1992.

Sometime between August and November 2006, C.H., a registered nurse, left S.W. and less than one-year-old M.H. in the car while she went inside her workplace to get some personal items. S.W. was in the front passenger seat, and M.H. was in a child seat in the back passenger seat facing backwards. C.H. returned approximately 10 minutes later. S.W. was in the backseat holding M.H., and he had unlatched the car seat and pushed it behind the driver's seat. C.H. went to the car's passenger side and asked S.W. what he was doing. C.H. opened the door, and S.W. handed M.H. to C.H. C.H. looked at S.W.'s crotch area and saw the cloth that covered his zipper was flipped open, but the zipper was closed. S.W. got out of the car, and C.H. saw he appeared to have an erection as the tip of his penis was poking at the top of the zipper area. When C.H. asked S.W. what he was doing, he did not respond. C.H. never again left S.W. alone with M.H., and she instructed other family members to never leave them alone together.

Approximately one year later, 19-year-old N.N. was babysitting M.H. when S.W. arrived home and walked into the kitchen. M.H. followed S.W. into the kitchen. When N.N. went into the kitchen approximately 30 seconds later, she saw S.W. with his hand in his pants and he appeared to be stroking his erect penis. S.W. told M.H. to touch his penis. N.N. returned to the living room and she called for M.H. to come to her. A little later, she called her mother and told her what had happened.

After advising him of his *Miranda*[1] rights, Officer Lori Bartel interviewed S.W., who said he had an "'urge'" in the kitchen. S.W. admitted both he and M.H. "handl[ed]" his penis, but he did not have an erection or ejaculate, and N.N. interrupted them. When Bartel asked him how that happened, he could not explain why.

A petition alleged S.W. committed the following acts: Count 1, between June 1, 2006, and June 30, 2006, a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a))[2]; and count 2 on or about September 10, 2007, a lewd act upon a child under the age of 14 (§ 288, subd. (a)). Counts 3 and 4 also alleged these offenses as attempted crimes pursuant to section 664.

Additional Facts

After trial, the juvenile court found counts 1 and 2 true beyond a reasonable doubt,[3] and declared S.W. a ward of the court. The court directed the probation department to prepare a disposition report and ordered an Evidence Code section 730 evaluation.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

[3] Because the court concluded the completed acts were true, the court found counts 3 and 4, the corresponding attempts, not true.

At the dispositional hearing, Probation Officer Maria Lange testified she prepared the dispositional report. She explained that historically juvenile offenders do not get recommended for juvenile hall for more than one year in part because counseling services last no more than one year. Lange recommended S.W. be placed in the Department of Juvenile Justice (the DJJ) because of the nature of the offense and the victim's age, and the minor's age, family and social history, and institutional records concerning his progress and treatment. She also considered important the fact the DJJ could provide a longer period of treatment than a local placement.

An Orange County probation officer in charge of local placement testified there are six placement residences in Orange County. He described the residences as non-secure residences where two residents typically share a room. He said the residences do not have security cameras and there have been instances of consensual and forced sexual activity between residents.

Dr. Laura Brodie, a clinical and forensic psychologist, testified she evaluated S.W. and diagnosed him with bipolar disorder, which includes the symptoms erratic school behavior, kleptomania, and chronic masturbation (all present in S.W.'s case). She opined he was not a predatory sex offender but could become one. Although she stated the DJJ provides the most effective sex-offender treatment available, Brodie believed S.W. should not be placed at the DJJ because he might have to wait for treatment and would be better placed with a psychiatrist.

After hearing argument, the juvenile court stated: "This is a very difficult case because of the need to balance [S.W.'s] best interest against the protection of any potential future victims." The court reasoned it could not "justify keeping him in juvenile hall for another year and a half so that he can have the sexual-offender treatment while he's in the hall." The court stated, "short of a lockdown, one-on-one supervision, [it] just [did not] think that [it] is sufficient for someone with the hypersexuality that [S.W.] has, until he is treated and until we know how he is going to respond to that treatment for both

the bipolar disorder and hypersexuality." The court continued: "[It did not] like the order that [it was] about to make; [it did] not like to send [S.W.] to the [DJJ]. But [it thought] in this case, it is best for [S.W]. It will provide him with the structure that he knows he needs . . . and he will receive the antipsychotic medication for the bipolar disorder that he so sorely needs . . . ." The juvenile court declared S.W. a ward of the court and set the maximum term of confinement as 10 years—eight years on count 1 and two years on count 2. The court ordered S.W. to register as a sex offender pursuant to section 290.

In our prior nonpublished opinion, *People v. S.W.*, *supra,* G040651, we reversed in part, affirmed in part, and remanded with directions. We reversed count 1 because insufficient evidence established S.W. was 14 years old at the time of the offense and that he knew of the wrongfulness of his act. We stated: "On remand, it is possible the juvenile court could commit S.W. to a local juvenile facility, and not to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, in which case he would not be required to register as a sex offender." (*People v. S.W.*, *supra,* G040651, at pp. 7-8.)

In June 2009, the DJJ filed an Individual Change Plan (the Plan) for S.W.[4] The Plan stated that in early 2009, S.W. admitted to molesting his step-brother. The Plan also indicated he continued to have anger management issues as late as March 2009. The Plan explained he had a 3.4 grade point average and "is capable but is not willing to challenge himself." The Plan indicated S.W. worked in the kitchen but was removed for making inappropriate remarks to a youth correctional counselor. Finally, the Plan revealed he suffered some type of disciplinary violation in January 2009.

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[4] We note the cover sheet for the Plan addressed to the juvenile court states it was prepared on June 5, 2009, but indicates it was filed on June 30, 2009. More importantly, the Plan states the case conference date was March 26, 2009, and the Plan was prepared on April 6, 2009.

On remand at the dispositional hearing on June 30, 2009, the juvenile court indicated the matter was remanded because this court reversed its finding on count 1, and the court dismissed count 1. Defense counsel requested the juvenile court do the following: (1) sentence S.W. to local time rather than the DJJ; (2) grant a one-month continuance to investigate S.W.'s background; and (3) sentence him to three years instead of eight years. The district attorney argued that although the court dismissed count 1, the court could consider the underlying conduct pursuant to Evidence Code section 1108. Defense counsel responded the court should not consider the conduct pursuant to Evidence Code section 1008 because there was no evidence he knew what he was doing was wrong.

The juvenile court ruled as follows: "The court did hear the evidence and the court does feel that the commitment to [the DJJ] was appropriate at the time based on the evidence that was presented at trial. And based on the evidence as well as the progress review, which I have received on June 5th from the [DJJ], I believe [S.W.] is really progressing well. I think he is doing well. [¶] I doubt that you like what you are doing, that you are enjoying it, but I do think you are making really good progress in the program. So I am not inclined to give a local commitment. [¶] I am not inclined to give time to get more information. We had a[n] [Evidence Code section] 730 evaluation. And the court is pretty familiar with [S.W.] and his background. And I think I have enough information to be able to make an intelligent and well-reasoned decision. I do believe that [S.W.] is better served at the [DJJ]. [¶] And so I will order that he be committed to the [DJJ] on count 2, which has a maximum period of confinement of eight years. I will order that his maximum term of confinement not exceed that which would be served by an adult convicted of the offense, which is eight years." The court stated that pursuant to Welfare and Institutions Code section 734, S.W. would benefit from time at the DJJ. The juvenile court required S.W. to register pursuant to section 290.008.

DISCUSSION

I. Local Placement

S.W. argues the trial court erroneously denied him local placement. Not so.

"The purpose of juvenile delinquency laws is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . .' ([Welf. & Inst. Code,] § 202, subds. (a), (b) & (d); . . . .) [¶] To accomplish these purposes, the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of [the juvenile court law] . . . ." ([Welf. & Inst. Code,] § 202, subd. (b).) (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615.)

"The appellate court reviews a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. [Citation.] Nonetheless, there must be evidence in the record demonstrating both a probable benefit to the minor by a [DJJ] commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. [Citations.] A [DJJ] commitment may be considered, however, without previous resort to less restrictive placements. [Citations.]" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.)

Here, the juvenile court considered what was in S.W.'s and the public's best interests and properly concluded the DJJ was the better placement because of the progress he had made there and the structure the DJJ provided. At the first dispositional hearing, the court heard evidence the local placement residences could provide treatment for up to one year while the DJJ provided the ideal treatment for a longer period of time. Additionally, there was evidence the local placement residences did not provide the same

structure as the DJJ. Although the court noted it was a very difficult decision, the court reasoned the DJJ was the better placement because S.W. could be treated for both his hypersexuality and bipolar disorder. At the second dispositional hearing, the juvenile court reiterated that it recalled the evidence presented at trial, which included the dispositional report, the Evidence Code section 730 evaluation, and the testimony offered at the first dispositional hearing, and continued to be of the opinion placement at the DJJ was in S.W.'s best interest. The court reviewed the Plan and opined S.W. was making progress at the DJJ and that a local placement was not in S.W.'s best interest.

Based on the entire record, we conclude there was sufficient evidence supporting the juvenile court's order placing S.W. at the DJJ. The evidence demonstrated the DJJ provided the most effective treatment program for sex offenders and for his bipolar disorder. The evidence also demonstrated the DJJ could provide treatment for a longer period of time than a local placement residence, and the DJJ provided more structure than a local placement residence. Implicit in the court's placement order is the finding placement at a local residence would be less effective than placement at the DJJ. "[T]he court [does not] necessarily abuse its discretion by ordering the most restrictive placement before other options have been tried. [Citation.]" (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.)

S.W. argues that on remand the juvenile court did not consider the value of local placement and considered the conduct underlying count 1, the reversed count, without considering its non-lewd nature. As to his first claim, S.W. asserts the juvenile court failed to consider he had no prior record, the progress he made at the DJJ could be replicated at a local facility, and he demonstrated the ability to comply with facility rules. The purpose of juvenile delinquency laws is rehabilitation and the fact S.W. had no prior record is not dispositive. Additionally, based on the record before us, we are not convinced the progress he made at the DJJ could be replicated at a local placement. As we explain above more fully, the evidence demonstrated the DJJ provided the more

effective and comprehensive treatment program. Finally, we disagree S.W. complied with the facility rules as there was evidence he was terminated from his kitchen job for making inappropriate comments to a counselor and he suffered one disciplinary violation.

With respect to his second claim, S.W. claims the juvenile court relied on count 1, the reversed count, at the second dispositional hearing. He cites to the court's comment, "The court did hear the evidence and the court does feel that the commitment to [the DJJ] was appropriate at the time based on the evidence that was presented at trial." Again, we are not convinced. We interpret the court's comment to refer to that evidence concerning count 2. At the beginning of the second dispositional hearing, the court acknowledged this court reversed the juvenile court's finding on count 1.

Additionally, S.W. makes much of the fact that in our prior nonpublished opinion we stated: "On remand, it is possible the juvenile court could commit S.W. to a local juvenile facility, and not to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, in which case he would not be required to register as a sex offender." (*People v. S.W., supra,* G040651, at pp. 7-8.) He reads too much into our statement as it was nothing more than a comment on what the court may do on remand.

Finally, in his reply brief, S.W. cites to Welfare and Institutions Code section 280,[5] for the first time, to argue the juvenile court's decision was not based on a current social study. We generally disregard arguments raised for the first time in a reply brief absent a showing as to why they could not have been made earlier because it deprives the respondent the opportunity to respond. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005.) In any event, the juvenile court had the benefit of the first dispositional report, the Evidence Code section 730 evaluation, and the then recently

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[5] Welfare and Institutions Code section 280 provides: "It shall be the duty of the probation officer to prepare for . . . a hearing as provided by Section 702, a social study of the minor, containing such matters as may be relevant to a proper disposition of the case. The social study shall include a recommendation for the disposition of the case." (Cal. Rules of Court, rule 5.785 [accord].)

prepared Plan that was prepared in April 2009, just two months before the dispositional hearing. Thus, the juvenile court properly ordered S.W. placed with the DJJ.

II. Continuance

S.W. contends the trial court erroneously denied his motion to continue. We disagree.

"A continuance in a criminal trial may only be granted for good cause. [Citation.] 'The trial court's denial of a motion for continuance is reviewed for abuse of discretion.' [Citation.] 'There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) "The grant or denial of a motion for a continuance rests within the sound discretion of the trial judge [citations]. The trial court's decision whether or not to grant a continuance will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citations.] Discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citation.]" (*In re Lawanda L.* (1986) 178 Cal.App.3d 423, 428.)

Here, in presenting his three requests, S.W.'s counsel stated as relevant to this issue: "If the court is not willing to [order local placement], [his] second alternative request is for the court to consider allowing us time to gain more information about [S.W.], his background and possibly continue the sentencing hearing for a month or so to do that, present more information to the court." The juvenile court responded: "I am not inclined to give time to get more information. We had a[n] [Evidence Code section] 730 evaluation. And the court is pretty familiar with [S.W.] and his background. And I think I have enough information to be able to make an intelligent and well-reasoned decision."

First, S.W.'s counsel made no offer of proof as to what material information he hoped to discover as a result of a continuance. Counsel merely requested time to acquire "background" information about S.W. Similarly, in his appellate briefs S.W. fails to specify what information he hoped to discover as a result of a continuance. Additionally, the juvenile court had before it the dispositional report, the Evidence Code section 730 evaluation, and then recently prepared Plan, and thus S.W. was not prejudiced. (*In re Eugene R.* (1980) 107 Cal.App.3d 605 [substantial compliance with Welfare and Institutions Code section 280 requirement of current social study], disapproved on other grounds in *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 115; but see *In re L. S.* (1990) 220 Cal.App.3d 1100 [court's failure to consider Welfare and Institutions Code section 280 social study not subject to harmless error analysis], abrogated on other grounds in *People v. Bullock* (1994) 26 Cal.App.4th 985, 989.) Based on the court's familiarity with the proceedings and extensive information it had before it, we conclude the court properly denied the continuance request as S.W. did not establish good cause for additional time.

S.W. makes much of the fact the reports the juvenile court considered, including the Plan, stated he committed two counts of lewd conduct. As we explain above, it is clear from the record the juvenile court was aware of and considered the fact he committed only one count of lewd conduct.

S.W. also relies on *In re Deon W.* (1998) 64 Cal.App.4th 143, to argue the juvenile court was required to grant a continuance to obtain an updated social study. *Deon* is inapposite as in that case the juvenile court refused minor's request for a contested dispositional hearing and current social study. Here, S.W. had a contested dispositional hearing and the juvenile court had before it the Plan that was prepared just two months before the hearing. Thus, the juvenile court properly denied S.W.'s request for additional time to obtain a social study, and his federal constitutional rights were not implicated.

III. Sex-Offender Registration

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), S.W. claims imposition of section 290.008's sex-offender registration, and section 3003.5's residency restrictions "violate[d] [his] fundamental property rights and other constitutional rights without benefit of a jury trial."

Section 290.008, subdivisions (a) and (c), require a minor must register as a sex offender if made a ward as a result of a violation of, among other statutes, section 288 and committed to DJJ. Section 3003.5, subdivision (b), provides, in relevant part: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to [s]ection 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

Both parties spend much time discussing whether sex-offender registration and residency restrictions are punishment for purposes of *Apprendi* and *Blakely* analysis. S.W. concedes sex-offender registration has been held not to be punishment. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196-1197; *In re Alva* (2004) 33 Cal.4th 254, 287-292; *People v. Castellanos* (1999) 21 Cal.4th 785, 804.)

As to Jessica's Law's residency restrictions, it does not impose punishment for the offense that gives rise to sex-offender registration but rather for conduct that occurs after the commission of, or the conviction for, the registerable offense and S.W. is not entitled to a jury trial. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4; *In re E.J.* (2010) 47 Cal.4th 1258, 1280.) If it is punishment, the holdings of *Blakely* and *Apprendi* rest on the federal constitutional right to a jury trial under the Sixth Amendment, a right not possessed by juveniles. (*McKeiver v. Pennsylvania* (1971) 403 U.S. 528; *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1225.) All questions in a juvenile case, including questions of guilt, are determined by the juvenile court. *Blakely* and *Apprendi* therefore have no application to juvenile court proceedings.

In any event, any error was harmless. There was overwhelming evidence of S.W.'s guilt as to count 2, and we conclude beyond a reasonable doubt that had the question been presented to the jury, it would have concluded S.W. committed count 2, and thus he should be subject to sections 290.008 and 3003.5. (*Washington v. Recuenco* (2006) 548 U.S. 212, 222.)

DISPOSITION

The order is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J