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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JOSHUA S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOSHUA S., Defendant and Appellant.	A128295 (Contra Costa County Super. Ct. Nos. J-09-00693, J-09-00636)

Joshua S. appeals from orders of the juvenile court revoking his probation. He contends the court erred in denying his motion to suppress evidence obtained as a result of an unlawful detention; failed to exercise its discretion to grant or deny deferred entry of judgment; and failed to make a finding as to whether his possession of concentrated marijuana was a felony or a misdemeanor. We agree that the motion to suppress was properly denied, but conclude the orders must be reversed and the matter remanded for the juvenile court to determine whether to grant or deny deferred entry of judgment and to determine the nature of the marijuana offense.

STATEMENT OF THE CASE

On April 29, 2009, a wardship petition was filed in San Francisco Juvenile Court (case No. JW 09-6258) alleging that appellant, then 16 years old, came within the

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of section entitled Statement of Facts, and Discussion section, parts I and III.

provisions of Welfare and Institutions Code[1] section 602 on the basis of two offenses, possession of cocaine base for sale (Health and Saf. Code, § 11351.5) and falsely representing identity to a peace officer (Pen. Code, § 148.9). He was determined to be eligible for Deferred Entry of Judgment (DEJ).

On May 8, 2009, a wardship petition was filed in Contra Costa County Juvenile Court (J09-00693) alleging a violation of Penal Code section 69, resisting an executive officer. Appellant was determined eligible for DEJ. On May 11, the petition was amended to add two counts of misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)). Appellant admitted the two misdemeanors and the Penal Code section 69 charge was dismissed. On May 26, he was adjudged a ward and placed on probation, to reside in the home of his mother.

On May 27, 2009, appellant denied the allegations of the San Francisco petition. The matter was continued several times, and on September 10 appellant filed a motion to suppress evidence. The motion was heard and denied on November 10. On the prosecutor's motion, count 1 (possession of cocaine base for sale) was amended to allege that appellant acted as an accessory to a felony (Pen. Code, § 32) and count 2 (falsely representing identity to a peace officer) was dismissed. Appellant admitted the amended count 1, a felony. The case was transferred to Contra Costa County for disposition (renumbered J09-00636) and appellant was released to his mother's custody.

On December 4, 2009, a petition was filed in Alameda County Juvenile Court (SJ09013871-01) alleging four felony counts, possession of marijuana for sale (Health & Saf. Code, § 11359), two counts of transportation or sale of marijuana (Health & Saf. Code, § 11360, subd. (a)), and unlawful carrying of a loaded firearm (Pen. Code, §12031, subd. (a)(1)). Appellant was determined to be eligible for DEJ. Appellant filed a motion to suppress evidence, which was apparently not heard by the court. Rather, on December 29, count 1 of the petition was amended to allege possession of cannabis (Health & Saf.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Code, § 11357, subd. (a)), appellant admitted this allegation and the other counts were dismissed. Appellant was detained at Juvenile Hall and the case was transferred to Contra Costa County for disposition.

In Contra Costa County, the San Francisco and Alameda cases were consolidated for disposition and the San Francisco case was consolidated with the Contra Costa lead case (J09-00693). On January 27, 2010, the court continued appellant as a ward and committed him to the Orin Allen Youth Rehabilitation Facility for six months, with an additional 90 day conditional release/parole period. On February 10, the court found appellant's maximum custody time to be four years and four months and awarded him 90 days of custody credit.

Appellant filed a timely notice of appeal on April 2, 2010.

STATEMENT OF FACTS[*] [2]

On Sunday, April 26, 2009, San Francisco police officers Moylan, Montero and Lew, in plain clothes, were on duty in the area of 400 Ellis Street in San Francisco as part of a narcotics surveillance operation. The area is residential with some businesses and, on a Sunday afternoon, has a lot of "foot traffic." All the officers had experience with narcotics surveillance and described the area as known for narcotics transactions. As Officer Moylan put it, "more base rock cocaine gets sold and used in that area, that corner [the northwest corner of Ellis and Jones], that intersection than any block in San Francisco."

At about 2:30 that afternoon, Officer Moylan, using binoculars, observed appellant and another minor "hanging out" on the northwest corner of Ellis and Jones. Moylan testified, "They were looking around, and it kind of caught my attention. First of all by their stature, they are both short. And they look young, like they were juveniles. [¶] I've done a lot of surveillance in that area. I've watched a lot of people sell drugs, buy drugs.

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[*] See footnote, *ante*, page 1.

[2] Only the facts related to the San Francisco County petition are related here, as the facts underlying the other petitions are not relevant to the issues on appeal.

I've . . . been doing it for a long time. [¶] I saw them interacting with individuals who were hanging out in the area. Then I saw them walk into the [corner] store. . . . They walked out of the store, and they, to me, they didn't purchase anything. That kind of caught my attention." The people with whom the minors were interacting were much older and, based on Moylan's training and experience, appeared to be users of base rock cocaine. Moylan notified Officers Conway, Lew, and Montero and instructed them to detain the minors to identify them and see "what was going on." He had not seen appellant holding or possessing any controlled substance, handling cash, or exchanging anything with the people the officer believed to be cocaine users; he had not seen those people smoking crack; and his position had not permitted him to hear anything appellant was saying or to see inside the corner store.

In response to Officer Moylan, Officers Montero, Conway, and Lew drove to the area and contacted appellant and the other minor in the 300-block of Jones. Montero approached the other minor, identified himself as a police officer and asked if he could talk with him, where he was from and what his name was. The minor attempted to say something that Montero could not make out and Montero noticed white rocks in the minor's mouth which, based on his training and experience, Montero believed to be cocaine base. This occurred less than a minute into the encounter. Montero "deployed a mastoid technique" and ordered the minor to spit out the rocks in order to prevent the minor from swallowing them. The minor spit out 18 rocks, which Montero seized from the ground.

As Officer Montero approached the other minor, Officer Lew approached appellant, identified himself as a police officer and asked if he could speak with him. Appellant said, "yeah." Lew told appellant he wanted to speak with him based on the information Officer Moylan had relayed about his observations, and asked appellant's name and age, which appellant provided. As he was about to ask appellant where he lived, Lew looked over and saw the other minor spitting rocks of cocaine onto the sidewalk, within 10 feet of where Lew and appellant were standing. Lew told appellant, "[I]f you got any drugs in your mouth, spit it out now. I don't want [] you [to] swallow it

and kill yourself trying to swallow drugs." Appellant spit one rock of what Lew believed to be rock cocaine onto the sidewalk. Lew asked if appellant had any more, reiterating that appellant could hurt or kill himself if he swallowed drugs. Appellant opened his mouth to show there was nothing else there. Lew arrested appellant and placed him in handcuffs, then collected the rock from the ground. Lew and Montero walked appellant and the other minor to the police station half a block away. There, Lew found four additional pieces of cocaine base in the other minor's pocket.

DISCUSSION

I.[*]

Appellant contends his motion to suppress should have been granted because his detention was unlawful and resulted in an unconstitutional search and seizure. "The standard of review of a trial court's ruling on a motion to suppress is well established and is equally applicable to juvenile court proceedings. ' "On appeal from the denial of a suppression motion, the court reviews the evidence in a light favorable to the trial court's ruling. [Citation.] We must uphold those express or implied findings of fact by the trial court [which] are supported by substantial evidence and independently determine whether the facts support the court's legal conclusions." [Citation.]' (*In re William V.* (2003) 111 Cal.App.4th 1464, 1468.)" (*In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1236; *People v. Hoyos* (2007) 41 Cal.4th 872, 891.)

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. (*Wilson v. Superior Court* (1983) 34 Cal. 3d 777, 784; *In re James D.* (1987) 43 Cal.3d 903, 911-912.)" (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) "[A] consensual encounter between a police officer and an individual does not implicate the Fourth Amendment. It is well established that law enforcement

[*] See footnote, *ante*, page 1.

officers may approach someone on the street or in another public place and converse if the person is willing to do so. There is no Fourth Amendment violation as long as circumstances are such that a reasonable person would feel free to leave or end the encounter. (*Florida v. Bostick* (1991) 501 U.S. 429, 434–435; *Florida v. Royer* (1983) 460 U.S. 491, 497; *In re Manuel G.*[, *supra,*] 16 Cal.4th at p. 821.)" (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) By contrast, in order to justify a detention, the police officer must have an objectively reasonable suspicion that the person detained is involved in criminal activity that has occurred, is occurring, or is about to occur. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.)

Appellant contends that the objective circumstances of his encounter with Lew demonstrate it was not consensual. He argues the encounter was a detention from its inception or, at least, became a detention when Lew asked him about his activities in the area.

The United States Supreme Court has explained, "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California v. Hodari D.* [(1991)] 499 U.S. 621, 628, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in *Terry v. Ohio* [(1968)] 392 U.S. 1, 19, [f]n. 16: 'Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'

"Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure. In *Florida v. Royer* [, *supra,*] 460 U.S. 491 (plurality opinion), for example, we explained that 'law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his

voluntary answers to such questions.' (*Id*. at 497; see *id*. at 523, [f]n. 3 (Rehnquist, J., dissenting)." (*Florida v. Bostick, supra,* 501 U.S. at p. 434.)

Here, prior to Officer Lew observing the other minor spitting rocks of cocaine out of his mouth, all that had happened was that Officer Lew approached appellant while another officer approached the other minor; Lew asked if he could speak to appellant and appellant responded affirmatively; Lew told appellant he wanted to speak with him "based on the information that Officer Moylan relayed to [Lew] about [appellant's] action in the area"; appellant provided his name and age in response to questions from Lew; and Lew asked where appellant lived. Nothing about this encounter suggests it was a detention. Officer Lew merely approached appellant and asked questions that appellant was apparently willing to answer. "There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice." (*United States v. Drayton* (2002) 536 U.S. 194, 203-204.)

Appellant argues that being confronted by police officers who showed their badges and identified themselves as officers reasonably conveyed to "the physically diminutive minors" that they were not free to leave. He cites *Kaupp v. Texas* (2003) 538 U.S. 626, 630-631, as holding that a suspect's youth is a factor to consider in determining whether the youth reasonably feels not free to terminate an encounter with police. *Kaupp* held that a 17-year-old was arrested within the meaning of the Fourth Amendment when he was "awakened in his bedroom at three in the morning by at least three police officers, one of whom stated ' "we need to go and talk," ' " and taken in handcuffs, without shoes, wearing only underwear, in January, driven in a patrol car to the scene of the crime and then to the sheriff's office, and questioned in an interrogation room. (*Id.* at pp. 630-631.) While *Kaupp* mentioned the defendant's age in its description of the facts, that description makes clear that much more than his age was at play in finding he was effectively arrested. Absent other factors, that a police officer identifies himself and shows his badge does not constitute a seizure. (*United States v. Drayton, supra,* 536 U.S. at p. 204.) Appellant apparently attempts to portray himself as particularly vulnerable by

describing himself and his companion as "diminutive," but the record reflects only Officer Moylan's description that they were both "short" in stature and looked "young, like they were juveniles." In the present case, the officers' conduct and appellant's age reveal nothing but an ordinary encounter between a police officer and a minor on a sidewalk.

Nor does the record support appellant's contention that the encounter was a detention because the officers blocked the minors from "easily exiting the area." To be sure, as appellant argues, whether police hamper a suspect's ability to leave the area of the encounter is a factor to be considered in determining whether the encounter was consensual. In *United States v. Drayton, supra,* 536 U.S. at pages 203-204, finding that police officers questioning passengers on board a bus as part of a routine drug and weapons interdiction effort did not amount to a seizure, the court noted, among other things, that the officers left the bus aisles free so that passengers could disembark if they chose. Conversely, *People v. Wilkins* (1986) 186 Cal.App.3d 804, 809, held that occupants of a parked car were "seized" when a police officer stopped his patrol vehicle behind the car so as to prevent it from leaving. Here, appellant maintains that the officers' positions, in relation to the minors and the building behind them, blocked the minors from leaving the police. Officer Montero testified that he made contact with the other minor "[m]idway down the block," with the minor between Montero and the building line. Appellant was to the north of Montero, between five and ten feet away. Appellant does not explain how the police officers' presence on the street side of the sidewalk in the middle of the block prevented him from being able to walk away to his right or to his left.

Finally, appellant contends that, at a minimum, the encounter became a detention when Officer Lew told him he wanted to speak based on the information another officer relayed about appellant's "action in the area." According to appellant, while he was willing to respond to Lew's questions about his identity and age, he said nothing in response to Lew's statement that he wanted to talk about appellant's " 'action in the area,' " thereby "indicating a lack of consent to continue the conversation along those

lines." Appellant urges that Lew's statement about appellant's activities "objectively conveyed a threat of arrest and prosecution that objectively produced the perception of restricted liberty in the minor's encounter with Lew."

Appellant draws upon *Wilson v. Superior Court, supra*, 34 Cal.3d 777, 791, footnote 11, which held that an encounter in which a police officer asked to speak to the defendant, who was standing at the open trunk of his car outside an airport terminal where he had just arrived on a flight from Florida, became a detention when the officer advised the defendant that he was conducting a narcotics investigation and had received information " 'that he would be arriving today from Florida carrying a lot of drugs.' " (*Id.* at p. 781, italics omitted.) The court explained that a reasonable person confronted with this statement from a police officer would not feel free to leave: "Before [the officer] made that statement, Wilson might well have thought that the officer was simply pursuing routine, general investigatory activities, and might reasonably have felt free to explain to the officer that he had an important appointment to keep and did not have the time—or, perhaps, the inclination—to answer the officer's questions or to comply with his requests for permission to search. Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion." (*Id.* at pp. 790-791.) The *Wilson* court explained that a reasonable person would be more likely to view the circumstances as a seizure when the officer asks about specific criminal acts than when the officer asks about "facts unrelated to a particular crime or class of crimes," noting, " 'It is the threat of arrest and prosecution that produces the perception of restricted liberty in a police-citizen encounter, and that perception is more likely to arise when conduct of the police is linked to the investigation of specific criminal activity.' " (*Id.* at p. 791, fn. 11, quoting Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest*" (1982) 43 Ohio St. L.J. 771, 795, 802.)

Unlike the situation in *Wilson*, Officer Lew did not directly accuse appellant of a crime. In *People v. Daugherty* (1996) 50 Cal.App.4th 275, 280, a police officer

approached the defendant at an airport, identified himself as a police officer and asked to speak with her, advising her that she was free to leave at any time but he had some questions for her if she did not mind. In response to the officer's requests, the defendant provided her name and airline ticket, which the officer looked at and returned. (*Ibid.*) The officer then told the defendant that he and his partner worked in the narcotics unit and only interviewed people they suspected of transporting narcotics through the airport. (*Ibid.*) The defendant consented to a search of her carry on bag but not to her checked luggage, at which point, the officer stated that he suspected her of transporting narcotics and detained her. (*Ibid.*) Of significance to the present case, *Daugherty* held that the defendant was not detained at the point the officer told her he only interviewed people suspected of transporting narcotics because this was not a direct accusation and the circumstances did not otherwise indicate compliance was required. (*Id.* at p. 285.)

Similarly, here, Officer Lew told appellant why he wanted to talk with him but did not accuse him of committing a crime. The questions the officer asked were permissible, general investigatory ones. Prior to the point Lew saw the other minor spit out cocaine rocks, there was no detention. At this point, appellant concedes the officer's observation "arguably" supported a reasonable suspicion that appellant also had cocaine rocks in his mouth. The conclusion is more than arguable. Regardless of whether the initial observations of appellant and his companion would have been sufficient to justify a detention in and of themselves, coupled with the observation of the companion in possession of cocaine, Lew unquestionably had a reasonable basis for suspecting appellant was also in possession of a controlled substance. Thus, at the point the cocaine in appellant's possession was discovered, he was not unlawfully detained. The motion to suppress evidence was properly denied.

II.

Appellant contends the juvenile court orders must be reversed and the matter remanded because the court failed to exercise its mandatory discretion to grant or deny DEJ in the San Francisco and Alameda County cases.

" 'The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)' " (*In re Kenneth J.* (2008) 158 Cal.App.4th 973, 976, quoting *Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558; *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1121-1122.) Although, as will be discussed, the decision to grant DEJ is a matter of discretion for the juvenile court, appellate courts have concluded that the procedures for considering DEJ reflect a "strong preference for rehabilitation of first-time nonviolent juvenile offenders" and limit the court's power to deny DEJ such that denial of DEJ to an eligible minor who wants to participate is proper only when the trial court finds " 'the minor would not benefit from education, treatment and rehabilitation.' " (*In re A.I.* (2009) 176 Cal.App.4th 1426, 1434, quoting *Martha C. v. Superior Court*, *supra*, 108 Cal.App.4th at p. 561.)[3]

[3] " 'While section 790 et seq. might be clearer on the matter, we conclude such denial [of DEJ to an eligible minor] is proper only when the trial court finds the minor would not benefit from education, treatment[,] and rehabilitation. [¶] Proposition 21 contains a noncodified section entitled Findings and Declarations; subdivision (j) of those findings states: "Juvenile court resources are spent disproportionately on violent offenders with little chance to be rehabilitated. If California is going to avoid the predicted wave of juvenile crime in the next decade, greater resources, attention, and accountability must be focused on less serious offenders such as burglars, car thieves, and first time non-violent felons who have potential for rehabilitation. This act must form part of a comprehensive juvenile justice reform package which incorporates major commitments to already commenced 'at risk' youth early intervention programs and expanded informal juvenile court alternatives for low-level offenders. These efforts, which emphasize rehabilitative protocols over incarceration, must be expanded as well

"Section 790 makes a minor eligible for DEJ if all the following circumstances exist: [¶] '(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.' (§ 790, subd. (a)(1)-(6).)" (*In re Kenneth J., supra,* 158 Cal.App.4th at pp. 976-977, fn. omitted; Cal. Rules of Court, rule 5.800(a); *In re Luis B., supra,* 142 Cal.App.4th at p. 1122.)

Rule 5.800(b) of the California Rules of Court[4] directs: "Before filing a petition alleging a felony offense, or as soon as possible after filing, the prosecuting attorney must review the child's file to determine if the requirements of [subdivision] (a) are met. If the prosecuting attorney's review reveals that the requirements of [subdivision] (a) have been met, the prosecuting attorney must file *Determination of Eligibility—Deferred Entry of Judgment—Juvenile* (form JV-750) with the petition." The prosecutor must also make available to the minor and defense counsel "the grounds upon which the determination [of eligibility] is based." (§ 790, subd. (b).)

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under the provisions of this act, which requires first time, non-violent juvenile felons to appear in court, admit guilt for their offenses, and be held accountable, but also given a non-custodial opportunity to demonstrate through good conduct and compliance with a court-monitored treatment and supervision program that the record of the juvenile's offense should justly be expunged." . . . [¶] These findings express not only a strong preference for rehabilitation of first-time nonviolent juvenile offenders but suggest that under appropriate circumstances DEJ is required. This strong preference for rehabilitation and the limitation on the court's power to deny delayed entry of judgment are reflected in the procedures used in considering DEJ.' " (*In re A.I., supra,* 176 Cal.App.4th at pp. 1433-1434, quoting *Martha C., supra,* 108 Cal.App.4th at p. 561, italics omitted.)

[4] All further references to rules will be to the California Rules of Court.

"If the minor consents and waives his or her right to a speedy jurisdictional hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment." When directed by the court, the probation department must investigate and consider specified factors, determine what programs would accept the minor and report its findings and recommendations to the court. (§ 791, subd. (b).)

"The court shall make the final determination regarding education, treatment, and rehabilitation of the minor." (§ 791, subd. (b).) Upon a finding that the minor is also suitable for deferred entry of judgment and would benefit from education, treatment, and rehabilitation efforts, the court may grant deferred entry of judgment." (§ 790, subd. (b).)

The court thus "has the ultimate discretion to rule on the suitability of the minor for DEJ after consideration of the factors specified in [former rule 1495(d)(3) [now rule 5.800(d)] and section 791, subdivision (b), and based upon the ' "standard of whether the minor will derive benefit from 'education, treatment, and rehabilitation' rather than a more restrictive commitment. [Citations.]" ' (*Martha C. v. Superior Court, supra,* 108 Cal.App.4th 556, [561-]562, italics omitted, quoting from *In re Sergio R.* (2003) 106 Cal.App.4th 597, 607.) The court may grant DEJ to the minor summarily under appropriate circumstances (rule 1495(d) [now rule 5.800(d)]), and if not must conduct a hearing at which 'the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.' (Rule 1495(f) [now rule 5.800(f)], italics added.)" (*In re Luis B., supra,* 142 Cal.App.4th at p. 1123.)

"While the court retains discretion to deny DEJ to an eligible minor, the duty of the prosecuting attorney to assess the eligibility of the minor for DEJ and furnish notice with the petition is mandatory, as is the duty of the juvenile court to either summarily grant DEJ or examine the record, conduct a hearing, and make 'the final determination regarding education, treatment, and rehabilitation . . . .' (§ 791, subd. (b); see also § 790, subd. (b); [former rule 1495(b), (d) & (f), now rule [5.800](b), (d) & (f); *Martha C. v.*

Superior Court, supra, at p. 559.) . . . ." The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold eligibility determination is made. (*Id*. at p. 604.)" (*In re Luis B., supra,* 142 Cal.App.4th at p. 1123.)

Luis B. reversed orders entered after jurisdictional and dispositional hearings because the prosecutor had failed to determine the minor's eligibility for DEJ and provide notice, and the court failed to conduct the required hearing and exercise discretion to determine whether the minor was suitable for DEJ. (*Luis B., supra,* 142 Cal.App.4th at p. 1123.) Here, the prosecutor in the San Francisco case filed JV-750, "Determination of Eligibility–Deferred Entry of Judgment–Juvenile," as required by California Rules of Court, rule 5.800(b). The prosecutor also filed JV-751, "Citation and Written Notification for Deferred Entry of Judgment–Juvenile," directed to appellant and his mother, ordering appellant to appear on May 8, 2009, for the hearing on whether to grant DEJ. The prosecutor in the Alameda County case also filed JV-750. Appellant's complaint is that the court did not make the determination required by sections 790 and 791 in either case.

Relying upon *In re Kenneth J., supra,* 158 Cal.App.4th 973, and *In re Usef S.* (2008) 160 Cal.App.4th 276, respondent maintains the court properly did not consider appellant for DEJ because appellant did not admit the allegations of the petitions but rather moved to suppress evidence and then negotiated a plea agreement to reduced charges. In *In re Kenneth J.*, after the prosecutor filed a wardship petition and determination that the minor was eligible for DEJ, and gave notice to the minor and his guardian of this determination, the minor requested a jurisdictional hearing and filed a motion to suppress evidence. The motion was heard at the contested jurisdictional hearing and denied at the conclusion of that hearing, after which the court sustained the allegations of the petition. In response to the claim on appeal that reversal was required because the juvenile court failed to hold a hearing on whether to grant DEJ, we explained: "Kenneth's approach erroneously assumes that a juvenile court can start the DEJ process in the teeth of the minor's opposition—in effect, that the DEJ procedure can

be forced on an unwilling minor. That is clearly illogical, as there is nothing in the statutory language of section 791 or rule 5.800 which suggests that a minor can be compelled to accept DEJ. Or to put it conversely, the language in the statute and rule 5.800 requires some measure of consent.

"It is perhaps true the DEJ statutes make no express provision for a minor in Kenneth's position, one who is advised of his DEJ eligibility, who does not admit the charges in the petition or waive a jurisdictional hearing, and who does not show the least interest in probation, but who insists on a jurisdictional hearing in order to contest the charges. But the DEJ is clearly intended to provide an expedited mechanism for channeling certain first-time offenders away from the full panoply of a contested delinquency proceeding. That goal could not coexist with a minor who insists on exercising every procedural protection offered, and who then on appeal faults the juvenile court for not intervening and short circuiting those very protections. This would place a juvenile court in an impossible 'Heads he wins, tails I lose' situation—not to mention apparently compelling a juvenile court to hold a hearing to consider DEJ for a minor who evinces no interest whatsoever in that option. We decline to adopt such a mischievous, if not self-defeating, construction." (*In re Kenneth J., supra,* 158 Cal.App.4th at p. 980.)

In re Usef S. followed *Kenneth J.* in concluding the juvenile court did not err in failing to hold a hearing to determine the minor's eligibility for DEJ "once it became clear [the minor] was not admitting the allegations against him, but rather was insisting on contesting them at a jurisdictional hearing." (*In re Usef S., supra,* 160 Cal.App.4th 276, 286, fn. omitted.)

Appellant did not initially admit the allegations of the petition, but neither did he insist on a jurisdictional hearing. Rather, he filed a motion to suppress evidence and, after it was denied, admitted a reduced charge. To apply the conclusions of *Kenneth J.* and *Usef S.* in this situation would be to require a minor to choose between taking advantage of the DEJ procedures and exercising his or her constitutional right to challenge an allegedly unlawful search and seizure.

In re A.I., supra, 176 Cal.App.4th 1435 refused to condone this result: "The People acknowledge that *Morse v. Municipal Court* (1974) 13 Cal.3d 149 (hereafter *Morse*) held diversion—the adult analog of DEJ—'requires the district attorney to refer a case to the probation department if a defendant, who has previously been determined eligible under [Penal Code] section 1000, consents to diversion and waives his right to a speedy trial *at any time prior to the commencement of trial*. Defendants eligible for diversion may tender usual pretrial motions prior to their expression of consent to consideration for diversion.' ([*Morse*]., at p. 160, original italics, fn. omitted.) *Morse* involved a motion to suppress evidence. (*Id.* at p. 153; Pen. Code, § 1538.5.) [¶] Applying *Morse* in the context of juvenile DEJ leads to the conclusion that a minor may first litigate a suppression motion and then, after its denial, accept DEJ." (*In re A.I., supra,* 176 Cal.App.4th at p. 1434.) *In re A.I.* distinguished *In re Kenneth J., supra,*158 Cal.App.4th 973, and *In re Usef S., supra,* 160 Cal.App.4th 276, because in those cases contested jurisdictional hearings were completed without the minors requesting DEJ. (*In re A.I., supra,* 176 Cal.App.4th at p. 1435.) By contrast, in *In re A.I.*, "DEJ was requested before the contested jurisdiction hearing was completed and before the expenditure of resources beyond those that were necessary for a pretrial suppression motion." (*Ibid.*)[5]

[5] The People in *In re A.I.* conceded that a minor may litigate a suppression motion and accept DEJ after the suppression motion is denied. (176 Cal.App.4th at p. 1434.) The wrinkle in that case was that after the minor was found eligible and suitable for DEJ, the minor filed a suppression motion and agreed to a procedure in which the motion would be heard simultaneously with the jurisdictional hearing, with the witnesses relevant to the motion heard first, the court ruling on the motion after they testified, and the jurisdictional hearing continuing if the prosecutor so chose after the ruling on the suppression motion. (*Id.* at pp. 1431-1432.) When the motion to suppress was denied and the minor wanted to accept DEJ, the prosecutor said this offer was no longer available and the court agreed. (*Id.* at p. 1432.) *In re A.I.* reversed, holding the juvenile court erred in denying DEJ "without finding that 'the minor would not benefit from education, treatment and rehabilitation' " ' " (*In re A.I., supra,* 176 Cal.App.4th at p. 1434, quoting *Martha C., supra,* 108 Cal.App.4th at p. 561) and in treating the minor's "entitlement to DEJ" as "a mere 'offer' from the prosecution that had been taken ' " 'off

We agree with the court in *In re A.I.* that a minor is not required to forego the right to a suppression hearing in order to accept DEJ. No part of a jurisdictional hearing was undertaken in the present case. When the suppression motion was denied in the San Francisco case, appellant admitted a reduced charge. In the Alameda case, appellant apparently did not pursue the suppression motion but rather admitted an amended petition. Unlike in *Kenneth J.* and *Usef S.*, appellant did not reject DEJ and then seek to take advantage of it after contesting the allegations against him.

We are not persuaded by respondent's assertion that the DEJ procedures require the minor to admit the charge initially alleged in the petition rather than a reduced one, as long as the admission *precedes* a contested jurisdictional hearing. A minor is not entitled to DEJ where he or she does not " 'admit the allegations' of the section 602 petition . . . ' "in lieu of jurisdictional and dispositional hearings." ' " (*In re T.J.* (2010) 185 Cal.App.4th 1504, 1511, quoting *In re A.I., supra*, 176 Cal.App.4th at p. 1432, fn. omitted.) "If the minor elects to contest some allegations but not others, or to contest an element of an allegation but not others, the statutory scheme does not entitle the minor to DEJ. Similarly, if the minor proceeds to a jurisdictional hearing where the court finds that an element of an allegation was not proven, the scheme does not entitle him to DEJ 'in lieu of' the hearing that was just conducted." (*In re T.J., supra*, 185 Cal.App.4th at p. 1511.) Here, however, no jurisdictional hearing was held. After his motion to suppress was denied in the San Francisco case, appellant did not *contest* the allegations against him; he admitted allegations of the petition, amended to allege a reduced charge. In the Alameda case, appellant did not even pursue the suppression motion.

Respondent urges that appellant should not be permitted to negotiate a plea agreement reducing his legal responsibility for his offenses and still be considered for

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the table and [thus was] no longer available.' " ' " (*In re A.I., supra*,176 Cal.App.4th at p. 1434.) *In re A.I.* rejected the argument that the minor's agreement to the procedure under which evidence from the suppression hearing could be considered on the jurisdictional issue made DEJ unavailable. (*Id.* at pp. 1435-1436.) The present case does not involve this issue.

DEJ because permitting this result would remove minors' incentive to "expedite the process by a full admission of responsibility." But the process in the present case was expedited: Appellant admitted the allegations of the (amended) petition right after the denial of his suppression motion in the San Francisco case (and without pursuing the suppression motion in the Alameda one), with no attempt to litigate the petitions. Thus, DEJ could have been granted, if found appropriate, "in lieu of jurisdiction and disposition hearings" (§ 791). And appellant did admit responsibility for his offenses, albeit not full responsibility for the initially charged offenses. In requiring a minor to "admit[] each allegation contained in the petition," section 791, subdivision (a)(3), does not specify that the petition cannot be amended where, as here, the amendment does not follow and is not the consequence of the minor contesting one or more of the allegations of the initial petition. (See *In re T.J., supra,* 185 Cal.App.4th at p. 1511.) The circumstances of this case are consistent with the goal of expediting juvenile wardship proceedings and avoiding contested jurisdictional hearings. Further, making DEJ unavailable to a minor who admits an amended petition without contesting the allegations of the initial petition would not serve the goal of increasing rehabilitation for first-time nonviolent juvenile offenders reflected in the Findings and Declarations section, subdivision (j) of Proposition 21. (See, *In re A.I., supra,* 176 Cal.App.4th at pp. 1433-1434; *Martha C., supra,* 108 Cal.App.4th at p. 561.)[6]

We held in *In re Kenneth J.* that a court is not required to hold a DEJ suitability hearing for a minor who has been notified of his or her eligibility for DEJ but denies the allegations of the petition and insists upon a jurisdictional hearing.[7] Appellant did not

[6] In fact, requiring a minor to admit the allegations of the original petition with no amendment in order to accept DEJ might in some circumstances lead to injustice. Where a minor has been overcharged by the prosecution, whether knowingly or unwittingly, he or she could secure a warranted reduction only by foregoing DEJ.

[7] It is not clear from the record whether appellant actually received the notice the prosecutor was required to provide him. The record includes the Determination of Eligibility form (JV-750) and the first page of the Citation and Written Notification for Deferred Entry of Judgment form (JV-751) that the prosecutor filed with the court. That

request a jurisdictional hearing and admitted the allegations of the amended petition. In this situation, appellant was entitled to an exercise of the juvenile court's discretion in determining whether he was suitable for DEJ and would benefit from education, treatment, and rehabilitation efforts. (§ 790, subd. (b); *In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.)

The matter is remanded for the trial court to exercise its discretion in determining whether appellant should be granted DEJ.

III.[*]

In the case originating in Alameda County, as indicated above, appellant admitted the allegation that he possessed concentrated cannabis in violation of Health and Safety Code section 11357, subdivision (a). This offense is a wobbler, punishable as either a misdemeanor or a felony. Appellant contends the juvenile court failed to make the requisite finding as to whether the offense he admitted was a misdemeanor or a felony.

Under section 702, "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." The court "must consider which description applies and expressly declare on the record that it has made such consideration, and must state its determination as to whether the offense is a misdemeanor or a felony." (Rules 5.778(f)(9), 5.780(e)(5), 5.795(a).) An express declaration is required to facilitate determination of the maximum term of physical confinement on the present or a future commitment, to ensure "that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702" and because of the potential future consequences of a felony finding. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1206-1209.)

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first page is the citation to appear; the second page, which provides the actual notice required by Welfare and Institutions Code section 791, is not included in the record. It is, of course, appellant's burden to provide this court with a complete record on appeal.

[*] See footnote, *ante*, page 1.

In order to satisfy the requirement of an express declaration, it is insufficient that the petition described the offense as a felony and the minor admitted the truth of the allegation, that the court set a felony-length maximum period of confinement, or that the court minutes state the minor was found to have committed a felony offense. (*In re Manzy W., supra,* 14 Cal.4th at p. 1208.) Where the juvenile court fails to comply with the statutory requirement, remand is required unless the record demonstrates that the court "was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler." (*Id.* at p. 1209.) "The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid*.)

Here there is no such indication. Defense counsel informed the court that appellant would admit "a felony [Health and Safety Code section] 11357[, subdivision] (A)" and, after taking appellant's waiver of rights, the court stated that appellant had "committed a violation of Health and Safety Code [section] 11357[, subdivision] (A)." There was no discussion about the offense being a wobbler or the court having to make any determination in this regard. Accordingly, there is nothing in the record to demonstrate that the juvenile court was aware it had discretion to treat the offense as a misdemeanor rather than a felony.

Respondent argues that the court was not required to determine the status of the offense because the parties agreed it would be treated as a felony when appellant agreed to admit a lesser offense on one count in exchange for dismissal of the remaining counts in the petition. According to respondent, because appellant's admission was made as part of a negotiated plea agreement, the court had the power to reject the agreement but not to unilaterally alter one of its terms. (*People v. Segura* (2008) 44 Cal.4th 921, 930.) Nothing in the record, however, demonstrates that the degree of the offense was a material part of the plea agreement; certainly there is no evidence of an explicit condition that the offense be treated as a felony. At least in the absence of evidence that the degree of the offense was a specifically negotiated term of the plea agreement, the trial court was required to comply with Welfare and Institutions Code section 702. Accordingly, on

remand, the court must consider whether appellant's offense was a misdemeanor or a felony and expressly state its determination on the record.

DISPOSITION

The orders are reversed and the matter is remanded for the trial court to determine whether appellant should be granted deferred entry of judgment and whether his cannabis possession offense is a misdemeanor or a felony.

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Kline, P.J.

We concur:

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Lambden, J.

_____
Richman, J.

Trial Court:	Contra Costa County Superior Court
Trial Judge:	Hon. Lewis A. Davis
Attorney for Appellant:	Jeffrey A. Needleman By appointment of the Court of Appeal under the First District Appellate Project's Assisted Case System
Attorneys for Respondent:	Edmund G. Brown Jr., Attorney General Kamala D. Harris, Attorney General Dane R. Gillette, Chief Asst. Atty. Gen. Gerald A. Engler, Sr. Asst. Atty. Gen. Eric D. Share, Deputy Attorney General Ronald E. Niver, Deputy Attorney General