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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re A.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.G., Defendant and Appellant.	A128416 (Contra Costa County Super. Ct. No. J0901700)

I. INTRODUCTION

After defendant A.G. pleaded no contest to robbery where the principal was armed with a firearm (Pen. Code, §§ 211, 212.5, subd. (c), 12022, subd. (a)(1)), the juvenile court committed him to the Division of Juvenile Facilities (DJJ) and set his maximum term at five years. Defendant contends the juvenile court abused its discretion in committing him to DJJ. We affirm as to the DJJ commitment. We further order, at the Attorney General's request, which defendant does not oppose, that the juvenile court prepare an amended JV-732 to correctly reflect the robbery is a Welfare and Institutions Code section 707, subdivision (b), offense, and that the "probation terms" imposed by the court be stricken.

II. BACKGROUND

We summarize here only the facts germane to the matters raised on appeal.

On December 17, 2009, after leaving his home without permission, defendant met an acquaintance, O.J., on the Delta DeAnza Trail in Bay Point. While the juveniles were on the trail, they accosted a 23-year-old man. The victim reported O.J. had on a ski mask and pointed a gun at him, and both juveniles demanded money. When the victim hesitated, defendant told O.J. to "Pop him," whereupon O.J. shot the victim in the thigh. Defendant urged O.J. to "Pop him again," but O.J. did not fire another shot. In the meantime, the victim turned over his wallet. Defendant then demanded, and the victim surrendered, his cell phone. The victim contacted the police and provided a description of the two juveniles. The police located and detained them, and the victim identified defendant. Defendant then admitted he was at the scene of the robbery.

Defendant claimed he had not planned on meeting O.J. that day, did not know O.J. had a gun and thought the ski mask O.J. was wearing on his head was a beanie. O.J. only pulled the mask down after they approached the victim. Defendant thought the gun was a "fake" and believed the victim thought it was a toy gun, as well. Defendant denied ever telling O.J. to "Pop" the victim and denied demanding the victim hand over anything.

On December 21, 2009, the Contra Costa District Attorney filed a delinquency petition (Welf. & Inst. Code, § 602, subd. (a)) alleging defendant had committed robbery where a principal was armed with a firearm (Pen. Code, §§ 211, 212.5, subd. (c), 12022, subd. (a)(1)) and assault with a firearm (Pen. Code, § 245, sub. (a)(2)). On January 28, 2010, defendant pleaded no contest to the robbery allegation, and the assault allegation was dismissed.

The dispositional report, filed February11, 2010, recounted defendant's denials of any significant involvement in the crime. Defendant also said he knew O.J. was the "type" of person that would rob people and carry guns, he felt the situation "wasn't right" and he "can't imagine how the victim's family feels" because he would not want something like that to happen to his family. He reported having a close relationship with his family and claimed to have disassociated with his "old" friends so his parents would not worry about him. His parents, while not married, have been a couple for 18 years. Both parents are unemployed. His mother receives government assistance; his father

receives Social Security benefits associated with his diabetes. Defendant has two younger brothers. The parents described a relatively stable home life and characterized defendant's behavior, while "not perfect," as "decent[]." The mother had never been arrested. The father was arrested in 2003 for battery and 2008 for vehicle theft and receiving stolen property. Neither arrest resulted in a conviction.

Defendant was diagnosed with ADHD in the fifth grade, has had an Individualized Educational Program (IEP) in place since the sixth grade, and since the fall of 2007, had been attending an alternative educational program. His family had opposed any medication for defendant's ADHD, but were now willing to explore such treatment. Despite special educational efforts, defendant's school record was replete with reports of inappropriate and disruptive behavior, including pouring water on books and desks, fighting, bullying, obscene language, and harassment. Like behavior occurred on the school bus and included throwing coins at people, jumping from seat to seat, and banging the bus door.

Defendant's behavior during his detention at juvenile hall followed course. On December 30, 2009, he "threw" gang signs at another detainee. On January 1, 2010, he threatened two other detainees and hurled a racial slur at a staff member with his fist clenched. On January 3, he made repeated threats to other detainees. On January 7, he instigated a "near fight" in a classroom. On January 20, he lied to the court that he had been denied a court-ordered telephone call. On January 26, there was Norteño graffiti on his bed, although defendant denied having anything to do with it.

While defendant's parents did not believe he used drugs or alcohol, he admitted an extensive history of substance abuse. He first started smoking marijuana at age 13. By the time he was 15, he smoked it whenever he could get away from home. He acknowledged his behavior had worsened during this time. He also occasionally consumed alcoholic beverages, but claimed not to like it and it made him sick.

Ms. Ingram, defendant's probation officer, concluded a group home was not appropriate. The county ranch refused to accept him on the ground an "open setting" was inappropriate given the nature of the offense. He was deemed an inappropriate candidate

for the Youthful Offender Treatment Program (YOTP) run through the juvenile hall because of the "severity of the offense." Because he had committed a Welfare and Institutions Code section 707, subdivision (b), offense, defendant was suitable for a DJJ commitment. There, "staff would access [defendant's] risks and needs and develop a specific treatment plan to address any mental health/anger issues or family problems." "The rehabilitative process at DJJ allows mental health treatment to take precedence, and the core program includes victim awareness, gang awareness, individual and group counseling and substance abuse counseling, if needed. The minor would be mandated to complete high school. Mentoring, employment assistance and vocational programs are also available with pre-parole transition."

Ingram recommended a DJJ commitment. Even apart from the gravity of the offense, defendant's "school behavior, and certainly his behavior during detention, exhibits an impressionable, violent young man, with no respect for rules and authority." She acknowledged this was his first juvenile referral and there was a strong familial bond. She also cautioned he could leave DJJ a more "seasoned" delinquent. Nevertheless, in her opinion, defendant needed "guidance and supervision in an effort to derail his current path and to protect the community from potential harm." He needed to address mental health, behavioral, and substance abuse issues. He also needed to address victimization issues and understand the impact of his conduct.

The court ordered a medical assessment. The evaluating psychiatrist recommended a trial of stimulant medication to treat defendant's attention deficit symptoms, followed by, if necessary, a trial of antidepressants if his depression symptoms continued.

On February 22, 2010, probation reported that Boy's Ranch would not accept defendant because of the circumstances of the offense and his behavior during detention. Bar-O also would not accept him because of the nature of the offense. Fouts Springs Ranch was willing to accept him if he was medically stabilized for 30 days prior to placement.

In a March 18, 2010, supplemental memorandum, Ingram reported Fouts would now "reluctantly" take defendant, but she believed YOTP was a more appropriate less restrictive placement because it would "accommodate the minor's rehabilitative needs, while removing him from the community and placing him in a secure facility." She also reported defendant's behavior at juvenile hall had improved. Nevertheless, she continued to recommend a commitment to DJJ.

Ingram repeated her assessment at the March 18 hearing. She believed an open setting was wholly inappropriate. And although defendant's behavior at juvenile hall had improved, it had done so only after the court had indicated it was inclined to commit him to DJJ. A DJJ commitment was warranted in light of the severity of the crime and the need to protect the public. At the conclusion of the hearing, the court indicated it was "on the fence [as to] DJJ or YOTP."

At the next hearing on March 22, 2010, defendant's counsel emphasized this was defendant's first referral and medical treatment for his attention deficit problems appeared to have significantly improved his behavior. Indeed, his behavior had so improved he was now a unit worker at juvenile hall. Counsel urged that YOTP was an appropriate, in-county placement, where defendant would receive counseling and assistance in numerous areas, including behavior management, substance abuse and gang "education." A number of adults who know defendant also wrote letters on his behalf, stating he was an upbeat, "wonderful kid."

The court committed defendant to DJJ. The court observed YOTP and DJJ are not "equivalent facilities" and "not designed for the same type of offender." The court also believed "the treatment options are more extensive at DJJ than they are at YOTP," although it acknowledged this belief was based on the court's experience in making DJJ commitments and not specific evidence before the court in the instant case. That said, the court fully understood it was charged with making an appropriate disposition in light of the purposes of the juvenile law. It explained, "I take the commitment to DJF extremely seriously as I do all dispositions, but particularly a case where, as it was presented to me, seemed quite suitable for DJF based on what was presented at the hearing."

The court was "concerned not only about the [defendant's] misrepresentations, which is a charitable way of saying lie," but also about his repeated misconduct in juvenile hall. The court acknowledged defendant's behavior had improved, but concluded he was "manipulating the system." "He refuses to accept any significant responsibility for the crime he committed." The court also recognized this was defendant's first referral to the juvenile justice system. But that did not exclude him from a DJJ commitment; rather, what the court was bound to consider were "all the surrounding circumstances of the offense and characteristics of [defendant]." As to the latter, the court was concerned about defendant's inappropriate and aggressive behavior at school. The court also emphasized the severity of the crime and senseless use of violence, and reiterated concern that defendant would continue to act with utter disregard for rules and authority and " 'continually threaten the community if untreated.' "

The court accordingly found "local resources are inappropriate in the rehabilitation" of defendant and his "mental and physical conditions and qualifications . . . are such as to render him probable that he would be benefited by the reformatory, educational discipline or other treatment provided by" DJJ. On April 16, 2010, defendant filed a timely notice of appeal from the commitment order.

On April 23, 2010, defendant filed a petition to change the court's order. Counsel expounded on defendant's much improved and continuing good behavior, urged the court to view it as resulting from appropriate medication and not intent to toy with the system, and asserted it constituted sufficiently "changed circumstances" to modify the commitment to DJJ. We presume the petition was denied since there is no subsequent order in the record.

III. DISCUSSION

Standard of Review

In *In re Carl N.* (2008) 160 Cal.App.4th 423, 431-433 (*Carl N.*), the court provided a concise overview of the applicable standard of review: "The decision of the

juvenile court to commit a juvenile offender to CYA[1] may be reversed on appeal only by a showing that the court abused its discretion. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395 . . . .) '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' (*People v. Giminez* (1975) 14 Cal.3d 68, 72 . . . .) [¶] As the court explained in *In re Michael D., supra*, 188 Cal.App.3d at page 1395, '[a]n appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law.' " (*Carl N., supra,* 160 Cal.App.4th at pp. 431-432.)

"The statutory declaration of the purposes of the juvenile court law is set forth in [Welfare and Institutions Code] section 202. (10 Witkin, Summary of Cal. Law (10th ed. 2005) § 442, pp. 551-552.) Before the 1984 amendment to section 202, California courts consistently held that ' "[j]uvenile commitment proceedings are designed for the purposes of rehabilitation and treatment, not punishment." ' (*In re Michael D., supra,* 188 Cal.App.3d at p. 1396, quoting *In re Aline D.* (1975) 14 Cal.3d 557, 567 . . . .) California courts treated a commitment to CYA as 'the placement of last resort' for juvenile offenders. (*In re Michael D., supra*, 188 Cal.App.3d at p. 1396.) [¶] However, '[i]n 1984, the Legislature replaced the provisions of section 202 with new language which emphasized different priorities for the juvenile justice system.' (*In re Michael D., supra,* 188 Cal.App.3d at p. 1396.) Section 202, subdivision (b) (hereafter section 202(b)) now recognizes punishment as a rehabilitative tool. (*In re Michael D., supra*, 188 Cal.App.3d at p. 1396.) That subdivision provides in part: 'Minors under the jurisdiction of the juvenile court who are in need of protective services shall receive care,

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[1] Effective July 1, 2005, the CYA was redesignated the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (Welf. & Inst. Code, § 1710, subd. (a).)

treatment, and guidance consistent with their best interest and the best interest of the public. Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, 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. Th*is guidance may include punishment that is consistent with the rehabilitative objectives of this chapter*.' (§ 202(b), italics added.)" (*Carl N., supra,* 160 Cal.App.4th at p. 432.)

" '[Welfare and Institutions Code s]ection 202 also shifted its emphasis from a primarily less restrictive alternative approach oriented towards the benefit of the minor to the express "protection and safety of the public" [citations], where care, treatment, and guidance shall conform to the interests of public safety and protection. [Citation.]' (*In re Michael D., supra,* 188 Cal.App.3d at p. 1396.) 'Thus, it is clear that the Legislature intended to place greater emphasis on punishment for rehabilitative purposes and on a restrictive commitment as a means of protecting the public safety.' (*Ibid.*) It is also clear, as the Court of Appeal recognized in *In re Asean D.* (1993) 14 Cal.App.4th 467, 473 . . . , that a commitment to CYA 'may be made in the first instance, without previous resort to less restrictive placements.' " (*Carl N., supra,* 160 Cal.App.4th at pp. 432-433.)

" '[T]his interpretation by no means loses sight of the "rehabilitative objectives" of the Juvenile Court Law. [Citation.] Because commitment to CYA cannot be based solely on retribution grounds [citation], there must continue to be evidence demonstrating (1) probable benefit to the minor and (2) that less restrictive alternatives are ineffective or inappropriate. However, these must be taken together with the Legislature's purposes in amending the Juvenile Court Law.' (*In re Michael D., supra,* 188 Cal.App.3d at p. 1396.)" (*Carl N., supra,* 160 Cal.App.4th at p. 433.)

The Juvenile Court Acted within Its Discretion in Ordering a DJJ Commitment

Defendant contends there was "*no* credible evidence of probable benefit to [him] from a DJJ commitment" and therefore the juvenile court abused its discretion in ordering such. Defendant's principal complaint seems to be that the court did not make a

progression of express findings pertaining to his particularized needs and how they would be met by a commitment to DJJ.

However, "[t]here is no requirement that the court find exactly how a minor will benefit from being committed to DJJ. The court is only required to find it is probable a minor will benefit from being committed . . . ." (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486.) "[T]he juvenile court *must* find [a DJJ] commitment [will] be a probable benefit to the minor. [Citation.] However, the specific reasons for such commitment need not be stated in the record. Rather that determination must be supported by substantial evidence in the record." (*In re Robert D.* (1979) 95 Cal.App.3d 767, 773.)

The juvenile court's order is supported by substantial evidence in the record, including the seriousness of the offense, defendant's minimization of his role, defendant's prior behavioral history and continuing inappropriate and aggressive conduct after he was detained, his deceitful conduct toward both his parents and the court, his need for serious counseling in many areas, and his need to complete high school and obtain additional job training. As the probation report made clear, resources to address defendant's specific problems and needs are available through a DJJ commitment. (See *In re Jonathan T., supra,* 166 Cal.App.4th at p. 486; *In re Asean D., supra,* 14 Cal.App.4th at p. 473.)

While defendant insists the court's sole reason for committing him to DJJ was to punish him and thus the court made no determination a commitment was of probable benefit to him, the record does not support this assertion. The court did not state it was committing defendant to DJJ solely to punish him. Its discussion on the record was not confined to punishment. The court expressly found a DJJ commitment would be of probable benefit. And the evidence in the record before the court, as we have discussed above, was sufficient to support that determination.

Similarly, while defendant asserts the court used an improper basis for "refusing" to refer him to YOTP—i.e., that YOTP was intended for juveniles committing less serious offenses and not eligible for DJJ—that, again, is not what the court did. The

court did, indeed, acknowledge the differences in the programs. But its decision to commit defendant to DJJ was based on numerous factors and the court's assessment as to the most appropriate placement.

Defendant repeatedly emphasizes this was his first referral to the juvenile justice system and claims that he should have been placed with the YOTP and remained at juvenile hall. However, a DJJ commitment need not be a last resort. (*Carl N., supra,* 160 Cal.App.4th at pp. 432-433; *In re Asean D., supra,* 14 Cal.App.4th at p. 473.) The court found defendant's offense extremely serious—"I don't know short of [him] actually . . . shooting him [instead of telling O.J. to shoot him] how it could be worse. So first offense or not, it is incredibly serious." Moreover, the court found defendant had "refuse[d] to accept any significant responsibility for the crime." (See *In re Jonathan T., supra,* 166 Cal.App.4th at p. 485.) Indeed, we note defendant still downplays his role in the robbery in stating his "participation was that of an aider and abettor. He is not the one in possession of the gun, [and] he did not shoot the victim." According to the victim, however, it was defendant who told his cohort to pull the trigger.

Referring to the *Farrell* litigation challenging conditions in the DJJ,[2] defendant contends that far from being of probable benefit, a DJJ commitment will only make him a "seasoned" delinquent. Defendant made no reference to this litigation in the juvenile court. Therefore it is not part of "the record presented at the disposition hearing" (*In re Michael D., supra,* 188 Cal.App.3d at p. 1395), and defendant cannot point to it to demonstrate a lack of evidence to support the court's disposition. (See also *In re Jonathan T., supra,* 166 Cal.App.4th at p. 486 [reports critical of conditions at DJJ did not establish juvenile would not benefit from placement].)

The cases defendant cites are distinguishable and do not compel the conclusion the juvenile court abused its discretion. The juvenile in *In re Aline D., supra,* 14 Cal.3d 557 (superseded in part by statute as stated in *In re Luisa Z.* (2000) 78 Cal.App.4th 978, 987-988), was a borderline mentally retarded 16-year-old girl, with a history of assaultive

[2] *Farrell v. Cate* (Alameda County Superior Court No. RGO3079344).

behavior and gang association. (*In re Aline D., supra*, 14 Cal.3d at pp. 559, 561-562.) The juvenile court's sole reasoning for committing her to what was then the CYA was that no other placement was available and it was not going to turn " 'this lady out in the street.' " (*Ibid.*) Although the commitment order contained a printed "finding" the ward "probably would benefit" from a CYA commitment, the record contained no such determination by the court or any evidence to support such a finding. (*Id.* at p. 562.) *In re Aline D.* was decided before the 1984 amendments, which to some degree altered the philosophical approach to juvenile dispositions. Further, as we have discussed, the state of the record here is decidedly different than that in *In re Aline D.*

The juvenile in *In re Teofilio A.* (1989) 210 Cal.App.3d 571, committed a much less serious offense, a $60 sale of cocaine. (*Id.* at p. 578 [juvenile was not aggressive or assaultive, was not armed and did not make any threats].) In addition, there was no evidence in the record that other placements had been considered. (*Id.* at p. 577.) The juveniles in *In re Todd W.* (1979) 96 Cal.App.3d 408, 410, 418-419, and *In re Carrie W.* (1979) 89 Cal.App.3d 642, 647-648, also committed less serious offenses—respectively, car theft and placing unauthorized phone calls—and these are also older cases pre-dating the amendments to Welfare and Institutions Code section 202.

We appreciate that defendant's counsel feels strongly a "sixteen year old boy, with no prior juvenile record" should not be committed to DJJ. However, on the entirety of this record, the juvenile court's choice of disposition was not an abuse of discretion.

Correction of DJJ Commitment Form and Striking Probation Conditions

The Attorney General observes the DJJ commitment order (Form JV-732) filed April 6, 2010, indicates defendant's adjudicated offense is not a Welfare and Institutions Code section 707, subdivision (b), offense. There is no question it is such an offense, and such was stated on the record. The Attorney General therefore requests that we order the juvenile court to prepare a new commitment order that correctly specifies that the offense is a Welfare and Institutions Code section 707, subdivision (b), offense. And we will do so.

The Attorney General also observes the "probation conditions" imposed by the court are improper and asks that the dispositional minutes be amended to delete them. (*In re Allen N.* (2000) 84 Cal.App.4th 513, 515-516.) We will order this correction as well.

IV. DISPOSITION

The juvenile court's order committing defendant to DJJ is affirmed. We further order: (1) that the juvenile court prepare a new commitment order (Form JV-732) that correctly specifies the defendant's offense is a Welfare and Institutions Code section 707, subdivision (b), offense and (2) that the March 22, 2010, dispositional minutes be amended to delete the "probation terms" imposed on defendant.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.