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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ROBERT M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ROBERT M., Defendant and Appellant.	F060094 (Super. Ct. No. 512000) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Susan D. Siefkin, Judge.

John K. Cotter, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II. of the Discussion.

Welfare and Institutions Code section 731 sets forth orders a court may issue when a minor is adjudged a ward of the court including an order to commit the ward to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (Division of Juvenile Facilities), "if the ward has committed an offense described in subdivision (b) of Section 707 and is not otherwise ineligible for commitment to the division under Section 733." (Welf. & Inst. Code, § 731, subd. (a)(4).)[1] Section 733 lists categories of wards that shall not be committed to the Division of Juvenile Facilities. Subdivision (c) of that section provides that wards must be excluded from a commitment to the Division of Juvenile Facilities unless they have committed a section 707, subdivision (b) offense or a sex offense listed in subdivision (c) of section 290.008 of the Penal Code.

Appellant, minor Robert M., committed an offense listed in Penal Code section 290.008, but not listed in section 707. In the published portion of our opinion, we find that wards who commit an offense listed in Penal Code section 290.008 may be committed to the Division of Juvenile Facilities even when their offense is not listed in section 707, subdivision (b). In the unpublished portion of our opinion, we find the court did not err in choosing to commit Robert M. to the Division of Juvenile Facilities in lieu of a less restrictive alternative.

PROCEDURAL AND FACTUAL HISTORY

The father of Robert M.'s three-year-old sister found her and 17-year-old Robert M. in bed together. They were both naked and Robert M. was on top of her. When questioned by authorities Robert M. admitted he placed his finger in his sister's vagina.

A section 602 petition was filed accusing Robert M. of committing a lewd and lascivious act with a child under the age of 14 (Pen. Code, § 288, subd. (a)) and sexual

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[1] All future code references are to the Welfare and Institutions Code unless otherwise noted.

penetration of a person who is under 14 years of age and who is more than 10 years younger than the perpetrator (Pen. Code, § 289, subd. (j)).

Robert M. admitted the allegations in the petition. Robert M.'s counsel argued Robert M. could not be committed to the Division of Juvenile Facilities because he had not committed a section 707, subdivision (b) offense. The court disagreed and committed Robert M. to the Division of Juvenile Facilities for a maximum term of 96 months.

DISCUSSION

I. Commitment to the Division of Juvenile Facilities Based on an Offense Listed in Penal Code Section 290.008 but not in Section 707, Subdivision (b)

Before September 2007, when a minor was adjudged a ward of the court on the ground he had violated the criminal law, the court could consider as an option committing the minor to the Department of the Youth Authority (now the Division of Juvenile Facilities) based on any offense unless the minor was under the age of 11 years or the minor suffered from any contagious infections or other disease which would probably endanger the lives or health of the other inmates. (Former §§ 731 & 733.)

Section 731 and 733 were amended effective September 1, 2007. (Stats. 2007, ch. 175, §§ 19, 22, 37.) "The amendments were enacted as part of chapter 175 of the Statutes of 2007 in order to make 'necessary statutory changes to implement the Budget Act of 2007....' (Stats. 2007, ch. 175, § 38.)" (*In re N.D.* (2008) 167 Cal.App.4th 885, 891.) "[I]n 2007, policy-makers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation which shifted responsibility to the counties for all but the most serious youth offenders." (*Ibid.*)

"Amended sections 731 and 733 are the parts of this 'realignment legislation' that limit the offenses for which juvenile courts can commit wards to state authorities." (*In re N.D., supra,* 167 Cal.App.4th at p. 892.) Section 731 now states that the court may commit a ward to the Division of Juvenile Facilities, "if the ward has committed an

offense described in subdivision (b) of Section 707 and is not otherwise ineligible for commitment to the division under Section 733." (§ 731, subd. (a)(4).)

Section 733 was amended to add an additional category of wards that may not be committed to the Division of Juvenile Facilities beyond the previous age and disease exclusions. Section 733 provides in pertinent part: "A ward of the juvenile court who meets any condition described below shall not be committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities: [¶] ... [¶] (c) The ward has been or is adjudged a ward of the court pursuant to Section 602, and the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707, unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code."

Robert M.'s two sexual offenses are not listed in section 707, subdivision (b), but his violation of Penal Code section 288, subdivision (a) is an offense set forth in subdivision (c) of Penal Code section 290.008. Thus, his offense does not meet the criteria of wards who may be committed to the Division of Juvenile Facilities in the inclusionary language of section 731, subdivision (a)(4), yet his sexual offense is exempted from the exclusionary criteria of section 733.

Robert M. argues that pursuant to section 731, subdivision (a)(4) he could not be committed to the Division of Juvenile Facilities because he was not found to have committed an offense contained in section 707, subdivision (b). He contends that the "mere mention" of a sex offense in the exception to the exclusionary statute (§ 733) cannot be used to counteract the clear requirement of section 731, subdivision (a)(4) that the offense must be a section 707, subdivision (b) offense. Robert M. asks us to utilize rules of statutory construction and apply the plain meaning of the statutes. Robert M. asserts that, "[i]f the legislature had meant not to require the commission of a section 707, subd. (b) if the offense were a sex offense subject to registration [Penal Code section 290.008], it could have done so in the language of section 731, subd. (a)(4), which is the

eligibility statute. However, it made no such decision." He claims that committing a ward such as Robert M. to the Division of Juvenile Facilities would be contrary to the legislative intent of reducing the population of the Division of Juvenile Facilities by placing in that facility only the most serious cases.

""""Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous." [Citations.] If the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, "[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes. [Citation.]" [Citation.] "'Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute...; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].' [Citations.]" [Citation.] If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. [Citation.]' [Citation.]" (*In re Eddie L.* (2009) 175 Cal.App.4th 809, 813-814.)

The language of each statute when read separately appears clear and unambiguous. But, when read together they are inconsistent. If we were to adopt Robert M.'s interpretation of the two statutes then the language in section 733, subdivision (c)--that a youth shall be excluded from the Division of Juvenile Facilities, "unless the offense is a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code"--would have no meaning or purpose. The Legislature did not merely add as an exception to the exclusionary clause the inclusionary language of section 731, subdivision (a)(4) (requiring that a § 707, subd. (b) offense be committed), but it expanded the exception to exclusion to include Penal Code section 290.008 listed offenses. "When two seemingly

inconsistent statutes apply, we harmonize the competing statutes and 'avoid an interpretation that requires one statute to be ignored.'" (*Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320, 343.)

If we were to find that a ward can only be committed to the Division of Juvenile Facilities if he committed a section 707, subdivision (b) offense, we would have to ignore the language in section 733, subdivision (c) that includes as an exception to the Division of Juvenile Facilities exclusions a ward who committed a sex offense set forth in subdivision (c) of Penal Code section 290.008. This we cannot do. The Legislature did not merely "mention" Penal Code section 290.008 but expressly added language regarding this section, that language is not found in other relevant sections. Thus, it is clear the language was added for a purpose. That purpose is to allow the court to commit a minor to the Division of Juvenile Facilities when the minor has committed an offense listed in Penal Code section 290.008.

The Legislative history of Senate Bill No. 81 supports our interpretation. The Assembly floor analysis explains that, among other things, this bill, "[p]rohibits the intake of youthful offenders adjudicated for non-violent, non-serious offenses (non-707b offenses) to the state Division of Juvenile Facilities within the California Department of Corrections and Rehabilitation (CDCR) on September 1, 2007. These youth would remain in county care and custody. **Juvenile sex offenders are excluded from this change and will not be impacted by this bill**." (Assem. Com. on Budget & Fiscal Review, Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 1, boldface added.) This same language appears in the Senate Floor Analysis of the bill altering the language in sections 731 and 733. (Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 81 (2007-2008 Reg. Sess.) as amended July 19, 2007, p. 2.)

The trial court was correct when it found that a ward who commits a sex offense listed in Penal Code section 290.008 may be committed to the Division of Juvenile

Facilities. Robert M. committed such an offense and was, thus, eligible for such a commitment.

II. Consideration of Commitment Factors

"One of the primary objectives of juvenile court law is rehabilitation, and the statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the DJJ [Department of Juvenile Justice]. [Citation.] Although the DJJ is normally a placement of last resort, there is no absolute rule that a DJJ commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the minor from the commitment and less restrictive alternatives would be ineffective or inappropriate." (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

"When determining the appropriate disposition in a delinquency proceeding, the juvenile courts are required to consider '(1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor's previous delinquent history.' [Citations.]" (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 484-485.) "A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion." (*In re Robert H.* (2002) 96 Cal.App.4th 1317, 1329-1330.)

Robert M. contends the juvenile court erred in its commitment of Robert M. to the Division of Juvenile Facilities because it did so without first considering the less restrictive alternative of placement in a group home. Robert M. relies on the fact that this was his first offense. Without a prior record, it is claimed, the court had no basis whatsoever for concluding that Robert M. would perform one way or another if placed on probation or in a group home dedicated to treating adolescent male sexual offenders. It is asserted by Robert M. that the court made a glancing reference to other placements, but

failed to give the other placements genuine consideration. In addition, Robert M. faults the probation department's report, arguing the department failed to investigate, consider, or suggest placement in a group home as an alternative. In conclusion, he claims the failure by the court to consider placement alternatives constituted an abuse of discretion.

A social study was prepared by the probation department. In addition to setting forth Robert M.'s family background, the report contained materials regarding his behavior. At the time of the crime, Robert M. was in the Independent Study Program. School personnel noted Robert M. had a tendency to intimidate others. He would act like a gang member and show aggressive tendencies. At home Robert M. would treat his siblings inappropriately. One minute he would be appropriate, and the next minute he would be throwing them around. Robert M. said he treated his brothers "like shit." In addition, Robert M. said his behavior at home, and while living with other relatives, was not very good. He used drugs, associated with gang members, drank alcohol, and did not perform well in school. He ran away from home on numerous occasions. He had previously been enrolled in drug counseling but he stopped going after one session. Robert M.'s behavior had not been an issue while in juvenile hall. The report detailed the Sexual Offender Programs available for Robert M. at the Division of Juvenile Facilities. The officer expressed concern that Robert M. lacked a showing of remorse and accountability for his actions. He was unable or unwilling to control his sexual impulses. Robert M. had violent tendencies, admitted to associating with a gang, and disclosed plans to physically assault others in the future. Robert M. refused to follow rules at school and home. In conclusion, the officer believed that Robert M. was not a fit and proper subject for probation and a commitment to the Division of Juvenile Facilities was necessary for the protection of the community and for the minor's rehabilitation.

The court found that a commitment to the Division of Juvenile Facilities was the appropriate commitment for Robert M. The court stated, "Although not previously a ward, the DJF [Division of Juvenile Facilities] commitment is appropriate because

specialized sex offender treatment will be made available to this minor. And the minor will -- it is probable -- benefit from reformatory educational or other treatment provided there. Less restrictive alternatives would be ineffective or inappropriate because the family is not involved in rehabilitation due to the nature of this offense. And the age of the minor at age 17 makes treatment in placement a less effective alternative. [¶] The minor also has a history of running away. And the potential threat to the community without adequate treatment for this minor is high."

Robert M. committed a very serious offense and the nature of his actions clearly posed a danger to the community. Robert M. has not acknowledged his actions and has not expressed remorse. He treated his other siblings poorly in his home and intimidated others in the community. He ran away from home on numerous occasions. The court stated reasons why it found less restrictive alternatives for treatment would be ineffective or inappropriate for Robert M. The court's reasons were supported by the record and were not disingenuous. The court did not abuse its discretion when it committed Robert M. to the Division of Juvenile Facilities.

DISPOSITION

The order of the juvenile court is affirmed.

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Detjen, J.

WE CONCUR:

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Levy, Acting P.J.

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Kane, J.