Filed 8/21/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re FRANK S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, **Plaintiff and Respondent,** **v.** **FRANK S.,** **Defendant and Appellant.**	**A110995** **(Contra Costa County Super. Ct. No. J0102291)**

Defendant Frank S. contends that his counsel was ineffective for failing to move to suppress evidence discovered incident to his arrest. He argues that the arresting officer's violation of the knock-and-announce rule requires exclusion of the evidence. The claim fails because the United Supreme Court recently held in *Hudson v. Michigan* (2006) 547 U.S. ___ [126 S.Ct. 2159] that violation of the knock-and-announce rule does not justify application of the exclusionary rule. In the unpublished parts of this decision, we also reject defendant's claims that the juvenile court erred in committing him to the California Youth Authority and that the court failed to exercise its discretion in setting the maximum term of confinement.[1]

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

1 We deny defendant's petition for writ of habeas corpus, case number A112996, by separate order filed this date.

PROCEDURAL BACKGROUND

A petition filed in Contra Costa County Juvenile Court alleged that defendant Frank S. (born in October 1987) came within the provisions of Welfare and Institutions Code section 602[2] based on an allegation of possession of marijuana for sale (Health & Saf. Code, § 11359). The petition alleged nine prior sustained offenses for purposes of disposition. The juvenile court sustained the petition.

At the dispositional hearing, the court committed defendant to the California Youth Authority for a maximum term of 132 months.[3]

FACTUAL BACKGROUND

In the afternoon on March 20, 2005, Pittsburg Police Officer Don Pearman was patrolling the El Pueblo neighborhood, an area with a high rate of drug-related crime. As Pearman drove on Ronnie Street, he saw defendant (whom he recognized from numerous previous contacts) walking in his direction on the sidewalk. Defendant was wearing a black jacket bearing sports team emblems. As Pearman drove past, defendant looked away and seemed to try to conceal himself behind a companion.

Pearman suspected that defendant was trying not to be recognized because he was on parole with a condition barring him from being in that area. Pearman had warned defendant in the past that he faced the possibility of arrest if Pearman ever saw him in that area.

Pearman decided against stopping defendant at that point because "he was prone to flee from the police." As Pearman continued driving he called for backup. In his rear view mirror, he observed defendant walk down a driveway on Ronnie Street. Pearman

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

[3] The California Youth Authority was renamed, effective July 1, 2005, the Division of Juvenile Justice of the Department of Corrections and Rehabilitation. (Gov. Code, §§ 12838, subd. (a), 12838.13.) However, for the sake of clarity we will use the designation CYA because that is the designation used below.

knew that defendant knew persons at that location. Pearman parked, met two other officers, and walked to the house.

The officers approached a sliding glass door on the side of the house. About five minutes had passed since Pearman had last seen defendant. He stood next to the door for 10 to 15 seconds. He heard "a bunch of commotion" that sounded like there were several people on the other side of the door and reached through an opening in the doorway and pulled aside a curtain. He saw defendant sitting on a couch about three feet away.

Pearman entered, arrested defendant, and patted him down for weapons. He did not fully search defendant at that time because the other persons in the house were becoming hostile. At the police station, Pearman discovered in defendant's inner jacket pocket a zip-lock bag containing loose marijuana and a sandwich bag containing 31 smaller bags containing marijuana.

Defendant's defense was that he had borrowed the jacket from his brother without knowing that there was marijuana in one of the pockets. Defendant admitted he had violated the law three days before the day of his arrest when he ran from the police when they tried to search him.

DISCUSSION

I. *Ineffective Assistance of Counsel*

The People concede that Officer Pearman violated the knock-and-announce rule in entering the house to arrest defendant. Defendant contends that his trial counsel was ineffective in failing to move to suppress the evidence discovered in the search of his jacket incident to the arrest.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Defendant has the burden

of establishing ineffective assistance of counsel. (*Ibid.*) Defendant has failed to demonstrate that his trial counsel was deficient in failing to move to suppress.

The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees the right of persons to be free from unreasonable searches and seizures. (U.S. Const., 4th Amend.; *People v. Camacho* (2000) 23 Cal.4th 824, 829.) A similar right is set forth in the California Constitution (Cal. Const., art. I, § 13), but under article I, section 28, subdivision (d), federal constitutional standards govern review of claims seeking exclusion of evidence on grounds of unreasonable search and seizure. (*People v. Camacho*, at p. 830; *People v. Rege* (2005) 130 Cal.App.4th 1584, 1588.) In other words, " 'Our state Constitution . . . forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.' " (*People v. Camacho*, at p. 830.)

The common law "knock-and-announce" rule forms part of the reasonableness inquiry under the Fourth Amendment. (*People v. Martinez* (2005) 132 Cal.App.4th 233, 242.) In California, the rule is codified in Penal Code section 844, which states: "To make an arrest … a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired." (See also Pen. Code, § 1531 [entry to execute a search warrant].)

In *Hudson v. Michigan, supra,* 126 S.Ct. 2159, the United States Supreme Court considered "whether violation of the 'knock-and-announce' rule requires the suppression of all evidence found in the search." (*Id.* at p. 2162.) The Court answered that question in the negative. In framing the issue, the Court noted that exclusion of evidence "may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression." (*Id.* at p. 2164.) Despite a causal connection, exclusion is not required where the relationship between discovery of the evidence and

the constitutional violation is sufficiently attenuated. (*Ibid.*) Attenuation can occur when the causal connection is remote or "when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." (*Ibid.*) This is because " '[t]he penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.' " (*Ibid.*)

The Fourth Amendment prohibition on warrantless home searches and arrests protects an individual's interest in shielding his or her person and effects from government scrutiny. (*Hudson v. Michigan, supra*, 126 S.Ct. at p. 2165.) Exclusion of the evidence obtained by a warrantless home search or arrest vindicates that right. (*Ibid.*) But the interests protected by the warrant requirement are not implicated in this case. The police were authorized to enter without a warrant because defendant was a parolee who had no legitimate expectation of privacy against warrantless arrests, even in the home. (*People v. Lewis* (1999) 74 Cal.App.4th 662, 671.) Defendant does not argue to the contrary.

Hudson held that the interests protected by the knock-and-announce rule are quite different from those protected by the warrant requirement and do not include the shielding of potential evidence from the government's eyes. (*Hudson v. Michigan, supra,* 126 S.Ct. at p. 2165.) Instead, the Court observed that the rule protects human life because "an unannounced entry may provoke violence in supposed self-defense by the surprised resident;" protects property by providing residents an opportunity to prevent a forcible entry; and protects "those elements of privacy and dignity that can be destroyed by a sudden entrance" by giving occupants an opportunity to collect themselves before answering the door. (*Hudson v. Michigan, supra,* 126 S.Ct. at p. 2165.) "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." (*Ibid.*) The Court also concluded that the deterrence

benefits of exclusion for violation of the knock-and-announce rule do not outweigh the social costs of exclusion. (*Id.* at pp. 2165-2168.)

Following *Hudson*, we conclude that Officer Pearman's entry in violation of the knock-and-announce rule did not implicate defendant's interest in preventing the government from seeing the drugs in his jacket pocket and exclusion of the evidence is not justified.

Defendant's contention that *Hudson* applies only where the police have a search warrant is not persuasive. *Hudson* held that a violation of the knock-and-announce rule does not justify application of the exclusionary rule. (*Hudson v. Michigan, supra,* 126 S.Ct. at pp. 2162, 2165, 2168; see also *id.* at p. 2170 [Kennedy, J., concurring]; *id.* at p. 2171 [Breyer, J., dissenting].) The rule turns on the nature of the constitutional violation at issue, not the nature of the police's authority for entering the home. The interest asserted by defendant is that protected by the prohibition on warrantless home searches and arrests, namely, the right to shield one's person and property from the government's scrutiny. (*Id.* at p. 2165.) But violation of the knock-and-announce rule did not implicate that interest. As in *Hudson*, because "the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." (*Ibid.*)[4]

Because knock-and-announce violations do not justify application of the exclusionary rule, defendant's counsel below was not ineffective in failing to move to suppress the evidence discovered in defendant's jacket.

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[4] In arguing that *Hudson* is distinguishable, defendant also asserts that "if the officers had knocked and announced themselves, appellant may well have taken off the jacket before his cousin answered the door, and the marijuana would not have been found." However, the propriety of exclusion does not turn only on whether the violation was a "but-for" cause of discovery of the evidence. (*Hudson v. Michigan, supra,* 126 S.Ct. at p. 2164.) Moreover, it is likely that the officers could have searched defendant's jacket incident to the arrest unless defendant took it off and put it in an area outside of his immediate control. (See, e.g., *People v. Rege* (2005) 130 Cal.App.4th 1584, 1588-1589.)

II. *Commitment to CYA*

Defendant contends his commitment to CYA violated his right to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution because no substantial evidence was presented of any "probable benefit" to him from a CYA commitment.

An appellate court typically reviews a CYA commitment for abuse of discretion. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.) Recasting the claim as one of deprivation of due process rather than abuse of discretion does not benefit defendant in this case. We still indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its factual findings where there is substantial evidence to support them. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) We review the record presented at the disposition hearing in light of the purpose of the juvenile court law (*ibid.*), which, according to section 202, subdivision (a), "is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court." The 1984 amendments to the juvenile court law reflect an increased emphasis on punishment as a tool of rehabilitation and a concern for the safety of the public. (§ 202, subd. (b); *In re Asean D.* (1993) 14 Cal.App.4th 467, 473; *In re Michael D.*, at p. 1396.) To support a commitment to CYA, "there must be evidence in the record demonstrating both a probable benefit to the minor by a CYA commitment and the inappropriateness or ineffectiveness of less restrictive alternatives." (*In re Angela M.*, at p. 1396; see also § 734.)[5]

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[5] Defendant also contends that the People were required to show that there are adequate facilities and services available at CYA, but the statutes to which he cites do not support the contention. Section 1730, subdivision (a) provides that no person may be committed to CYA "until the Authority has certified in writing to the Governor that it has . . . facilities and personnel sufficient for the proper discharge of its duties and functions." Defendant does not contend that the required certification has not occurred. Section 1731.5, subdivision (b) applies to juveniles who have been prosecuted in the adult courts and then committed to CYA. (*People v. Olivas* (1976) 17 Cal.3d 236, 242-243.) Also, the language relied on by defendant is a directive to CYA ("[t]he Youth Authority shall

A. *Judicial Notice*

In arguing that there was no evidence of probable benefit, defendant principally relies on December 2003 reports commissioned by CYA in connection with a lawsuit, which outline concerns regarding the availability and effectiveness of CYA's treatment and educational programs. Defendant contends that the juvenile court erred in denying defendant's request for judicial notice of the reports. We review the juvenile court's decision for abuse of discretion. (*In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1525; see also *Willis v. State of California* (1994) 22 Cal.App.4th 287, 291.)

Defendant contends that the reports are judicially noticeable under Evidence Code section 452, subdivision (h), which provides for judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Regardless of whether CYA has acknowledged the substantial accuracy of the reports, the juvenile court reasonably could have concluded that the descriptions and opinions in the reports are not akin to " 'facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter.' " (*People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17 [overruled on an another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1]; see also *Butt v. State of California* (1992) 4 Cal.4th 668, 676, fn. 6 [refusing to accept the findings in a grand jury report as evidence or to accept the report's criticisms as "conclusively founded"].)

Defendant also suggests that the reports were judicially noticeable as court records. (Evid.Code, § 452, subd. (d).) However, under that provision a court may only take notice of the existence of the reports; "[t]he truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice." (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 147.)

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accept a person committed to it pursuant to this article if it believes . . ."), not a directive to the juvenile court making a disposition.

Furthermore, a court may only take judicial notice of relevant material. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.) The juvenile court reasonably could have concluded that the 2003 reports were not directly relevant to its July 2005 disposition, even assuming that many of the problems identified in the report persist. Also, although the documents detail inadequacies in a number of CYA's programs and conditions, they do not purport to demonstrate that no ward will benefit from any of the programs offered. The juvenile court reasonably could have concluded that defendant's claim that he cannot benefit from a commitment to CYA as a result of the problems identified in the reports was speculative. The trial court did not abuse its discretion in denying defendant's request for judicial notice.[6]

B. *CYA Commitment Determination*

According to the probation office report in this case, defendant was first committed to CYA on March 21, 2003, after a sustained petition for assault with a firearm, resisting arrest, and two counts of attempted second degree robbery with firearm enhancements. The report described defendant's involvement in the offenses as follows: "In the incident, the minor and co-responsible robbed two victims. The co-responsible struck the victim in the head with a pistol and ordered the victims to empty their pockets and get on the ground. The co-responsible[] shot one of the victims in the groin, and the bullet lacerated his penis while he was on the ground. During the incident, the minor told the co-responsible to 'shoot the other nigga.' 'Shoot the mother fucker.' "

Defendant was released on parole in December 2004 and reportedly was doing "well on parole" until the March 2005 arrest in the present case. However, he did not

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[6] On March 3, 2006, we denied defendant's request that we take judicial notice of four other documents related to the lawsuit, which were not presented to the court below. Because we conclude the juvenile court did not abuse its discretion in declining to take notice of the 2003 reports, we also deny defendant's request that *we* take judicial notice of those reports. The reports were not part of the evidentiary record below, and it long has been the general rule that " 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' " (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

comply with his parole officer's directive to stay away from the El Pueblo area. The probation office referred defendant's case to the Orin Allen Youth Facility, but that ranch placement rejected him because he was a "danger to the community if placed in an open setting" and his "treatment needs exceed services available at the ranch." The probation office report concluded that "[t]he minor has yet to be impacted by his contacts with law enforcement agencies, and he continues to be involved in criminal activity. The instant offense indicates the minor is not ready to be independent in the community.[¶] This deputy completely concurs with the minor's parole officer that the minor is to be returned to the California Youth Authority."

In rendering its disposition, the comments of the court indicated it had read and considered the probation report, which outlined the particular circumstances of the minor. The court stated, "quite honestly this is not a close call. I will send you to CYA as recommended by probation. You have been to CYA; and within a short period of time, even during your parole period from CYA, you have now been convicted of a new serious offense." The court pointed out that defendant had failed to stay away from the El Pueblo area, that defendant admitted running from the police, and that defendant continued to have "serious drug problems." The court stated, "[t]he fact is that you don't seem to want to—or that you are not able to follow the rules." The court emphasized that defendant had failed at previous placements when given opportunities in the past and stated "[t]he Court has considered all local less restrictive programs and forms of custody and is fully satisfied they are inappropriate dispositions and that the minor can benefit from the various programs provided by the Department of Youth Authority."

This court of course recognizes that in recent years CYA has been subject to legitimate criticism regarding its treatment programs. The juvenile court indicated that it was "familiar with many of the reports and concerns" and that it had toured CYA the previous fall. Despite its inadequacies, the courts have recognized that, as a general matter, CYA has treatment programs of some benefit to wards with psychological and emotional needs. (See *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 153; *In re Gerardo B.* (1989) 207 Cal.App.3d 1252, 1258.) Moreover, the rehabilitative value of a

CYA commitment results not only from the programs offered, but from punishment that " 'holds [the minor] accountable for [his] behavior.' " (*In re Tyrone O.,* at pp. 151, 153, quoting § 202, subd. (b); see also *In re Michael D., supra,* 188 Cal.App.3d at p. 1396.) Defendant has presented no authority which supports the proposition that the juvenile court's CYA commitment decision must be supported by substantial evidence of the availability and efficacy of specific treatment programs. Instead, section 734 states that "[n]o ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority." Accordingly, where less restrictive placements are inappropriate, it is enough that substantial evidence supports the juvenile court's finding of probable benefit. (*In re Angela M., supra,* 111 Cal.App.4th at p. 1396.)

The record demonstrates that the juvenile court considered the probable benefit of a CYA commitment and the ineffectiveness of alternative placements. The court properly considered the large number of prior offenses, that the current offense was committed while defendant was on parole, and that defendant fled from the police just three days before his arrest. In placing defendant at CYA, the court properly focused on the "dual concerns of the best interests of the minor and public protection." (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684.) Substantial evidence supports the juvenile court's findings that less restrictive placements were inappropriate and that CYA was of probable benefit to defendant. The court's decision was neither an abuse of discretion nor a violation of defendant's right to due process of law.

III. *Maximum Period of Confinement*

Defendant contends the court failed to exercise its discretion in setting his maximum term of confinement pursuant to section 731, subdivision (b). That section provides the juvenile court with discretion to impose a maximum term of commitment

that is less than the statutory upper term for an adult offender. (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1185.)

At the dispositional hearing in this case the juvenile court stated, "[a]t this time you are committed to the Department of Youth Authority for a term prescribed by law and the Court has considered the length of the term and is finding that your maximum period of confinement is 132 months. *I am not reducing it down*. This is a new charge and I believe that the full time and the sentence should run consecutive. [¶] I see this was already a prior finding by Judge Haight on the first seven convictions and this is a new one and that should run consecutive. And probation calculates that at 132. . . . So I will accept that." (Emphasis added.)

The record reflects that the juvenile court exercised its jurisdiction under section 731, subdivision (b). "[W]hile the statute does not require a recitation of the facts and circumstances upon which the trial court depends, or a discussion of their relative weight, the record must reflect the court has considered those facts and circumstances in setting *its* maximum term of physical confinement even though that term may turn out to be the same as would have been imposed on an adult for the same offenses." (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 438.) In this case, the juvenile court stated that it had "considered the length of the term," had decided not to reduce the term, and had found that the maximum period of confinement is 132 months. The court did not mechanically designate the maximum term that could have been imposed on an adult for the same offenses. (Cf. *In re Sean W.*, *supra*, 127 Cal.App.4th at p. 1182.)

Defendant also contends that, in stating that the maximum term would not be reduced, the court was referring to its decision to run the sentences consecutively rather than exercising its discretion to impose a maximum term less than the statutory upper term for an adult offender. We disagree. The more plausible interpretation of the court's comments is that it exercised its discretion under section 731, subdivision (b) and also decided to run the sentences consecutively. Because the record does not establish on its face that the court misunderstood the scope of its discretion, we will not presume that the court erred. (*In re Jacob J.*, *supra*, 130 Cal.App.4th at p. 438.)

DISPOSITION

The juvenile court's orders are affirmed.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

In re Frank S. (A110995)

Trial court:	Contra Costa County Superior Court
Trial judge:	Hon. Gary Silber

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, SeniorAssistant Attorney General, Martin S. Kaye, Supervising Deputy Attorney General, Michael E. Banister, Deputy Attorney General, for Plaintiff and Respondent.

Rachel Lederman, for Defendant and Appellant.