

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re NANCY C., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

NANCY C.,

Defendant and Appellant.

C048636

(Super. Ct. No. JV118616)

OPINION ON REHEARING

APPEAL from a judgment of the Superior Court of Sacramento County, John A. Mendez, Judge. Reversed with directions.

Tim Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Wanda Hill Rouzan, Supervising Deputy Attorney General, Stephen G. Herndon, Supervising Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and III.

In the Yolo County Juvenile Court, Nancy C., 14 years of age, admitted a felony charge of unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)) in exchange for the dismissal of a charge of obstructing a peace officer in the performance of the officer's duties. The matter was then transferred to Sacramento County, the residence of the minor's mother, for disposition.

The Sacramento County Juvenile Court, having accepted the transfer, declared the minor a ward of the court, found her maximum period of confinement to be three years, ordered her committed to the Youth Center, and then to the custody of her mother. Over the minor's objection, the court also ordered the minor to provide samples for the DNA data bank in accordance with Penal Code¹ section 296.

On appeal, the minor argues: (1) remand is required because the juvenile court failed to declare whether the violation of Vehicle Code section 10851, subdivision (a), a wobbler, was a felony or misdemeanor; (2) we should stay the court's order requiring the minor to provide DNA samples pending the court's determination of the felony/misdemeanor status of her offense; and (3) she is entitled to an additional nine days of custody credit.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I

Designation Of A Felony Or Misdemeanor

Welfare and Institutions Code section 702 (hereafter section 702) provides in relevant part: "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."

"[Section 702's] requirement is obligatory: '[Welfare and Institutions Code] section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.'" (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204, citing *In re Kenneth H.* (1983) 33 Cal.3d 616, 619.)

"[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether the offense is a misdemeanor or felony." (*In re Manzy W.*, at p. 1208.)

The purpose of requiring the court to make this declaration is to "ensur[e] that the juvenile court is aware of, and actually exercises, its discretion under . . . section 702." (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1207.)

The People claim the juvenile court complied with section 702 by declaring the offense was a felony first when it accepted the minor's plea and two more times at the dispositional hearing. The People are simply wrong, there was no such declaration.

In accepting the minor's admission in Yolo County, the court asked the minor how she was pleading to "a felony violation" of Vehicle Code section 10851, subdivision (a), and the minor responded, "No contest." At the disposition hearing, the court noted that the "minor admitted to a felony violation of [Vehicle Code] Section 10851(A)," and that she now had "a felony on [her] record."

These statements show nothing more than what is obvious -- that the minor admitted a felony violation of Vehicle Code section 10851, subdivision (a). The compliance required by section 702 is a statement by the court, express or implied, showing "that the juvenile court is aware of, and actually exercises, its discretion under . . . section 702." (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1207.) Neither of the cited statements nor anything else in the record shows the court was aware of its section 702 discretion or that it exercised it. Consequently, the matter must be remanded for such a showing.

II

DNA Sample Requirement

The minor requests that we stay the juvenile court's order requiring her to give body samples for the DNA data bank pending the juvenile court's determination of whether her offense was a misdemeanor or felony. We should do so, she argues, because the statute under which the samples were ordered, section 296, subdivision (a)(1) (hereafter section 296(a)(1)), does not apply to misdemeanors.

The People oppose the minor's request, claiming: (1) the court had declared the offense a felony; and (2) section 296(a)(1) applies to the minor irrespective of whether the court declares her offense to be a misdemeanor. We rejected the People's first claim under part I of the Discussion, and we conclude the minor has the better argument regarding the meaning of the statute.

As applicable in the present case, section 296, subdivision (a) requires body samples from "(1) Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense . . . or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense."²

Relying on *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, the People argue the minor comes within section 296(a)(1) because "[c]onviction, for purposes of DNA collection, occurs at the time of the felony plea or verdict." While *Coffey* does so hold, it is not on point because its analysis was based on section 296(a)(1) before that section was rewritten by Proposition 69, adopted in the General Election of November 3, 2004.

² This version of section 296 became effective November 3, 2004, which was approximately one month before the juvenile court's order. (Amended by initiative (Prop. 69) at the Nov. 2, 2004, Gen. Elec.)

At the time of defendant Coffey's plea and sentencing, section 296(a)(1) read: "'Any person who is convicted of [a qualifying offense] . . . shall, regardless of sentence imposed or disposition rendered, be required to provide [specified body samples] for law enforcement identification analysis.'" (*People v. Coffey, supra*, 129 Cal.App.4th at p. 814.) Juveniles were simply not included in this section.

As it presently reads, section 296(a)(1) divides juveniles into two categories -- (1) those who are unfit for juvenile court and therefore, are prosecuted in adult court, and (2) those who are processed through the juvenile court, specifically, "any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing a felony offense."

Any attempt to place the minor in the first category would run afoul of the established rule of statutory construction that a "'specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.'" (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577.)

Additionally, a minor's admission of a wobbler offense charged as a felony is not an "adjudication" of the misdemeanor or felony status of that offense. (*In re Manzy W., supra*, 14 Cal.4th at p. 1208.) That determination is to be made by the

juvenile court in the course of the proceedings. (*Id.* at pp. 1207-1208; Welf. & Inst. Code, § 702.)

Finally, the first category of section 296, subdivision (a)(1) requires body samples for any adult or juvenile who is convicted, pleads guilty, or pleads no contest. If the Legislature had meant this category to apply to adjudications under Welfare and Instructions Code section 602, the second category would be rendered utter surplusage, a construction to be avoided if possible. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 ["Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage"].)

Consequently, if the court on remand declares the minor's offense to be a misdemeanor, it should strike its order requiring the minor to provide physical body samples pursuant to section 296(a)(1), and if such samples have already been collected, the minor may seek relief pursuant to the expungement procedure provided by section 299.

III

Custody Credit

The minor contends she is entitled to nine additional days of presentence custody credit. The People, noting the record is unclear, argue she is most likely entitled to eight days. We agree the record is unclear and that the minor is entitled to some additional days. However, because we are remanding the matter to the juvenile court, the matter may be addressed at that time.

DISPOSITION

The matter is remanded to the juvenile court for further proceedings in accordance with this opinion.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.