

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re OLIVIA J., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

OTIS J.,

Defendant and Appellant.

D044209

(Super. Ct. No. J515074)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Kelety, Judge. Affirmed.

Kathleen M. Mallinger, under appointment by the Court of Appeal, for Defendant and Appellant.

John J. Sansone, County Counsel, Susan Strom, Chief Deputy County Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

Alice C. Shotton, under appointment by the Court of Appeal, for the Minor.

Otis J. appeals a juvenile court judgment of contempt and order for incarceration under Welfare and Institutions Code section 213¹ and Code of Civil Procedure section 1218 after the court found he willfully disobeyed its order to participate in the Substance Abuse Recovery Management System program (SARMS)² as part of his reunification plan in the dependency case involving his minor daughter Olivia J. Otis contends: (1) the court had no authority to order incarceration based on his non-compliance with a reunification component not reasonably related to the problems that caused Olivia to be a dependent; (2) the judgment of contempt was invalid because the court did not enter a specific order that formed the basis of a willful violation; (3) the court improperly delegated complete discretion to a SARMS "recovery specialist" to determine the specific requirements that resulted in a contempt finding and incarceration; and (4) he was denied his right to effective assistance of counsel because his attorney did not seek a continuance to terminate the SARMS requirement, nor did she attempt to stay the order of incarceration to file for writ relief. We affirm the judgment.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

² SARMS is part of the San Diego County Dependency Court Recovery Project, whose goal is to achieve reunification for families by promoting successful recovery from alcohol or drug dependency. To this end, SARMS provides alcohol and drug treatment services to parents in the dependency system who agree to cooperate with prescribed treatment plans, and case management services to assist parents in addressing their substance abuse problem and support and encourage sobriety.

FACTUAL AND PROCEDURAL BACKGROUND

Olivia lived with her mother Lenore and two older sisters. Otis had little contact with Olivia but paid child support for her. In June 2003 seven-year-old Olivia telephoned Otis complaining she had been injured when Lenore beat her with a belt. Otis took Olivia to the hospital where it was determined her finger was broken. Olivia became a dependent of the juvenile court under section 300, subdivision (a) based on findings Lenore subjected her to excessive discipline and Olivia had suffered, or was at substantial risk of suffering, serious physical harm inflicted nonaccidentally. The court placed Olivia with her adult sister and ordered reunification services for the parents, including unsupervised visits for Otis.

Otis reported a history of alcoholism but said he had been sober for several years. His criminal history included a 1980 felony conviction for driving under the influence and a 1995 conviction for spousal abuse involving Lenore. Otis was 58 years old and lived with his mother, two brothers and sister. Although Otis wanted Olivia placed with him, he acknowledged he did not have appropriate housing for her.

On September 9, 2003, the court held a special hearing to order Otis into SARMS. Otis indicated he was prepared to accept the order. The court ordered Otis to participate in SARMS and explained its various requirements, including not using or possessing any alcohol or illegal drugs, testing on demand, attending all required counseling and treatment, following the rules of the program and cooperating with SARMS staff and the social worker. The court admonished Otis that failing to comply with these requirements could result in a finding of contempt of court for disobeying a court order, which meant

he could be placed into custody, terminated from SARMS or asked to go to dependency drug court.³ (See § 213; Super. Ct. San Diego, Local Rules, div. VI, rule 6.19.) Otis said he understood the order, including the consequence that a missed drug or alcohol test would be considered a failed test. He received a copy of the SARMS client guidelines and agreement, and acknowledged receiving the SARMS agreement as to his recovery services plan. The court set SARMS review hearings for October 8 and November 12, 2003.

When Otis did not appear for the October 8 hearing, a bench warrant was issued and withheld until the November 12 hearing. Otis appeared on November 12 and requested a hearing on the order to show cause (OSC) re: contempt. The contempt declarations alleged that from September 16 to October 15, Otis did not submit proof of attendance at five 12-step meetings a week, make himself available for drug and alcohol screening or maintain weekly contact with his SARMS recovery specialist.

At the OSC hearing in November 2003, Otis testified he believed the SARMS requirements were excessive and he did not have time to attend five meetings a week. According to an offer of proof by SARMS recovery specialist Anthony Tucker, Otis had been sober for quite some time, and consequently he was not required to attend drug and alcohol treatment classes but only to test and attend 12-step meetings. However, Otis had not complied with those requirements. Counsel for Otis requested dismissal of the

³ The purpose of a SARMS order is to ensure the parent refrains from drug and alcohol use and complies with his or her treatment program. The punitive component of SARMS is intended as an incentive for the parent to remain sober and avoid relapse.

contempt charge based on Otis's inability to comply with the SARMS requirements because of his work schedule. Alternatively, counsel suggested the court admonish Otis and modify his case plan to include less stringent requirements.

The court found the SARMS order was valid, Otis had the ability to comply with the order and he willfully disobeyed it. The court found Otis guilty of four counts of contempt, sentenced him to three days in custody but stayed the sentence on the condition Otis have no further noncompliant events. However, the court commented it was "a little troubled" by the SARMS requirements because although Otis was a recovering alcoholic, he had been sober for a substantial amount of time. The court modified the SARMS order by requiring Otis attend two, rather than five, 12-step meetings a week, submit to drug and alcohol screening and maintain contact with the recovery specialist. Otis agreed to comply with the court's modified order.

In a report prepared for the six-month review hearing set for February 25, 2004, the social worker noted Otis had expressed his reluctance in October 2003 to participate in services because the SARMS requirements were too stringent. The social worker told Otis to request a re-evaluation by SARMS. Otis was given an amended recovery services plan and had since been in compliance.

In January 2004 Lenore tested positive for methamphetamine. At the six-month hearing, the court ordered an evaluation of the home of relatives in Georgia for Olivia's placement after Olivia's sister told the social worker she would be unable to continue caring for her. The court commended Otis for complying with SARMS, found he made

substantive progress with his case plan and extended reunification services to the 12-month date.

In April 2004 the court set an OSC re: contempt hearing based on a SARMS declaration that between March 1 and March 15, 2004, Otis had three unexcused absences from 12-step meetings,⁴ failed to make himself available for drug and alcohol screening and failed to maintain weekly contact with his recovery specialist. At the hearing on April 22, 2004, Otis unsuccessfully requested a continuance to retain new counsel. According to the stipulated testimony of recovery specialist Tucker, Otis was out of compliance with SARMS from September 30 to November 21, 2003. Otis returned to SARMS on November 21, agreed to participate in the program and complied with the requirements until February 25, 2004. Since February 25, Otis had not contacted Tucker and was considered "missing in action" from the program.

Otis testified he had not complied with the court's SARMS order since March 1, 2004. He understood there would be consequences for failing to comply. However, Otis claimed the urine collection procedure was degrading, he did not need the program and he told his attorney he did not want to participate. Counsel for Otis requested the court dismiss the contempt charge and terminate Otis from SARMS.

⁴ Although the court ordered Otis to attend two 12-step meetings a week, recovery specialist Tucker reported Otis's recovery service plan required three 12-step meetings a week. In a two-week period, Otis submitted proof of attendance at only three meetings, showing he was noncompliant with the court's order.

The court took judicial notice of its previous findings and orders sentencing Otis to three days in custody and staying the sentence. The court found Otis guilty of contempt because the SARMS order was valid and Otis had the ability to comply with the order but willfully disobeyed it. The court imposed the previously stayed sentence of three days in custody and sentenced Otis to an additional two days, to begin on April 26 and end on April 30.

DISCUSSION

I

Otis contends the court had no authority to order incarceration based on his failure to comply with a reunification order not reasonably related to the problems that led to Olivia's dependency. He asserts the initial order for SARMS, and the order at the six-month hearing to continue SARMS, were improper because: (1) he was a nonoffending parent who had no current problem with alcohol and who posed no risk to Olivia; (2) the SARMS requirements were burdensome, invasive and not reasonably related to the facts; and (3) the threat of contempt was unreasonable and prohibited by a statutory scheme that does not permit parents to be prosecuted in the juvenile court.

At a disposition hearing, the juvenile court must order child welfare services for the minor and the minor's parents to facilitate reunification of the family. (§ 361.5, subd. (a); Cal. Rules of Court, rule 1456(f)(1).) The court has broad discretion to determine what would best serve and protect the child's interests and to fashion a disposition order accordingly. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.) In this regard, the court's reunification plan must be appropriate to each family based on the unique facts

relating to that family, and must be designed to eliminate the conditions that brought the minor to the attention of the court. (§ 362, subd. (c); *In re Michael S.* (1987) 188 Cal.App.3d 1448, 1458.)

A parent seeking to challenge a component of his or her reunification plan as unsupported by the facts must first raise the issue in the trial court. (*In re Jasmin C.* (2003) 106 Cal.App.4th 177, 181 [mother objected at disposition hearing to parenting class as part of reunification order on ground there was no evidence to support that order]; *In re Christopher H., supra*, 70 Cal.App.4th at p. 1005 [father objected to condition of drug testing as unsupported by jurisdictional findings].) If an objection could have been but was not made in the trial court, a reviewing court ordinarily will not consider a challenge to the ruling. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*)

Here, although Otis maintained he currently did not have a problem with alcohol, he agreed to participate in SARMS and did not object when the court explained the program's requirements and potential consequences for failing to comply with the court's order. Even after Otis complained the SARMS requirements were too burdensome, he agreed to the court's modified order to attend two 12-step meetings a week, submit to drug and alcohol screening and maintain contact with the recovery specialist. By acquiescing, Otis has waived the right to claim the SARMS order, with its threat of contempt, was unreasonable. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1296; see also *In re S.B., supra*, 32 Cal.4th at

p. 1293, fn. 2 ["waiver is the ' "intentional relinquishment or abandonment of a known right." ' "].)

Further, "[a] challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed." (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811; *In re Sergio C.* (1999) 70 Cal.App.4th 957, 959-960 [father challenged on appeal the sufficiency of the evidence to support court's drug testing order].) Both a disposition order and an order made at a six-month review hearing are appealable. (§ 395.) Where, as here, an order is appealable and no timely appeal is filed, the issues determined by the order are res judicata. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.) The orders requiring SARMS participation, both at the disposition hearing and the six-month review hearing, have long since become final and any challenge to them is not cognizable on appeal.

Otis asserts the dependency scheme does not authorize incarceration for failing to comply with the terms of reunification. Preliminarily, we note Otis agreed to participate in SARMS with the understanding his noncompliance would result in sanctions, including a finding of contempt and possible incarceration for up to five days. (§ 213; Super. Ct. San Diego, Local Rules, div. VI, rule 6.19.) Thus, Otis has waived his right to challenge the court's ability to enforce its order through contempt and incarceration. (*In re Aaron B., supra*, 46 Cal.App.4th at p. 846; *In re Margarita D., supra*, 72 Cal.App.4th at p. 1296.)

In any event, the finding of contempt and resulting incarceration here were based on Otis's willful violation of a lawful order of the juvenile court under section 213,⁵ not on his failure to participate in a reunification plan. The juvenile court retains ordinary contempt powers and may punish disobedience of its orders with a finding of contempt. (§ 213; *In re Michael G.* (1988) 44 Cal.3d 283, 289; *In re Ashley M.* (2003) 114 Cal.App.4th 1, 10, fn. 5.) "[A] civil contempt proceeding is criminal in nature because of the penalties that may be imposed." (*In re Ricardo A.* (1995) 32 Cal.App.4th 1190, 1199.) The penalties for violating section 213 are set forth in Code of Civil Procedure section 1218, and include a fine of up to \$1,000, imprisonment of up to five days, or both. (Code Civ. Proc., § 1218, subd. (a).)

Otis cites no authority, and we have found none, to support the proposition a parent cannot be subject to a contempt proceeding and its penalties for willfully violating juvenile court orders that are part of a reunification plan. Once the court found the SARMS order was valid and Otis had the ability to comply with the order but willfully disobeyed it, the court properly exercised its contempt powers under section 213 and Code of Civil Procedure section 1218 by sentencing Otis to five days in custody.

II

Otis contends the judgment of contempt was invalid because the court's SARMS order did not specify what he had to do to avoid contempt. He asserts the SARMS rules

⁵ Section 213 provides: "Any willful disobedience or interference with any lawful order of the juvenile court or of a judge or referee thereof constitutes a contempt of court."

to be followed were improperly left to the absolute discretion of the recovery specialist and thus the court's order could not form the basis of a willful violation.

As a general rule, a party may not assert on appeal theories that were not raised in the trial court. (*In re Joseph E.* (1981) 124 Cal.App.3d 653, 657.) Here, Otis never claimed the court's SARMS order lacked specificity or that he was not sufficiently aware of what was required to comply with that order. Indeed, the record shows Otis complied, from November 21, 2003 until February 25, 2004, with the SARMS requirements he now claims were not clearly communicated to him.

Moreover, the finding of contempt was based on a violation of a specific court order, not on the discretionary requirements of the SARMS recovery specialist. The court ordered Otis to participate in SARMS on specific terms and conditions, including refraining from consuming alcohol or using illegal substances, appearing for any special hearings set by the court, submitting to random alcohol or drug tests ordered by the court and administered by SARMS, participating in all required SARMS programs, complying with all the rules of his recovery services plan and cooperating fully with the SARMS recovery specialist and SARMS staff.⁶ After Otis was assessed by SARMS to determine what level of treatment was required, he received a copy of the SARMS client guidelines,

⁶ Contrary to Otis's argument, the contempt citation was not invalid because the court did not further specify the number of times he was required to submit to drug and alcohol screening, attend 12-step meetings or contact his recovery specialist. Rather, those administrative details were properly part of the recovery specialist's assessment, subject to review by the juvenile court.

the SARMS agreement and his recovery services plan. The court's order formed the basis of a willful violation because Otis did not submit to drug and alcohol screening, cooperate with the SARMS recovery specialist by maintaining contact with him or participate in the 12-step program in compliance with his recovery services plan.

III

Otis contends the court erred by delegating to the recovery specialist complete discretion to impose specific reunification requirements that resulted in his incarceration. He asserts this improper delegation of judicial authority precluded the court from entering a reasonable, limited order that was consistent with Olivia's best interests.

The juvenile court may delegate the ministerial tasks of overseeing reunification services to the person or entity best able to perform them. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757 [ministerial task of overseeing visitation as defined by juvenile court is best left to child protective services agency]; *In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374 [juvenile court may delegate to social worker the responsibility to manage details of visitation such as time, place and manner].) Thus, the court may transfer the essentially ministerial function of administering court-ordered reunification services to qualified service providers. (*In re Walter E.* (1992) 13 Cal.App.4th 125, 137.) Through its review of the service providers' reports, the juvenile court retains ultimate control over the provision of services. (*Id.* at p. 136.) Only when the court delegates absolute discretion to determine whether the parent is entitled to services in the first instance does its order violate the statutory scheme and separation of powers doctrine.

(*In re Jennifer G.*, *supra*, 221 Cal.App.3d at p. 758; *In re Moriah T.*, *supra*, 23 Cal.App.4th at p. 1374.)

Here, Otis voluntarily agreed to participate in reunification services. (See *In re Christina L.* (1992) 3 Cal.App.4th 404, 414 [reunification services are voluntary and cannot be forced on an unwilling or indifferent parent].) As part of those services, Otis agreed to cooperate with a prescribed treatment plan through his participation in SARMS. Although the necessary treatment was identified by the SARMS recovery specialist based on an individualized evaluation, the court maintained supervision of Otis's recovery services plan and ultimately determined his compliance with its requirements. Indeed, the court exercised its authority to modify the plan by reducing the number of 12-step meetings from five to two per week, agreeing the SARMS requirement was excessive. The court did not abdicate its judicial authority.

IV

Otis contends his counsel was incompetent because she did not seek to avoid his incarceration with timely and appropriate interventions. He asserts counsel should have: (1) sought a continuance of the April 2004 contempt hearing and filed a section 388 modification petition to terminate him from SARMS; or (2) requested a stay of the order for incarceration and immediately filed for writ review.

Otis has the burden of proving a claim of ineffective assistance of counsel by showing: (1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1407; *In re Arturo A.*

(1992) 8 Cal.App.4th 229, 237.) "A court need not evaluate whether counsel's performance was deficient before examining prejudice suffered by defendant. [Citation.] Thus, a court may reject a claim if the party fails to [show] that but for trial counsel's failings, the result would have been more favorable to the defendant." (*In re Nada R.*, *supra*, 89 Cal.App. 4th at p. 1180.)

Here, no prejudice to Otis resulted from counsel's failure to request a continuance for purposes of filing a section 388 modification petition. Even had the court granted a continuance, a section 388 petition would have sought modification on the ground SARMS was not an appropriate form of treatment and Otis should be excused from compliance. A successful section 388 petition would have operated prospectively but would not have avoided the outcome of the contempt hearing at which prior violations of the court's order were alleged.⁷

Nor is there merit to Otis's assertion counsel was ineffective because she did not request a stay of his five-day sentence under Code of Civil Procedure section 1209, subdivisions (b) and (c) to seek writ relief. Those sections provide for mandatory stays of incarceration if an order of contempt affects certain attorneys or their agents (Code Civ. Proc., § 1209, subd. (b)) or certain public safety employees (Code Civ. Proc., § 1209, subd. (c).) Thus, requesting a stay for Otis would have been unsuccessful.

⁷ Rather than filing a section 388 modification petition, counsel asked the court to dismiss the contempt finding and release Otis from the SARMS requirement. Although the court declined to do so on the ground Otis had already violated the court's order, it suggested it would revisit the issue of whether it was necessary for Otis to continue with SARMS.

Citing Code of Civil Procedure section 1211, Otis further claims he was entitled to a stay of his sentence because the court may only summarily punish contempt that is committed in the court's direct presence. However, Otis's contempt was not summarily punished. Rather, it was set for an evidentiary hearing at which the court received declarations and heard testimony regarding Otis's violation of the court's SARMS order. The court found Otis in contempt on April 22, 2004, and ordered his sentence to begin on April 26, 2004. Because Otis was not entitled to a stay, no prejudice to him resulted from counsel's failure to request one.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.