Filed 5/18/10 In re C.H. CA2/6
Received for posting 6/30/10

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C. H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B214707 (Super. Ct. No. 2005040811) (Santa Barbara County)
THE PEOPLE, Plaintiff and Respondent, v. C. H., Defendant and Appellant.	

Christopher H. appeals from a juvenile court dispositional order committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ),[1] for a maximum term of confinement of eight years. Appellant contends that the court abused its discretion because "1. There was insufficient

[1] "The California Youth Authority (CYA) was renamed California Department of Corrections and Rehabilitation, Juvenile Justice, effective July 1, 2005. The Division of Juvenile Facilities (DJF) is part of the Division of Juvenile Justice. (Gov.Code, §§ 12838, 12838.3, 12838.5, 12838.13.) DJF is referenced in statutes, such as [Welfare and Institutions Code] sections 731 and 733, that formerly referred to CYA." (*In re M.B.* (2009) 174 Cal.App.4th 1472, 1475, fn.2.) In this opinion, we use the term "DJJ" whenever reference to the DJJ or DJF is appropriate.

evidence to support the court's finding of probable benefit from the commitment to DJJ; and [¶] 2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered [by appellant]." Appellant also contends that the commitment offense - lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)) - does not qualify as an offense for which he can be committed to the DJJ. We affirm.[2]

Factual and Procedural Background

Appellant was born in August 1992 and was adopted three days later. In October 2005, when appellant was 13 years old, he licked the vagina of his three-year-old sister and put his penis inside her mouth. This incident constitutes the commitment offense. Appellant admitted to the police that a similar incident had "happened another time with the victim at their house about a year prior and that his father caught him." Appellant also admitted that, about a year earlier, he had "put[] his mouth" on his then seven-year-old sister's vagina and had sexually molested his then seven-year-old brother.

Appellant's parents said that they "first became aware of [appellant] sexually acting out when he was seven years old." Appellant's mother caught him and another boy with their pants down. The other boy "said that [appellant] told him 'If you suck my penis, I'll suck yours.' " Appellant's mother "heard from neighbors and a family friend that [appellant] asked a neighbor boy (age 8) and a girl (age 11) to have sex about two years ago" when appellant was 11 years old.

In October 2005 when appellant sexually molested his three-year-old sister, he was in counseling for his prior sexual misconduct. His therapist said that appellant "is unable to control his impulses to sexually acting out" and that he had not improved after almost one year of treatment.

---

[2] Appellant's petition for writ of habeas corpus is denied by separate order.

In November 2005 a petition was filed pursuant to section 602 of the Welfare and Institutions Code.[3] The petition alleged that, in violation of Penal Code section 288, subdivision (a), appellant had committed a lewd act upon his three-year-old sister in October 2005. In December 2005 appellant admitted the petition's allegations, and the juvenile court found that he came within the provisions of section 602. The court released appellant to the custody of his aunt after he had signed a contract forbidding him from contacting anyone not approved by his aunt. Three days later, appellant violated the contract "by conversing with an 'older' female on a 'sexual website.' " Appellant was detained and transported to a juvenile facility.

On January 5, 2006, appellant was declared a ward of the juvenile court and placed on probation. He was removed from the custody of his parents and "committed to the care of the probation officer for placement in a suitable open placement."

On January 12, 2006, appellant was placed at Starshine Treatment Center. In a supplemental report filed in July 2006, appellant's probation officer characterized his "performance in the overall program at Starshine . . . as lethargic." The probation officer noted that appellant had "just recently had an incident with another minor involving inappropriate sexual conduct."

In a supplemental report filed in January 2007, the probation officer wrote that appellant had "made little improvement" at Starshine. Appellant's therapist said that "he continues to be at a high risk to re-offend."

In February 2007 the probation officer filed a notice of charged violations of probation. The violations included a failure to complete therapy assignments and to participate in group therapy. The probation officer declared: "When asked why he doesn't do what he needs to do, [appellant] has nothing to say aside from, 'I don't know.' [Appellant's] therapist . . . has tried several different therapeutic approaches . . . to try to gain his participation, and still [appellant] does not respond."

---

[3] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Appellant admitted that he had violated his probation by failing to complete therapy assignments and participate in group therapy. Pursuant to the juvenile court's recommendation, appellant was removed from Starshine and placed at Rancho San Antonio.

On May 30, 2007, the probation officer filed a second notice of charged violations of probation. Appellant was charged with engaging in two consensual sex acts with another resident at Rancho San Antonio. The sex acts involved oral copulation and anal penetration. Because of these incidents, Rancho San Antonio terminated appellant's participation in its treatment program. Appellant told the probation officer that, when he becomes an adult, he would like to have an operation to change his sex from male to female. The probation officer declared: "This 14 year old minor failed his first treatment program after 13 months of substandard progress before entering Rancho San Antonio in February '07. Unfortunately, [appellant] demonstrated the same lackluster effort while at Rancho San Antonio. More concerning to Rancho San Antonio treatment team was [appellant's] gender identity issue . . . ."

Appellant admitted the charged violations of probation. On June 20, 2007, appellant was placed at Gay and Lesbian Adolescent Social Services (GLASS) in Los Angeles. In a supplemental report filed on July 5, 2007, appellant's probation officer noted that at GLASS appellant was "receiving sex offender therapy, as well as therapy that addresses his gender identity issues."

On May 1, 2008, the probation officer filed a third notice of charged violations of probation. Appellant was charged with failing to complete assignments for his sex offender therapy at GLASS. The manager of GLASS reported that appellant had completed only one of twelve assignments. His therapist at GLASS stated: " '[Appellant] has shown myself and other staff that he is an intelligent and caring young man who can be manipulative and very lazy. He has shared how he has learned over time that if he plays "dumb" or incompetent, less is expected of him and in his mind means more TV and game time. He has also stated that he enjoys "getting one over"

on adults by not doing his work, or pretending that he doesn't understand it. This learned helplessness has been going on for many years before he arrived at GLASS according to [appellant].' "

On May 2, 2008, appellant admitted the charged violations of probation. The juvenile court ordered that he serve 90 days in the "Juvenile Justice Facilities." But it stayed execution of the 90-day commitment until July 18, 2008. The court said that on that date it would vacate the commitment if appellant had made a genuine effort to participate in the treatment program at GLASS.

On July 18, 2008, the probation officer filed a memorandum concerning appellant's behavior at GLASS. The probation officer reported: "On 7/10/08, Probation met with GLASS staff to review [appellant's] progress. Staff reported no improvements with his attitude and behavior. [Appellant] still failed to complete his assignments for his JSO [Juvenile Sex Offender] group." When a therapist asked him why he did not complete his assignments, appellant replied: " 'I won't lie, I just didn't feel like doing it.' " A GLASS progress report noted that appellant " 'prefers to watch TV, play Playstation games, or just lie around and do nothing.' " The progress report further observed: " 'For four weeks straight [appellant] was not prepared with his issues for the advanced JSO group. He was voted by his peers and staff to start back over in the entry level JSO group.' " The progress report opined that " '[a]t this time [appellant] is at a high risk of re-offending.' " On July 18, 2008, the juvenile court ordered appellant to serve the previously stayed 90-day commitment at the Juvenile Justice Facilities.

In a memorandum filed on August 29, 2008, the probation officer reported that appellant's performance at the Juvenile Justice Facilities "has been satisfactory." On that same date, the juvenile court granted appellant an early release and ordered that he be returned to GLASS.

On January 2, 2009, the probation officer filed a supplemental report on appellant's progress at GLASS. The probation officer concluded that appellant had failed "to make any progress in his JSO program." A GLASS progress report

observed: " 'Since [appellant] returned from juvenile hall his attitude has been more negative. He is defiant with staff. He often refuses to do what is asked of him or if he does it, he makes very little effort to do it correctly. He has lied to staff and cursed at them. He is doing very little Juvenile Sex Offender (JSO) work and school work. His school grades are very poor. . . . Even if told to sit a[t] the kitchen table to do his work, if left alone, he will put his head down and sleep.' " The progress report noted that, on a PlayStation Portable device, appellant had accessed "several pornographic sites including one of beastiality [*sic*]."

On January 5, 2009, the probation officer filed a fourth notice of charged violations of probation. The notice alleged that appellant "fails to follow the [GLASS] program rules, is not completing assignments for his sex offender therapy, and is making no progress." The probation officer declared that, during an interview on December 31, 2008, appellant had "admitted that the reason he did not complete his assignments was due to laziness not because he did not understand the assignments/material." Appellant "stated that if he had chosen to complete the assignments, he would not have had any difficulty in doing so."

On January 6, 2009, appellant admitted the probation violations. The juvenile court asked the probation officer "to contact the [DJJ] to see if a commitment there would ensure [appellant] participate in their sexual offender therapy program."

On February 18, 2009, the probation officer filed a supplemental report. The probation officer said that appellant had been "screened for a commitment" to the DJJ. If so committed, appellant "will participate in the sex behavior treatment program[]." The probation officer concluded: "[Appellant's] continued defiance and resistance to treatment justify his need for a structured program that is able to provide aggressive treatment. Due to his high risk to re-offend, it is recommended that [appellant] be provided a higher level of supervision, with no immediate access to the community. A commitment to the [DJJ] would enable [appellant] to receive the appropriate level of treatment and supervision."

On February 11 and 18, 2009, the juvenile court conducted a disposition hearing on appellant's probation violations. Appellant's counsel asked the court "for one last placement" before sending him to the DJJ. Counsel recommended that appellant be placed at the Stetson School in Massachusetts. A psychologist, Dr. Dani Levine, appeared in court and opined that the DJJ cannot effectively treat appellant and is "not a safe environment" for him. In a letter filed with the court, Dr. Levine also recommended the Stetson School for appellant because it "offers a unique program specifically designed to treat children with sexual behavioral problems." Dr. Levine wrote that the Stetson School "has earned a reputation of expertise in the juvenile sex offender field."

Appellant's mother spoke and requested that the court consider placing him at the Woodward Academy in Iowa. Mother stated that the academy is "100-percent certified by the State of California" and currently has two California children in its sex offender program. Mother said that appellant would have to be interviewed by the academy's director of admissions before he could be accepted into the program. Mother believed that appellant's commitment to the DJJ "would be destructive to [appellant] more than helpful." Appellant's counsel said that, if the court did not want an out-of-state placement for appellant, she would try to find a suitable local placement for him.

The juvenile court decided to commit appellant to the DJJ so that he could participate in its sex offender program: "I think the best chance for [appellant] is at the . . . [DJJ], Sexual Offender Program. . . . [¶] I just think that's the place where he can receive the appropriate level of treatment and supervision . . . . [¶] I think the longer we wait, the longer we run the risk of not helping this young man." "It's not like we're putting him in a cell, locking it up and walking away. We're not doing that. [¶] I don't know of any better program, quite frankly." The court noted that "he's had three opportunities in three very fine programs. Rancho San Antonio is top notch, and he hasn't made it. And he doesn't make it because he hasn't wanted to." The court was "fully satisfied that the mental and physical condition and qualifications of [appellant]

are such as to render it probable that [he] will be benefited by the reformatory, educational discipline, and other treatment provided by the [DJJ]." The court also concluded that appellant "poses a significant risk to the safety of children in our community" and needs to be "in a place where he cannot have access to other potential victims. And that comes down to the [DJJ]."

The Juvenile Court Did Not Abuse Its

Discretion by Committing Appellant to the DJJ

"The decision of the juvenile court to commit a juvenile offender to [the DJJ] may be reversed on appeal only by a showing that the court abused its discretion. [Citation.] '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*In re Carl N.* (2008) 160 Cal.App.4th 423, 431-432.) "A decision by the juvenile court to commit a minor to the [DJJ] will not be deemed to constitute an abuse of discretion where the evidence 'demonstrate[s] probable benefit to the minor from commitment to the [DJJ] and that less restrictive alternatives would be ineffective or inappropriate. [Citation.]' [Citation.]" (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556.)

Appellant contends that the juvenile court abused its discretion because "1. There was insufficient evidence to support the court's finding of probable benefit from the commitment to DJJ; and [¶] 2. Alternative placements were not sufficiently considered and it was improper to reject the ones offered [by appellant]."

We disagree. The juvenile court's finding of probable benefit is amply supported by the probation officer's description of the DJJ sex offender treatment program. In the supplemental report filed on February 18, 2009, the probation officer explained that the program, which usually requires 24 months to complete, "is divided into four phases as follows: The Orientation Phase is approximately 28 weeks long. In this stage, youth gain an understanding of treatment concepts, rules of group therapy, psychological testing, and overall rules/expectations, including the expectation of full disclosure. The Core Program Phase[] is approximately 40 weeks. In this phase, youth go through an intense exploration of their sexual offender behavior patterns,

identifying triggers, antecedents, perceptions, cognitions and emotions. They learn their assault cycle and how to interrupt it. The Relapse Phase is approximately 20 weeks. This [involves] the development of a detailed plan on how to interrupt the sexual offending cycle and prevent or eliminate criminal behaviors. [Appellant] will also participate in the following groups: victim awareness, anger management, and family dynamics counseling."

The record demonstrates that the juvenile court considered less restrictive placements and did not abuse its discretion in rejecting them as ineffective or inappropriate. Appellant had dismally failed at three prior less restrictive placements. In view of these failures, the juvenile court reasonably concluded that appellant's best chance at rehabilitation was the DJJ sex offender treatment program. That program would provide him with extensive, long-term sex offender counseling in a highly structured, disciplined, and closely supervised environment. Such a restrictive environment was necessary to ensure appellant's participation in the treatment program.

Moreover, since appellant had been assessed as posing a high risk of reoffending, his commitment to the DJJ would ensure the safety of the community. "The purposes of juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct. [Citations.] The preservation of the safety and welfare of a state's citizenry is foremost among its government's interests . . . ." (*In re Jose C.* (2009) 45 Cal.4th 534, 555.)

Because the juvenile court did not abuse its discretion by committing appellant to the DJJ, we reject appellant's contention that the commitment violated his constitutional right to due process.

Appellant's Offense Renders Him Eligible for Commitment to the DJJ

Appellant contends that the commitment offense - lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)) - does not qualify as an offense for which a ward may be committed to the DJJ because it is not listed in section 707, subdivision (b). Section 731, subdivision (a)(4), provides that the juvenile court may commit a

ward to the DJJ "if the ward has committed an offense described in subdivision (b) of Section 707 . . . ."

In determining whether a violation of Penal Code section 288, subdivision (a), qualifies as an offense for which a ward may be committed to the DJJ, "[o]ur task is to ascertain legislative intent so we can 'effectuate the purpose of the law.' [Citations.] We begin with the statutory language, which is usually the most reliable indicator of legislative intent. [Citations.] Ordinarily, if that language is susceptible of only one meaning, ' "we presume the Legislature meant what it said, and the plain meaning of the statute controls." ' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1045-1046.)

The relevant statutory language clearly manifests the Legislature's intent that a violation of Penal Code section 288, subdivision (a), shall qualify as an offense for which a ward may be committed to the DJJ. Section 733, subdivision (c), provides that a ward shall not be committed to the DJJ if "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*." (Italics added.) A violation of Penal Code section 288 is one of the sex offenses set forth in Penal Code section 290.008, subdivision (c)(2).

Section 733 was added to the Welfare and Institutions Code in 2007 and became operative on September 1, 2007. (Stats.2007, c. 175, §§ 22, 37.) Section 731.1, also added in 2007, (Stats.2007, c. 175, § 20) provides that "the court committing a ward to the [DJJ], upon the recommendation of the chief probation officer of the county, may recall that commitment in the case of any ward whose commitment offense was not an offense listed in subdivision (b) of Section 707, *unless the offense was a sex offense set forth in subdivision (c) of Section 290.008 of the Penal Code,* and who remains confined in an institution operated by the [DJJ] on or after September 1, 2007." (Italics added.) Thus, a court that committed a ward to the DJJ for a violation of Penal Code section 288, subdivision (a), cannot recall the

commitment even though that offense is not listed in subdivision (b) of section 707. If the legislature had intended that only offenses listed in subdivision (b) of section 707 shall qualify for commitment to the DJJ, it would have permitted recall for an unlisted commitment offense irrespective of whether that offense was set forth in subdivision (c) of Penal Code section 290.008.

Disposition

The dispositional order of the juvenile court committing appellant to the DJJ is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Donald D. Coleman, Judge

Superior Court County of Ventura

Susan B. Gans-Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Michael J.Wise, Deputy Attorneys General, for Plaintiff and Respondent.