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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re JAIME P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JAIME P., Defendant and Appellant.	A107686 (Solano County Super. Ct. No. J32334)

The minor Jaime P. appeals following the juvenile court's denial of his motion to suppress and sustaining of allegations that he drove a vehicle without a license (Veh. Code, § 12500, subd. (a)) and carried a loaded firearm (Pen. Code,[1] § 12031, subd. (a)(1) while associated with a criminal street gang (§ 186.22, subd. (b)(1)). The minor was continued as a ward of the court and placed on probation. The minor contends on appeal that the juvenile court erred by denying his motion to suppress, by failing to determine if the charge of carrying a loaded firearm was a felony or misdemeanor, and by incorrectly calculating the maximum term of confinement. We reject the first of these contentions and find that any error in failing to determine whether the charge was a felony or

[1] All further section references are to the Penal Code unless otherwise indicated.

misdemeanor to be harmless, but find that the matter must be remanded for recalculation of the minor's maximum term of confinement.

I.
BACKGROUND

On April 27, 2004, Fairfield Police Officer Darren Moody detained the minor and three other persons after observing what he believed to be a traffic violation. Moody initially began following the Chevrolet Caprice in which the four individuals were riding when another officer ran a check on its registration and Moody heard over the radio that the registration came back to a Toyota rather than a Chevrolet. As Moody followed the Caprice, he heard the dispatcher correct the report to indicate the registration actually did belong to a Chevrolet. Moody continued his pursuit of the Caprice, however, because he saw it turn from Tabor Avenue onto Nottingham Drive without signaling. The Caprice then pulled over to the curb, again without signaling.

Moody pulled in behind the Caprice, but had not yet turned on his emergency lights when two of the vehicle's four occupants got out. The officer detained the two passengers who got out of the car, because a home on the block had been the target of gang violence within the previous several days. The minor Jaime P., the driver of the vehicle, and another minor remained seated in the car. After a back-up officer arrived, Moody turned his attention to the individuals remaining in the car. The minor turned several times to face the officer, appearing like "a deer in the headlights." The passenger was bending over the seat into the floorboard area or under the seat. Officer Moody yelled at both individuals to keep their hands where he could see them.

The minor could provide only a school identification and said he did not have a driver's license. While talking to the minor, Officer Moody observed a box of ammunition in plain view on the front floorboard. Moody then ordered the minor and passenger to exit the vehicle and he patsearched all four individuals. The only weapon located was a padlock tied to a bandana, found on one of the passengers who initially exited the vehicle. After determining that none of the four individuals had a valid

driver's license, Moody called a tow truck to remove and store the car. An inventory search of the vehicle revealed a loaded .44 caliber handgun beneath the rear passenger seat.

The minor was arrested and after being advised of his constitutional rights at the police station, he admitted that he was a member of the Calle San Marco (CSM) gang. He indicated that he had given a ride to the other three occupants of the vehicle and that one of them produced the gun, which was passed around but not taken out of its holster. At the jurisdictional hearing, Detective Christine Golez testified that CSM is a gang of 150-200 members in Fairfield and is a subset of the Sureno gang; its members are "foot soldiers" of the Mexican Mafia, a prison gang. The Surenos commonly engage in homicide, assault with a deadly weapon, and robbery offenses. Golez indicated that she believed the minor to be an active member of CSM, based upon his self-admission, his associates, his style of dress, and graffiti located at his residence. Additionally, in February of 2003 he was the intended victim of an attack by rival Norteno gang members. Predicate acts of the Sureno gang included a robbery by gang member Francisco Aviles in 2002 and a robbery by gang member Dennis Derrick in 2001.

Based upon this evidence, the juvenile court denied the minor's motion to suppress the firearm, relying upon the minor's probation search condition to justify the officer's action. The court then sustained the petition as to the allegations that the minor drove a vehicle without a license and carried a loaded firearm. This timely appeal followed.

II.
DISCUSSION

A. The trial court properly denied the minor's motion to suppress.

The minor moved below to suppress the firearm seized from the vehicle, arguing that the initial detention of the vehicle was illegal as there was no traffic violation observed by Officer Moody. The prosecution conceded that the officer could not stop the vehicle for a traffic violation because failure to signal is not illegal unless another vehicle

may be affected by the movement and there was no evidence that other vehicles were affected in the present case. (Veh. Code, § 22107.) The juvenile court apparently accepted this concession but nevertheless found the search legal, based upon the minor being on probation with a search and seizure condition.

The parties agree that the pivotal issue presented is whether a juvenile probationary search condition can justify an otherwise illegal search and seizure when the officer is unaware at the time of the challenged conduct that the juvenile offender is on probation and subject to the search and seizure condition. *In re Tyrell J.* (1994) 8 Cal.4th 68, 86-87 held that prior knowledge of the search and seizure probation condition was not necessary in a juvenile case reasoning, in part, that, "imposing a strict requirement that the searching officer must always have advance knowledge of the search condition would be inconsistent with the special needs of the juvenile probation scheme. That scheme embraces a goal of rehabilitating youngsters who have transgressed the law, a goal that is arguably stronger than in the adult context. [Citations.] . . . [T]he condition of probation permitting police . . . to conduct warrantless searches is imposed by the juvenile court to serve the important goal of deterring future misconduct."[2] The court found that having a juvenile probationer assume that every law enforcement officer might stop and search him at any moment would provide a "strong deterrent effect upon the minor tempted to return to his antisocial ways. [Citations.]" (*Id.* at p. 87.)

Our Supreme Court recently revisited the issue of whether prior knowledge of a search condition is required, in the context of adult parolees, and held that "an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*People v. Sanders* (2003) 31 Cal.4th 318, 335, fn. omitted.) This is so, the court reasoned, because

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[2] The court also relied upon the reduced expectation of privacy that probationers, as a general matter, hold, and reasoned that suppressing the evidence under the circumstances presented would not further the purpose of the exclusionary rule. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 86.)

"whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted." (*Id*. at p. 334.) While the court in *Sanders* noted that a number of commentators had criticized the ruling in *Tyrell J*., "[b]ecause this case does not involve a juvenile, we need not, and do not, decide," whether the reasoning of *Tyrell J.* is correct. (*Sanders, supra*, at p. 335, fn. 5.) Although subsequent published opinions in various Courts of Appeal have applied the reasoning of *Sanders* to cases involving adult probationers,[3] only one has applied it to juvenile probationers. (*People v. Hester, supra,* 119 Cal.App.4th 376.)

As the Supreme Court has not overruled *Tyrell J*., supra, 8 Cal.4th 68, we are bound by its precedent.[4] The search of the minor's vehicle was thus legal under his juvenile probation search clause.[5]

B. Failure to state whether offense was felony or misdemeanor was harmless.

The minor next contends that the juvenile court erroneously failed to declare the offense of carrying a loaded firearm, a wobbler, to be a misdemeanor or a felony offense. Welfare and Institutions Code section 702 requires that when an offense can be punished either as a felony or as a misdemeanor, "the court shall declare the offense to be a misdemeanor or felony." One purpose of this requirement is to facilitate the

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[3] See, e.g., *Myers v. Superior Court*, *supra*, 124 Cal.App.4th 1247, 1251-1256; *People v. Hoeninghaus* (2004) 120 Cal.App.4th 1180, 1186; *People v. Lazalde* (2004) 120 Cal.App.4th 858, 864; *People v. Hester, supra,* 119 Cal.App.4th 376 at pp. 397-398; *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1268-1269.

[4] As Justice Kennard notes in her concurring opinion in *Sanders,* "Left open by the majority here is the continuing vitality of the majority opinion in *Tyrell J*., which upheld an officer's warrantless search of a minor based upon the minor's probation search condition of which the officer conducting the search was unaware." (*People v. Sanders, supra,* 31 Cal.4th 318 at p. 337.)

[5] To the extent this decision is inconsistent with *People v. Hester*, *supra*, 119 Cal.App.4th 376, cited by defendant, we respectfully disagree with our colleagues in the Fifth District.

determination of the limits on present or future commitment to physical confinement; another is to assure that the juvenile court is aware of its discretion to treat the offense as a misdemeanor. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1206-1207.) As the court in *Manzy W.* noted, the mere fact that the petition charges the offense as a felony, or that the minute order reflects a finding of a felony, or that the juvenile court sets the felony-level maximum period of confinement, has been held inadequate to comply with Welfare and Institutions Code section 702's mandate. (*Id.* at pp. 1207-1208.) Here the trial court failed to specifically indicate that it was finding the offense of carrying a loaded weapon to be a felony, as required by Welfare and Institutions Code section 702; however, we find such error to be harmless.

The court in *Manzy W.* stated, "we disagree with the minor that remand is, in effect, 'automatic' whenever the juvenile court fails to make a formal declaration under Welfare and Institutions Code section 702 . . . the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*In re Manzy W., supra*, 14 Cal.4th at p. 1209.) Here the juvenile court signed a minute order which deemed the offense to be a felony and signed a dispositional order which confirmed the felony designation. These written findings, signed by the court, are sufficient to indicate that the juvenile court was "aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid*.) This is all that *Manzy W.* requires.[6] Any error in failing to make a specific Welfare and Institutions Code section 702 finding was harmless.

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6 The *Manzy* court noted that *In re Kenneth H.* (1983) 33 Cal.3d 616, 620, fn. 6 found that a signed "Findings and Order" which stated that the charged felony was to run concurrent with a prior commitment was held to be in compliance with Welfare and Insurance Code section 702, in that it was an "explicit finding" of felony status. (*In re Manzy W., supra*, 14 Cal.4th at p. 1208.)

C. The minor's maximum confinement time must be recalculated.

The trial court set the minor's maximum confinement time, under Welfare and Institutions Code section 726, subdivision (c), at eight years and four months. The maximum period of confinement for carrying a loaded firearm is three years (§ 12031, subd. (a)(2)(F)). The maximum term for the gang enhancement is four years (§ 186.22, subd. (b)(1)(A)). Thus, the maximum term of confinement on the felony offenses is seven years. For the misdemeanor offense of driving without a license, the maximum term, if the offense is to run consecutively, is one-third the proscribed term, or two months (maximum term for driving without a license is six months). (Veh. Code, § 12500, subd. (a); *In re Eric J.* (1979) 25 Cal.3d 522, 536-537.) Thus, the minor's maximum term of confinement for these offenses should have been seven years and two months, as conceded by respondent. The juvenile court's order does not set forth how it reached the maximum period of confinement of eight years and four months. Even by aggregating previously sustained petitions, this court cannot reach the term of eight years and four months. It appears, from trying to piece together information from prior probation reports, that the aggregate maximum period of confinement for all previously sustained and current offenses would total nine years and four months.[7] The matter must therefore be remanded for a determination of the correct maximum period of confinement.

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[7] According to the probation reports, petitions were previously sustained as to two counts of misdemeanor vandalism (§ 594, subd. (a)(2)(A)), each punishable by a maximum of 12 months, one count of felony vandalism (§ 594, subd. (b)(1), punishable by 16 months, 2 years, or 3 years, one count of misdemeanor driving without a license, punishable by a maximum of 6 months, and one count of felony second degree burglary, punishable by 16 months, 2 years, or 3 years. The previously sustained charges could result in only one-third the midterm (for the felony charges) or one-third the maximum (for the misdemeanor charges), for a total of 26 months, if the new charge of carrying a loaded firearm is treated as the principal term (7 years, including the enhancement). Adding the additional 2 months for the new driving without a license charge, the total maximum confinement period would be 9 years, 4 months.

III.
DISPOSITION

The matter is remanded to the juvenile court for determination of the proper maximum period of confinement. In all other regards, the judgment is affirmed.

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Sepulveda, J.

We concur:

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Kay, P.J.

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Rivera, J.

People v. Jaime P. (A107686)