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

In re JEROME D., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME D.,

Defendant and Appellant.

C065223

(Super. Ct. No.
JV128685)

Minor Jerome D.¹ appeals from an April 2010 order of the
juvenile court after a contested dispositional hearing. The

¹ We do not use an initial for the given name of the minor in the caption. It impairs readability and leads to confusion for legal research and record-keeping, and his name is among the 1000 most popular birth names during the last nine years. (*In re Jennifer O.* (2010) 184 Cal.App.4th 539, 541, fn. 1; *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1051, fn. 2; *In re Branden O.* (2009) 174 Cal.App.4th 637, 639, fn. 2; *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn. 1; Cal. Rules of Court, rule 8.401(a)(2).) Moreover, the minor is known by his middle name.

minor argues that the juvenile court failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. [ICWA]), failed to determine whether he had any special educational needs, and failed to calculate his custody credits properly. (The minor originally had also argued there was an abuse of discretion in committing him to an Iowa facility rather than the home of a relative in Ohio. In accordance with his subsequent request, we will disregard this claim.) We shall conditionally reverse the order and remand for compliance with the ICWA.

We omit the jurisdictional facts relating to the minor's offenses and violations of probation, because they are not relevant to the arguments on appeal. We will incorporate the facts pertinent to each of the minor's claims in the Discussion.

PROCEDURAL BACKGROUND

In November 2008, Jerome D. admitted allegations that he came within the jurisdiction of the juvenile court because he had committed attempted robbery. (Welf. & Inst. Code, § 602 [undesigned section references will be to this code].) The court granted probation, and imposed but stayed a commitment to the Thornton Youth Center (vacating the commitment in March 2009 on the minor's completion of community service).

The People filed a subsequent petition later in March 2009, based on the minor's commission of a robbery (for which he was being held in custody in Juvenile Hall). The juvenile court sustained the petition and ordered the minor's commitment to the Thornton Youth Center. The minor completed the residential

portion of the commitment in June 2009 (upon the program's closing), and returned to his mother's custody under the supervision of the probation department.

In October 2009, the minor admitted an allegation that he violated probation when he resisted arrest in July 2009 for fighting in public (which resulted in a brief placement in Juvenile Hall). The court ordered the minor's commitment to the Sacramento Boys Ranch. Initially, it stayed execution of the commitment and released the minor on home supervision. The minor's mother reported that he was leaving the house without her permission, and the probation department moved to modify his custody status (holding him in Juvenile Hall pending the court's modification). The juvenile court committed the minor to the Boys Ranch.

The People filed a subsequent petition in November 2009 in which they alleged violations of probation (for which the minor was being held in Juvenile Hall). The minor admitted having been suspended from school for misconduct, and the juvenile court dismissed the other allegations. Following the contested dispositional hearing in April 2010, the juvenile court ordered the minor's commitment to a placement in an Iowa facility for a maximum period of five years and eight months; it denied the minor's motion for reconsideration.

DISCUSSION

I

A

On the initial detention of the minor in November 2008, the

intake report described his ethnicity as Black, but the mother stated that "there is Cherokee Indian/Native American Heritage on both the maternal and paternal side of the family. However, the family is not registered with the tribe." In accordance with the then-prevailing practice of the juvenile court, the report asserted that "Although the minor may have Indian/Native American Heritage, termination of parental rights is not likely the case plan. Therefore, the [ICWA] does not apply" The juvenile court adopted a proposed finding to this effect in ordering the minor's detention. The probation officer's social study reiterated a similar proposed finding, which the juvenile court's November 2008 order also adopted.

In connection with the subsequent petition in March 2009, the intake report simply cited the November 2009 finding, and the juvenile court again adopted the report's proposed finding of the ICWA's inapplicability in its detention order. However, the social study subsequently included a proposed finding asserting—incorrectly—that the prior order in November 2008 had determined that the ICWA did not apply because "the minor was not of Native American Heritage or Ancestry." The juvenile court's April 2009 order adopted this erroneous proposed finding.

The intake report for the July 2009 probation violation then cited the April 2009 order (as did the social study), which resulted in an October 2009 dispositional order perpetuating the error. The reports and findings for the November 2009 petition simply asserted the minor's lack of Indian ancestry without

additional elaboration (other than a single reference to the erroneous finding to this effect in the October 2009 order), and the family assessment case plan (§§ 706.5, 706.6) described his ethnicity only as "Black or African American."

B

The minor correctly maintains that once the disposition of the present matter considered placing him in an Iowa facility, this put him at risk of entering into the equivalent of foster care², which triggered the requirement *under state law* of complying with the procedural provisions in the ICWA for investigating whether he is or may be an Indian child and for providing notice to any implicated tribes, *even though the case plan does not include termination of parental rights.* (*R. R. v. Superior Court* (2009) 180 Cal.App.4th 185, 193-194 (*R. R.*); §§ 224.2, 224.3; Cal. Rules of Court, rules 5.480-5.484.)³ The duties of inquiry and notice are ongoing throughout the course of the delinquency proceedings. (*R. R., supra*, 180 Cal.App.4th at p. 199.) Because notice under the ICWA protects interests of absent tribes, the issue is cognizable in the first instance on

² The People concede in supplementary briefing that the record reflects the status of the Iowa placement - an out-of-state group home - as an equivalent of foster care meeting the requirements of Family Code section 7911.1. (§ 727.4, subd. (d)(1); 11402, subd. (g)(6).)

³ We note the Supreme Court has granted review of a decision disagreeing with *R.R.* (*In re W.B.* (2010) 182 Cal.App.4th 126, rev. granted May 12, 2010, S181638), which had concluded state law cannot expand the reach of the ICWA to delinquency cases.

appeal, as here. (*In re Z.N.* (2009) 181 Cal.App.4th 282, 296-297.)

Here, the juvenile court initially operated under the same mistaken policy that we rejected in our *R.R.* decision: namely, that the ICWA does not apply in delinquency proceedings unless a termination of parental rights is under consideration. (*R. R.*, *supra*, 180 Cal.App.4th at pp. 194-196.) Therefore, despite receiving specific information sufficient to give it reason to believe the minor was an Indian child, triggering the duty under state law to apply the ICWA (*In re Jose C.* (2007) 155 Cal.App.4th 844, 846, 848), the juvenile court did not act on the information. This error was compounded when the March 2009 social study incorrectly described the November 2008 order of the juvenile court as finding ICWA did not apply because the minor did not have Indian ancestry, an error perpetuated thereafter from order to report to order to report. As a result, even after we issued *R.R.* the juvenile court was unaware of its ongoing ICWA duties when the equivalent of foster care became the disposition under consideration in connection with the November 2009 petition.

The People assert that we should *infer* that the allegations of the minor's Indian heritage were in fact investigated and found untrue. However, unlike *In re S.B.* (2005) 130 Cal.App.4th 1148, 1160-1161, and *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-942 (assuming the validity of these holdings), the reports in the present case did not include *any* designation that would reflect an investigation dehors the record; rather, the

reports at the outset indicated *indifference* to the possibility of Indian heritage (because of the mistaken belief that the ICWA was nevertheless inapplicable), and then a perpetuated error that the juvenile court had made an express ruling of the lack of Indian heritage (which it had not).

The People also assert the mention of Indian heritage was too vague and speculative. (*In re Jerimiah G.* (2009) 172 Cal.App.4th 1514, 1516; *In re O.K.* (2003) 106 Cal.App.4th 152, 157.) However, the information here was more specific than in those or other similar cases, and did not on its face indicate the minor's parents would be excluded from *tribal* consideration for membership. (*In re Damian C.* (2009) 178 Cal.App.4th 192, 199; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406-1407.)

Therefore, we must conditionally reverse the order and remand to investigate whether the minor is in fact an Indian child and provide notice to any affected tribe. If, however, the juvenile court ultimately determines the case is not subject to the substantive provisions of the ICWA, it may reinstate its order. As the application of the ICWA's substantive provisions is highly speculative at this point, we will address the minor's other challenges to the juvenile court's order in the event it is reinstated.

II

A

The various reports and social studies in the proceedings leading up to the November 2009 subsequent petition noted that

the minor had a diagnosis of attention-deficit hyperactivity disorder (ADHD), for which he took medication. However, he did not have a diagnosed learning disorder, was not the subject of an individualized education plan (IEP),⁴ and did not qualify for one. On this basis, the juvenile court determined in its October 2009 order that the minor did not have exceptional needs.

In its December 2009 update for the present petition, the probation department included a proposed finding to the same effect. Its family assessment/case plan reiterated that the minor was neither the subject of an IEP nor had any educational needs, but identified his ADHD as a "mental health educational" need.

The minor's counsel had solicited a psychiatric evaluation of him. The minor had been taking various medications for ADHD since at least third grade. After continued conflict with his teachers and peers in eighth grade, the minor was in an independent-study program. The doctor observed that the minor's behavioral problems at Boys Ranch had improved once he obtained access to his medications. Although the doctor acknowledged that "there was no evidence [of] cognitive impairments or learning disabilities," he nonetheless recommended the minor

⁴ An IEP is a written statement of a minor's present level of educational performance, which documents the degree to which any disability affects performance in regular educational programs, and includes goals, benchmarks, and necessary services. (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1397, fn. 2 [paraphrasing 20 U.S.C. § 1414(d) (1) (A)] (*Angela M.*).

"should be evaluated for an IEP" to accommodate a "serious emotional disability." He also believed an aggressive approach to the minor's medication would improve any behavioral problems.

In a second supplement, the probation department reiterated its proposed finding on the lack of any exceptional needs, and the retention by the mother of the right to make educational decisions. The juvenile court's present order incorporated the recommendations.

B

The minor states, without any evidentiary or legal support, the proposition that "Youth [who] suffer[] from ADHD generally have special education[al] needs, and the failure to have such needs provided for often leads to serious consequences." He claims the juvenile court failed to assess or determine his educational needs despite the recommendation in his evaluation (asserting in passing that the juvenile court "prevented" the doctor from testifying) and we should remand for the purpose of ordering an IEP. He contends this violated the juvenile court's duty under *Angela M., supra*, and asserts his failure to raise a contemporaneous objection to this purported dereliction should not forfeit the issue.

If minor's counsel had any basis for believing the minor had any exceptional needs that would benefit from an evaluation for an IEP, it was incumbent upon her to object at the time the juvenile court announced its intention to adopt the finding to the contrary. We presume she had reasons to the contrary to consider this unnecessary (foremost among which would have been

her concurrence in the probation department's assertion that the minor did not qualify for one, or the opinion in the psychiatric evaluation that his behavioral problems could be controlled with an aggressive pharmaceutical approach). The issue thus is forfeited on appeal. In any event, the claim fails on the merits.

In the first place, the court did not "prevent" the doctor from testifying. At the dispositional hearing, the minor's counsel stated that she did not intend to call the doctor as a witness unless either the juvenile court or the People wanted to cross-examine him about the evaluation. Both demurred to the offer, the court stating, "I think his report is quite clear."

Angela M., supra, explained that under various state and federal provisions, a minor has "exceptional" educational needs *if* an IEP has determined that the minor has an impairment of sufficient degree to require special education that modification of a regular school program cannot provide. (111 Cal.App.4th at pp. 1397-1398.) At the time of the decision, a court rule provided that in declaring a child its ward the juvenile court "must consider the educational needs of the child," which *Angela M.* construed as imposing a mandatory duty to "consider **or** determine whether [a minor has] special educational needs."⁵

⁵ *Angela M.* also cited a section of the Standards of Judicial Administration (presently numbered without change as section 5.40(h)) directing juvenile courts to "[t]ake responsibility . . . at every stage of the child's case, to ensure that the child's educational needs are met . . ." (See 111 Cal.App.4th at p. 1398, fn. 5.)

(*Id.* at p. 1398 [emphasis added].) Even though there were facts that would indicate the existence of special educational needs, *Angela M.* did not believe the court gave this any consideration because it “did not mention this issue when committing her to the CYA.” (*Id.* at p. 1399.)

Angela M. is thus doubly distinguishable. The present renumbered version of the rule does not include a direction to consider education needs when finding a minor to be a ward of the juvenile court, other than to “consider whether it is necessary to limit the right of the parent . . . to make educational decisions for the child.” (Cal. Rules of Court, rule 5.590(f)(5).) (The juvenile court’s order, as noted, does include a finding that it was unnecessary to limit the mother’s educational rights.) Thus, an *Angela M.* duty does not exist any longer. Moreover, the juvenile court’s order in fact includes an *express provision* that the minor did *not* have any exceptional needs. Therefore, the order both considered *and* determined the issue (unlike the *Angela M.* court).

As a result, the minor could properly argue only that the present finding lacks substantial evidence (a claim he does not make), which would fail in the face of the probation department’s reports and the concessions in the evaluation that the minor did not have any learning disability or impairment beyond the ADHD that his medication seemed to be remediating. We therefore reject this argument.

III

As noted, the minor originally argued that the juvenile

court had abused its discretion in committing him to the Iowa facility, asserting the court had improperly refused to receive evidence in support of a placement with his great-uncle in Ohio. He has asked permission to abandon the argument, which we have granted.

IV

In its January 2010 supplemental memorandum to the court, the probation department included the latest calculation of the minor's custody credits throughout these proceedings. It showed two days in Juvenile Hall attributable to the original November 2008 petition, 38 days in Juvenile Hall and 62 days in the Youth Center attributable to the March 2009 supplemental petition, two days in Juvenile Hall attributable to the July 2009 violation of probation (along with three days in Juvenile Hall on the motion to modify his custody status from home supervision to Boys Ranch, and 31 days at Boys Ranch), and ongoing custody at Juvenile Hall attributable to the November 2009 violation of probation that began on November 23, 2009. The memorandum calculated the latter as 59 days, apparently as of a scheduled hearing date of January 21, 2010 (although that appears to be one day short and may reflect use of the November 24 date of the petition rather than the start of custody).

In the midst of her argument in favor of a commitment to the home of the great-uncle at the hearing on April 8, 2010, the minor's counsel asserted that the minor had spent a total of 452 days in ordinary forms of confinement (which included both home supervision and electronic monitoring), and these traditional

approaches were "just not working."

After the court made its oral ruling, the "presenter" brought the court's attention to custody credits, stating the minor had accrued 135 days attributable to the November 2009 petition (although *that* total appears to be *two* days short). The minor's counsel stated that her calculation was 144 days; she began to calculate the prior Boys Ranch custody when the presenter interrupted to remind her that the minor had already been credited for those. The minor's counsel then acceded to the calculation of 135 days. The court's order reflects this figure.

Comparing apples and pomegranates, the minor cites these three different places in the record and asserts we must remand to reconcile the inconsistencies. To the contrary, the January 2010 *preliminary* calculation of the minor's latest custody was 59 days apparently as of *January 21*, with 197 days *in total*; the presenter calculated 135 days for only the *latest* custody as of the hearing on *April 8*. The amount of custody to which the minor's counsel rhetorically attested, on the other hand, was a total amount that included other commitments not qualifying for custody credits that were cited only to make the point that the minor needed a different type of commitment.

Consequently, a discrepancy warranting remand does not exist. We will, however, direct the juvenile court to correct its April 2010 order (in the event of its reinstatement) to reflect that the minor was entitled to two additional days of custody credit attributable to the November 2009 petition as of

April 8, 2010 (in addition to any custody credit he accrued subsequently).

DISPOSITION

The dispositional order of the juvenile court is reversed and the matter remanded with directions to investigate whether the ICWA applies to the minor. If the ICWA applies, the court shall give the required notices. If after notice a tribe claims an interest in the minor as an Indian child, the juvenile court shall proceed in conformity with the substantive provisions of the ICWA. If the juvenile court determines that ICWA does not apply, or it does not receive a response from any tribe claiming the minor as an Indian child, the court may reinstate its April 2010 order, corrected to include two additional days of custody credit as of April 8, 2010.

We concur: BLEASE, Acting P. J.

ROBIE, J.

MAURO, J.