Filed 10/28/19 In re Raven W. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re RAVEN W., a Person Coming Under the Juvenile Court Law.	B288463
THE PEOPLE, Plaintiff and Respondent, v. RAVEN W., Defendant and Appellant.	(Los Angeles County Super. Ct. No. YJ39400)

APPEAL from an order of the Superior Court of Los Angeles County, Catherine J. Pratt, Judge. Conditionally reversed and remanded for further proceedings.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Raven W. appeals the juvenile court's order declaring her a ward of the court pursuant to Welfare and Institutions Code[1] section 602 without giving her notice of her eligibility for deferred entry of judgment (§ 790, et seq.). Additionally, she and the People agree that the juvenile court failed to exercise its discretion, as required by section 702, to determine whether the adjudicated allegation of a "wobbler" offense was a felony or misdemeanor; that because the offense was not declared a felony, the order to provide a DNA sample was improper; and that the court erred by declaring a maximum term of commitment. We conditionally vacate the court's findings, conditionally reverse the dispositional order, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In a 2017 wardship petition, Raven W. was alleged to have committed two offenses: possession of a firearm by a minor (Pen. Code, § 29610) and illegal possession of live ammunition (Pen. Code, § 29650). The juvenile court found true both allegations of this petition.

After the adjudication of the 2017 petition but before its disposition, a second wardship petition was filed in which Raven W. was alleged to have committed second degree robbery. This petition was later amended to allege petty theft (Pen. Code, § 484, subd. (a)). Raven W. admitted the petty theft allegation and the robbery allegation was dismissed.

At the disposition hearing for both petitions, the court declared Raven W. a ward of the court and ordered her home on probation. The court calculated her maximum term of

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[1] Unless otherwise indicated all further statutory references are to the Welfare and Institutions Code.

confinement as four years two months. Additionally, the court ordered Raven W. to provide a DNA sample and palm print. Raven W. appeals.

DISCUSSION

Raven W. argues, and the People concede, that the statutory procedures for deferred entry of judgment (DEJ) were not followed.

"The DEJ provisions of section 790 et seq. 'provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)' [Citation.]" (*In re C.W.* (2012) 208 Cal.App.4th 654, 659.)

"Under section 790, the prosecuting attorney is required to determine whether the minor is eligible for DEJ. Upon determining that a minor is eligible for DEJ, the prosecuting attorney 'shall file a declaration in writing with the court or state for the record the grounds upon which the determination is based, and shall make this information available to the minor and his or her attorney.' (§ 790, subd. (b).) The form designed for this purpose is a form JV-750, the completion of which requires the prosecutor to indicate findings as to the eligibility requirements by checking, or not checking, corresponding boxes. (Cal. Rules of Court, rule 5.800(b).) If a minor is found eligible

for DEJ, form JV-751, entitled 'Citation and Written Notification for Deferred Entry of Judgment—Juvenile,' is used to notify the minor and his or her parent or guardian. There is a box to check on the form JV-750 indicating that the form JV-751 is attached." (*In re C.W.*, *supra*, 208 Cal.App.4th at p. 659.) "In addition, the prosecutor's 'written notification to the minor' of the minor's eligibility must include, inter alia, '[a] full description of the procedures for deferred entry of judgment' (§ 791, subd. (a)(1)) and '[a] clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment' (§ 791, subd. (a)(3))." (*In re C.W.*, at p. 660.)

"Once the threshold determination of eligibility is made, the juvenile trial court has the ultimate discretion to rule on the minor's suitability for DEJ. [Citation.] Suitability for DEJ is within the court's discretion after consideration of the factors specified by statute and rule of court, and based upon the standard of whether the minor will derive benefit from """"education, treatment, and rehabilitation""""" rather than a more restrictive commitment. [Citation.]" (*In re C.W.*, *supra*, 208 Cal.App.4th at p. 660.)

The requirements of sections 790 and 791 for notice regarding DEJ were not met here. The prosecuting attorney partially completed and signed a form JV-750 in which she determined that Raven W. was eligible for DEJ. The prosecutor did not mark the box that indicated that a form JV-751 was attached. While the record does contain a JV-751 form, it is incomplete: Other than Raven W.'s name, all other spaces are

blank. No date or location for a suitability hearing was provided. There is no indication that the form was ever served on Raven W. or her parent, or that the information required by section 791 to be provided in writing was provided to her.[2] There is also no indication in the record that the juvenile court ever held a hearing concerning Raven W.'s suitability for DEJ. "Where, as here, the prosecuting attorney filed a determination of eligibility but the accompanying citation failed to provide notice of a date when a suitability hearing would be conducted, we cannot

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[2] Section 791 provides that the prosecuting attorney's written notification to the minor shall include a full description of the procedures for DEJ; a general explanation of the roles and authorities of the probation department, the prosecuting attorney, the program, and the court in that process; a clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant DEJ with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment, and that upon the successful completion of the terms of probation, the positive recommendation of the probation department, and the motion of the prosecuting attorney, the court shall dismiss the charge or charges against the minor; a clear statement that if the minor fails to comply with the terms of probation, judgment of wardship may be entered on the charges in the original petition and a disposition hearing scheduled; an explanation of record retention and disposition resulting from participation in the DEJ program and the minor's rights relative to answering questions about his or her arrest and DEJ after completing the program successfully; a statement that if the minor fails to comply with program terms and judgment is entered, the offense may serve as a basis for a finding of unfitness pursuant to section 707, subdivision (d), if the minor commits two subsequent felony offenses. (§ 791, subd. (a).)

conclude that the juvenile court met its obligations." (*In re Trenton D.* (2015) 242 Cal.App.4th 1319, 1326.)

The People acknowledge that the record does not demonstrate that Raven W. was given the notice required by statute, but argue that the error is harmless because "the record shows appellant would not have accepted DEJ and she was aware of her eligibility." The People contend that Raven W. was aware of her DEJ eligibility because her attorney sought informal supervision under section 654 prior to the adjudication of the first wardship petition; when that request was denied, asked for a continuance while she pursued a pre-filing diversion program; and after the adjudication of the first petition, while seeking transfer of the case for disposition in another specialized court, mentioned that the probation department's pre-plea report had recommended DEJ. The People also argue that because Raven W. declined to participate in a different diversion program, it can be concluded that she did not want to admit the charges against her, so she would have refused DEJ because it too would have required admitting the charges. We are not persuaded. The record does not demonstrate that Raven W. was aware that the prosecutor had declared her eligible for DEJ; that she knew the information required by law to be provided to her about DEJ; that the reason she declined a different program was that she would have to admit the charges; or that she would have rejected DEJ had she been properly informed of the program and her eligibility. Moreover, although a juvenile court is not required to determine whether a minor is suitable for DEJ when the minor is properly advised of his or her DEJ eligibility and fails to admit the charges or waive the adjudication hearing (*In re Usef S.* (2008) 160 Cal.App.4th 276, 283, 286; *In re Kenneth J.* (2008) 158

Cal.App.4th 973, 979-980), the court is not excused from holding a suitability hearing where, as here, there is insufficient evidence that the minor was properly notified of his or her eligibility for DEJ.

The People finally argue that the failure to conduct a suitability hearing was harmless because Raven W.'s case was transferred for disposition to a court providing enhanced services and supervision to victims of sex trafficking through a program called Succeeding Through Achievement and Resilience (STAR Court). The People assert that if Raven W. completes that program successfully, she "may avoid entry of judgment against her." Although the People suggest that the two programs are equivalent, they do not demonstrate that the outcome would have been the same in either program. We note that the possibility asserted by the People that a successful participant in the STAR Court program "may avoid entry of judgment" in undefined circumstances does not appear equivalent to the DEJ program's statutory mandate that the court dismiss the charges against a minor who successfully completes the terms of probation. (§ 791, subd. (a)(3).) We cannot conclude on this record that the failure to conduct a suitability hearing was harmless.

Because the court did not conduct the necessary inquiry into Raven W.'s suitability for DEJ, we conditionally vacate its findings and dispositional order and remand the case for further proceedings that comply with the statutory scheme, including notice to Raven W. of her eligibility for DEJ. If Raven W. elects to seek DEJ, the juvenile court shall exercise its discretion whether to grant her DEJ.

Our determination that a conditional reversal and remand is necessary makes it unnecessary to address the errors in the

dispositional orders that have been identified by Raven W. and conceded by the People. On remand, if Raven W. declines or is denied DEJ, the court shall reinstate its findings and issue new dispositional orders in which the court shall exercise its discretion to declare whether her "wobbler" offense, possession of a firearm by a minor, is a felony or a misdemeanor (§ 702 ["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"]). Only if the juvenile court declares the offense a felony shall the court order her to provide a DNA sample and palm print. (Pen. Code, § 296.) Additionally, the court shall not specify a maximum term of confinement for a minor ordered home on probation. (§§ 726, subd. (d), 731, subd. (c); *In re Ali A.* (2006) 139 Cal.App.4th 569, 572-573.)

In the course of the further proceedings, if Raven W. is not adjudicated under section 602 for committing a felony and therefore is not required by Penal Code section 296 to provide physical body samples, she may seek relief for any samples already collected under the expungement procedure provided by Penal Code section 299.

DISPOSITION

We conditionally vacate the juvenile court's findings, conditionally reverse the dispositional order, and remand the case for further proceedings under Welfare and Institutions Code section 790 et seq., including notice to Raven W. of her eligibility for a DEJ. If Raven W. desires DEJ, the juvenile court shall exercise its discretion whether to grant her DEJ.

If Raven W. declines or is denied DEJ, the court shall reinstate its findings and issue new dispositional orders. In so

doing, the court shall exercise its discretion to declare whether the "wobbler" offense of possession of a firearm by a minor is a felony or a misdemeanor. The court shall not order Raven W. to provide a DNA sample and palm print unless the court declares the wobbler offense to be a felony. Additionally, the court shall not specify a maximum term of confinement for a minor ordered home on probation.

If Raven W. ultimately is not adjudicated under section 602 for committing a felony and therefore is not subject to the physical sample requirements of Penal Code section 296, she may seek relief for any physical body samples already collected under the expungement procedure provided by Penal Code section 299.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.