Filed 11/13/12 In re T.P. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T.P., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. T.P., Defendant and Appellant.	B233556 (Los Angeles County Super. Ct. No. MJ18382)

APPEAL from an order of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed.

Torres & Torres and Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant T.P., a ward of the juvenile court under Welfare and Institutions Code section 602,[1] was placed at home on probation. The district attorney filed a supplemental petition that alleged a violation of probation based on truancy. (§ 777.) After appellant waived his right to a hearing and admitted the truancy allegation, the juvenile court sustained the supplemental petition and ordered him suitably placed. In his appeal from that order, appellant contends that "[t]he referee committed misconduct and denied [him his] due process right to a fair and impartial tribunal by conducting her own investigation into the facts, strongly suggesting that a supplemental petition be filed against appellant under section 777, and then acting as an advocate by presenting evidence against him." Based on our determination that the record does not support appellant's contentions, we affirm.

BACKGROUND

On May 26, 2009, the Los Angeles County District Attorney filed a section 602 wardship petition, which alleged that appellant had committed assault by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1), a felony (count 1). Count 1 was dismissed and appellant admitted an amended count of battery with serious bodily injury in violation of Penal Code section 243, subdivision (d), a felony (count 2). The court declared appellant a ward of the court and placed him at his parents' home on probation. Appellant's home, at that time, was with his father and stepmother in Palmdale. He later moved to his mother's home in Compton.

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[1] All further undesignated statutory references are to the Welfare and Institutions Code. Section 602, subdivision (a) provides: "Except as provided in subdivision (b), any person who is under the age of 18 years when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

On March 24, 2010, appellant's probation officer issued a notice of violation of probation. (§ 777.)[2] After appellant conceded that the allegations were true, he was briefly detained in a juvenile hall drug treatment program.[3] Upon his release, he was returned home on probation on March 30, 2010.

In September 2010, appellant lived with his mother in Compton and participated in an independent study program, substance abuse counseling, and community service. However, he tested positive for marijuana on June 28, 2010, August 5, 2010, and September 8, 2010, which resulted in his second detention in a juvenile hall drug treatment program from September 28 to October 12, 2010.

At the October 12, 2010 progress hearing, the court informed appellant and his parents that he could not remain in an independent study program if there was no adult

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[2] Section 777 provides in relevant part: "An order changing or modifying a previous order by removing a minor from the physical custody of a parent . . . and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after a noticed hearing. [¶] (a) The notice shall be made as follows: [¶] . . . [¶] (2) By the probation officer or the prosecuting attorney if the minor is a court ward or probationer under Section 602 in the original matter and the notice alleges a violation of a condition of probation not amounting to a crime. The notice shall contain a concise statement of facts sufficient to support this conclusion. [¶] . . . [¶] (c) The facts alleged in the notice shall be established by a preponderance of the evidence at a hearing to change, modify, or set aside a previous order. The court may admit and consider reliable hearsay evidence at the hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in People v. Brown, 215 Cal.App.3d (1989) and any other relevant provision of law."

[3] According to the March 24, 2010 notice of violation of probation, appellant was asked to leave two middle schools (Gompers and Davis) in three months in order to avoid assault charges. At Gompers, he displayed a poor attitude, failed all his classes, and had 35 absences and numerous tardies. At Davis, he left school without permission and consumed marijuana. The March 24 notice alleged that appellant had: (1) failed to obey all instructions and orders of his parents, teachers, and school officials; (2) failed to perform his required hours of community service; (3) failed his classes at Gompers and had poor attendance at Davis; and (4) tested positive for marijuana on November 5, 2009, December 7, 2009, January 7, 2010, and February 25, 2010.

supervision at home while his mother was at work. His mother assured the court that her 20-year-old adult daughter would be home to supervise appellant. The court stated, "Okay. Then make sure she does." The court warned appellant that if he used marijuana again, his "next stop is camp." The court ordered appellant to continue drug testing and released him to his parents.

At the April 12, 2011 progress hearing, the court announced that because it did not receive a probation report, it had "the school liaison pull the information from the school," which "virtually shows he's not been in school."[4] However, the court also had received (from appellant's father) the school administrator's letter, which stated that appellant's attendance and conduct had improved significantly. Noting the discrepancy between the attendance records and the letter, the court stated: "Well, I don't know how they can say he's had significant improvement in academics and attitude. Based upon what I got he was absent part of April 6th, part of April 7th, part of April 8th, actually the whole day April 8th." The court detained appellant in juvenile hall pending the continued hearing on April 14, and directed the probation officer to appear and provide a report on that date. The court stated: "If minor's grades are all F's and no marks, the Court strongly recommends that probation file a WIC 777."

On April 14, 2011, the district attorney filed a supplemental petition under section 777 (supplemental petition), which alleged that appellant had violated his probation by being truant from February 2011 to the present. The supplemental petition further stated that because the current placement at home on probation was not effective, a camp community placement was warranted.

In contrast, the probation officer recommended in his April 14 report that jurisdiction be terminated. The probation officer's report stated that appellant was attending school full time, had tested negative for drugs between October 2010 and

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4 By the April 12, 2011 hearing, appellant had enrolled in a public high school in Compton.

We infer from the juvenile court's remarks and the parties' briefs on appeal that the "school liaison" was provided to the juvenile court specifically to assist the court in monitoring the behavior and school attendance of the court's wards.

March 2011, and, according to his mother, had shown a significant improvement in his behavior.

At the April 14 hearing, the court informed the parties of the following: When the court did not receive a probation report for the April 12 hearing, it asked the school liaison to obtain appellant's school's attendance records, which showed that he was rarely in school.[5] In contrast, the school administrator's letter stated that appellant's attendance and conduct had improved significantly. In light of this discrepancy, the court asked the school liaison to verify the administrator's letter with the school. When the school liaison called the school, the administrator was not there, but an assistant verified that the letter was written by the administrator, who "likes to write positive things about the kids to show they are backing their students."

Appellant's attorney objected on the ground that the court had conducted its own investigation, which is "not the bench officer's function. The bench officer is supposed to be a fair and impartial judge of the facts before her, not investigate facts and deduce the facts." Counsel pointed out that after the probation officer was advised of the school records, the probation officer "changed his opinion as to the outcome of [t]his case. So on that basis I would object to the attendance records being used against my client." In addition, counsel requested that appellant be assigned to an independent study program at home because there was no indication "that he's going to be out misbehaving."

The court disagreed, stating that appellant needed to attend a school that was approved by the probation department. Appellant had used drugs during his independent study program at home, which was not conducive to his education, and his mother had been out at work during the day, which was a violation of the independent study program's rules.

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[5] The attendance records showed that appellant was absent "almost the entire one day one class for April 12th. The full day of April 11th — no April 8th. The two classes are for April 7th. Almost the full day of April 6th. Nearly the full day for April 5th. Nearly the full day for April 4th. Two classes March 31st. Two classes March 30th. Full day — almost a full day of March 29th. One class for March 28th. Two classes on March 25, and it just goes on."

The probation officer agreed that in light of appellant's excessive absences from school, his placement at home on probation was not working well. The probation officer believed that in light of appellant's youth, he would be better served by receiving therapy and counseling in a camp setting.

The prosecutor concurred that appellant's school attendance records contained "just pages and pages of truancies." To clarify the record, the prosecutor explained that the "court did not order the district attorney's office to file" the supplemental petition. On the contrary, the district attorney's office had recommended a three-month placement in "camp" for the offense (battery with serious bodily injury) that was alleged in the amended section 602 petition.

The court stated that the school administrator's letter was "virtually misleading to the court based upon what this young man is doing. I — I don't call it fraud on the court, but it's very close and [because] I know it's written by a school official it makes [the] court even sadder."

Appellant's attorney reiterated that appellant was requesting an independent study program at home "because he lives in South Central Los Angeles, which is a very dangerous area. Part of the reason why he's been showing up late to school is because the court here ordered him to attend full-time school when he's got to get from his home to the school, which is dangerous."

The court refused to place appellant in an independent study program at home. The court pointed out that according to the school's attendance and disciplinary records, the dangerous neighborhood was not the relevant problem. Appellant was able to get to school, but he was not staying in class once he arrived.[6]

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[6] The court stated: "March 31st, once again that was one of the dates that I had that he wasn't in school or he ditched a couple of classes. March 31st, ditching class. He was on campus safe. He was there but he refused to come to his class where he could have been safe. Again, on March 31st he went to the restroom and refused to go back to class. Going to the restroom could put him in danger but he refuses to go back to class. March 31st, same day, T[.] refused to come into his class. He walked out after the individual reporting [had] asked him to stay in class. March 30th, T[.] asked to go to the

Appellant's counsel repeated his objection that the court had obtained information through its "own investigation by requesting the other individuals, not probation, to obtain. I don't know what the authenticity or what the basis of those records are. That's the whole point of my argument, Your Honor, that the court conducted an illegal investigation."

The court denied that it had conducted an illegal investigation or engaged in any misconduct. The court explained that the school liaison's services are provided to the court in order to assist in the rehabilitation of the court's wards: "Mr. Farias, I already heard you and over your objection court does have access to a school liaison. The school

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restroom but instead went to the lunch area. He refused to return to the classroom when requested by whoever Nacho is, N-A-C-H-O. March 28th T[.] came into the class but left without permission before he even sat down. 'I observed him running around the campus later yelling and being disruptive.' March 28th, walk out — T[.] walked out of his third period without any permission and never returned. March 25th, foul language. 'T[.] continues to cuss throughout class numerous times. I asked him to go outside so I could talk to him and while he was outside he was banging on the door, shouted out, cussed and walked off.' March 23rd, student was commenting on other incidents occurring within the classroom during whole group instruction. 'He refused to stop and said he was tired of me telling him to be quiet. He had already been given a verbal warning along with a private talk regarding expectations. Student chose to go to the office.' Same date disrupting classmates, foul language, left. He was supposed to copy an assignment which he asked his neighbor to do the assignment. He kept telling his classmates to shut up even though he was asked to stop talking and he was warned. He cussed at her. He was asked to step outside to talk to him about his language and how he treated his classmates. When he came back in he refused to sit in his seat. He refused to redo his assignment. He talked to the same classmate. 'I told him that . . . it was his decision but it would affect his grade. He sat there for a minute and said fuck this class then walked out and slammed the door.' April 18th he is suspended for defiance disrespect, vulgarities and habitual profanity. March 18th, inappropriate conversations. He's talking continuously cussing at one other — with another student. The teacher tried to intervene. They continued to fight. It took maybe five minutes to leave the classroom. 'When he did he told me to shut the fuck up and to suck his' — and he didn't say what word he used. That's just to March 18th. I have almost something every single day where he gets to class. I even saw where the daughter took him to school one day, even though they were late. This is delinquent behavior. This is where he's not sitting in a classroom. The teacher goes on in one of them to describe he does this so he can get out of class. So this is not an issue of him being, you know, afraid to be in school because he gets there and he just won't stay in his classrooms. At least that's my take."

liaison is to assist the court in rehabilitation of these young people. The school liaison is sitting here at the welcoming of the court. And under its authorization court has also undergone — gotten information from judicial ethics with regards to its ability to use the school liaison, and so I'm disseminating the information. Court's now going to rely on this since I don't have anything else from probation and I have just one letter that's ambiguous with regards to this minor from the school."

In response to appellant's objection to the school records, the court offered to hold a contested hearing at which the probation officer would be ordered to call a witness who could authenticate the disputed records "so we can get an accurate reading of what is going on here, because I don't know what to believe." The court pointed out that the school's attendance records were contradicted by the administrator's letter, which appellant's counsel had not yet authenticated.

However, appellant's counsel refused to participate in a contested hearing in front of a bench officer (Robin R. Kesler, Referee) who "has already created an opinion based on its own investigation." Counsel argued that the court would not be an impartial arbiter and therefore should be disqualified.

The court denied that there were grounds for recusal: "Mr. Farias, I understand your statement there. However, I'm not inclined to do that. I am certain there's nothing — when I get something that's contradictory from the parents and the school I try to give the parents the benefit of the doubt and bring this individual in, and maybe there is something that I'm not seeing. Maybe these are false entries or there's another kid with the same name or something else that might be going on, at least based on the information court has in front of it today. Request for recusal is denied."

At that point, appellant's counsel declared that appellant would "accept the court's indicated of suitable placement" without a contested hearing.

The court reiterated that it was still "willing to listen to all the evidence. Like I said, all I have is what's been presented. The court is allowed to get schooling information, especially when it has no report from probation and probation provided the court with no information . . . with regards to his schooling for in excess of six months."

Appellant's counsel reaffirmed that appellant would waive his right to a hearing and admit the truancy allegations of the supplemental petition: "Just for the record, before the waiver, I did confirm with my client again and he does wish to waive his right for a hearing before this court and admit for suitable placement."

Appellant, after being properly advised of the allegations in the supplemental petition and his right to a hearing,[7] waived his right to a hearing and admitted the truancy allegations in the supplemental petition. The court sustained the supplemental petition and ordered that appellant be removed from his parents and suitably placed.

Appellant filed both a notice of appeal and a request for a rehearing before a juvenile court judge.[8]

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[7] Appellant was advised: "Before you admit to the probation violation you have to give up your right to a hearing. At that hearing you would have the right to bring in witnesses that would testify in that chair up there. At that hearing if the judge found you were in violation of your probation beyond a preponderance of the evidence then she would find the evidence true against you. During this hearing you would have the right to bring in any witnesses you wanted on your own behalf at no cost to you using the subpoena power of the court. You would have the right to be present at all times and assist your attorney who would be able to ask questions of witnesses either for or against you. You would have the right to bring in any evidence, make a defense, and you would have the right to not have to get up in that chair right there and testify, that's called your right against self-incrimination."

[8] According to appellant's opening brief, the request for a rehearing before a juvenile court judge was summarily denied on May 6, 2011.

In his request for rehearing, appellant argued that the school "liaison contacted T[.]'s school and spoke with the secretary to the principal who wrote a letter of recommendation on his behalf. The secretary confirmed that the letter was legitimate but that the principal (administrator in charge) tended to be generous with his comments. Please note that the school liaison was not present at either the April 12, 2011, nor April 14, 2012, hearings so these multiple layers of hearsay, what the school secretary told the liaison, who then told the referee, who then used against my client in court were all part of Ref. Kesler's investigation. Based on these multiple layers of hearsay and ex parte communications Ref. Kesler (as reflected on the records) formed the opinion that the principal's letter was close to a fraud on the court and at the very least misleading. Thus, Ref. Kesler based on her own investigation and ex parte communications had already formulated a negative opinion of a likely defense witness at a hearing on the alleged violation. Furthermore, Ref. Kesler read into the record not only the truant

DISCUSSION

Appellant contends on appeal that "[t]he referee committed misconduct and denied [him his] due process right to a fair and impartial tribunal by conducting her own investigation into the facts, strongly suggesting that a supplemental petition be filed against appellant under section 777, and then acting as an advocate by presenting evidence against him."

I. The Record Does Not Support a Finding of Judicial Misconduct

Appellant contends that the court violated Canon 3(B)(7) of the California Code of Judicial Ethics, which provides in relevant part: "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

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conduct alleged in the prosecution's motion but also unsubstantiated allegation of defiant behavior obtained by the school liaison. At a hearing with due process protections the referee would not introduce evidence against the accused. If the prosecution wanted to introduce the same evidence they would have to call witnesses subject to cross examination. Defense objected to her reading evidence into the record to no avail.

"Based on the fact that Ref. Kesler was conducting her own investigation into the case, obtaining information regarding the facts through ex parte communications, making her own factual findings and in effect testifying into the record her opinions as the basis for proposed punishment it became apparent to both defense counsel and T[.] that a fair hearing could not be held in her court. After the court indicated a proposed sentence of suitable placement defense counsel requested that Ref. Kesler recuse herself so that T[.] could have the opportunity to be heard by a fair and impartial arbiter of facts. Defense counsel explained that given the investigation and record indicating a negative opinion of a potential defense witness a fair hearing before Ref. Kesler was not possible. Defense request for recusal was denied and T[.] reluctantly admitted the violation believing that a hearing before Ref. Kesler would not be fair or impartial and would thus be a waste of further time in custody."

"(a) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

"(b) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

"(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

"(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

"(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

"(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

"(e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so."

Appellant also relies on the commentary to Canon 3(B)(7), which provides in relevant part: "A judge must not independently investigate facts in a case and must consider only the evidence presented, unless otherwise authorized by law. For example, a judge is statutorily authorized to investigate and consult witnesses informally in small claims cases."

Appellant argues that the referee in this case violated Canon 3(B)(7) "when she directed the juvenile court's school liaison to conduct an investigation into appellant's schooling and then did not even order the school liaison to testify at the hearing."

The Attorney General responds that the court was authorized to request and receive "appellant's attendance records from the *court's* 'school liaison.'" (Italics added.)

We conclude that the subdivision (b) exception to Canon 3(B)(7) supports the Attorney General's position that no misconduct occurred. This exception permits a judge to "consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities." (Canon 3(B)(7)(b).) The record in this case clearly indicates that the court acted within the parameters of this exception by asking its own school liaison to obtain school records and information that the probation department had not provided.

We have been given no authority for the proposition that a juvenile court, when faced with the prospect of either idly awaiting an overdue probation report or obtaining the necessary school records through its own school liaison, must sit and wait for the probation department to act.

Appellant contends that the court's direct request for assistance from an official resource—the court's school liaison—other than the probation department constituted judicial misconduct as a matter of law. We disagree. According to the Code of Judicial Ethics, the court may direct a request for assistance to members of its own personnel. Appellant has failed to identify any evidence that would suggest the court's school liaison falls outside the category of court personnel. The court's remarks, reasonably construed, support a finding that the court viewed the school liaison as a member of its own personnel, who was available to assist the court in carrying out its adjudicative functions. If there is any evidence or authority to the contrary, appellant has failed to bring it to our attention.

Accordingly, we presume in favor of the trial court's ruling that the record is devoid of any evidence that would support a finding of judicial misconduct. "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [the appellant must provide an adequate record demonstrating error in order to overcome the presumption on appeal that the order is correct].)

II. Appellant's Federal Constitutional Right to a Fair and Impartial Tribunal Was Not Violated

Appellant contends that because the court assumed the functions of an advocate, he was denied a fair hearing. He argues that the "probation department and the deputy district attorney were only nominally involved in presenting a case that appellant's probation should . . . be terminated, and that he should be suitably placed. Although the prosecutor was present at the April hearings, she participated in appellant's case only to the extent that she followed the referee's strong recommendation to file a supplemental section 777 petition. Further, this investigation was based upon the investigation conducted by the school liaison at the referee's behest, not investigation conducted by the probation department or the District Attorney's office. To the extent the probation officer participated in the hearing, it was only to state that he was inclined to change his recommendation that appellant's probation should be terminated based upon the evidence he heard presented by the referee in the courtroom. [¶] Thus, to the extent any evidence was presented against appellant, it [was] the referee who secured the information based upon her investigation, and it was the referee who then presented the information as evidence against appellant. Because the referee acted as both advocate and arbiter of the facts, her conduct violated appellant's right to due process of law."

For the reasons stated above, we conclude that this argument lacks merit. The lack of a trial on the substantive offense resulted from appellant's knowing and voluntary waiver of his right to a hearing and his knowing and voluntary admission of the truancy allegations. We distinguish the cases cited in the opening brief because they involved contested proceedings at which the court improperly assumed the functions of an advocate, as opposed to the situation in this case where appellant *waived* his right to a hearing and *admitted* the allegations of the supplemental petition. (See *In re Jesse G.* (2005) 128 Cal.App.4th 724 [court improperly assumed the functions of an advocate at a *contested* hearing]; *Lois R. v. Superior Court* (1971) 19 Cal.App.3d 895 [same];

Gloria M. v. Superior Court (1971) 21 Cal.App.3d 525 [same]; *In re Ruth H.* (1972) 26 Cal.App.3d 77 [same].)[9]

Having freely and voluntarily waived his right to a hearing, appellant is barred from arguing that his right to due process was violated by the failure to call witnesses at a hearing that he expressly waived.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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9 Although it is not necessary for our purposes to reach this issue, we note that Evidence Code section 775 permits the court to call and examine witnesses subject to objections and cross-examination by the parties. *Gloria M.*, *Lois R.*, and *Ruth H.* predate *People v. Carlucci* (1979) 23 Cal.3d 249, which held that a judge has the power to examine witnesses to assist in ascertaining the truth. (*Conservatorship of Pamela J.* (2005) 133 Cal.App.4th 807, 826.)