Filed 1/11/17 In re D.B. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 D.B., a Person Coming Under the Juvenile Court Law.	B264879 (Los Angeles County Super. Ct. No. TJ21333)
THE PEOPLE, Plaintiff and Respondent, v. D.B., Defendant and Appellant.	

APPEAL from an order of the Superior Court for Los Angeles County, Catherine J. Pratt, Commissioner. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Minor defendant D.B. (minor) appeals from an order of the juvenile court sustaining a petition under Welfare and Institutions Code section 602 alleging that he committed assault by means likely to produce great bodily injury (Pen. Code,[1] § 245, subd. (a)(4)), a misdemeanor, and placing him on probation. Minor argues that the juvenile court erred in finding minor was competent and that a probation condition imposed upon him is unconstitutionally vague. We affirm the order.

BACKGROUND

Minor, who was a sixth grade student at John Muir School, hit another student in the head, causing the student to lose consciousness for a few minutes. Minor told his mother that the student had been bothering a girl, and minor had told the student to stop. Minor said that he hit the student to stop him from bothering the girl, and he did not intend to hurt him.

The Los Angeles County District Attorney filed a petition alleging that minor was a person described by Welfare and Institutions Code section 602. It alleged that minor committed a felony assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)).

At the trial setting conference on June 2, 2014, minor's counsel declared a doubt as to minor's competency. The juvenile court

---

1 Further undesignated statutory references are to the Penal Code.

appointed Dr. Haig Kojian to evaluate minor and suspended the proceedings.

A hearing was held to determine minor's competency, at which minor presented the testimony of Dr. Timothy Collister, a psychologist retained by minor's counsel. Dr. Collister conducted a three-hour comprehensive psychological evaluation of minor on May 28, 2014, before minor's counsel declared a doubt as to minor's competency, and a second, hour-and-a-half to two-hour evaluation to look specifically at minor's competence on August 22, 2014. Dr. Collister's reports from those evaluations were admitted into evidence.

As part of his first evaluation, Dr. Collister reviewed various records, including minor's school records, and administered various intelligence, academic achievement, developmental, and behavioral tests. Minor generally scored in the low average range to the upper end of the mild range of intellectual disability in the intelligence tests, but his scores in academic achievement tests were significantly higher, and thus ruled out an intellectual disability. Dr. Collister observed that minor showed substantial difficulty with attention and concentration, and also showed overactivity, which could explain why he scored significantly lower in intellectual function compared to higher academic achievement. Dr. Collister noted that it appeared that minor has an attention deficit hyperactivity disorder (ADHD) and possibly a language processing disorder. He concluded "[t]here is reason to believe that [minor] may be incompetent," noting that minor's score on the verbal comprehension index was roughly at the level of function of an average 7 year, 3 month old child (at the time of the evaluation, minor was 12

years, 8 months old), which might cause him difficulty understanding the legal proceedings.

In Dr. Collister's second evaluation of minor, he conducted a Juvenile Adjudicative Competence Interview (JACI). Based upon minor's responses to questions regarding the nature and seriousness of the offense he was charged with, the nature and purpose of the juvenile court trial, possible pleas, guilt and punishment, the roles of the prosecutor, defense lawyer, probation officer, and juvenile court judge, and other trial-related matters, Dr. Collister concluded that minor was not competent to proceed. He observed that minor lacked a sufficient present ability to consult with counsel and assist in preparing his defense with a reasonable degree of rational understanding, and that he lacked a rational or factual understanding of the nature of the charges and proceedings against him. Dr. Collister also concluded that there was no significant probability that minor would attain competence with treatment and competency training.

Dr. Haig Kojian was called by the prosecution to testify at the competency hearing. He interviewed minor on June 27, 2014, and produced a report, which was admitted into evidence. Dr. Kojian conducted a clinical interview, reviewed minor's records, including Dr. Collister's report from his first evaluation, and conducted a JACI.[2] Dr. Kojian described minor's answers to the JACI questions, and observed

---

[2] During the competency hearing, the court asked minor's mother how long minor's interview with Dr. Kojian lasted. She responded that it lasted 35 minutes at most.

that those answers demonstrated an adequate understanding of the nature and seriousness of the offense, the nature and purpose of the juvenile court and possible pleas, and the roles of the prosecutor, defense lawyer, probation officer, and judge. Based upon his review of minor's records, his own observations, and minor's responses to the JACI questions, Dr. Kojian concluded that minor appeared to have an ADHD, but did not have any developmental disability. He opined that minor had the capacity to consult with his attorney and assist in the preparation of a defense, and knows, understands, and appreciates what is happening legally. He concluded that minor was competent to stand trial.[3]

The juvenile court found that, based upon the evidence presented, as well as its own observations of minor during the proceedings, minor was competent to stand trial. The court noted that although it appears that minor has some cognitive deficit, it did not believe that that deficit, or minor's possible ADHD, impaired his ability to participate in court proceedings. It observed that, even though Dr. Collister reported that minor gave nonresponsive answers to several questions in the JACI, which could be interpreted as minor's lack of understanding of court proceedings, those answers also could be interpreted as a kind of malingering, especially given Dr. Kojian's report that minor

---

[3] We note that in the text of Dr. Kojian's report, he states that minor was 14 years old at the time of the interview. In his testimony, Dr. Kojian explained that this was a typographical error, noting that the cover page of his report accurately states minor's birth date, showing that minor was 12 years old at the time of the interview.

demonstrated his understanding of court proceedings when Dr. Kojian conducted the JACI.

The juvenile proceedings were reinstated, and at the adjudication hearing minor admitted the offense as a misdemeanor and the district attorney dismissed the great bodily injury allegation. The juvenile court sustained the petition as a misdemeanor and dismissed the great bodily injury enhancement, declared minor a ward of the court, and placed him at home on probation subject to certain probation conditions.

Minor timely filed a notice of appeal.

DISCUSSION

On appeal, minor contends the juvenile court erred in finding him competent because the weight and character of the evidence of incompetency was such that the court could not reasonably reject it. Minor also contends that one of the probation conditions -- which stated, "You must go to school every day. You must be on time to each class. You must have good behavior at school. You must receive satisfactory grades." -- is unconstitutionally vague because it does not adequately inform minor of what constitutes "good behavior" or "satisfactory grades."

A. *Competency Finding*

A minor who is the subject of a wardship petition under Welfare and Institutions Code section 602, like an adult facing criminal charges, has a due process right not to be tried while mentally incompetent. (*In re R.V.* (2015) 61 Cal.4th 181, 185.) Under Welfare and Institutions

Code section 709, "[a] minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her."[4] (Welf. & Inst. Code, § 709, subd. (a).) A minor may be found incompetent solely due to developmental immaturity. (*In re John Z.* (2014) 223 Cal.App.4th 1046, 1053.)

A minor is presumed competent to stand trial in a wardship proceeding, and bears the burden of proving incompetency by a preponderance of the evidence. (*In re R.V.*, *supra*, 61 Cal.4th at p. 196.) When reviewing a claim that the record does not support finding of competency, we apply the deferential substantial evidence standard of review. We view the record in the light most favorable to the juvenile court's determination, and uphold the finding if it is supported by substantial evidence. (*Id.* at p. 200.)

In the present case, minor argues that, in light of Dr. Collister's lengthy psychological and competency evaluations and detailed reports, compared to Dr. Kojian's brief interview and report, the juvenile court acted unreasonably in rejecting the evidence that minor was incompetent. In making this argument, minor relies upon the Supreme Court's statement in *In re R.V.* that "the inquiry on appeal is whether the weight and character of the evidence of incompetency was such that

---

[4] This provision codifies the so-called "*Dusky* standard" set forth in *Dusky v. United States* (1960) 362 U.S. 402.

the juvenile court could not reasonably reject it." (*In re R.V.*, *supra*, 61 Cal.4th at p. 201.) Minor's reliance on this standard is misplaced.

In *In re R.V.*, the only evidence regarding competency was the report and testimony of the expert (who happened to be Dr. Kojian), and the written materials on which he based his opinion that the minor was not competent to stand trial; the prosecutor presented no affirmative evidence of competency. (*In re R.V.*, *supra*, 61 Cal.4th at p. 200.) The Supreme Court noted that "[e]ven if the prosecution presents no evidence of competency, a juvenile court can properly determine that the minor is competent by reasonably rejecting the expert's opinion. This court has long observed that "'[t]he chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion.'" [Citation.]" (*Id.* at pp. 200-201.) Thus, the Supreme Court instructed that "the proper formulation of the substantial evidence test for reviewing a challenge to the sufficiency of the evidence supporting a juvenile court's competency determination *in a case such as this one, in which the evidence before the court consists of the opinion of a qualified expert concluding that the minor is incompetent to proceed and the materials on which the expert relied*, inquires whether the weight and character of the evidence of incompetency was such that the juvenile court could not reasonably reject it." (*Id.* at p. 203, italics added.)

This case is not such a case. Unlike *In re R.V.*, where the *only* evidence before the juvenile court was a single expert's opinion that the

minor was incompetent and the materials upon which the expert relied, the court in this case was presented with the opinions of two qualified experts, one concluding that minor was competent and the other concluding he was incompetent, and the materials on which each expert relied. The court also heard testimony from each expert, including testimony from Dr. Kojian explaining why the results from the tests that Dr. Collister conducted did not mean that minor was incompetent under the *Dusky* standard. The court properly could, and did, assess the weight and persuasiveness of each expert's opinion based upon the evidence presented (*People v. Lawley* (2002) 27 Cal.4th 102, 132), as well as the court's own observations of minor (*In re R.V.*, *supra*, 61 Cal.4th at p. 199), and found more persuasive Dr. Kojian's opinion and report that minor was competent. We must defer to the juvenile court's finding, which was supported by that substantial evidence.

B. *Probation Condition*

As noted, one of the probation conditions the juvenile court imposed on minor stated: "You must go to school every day. You must be on time to each class. You must have good behavior at school. You must receive satisfactory grades." Minor did not object to this condition in the juvenile court, but challenges it on appeal on the ground that the requirements to have "good behavior" and to receive "satisfactory grades" are unconstitutionally vague.[5] We disagree with that assertion.

---

[5] Minor did not forfeit this contention by failing to object to the condition in the juvenile court. As the Supreme Court explained in *In re Sheena K.* (2007) 40 Cal.4th 875, a minor's claim that a probation condition is

"[J]uvenile courts have 'broad discretion to fashion conditions of probation' to further a minor's rehabilitation [citation], but '[a] probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated," if it is to withstand a challenge on the ground of vagueness.' [Citation.] '[T]he underpinning of a vagueness challenge is the due process concept of "fair warning." [Citation.] The rule of fair warning consists of "the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders" [citation], protections that are "embodied in the due process clauses of the federal and California Constitutions."' [Citation.]" (*In re P.O.* (2016) 246 Cal.App.4th 288, 299, quoting *In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

In this case, minor argues that the probation condition at issue is vague because "'[g]ood' and 'satisfactory' are both terms susceptible to multiple subjective interpretations and thus . . . fail to give the minor notice of what is required of him in terms of behavior and performance." We review minor's vagueness claim de novo. (*In re P.O.*, *supra*, 246 Cal.App.4th at p. 299.)

"In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific *context*,' and that, although not

---

unconstitutionally vague is not forfeited by the minor's failure to raise it in juvenile court when that claim raises a """pure question[] of law that can be resolved without reference to the particular sentencing record developed in the trial court."""" (*Id.* at p. 889.)

admitted of 'mathematical certainty,' the language used must have "'*reasonable* specificity.'" [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890, italics in original.) "A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116.)

In the present case, had the probation condition simply stated that minor must have good behavior generally, we might agree that the condition was too standardless to give minor notice of what is required of him. (See, e.g., *In re P.O.*, *supra*, 246 Cal.App.4th at p. 299 [finding that condition imposed upon 17-year-old minor that he "'be of good behavior and perform well'" at school *and work* was vague].) But the probation condition instructs minor that he "must have good behavior *at school*." (Italics added.) In this context, it is clear that this condition simply requires minor to follow his school's rules of conduct. Thus, we conclude this portion of the probation condition is not unconstitutionally vague.

The constitutionality of a probation condition requiring a minor to maintain "satisfactory grades" was addressed in *In re Angel J.* (1992) 9 Cal.App.4th 1096. The appellate court in that case noted that the term "satisfactory grades" arose (as in this case) from the use of a standardized juvenile court form, on which the court selects appropriate probation conditions from a list of restrictions. (*Id.* at p. 1102.) The court resolved the constitutional issue by finding "that satisfactory

grades means passing grades in each graded subject" (*ibid.*), that is, a non-failing grade, such as a D or above in an A through F grading system (*id.* at p. 1102, fn. 7). We do the same here, and conclude the condition is not unconstitutionally vague on its face.

Minor argues that even if we found that a satisfactory grade means a passing grade, we nevertheless should strike the condition because "there is no information in the record to suggest that the minor would be able to satisfy the condition at present." However, this contention raises an issue of fact, rather than a pure question of law, and therefore was forfeited by minor's failure to raise the issue before the juvenile court. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 889 ["[W]e do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." . . . In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court."'"].)

//

//

//

//

//

//

//

//

DISPOSITION

The phrase "satisfactory grades" in probation condition number nine shall be defined to mean passing grades, such as Ds or above in an A to F grading system. The order declaring minor a ward of the court and placing him on probation is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.