Filed 10/4/12 In re D.S. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.S., A Person Coming Under the Juvenile Court Law.	B233161
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. D.S., Defendant and Appellant.	(Los Angeles County Super. Ct. No. NJ24948)

APPEAL from an order of the Superior Court of Los Angeles County. John C. Lawson II, Judge. Remanded with directions.

Laini Millar Melnick, 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 Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court dismissed two petitions filed against minor D.S. under Welfare and Institutions Code section 602,[1] but upon learning of a pending third petition, purported to vacate the dismissals and reassert jurisdiction. The court placed D.S. home on probation, and set a maximum period of confinement of three years and six months. We agree with D.S.'s contentions that the court lacked authority to vacate the dismissals, and erred in setting a maximum period of confinement. We remand the case for further proceedings.

FACTS AND PROCEDURAL HISTORY

In July 2009, then 14-year-old D.S. (hereafter minor) was taken into custody for stealing a cell phone. Minor admitted the petition's allegations in Department 245 in Long Beach, but the court deferred entry of judgment. (§ 790.) Seven months later in February 2010, minor was taken into custody for shoplifting and the People filed a new petition. Minor admitted the new petition's allegations. Department 245 ordered minor's deferred entry of judgment to remain in effect.

In October 2010, police took minor into custody for a third time. The People filed a new petition in a different court (Department 242 in Inglewood), charging minor with possession of marijuana and resisting or obstructing a police officer. Before Department 242 in Inglewood adjudicated the possession and resisting petition, Department 245 in Long Beach conducted a hearing in February 2011 on minor's performance under the two petitions for which the court had deferred entry of judgment. Unaware of the pending petition in Inglewood, the Long Beach court noted that minor's probation report showed academic improvement and attendance at a mentoring services program. Based on minor's progress, minor's attorney asked the Long Beach court to terminate jurisdiction. The court agreed, stating "it is my

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[1] All further undesignated section references are to the Welfare and Institutions Code.

pleasure to dismiss" the petitions and terminate jurisdiction. The court entered the dismissals into its minute order which it entered that day.

Shortly after dismissing the petitions for stealing the cell phone and shoplifting, Long Beach's Department 245 learned about minor's pending petition in Inglewood. Over minor's objection, Department 245 vacated its dismissals of the first two petitions and reinstated deferred entry of judgment. Following reinstatement of minor's two petitions, Inglewood's Department 242 held a hearing in May 2011. Minor admitted the allegations of the third petition and the court declared him a ward of the court. At the dispositional hearing for all three petitions, Long Beach's Department 245 ordered him home on probation and set a maximum term of physical confinement at three years and six months. (§§ 602, 726, subd. (c).) This appeal followed.

DISCUSSION

1. No Jurisdiction to Reinstate Petitions

Minor contends the court lacked jurisdiction to vacate the court's lawful dismissals of the petitions against him for stealing a cell phone and shoplifting. Minor is correct. The People, not the court, initiate a juvenile proceeding by filing a petition. (§ 650.) When the court entered its minute order dismissing the petitions, the dismissals took effect. (*In re Anthony H.* (1982) 138 Cal.App.3d 159, 165 [noting jurisdictional import of entering dismissal in court minutes].) When the court dismissed the petitions and terminated jurisdiction, the proceedings ceased as to those two petitions and, as to them, nothing remained pending before the court. (See *Smith v. Superior Court* (1981) 115 Cal.App.3d 285, 287 [trial court lacked authority to vacate dismissal]; see also *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 237-238 [noting difference between vacating dismissal of some, but not all, criminal counts during trial, compared to dismissal of entire case which cannot be reinstated].)

A court's authority to act is not free-floating; it derives from the federal and state Constitutions, statutes, and case law. Neither the court when it purported to reinstate the petitions, nor respondent on appeal, cites authority expressly empowering the court to vacate a lawfully entered dismissal. Nevertheless, about two weeks after entering the dismissals, the court tried to walk them back by stating the court lacked the power to dismiss the petitions. Citing section 790, the court held the third, *pending* possession and resistance petition in Inglewood as a matter of law extinguished minor's deferred entry of judgment. Thus, the court reasoned, it erred in relying on the deferred entry of judgment to dismiss the two Long Beach petitions. The court stated, "Unbeknownst to the court, the probation department did not notify the court at the time of the progress report that [minor] has a pending matter out of [Inglewood's] Department 242 which by law would lift the 790 [deferred entry of judgment]. The court could not terminate the jurisdiction."

The court was mistaken. A declaration of wardship following a *sustained* petition does lift a deferred entry of judgment. Section 793, subdivision (a) states: "If after accepting deferred entry of judgment and during the period in which deferred entry of judgment was granted, the minor is convicted of, or declared to be a person described in Section 602 . . . , the judge shall enter judgment and schedule a dispositional hearing." Here, however, Inglewood's possession and resistance petition had not been adjudicated and minor had not been declared a ward – "a person described in Section 602" – when the court dismissed the Long Beach petitions. Thus, the court lawfully exercised its power to dismiss those petitions, even if the court later regretted doing so.

The court alternatively tried to walk back its dismissals by characterizing its reinstatement of the petitions as a nunc pro tunc order. The court's characterization was unavailing. The court's minute order dismissing the petitions accurately reflected the court's intention at the time it entered the dismissals – the court intended to dismiss, and the minute order so stated. The court's later reconsideration of the dismissals, a reconsideration triggered by the court's discovery of the third, pending

petition, does not mean the court did not intend to dismiss the petitions; it means instead that the court acted under a misunderstanding of the facts. The nunc pro tunc doctrine permits a court to correct clerical error, not judicial error. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) "The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' [Citation.]" (*Ibid.*) A court's factual misunderstanding is judicial error, not clerical error. Hence, the court's modification of its minute order nunc pro tunc does not support the court's reinstatement of the petitions because "a court cannot revive lapsed jurisdiction by the simple expedient of issuing an order nunc pro tunc." (*In re Daoud* (1976) 16 Cal.3d 879, 882; see also *Smith v. Superior Court, supra*, 115 Cal.App.3d at p. 292 ["We do not accept the Attorney General's argument that a criminal court has inherent power to routinely vacate its judgments to correct for misapprehensions"].)

In urging that we affirm the trial court, respondent embraces neither of the court's stated reasons for reinstating the petitions. Respondent does not argue the court lacked authority to dismiss the petitions, and does not assert the court properly employed nunc pro tunc principles to correct its minute order. Instead, respondent notes that minor, and possibly minor's counsel, knew about the third, pending petition in Inglewood when minor requested dismissal of the two petitions in Long Beach, but did not tell the court about the pending petition. Respondent thus contends minor should be estopped from objecting to the court's order vacating the dismissals.

Respondent's reliance on estoppel is misplaced. "The basic principles of equitable estoppel are well established and easily stated. 'Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.' [Citation.]" (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37.) Here, minor does not contradict himself; he asked for and received dismissal of the petitions, and on appeal he asks that those dismissals stand. (Cf., e.g., *In re Omar R.* (2003) 105 Cal.App.4th

1434, 1437 [by accepting probation, minor estopped from arguing court erred in imposing probation].) We do not condone minor's counsel for not speaking up about the pending petition, but the remedy for counsel's silence is not a judicial act that exceeds the court's authority. (*People v. Kirkpatrick* (1991) 1 Cal.App.4th 538, 543 [defendant's false statements to trial court do not permit court to modify sentence after sentence entered into minutes]; accord, *People v. Tindall* (2000) 24 Cal.4th 767, 776, fn. 6 [jurisdiction which does not exist cannot be created by estoppel].)

2. The Maximum Term of Confinement Shall Be Struck

The court's dispositional order set a maximum period of physical confinement of three years and six months. Minor contends the court erred in setting a maximum term of confinement because he was placed home on probation. He is correct. Section 726, subdivision (c) provides for the declaration of a maximum period of confinement when the court removes the minor from parental physical custody. "If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (§ 726, subd. (c).) But a court must not set a maximum period of confinement if the juvenile is not removed from the parental home. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) We therefore strike the maximum term of confinement from the dispositional order. (*Ibid.*)

DISPOSITION

That portion of the court's February 23, 2011, order vacating nunc pro tunc the court's dismissal of the petitions dated September 24, 2009, and April 26, 2010, is reversed. The court's setting of a maximum period of confinement in its May 10,

2011, dispositional order is struck. The matter is remanded to the court for further proceedings consistent with this opinion.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.