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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.W., a Person Coming Under
the Juvenile Court Law.

B284675
(Los Angeles County
Super. Ct. No. YJ38319)

THE PEOPLE,

Plaintiff and Respondent,

v.

A.W.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Gibson W. Lee, Judge. Reversed and remanded with instructions.

Gerald Peters, 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, Blythe J. Leszkay and David A. Voet, Deputies Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant A.W., a minor, contends on appeal that the juvenile court erred in calculating his maximum term of confinement. We reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2015, the Los Angeles County District Attorney filed a Welfare and Institutions Code¹ section 602 petition in the juvenile court located in Inglewood, charging A.W. with a felony violation of Penal Code section 422, subdivision (a) for making criminal threats. On January 19, 2016, A.W. admitted the allegations of the petition. The juvenile court then deferred entry of judgment pursuant to section 790, placed A.W. on probation for a period of 12 to 36 months, and released A.W. to his mother.

On July 10, 2017, a second section 602 petition was filed in another branch of the juvenile court, located in Compton, under the same case number (YJ38319) as the first petition. That second petition charged A.W. with possession of a firearm by a minor in violation of Penal Code section 29610, a felony, and possession of live ammunition by a minor in violation of Penal Code section 29650, a misdemeanor.

¹ All statutory citations are to the Welfare and Institutions Code unless otherwise indicated.

At the August 2, 2017, adjudication hearing, the Compton juvenile court sustained the petition, finding that A.W. possessed a firearm and live ammunition as alleged in the July 10, 2017 petition. The juvenile court also found that the possession of a firearm by a minor charge was a felony, and the possession of live ammunition by a minor charge was a misdemeanor. The parties informed the Compton juvenile court that the case was originally filed in the Inglewood juvenile court and should be sent to that court for disposition. The court clerk then asked if “we have a maximum of confinement time?” The juvenile court responded, “[t]hree years, six months,” without explanation as to how the court reached that calculation or whether it included the charge from the first petition.

The matter was sent to the Inglewood juvenile court for disposition. At the August 17, 2017, disposition hearing, the Inglewood juvenile court stated that the disposition would encompass the charges in both petitions. The court terminated deferred entry of judgment for the criminal threats violation in the first petition, declared defendant a ward of the court, took custody from the parents, sentenced A.W. to placement in community camp for a term of five to seven months, and awarded A.W. 45 days of credit (consisting of two days in connection with the first petition and 43 days in connection with the second petition). The Inglewood juvenile court did not calculate or state on the record A.W.’s maximum period of confinement.

DISCUSSION

Both parties agree there was error in the juvenile court with respect to determining the maximum period of confinement, but the parties’ views diverge with respect to the nature of that

error and what should happen as a result. A.W. contends the juvenile court in Compton erred by erroneously setting the maximum term of confinement at three years and six months, and argues the maximum term should instead be three years and two months. The People argue the juvenile court in Inglewood erred by failing to set *any* maximum term of confinement at the disposition hearing and accordingly ask this court to remand the matter so that the juvenile court may determine the maximum term of confinement for all three charges from both petitions, which, in part, would depend on whether the juvenile court elects to treat the criminal threats violation from the first petition as a felony or a misdemeanor. For the reasons that follow, we agree with the People.

Section 726, subdivision (d)(1) provides in relevant part that “[i]f the minor is removed from the physical custody of his or her parent . . . 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” The juvenile court’s duty to specify the maximum term is mandatory. (*In re James A.* (1980) 101 Cal.App.3d 332, 339 [“Section 726 of the Welfare and Institutions Code is . . . clearly directive and requires the juvenile court judge to automatically specify in his commitment order the maximum period of confinement”].) By the express terms of the statute, this requirement arises when the juvenile court removes the minor from custody of the minor’s parents. (See *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 [interpreting prior version of statute at section 726, subdivision (c)]; *In re Ali A.* (2006) 139 Cal.App.4th 569, 573-574 [same], overruled on other grounds in *In re A.C.* (2014) 224 Cal.App.4th 590, 592.)

Here, the duty to specify the maximum term of confinement arose when the Inglewood juvenile court removed A.W. from the custody of his parents at the disposition hearing. It was, therefore, error for the Inglewood juvenile court to sentence A.W. to placement in community camp for a term of five to seven months on both petitions without calculating a maximum period of confinement as required by section 726, subdivision (d)(1). We accordingly remand this matter to the juvenile court to make that determination. In so doing, we do not reach A.W.'s argument that the Compton juvenile court's calculation of the maximum term was erroneous. The Compton juvenile court was not supposed to set a maximum term when referring the matter for disposition to the Inglewood juvenile court, and its premature determination of any such term "is of no legal effect." (*In re Ali A.*, *supra*, 139 Cal.App.4th at p. 574; see also *In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 541 ["Appellant was not removed from his mother's physical custody. This means that the necessary predicate for specifying a term of imprisonment does not exist. . . . The statute did not empower the court to specify a term of imprisonment Thus, our order is to strike the specification of a term of imprisonment"].)

On remand, however, we do note that, as A.W. contends on appeal, the juvenile court must calculate the maximum term of confinement by using a two-month term (as opposed to six months) for A.W.'s misdemeanor violation of Penal Code section 29650.² (*In re Eric J.* (1979) 25 Cal.3d 522, 536-538 [requiring

² Penal Code section 29700, subdivision (b) provides that a violation of Penal Code section 29650 shall be punishable as a misdemeanor. Where no particular punishment is prescribed for

use of one-third of the subordinate misdemeanor term of imprisonment when aggregating terms for multiple violations]; see also *In re David H.* (2003) 106 Cal.App.4th 1131, 1133-1134 [“When aggregating multiple counts and previously sustained petitions, the maximum confinement term is calculated by adding the upper term for the principal offense, plus one-third of the middle term for each of the remaining subordinate felonies or misdemeanors”].)

Furthermore, we agree with the People that, on remand, the juvenile court must declare whether A.W.’s Penal Code section 422 violation for criminal threats will be treated as a felony or a misdemeanor. Section 702 provides that if an offense committed by a minor may be punished alternatively as a felony or misdemeanor, also known as a “wobbler,” “the court shall declare the offense to be a misdemeanor or felony.” (§ 702.) The juvenile court may make this declaration at either the jurisdictional hearing or the dispositional hearing. (Cal. Rules of Court, rules 5.780(e)(5), 5.790(a)(1).) But, “[t]he requirement is obligatory” to make the declaration, and “[i]t requires an explicit declaration by the juvenile court whether an offense would be a felony or a misdemeanor” when the determination is made. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.) Here, Penal Code section 422 is a “wobbler” in that any person who violates that section “shall be punished by imprisonment in county jail not to exceed one year, or by imprisonment in the state prison” for a

a violation of Penal Code section 29650, the term of imprisonment is up to six months. (Pen. Code, § 19.)

term of 16 months, two years, or three years. (Pen. Code, § 422.)³ The record does not disclose that the juvenile court declared whether A.W.’s Penal Code section 422 violation would be treated as a felony or a misdemeanor at either the jurisdictional hearing or the dispositional hearing. The juvenile court must do so on remand. (See *In re Manzy W.*, *supra*, 14 Cal.4th at pp. 1210-1211 [requiring remand where juvenile court did not make section 702’s mandated declaration].)

Indeed, the correct calculation of A.W.’s maximum term of confinement on remand depends on whether the juvenile court declares A.W.’s violation of Penal Code section 422 to be a felony or a misdemeanor. If the Penal Code section 422 violation is a felony, then the maximum term of imprisonment would be three years and 10 months, consisting of: (1) a base term of three years based on the upper term for a felony violation of either Penal Code section 422 or 29610⁴; (2) eight months for the remaining felony not used as the base term (i.e., 1/3 of the midterm of two years); and (3) two months for the misdemeanor violation of Penal Code section 29650 (i.e., 1/3 of the six-month term of

³ Because Penal Code section 422 does not prescribe a particular punishment for a felony violation thereof, a felony violation of that section “is punishable by imprisonment for 16 months, or two or three years.” (Pen. Code, § 18, subd. (a).)

⁴ Pursuant to Penal Code section 29700, a violation of Penal Code section 29610 is a “wobbler” punishable by up to six months imprisonment as a misdemeanor (see Pen. Code, §§ 18, 29700, subd. (b)) or 16 months, two years, or three years imprisonment as a felony (see Pen. Code, §§ 1170, subd. (h)(1), 29610, subd. (d)). The Compton juvenile court declared that A.W.’s violation of Penal Code section 29610 was a felony at the adjudication hearing.

imprisonment). If it is a misdemeanor, then the maximum term would be three years and six months, consisting of: (1) the upper term of three years for the Penal Code section 29610 felony; (2) four months for the misdemeanor violation of Penal Code section 422 (i.e., 1/3 of the one-year term of imprisonment); and (3) two months for the misdemeanor violation of Penal Code section 29650.⁵

⁵ We acknowledge the Compton juvenile court's statement at the August 2, 2017, adjudication hearing that the maximum period of confinement is "[t]hree years, six months" might ultimately be correct. We, nonetheless, reverse and remand because, as noted above, the Compton court's calculation was premature and has no legal effect. (*In re Ali A.*, *supra*, 139 Cal.App.4th at p. 574.) There is also nothing in the record to suggest the Inglewood juvenile court adopted that finding. Moreover, to deem the Compton juvenile court's pronouncement correct, we necessarily must assume the juvenile court determined A.W.'s Penal Code section 422 violation should be deemed a misdemeanor. We will not imply such a finding. (See *In re Manzy W.*, *supra*, 14 Cal.4th at pp. 1207-1208 [rejecting argument that the juvenile court's imposition of a felony-length term constituted an "implied" declaration under section 702].)

DISPOSITION

The dispositional order is reversed, and the matter is remanded to the Inglewood juvenile court to calculate A.W.'s maximum period of confinement consistent with this opinion, including a declaration of whether A.W.'s violation of Penal Code section 422 will be treated as a felony or a misdemeanor.

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KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.