

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re ANTONIO E., a Person Coming
Under the Juvenile Court Law.

B234942

PEOPLE OF THE STATE OF
CALIFORNIA,

(Los Angeles County
Super. Ct. No. VJ38684)

Plaintiff and Respondent,

v.

ANTONIO E.,

Defendant and Appellant.

APPEAL from the judgment of the Superior Court of Los Angeles County.
Heidi W. Shirley, Referee. Affirmed and remanded.

Steven A. Torres and Torres & 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, Senior Assistant Attorney General, and Tasha G. Timbadia,
Deputy Attorney General for Plaintiff and Respondent.

* * * * *

Pursuant to a petition filed by the District Attorney of Los Angeles County under Welfare and Institutions Code section 602, the juvenile court found, beyond a reasonable doubt, that appellant was a ward because he had committed the crime of possessing a firearm (Pen. Code, former § 12101, subd. (a)(1)). Appellant contends the juvenile court failed to explicitly declare whether this offense was a wobbler, as required by Welfare and Institutions Code section 702 (section 702). He also asks that we independently review the juvenile court's in camera proceedings of his *Pitchess*¹ motion and determine whether the court abused its discretion in determining there were no discoverable items.

We conclude the juvenile court did not abuse its discretion in its *Pitchess* determination, but that it failed to make the required determination under section 702. We therefore remand the case so that the court can make an express declaration of whether the offense was a felony or misdemeanor.

FACTS AND PROCEDURAL HISTORY

During the evening of June 17, 2011, Los Angeles County Sheriff's Deputy Julio Martinez was on patrol when he received a radio call about a man with a gun. This man was later identified as appellant. Appellant was pointing the gun at the necks of people who were attending a party. Deputy Martinez was told appellant was a Hispanic man wearing a dark-colored shirt, blue jeans, and between the ages of 18 and 20.

A few minutes after receiving the call, Deputy Martinez saw two people driving in a car without the headlights on. Appellant, who was seated in the front seat, matched the description given to Deputy Martinez. The car was about three quarters of a mile away from the party.

Deputy Martinez stopped the car. As he approached it, he saw appellant had a handgun concealed in his waistband. Deputy Martinez saw appellant's right hand move toward his waistband. He then ordered appellant to exit the car, patted him down and retrieved the handgun from appellant's waistband. The gun was loaded with .45-caliber rounds and appeared to be in good working condition. Appellant told Deputy Martinez he bought the gun from a friend two days before for \$40, and that he got it for protection.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534 (*Pitchess*).

Appellant testified that Brandon, the driver of the car, was his acquaintance and when Deputy Martinez pulled them over Brandon handed him the gun and threatened to “beat him” and do “bad stuff” to his house if he did not take it. Appellant testified that Deputy Martinez told him he saw Brandon hand appellant the gun, and Brandon is a gang member, which is why appellant believed his threats.

This appeal followed.

DISCUSSION

1. The Pitchess Motion

Appellant filed a *Pitchess* motion with the juvenile court seeking discovery of personnel files of several deputies. The sheriff’s department opposed the motion. The court found sufficient justification to review material as to Deputy Martinez only. After conducting an in camera hearing, the court found there was no discoverable information in Deputy Martinez’s personnel file. Appellant contends we should independently review the in camera hearing in accordance with *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*).

In *Mooc*, the court held that at an in camera hearing the custodian of personnel records should describe each item produced that is relevant to the defendant’s *Pitchess* motion, and should tell the court what materials, if any, the custodian deems irrelevant. The trial court should then make a record of what documents it examines before ruling on the motion. (*Mooc, supra*, 26 Cal.4th at p. 1229.) If the trial court finds no discoverable information, on appeal the reviewing court will examine the record to determine whether the trial court’s ruling constituted an abuse of discretion. Unless the personnel records contain materials favorable to the defense, the judgment should be affirmed. (*Id.* at p. 1232.)

We have independently reviewed the sealed reporter’s transcript of the trial court’s in camera hearing. We find no abuse of discretion. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *Mooc, supra*, 26 Cal.4th at pp. 1228, 1232.)

2. The Section 702 Determination

Appellant contends the trial court erred by not expressly declaring whether the offense in this case -- possession of a firearm by a minor -- was treated as a felony or a misdemeanor. The People concede the court erred, and we agree.

A person found guilty of Penal Code former section 12101, subdivision (a)(1) may be punished by “imprisonment in the state prison or in a county jail . . .” (Pen. Code, former § 12101, subd. (c)). In any such case, when an offense found true can be treated as a felony or misdemeanor, “[Welfare and Institutions Code] section 702 means what it says and mandates the juvenile court to declare the offense a felony or misdemeanor.” (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619; see also *In re Ricky H.* (1981) 30 Cal.3d 176, 191.)²

An express declaration is necessary. (See Cal. Rules of Court, rules 5.780(e)(5) [requiring expressed declaration whether offense is misdemeanor or felony following a contested jurisdiction hearing], 5.795(a) [requiring declaration whether offense is misdemeanor or felony following disposition hearing if not previously determined]; *In re Manzy W.* (1997) 14 Cal.4th 1199, 1210 [the purpose of requiring this finding on the record is to ensure the court exercises its discretion in determining the offense to be a misdemeanor or a felony].) The court’s failure to comply with this mandate requires a remand unless the record shows the juvenile court was aware of, and actually exercised, its discretion to determine the offense to be a misdemeanor or a felony. (*Manzy W.*, at p. 1209.)

We have reviewed the record and agree with the parties that the trial court never declared appellant’s offense as a felony or misdemeanor. At the adjudication hearing, defense counsel asked the court if the offense could be reduced to a misdemeanor. The court refused, leaving the matter to be decided by the court at disposition in Department 250. At the disposition hearing, defense counsel again asked if the court would reduce

² Section 702 provides, in relevant part: “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.”

the offense to a misdemeanor. The court never directly responded to this request. Instead, the court stated that probation at home was inappropriate and ordered appellant to a short-term camp, with a maximum confinement time of three years eight months.

Because the juvenile court did not make the determination required by section 702, the matter must be remanded for the court to do so. (See *In re Eduardo D.* (2000) 81 Cal.App.4th 545, 549 [matter remanded to the juvenile court so it could determine whether the offense was a felony or misdemeanor, even though the minute order reflected the offense as a felony and the minor's period of confinement was based on the felony period], disapproved on other grounds by *In re Jesus O.* (2007) 40 Cal.4th 859, 867; *In re Jacob M.* (1987) 195 Cal.App.3d 58, 63-65 [matter remanded for § 702 determination, even though minute order indicated the offense was a felony, where the record did not indicate the court's awareness of its discretion to treat the offense as a misdemeanor].)

DISPOSITION

The matter is remanded to the juvenile court to exercise its discretion to declare on the record whether the underlying offense is a misdemeanor or a felony, as required by section 702. In all other respects the order is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.