Filed 1/9/13 In re Mario A. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MARIO A., a Person Coming Under the Juvenile Court Law.	B242596 (Los Angeles County Super. Ct. No. YJ35773)
THE PEOPLE, Plaintiff and Respondent, v. MARIO A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Irma J. Brown, Judge. Affirmed in part and remanded for further proceedings.

James M. Crawford, 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, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Mario A. appeals from the juvenile court's order declaring him a ward of the court and placing him home on probation. He contends assault with a deadly weapon is not a qualifying offense under Welfare and Institutions Code section 707, subdivision (b),[1] and the court failed to determine whether the offense was a misdemeanor or a felony. We affirm in part and remand for further proceedings.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Mario, then 17 years old, set fire to a classmate's hair at Inglewood High School on April 26, 2011. The People filed a petition under section 602 alleging he had committed assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1), count 1) and assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 2).[3] Mario denied the allegations.

Following the jurisdiction hearing, the juvenile court found both counts true. At the disposition hearing, the court reversed its finding as to count 2, assault by means likely to produce great bodily injury, concluding it was duplicative of count 1, assault

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The court also orally calculated a maximum term of physical confinement of four years. However, as Mario asserts, because he was placed home on probation, the court's calculation of that maximum term is of no legal effect. (See *In re Ali A.* (2006) 139 Cal.App.4th 569, 572-574 [when minor placed home on probation, juvenile court is not authorized to include maximum term of confinement in disposition order; maximum term of confinement contained in such an order is of no legal effect]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1744 ["[o]nly when a court orders a minor removed from the physical custody of his parent or guardian is the court required to specify the maximum term the minor can be held in physical confinement."].) Because, as will be discussed, we must return the matter to the juvenile court to declare on the record whether the aggravated assault is a misdemeanor or a felony and to determine the application, if any, of section 707, subdivision (b), rather than strike this portion of the disposition order as we normally would (see *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541), we leave it to the juvenile court to modify its order on remand.

[3] We use the version of section 245, subdivision (a) then in effect, recognizing it has since been amended as this court discussed in *People v. Brown* (2012) 210 Cal.App.4th 1, 5, footnote 1.

with a deadly weapon. The court then declared Mario a ward of the court, designated assault with a deadly weapon a strike offense and ordered him home on probation and to perform 100 hours of community service. The court dismissed count 2. The minute order stated, "Minor is advised that count 1 is a strike and 707 B WIC offense."

DISCUSSION

1. *Failure To Designate the Aggravated Assault as a Felony or Misdemeanor*

Assault with a deadly weapon may be either a misdemeanor or felony. (Pen. Code, § 245, subd. (a)(1).) When a juvenile is found to have committed an offense that in the case of an adult could be punished as a misdemeanor or felony, section 702 requires the juvenile court to declare the offense to be a misdemeanor or felony. (See Cal. Rules of Court, rules 5.780(e)(5) [requiring express 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].) The requirement "serves the purpose of ensuring that the juvenile court is aware of, and actually exercises, its discretion" under the statute. (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1207.) An express declaration is necessary. 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. (*Id*. at p. 1209.)

In this case the juvenile court failed to declare whether the aggravated assault committed by Mario is a felony or misdemeanor. Alleging the offense is a felony in the section 602 petition, checking the felony box, stating the offense constitutes a strike, and indicating it is a section 702, subdivision (b) offense in the unsigned minute order are not sufficient to demonstrate the court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit. (*In re Manzy W., supra,* 14 Cal.4th at p. 1210.) Accordingly, as the People acknowledge, the matter must be remanded for the court to expressly declare on the record whether the assault with a

deadly weapon is a misdemeanor or felony. (*In re Eduardo D.* (2000) 81 Cal.App.4th 545, 549, disapproved on another ground by *In re Jesus O.* (2007) 40 Cal.4th 859, 867.)

2. *Designation of Count 1 as a Section 707, Subdivision (b) Offense*

Section 707, subdivision (b) lists a series of serious offenses, including "[a]ssault by any means of force likely to produce great bodily injury." (§ 707, subd. (b)(14).) That subdivision has been interpreted to include both forms of assault defined in Penal Code section 245, subdivision (a)(1), i.e., assault with a deadly weapon or by any means likely to produce great bodily injury. (*In re Pedro C.* (1989) 215 Cal.App.3d 174, 182.)

In *In re Sim J.* (1995) 38 Cal.App.4th 94, 98, the court considered whether the juvenile court erred in designating a misdemeanor violation of Penal Code section 245, subdivision (a)(1) as a section 707, subdivision (b) offense. The court noted although assault by means of force likely to produce great bodily injury is listed in section 707, subdivision (b), the statute does not specify whether it applies to misdemeanor assaults. (*In re Sim J., supra*, 38 Cal.App.4th at p. 98.) The court observed the offenses listed in that section "constitute extremely serious offenses." (*Ibid.*) The court further reasoned a section 707, subdivision (b) offense may qualify as a strike and the Three Strikes law was not intended to increase punishment for prior misdemeanors. (*In re Sim J., supra*, 38 Cal.App.4th at pp. 98-99.) The court therefore concluded, "[S]ection 707 [, subdivision] (b) offenses do not include misdemeanor violations," and held the juvenile court had erred in designating the minor's prior misdemeanor assault adjudication as a section 707, subdivision (b) offense. (*In re Sim J., supra*, 38 Cal.App.4th at p. 99.)

Here, in the absence of a finding the aggravated assault was a felony, the designation of the offense as a section 707, subdivision (b) offense was improper.

DISPOSITION

The matter is remanded to the juvenile court to exercise its discretion to declare on the record whether the assault with a deadly weapon offense is a felony or misdemeanor and, [if a misdemeanor, to strike the section 707, subdivision (b) determination,] and to correct its disposition order by eliminating any determination of the maximum term of confinement. In all other respects the order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.