Filed 7/25/17 In re A.F. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. A.F., Defendant and Appellant.	B275427 (Los Angeles County Super. Ct. No. YJ38389)

APPEAL from an order of the Superior Court of Los Angeles County, Irma J. Brown, Judge. Reversed in part, affirmed in part, and remanded with directions.

Tonja R. Torres, 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, Assistant Attorney General, Susan Sullivan Pithey and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

After the juvenile court found that appellant A.F. committed a lewd act upon his four-year-old niece A.G., it issued a protective order. Appellant challenges the protective order, contending that its duration exceeds the statutorily permitted maximum length, and that it contains a defective provision. We agree with those contentions, reverse those portions of the protective order, and direct the juvenile court to modify the order. We otherwise affirm the orders of the juvenile court.

RELEVANT PROCEDURAL HISTORY

On July 16, 2015, a petition was filed under Welfare and Institutions Code section 602, charging appellant with a lewd act upon A.G., a child under the age of 14 years (Pen. Code, § 288, subd. (a)).[1] On April 25, 2016, following a contested adjudication hearing, the juvenile court sustained the petition, determined the offense to be a felony, declared

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[1] All further statutory citations are to the Welfare and Institutions Code.

appellant a ward of the court, and ordered him placed on probation in the home of his parents. Under the probation conditions, appellant was obliged to have no contact with A.G. directly or through a third party. The court also issued a protective order with an expiration date of April 24, 2026. The order names A.G. as the protected person, bars appellant from approaching within 100 yards of her, and directs him to "take no action to obtain the addresses or locations of protected persons [that is, A.G.] or their family members, caretakers, or guardian unless good cause exists otherwise."

FACTS

A. *Background*

In June 2015, A.G. was four years old, and had two brothers who were five. A.G. and her brothers lived with her mother, Jessica. Appellant, who is A.G.' s uncle, was then 14 years old, and lived with his parents.

B. *Prosecution Evidence*

Jessica testified that on June 10, 2015, she drove A.G. and her brothers to school. According to Jessica, A.G.'s grandfather -- appellant's father -- had permission to take the children to his home after school, as it was their own father's "visit day." At approximately 6:00 p.m., Jessica picked up the children and brought them home. When Jessica gave A.G. a bath, A.G. said that she felt a great deal of pain and that appellant "touched [her] cha cha." Upon

seeing that A.G.'s labia was inflamed, Jessica took A.G. first to a pediatrician and then to an emergency room, where she talked to a police officer.

Los Angeles County Sheriff's Department Detective Jason Marx testified that he interviewed appellant, who admitted that on one occasion, while A.G. was in the bathroom of his house, he put his fingers and penis into A.G.'s vagina. An audio recording of the interview was admitted into evidence.

Jennifer Rivera, a sexual assault nurse examiner, testified that on June 22, 2015, she examined A.G., and found an abnormal cleft in her hymen. She stated that the cleft might have been a birth defect or the result of sexual abuse.

C. *Defense Evidence*

Appellant denied putting his penis or fingers in A.G.'s vagina. He testified that on the afternoon of June 10, 2015, he was at home. Also present were two of appellant's brothers, as well as A.G. and her brothers. While appellant was watching television in the living room, A.G. went to the bathroom and called out to appellant to "wipe her." After entering the bathroom and assisting A.G., appellant sent her out of the bathroom and used it himself. According to appellant, when interviewed by Detective Marx, he agreed with Marx's suggestion that abuse occurred because he was frightened.

Appellant's father testified that appellant often babysat A.G. and her brothers when they visited his house. According to appellant's father, both Jessica and A.G.'s father had given appellant permission to "wipe" A.G. when necessary.

DISCUSSION

Appellant contends that the duration of the protective order exceeds the maximum statutorily permitted length under section 213.5, and that it contains a defective provision. For the reasons explained below, we agree.[2]

A. *Duration of the Protective Order*

Appellant contends the 10-year effective period of the protective order exceeds the three-year maximum period established in Welfare and Institutions Code section 213.5, which permits the juvenile court to issue an order "enjoining the child from contacting . . . any person the court finds to be at risk from the conduct of the child" (§ 213.5, subd. (b)). Appellant notes that the protective order states that it was issued under Penal Code section 136.2, but argues that the

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[2] "With regard to the issuance of a restraining order by the juvenile court pursuant to section 213.5, appellate courts apply the substantial evidence standard to determine whether sufficient facts supported the factual findings in support of a restraining order and the abuse of discretion standard to determine whether the court properly issued the order." (*In re Carlos H.* (2016) 5 Cal.App.5th 861, 866.)

order is subject to, and contravenes, the maximum period set forth in section 213.5.

In our view, appellant is correct. Although Penal Code section 136.2, subdivision (a)(1), authorizes protective orders in "criminal matter[s]," section 213.5, subdivision (b) specifically states that it applies to such orders issued "[a]fter a petition has been filed pursuant to . . . [Welfare and Institutions Code] section . . . 602" (§ 213.5, subd. (b)). Respondent agrees that section 213.5, rather than Penal Code section 136.2, governs the protective order.

Section 213.5 limits the duration of a protective order to three years, absent exceptional circumstances. Subdivision (d)(1) of section 213.5 provides that an order under subdivision (b) of that statute "shall remain in effect, in the discretion of the court, *no more than three years*, unless otherwise terminated by the court, extended by mutual consent of all parties to the restraining order, or extended by further order of the court on the motion of any party to the restraining order." (Italics added.)

The record reflects no circumstance permitting the effective period of the protective order to exceed three years. Subdivision (d)(1) of section 213.5, on its face, authorizes an initial order with a maximum effective period of three years, and permits that period to be subsequently "extended" in two ways, namely, by an agreement or a "further order." The provision thus limits the initial order to a three-year effective period.

Respondent asserts that appellant has forfeited his contention of error by failing to object before the juvenile court. We find no forfeiture. In *In re Sheena K.* (2007) 40 Cal.4th 875, 878-889 (*Sheena K.*), our Supreme Court examined the application of the forfeiture doctrine in the context of a challenge to a probation condition imposed in a section 602 juvenile proceeding. The court explained that an unauthorized sentence -- that is, "[a]n obvious legal error at sentencing that is 'correctable without referring to factual findings in the record or remanding for further findings'" -- is properly reviewed on appeal absent an objection, as is a constitutional error that presents a pure question of law, such as a facially vague and overbroad probation condition. (*Id.* at pp. 887-889.) The court further explained that appellate courts have the discretion to address a party's contention in other situations in the absence of a timely objection. (*Id.* at pp. 887-888, fn. 7.) That discretion is properly invoked when the contention "involves an important issue of constitutional law or a substantial right," the application of the forfeiture rule is "uncertain," or the party "did not have a meaningful opportunity to object at trial." (*Id.* at p. 887.) Here, appellant's contention falls within the exception to the forfeiture doctrine for unauthorized sentences.

Respondent also contends the absence of a timely objection shows that appellant "implicitly agreed" to the order's 10-year term. We disagree. Because the statutory three-year limit is favorable to appellant, the crux of

respondent's contention is that appellant's failure to object to the 10-year term amounted to a *waiver* of his right to that limit. Generally, in criminal proceedings, "[a] defendant may waive a right that exists for his or her own benefit, where such waiver is not against public policy." (*People v. Farnam* (2002) 28 Cal.4th 107, 146; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) Ordinarily, a waiver occurs when the defendant intentionally gives up a known right. (*Cowan*, *supra*, 14 Cal.4th at p. 371.)[3] Here, the record does not show that appellant intentionally and knowingly gave up his right relating to the three-year limit, as the protective order states that it was issued under Penal Code section 136.2, which lacks the three-year limit on protective orders. In sum, the protective order must be modified to limit its term to three years.

B. *Condition Limiting Access to Addresses and Locations*

Appellant contends a provision of the protective order is unconstitutionally overbroad and unsupported by adequate evidence. Generally, appellant's probation conditions and the protective order bar appellant from contacting A.G. directly or through a third party. In addition, the protective order states several related prohibitions, including that appellant not come within 100

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[3] Our Supreme Court has distinguished waiver from forfeiture, characterizing the latter as "losing a right by failing to assert it." (*Cowan*, *supra*, 14 Cal.4th at p. 371.)

yards of A.G. Appellant challenges one of the additional prohibitions contained in provision No. 9 of the protective order, which directs that appellant "'take no action to obtain the addresses or locations of [A.G.] or [her] family members, caretakers, or guardian unless good cause exists otherwise.'"

Appellant contends that because his and A.G.'s families overlap, the prohibition bars him from updating his knowledge of the addresses of members of his family who do not reside with A.G. and need no protection from him. He places special emphasis on his parents and one of his brothers -- A.G.'s grandparents and her father -- who have had access to A.G in the past. Appellant proposes that the prohibition be modified to state that he "take no action to obtain the addresses or locations of [A.G.] or [her] family members, caretakers, or guardian *living with A.G.* unless good cause exists otherwise."

Respondent maintains that appellant forfeited his contention for want of a timely objection. We decline to find a forfeiture, even though appellant's contention relies on facts regarding familial relationships, and thus falls outside the exceptions to the forfeiture doctrine for unauthorized sentences and constitutional errors presenting pure questions of law. As explained above (see pt. A.1. of the Discussion, *ante*), despite the absence of a timely objection, we may properly examine a contention involving "a substantial right" or when the appellant lacked a meaningful opportunity to object before the trial court. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-888, fn. 7.) In our view, such a

right is at issue here, as the Welfare and Institutions Code expressly states that one of its principal goals is "to preserve and strengthen the minor's family ties whenever possible." (§ 202, subd. (a).) Furthermore, nothing in the prosecutor's discussion with the juvenile court regarding the proposed protective order suggested that it included the prohibition contained in provision No. 9. (See *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537 [although the defendant failed to object to statutorily unauthorized DNA testing, the appellate court declined to find a forfeiture because defense counsel had little opportunity to react and was surprised by the order].)

We find guidance on appellant's contention from *In re C.Q.* (2013) 219 Cal.App.4th 355 (*C.Q.*) and *In re N.L.* (2015) 236 Cal.App.4th 1460 (*N.L.*). In *C.Q.*, the Los Angeles County Department of Children and Family Services (DCFS) initiated a dependency proceeding following an incident during which the father of three minor children hit their mother while the children were nearby. (*C.Q.*, *supra*, 219 Cal.App.4th at p. 358.) The juvenile court issued an injunction under section 213.5 naming the mother and the three children as protected persons. (*C.Q., supra,* at p. 357.) The order specifically required the father to stay away from the residence where they lived, and to stay away from all of them except during monitored visitation. (*Ibid.*) On appeal, the father did not challenge the injunction's requirement that he stay away from the residence where the mother and three children lived, but asserted that there was no evidence

to support the inclusion of the children as protected persons. The appellate court agreed and reversed that portion of the injunction. (*Id*. at pp. 364-366.)

In *N.L.*, DCFS initiated a dependency proceeding, alleging that a minor child was at risk due to her mother's drug use and false claims that the child's father had sexually abused the child. (*N.L.*, *supra*, 236 Cal.App.4th at p. 1462.) After placing the child with the father, the juvenile court issued a protective order that named the father and child as protected persons, and required the mother to stay at least 100 yards away from the father and the child, their residence, and the child's school. (*Id*. at pp. 1462-1465.) On appeal, the mother did not contest the order's requirement that she stay away from the residence of the father and child, but challenged the inclusion of the child as a protected person. (*Id*. at p. 1467.) The appellate court reversed that portion of the order, concluding there was insufficient evidence to support it.

Here, the protective order identifies A.G. as the sole protected person, but bars appellant from learning the addresses and locations of "[her] family members, caretakers, or guardian." The apparent intent of that prohibition is to prevent appellant from making indirect contact with A.G. through those individuals. However, as framed in the protective order, the prohibition encompasses members of appellant's family with whom A.G. does not reside, as the record shows that appellant's parents and brother -- A.G.'s grandparents and her father -- have

provided care for A.G. but do not live with her. Although the juvenile court's dispositional order directing appellant to live with his parents may afford appellant "good cause" to know their address, that is not true of the address of A.G.'s father. Furthermore, the prohibition potentially encompasses other members of appellant's family who are also members of A.G.'s family but have little or no contact with her. Because the protective order prohibits appellant from contacting A.G. directly or through third parties and approaching within 100 yards of her, a concern for A.G.'s safety does not reasonably support barring appellant from knowing the address of A.G.'s father and other members of appellant's family who do not reside with A.G.

Respondent appears to agree the prohibition would be unreasonable if the phrase "family members, caretakers, or guardian," were to include individuals not residing with A.G., but argues that the phrase is, in fact, limited to individuals who live with her. Respondent states: "[W]hen considered in the context of the protective order as a whole and its purpose of protecting the victim, the provision . . . [does] not unreasonably restrict appellant's ability to live with his parents or to contact his brother *because they* [*do*] *not reside with A.G.*" (Italics added.) However, the prohibition incorporates no such residence requirement. Accordingly, we conclude that the prohibition contained in

provision No. 9 of the protective order must be modified to do so.[4]

[4] In view of our conclusions, it is unnecessary to address appellant's contention that his counsel rendered ineffective assistance by failing to object to the protective order's effective period and defective prohibition.

DISPOSITION

The protective order is reversed with respect to its expiration date and the prohibition contained in provision No. 9, and the juvenile court is directed to modify the order to have an expiration date of April 24, 2019, and to state that appellant shall "take no action to obtain the addresses or locations of the protected person or her family members, caretakers, or guardian who reside with her unless good cause exists otherwise." The orders of the juvenile court are otherwise affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.