Filed 5/17/17 In re D.D. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.D., a Person Coming Under the Juvenile Court Law.	B275449 (Los Angeles County Super. Ct. No. TJ22345)
THE PEOPLE, Plaintiff and Respondent, v. D.D., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, and J. Michael

Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

D.D. was declared a ward of the juvenile court based on sustained allegations he had threatened a public officer (Pen. Code, § 71)[1] and resisted or obstructed a peace officer (§ 148, subd. (a)(1)). On appeal he contends there was insufficient evidence to support the finding he had threatened a public officer. D.D. also challenges one of the conditions of probation as improper, requests correction of the minute order following the disposition hearing classifying the offense of threatening a public officer as a felony and asks that we strike the maximum term of confinement improperly pronounced by the court. We modify the order of the juvenile court to reflect its designation of the section 71 offense as a misdemeanor and to strike the maximum term of confinement and affirm the order in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2015 16-year-old D.D. attended a football game at Centennial High School with some friends, including Darlene J. D.D., who was not a student at Centennial, had been invited by Darlene to come to the game. D.D. and Darlene watched the game together. After the game Darlene went to retrieve her phone from a friend while D.D. went to the parking lot to wait for their ride. The parking lot was adjacent to a room used by Centennial's band. Band members returned to the band

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[1] Statutory references are to this code unless otherwise stated.

room to store their instruments and belongings once the game was over.

While waiting in the parking lot D.D. approached band member Michael S., who was standing with his foot on his skateboard. D.D. asked Michael where he was from. Michael thought D.D. might be asking whether Michael was affiliated with a gang. D.D. also told Michael he had a "burner." Michael understood that to mean D.D. had a gun. D.D. put his foot on Michael's skateboard and tried to pull it away. Michael was able to pick up the skateboard and turned to leave. D.D. then put his hand on Michael's shoulder to stop him. At that point a band volunteer, Tyree M., intervened, pushed D.D. and told him to leave Michael alone. D.D. began digging through his backpack and again stated he had a burner. Darlene arrived at the parking lot and saw D.D. arguing with Tyree as other band members held the two of them back from fighting. The altercation ended, and D.D. and Darlene went to the parking lot gate to wait for their ride.

Several students told Manuel Castaneda, a music teacher who had been in the band room after the game, that there had just been an altercation involving a band member and that the other person involved said he had a burner. Castaneda approached D.D. to get his side of the story and to ensure the incident was resolved and would not escalate further. Castaneda asked D.D. if he had a burner, and D.D. replied he did. Concerned about D.D.'s aggressive tone and demeanor, Castaneda flagged down Compton Unified School District Police Officers Amoroso and Mendoza, who were in their car nearby. Castaneda described the situation to the officers and reported D.D. had said he had a burner. The officers got out of their car

and asked D.D. to come talk to them. D.D. appeared agitated and refused to comply with the officers' request. He backed away from the officers and ran across the street to hide between buildings. The officers got back in their car and drove down the street in the direction D.D. had run.

Once he saw the officers leave, D.D. walked back to the school parking lot where Castaneda was still standing. When he was about 30 feet from Castaneda, D.D. put his hand in the air and yelled, "I'm going to shoot you, cuz. I'm going to shoot you, cuz. I got a burner. I'm going to shoot you, cuz." Castaneda believed D.D. was threatening him, and he feared for his life. The officers had by this point returned to the parking lot and witnessed D.D.'s threat. They drew their weapons, ordered D.D.to the ground and arrested him.

On November 25, 2015 the People filed a two-count petition pursuant to Welfare and Institutions Code section 602 alleging D.D. had threatened a public officer, Manuel Castaneda, in violation of section 71 and had resisted, delayed or obstructed a public officer, Officer Amoroso, in violation of section 148, subdivision (a)(1). On January 11, 2016 the People filed a second petition pursuant to Welfare and Institutions Code section 602 alleging D.D. had committed attempted robbery of Michael S. in violation of sections 664 and 212.5, subdivision (c). The two petitions were adjudicated together.

During the contested jurisdiction hearing Michael, Officer Amoroso and Castaneda testified concerning the incident. Both Amoroso and Castaneda confirmed D.D. had yelled he had a burner and would shoot Castaneda.

Testifying in his defense D.D. denied speaking to Michael the night of the incident and said he had never seen him before

the trial. However, D.D. admitted having an altercation with Tyree after D.D. had asked another student how much he paid for his bike. D.D. denied telling Tyree or any of the other students he had a burner. D.D. also denied threatening Castaneda or telling him he had a burner. D.D. testified he simply walked away without saying anything when Castaneda questioned him.

Darlene also testified for the defense and corroborated D.D.'s testimony he had not told Castaneda he had a gun or would shoot anyone. In fact, Darlene testified Castaneda did not speak to D.D. at all, but had immediately motioned for the police once he saw D.D.

After hearing the evidence and argument the juvenile court sustained both counts of the November 25 petition (threatening a public officer and resisting a public officer) and dismissed the January 11 petition (attempted robbery). D.D. was declared a ward of the juvenile court and placed home on probation. After the court pronounced its decision, the People requested as a condition of probation D.D. be prohibited from having any contact with Michael. D.D.'s counsel objected the condition was not reasonably related to the section 71 violation. The court overruled the objection and imposed the "no contact" provision.

DISCUSSION

1. *Substantial Evidence Supports the Juvenile Court's Finding D.D. Violated Section 71*

   a. *Standard of review*

The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to

support an adult criminal conviction. (*In re V.V.* (2011) 51 Cal.4th 1020, 1026; *In re Kyle T.* (2017) 9 Cal.App.5th 707, 712.) In either type of case "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626.)[2]

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[2] This standard applies to review of convictions and

b. *Governing law*

Section 71, subdivision (a), provides, "Every person who, with intent to cause, attempts to cause, or causes, any officer or employee of any public or private educational institution or any public officer or employee to do, or refrain from doing, any act in the performance of his duties, by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out, is guilty of a public offense . . . ." "The purpose of [section 71] is to prevent threatening communications to public officers or employees designed to extort their action or inaction." (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 308.)

Section 71 "is designed to prohibit plausible or serious threats and 'to ignore pranks, misunderstandings, and impossibilities.' . . . [Section 71] does require that the threatened injury be of a nature that would be taken seriously and could cause the recipient to act or refrain from acting to avoid the threatened harm." (*In re Ernesto H.*, *supra,* 125 Cal.App.4th at pp. 310-311.)

c. *There was substantial evidence D.D. intended to interfere with the duties of a public officer*

Although conceding his statement "I'm going to shoot you, cuz" constituted a threat, D.D. contends there was no substantial

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adjudications for violations of section 71 when, as here, there is no claim the words at issue were constitutionally protected speech under the First Amendment. (*In re George T.* (2004) 33 Cal.4th 620, 630-634; *In re Ernesto H.* (2004) 125 Cal.App.4th 298, 306-308.)

evidence the threat was intended to cause Castaneda to do, or refrain from doing, an act in the performance of his duties, as required by section 71. Specifically, D.D. argues he never explicitly conditioned his threat on Castaneda performing or not performing a specific act.

D.D. overstates the significance of the absence of direct evidence that he intended to deter Castaneda from performing an act within his official duties. "Intent is rarely susceptible of direct proof. Therefore, in determining whether the element of intent has been established, we consider whether it may be inferred from all the facts and circumstances disclosed by the evidence." (*In re Ernesto H., supra*, 125 Cal.App.4th at p. 313.)

Castaneda testified his official duties as music teacher and band conductor included supervising students as they returned to the band room after the football game. He also testified he approached D.D. to ensure the earlier altercation had been resolved and would not resume or escalate. Thus, Castaneda's interaction with D.D. was well within the scope of his official duties. (See *In re Ernesto H., supra*, 125 Cal.App.4th at p. 314 ["among the many duties of a high school teacher, are the duties of maintaining order, preventing fighting, and keeping students safe"].) D.D. threatened Castaneda only after the teacher had confronted him about the altercation and had involved campus police. The evidence presented was reasonably susceptible to the inference drawn by the juvenile court—that D.D.'s threat was a result of Castaneda's efforts to maintain peace on campus and was intended to dissuade Castaneda from further attempting to hold D.D. accountable for his behavior or intervening in any dispute D.D. had with a student—and, therefore, was sufficient to support the juvenile court's finding the threat had been made

to interfere with a public employee's performance of duties as required by section 71.

d. *There was substantial evidence the recipient of the threat reasonably believed it could be carried out*

D.D. also argues there was no substantial evidence his words were reasonably understood to constitute a threat that could be carried out. To the contrary, D.D. contends his words were "mere bluster" and an "expression of frustration." D.D. emphasizes he had no gun in his possession at the time and, therefore, asserts he could not possibly have followed through with his threat to shoot Castaneda.

That D.D. was actually unarmed is beside the point: "[S]ection 71 does not require a present ability to carry out the threat. . . . It is sufficient if the defendant made a threat with the requisite intent and it reasonably appears to the recipient that the threat could be carried out." (*People v. Harris* (2008) 43 Cal.4th 1269, 1311.) The proper inquiry is whether there was substantial evidence Castaneda reasonably believed D.D.'s threat could be completed.

Castaneda testified both that his students had reported D.D. had a gun and that during their initial conversation D.D. confirmed to Castaneda he had a gun. D.D. then repeated he had a gun when he returned to the parking lot and threatened to shoot Castaneda. Castaneda also testified D.D. had acted in an aggressive manner during his earlier confrontation with Michael and his angry outburst caused him to fear for his life. This evidence was sufficient to establish Castaneda had a reasonable belief D.D. had a gun and was capable of carrying out his threat. The reasonableness of Castaneda's belief is reinforced by the fact the responding officers viewed the situation as serious enough to

draw their weapons to restrain and arrest D.D. On this record there was ample evidence D.D.'s threat constituted a violation of section 71. (See *People v. Harris, supra,* 43 Cal.4th at p. 1311 [evidence sufficiently established threats could be carried out when targets testified they took threats seriously and took precautions against them]; *In re Ernesto H., supra,* 125 Cal.App.4th at p. 311 [threat violated section 71 when target of threat testified he felt minor was serious and feared for his safety]; cf. *People v. Tuilaepa* (1992) 4 Cal.4th 569, 590 [threats did not violate section 71 when recipients of threats "indicated they did not actually fear for their safety"].)

2. *The Probation Condition Prohibiting Contact with Michael Is Valid*

a. *Governing law and standard of review*

The juvenile court is authorized to "impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime." (*In re Walter P.* (2009) 170 Cal.App.4th 95, 100.)

"'The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents' [citation], thereby occupying a 'unique role . . . in caring for the minor's well-being.' [Citation.] . . . [¶] The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."' [Citation.] This is

because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' [Citation.] Thus, ""a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court."""" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 909-910.) A condition of probation that "imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Thus, when probation conditions are applied to juveniles, they are valid even where they restrict the minor's "exercise of constitutional rights if they are narrowly drawn to serve the important interests of public safety and rehabilitation [citation] and if they are specifically tailored to the individual probationer." (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084; accord, *In re J.B.* (2015) 242 Cal.App.4th 749, 753-754 [juvenile court may impose condition that would be otherwise unconstitutional "'so long as it is tailored to specifically meet the needs of the juvenile'"].) We review constitutional challenges to probation conditions de novo. (*In re J.B.,* at p. 754.)

When a probation condition is challenged on nonconstitutional grounds, it "will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime

of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486; accord, *In re D.G.* (2010) 187 Cal.App.4th 47, 52 [*Lent* factors are applicable in evaluating juvenile probation conditions].) We review a challenge to the juvenile court's probation conditions on nonconstitutional grounds for abuse of discretion. (*In re P.A.* (2012) 211 Cal.App.4th 23, 33.)

b. *The restriction on contact with Michael does not impermissibly infringe on D.D.'s constitutional rights*

D.D. argues the probation condition prohibiting contact with Michael impermissibly infringes his constitutional rights to freedom of association and privacy.[3] While the condition does limit D.D.'s ability to associate with absolutely anyone he wants, the restriction is proper "'if reasonably necessary to accomplish the essential needs of the state and public order.' [Citations.] Such restrictions are 'part of the nature of the criminal process. [Citation.]'" [Citation.] A limitation on the right to associate which takes the form of a probation condition is permissible if it is '(1) primarily designed to meet the ends of rehabilitation and protection of the public and (2) reasonably related to such ends.'" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 627-628.) This test is met here. Even though the allegation D.D. had attempted to rob Michael was dismissed, the juvenile court properly found his

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[3] The People argue D.D. has forfeited this issue by failing to object on constitutional grounds in the juvenile court. However, this court has discretion to consider issues of constitutional significance involving pure questions of law presented for the first time on appeal. (*In re Sheena K.*, *supra,* 40 Cal.4th at pp. 887-888 & fn. 7; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.)

confrontation with Michael, even if not criminal, prompted D.D.'s subsequent unlawful interaction with Castaneda and the school district police officers. As such, the condition is reasonably related to the goal of rehabilitating D.D. by preventing contact with an individual he has previously accosted and protecting Michael from any further harassment or retaliation for testifying against D.D. Even broader conditions prohibiting contact with individuals who played a role in the juvenile's misconduct have been repeatedly upheld. (See, e.g., *In re Byron B.* (2004) 119 Cal.App.4th 1013, 1015, 1018 [probation condition prohibiting contact with "anyone known to be disapproved by parent(s)/guardian(s)/probation officer, staff" was constitutional because appellant's misconduct "had been influenced by other people"]; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1331 [condition prohibiting association with anyone known to be on probation was constitutional when minor's misconduct occurred because of presence at party with other juveniles and alleged gang member].)

The no-contact condition, which prohibits contact with a single individual, is also narrowly tailored to D.D.'s circumstances and the facts of the underlying offenses. D.D. and Michael are not friends; and D.D. has not identified any common friends, family or specific groups he would be prevented from associating with because of the condition. While D.D. does state Michael "apparently associates with people appellant knows," this vague statement does not compel a finding D.D.'s freedom of association has been impermissibly restricted.

Likewise, D.D.'s privacy rights have not been impermissibly infringed. D.D. states generally the right to privacy includes a right to make intimate personal decisions,

including a right to freely associate with the individuals one chooses. However, because there has been no impermissible infringement on D.D.'s right to associate with whomever he chooses, there has likewise been no violation of his right to privacy.

c. *The juvenile court did not abuse its discretion by imposing the condition prohibiting contact with Michael*

In addition to his constitutional challenge D.D argues the no-contact condition is unreasonable and constitutes an abuse of discretion. As discussed, "a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.) Although D.D. contends the condition is improper because "the offense in this case was not tied to Michael," the confrontation with Michael led to the incidents that resulted in D.D.'s arrest and sustained delinquency petition. Thus, the condition is reasonably related to the crime committed. There was no abuse of discretion.

3. *The Minute Order Following the Disposition Hearing Does Not Accurately Reflect the Court's Designation of the Section 71 Violation as a Misdemeanor*

Threatening a public officer (section 71) may be either a felony or a misdemeanor. (§ 71, subd. (a)(1); *In re Jeffery M.* (1980) 110 Cal.App.3d 983, 984.) When a juvenile is found to have committed an offense that in the case of an adult could be punished as a felony or a misdemeanor, Welfare and Institutions Code section 702 requires the juvenile court to declare the offense to be a misdemeanor or felony. (See also Cal. Rules of Court,

rule 5.780(e)(5) [court must "expressly declare on the record" that it has considered whether the offense is a misdemeanor or a felony].) 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 felony or a misdemeanor. (*Id.* at p. 1209.)

Here, during the disposition hearing the People asked the juvenile court whether the section 71 allegation was sustained as a felony. The court replied, "The court's confident that's a misdemeanor." The court then stated the maximum term of confinement to be three years four months, which contemplates a maximum felony sentence for the section 71 offense.[4] In addition, the May 10, 2016 minute order following the jurisdiction and disposition hearings states the section 71 violation is a felony.

D.D. argues that, despite the articulated maximum sentence and the language in the minute order, the juvenile

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[4] It appears the juvenile court arrived at the maximum term of confinement by applying the high term of three years for a felony violation of section 71 (see §§ 71, subd. (a)(1), 1170, subd. (h)(1)) and one-third the maximum term of one year for a section 148, subdivision (a)(1), violation (see *In re Eric J.* (1979) 25 Cal.3d 522, 538 [aggregation principles of § 1170.1 apply to juveniles whether the offenses committed are felonies or misdemeanors]; *In re Claude J.* (1990) 217 Cal.App.3d 760, 765 [in determining the maximum term of confinement for minors, the consecutive sentence provisions of § 1170.1 apply to both felonies and misdemeanors]).

court's statement the offense is deemed a misdemeanor was sufficient to satisfy the requirements of Welfare and Institutions Code section 702. Thus, D.D. argues the minute order must be corrected to reflect the court's oral pronouncement the offense was a misdemeanor. In the alternative, if we find the court's statement to be ambiguous or insufficient under Welfare and Institutions Code section 702, D.D. urges we remand the case for the court to exercise its discretion and declare whether the offense is a felony or a misdemeanor. The People, on the other hand, simply argue the juvenile court's statements on the record are ambiguous and the case must be remanded.

The court's statement, in response to the People's inquiry, that the offense was a misdemeanor was express, direct and unequivocal. Its later, contradictory calculation of a maximum term of confinement does not negate that express declaration. (Cf. *In re Manzy W.*, *supra*, 14 Cal.4th at p. 1209 [setting a felony-length maximum term of confinement, by itself, does not indicate juvenile court was aware of its discretion to treat offense as a felony or misdemeanor and concluded it should be treated as a felony].) Likewise, the clerk-prepared minute order's indication the offense is a felony does not control in light of the court's direct statement during the disposition hearing. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of court's oral pronouncement controls over clerk's minute order]; *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073 [oral pronouncement on the record controls "[w]hen there is a discrepancy between the minute order and the oral pronouncement of judgment"].) Accordingly, we order correction of the minute order to state the section 71 offense is a misdemeanor. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [appellate court may correct

clerical error on its own motion or upon application of the parties].)

4. *The Juvenile Court Erred in Setting a Maximum Term of Confinement*

The juvenile court set a maximum period of physical confinement at three years four months. However, because D.D. was placed home on probation, and not removed from the physical custody of his parents, he contends, the People concede, and we agree, the juvenile court erred in doing so. (See § 726, subd. (d); *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541 [court is required to specify maximum period of physical confinement only when minor is removed from the physical custody of his or her parent or guardian].) Accordingly, we strike the maximum term of confinement from the juvenile court's disposition order. (See *In re A.C.* (2014) 224 Cal.App.4th 590, 592 ["where a juvenile court's order includes a maximum confinement term for a minor who is not removed from parental custody, the remedy is to strike the term"].)

DISPOSITION

The jurisdiction and disposition order, as reflected in the juvenile court's May 10, 2016 minute order, is modified to reflect the court's designation of the section 71 offense as a misdemeanor and to strike the maximum term of confinement. In all other respects the order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SMALL, J.*

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