Filed 6/12/13 In re Sergio C. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re SERGIO C., a Person Coming Under the Juvenile Court Law.	B239578
THE PEOPLE, Plaintiff and Respondent, v. SERGIO C., Defendant and Appellant.	(Los Angeles County Super. Ct. No. JJ18730)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steve Klaif, Referee. Affirmed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Minor and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Roberta L. Davis and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Sergio C. appeals from a judgment declaring him a ward of the juvenile court pursuant to Welfare and Institutions Code section 602. We affirm the judgment.

FACTS

This appeal stems from two Welfare and Institutions Code section 602 petitions – one for battery and other offenses involving an attempt to prevent an officer from issuing a truancy violation and the other involving petty theft of a mobile phone. The facts supporting each petition are generally undisputed.

On Friday, December 9, 2011, Sergio was observed walking off school grounds. He ignored the school police officer's instruction to return to school. Sergio was absent the following Monday and Tuesday. On Wednesday, December 14, 2011, school police officer Clesha Nelson conducted a truant investigation and asked Sergio to go to the counselor's office. When she advised him she was writing him a ticket, Sergio became angry though he admitted he was off campus and ignored instructions to return. He accused Nelson of failing to write the ticket earlier that day when he was with his mother because Nelson was afraid of his mother. He then began a profanity-laced tirade, yelling, "Fuck this" and "You cannot fucking give me a ticket. If you give me this ticket, I'm not going to do anything but tear this ticket up and do what I usually do."

He became angrier when Nelson advised him that he would continue receiving tickets if he left campus. He clenched his fists and pounded his fist on his thigh, breathing heavily. He began yelling, "You're lucky you have a gun and a badge or I will fuck you up or I will hit you." At one point, the principal walked in to ask Sergio to lower his voice and to be respectful of Nelson. Although he continued to complain, Sergio calmed down.

He soon grew angry again and attempted to leave. He said "fuck this" and got up from his chair. Nelson placed her hand on his chest/stomach area and told him to sit down and wait until she finished the citation. He slapped her hand away and said, "Don't fuckin[g] touch me bitch." When he attempted to get up again, Nelson put her hand in front of him and Sergio yelled, "This is Florencia 13. I'll fuck you up. I'll fuck you up. This is Florencia." He became combative. Nelson held him up against the wall with her

forearm. He screamed, "Get off me. Get off me." He also began elbowing her in the chest. During their struggle, a chair was knocked over as well as several items on the desk. Nelson turned him to face the wall, but he continued to struggle. She then grabbed him and pulled him into the hallway in an attempt to gain control. She lost her footing and they both fell to the ground. Ultimately, Sergio put his arm behind his back and Nelson handcuffed him. Nelson was not able to finish writing out the truancy citation to give to Sergio because he would not calm down. When he complained of back pain, Nelson called an ambulance for him. A petition was filed on December 15, 2011, pursuant to Welfare and Institutions Code section 602, alleging one count each of resisting an executive officer (Pen. Code, § 69),[1] threatening a school or public officer (§ 71) and committing battery on an officer (§ 243, subd. (b)).

The second petition, filed on December 23, 2011, alleged one count of petty theft. On October 21, 2011, Gilberto Luna, a computer teacher at Sergio's high school, left his mobile phone on top of his desk during the class. Luna moved around the classroom, assisting students at their desks. Sergio was present that day and sat in the second row. Luna discovered his mobile phone was missing at the end of class and a student told him that Sergio had been "hovering" near his desk. Luna reported the theft to school police officer Hector Trujillo.

Trujillo questioned Sergio one week later on October 27, 2011. Trujillo read Sergio his *Miranda*[2] rights and Sergio said he understood them. Sergio initially denied taking Luna's mobile phone. He then admitted he took the phone after Trujillo used a ruse and told him several people saw him take the phone. Sergio said that he gave the phone to a friend but refused to name the friend.

Both petitions were adjudicated on February 15-16, 2012. The juvenile court sustained the petitions as to all counts. Sergio was declared a ward of the juvenile court and placed home on probation. Sergio filed a notice of appeal on February 22, 2012.

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1 All further section references are to the Penal Code unless otherwise specified.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

DISCUSSION

Sergio makes various legal and evidentiary challenges to the judgment. First, he contends that the allegations contained in the December 15, 2011 petition cannot be sustained because he was unlawfully detained when Nelson sought to give him a citation for a truancy violation. Second, there was insufficient evidence to prove he intended to prevent Nelson from performing her duties. Third, he argues that he did not voluntarily and knowingly waive his Fifth Amendment rights. Finally, he contends one probation condition imposed by the trial court is unconstitutionally vague and overbroad. We find none of these arguments persuasive.

I. Unlawful Detention

Sergio contends the petition relating to the truancy citation cannot be sustained because he was unlawfully detained at the time of the alleged offenses. Each of the three counts in the December 15, 2011 petition against Sergio was premised on the officer being engaged in the performance of his or her duties at the time of the prohibited conduct. (§§ 69, 71, 243, subd. (b).) According to Sergio, Nelson was not engaged in the performance of her duties when she detained him in the school counselor's office as part of a truancy investigation. Sergio contends Nelson had no authority to detain him for truancy on Wednesday because he was not truant then. Nelson's only authority, according to Sergio, lay in giving him a citation for truancy at the time he was actually truant, not days afterwards when he was in school. In short, her conduct at the time of the detention was *unlawful* and therefore, Sergio could not have been attempting to deter her from her *lawful* duties. We disagree.

The long-standing rule in California and other jurisdictions is that a defendant cannot be convicted of an offense against a peace officer engaged in the performance of his or her duties unless the officer was acting lawfully at the time. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217; *In re Manuel G.* (1997) 16 Cal.4th 805, 818 [applying rule to juvenile criminal matter].) "The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in 'duties,' for purposes of an

offense defined in such terms, if the officer's conduct is unlawful. [Citations.]" (*Gonzalez*, at p. 1217.)

We evaluate whether Nelson's conduct was lawful under the guidance provided by *In re Randy G*. (2001) 26 Cal.4th 556, which held, "the broad authority of school administrators over student behavior, school safety, and the learning environment requires that school officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner." (*Id.* at p. 559.) There, a campus security officer observed a student acting nervously in a restricted area of campus. The officer pulled the student out of his class and detained him. During questioning, the student consented to a patdown search and a knife with a locking blade was found in his pocket. At trial, the court denied a motion to suppress. (*Id.* at p. 560.) The defense argued on appeal that the detention was unlawful because the officer lacked reasonable suspicion of criminal activity or violation of a school rule. Thus, it was an unreasonable search and seizure under the Fourth Amendment. (*Ibid.*)

Holding that "detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment[,]" the California Supreme Court reasoned that "liberty is scarcely infringed if a school security guard leads the student into the hall to ask questions about a potential rule violation." (*In re Randy G.*, at pp. 566-567.)

If a detention is lawful under the circumstances described in *In re Randy G.*, we fail to see how it is not lawful in this instance. Sergio does not contend he had permission to leave campus the week before his encounter with Nelson. In fact, he acknowledged that he ignored the officers' request to come back to school. Nor does he dispute that he has a prior history of truancy. Indeed, he indicated that he intended to continue to be truant when he told Nelson, "I'm not going to do anything but tear this ticket up and do what I usually do." Nelson's detention of Sergio to conduct a truancy investigation was not arbitrary, capricious or harassing. We are also not persuaded by Sergio's argument that a school police officer is subject to a different standard than any

other school official. The Supreme Court specifically "decline[d] the invitation to distinguish the power of school security officers over students from that of other school personnel[.]" (*In re Randy,* at p. 568.)

II. Intent

Sergio next challenges the juvenile court's true finding that he resisted an executive officer as described under section 69[3] and that he threatened a public officer under section 71.[4] Both section 69 and section 71 require evidence of the specific intent to interfere with the performance of the officer's duties. (*People v. Hopkins* (1983) 149 Cal.App.3d 36, 43; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1154.) Sergio argues that the petition as to these two counts cannot be sustained because there is no evidence that he had the specific intent to prevent Nelson from issuing a truancy citation. Instead, Sergio told Nelson he planned to ignore the ticket and only made threats after she prevented him from leaving.

We find Sergio's arguments unpersuasive. We review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605.)

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[3] Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment."

[4] 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 . . . ."

Substantial evidence supports a finding that he had the requisite intent. Sergio began his angry tirade immediately after Nelson told him she was writing him a ticket for truancy. He threatened to "fuck [her] up," and indicated he was affiliated with a street gang, Florencia 13. He yelled, "You're lucky you have a gun and a badge or I will fuck you up or I will hit you." He also exhibited threatening behavior, clenching his fists and pounding his fist against his thigh, and became combative.

Contrary to Sergio's analysis, it is irrelevant when he made the threats or when he began to struggle with Nelson. All of his actions indicated that he was upset about the citation and did not want it, including his attempt to leave. Indeed, Nelson prevented him from leaving only to finish writing up the citation to give to him. Sergio's threats were made while Nelson was writing the citation. Ultimately, he was successful; Nelson was unable to give him the citation. Given these facts, it is reasonable to infer Sergio's threats and actions were intended to deter or prevent Nelson from performing her duties relating to the issuance of the truancy citation.

III. *Miranda* Waiver

At trial, Trujillo testified that he read Sergio his *Miranda* rights from a form created by the Los Angeles Police Department. Although he appeared nervous, Sergio indicated he understood those rights four separate times. Sergio then began to answer questions from Trujillo regarding the missing mobile phone, including confessing that he took it. At trial, defense counsel objected to the admission of the confession on the ground that the totality of circumstances – Sergio appeared nervous, he was 15 years old at the time, he was never asked if he wanted his parents with him for the interview, he was never asked if he knew what an attorney was, he was never asked if he wanted to discuss the case – indicated there was not a voluntary, willful waiver. The trial court disagreed and the confession was admitted into evidence.

On appeal, Sergio contends for the first time that the waiver was not knowing or voluntary *due to his learning disabilities*. The probation report issued prior to trial indicated that Sergio was a special education student with a specific learning disability involving "auditory processing and attention skill deficit" who was placed in a smaller

class with a special education teacher and who met with a special resource teacher once a week.

We believe Sergio has forfeited this claim. (*People v. Williams* (2010) 49 Cal.4th 405, 424; *People v. Rundle* (2008) 43 Cal.4th 76, 116, 121 [forfeiture doctrine applies to objections based on *Miranda* violations], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [forfeiture applies in juvenile delinquency cases].) Although he objected to the admission of the confession, he failed to raise the issue of his learning disability. The prosecution therefore had no opportunity to fully develop the factual record and allow the trial court to make a ruling on it.

One of the basic justifications for the forfeiture doctrine – to provide the court with the opportunity to make findings based on a fully developed factual record (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754) – and the difficulty in reviewing such issues for the first time on appeal, are highlighted here. To determine the merits of Sergio's claim, we must consider whether, under the totality of the circumstances, his disability prevented a knowing and voluntary waiver. However, there is no information in the record regarding the severity of Sergio's disability or even what it means to have "auditory processing and attention skill deficit."[5] We review the trial court's legal conclusions in this regard independently but " 'evaluate the trial court's factual findings regarding the circumstances surrounding the defendant's statements and waivers, and " 'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' " ' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) Because Sergio did not raise the issue in the trial court, there is little factual record from which to make this determination.

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[5] In his reply brief, Sergio presents a National Institutes of Health publication describing auditory processing difficulty. That is evidence outside of the record and will not be considered. (Cal. Rules of Court, rule 8.204(a)(2)(C); *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 453, fn. 6.)

Inexplicably, the Attorney General did not raise the issue of forfeiture. As a result, we will assume that Sergio's claims were preserved. We nevertheless conclude they lack merit. We consider "the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.) Because defendant is a minor, the required inquiry "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Id.* at p. 725.) The prosecution bears the burden of demonstrating that the challenged waiver is valid by a preponderance of the evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 751; *People v. Nelson* (2012) 53 Cal.4th 367, 375.) "A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights." (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 218-219.)

Here, Sergio indicated four times that he understood his Fifth Amendment rights. It was apparent that he knew that he could remain silent when he wished. For example, he refused to disclose to whom he gave the mobile phone, despite being asked twice to do so. Although he participated in special education classes, he followed a general curriculum. Further, the probation report also assessed Sergio as follows: "The minor's behavior at home is good. He follows the rules, takes out the trash and cleans the livingroom. He is very friendly, he smiles and talks a lot. He is a good kid, very energetic and *very smart* but he just needs to apply himself." (Italics added.) The totality of the circumstances supports the trial court's conclusion that Sergio knowingly and voluntarily waived his Fifth Amendment rights under *Miranda*.

Sergio's reliance on *In re Shawn D.* (1993) 20 Cal.App.4th 200 is misplaced. In *In re Shawn D.*, the court held that the detective's repeated suggestions to the unsophisticated and naïve 16-year old defendant that he would be treated more leniently if he confessed rendered the confession inadmissible. (*Id.* at p. 214.) There is no

indication in the record that such promises of leniency were ever made to Sergio, much less multiple times. Instead, Trujillo stated that "it wouldn't look good for him" in court since there were witnesses who saw him take the phone. This isolated comment conveys no suggestion that Sergio would benefit from confessing. Moreover, the *Shawn D.* court held that the detective's use of a ruse – that he already had enough evidence to convict defendant – was not enough to demonstrate the defendant's will was overborne. (*Id.* at p. 213.)

IV. Probation Condition

The juvenile court conditioned Sergio's probation on, among other things, Sergio "not be[ing] within one block of any school ground unless enrolled, attending classes, on approved school business, or with school official, parent or guardian." Sergio contends this condition is unconstitutionally vague and overbroad because it does not include any requirement that he know that he is within the prohibited radius. With over 1,000 schools in over 720 square miles in Los Angeles, Sergio argues he could easily violate the condition without knowing he was doing so. Accordingly, Sergio requests we either strike the condition for being impossible to comply with or modify it to include a scienter requirement. We decline to do either.

As noted by the court in *People v. Barajas* (2011) 198 Cal.App.4th 748, 761-762, footnote 10, "the locations of most public schools are well marked as required by statutes with speed limit signs (Veh. Code, § 22352, subd. (a)(2)(B)), painted crosswalks labeled "SCHOOL XING" (Veh. Code, § 21368), federal and state flags (Gov. Code, § 431, subd. (d)), and notices of school hours (Ed. Code, § 32211, subd. (e)), as well as their often distinctive combinations of buildings, playgrounds, and parking lots." It is unlikely that Sergio will unknowingly violate this probation condition if he is within one block of a school.

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition 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. [Citation.]" (*In re Sheena K., supra,* 40 Cal.4th at p. 890.) Given these guidelines, we conclude the challenged probation condition is not unconstitutionally vague or overbroad.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.