Filed 11/29/18 In re T.W. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re T.W., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B285939 (Super. Ct. No. YJ39178) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. T.W., Defendant and Appellant.	

The juvenile court sustained a petition against T.W. following an adjudicatory hearing. The court found true second degree attempted burglary of a vehicle (Pen. Code, §§ 459, 664)[1]; tampering with a vehicle (Veh. Code, § 10852); possession of

[1] All statutory references are to the Penal Code unless otherwise stated.

burglary tools (§ 466); and giving false information to a police officer (§ 148.9, subd. (a)).

The juvenile court placed T.W. at home on probation. The court declared the maximum period of confinement to be five years eight months. We strike the court's declaration of the maximum term of confinement. In all other respects, we affirm.

FACTS

On May 31, 2017, Philip Rodriguez parked his silver Nissan in front of his Manhattan Beach apartment. He locked the car. He did not give anyone permission to drive, touch or have access to the car.

At approximately 10:00 a.m., two witnesses in separate apartments saw three young men walking down the street. One of the men stayed under a tree while the other two crossed the street. The man under the tree turned his head quickly back and forth as though he was looking to see if other people were approaching.

One of the men who crossed the street squatted down by the Nissan's driver's side door. He lifted the handle on the door, but the door did not open. The man standing under the tree crossed over and the three men continued to walk down the street. Both witnesses called the police.

Manhattan Beach Police Officers Paul Inguanzo, Donovan Torres and Shawn Thompson responded to the call in separate cars. All the officers were in uniform and driving marked police cars. Inguanzo saw the three men and broadcast his location to the other officers. One of the men saw Inguanzo sitting in his police car and all three immediately began to run. Inguanzo broadcast the information.

Officer Thompson saw the men and got out of his car to apprehend them. Two of them temporarily got away, but T.W.

slipped and fell. Thompson was able to handcuff him. When Thompson asked T.W. his name, he said "Tyrone Jones."

Officer Torres arrived and conducted a pat down search of T.W. Torres found a six and one-half inch flathead screwdriver in T.W.'s pants pocket. Torres placed T.W. in the back of his patrol car.

Thompson went to Torres's car and advised T.W. of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. T.W. agreed to talk. T.W. said he was in the area to look for cars that were unlocked so that he could steal from them. He said the screwdriver belonged to his mother's boyfriend. He denied he was using it to break into locked cars. He said he was using it to see if the cars were unlocked.

Defense

T.W. testified in his own defense. He admitted he was in the area to steal from cars. He said he checked the door handles to see if the car was unlocked. If a car was locked, he walked away. He denied using the screwdriver to steal from cars. He said he was holding the screwdriver for his mother's boyfriend. He admitted that he gave the police a false name.

DISCUSSION

I

T.W. contends the juvenile court's true finding to the charge of attempted vehicle burglary is not supported by the evidence.

We review a true finding in the juvenile court under the substantial evidence standard. (*In re George T.* (2004) 33 Cal.4th 620, 630.) We review the record in a light most favorable to the finding to determine whether there is evidence whether a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*Id.* at pp. 630-631.) That a rational trier of

fact may have also found to the contrary does not justify reversal. (*Id.* at p. 631.)

Section 459 provides in part, "Every person who enters any . . . vehicle . . . , when the doors are locked, . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." An attempt to commit a crime consists of a specific intent to commit the crime and a direct but ineffectual act done toward its commission. (*People v. Ross* (1988) 205 Cal.App.3d 1548, 1554.)

T.W. argues there is no substantial evidence he acted with the intent to steal from a locked vehicle. But T.W. was carrying a screwdriver. A screwdriver can be used to break into a locked vehicle. In fact, there appears to be no other reason for T.W. to be carrying a screwdriver at the time he was attempting to enter the Nissan. His statement to Officer Thompson that he was using the screwdriver to see if the car was unlocked is not credible. As T.W. amply demonstrated, the easiest way to see if a vehicle is unlocked is to try the door handle. The juvenile court was not required to believe T.W.'s testimony that he intended to steal only from unlocked vehicles. T.W. points out that there is no evidence he attempted to break into the Nissan once he discovered it was locked. But he may have realized he was being watched or simply lost his nerve. We need not speculate. That T.W. was carrying a screwdriver while trying to enter the Nissan is sufficient to support a true finding.

Substantial evidence supports a true finding of attempted burglary.

II

T.W. contends the juvenile court erred in making a true finding to the charge of tampering with a vehicle.

T.W. argues that tampering with a vehicle is a necessarily lesser included offense of vehicular burglary. Vehicle Code

section 10852 provides: "No person shall either individually or in association with one or more other persons, wilfully injure or tamper with any vehicle or the contents thereof or break or remove any part of a vehicle without the consent of the owner."

Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. (*People v. Thomas* (1962) 58 Cal.2d 121, 128.) The analysis is done in the abstract. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218.) The question is whether it is "theoretically possible" to commit the greater offense without committing the lesser. (*Ibid.*) A judicially created rule prohibits a person from being convicted of both the greater and the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

The People concede that tampering is a necessarily included offense of vehicular burglary. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 505.) The People argue, however, that tampering is not a necessarily included offense of attempted vehicular burglary. The People give the example of a person who is in the act of swinging a crowbar at the window of a locked vehicle to break in, but is stopped by the police before he hits the window. He could be convicted of attempted vehicular burglary, but not tampering.

T.W. replies that the People define tampering too narrowly. He cites *People v. Anderson* (1975) 15 Cal.3d 806, 810, for the proposition that tampering includes "any act inconsistent with the ownership" of a vehicle. Presumably swinging a crowbar at a non-owned vehicle's window is an act inconsistent with the ownership.

But the court in *Anderson* defined tampering in the context of deciding that tampering is a necessarily included offense of grand theft auto. (*People v. Anderson*, *supra*, 15 Cal.3d at pp.

810-811.) The offense of grand theft auto requires physical contact with the vehicle. It may well be that a person may tamper with a vehicle without physical contact by opening the locks with a remote device. But even there the vehicle is physically altered. Although *Anderson* gave "tampering" a broad definition, it stretches the meaning of the term beyond reason to say that one may tamper with a vehicle without making physical contact or altering it in any way. Thus, under the People's hypothetical, the person with the crowbar would not be guilty of tampering. Tampering is not a necessarily included offense of attempted vehicle burglary.

III

The People concede that the juvenile court's declaration of the maximum term of confinement must be stricken. The court must specify the maximum term of physical confinement only where a minor is removed from the custody of his parents. (Welf. & Inst. Code, § 726, subd. (d)(1).) Where a minor is not removed from the custody of his parents, reference to the maximum term of confinement should be stricken. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.)

The maximum term of confinement is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Irma J. Brown, Judge

Superior Court County of Los Angeles

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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Shezad H. Thakor, Deputy Attorney General, for Plaintiff and Respondent.