Filed 9/21/17 In re Lonnie Y. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re LONNIE Y., a Person Coming Under the Juvenile Court Law.	B271049 (Los Angeles County Super. Ct. No. TJ20880)
THE PEOPLE, Plaintiff and Respondent, v. LONNIE Y., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Catherine J. Pratt, Judge. Affirmed.

Laini Millar Melnick, 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, Paul M. Roadarmel, Jr., and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lonnie Y. appeals from the juvenile court's order declaring him a ward of the court under Welfare and Institutions Code section 602[1] following the sustaining of a petition filed June 17, 2015 charging him with first degree residential burglary (Pen. Code, § 459, subd. (a)) and grand theft of personal property (*id.*, § 487, subd. (a)). He contends that the juvenile court erred in denying his motion to dismiss under section 701.1 for insufficient evidence, that the evidence was insufficient to sustain the petition, and that the juvenile court erred in declaring him statutorily ineligible for deferred entry of judgment. We affirm.

BACKGROUND

Prosecution Evidence

Around 7:00 a.m. on November 10, 2014, Marion Patricia House left her home on East Avenue in Los Angeles. She returned briefly at 1:30 p.m. and left again around 2:00 p.m. Later that evening, when she arrived home around 6:00 or 7:00 p.m., she observed that her locked chain link gate was ajar about 12 to 14 inches, and her dog, which she had left inside the house, was outside. Inside her home, she observed that the dog door had been kicked in.

After the police arrived, she found that several items were missing from her residence, including: a Toshiba lap top computer, which cost about $800; two of her son's backpacks, which cost about $65 each; a

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[1] All undesignated section references are to the Welfare and Institutions Code.

Play Station 3 system, which cost about $550, and all 20 of the games they had, which cost about $1,000; money from inside of a purse amounting to approximately $300 or $400; a piggy bank containing 80 to 100 silver half-dollar coins; a piggy bank with about $75 to $100; and a piggy bank with about $100.

Los Angeles Sheriff's Detective Matthew Pereida investigated the burglary. On December 5, 2014, he questioned appellant. Appellant was a high school friend of House's son, Tommy, and had been to the home on a few occasions in the past. The interview, which was recorded and transcribed, occurred in a patrol car while appellant's home was being searched (no stolen property was discovered). In the prosecution's case at the adjudication hearing, Detective Pereida testified concerning appellant's statements. At times he was impeached or had his recollection refreshed by reference to the transcript of the interview. Later, as part of the defense case, a recording of the interview and the transcript were admitted into evidence as defense exhibits and reviewed by the court. In summarizing the evidence, we rely on the transcript of the interview, rather than on Detective Pereida's testimonial description of the interview.

As reflected in the transcript, appellant told Detective Pereida that he was approached by a man called "Boobie" (referred to as "Bobby" in Detective Pereida's testimony), a Grape Street gang member who used to be the boyfriend of appellant's aunt. Boobie suggested burglarizing the home of appellant's friend, Tommy. Appellant said, "naahhh, cuz that's messed up. I be around him daily, and he go to my school." Boobie said "like alright we're gonna go down here . . . and we

gonna go in his house." Appellant replied, "I'm like, I'll go with you but I'm not going to his house. So we went down there, I showed him where Tommy lived, but I didn't go in his house." It was around 6:00 p.m. when appellant took Boobie and another person to Tommy's house. Boobie told appellant that whatever he got he would split with appellant. Appellant told him "whatever you get you can keep" because he was "not gonna steal from my homies." Boobie called appellant a "mark." Appellant saw Boobie and the other person go through the gate. He did not wait for them, and headed home. The next day Boobie told appellant that he "passed" (according to Detective Pereida, slang for stealing something in a residential burglary). From that, appellant "guess[ed] [Boobie] got stuff out of the house."

Defense

According to appellant's mother, Shyla Burnett, appellant had been attending RX Parris School in November 2014. On November 10, 2014, she kept him home from school because she thought it was a holiday. Later, when Burnett was notified that appellant missed school, she informed the school she told him he could stay home. Burnett also explained that her sister had dated a person named Bobby.

DISCUSSION

Sufficiency of the Evidence

Appellant contends that the juvenile court erred in denying his motion to dismiss the petition under section 701.1 at the close of the

prosecution's case,[2] and also that the evidence was insufficient to support the petition. The bases for these arguments is the same: that appellant's statements to Detective Pereida showed that he did not intend to aid Boobie in burglarizing the House residence. Because both of these contentions are resolved under the substantial evidence test and because there was no material difference in the state of the evidence as it existed at the close of the prosecution case and the close of the defense case, we consider the contentions together. Under the substantial evidence test, we view the evidence in the light most favorable to the trial court's findings, and draw all reasonable inferences in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206-1207.)

"We have described the mental state required of an aider and abettor as 'different from the mental state necessary for conviction as the actual perpetrator.' [Citation.] The difference, however, does not mean that the mental state of an aider and abettor is less culpable than that of the actual perpetrator. On the contrary, outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. 'To prove that a

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[2] Section 701.1 provides: "At the hearing, the court, on motion of the minor or on its own motion, shall order that the petition be dismissed and that the minor be discharged from any detention or restriction therefore ordered, after the presentation of evidence on behalf of the petitioner has been closed, if the court, upon weighing the evidence then before it, finds that the minor is not a person described by Section 601 or 602. If such a motion at the close of evidence offered by the petitioner is not granted, the minor may offer evidence without first having reserved that right."

defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.)

In the present case, appellant's statements to Detective Pereida were sufficient to prove that he aided the burglary and theft with knowledge of the criminal purpose of the perpetrator and with an intent to facilitate the commission of the offenses. (*People v. Beeman* (1984) 35 Cal.3d 547, 559.) It is true that because Tommy was his friend, appellant disclaimed any interest in personally entering the residence and either personally stealing anything or sharing in any of the property stolen by Boobie and his other accomplice. But even accepting those claims at face value, appellant nonetheless intentionally facilitated the burglary and theft. He knew that Boobie intended to burglarize Tommy's residence. He agreed to accompany Boobie to the residence. He showed Boobie and another accomplice where Tommy lived, and watched as they went through the gate. He then left. Drawing all inferences in favor of the juvenile court's findings, this evidence was sufficient to prove that even though appellant did not personally enter the residence or intend to share in any stolen property,

he nonetheless intentionally facilitated Boobie and his other accomplice in committing the burglary and theft – he knew they were going to burglarize the residence, and showed them where Tommy lived so as to facilitate the crime, even though he did not intend to personally benefit. Thus, the court properly denied the section 701.1 motion, and the evidence was sufficient to support the petition.

Deferred Entry of Judgment (*DEJ*)

Appellant contends that the juvenile court erred in declaring him statutorily ineligible for deferred entry of judgment under section 790 et. seq., and that the case should be remanded to the juvenile court to determine whether he was suitable. We conclude that the court's error in not exercising its discretion to determine whether appellant was suitable for DEJ was not prejudicial.

Procedural Background

The section 602 petition involved in the present appeal, filed on June 17, 2015, was the second petition filed against appellant. The first section 602 petition was filed in August 2013. It alleged that appellant, then 15 years old, committed felony second degree burglary (Pen. Code, § 459). The petition was heard in Department 260 of the Compton Courthouse. In December 2013, a disposition was reached, in which appellant admitted an amended allegation of misdemeanor trespass (Pen. Code, § 602, subd. (m)), the felony burglary allegation was dismissed, and appellant was placed on probation and released to his mother.

On June 17, 2015, when appellant was 17 years old, a second section 602 petition was filed – the petition involved in the instant appeal – alleging that he committed first degree residential burglary (Pen. Code, § 459) and grand theft of personal property (Pen. Code, § 487, subd. (a).) This petition was heard in Department 285 of the Lancaster Courthouse. Appellant denied the allegations and the case was set for adjudication.

On August 19, 2015 (by which time he was 18 years old), appellant appeared in Department 285 with counsel. The court noted that in addition to the June 2015 petition under section 602, a 777 petition alleging a violation of probation had been filed by the probation department. The section 777 petition (a copy of which is not included in the record on appeal) alleged a violation of appellant's probation on the August 2013 petition handled in the Compton Courthouse. Appellant's counsel told the court that "with regards to the 777, [appellant] is not on probation here. He is on probation out of Compton." After discussion with the parties, the court struck the section 777 petition and ordered it to be filed in the "home court," Department 260 in Compton.

Appellant's counsel requested a continuance to prepare for the adjudication on the June 2015 petition in order to locate Boobie and develop cell phone evidence to exculpate appellant. He explained that the allegations in the June 2015 section 602 petition had previously been dismissed twice in order to locate Boobie. The prosecutor objected to a continuance because the prosecution witnesses had been summoned to court "probably" six times. He asked the court to trail the

case to the next day, because the witnesses had "difficult schedules" and were available the next day. Ultimately, the court trailed the case to August 27, 2015, and "expect[ed] all parties to be ready on that day to proceed."

All parties appeared on August 27, 2015. They waived opening statements, and the prosecutor called his first witness. The court then stated, "Before we get started . . . is he eligible for DEJ?" The prosecutor replied, "I don't think so. He is currently on probation." The court stated, "Okay. So he's not eligible." Defense counsel did not object, and the adjudication hearing proceeded.

Following the hearing, the court sustained the June 2015 petition and declared the offenses to be felonies. It then transferred the case back to Department 260 of Compton Court for disposition.

Department 260 continued the disposition hearing to January 14, 2016. In the meantime, in November 2015, appellant was arrested on a new charge as an adult, and a new section 777 petition was filed in Department 260.

The disposition hearing on the June 2015 petition was held in Department 260 on January 14, 2016. Appellant was currently being held as an adult in county jail. At the hearing, the court dismissed the section 777 petitions. As to the June 2015 petition, the court ordered restitution of $7,869, and ordered appellant to serve 45 days in county jail, after which jurisdiction would terminate. On February 25, 2016, the court terminated jurisdiction, subject to further proceedings regarding financial responsibility.

Discussion

"'The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that [for a minor who is statutorily eligible under § 790, subd. (a), and who is thereafter found suitable by the court under § 790, subd. (b)] in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3), 793, subd. (c).)'" (*In re Kenneth J.* (2008) 158 Cal.App.4th 973, 976-977.) The "minor's admission of the charges contained in the petition . . . shall not constitute a finding that a petition has been sustained for any purpose, unless a judgment is entered pursuant to subdivision (b) of section 793." (§ 791, subd. (c).)

Section 793 governs when a minor fails to comply with the conditions of deferred entry of judgment. Section 793, subdivision (a) provides in relevant part: "If it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily in the assigned program or is not complying with the terms of the minor's probation, or that the minor is not benefiting from education, treatment, or rehabilitation, the court shall lift the deferred

entry of judgment and schedule a dispositional hearing." Under section 793, subdivision (b): "If the judgment previously deferred is imposed and a dispositional hearing scheduled pursuant to subdivision (a), the juvenile court shall report the complete criminal history of the minor to the Department of Justice, pursuant to Section 602.5."

Appellant contends that at the time of the adjudication of the June 2015 petition, he was statutorily eligible for DEJ. We agree.[3] In particular, the fact that he was on probation was not sufficient to deem him ineligible. Section 790, subdivision (a)(1) precludes DEJ for a

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[3] Section 790 describes the statutory eligibility requirements:

"(a) Notwithstanding Section 654 or 654.2, or any other provision of law, this article shall apply whenever a case is before the juvenile court for a determination of whether a minor is a person described in Section 602 because of the commission of a felony offense, if all of the following circumstances apply:

"(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense.

"(2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707.

"(3) The minor has not previously been committed to the custody of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.

"(4) The minor's record does not indicate that probation has ever been revoked without being completed.

"(5) The minor is at least 14 years of age at the time of the hearing.

"(6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.

"(7) The offense charged is not rape, sodomy, oral copulation, or an act of sexual penetration specified in Section 289 of the Penal Code when the victim was prevented from resisting due to being rendered unconscious by any intoxicating, anesthetizing, or controlled substance, or when the victim was at the time incapable, because of mental disorder or developmental or physical disability, of giving consent, and that was known or reasonably should have been known to the minor at the time of the offense."

minor who has previously been declared a section 602 ward for the commission of a felony offense. Here, appellant was on probation following a section 602 declaration of wardship based on his admission of misdemeanor trespass in the August 2013 petition heard in Department 260 of the Compton Court. The felony burglary allegation in that petition was dismissed. Thus, he had not been declared a section 602 ward based on a felony offense. Further, section 790, subdivision (a)(4) precludes DEJ for any minor whose probation has ever been revoked without being completed. But at the time of the adjudication hearing on the June 2015 petition, appellant's probation had not been revoked. (See *In re T.P.* (2009) 178 Cal.App.4th 1, 4 [revocation requires more than a finding that probation has been violated].) Thus, section 790, subdivision (a)(4) did not render him ineligible. Further, the record shows that none of the other disqualifying factors applied.

Thus, it appears that appellant was statutorily eligible for DEJ, and the court should have considered whether he was suitable.[4] However, on this record, the error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[4] Section 790, subdivision (b) provides in relevant part: "Upon a finding that the minor is also suitable for deferred entry of judgment and would benefit from education, treatment, and rehabilitation efforts, the court may grant deferred entry of judgment. Under this procedure, the court may set the hearing for deferred entry of judgment at the initial appearance under Section 657. The court shall make findings on the record that a minor is appropriate for deferred entry of judgment pursuant to this article in any case where deferred entry of judgment is granted."

To have participated in DEJ, appellant would have had to comply with section 791, subdivision (b) and admit the allegations of the June 2015 petition that he was a ward of the court under section 602 based on his commission of first degree residential burglary and grand theft of personal property. However, nothing in the record suggests that appellant was prepared to do so. He was already 18 years old, and his attorney made it clear to the court that appellant was contesting the allegations.

More importantly, even if he had admitted the allegations at the August 2013 adjudication hearing, been found suitable, and placed on DEJ, it is not reasonably probable that the outcome of his case would have been different. As a result of the adjudication hearing, the allegations of the June 2015 petition were found true, and the offenses were declared to be felonies. Before the disposition, in November 2015, appellant was arrested as an adult for a new offense, and was incarcerated in county jail. In light of these circumstances, at the disposition hearing on January 14, 2016, the court elected to order restitution and an additional 45 days in custody, and then to terminate jurisdiction (which was done on Feb. 25, 2016).

Had appellant been on DEJ, it is not reasonably probable that his November 2015 arrest as an adult and his incarceration in county jail would have caused the court to do anything other than lift the deferred entry of judgment on the June 2015 petition and hold a disposition hearing under section 793, subdivision (a), because appellant was "not performing satisfactorily in the assigned program or . . . not complying with the terms of the minor's probation, or . . . not benefiting from

education, treatment, or rehabilitation." Further, it is not reasonably probable that the court would have done anything other at the disposition hearing than it did: order restitution for the first degree burglary and grand theft alleged in the June 2015 petition, impose additional county jail time (appellant was already an adult and in county jail custody on the adult charge), and thereafter terminate juvenile jurisdiction. As a result, under section 791, subdivision (c), appellant's admission of the allegations of the petition (which would have been necessary for him to participate in DEJ) would have constituted findings that he committed the crimes alleged: first degree residential burglary and grand theft of personal property.

In short, even if had been on DEJ, his commission of a new offense as an adult and his incarceration in county jail would almost certainly have led to the same disposition of his DEJ grant as was actually imposed following the adjudication of the June 2015 petition. Thus, we conclude that even if appellant had been found suitable for and placed in DEJ, it is not reasonably probable that the result of his section 602 proceeding on the June 2015 petition would have been different. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

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DISPOSITION

The order is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.