Filed 5/10/12 In re H.R. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re H.R., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. H.R., Defendant and Appellant.	B230482 (Los Angeles County Super. Ct. No. FJ45970)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia Loo, Juvenile Court Referee. Affirmed and remanded with directions.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Two petitions filed under Welfare and Institutions Code section 602 alleged that appellant H.R. committed forcible rape and sexual battery by restraint (Pen. Code, §§ 261, subd. (a)(2); 243.4).[1] H.R. admitted both offenses and, following a contested disposition hearing, the juvenile court committed him to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), for a period of time not to exceed nine years.

The judgment is affirmed and the matter is remanded with directions.

BACKGROUND

Because this matter was resolved by H.R.'s admission to the allegations in the juvenile petitions, the underlying facts of the rape offense are taken from the probation report.

On February 2, 2010, 15-year-old A.P. was attending a basketball game at the Highland Park Recreational Center gym. The minor, 17-year-old H.R., approached A.P. and asked if she remembered him from P.E. class at their high school. She vaguely remembered him and they chatted. H.R. asked her to go outside with him and she did. He asked her for a hug and then kissed her on the mouth. A.P. unsuccessfully tried to block his kiss with her hand and then kissed him back. H.R. unzipped her pants, reached into her underwear, and put his fingers into her vagina. A.P. tried to escape but H.R. overpowered her and inserted his fingers into her vagina again. He then put his arm around her and forced her to walk to a remote area of the park.

When they stopped, H.R. grabbed A.P.'s wrists, pulled down her pants, pulled down his own pants, and inserted his erect penis into her vagina. A.P. felt excruciating pain and told H.R., "No, stop I'm scared," but he replied, "Don't be scared, it'll be okay." She made several attempts to remove his penis, but he

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

physically stopped her. Finally, A.P. was able to get free and she immediately pulled her pants up. H.R. began to masturbate himself and asked her to help him "complete the mission" by putting her mouth on his penis, but she refused.

H.R. asked if she wanted to go to a nearby house. A.P. agreed and willingly walked with him because she felt confident she could refuse to have sex with him. As they were walking through a residential hillside area, H.R. began to kiss her again. She kissed him back. He began to take her pants off, but A.P. said she didn't want to have sex. She tried to walk away, but he laid her on the ground, pulled off her pants and again inserted his penis. A.P. made several attempts to escape, but he was too strong for her. Eventually she put her pants on and began to walk away. H.R. asked if she thought this was rape. Fearing for her safety, she did not respond.

A.P. walked back to the gym and spoke to a family member who later told her parents to take her to the hospital. Her parents did so and then filed a complaint. H.R. was arrested on March 1, 2010.

CONTENTIONS

1. The juvenile court erred by committing H.R. to the Division of Juvenile Justice.

2. The juvenile court violated the terms of H.R.'s plea agreement by failing to dismiss two counts of the second petition.

3. The juvenile court failed to properly calculate H.R.'s predisposition custody credits.

DISCUSSION

1. *H.R. was properly committed to DJJ.*

H.R. contends the juvenile court erred by committing him to the Division of Juvenile Justice (DJJ) rather than to his proposed alternative treatment facility. This claim is meritless.

a. *Procedural background.*

Two separate and unrelated Welfare and Institutions Code section 602 petitions were filed against H.R. The first, filed in November 2009, alleged he had committed petty theft and sexual battery by restraint. H.R. admitted the sexual battery charge and the petty theft count was dismissed. He was declared a ward of the court and placed on home probation. The second petition, filed in March 2010, contained three counts: forcible rape (count 1), sodomy by force (count 2), and sexual penetration by a foreign object (count 3). H.R. admitted count 1. Following a contested dispositional hearing, the juvenile court committed him on both petitions to DJJ for a maximum confinement period of nine years, and awarded him 313 days predisposition custody credit.

b. *The contested disposition hearing.*

According to the defense psychologist's report, H.R. was born in El Salvador and had been living in the United States just for three years. He never knew his father. When he was six years old, he was sexually abused by a babysitter's brother who "used to make me do oral sex to him and he would do oral sex to me." When his mother came to the United States, H.R. was eight or nine and he remained in El Salvador with relatives. After moving to the United States, H.R. was given cocaine and alcohol by a 29-year-old male family friend who penetrated H.R. anally for several months.

At the disposition hearing, the juvenile court took testimony from A.P. and A.P.'s mother about the impact of H.R.'s sexual assault on A.P.'s life.

Melissa Pitts, a DJJ parole agent who worked as a court liaison, testified about DJJ's treatment program. H.R. would initially be evaluated at DJJ's Norwalk facility and then sent to the Chaderjian facility in northern California for orientation into the sexual behavior treatment program. Following this short orientation program, he would be transferred to the actual treatment facility. A placement in southern California would depend on availability. The average age at first commitment to DJJ was 17.2 years, and the current average age in their system was

19 years. DJJ treatment facilities were secure, locked sites, and the minors attended school inside the facility.

H.R.'s attorney told the juvenile court there was a possibility H.R. might be accepted into the program offered by Starshine Treatment Center. An interview had been arranged, although there was an issue regarding H.R.'s age because he was now 18. The juvenile court continued the disposition hearing to accommodate this new development, saying: "As you can tell it's going to be a fight. And if he is accepted into the program, I think it's really important we have someone from the program [testify] because let's be frank about his history in the underlying [*sic*] of this most recent offense. [¶] The court has to consider the severity of the crime and public safety. I don't know whether this place is open or locked. So that is a big concern."

At the next hearing, defense counsel announced Starshine had determined it would accept H.R. Tracy Jones, a social worker with the Public Defender's Office, described Starshine's sex offender program. She said Starshine was willing to accept H.R. even though he was technically too old for their program.[2] The juvenile court noted Starshine's "age range is from 12 to 17 and their program usually lasts 18 to 24 months, and so it is a huge concern that obviously the minor who is 18 now is going to be 19 and possibly 20 by the time he finishes his program, and the court is very concerned that I don't have any formal reassurances that he would be able to stay in the program that long. That is one thing. The other

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[2] Jones explained: "[T]hey have done this one other time when there was an 18 year old already that they made accommodations for and got a waiver and took him even though he was 18, so it is something that they have done before. I called an awful lot of facilities and made a lot of inquiries, and as the court knows it is nearly impossible . . . to get an 18 [year] old into placement. Because they have done it before they were willing to look at the packet initially which they did. I will say . . . they were kind of hesitant. They didn't jump at the chance. . . . Once they interviewed him, they said he . . . seems amenable to treatment."

thing the court is concern[ed] about, this doesn't seem to be a secure placement which is something that the court very much wanted. Ms. Jones do you know anything about that?

"Ms. Jones: I called a number of placements. To find one that will specifically offer treatment in this area, there wasn't one to my knowledge . . . that is secure.

"The Court: So it is a trade off.

"Ms. Jones: It is a trade off."

The juvenile court then heard from Sylvia Pace, a Starshine administrator. Pace said Starshine was an open facility located next to a public park, and that the residents attended public school. Pace said Starshine had faced only "one other situation like this where we actually brought someone into the program when they were 18," and in that case they had required the person "to get through the program within 18 months." The program is generally 18 to 24 months long. The juvenile court said: "So we have not that much time. What happens when . . . it looks like he could benefit . . . from 24 months of treatment?" Pace replied "the hope would be that . . . we could receive an extension or an age variance to get him through . . . so that he could complete the program."

In announcing its decision, the juvenile court said: "[I]n determining whether or not the minor is predatory or experimental, the nature of the offense and the fact that the minor had a previous sexual battery leads the court to believe that his actions are more predatory. The court has been impressed with the alternative to DJJ that has been provided by the minor, and the court has carefully considered what this program has to offer, but what troubles the court unfortunately is that it is not a secure setting, and that is something that the court thinks is extremely important in this case. [¶] The court is aware of the policy to pick the least restrictive disposition that could lead to the . . . rehabilitation of the minor while insuring public safety, and unfortunately I think at this time the court finds that it is DJJ. The most important thing is how to best rehabilitate this minor. And what the

court intends to do is to order commitment of the minor to DJJ. The court would like to keep in contact with DJJ through Ms. Pitts, and I want to know how high he is going to score on the risk assessment and whether or not he will be able to get into the sexual behavior program. If he does . . . then I will have him remain at DJJ. If he does not, if he is just going to be housed in the general population and not get the rehabilitation therapy that I think this young man so desperately requires, then I will bring him back to court and reassess. At that point the court will again turn to Starshine and see whether that program can better assist with his needs than DJJ."

c. *Legal principles.*

"The purpose of juvenile delinquency laws is twofold: (1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . .' [Citations.] [¶] To accomplish these purposes, the juvenile court has statutory authority to order delinquent wards to receive 'care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of [the juvenile court law] . . . .' [Citation.]" (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614-615.)

"One of the primary objectives of juvenile court law is rehabilitation, and the statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the DJJ. [Citation.] Although the DJJ is normally a placement of last resort, there is no absolute rule that a DJJ commitment cannot be ordered unless less restrictive placements have been attempted. [Citations.] A DJJ commitment is not an abuse of discretion where the evidence demonstrates a probable benefit to the

minor from the commitment and less restrictive alternatives would be ineffective or inappropriate. [Citation.]" (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)

"When determining the appropriate disposition in a delinquency proceeding, the juvenile courts are required to consider 'the circumstances and gravity of the offense committed by the minor, and . . . the minor's previous delinquent history.' [Citations.] Furthermore, when setting a minor's maximum confinement time at DJJ, the juvenile courts are expressly directed to consider 'the facts and circumstances of the matter . . . that brought or continued the ward under the jurisdiction of the juvenile court. . . .' [Citations.]" (*In re G.C.* (2007) 157 Cal.App.4th 405, 409.)

d. *Discussion.*

H.R. argues the juvenile court "abused its discretion because the evidence did not support a finding that the less restrictive, alternative placement offered by the defense would be ineffective or inappropriate compared to a commitment to DJJ." We disagree. It is clear from the record the juvenile court had two very serious concerns about H.R.'s proposed alternative placement. The court was concerned about H.R.'s age and whether, if he started a treatment program at Starshine, he would be able to finish it there. Also, given the seriousness of H.R.'s conduct, there was an important safety issue which made a Starshine placement inappropriate because it was not a secure facility.

As the Attorney General argues, the juvenile court "was faced with a young man who had committed sexual battery by restraint against one victim, then a few months . . . later and while on probation for that first offense, committed forcible rape against another victim. . . . [T]he court expressly noted its aims of rehabilitating appellant and protecting the public. [¶] . . . Ultimately, because Starshine could not provide a secure enough environment for appellant, the court found Starshine was not an acceptable disposition. This was reasonable given that Starshine was not as secure as DJJ and was an 'open' facility, and appellant would be attending an off-grounds public school if he went to Starshine, while at DJJ, he

would remain within a secure facility at all times. This conclusion was also reasonable, given appellant's conduct in the two cases before the court, the evidence before the court, and the need to protect the public while simultaneously working toward appellant's rehabilitation. Moreover, the court noted that appellant's age was a factor, since there were no 'formal assurances' he could remain in the Starshine program long enough, while there was evidence that 19 years of age was the average age of youths incarcerated at the DJJ. [¶] The juvenile court . . . balanced appellant's rehabilitation with the need to protect the public. With respect to appellant's rehabilitation, the court considered the testimony of the DJJ representative and the Starshine representatives regarding the therapy available to him in each alternative. In addition, the court set a hearing to be held three months after the dispositional hearing to ensure that appellant was receiving at DJJ the treatment he needed. The court expressly stated that if appellant had not been enrolled in the sex offender program, it would recall the commitment and reassess the case.[3] Under these circumstances, it cannot be said that the juvenile court abused its discretion."

H.R. complains his DJJ commitment means he will be forced to register as a sex offender. He cites no authority for his implied suggestion this requirement should have deterred the juvenile court from committing him to DJJ, and we find none. Under Penal Code section 290.008, subdivisions (a) and (c), "the juvenile court does not have the discretion to except a minor from having to register as a sexual offender after he has been committed to DJJ" for forcible rape. (*In re G.C., supra,* 157 Cal.App.4th at p. 411.)

We conclude the juvenile court did not abuse its discretion by committing H.R. to DJJ.

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[3] The Attorney General reports H.R. was admitted to the sexual offender program at DJJ.

2. *H.R. is entitled to fulfillment of the plea agreement.*

H.R. contends the juvenile court violated his rights by failing to dismiss counts 2 and 3 of the March 2010 petition as contemplated by his plea agreement. This claim has merit.

a. *Background*.

On September 10, 2010, when H.R. admitted count 1 (rape) of the March 2010 petition, nothing was expressly said about either count 2 (sodomy by force) or count 3 (sexual penetration by a foreign object).

On January 10, 2011, after determining it would commit H.R. to DJJ, the juvenile court set the following maximum confinement times: four years arising out of the November 2009 petition and eight years arising out of the March 2010 petition, consisting of concurrent maximum eight-year confinement times for each of the three counts: forcible rape (count 1), forcible sodomy (count 2), and sexual penetration by a foreign object (count 3).[4] Combining the two petitions, this amounted to a total maximum confinement time of 13 years.

But when defense counsel said only count 1 of the 2010 petition had been sustained and that the other counts should have been dismissed pursuant to the negotiated disposition, the prosecutor agreed and the juvenile court said, "All right. Then the court will amend the maximum period of confinement to be 9 years." The juvenile court did not, however, dismiss counts 2 and 3 of the 2010 petition.

H.R. now contends the juvenile court erred by not dismissing counts 2 and 3 pursuant to the implied terms of the parties' agreement. The Attorney General disagrees, asserting: "While defense counsel may have thought that counts II and III were to be dismissed, he did not say so when appellant entered his plea. Nor did the court or prosecutor mention those counts at that time. Even at the disposition hearing, appellant's counsel failed to ask the court to dismiss counts II and III; his

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[4] The juvenile court implicitly imposed concurrent terms on counts 2 and 3.

concern was apparently that the maximum confinement time not include any time for counts II and III. Regardless, the parties proceeded at disposition only on count I, the count that appellant admitted. The terms of the plea agreement were met here."

b. *Legal principles.*

A juvenile has a due process right to the benefits of his or her plea agreement. (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1465.) "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon. [¶] ' "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." [Citation.]' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) "Not all terms of a plea bargain have to be express; plea bargains may contain implied terms." (*People v. Arata* (2007) 151 Cal.App.4th 778, 787.)

c. *Discussion.*

We agree with H.R. that the procedural history of this case demonstrates the parties intended counts 2 and 3 of the March 2010 petition to be dismissed in return for H.R.'s admission to count 1. That procedural history was the following:

On September 20, 2010, the parties appeared before Judge Mautino. H.R. was represented by Tony McAuley. The People were represented by Sheetal Jhala, who told the court: "My understanding is that [H.R.] will be admitting to count 1 and we will set this matter in his home court, Department 205 for disposition. It will be a contested dispo." The prosecutor then took H.R.'s plea, saying: "My understanding is that you were going to admit to count 1, and as [a] result, the case will be transferred to your home court . . . where we will have what's called a contested disposition. [¶] The People will be arguing for DJJ. Your attorney will be arguing for something else, and, ultimately, Referee Lou [*sic*] will decide what

the disposition would be. [¶] Is that your understanding of the agreement?" H.R. said yes. Following certain advisements, including the fact he would be admitting a strike, H.R. admitted count 1. The court ruled H.R.'s plea was knowing and voluntary, scheduled the contested disposition hearing, and said nothing about counts 2 and 3. The boxes checked on the corresponding minute order indicate H.R. admitted the entire, unamended petition. The Attorney General acknowledges this minute order is erroneous.[5]

At the subsequent contested disposition hearing before Referee Loo, defense counsel interrupted the court's pronouncement of sentence to say:

"Mr. McCauley: Your Honor, I'm sorry, I know the court mentioned the maximum on the multiple counts. [H.R.] only admitted count 1 on this case. . . .

"The Court: I was looking at the petition, and it looked like the whole petition had been sustained.

"Mr. McCauley: Just count 1.

"The Court: The March 2nd petition.

"Mr. McCauley: That is correct. On the current petition . . . it was count 1 that was sustained, and the People dismissed counts 2 and 3 per case settlement.

"The Court: Do the People have any notes in their file?

"Ms. Mikikian: I am looking through my file. I was not present during the day of the admission. . . . However, I want to say that I did speak with the previous prosecutor in this case and . . . I believe it was an admission to count 1. Can we check the minute order to see?

"The Court: I am looking at the minute order. This court was not the court that took the admission. It was Judge Mautino on September 20. I have on the minute order that it looks like the entire petition was sustained, and it doesn't

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[5] "Respondent does agree with appellant, however, that the minute order for the plea proceedings is incorrect in that it states appellant admitted the 'petition,' whereas, in fact, he only admitted count I."

note . . . whether count 1 was sustained and count 2 and 3 were dismissed, and doesn't note a maximum period of confinement time.

"Ms. Mikikian: You were there Mr. McCauley.

"Mr. McCauley: Yes. He admitted to count 1. The reason we entered into an admission in this case was in part because the two other counts were to be dismissed, and obviously he is avoiding two strikes on that which greatly factored into my decision. I don't think I would have ever . . . admitted this case if he had to admit a 3 strikes and face the risk of DJJ, so I don't know why it didn't make the minute order. I know there are two petitions. One that did not have a count 2 and 3. Maybe that is what happened, but he only admitted to count 1.

"The Court: Okay.

"Ms. Mikikian: And just, Your Honor, based on my memory with [Ms.] Jhala who was the previous prosecutor in this case, I believe she told me that he made admission to count 1. Unfortunately she did not document it. . . . I will go ahead and I will trust my memory, and I trust Mr. McCauley's word and because Ms. Jhala who is normally very attentive, and she only wrote that he admitted, and the only charge I see on the file is count 1 a [forcible rape], I think we will just go ahead with that, Your Honor.

"The Court: All right. Then the court will amend the maximum period of confinement time to be 9 years. And was there anything else?

"Mr. McCauley: Other than seeing if that changes the court's mind about . . . setting the term of confinement, I will submit to the court.

"Ms. Mikikian: I am sorry to interrupt. I did find something in writing by Ms. Jhala on the day of trial. The minor did admit count 1, forcible rape, so it is count 1 in writing."

We agree with H.R. this record "demonstrates that the dismissal of [counts 2 and 3] was, at the very least, an implied term of appellant's plea agreement."

Hence, we will remand the matter and order the juvenile court to dismiss counts 2 and 3 of the March 2010 petition.

3. *H.R.'s predisposition custody credits must be recalculated.*

H.R. contends the matter must be remanded for a proper accounting of his predisposition custody credits. The Attorney General properly agrees a remand is necessary.

At the January 10, 2011, disposition hearing the juvenile court asked for H.R.'s pre-disposition custody credits. Defense counsel gave a figure of 313 days, apparently referring only to the 2010 petition. No mention was made of any credits arising out of the 2009 petition. H.R. asserts he should have received 316 days custody credit in connection with the 2010 petition, *and* that the juvenile court should have also awarded predisposition credits for the 2009 petition.

"[A] minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.] It is the juvenile court's duty to calculate the number of days earned, and the court may not delegate that duty. [Citations.] [¶] . . . [¶] The California Supreme Court has concluded that when a juvenile court elects to aggregate a minor's period of physical confinement on multiple petitions . . . the court must also aggregate the predisposition custody credits attributable to those multiple petitions. [Citation.]" (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

The Attorney General agrees a remand is needed: "[I]t is not clear why credits under the 2009 petition were not considered since it appears that appellant was in custody on that petition." The Attorney General also agrees it appears from the record H.R. was entitled to 316 days, rather than only 313 days, predisposition credit for the second petition. We will remand for a proper calculation of these credits.

DISPOSITION

The judgment is affirmed. The matter is remanded for the juvenile court to dismiss count 2 and count 3 of the March 2010 petition and recalculate the minor's predisposition custody credits.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.