Filed 12/3/18 In re S.N. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re S.N., A Person Coming Under the Juvenile Court Law, _____ THE PEOPLE, Plaintiff and Respondent, v. S.N., Defendant and Appellant.	B283266 (Los Angeles County Super. Ct. No. PJ52012)

APPEAL from an order of the Superior Court of Los Angeles County, Fred J. Fujioka, Judge. Affirmed in part and reversed in part.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Douglas L. Wilson, Deputy Attorneys General for Plaintiff and Respondent.

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When S.N. was 14 years old, he began sexually abusing his cousin, who was 6 years old. He continued to molest her for a period of approximately three years. Years later, the abuse came to light, and, at 22 years of age, S.N. was charged with five counts of sexual abuse in the juvenile court. The court sustained the allegations, and committed him to the Division of Juvenile Facilities (DJF).

On appeal, S.N. argues: (1) the juvenile court lacked jurisdiction to commit him to the DJF because he had aged out of the court's jurisdiction; (2) counts 2 through 5 must be dismissed because they were charged as alternatives to count 1 (continuous sexual abuse); (3) his commitment to the DJF was a violation of the ex post facto clause; and (4) his commitment constituted an abuse of the court's discretion. We agree with defendant's first two points and reverse in part on those two grounds. The Attorney General agrees on the second point. We do not reach the remaining issues.

FACTUAL AND PROCEDURAL BACKGROUND

When the victim was in eighth grade, she passed a note to a friend saying that she had been raped. The friend gave the note to a teacher, and the teacher notified a counselor. The victim spoke with a detective, and told him that S.N. had sexually assaulted her when she was between six and eight years old.

S.N. was arrested, and questioned by a detective. He was 22 years old at the time. He initially denied having sexually abused the victim, and blamed the victim "for past issues that she had." He also suggested that his uncle was, in fact, the perpetrator.

About an hour and 45 minutes in to the interview, S.N.'s demeanor changed, and he became "very remorseful" and "started to cry." He said he had started to sexually abuse the victim when he was 15 years old. He admitted that he tried to put his penis "inside of her" " 'once,' " but " 'it felt wrong, and I just stopped.' " He also said he had "made her kiss his penis one time." The abuse stopped when he was 18 years old because he " 'grew up' " and his " 'thinking process changed.' "

During the interview, S.N. wrote and signed the following statement: "I am sorry for everything that's happened. I am sorry to you, [victim], to my mom, to my dad, to my family . . . and everyone else that I have embarrassed and disappointed. There's nothing I can say or do to change anything that happened, and that's my fault. I just hope I may one day obtain forgiveness and peace." He then shook the detective's hand, and said he was sorry " 'about everything.' "

A petition was filed under Welfare and Institutions Code section 602 charging S.N. with the continuous sexual abuse of a child under the age of 14 years old (Pen. Code, § 288.5, subd. (a); count 1), and four counts of lewd acts on a child (Pen. Code § 288, subd. (a); counts 2–5). All the crimes were alleged to have occurred between 2008 and 2011.

When S.N. testified at trial, he denied having sexually abused the victim. He was confronted with his prior statements to the detectives, but blamed the detectives for having " 'manipulated [his] words.' "

The victim, now 13 years old, testified that S.N. had molested her between 1st grade and 3rd grade. The abuse started when her grandparents took her on weekend visits to see her aunt, S.N.'s mother. S.N. raped the victim in the garage and

in his bedroom. He orally copulated her, and forced her to orally copulate him. He raped her "about" every other weekend.

The trial court sustained the allegations of sexual abuse against S.N. The court concluded that "explicit in the court's finding that the victim told the truth is that [S.N.] testified and lied under oath when he said he didn't do it. And it is clear to me it's proven beyond a reasonable doubt that he did." The court detained S.N. and continued the hearing for a contested disposition.

At the disposition hearing, S.N. requested that he be sent home on probation. He filed a psychological evaluation based on an interview with S.N. two days prior. Despite the court having already sustained the allegations against S.N., the psychologist opined that "*should* the allegations against [S.N.] prove to be true," S.N. should complete a "sexual education/ awareness program" while home on probation. S.N. also submitted over 20 letters from friends and family, the majority of whom opined that S.N. had not abused the victim.

The court concluded that S.N. was "in severe denial over what he did. . . . I believe that [he] has suffered severe trauma in his own life, that until he deals with that trauma, there's a substantial danger that he will reoffend in the future . . . . I believe that the program and services offered by the [Department of Juvenile Justice] would be best suited to assist the minor in not offending in the future . . . ." The court committed S.N. to the DJF for a maximum period of confinement of 16 years on count 1 with the remaining counts "merge[d] into count 1."[1] S.N. timely appealed.

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[1] When a minor is declared a ward under Welfare and Institutions Code section 602, the juvenile court must specify the

DISCUSSION

1. *Jurisdiction*

S.N. argues that the juvenile court lacked jurisdiction over him because he was over 21 years of age. He acknowledges that the court had initial jurisdiction because he committed the crimes when he was under 18 years old. However, he contends the court was not authorized to retain jurisdiction because the applicable statute—Welfare and Institutions Code section 607—does not extend to wards who are over 21 years of age except when they have committed certain serious crimes. The crimes S.N. was found to have committed—violations of Penal Code section 288, subdivision (a), and section 288.5—are not included in the enumerated crimes referred to in section 607. We agree with these arguments.

"The jurisdiction of the juvenile court extends to persons who are under 18 years of age when they violate any law defining a crime. (§ 602, subd. (a).)" (*In re Julian R.* (2009) 47 Cal.4th 487, 495.) "Once the juvenile court has jurisdiction over the minor, its jurisdiction may be extended until the minor's 21st birthday (§ 607, subd. (a)), or if the minor has been committed to

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"maximum period of confinement." (Cal. Rules of Court, rule 5.795(b).) However, as explained below, the *actual* period of confinement is different. A juvenile offender committed to the DJF only remains confined for two years or until his 21st birthday, whichever occurs later, unless he was found to have committed certain serious offenses, in which case, he may remain committed until his 25th birthday or for two years, whichever occurs later. (Welf. & Inst. Code, § 1769, subds. (a) & (b).)

All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

[DJF] for an offense listed in section 707, subdivision (b), jurisdiction may be extended until the person reaches 25 years of age. (§ 607, subd. (b).)" (*In re Charles C.* (1991) 232 Cal.App.3d 952, 957; *In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1320.) Section 707, subdivision (b) lists various serious crimes.

In other words, once the juvenile court has properly asserted jurisdiction over a person who was under 18 years of age when he committed a crime, the court generally only retains jurisdiction until the ward is 21 years old. The exception to that rule is when a ward is committed to the DJF *and* was found to have committed one of the serious offenses listed in section 707, subdivision (b)—under that scenario, the juvenile court's jurisdiction is extended until the ward is 25 years of age.

Here, S.N. was under 18 when he sexually assaulted the victim, thus, the court properly asserted jurisdiction over S.N. under section 602. However, because he was 22 years old when the court declared him a ward, the court could not retain jurisdiction over him unless he fell within the exception to the general rule that the court's jurisdiction expires at 21 years of age. As S.N. had not committed one of the offenses listed in section 707, subdivision (b), he did not fall within the exception extending jurisdiction until 25 years of age. (See *In re Antoine D.*, *supra*, 137 Cal.App.4th at p. 1323 [recognizing that section 607 functions to extinguish juvenile court jurisdiction].)

We note that the provision in section 607 that allows for continuing jurisdiction over certain wards until 25 years of age was added in 1982 because the Legislature decided the juvenile court should be able to retain jurisdiction for a longer period of time over all wards who had committed serious crimes. (*In re Tino V.* (2002) 101 Cal.App.4th 510, 512–513.) Clearly, Penal

Code sections 288, subdivision (a) and 288.5 constitute serious offenses that reasonably could have been included in that category. But they were not. The Legislature appears to have recognized this gap, because it recently amended section 607 to address this situation.

Under the 2018 additions to section 607, the juvenile court retains jurisdiction over a ward found to have committed any offense listed in Penal Code section 290.008, subdivision (c)—which includes violations of Penal Code section 288, subdivision (a) and section 288.5—until the ward attains 25 years of age or two years pass, whichever occurs later, if that person faced an aggregate sentence of seven years or more. (§ 607, subds. (g)(1) & (g)(2).) Although the newly amended law would provide for continuing jurisdiction over S.N., the amendment is expressly not retroactive and, therefore, does not apply to him. (*Id.*, at subds. (g)(1) & (i).) Respondent does not argue otherwise.

In opposition to S.N.'s argument that the juvenile court lost jurisdiction over him, respondent argues that section 607 only governs "retention of the juvenile court jurisdiction *after commitment*." (Emphasis added.) Respondent cites to no authority in support of this assertion. In fact, the plain language of section 607 indicates it applies after the juvenile court has asserted jurisdiction over a juvenile by declaring him to be a ward. (See *Joey W. v. Superior Court* (1992) 7 Cal.App.4th 1167, 1172.) While section 602 provides the circumstances under which the juvenile court may "adjudge [a] person to be a ward of the court," it is section 607 that provides the circumstances under which the court "may retain jurisdiction over a person who is found to be a ward." That the juvenile court had initial jurisdiction over S.N. under section 602 based on his age at the

time of offense does not resolve whether it may retain jurisdiction under section 607 once he has reached the statutory age ceiling.

Respondent also contends that S.N. was "eligible for commitment" to the DJF under sections 731 and 1769. Section 731 provides that a ward who is convicted of an offense described in Penal Code section 290.008 may be committed to the DJF under certain circumstances. (§ 731, subd. (a)(4).) Section 1769 deals exclusively with discharge from the DJF. It provides that every person committed to the DJF shall be discharged only upon the expiration of two years or when a ward attains 21 years of age, whichever occurs later. According to respondent, these statutes preclude "any argument under these circumstances that [S.N.] was ineligible for commitment to the [DJF] due to his age."

S.N.'s argument is not so much that he was "ineligible for commitment" to the DJF, but that the court's jurisdiction over him has expired. Sections 731 and 1769 provide the conditions under which wards shall be committed and discharged from the DJF. They do not render obsolete section 607's provision regarding the juvenile court's "retention of, and discharge from, jurisdiction." Because the juvenile court's jurisdiction over S.N. has expired, we reverse his commitment to the DJF.

2. *Counts 2-5 Must Be Dismissed*

S.N. argues, respondent concedes, and we agree that counts 2 through 5 must be dismissed. The petition alleged as to count 1 that S.N. had committed continuous sexual abuse of the victim between 2008 and 2011. Counts 2 through 5 alleged individual lewd acts upon a child under 14 during the same time period. "Because [Penal Code] section 288.5 subdivision (c) clearly mandates the charging of continuous sexual abuse and specific sexual offenses, pertaining to the same victim over the same

period of time, only in the alternative, [the prosecution] may not obtain multiple convictions" when a defendant is charged with discrete sexual offenses and continuous sexual abuse in the alternative. (*People v. Johnson* (2002) 28 Cal.4th 240, 248.) Here, because counts 2 through 5 were charged as alternatives to the count of continuous sexual abuse, they must be dismissed.

DISPOSITION

The order committing the minor to DJF is reversed. Counts 2 through 5 are dismissed. The judgment is otherwise affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

DUNNING, J.*

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