Filed 9/17/13 In re K.D. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re K. D., a Person Coming Under the Juvenile Court Law.	B244595
THE PEOPLE, Plaintiff and Respondent, v. K. D., Defendant and Appellant.	(Los Angeles County Super. Ct. No. MJ21284)

APPEAL from a judgment (dispositional order) of the Superior Court of Los Angeles County, Akemi D. Arakaki, Judge. Reversed and remanded with directions.

Torres & Torres and Steven A. 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, Shawn McGahey Webb and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant K. D., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following determinations he committed nine counts of felony vandalism (Pen. Code, § 594, subds. (a), (b)(1); counts 1 – 9) and one count of misdemeanor vandalism (Pen. Code, § 594, subds. (a), (b)(2)(A); count 10). The court ordered appellant suitably placed and stated his maximum theoretical period of confinement was five years eight months. We reverse the judgment, vacate the trial court's jurisdictional order, and remand the matter with directions.

FACTUAL and PROCEDURAL SUMMARY

The record reflects on January 31, 2012, a deputy district attorney signed a JV-750 form, i.e., a form entitled "Determination of Eligibility [¶] Deferred Entry of Judgment – Juvenile."[1] (Some capitalization omitted.) The form reflects appellant as the defendant. The form is not stamp-filed and no case number appears on the form. Nothing in the record reflects the form was filed with the trial court, either with the petition in this case or otherwise.

The form indicates the deputy district attorney reviewed records regarding appellant. The form contains boxes checked by the deputy district attorney and indicating (1) the six deferred entry of judgment (DEJ) eligibility factors applied and (2) appellant was eligible for DEJ. The form contains a box to be checked if the "Citation and Written Notification for Deferred Entry of Judgment—Juvenile, Form JV-751, is attached." (We discuss that form *infra*.) That box is not checked. Nothing in the record reflects a JV-751 form was issued by the court, attached to any JV-750 form, or served on appellant's custodial adult.

On March 20, 2012, the same deputy district attorney filed the petition in this case. The petition alleged the 10 counts of vandalism and that, based on those allegations, appellant came within the provisions of Welfare and Institutions Code section 602.[2] On

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[1] There is no need to discuss the facts of the alleged offenses.

[2] Counts 1 through 9 were originally alleged as felonies. Count 10 was originally alleged as a misdemeanor.

March 20, 2012, the court appointed Attorney G. Arevalos-Farias to represent appellant and appellant denied the allegations in the petition. At all times below mentioned, Arevalos-Farias represented appellant.

On May 15, 2012, a probation report was filed. The report recommended DEJ for appellant. On September 13, 2012, Judge Akemi Arakaki, who had not previously been involved in this case, continued the adjudication to September 27, 2012. Judge Arakaki presided over the adjudication. The adjudication occurred on September 27 and October 9, 2012.[3] At the conclusion of the adjudication on October 9, 2012, the court impliedly found appellant committed the offenses alleged in counts 1 through 10, and sustained the petition. The court declared appellant was a person described by Welfare and Institutions Code section 602, declared him a ward of the court under that section, and declared count 8 was a felony and the remaining counts were misdemeanors.

Later on October 9, 2012, appellant, discussing the issue of disposition, noted the probation report recommended DEJ. Appellant, citing *In re C.W.* (2012) 208 Cal.App.4th 654 (*C.W.*) (discussed *infra*), commented he had never received notice he was eligible for DEJ; therefore, the fact an adjudication had occurred in the present case did not prevent appellant from being eligible for DEJ. Judge Arakaki indicated that, before the adjudication had begun, a discussion had occurred about whether there had been prior discussions concerning resolving the case, no such prior discussions had occurred, and "the court did not discuss with him that option."

Judge Arakaki later stated, "[b]ased on my conversation with you, I would have to say I don't believe that DEJ is available at this time based on the questions inquired of counsel, . . ." Judge Arakaki indicated he had asked appellant's counsel if there were any way to resolve the matter, appellant's counsel had indicated there was not, and "based on

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[3] Neither the prosecutor at the September 13, 2012 proceeding, nor the prosecutor at the adjudication, was the deputy district attorney who had signed the previously mentioned JV-750 form on January 31, 2012.

that the court, then, was under the impression that the options were discussed with your client."

Fairly read, the record reflects appellant later suggested the court should read *C.W.* and the court indicated it had read it. The court then stated, ". . . I had an inkling what was on your thought that's why I asked, specifically, about it and prior to us handling the matter and thinking that inquiry was sufficient . . . ."

The court later stated, "[B]ased on . . . my understanding of the law and with regard to deferred entry of judgment being available it's a pretrial option that the court clearly felt and that may have been my error. And I did think that that option had been discussed with your client . . . ." (*Sic*.) The court suggested the probation report indicated appellant was eligible for DEJ and "it looks to me what happened was . . . you want to go forward with the adjudication in order to address the issues and in order to get them reduced to a misdemeanor, . . ." The court ordered appellant suitably placed and stated his maximum theoretical period of confinement was five years eight months.

ISSUES

Appellant claims (1) a restitution order must be reversed, (2) the court's finding that count 8 was a felony must be reversed, (3) if this court concludes count 8 was a misdemeanor, this court should order that appellant need not provide a DNA sample and palm print, and any such samples should be destroyed, (4) probation condition numbers 21 and 22 are erroneous, and (5) the trial court failed to consider appellant's suitability for DEJ.

Appellant's fifth claim is dispositive of this appeal.

DISCUSSION

The Prosecutor and Trial Court Erroneously Failed to Comply With DEJ Procedures.

1. *Applicable Law*.

The DEJ provisions of Welfare and Institutions Code section 790, et seq. were enacted in March 2000 as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998. The sections provide that in lieu of jurisdictional and

dispositional hearings, a minor may admit the allegations contained in a Welfare and Institutions Code 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 the motion of the prosecution and with a favorable recommendation from the probation department, the court is required to dismiss the charges. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1121-1122 (*Luis B.*).) "The determination of whether to grant DEJ requires consideration of 'two distinct essential elements of the [DEJ] program,' viz., 'eligibility' and 'suitability.' " (*C.W., supra,* 208 Cal.App.4th at p. 659.) We discuss those elements below.

a. *Prosecutorial Eligibility Determination*.

We first consider matters relating to the prosecutor's determination whether the minor is eligible for DEJ. To be admitted to the DEJ program, a minor must be eligible under Welfare and Institutions Code section 790, subdivision (a). (*Luis B., supra*, 142 Cal.App.4th at p. 1122.) A minor is eligible if the six factors listed in Welfare and Institutions Code section 790, subdivision (a) apply. (*Luis B.*, at p. 1122; Cal. Rules of Court, rule 5.800(a).) The prosecutor *reviews* the prosecutor's file to determine whether the minor is eligible for DEJ. (Welf. & Inst. Code, § 790, subd. (b); Cal. Rules of Court, rule 5.800(b)(1).)

(1) *When the Prosecutor Determines the Minor is Eligible*.

(a) *Prosecutorial Filing Requirements*.

If, following the prosecutorial review, the prosecutor *determines* the minor is eligible for DEJ, the prosecutor has a *statutory* duty to *express* that determination to the court in one of two ways. Welfare and Institutions Code section 790, subdivision (b), provides, "If the minor is found eligible for deferred entry of judgment, the prosecuting attorney shall *file* a declaration in writing with the court or *state for the record* the grounds upon which the determination is based, and shall make this information available to the minor and his or her attorney." (Italics added.)

In *C.W., supra,* 208 Cal.App.4th 654, the court, discussing the above language, stated, "The form designed for this purpose is a form JV-750, the completion of which requires the prosecutor to indicate findings as to the eligibility requirements by checking, or not checking, corresponding boxes." (*Id.* at p. 659.) California Rules of Court, rule 5.800(b)(1), states, "(b) Procedures for consideration (§ 790) [¶] (1) . . . If the prosecuting attorney's review reveals that the requirements of (a) have been met, the prosecuting attorney must file *Determination of Eligibility--Deferred Entry of Judgment--Juvenile* (form JV-750) with the petition."[4] (Underscoring added.)

(b) *Prosecutorial Notice Requirements.*

If the prosecutor determines the minor is eligible for DEJ, the prosecutor must comply not only with filing requirements but with notice requirements.

1) *The Statutory Requirement.*

If the prosecutor determines the minor is eligible for DEJ, the prosecutor has a *statutory* duty to comply with the filing or statement requirement and "*make this information available* to the minor and his or her attorney." (Welf. & Inst. Code, § 790, subd. (b), italics added.)

2) *Court Notice Requirements.*

The court is subject to notice requirements as well. Welfare and Institutions Code section 792, states, in relevant part, "The *judge* shall issue a *citation* directing any custodial *parent*, . . . of the minor to appear at the time and place set for the hearing, and directing any person having custody or control of the minor concerning whom the petition has been filed to *bring the minor* with him or her. . . . Personal service shall be made at least 24 hours before the time stated for the appearance." (Italics added.)

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[4] Pursuant to Welfare and Institutions Code section 658, subdivision (a), the juvenile court clerk must serve, inter alia, a copy of the petition upon a minor eight years old or older, and upon the minor's attorney. (See also Cal. Rules of Court, rule 5.524(f)(2).)

The complementary rule is California Rules of Court, rule 5.800(c), that states, "(c) Citation (§ 792) [¶] The court must issue *Citation and Written Notification for Deferred Entry of Judgment--Juvenile* (form JV-751) to the child's custodial parent, . . . The form must be personally served on the custodial adult at least 24 hours before the time set for the appearance hearing." (Underscoring added.)

3) *In re C.W.: Court Notice Requirements Impact Prosecutorial Notice Requirements.*

As mentioned, Welfare and Institutions Code section 790, subdivision (b), includes a *prosecutorial* notice requirement, i.e., ". . . [T]he prosecuting attorney . . . *shall make this information available* to the minor and his or her attorney." (Italics added.) As discussed below, a *court* notice requirement impacts the prosecutorial notice requirement.

In *C.W.*, the court, discussing Welfare and Institutions Code section 790, subdivision (b), including its *prosecutorial* notice requirement, stated, "The form designed for this purpose is a form JV-750, . . . If a minor is found eligible for DEJ, form JV-751, entitled "Citation and Written Notification for Deferred Entry of Judgment—Juvenile," is used to notify the minor and his or her parent or guardian. There is a box to check on the form JV-750 indicating that the form JV-751 is attached." (*C.W., supra*, 208 Cal.App.4th at p. 659.)[5] (As mentioned, JV-751 is a *court*-issued form.) "The duty of the prosecuting attorney to . . . furnish notice with the petition is mandatory." (*Luis B., supra*, 142 Cal.App.4th at p. 1123.)

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[5] The prosecutor's notice requirements extend beyond providing notification the prosecutor has determined the minor is eligible for DEJ. Welfare and Institutions Code section 791, subdivision (a) provides, "The prosecuting attorney's written notification to the minor" shall include six categories of information.

(2) *When the Prosecutor Determines the Minor is Ineligible*.

California Rules of Court, rule 5.800(e), provides, "If it is determined that the child is ineligible for deferred entry of judgment, the prosecuting attorney must complete and provide to the court, the child, and the child's attorney *Determination of Eligibility—Deferred Entry of Judgment—Juvenile* (form JV-750)."

b. *Court Suitability Determination.*

"Once the threshold determination of *eligibility* is made, the juvenile trial court has the ultimate discretion to rule on the minor's *suitability* for DEJ. [Citation.]" (*C.W.*, *supra*, 208 Cal.App.4th at p. 660, italics added.) "The court may grant DEJ to the minor *summarily* under appropriate circumstances [citation], and if not *must conduct a hearing* at which 'the court *shall* consider the declaration of the prosecuting attorney, any report and recommendations from the probation department, and any other relevant material provided by the child or other interested parties.' [Citation.]" (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1123, first and second italics added; Welf. & Inst. Code, § 791, subd. (b); Cal. Rules of Court, rule 5.800(d)(1) - (3); see *C.W.*, at p. 661.) "The court is not required to ultimately grant DEJ, but is required to at least follow specified procedures and exercise discretion to reach a final determination once the mandatory threshold eligibility determination is made." (*Luis B.*, at 1123.)

2. *Application of the Law to the Facts.*

In the present case, a deputy district attorney signed, on January 31, 2012, a JV-750 form indicating appellant was eligible for DEJ. There is no dispute that, as of that date, the People had determined appellant was eligible for DEJ. However, nothing in the record indicates when that form was provided to the trial court. The prosecutor erroneously failed to file the form as required by California Rules of Court, rule 5.800(b)(1). Nothing in the record indicates the form was filed with the petition as required by that rule. The prosecutor erroneously failed to comply with Welfare and Institutions Code section 790, subdivision (b) by either filing the requisite declaration or stating for the record the grounds upon which the eligibility determination was based.

The People violated their mandatory filing duties. (Cf. *In re Luis B.*, *supra*, 142 Cal.App.4th at pp. 1121-1123.)[6]

The prosecutor also erroneously failed to give the notice required by Welfare and Institutions Code section 790, subdivision (b), erroneously failed to indicate on the JV-750 form that a JV-751 form was attached, erroneously failed to attach the latter form, and erroneously failed to give written notice of the six categories of information specified in Welfare and Institutions Code section 791, subdivision (a). Respondent concedes "it appears appellant was not provided with notice as to his DEJ eligibility." We accept the concession. The People violated their mandatory notice responsibilities. (*C.W.*, *supra*, 208 Cal.App.4th at pp. 660-661; *In re Luis B.*, *supra*, 142 Cal.App.4th at pp. 1121-1123.)

Similarly, the trial court erroneously failed to give notice of appellant's eligibility as required by Welfare and Institutions Code section 792. (*C.W.*, *supra*, 208 Cal.App.4th at p. 660; see Cal. Rules of Court, rule 5.800(c).) Moreover, the trial court erroneously failed either to summarily grant DEJ to appellant or to conduct a DEJ hearing to determine whether to grant or deny DEJ. (*C.W.*, at p. 657; *In re Joshua S.* (2011) 192 Cal.App.4th 670, 673 (*Joshua S.*); *Luis B.*, *supra*, 142 Cal.App.4th at p. 1120.)

We have cited pertinent October 9, 2012 comments of Judge Arakaki and appellant's counsel. Those comments reveal appellant's counsel denied appellant had received notice, and Judge Arakaki erroneously assumed without a factual basis that appellant's counsel had discussed with appellant his DEJ eligibility. At one point Judge Arakaki suggested his assumption "may have been [his] error." The record fails to demonstrate that, before October 9, 2012, appellant's counsel ever received actual notice of the People's DEJ eligibility determination.

Although, when discussing *C.W.*, Judge Arakaki suggested he had had an inkling appellant's counsel had been thinking about DEJ, Judge Arakaki never expressly asked appellant about it before or during the adjudication. Judge Arakaki concluded, not that

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[6] Respondent does not address the fact the JV-750 form reflecting the prosecutor's eligibility determination was not filed with the court.

appellant was not "eligible" or "suitable" for DEJ, but that DEJ was not "available" in light of the discussion that occurred before the adjudication and the fact DEJ was a pretrial option. Judge Arakaki concluded based on that discussion that appellant wanted an adjudication but the record fails to demonstrate that, before October 9, 2012, appellant knew he was eligible for DEJ in lieu of that adjudication.

The errors of the prosecutor and trial court were prejudicial; therefore, we will remand the matter to permit compliance with DEJ procedures. (*C.W.*, *supra*, 208 Cal.App.4th at pp. 657, 662-663; *Joshua S.*, *supra*, 192 Cal.App.4th at pp. 673, 682; *Luis B.*, *supra*, 142 Cal.App.4th at pp. 1120, 1123-1124.) We express no opinion as to (1) whether appellant is eligible and/or suitable for DEJ, and/or (2) which option, i.e., granting, or denying, DEJ, the trial court should select. "In light of our conclusions and disposition, we need not confront the remaining issues raised by [appellant], as we do not yet know whether the juvenile court's findings and orders will stand." (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1124, fn. 4.) Our disposition will permit appellant to raise any such issues in a future appeal in the event the trial court denies DEJ.

3. *None of the Parties' Arguments Compel a Contrary Conclusion.*

None of the parties' arguments compel a contrary conclusion. First, respondent argues the error appellant "was not provided with notice as to his DEJ eligibility" was harmless in light of *In re Usef S.* (2008) 160 Cal.App.4th 276 (*Usef S.*) and *In re Kenneth J.* (2008) 158 Cal.App.4th 973 (*Kenneth J.*).

C.W. rejected a similar argument by the Attorney General in that case. Like *C.W.* and the present case, *Usef S.* and *Kenneth J.* each involved an adjudication. (*Usef S.*, *supra*, 160 Cal.App.4th at p. 279; *Kenneth J.*, *supra*, 158 Cal.App.4th at p. 976.) However, *C.W.* stated, "In [*Usef S.* and *Kenneth J.*], . . . *the minors were given notice that they were eligible for DEJ* but would be considered for it only if they admitted the allegations of the petition. (See *Kenneth J.*, *supra*, at pp. 978–980; *Usef S.*, *supra*, at pp. 283–284, 286.) Thus, *Kenneth J.* and *Usef S.* stand for the proposition that a juvenile court is excused from its statutory duty to determine a DEJ-eligible minor's suitability for

DEJ if the minor—*after receiving notice of his or her DEJ eligibility*—nonetheless *rejects the possibility of DEJ* by contesting the charges. *Here, as discussed, there is no evidence whatsoever in the record on appeal that C.W. was ever advised of her eligibility for DEJ at any point in the proceedings.* Thus, unlike in *Kenneth J.* and *Usef S.*, it cannot be said that *C.W. chose* not to pursue DEJ, as there is no indication that she was aware of her eligibility for it. Consequently, the juvenile court in this case was not excused from the mandatory statutory duty to consider whether *C.W.* was suitable for DEJ." (*C.W.*, *supra*, 208 Cal.App.4th at p. 662, italics added.)

Usef S. and *Kenneth J.* indicate that when a minor has notice of DEJ eligibility but wants an adjudication, the trial court does not err by failing to determine the minor's DEJ suitability. Those cases do not, however, as respondent suggests, indicate that when a minor has not received DEJ notice, the mere fact the minor wants an adjudication renders harmless the error of the prosecutor (or trial court) in failing to give that notice.

Second, appellant, in his reply brief, cites *Joshua S.*, *supra*, 192 Cal.App.4th 670, and suggests, as a matter of remedy, the matter should be remanded to the trial court to permit it to comply with DEJ procedures but we should leave undisturbed both the trial court's findings appellant committed the offenses and the trial court's declaration that all offenses were misdemeanors except count 8, which was a felony. We disagree.

DEJ is available to a minor if the minor "admits" the charges in the petition. (Welf. & Inst. Code, § 791, subd. (b).) The DEJ program was part of a legislative effort emphasizing rehabilitation of low-level offenders (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 561) and requires nonviolent juvenile felons to "*admit guilt for their offenses, and be held accountable.*" (*Ibid*.) Requiring a minor to admit an offense and be accountable serves the goal of rehabilitation in a way a court finding, following an adjudication, that the minor committed the offense does not.

If no DEJ error had occurred in this case and appellant originally had admitted the allegations in the petition as part of DEJ procedures, the pronouncing of judgment as to those charges would not have occurred unless, based on appellant's later performance on

probation, the court lifted the deferred entry of judgment. (See Welf. & Inst. Code, §§ 791, 793.) The trial court would have been entitled at the time of the admissions to defer until the dispositional hearing a declaration that a felony offense was a misdemeanor. (Cal. Rules of Court, rule 5.780(e)(5).) That deferral would have enhanced appellant's rehabilitation by impressing upon him the importance of successfully completing probation. That rehabilitative procedure should apply here, i.e., following remand, if appellant admits the allegations in the petition pursuant to DEJ procedures, he is to admit the alleged felonies as felonies, and Judge Arakaki's declarations that some felony offenses were misdemeanors are to have no effect.[7] (We note count 10 was originally alleged as a misdemeanor.)

Appellant's reliance on *Joshua S.* is misplaced. In *Joshua S.*, the People satisfied DEJ filing requirements, it was not clear whether the minor had received notice of DEJ eligibility, but, in any event, the minor entered negotiated *admissions* to charges. The minor complained on appeal the trial court erroneously had failed to grant or deny DEJ. *Joshua S.* remanded to permit the trial court to comply with DEJ procedures but left the admissions undisturbed. (*Joshua S., supra*, 192 Cal.App.4th at pp. 673-675, 678, 680, 681, fn. 7, 682.) *Joshua S.* therefore had no occasion to consider the issue of remedy in a case such as the instant one, i.e., in which the People failed to satisfy DEJ filing requirements and appellant, who erroneously had not been given notice of DEJ eligibility, participated in an *adjudication* at the conclusion of which the trial court *found* appellant committed offenses. Cases are not authority for propositions not considered. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 198.)

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[7] In the event, following remand, the trial court granted DEJ but later, based on appellant's performance, lifted the DEJ and pronounced judgment, nothing we have said would prevent the trial court, at the time it pronounced judgment, from declaring one or more felonies to be misdemeanors. We express no opinion as to whether a trial court in such circumstances should or should not make such a declaration.

DISPOSITION

The judgment (dispositional order) is reversed, the trial court's jurisdictional order is vacated, and the matter is remanded with directions to the People and the trial court to comply with their respective duties prescribed by the Welfare and Institutions Code and the California Rules of Court pertaining to DEJ eligibility and/or suitability determinations, and with directions to the trial court to exercise its discretion as to whether to grant or deny appellant DEJ. In the event the trial court grants DEJ, the trial court will conduct further proceedings accordingly. In the event the trial court denies DEJ, the trial court's previously mentioned jurisdictional order and judgment (dispositional order) are reinstated. Appellant would then have an opportunity to appeal such orders and raise any issues he deems relevant.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.