Filed 11/28/18 In re E.G. CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re E.G., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B286495 (Super. Ct. No. 2017005577) (Ventura County)
THE PEOPLE, Plaintiff and Respondent, v. E.G., Defendant and Appellant.	

E.G. challenges a disposition order committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) (Welf. & Inst. Code, §§ 731, subd. (a)(4), 734)[1] after he stabbed a high school student with a knife. (Pen. Code, §§ 245, subd. (a)(4), 12022, subd. (b)(1)). We

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

reverse the commitment order and remand for a new disposition hearing because no findings were made that a less restrictive placement would be inappropriate or ineffective, and substantial evidence does not support the finding that appellant would probably benefit from a DJJ commitment. (§ 734; *In re Carlos J.* (2018) 22 Cal.App.5th 1, 5.)

Factual and Procedural History

On March 1, 2017, 15-year-old appellant approached V.G. outside Santa Paula High School, accused him of stealing, and stabbed him in the torso, chest, and wrist. V.G. was transported to the hospital and underwent surgery to repair a punctured liver and remove part of his intestines. One stab wound narrowly missed a major artery, which if punctured, would have most likely led to death. Before the stabbing, appellant said that he was going "to stab that fool" for "trying to rob things." A second witness told the police that appellant stabbed the victim to "prove something" and that appellant was "banging for" the 12th Street Locos, a Santa Paula criminal street gang.

There were other assaults which resulted in appellant's expulsion from two schools. In 2016, appellant punched a gym teacher and, in another incident, punched a student in class. At Gateway Community School, appellant was high on crystal methamphetamine and punched the school principal.

An amended juvenile petition was filed alleging two counts of battery on a school employee (Pen. Code, § 243.6), possession of marijuana on school grounds (Health & Saf. Code, § 11357, subd. (d)), and assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) with deadly weapon and great bodily injury enhancements (Pen. Code, §§ 12022, subd. (b)(1), 12022.7, subd. (a)). After appellant admitted the aggravated

assault and weapon enhancement, the other counts were dismissed.

The probation department reported that appellant had no criminal or dependency record, had experimented with drugs since age 10, and was raised by his grandmother after his parents separated and moved away. The probation report stated that appellant was at low risk of reoffending but recommended DJJ based on "the seriousness of the present offenses, the minor's pattern of violent behavior, and risk to the community."

Doctor Stephanie N. Marcy evaluated appellant and reported that appellant's "relationship with drugs and alcohol is significant, but inconsistent, and an area of concern due to the degree of impairment he experienced when using. [Appellant] was exposed to a moderate amount of substance use within his family (brothers, biological father) and social settings during his childhood. . . . [H]is first use of illicit substances was when he was very young, in the 4th grade, when he tried smoking marijuana with his brothers." Dr. Marcy believed appellant used drugs to self-medicate his anxiety, anger, and hypervigilance.

Dr. Marcy reported that appellant was subject to several risk factors including "disrupted attachment/parental abandonment, strong community gang presence, witnessing community violence, . . . mental illness [in the family], substance use, and low socio-economic status." The doctor opined that it was highly unlikely that a commitment to DJJ would be beneficial to appellant and recommended a less restrictive placement that would include therapy to treat appellant's depression and anxiety, psychotropic medication, and vocational training. During the seven months appellant was detained,

appellant responded well to the structure and routine of Juvenile Hall, made honor roll, and was responding to therapy.

The trial court declared the aggravated assault a felony and committed appellant to DJJ for a maximum confinement period of four years.

DJJ Commitment

On review, we indulge all reasonable inferences in favor of the judgment where it is supported by substantial evidence. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) "Under section 202, juvenile proceedings are primarily 'rehabilitative' (*id.,* subd. (b)), and punishment in the form of 'retribution' is disallowed (*id.,* (subd. (e)). Within these bounds, the court has broad discretion to choose probation and/or various forms of custodial confinement in order to hold juveniles accountable for their behavior, and to protect the public. [Citation.]" (*In re Eddie M.* (2003) 31 Cal.4th 480, 507.) A DJJ commitment is proper where it would be of probable benefit to the minor and less restrictive alternatives would be ineffective or inappropriate. (§ 734; *In re M.S.* (2009) 174 Cal.App.4th 1241, 1250.)[2]

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[2] Section 202, subdivision (b) provides in pertinent part: "Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, 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 this chapter."

Section 734 provides: "No ward of the juvenile court shall be committed to the [DJJ] unless the judge is fully satisfied that

The trial court found the stabbing was unprovoked and "up-close-and-personal." It came close to being a murder and raised concerns about appellant's ability to conform on a probation grant. Prior to the stabbing, appellant committed acts of gratuitous violence "against figures of authority" including a high school principal and gym teacher. The trial court also found a history of nonsupport by appellant's family and believed it was a "red flag." The trial court committed appellant to DJJ because "[t]here's some good programming there that will be of benefit to him."

The case is similar to *In re Carlos J., supra,* 22 Cal.App.5th 1 in which the Court of Appeal concluded that generalized findings about public safety do not satisfy the probable benefit requirements of section 202 and 734 for a commitment to DJJ. (*Id.* at pp. 10-11.) There, a 15-year-old minor was flunking school, had 30 incidents of defiance at school, smoked marijuana, and committed a gang-related shooting in which five or six shots were fired at the victim. (*Id.* at pp. 4 & 7.) A psychologist reported that the minor suffered from Post Traumatic Stress Disorder (PTSD) and recommended probation camp or a local program that would provide high structure and therapy. (*Id.* at p. 8.) The probation department, however, recommended that the minor be committed to DJJ "'where his educational, therapeutic, and emotional issues can be addressed in a secured facility. . . .'" (*Id.* at pp. 8-9.) The trial court could not "'get over the seriousness of the offense . . . of firing a weapon multiple

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the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJJ]."

times for the purposes of gang activities.'" (*Id.* at p. 9.) It ordered the minor committed to DJJ even though the minor had no substantial prior juvenile record. (*Ibid.*) Paraphrasing the language of section 734, the trial court found "'that the actual and physical condition and qualifications of this youth render it probable that the youth will benefit from the reformatory, discipline or other treatment provided by the [DJJ].'" (*Ibid.*) The trial court told the minor that "'the possibilities are limited as to what I can do under the circumstances and that's why I'm imposing the [DJJ] commitment.'" (*Id.* at p. 10.)

The Court of Appeal reversed because there was no substantial evidence that the commitment to DJJ would probably benefit the minor even though the probation report stated that "'placement in a structured facility . . . can offer gang intervention services.'" (*In re Carlos J.*, *supra*, 22 Cal.App.5th at p. 11.) One could infer that DJJ offered gang intervention services but the probation report contained "no information about the nature of the gang intervention services in order to allow the juvenile court (and this court on review) to make an assessment of the appropriateness and adequacy of the programs for appellant." (*Ibid.*)

The same evidentiary void exists here. "We recognize that participants in the below proceeding – the juvenile court, the probation department, and counsel for appellant and respondent - frequently participate in placement determinations and have some knowledge of the programs at [DJJ] and other placements. It may be reasonable in such circumstances for participants in the proceedings to speak in 'shorthand' about placements and other matters. Nevertheless, judicial review *by this court*, requires some concrete evidence in the record about relevant

programs at the [DJJ]. Otherwise, this court's review for substantial evidence is an empty exercise, nor meaningful appellate review. . . . [Citation.]" (*In re Carlos J.*, *supra*, 22 Cal.App.5th at pp. 11-12.)

The probation report states that appellant has been screened by DJJ and is eligible for commitment as a category 4 offender, which would render appellant eligible for parole in two years. "While serving this commitment, [appellant] will be given numerous services that he needs to assist him to make the necessary changes to rehabilitate, while making the community safe." The probation report did not discuss what DJJ programs were available or how those programs would benefit appellant.

Although the probation report can fairly be read to say that DJJ is the best placement, that is not enough. "[T]he law required the juvenile court, not the probation department, to make the finding of probable benefit. The court could not make that finding, and this court cannot review the adequacy of the evidence supporting the finding, without evidence in the record of the programs at the [DJJ] expected to be of benefit to appellant. The probation officer's unexplained and unsupported assertion of possible benefit is not evidence of 'reasonable, credible and of solid value' from which the juvenile court could make an informed assessment of the likelihood a [DJJ] placement would be of benefit to appellant . . . . [Citation.]" (*In re Carlos J.*, *supra*, 22 Cal.App.5th at p. 10.)

This is not a case where the minor had a prior juvenile history or the juvenile court had already tried less restrictive placements. (Compare, *In re A.R.* (2018) 24 Cal.App.5th 1076, 1081-1082.) Nor can we say there is substantial evidence that allowing appellant to remain in juvenile hall would be ineffective

or inappropriate. (See *In re Calvin S.* (2016) 5 Cal.App.5th 522, 528.) The trial court found that DJJ has "some good programming" but that is not enough. "'[T]he juvenile court must consider each individual case on its merits without a mechanized approach based solely on the seriousness of the offense and must evaluate the appropriateness of the available lesser alternative dispositions in light of the purposes of the Juvenile Court Law. Before committing a minor to [DJJ], there should be some evidence in the record to support a finding that all these purposes cannot be accomplished by placement in a county facility.' [Citation.]" (*In re Ricky H.* (1981) 30 Cal.3d 176, 183, fn. omitted.) "Considering the significance of a decision to send a minor to the [DJJ] and the statutory mandates of sections 202 and 734, it is reasonable and appropriate to expect the probation department, in its report or testimony, to identify those programs at the [DJJ] likely to be of benefit to the minor under consideration. Where a minor has particular needs, the probation department should also include *brief* descriptions of the relevant programs to address those needs." (*In re Carlos J.*, *supra*, 22 Cal.App.5th at p. 12.)

Here, the trial court had no evidence before it regarding what programs were available at DJJ and how they would probably benefit appellant. We reverse and remand for a new disposition hearing, and offer no position on whether a commitment to DJJ would be in appellant's best interests. The trial court has broad discretion to order a DJJ commitment or a commitment to a local detention or treatment facility, such as a juvenile home, ranch, camp, forestry camp, or juvenile hall. (§ 730, subd. (a); *In re W.B.* (2012) 55 Cal.4th 30, 45.) On remand, the trial court is to make its decision based on the facts

existing at the time of the new disposition hearing. (See *In re Ashly F.* (2014) 225 Cal.App.4th 803, 811.) We express no opinion on how the juvenile court should rule.

Disposition

The judgment (order committing appellant to DJJ) is reversed and remanded for a new disposition order only.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

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