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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re VINCENT C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. VINCENT C., Defendant and Appellant.	A092520 (Solano County Super. Ct. No. J29072)

In this case, we confirm that a juvenile's presence is required in a proceeding, following remand, which affects—or which may affect—his maximum period of confinement at the California Youth Authority (CYA). We also conclude that, in the case before us, counsel's purported waiver of the juvenile's presence was ineffective. We finally conclude that the error in failing to secure the juvenile's presence at the postremand proceedings and/or in failing to secure an effective waiver of his attendance was not harmless beyond a reasonable doubt.

I. FACTS

A. *Proceedings Prior to Remand*

Vincent C. (appellant) was the subject of a petition filed in 1997 and a series of amended petitions filed in 1998, alleging that he had committed a number of criminal offenses. One of the amended petitions, filed July 23, 1998, alleged that, on June 13,

1998, appellant had committed two counts of attempted carjacking, two counts of conspiracy to commit carjacking and two counts of attempted second degree robbery. As to all six counts, the amended petition alleged that appellant had personally used a firearm pursuant to Penal Code section 12022.5. On November 16, 1998, appellant admitted one count of conspiracy to commit carjacking; the personal use of a firearm allegation was amended to allege that a principal had been armed during the commission of the offense pursuant to Penal Code section 12022, subdivision (a)(1). Appellant admitted the truth of the amended arming allegation, and the remaining allegations were dismissed. As part of the negotiated plea, the district attorney agreed not to seek a commitment to CYA.

At the conclusion of the dispositional hearing, the juvenile court committed appellant to CYA for a maximum period of 10 years 5 months. Although the question of whether the conspiracy allegation admitted by appellant constituted a Welfare and Institutions Code[1] section 707, subdivision (b) (section 707(b)) offense was addressed during the hearing, the juvenile court made no specific finding on the record on that issue. However, both the minute order from the dispositional hearing and the CYA commitment order indicated that it was such an offense.

Appellant appealed, contending that the juvenile court erred in classifying the conspiracy to commit carjacking admission as a section 707(b) offense.[2] Respondent conceded that the record did not appear to support a finding that the admitted offense was a section 707(b) offense and asked that we remand the case for a proper finding on that issue. We followed respondent's suggestion and remanded the matter for "redetermination" of whether appellant personally used a firearm while engaged in the

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

[2] Section 707(b) lists numerous acts which, if committed by a minor, have significant ramifications. We discuss several of those ramifications in part III.A., *post*. In the case before us, the focus of the parties and the juvenile court has been on section 707(b)(17) (personal use of a firearm while committing a felony) and section 707(b)(18) (possession of a sawed-off rifle).

conspiracy to carjack. We also observed that it would be proper for the juvenile court, following remand, to examine the police report considered at the original dispositional hearing. (*In re Vincent C.* (Jan. 24, 2000, A094197) [nonpub. opn.].)

B. *Initial Proceedings Following Remand*

Following remand, the juvenile court conducted a series of hearings to determine whether or not, based on the police report, appellant had personally used a firearm while engaged in the admitted conspiracy to commit a carjacking. The first took place on June 28, 2000. At the outset, the court asked appellant's counsel if he believed appellant had "a right to be here while we respond to the inquiries by the Court of Appeal." Counsel replied: "I won't ague that, no, your Honor. I don't believe I have any authority one way or the other, but I don't believe his presence is required, your Honor." The court asked the prosecutor if she concurred. She replied: "Yes, your Honor, based on I don't have any law either way either." The rest of that hearing and all of the succeeding hearings proceeded without appellant's attendance.

After resolving the issue of appellant's presence, the court defined the task before it as "framed by the Court of Appeal," specifically, "whether or not there's evidence to allow this Court to make a finding that this minor was personally armed with a firearm." The court then invited comments from counsel. The prosecutor suggested that the court review the police report "in its entirety." Defense counsel objected to the court's use of the police report because it constituted hearsay. Counsel argued that the court had already examined the report in a different context and should extend its earlier findings to conclude that appellant had not committed a section 707(b) offense. The court indicated that it was going to review the police report to determine whether or not appellant personally used a firearm. The court asked that a copy of the police report be provided to the court before the next hearing. The court indicated that it would mark the report as a court exhibit. The court did so on July 21, 2000, at the commencement of the next hearing.

C. *The Police Report*

The "police report" identified by the court and parties and marked as an exhibit is, in reality, a series of reports, describing the Fairfield Police Department's investigation of the attempted carjacking. The initial police report regarding the incident was prepared shortly after it occurred. According to that report, Carlos Hernandez and Larry Williams stated that they were driving around Fairfield on the night of June 13, 1998. They encountered two young Black men at a liquor store and asked them if they knew where Hernandez and Williams could find young women who might be interested in going to a graduation party at Williams's home. The two Black men (appellant and his co-conspirator, later identified as T.B.) said that they did and got in the back seat of the car. At one point, one of the men told Williams to drive into "C. Lane" and stop in front of a particular address on C. Lane. The two strangers left the car and returned a few minutes later. As Williams began to drive away, Hernandez stated that one of the strangers ("S#1") had a "sawed off rifle pointed at him." An altercation ensued involving all four individuals. Eventually, all wound up outside the car. At some point thereafter, the gun was pointed at Williams by S#1. Eventually, Hernandez fled the scene on foot, and Williams escaped in the car. The initial report also described an interview conducted with Sharon, a witness who claimed to have seen the "end part of the incident" but did not know either of the young men who "appeared to be the aggressors."

Subsequent investigation led the police to suspect that T.B. was the person who had initially displayed the gun in the back of the car. That suspicion was confirmed by Williams and Hernandez, who picked T.B. out of a photographic lineup. In contrast to the initial report, the report in which T.B. was identified as one of the conspirators referred to the person who initially possessed the gun as "S-2." That follow-up report also indicated that, at the point when "S-1" exited the car, he possessed the rifle and pointed it at Hernandez. The police did not determine that appellant had been T.B.'s co-conspirator until after T.B. was arrested.

After suspicion focused on appellant, the police reinterviewed Sharon. During the second interview, she said that she had been attracted to the altercation by a knock on the

door of her apartment on C. Lane. She opened the door and saw a car at the end of C. Lane. She thought a carjacking might be taking place. She stated that she saw a man whom she knew "from previous contacts as 'Vince'" using a sawed-off shotgun to hit a White male in the head. She also stated that she thought the man with the gun had the gun down his pants before he began to use it to hit the other man. She knew Vince because he had come to her house on several different occasions with other friends she knew better than she knew Vince. She did not personally know any of the other people she saw that night; however, her husband, Jason, told her who they were. Sharon picked appellant's picture out of a photographic lineup, identifying him as the "Vince" she had seen on the night of June 13.

The police also interviewed Jason. He told them he came to the door on the night of June 13 and witnessed a part of the incident. At one point, he saw appellant, whom he later identified in a photographic lineup, point a gun at a White male. The White male grabbed the gun and pointed it away from him.

D. *Hearings Following Introduction of Police Report*

During the July 21 hearing, argument focused on three issues: (1) who possessed the firearm used in the attempted carjacking (appellant or his coconspirator); (2) when, if at all, appellant possessed the firearm (during the attempted carjacking or after the attempt had been thwarted); and (3) whether the firearm was a weapon described in Penal Code section 12022, subdivision (a) (specifically, a sawed-off rifle). The court made its finding "based upon [its] review of the police report" (a 74-page exhibit). The court found that appellant "used the gun that was involved," one that "appeared to be a rifle," at the "conclusion of the transaction between [appellant, his coconspirator and the victims]." The court found that appellant used the gun after he, his coconspirator and the victims had exited the car; however, the court was "prepared to find that the carjacking was still going on at that time."

The proceedings of July 21, 2000, did not bring matters to a conclusion. Another hearing took place on August 1, 2000. The court noted that, after it had made its ruling on July 21, it had reviewed the reporter's transcript of the original dispositional hearing,

as well as appellant's admissions on November 16, 1998. The court stated that, in reviewing those proceedings, it appeared to the court that, at the time of the first dispositional hearing, it had reviewed only 10 pages of the 74-page report it had reviewed after June 28, 2000. The court indicated that it could not state whether the 10 pages it reviewed at the 1998 dispositional hearing included the key pages of the report—those in which a witness reported that he had seen appellant holding a gun on one of the carjacking victims. The court went on to say that it "suspect[ed]" that it did not rely on those pages of the police report but, instead, relied on the allegations found in the amended petition that appellant told one of the victims to stop near a house, then exited the car, obtained a rifle and pointed it at the victim. The court concluded that its reliance on the "allegations" of the amended petition during the 1998 dispositional hearing constituted an "improper [basis]" for the section 707(b) finding.

The court then stated that, after reviewing the entire police report, it had concluded that "at the beginning of the carjacking" appellant's coconspirator, T.B., in fact went into an apartment, obtained a gun and "initially pointed it at the victims in the car." The court considered that sequence of events to constitute the "heart and soul of the carjacking." The court went on to find that, thereafter, the "car crashed and there was a fight between the participants." The court also found that, at one point after the crash (presumably during the fight), appellant had possession of the gun because he pointed it at a White male near the passenger-side door of the car. The court based that conclusion on a statement attributed to a witness, "[Jason]," set out in the report. The court noted that Jason knew appellant by sight because appellant had been at his house on a number of occasions and that Jason had later picked appellant's photo out of a photographic lineup. The court then permitted the parties to brief the question of whether appellant's conduct "at the end of the transaction" constituted "use" of the gun in furtherance of the conspiracy to commit carjacking.

The final hearing on September 6, 2000, did not address the question the court permitted the parties to brief. Instead, the court reiterated its statement of August 1, 2000, about the first dispositional hearing and the current basis for the finding that

appellant personally used a firearm during the course of the conspiracy to commit carjacking.

II. ARGUMENTS

Appellant argues, first, that it was error for the juvenile court to conduct the hearings described in parts II.B. and II.D. in his absence. The Attorney General (respondent) does not take issue with appellant's claim that he had the right to be present at the hearings. However, respondent does assert that defense counsel's statements to the court on June 28, 2000, constituted consent to appellant's absence from the hearings. Respondent further argues that, if the court erred in not requiring appellant's presence, appellant cannot establish beyond a reasonable doubt that he was prejudiced by the error.

Appellant asserts that his counsel's purported waiver of his personal appearance was ineffective. However, if counsel's waiver were valid, he contends that counsel's assistance was ineffective. He further argues that reversal is required unless the *People* can demonstrate that the error in proceeding without him was harmless beyond a reasonable doubt. He concludes that no such demonstration can be made here.

III. ANALYSIS

A. *Appellant Was Entitled to Attend the Hearings Following Remand*

As noted above, appellant contends that he had a right to be present at the hearings that followed remand. As also noted, respondent does not challenge that claim. Indeed, respondent points out that California Rules of Court,[3] rule 1410(b), provides that a minor is "entitled" to be present at all juvenile court proceedings.

Appellant's right to be present at the hearings that followed remand in the case before us is founded on more than a rule of court. That right has both a statutory and a constitutional base. Welfare and Institutions Code section 679 provides that a minor who is the "subject of a juvenile court hearing . . . is entitled to be present at such hearing." In addition, a defendant has a constitutional right to be present at all critical stages of a criminal prosecution or whenever his or her presence has a reasonably substantial relation

[3] All further references to "rule" are to the California Rules of Court.

to his opportunity to defend. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 260 (*Rodriguez*), citing *Faretta v. California* (1975) 422 U.S. 806, 819, fn. 15, and *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106.)

Juvenile court proceedings which may result in "substantial loss of personal freedom are regarded as quasi-criminal in nature, and as a consequence the fundamental notions of due process and fairness must be strictly observed. [Citations.]" (*In re Aaron N.* (1977) 70 Cal.App.3d 931, 941.) The right to due process and fairness mandates that a minor be present—or knowingly and intelligently waive the right to be present—at proceedings that may lead to a loss of personal freedom. (*In re Sidney M.* (1984) 162 Cal.App.3d 39, 48 (*Sidney M.*).)

Here, our charge to the court on remand required the court to determine whether or not appellant personally used a firearm in the commission of the conspiracy to carjack. We indicated that the court could review the police report in making its sentencing determination. Thus, the court was to consider evidence and make a factual determination that had a significant effect on the disposition of the case. Further, as we noted when we issued our first opinion, a section 707(b) finding had (has) significant ramifications. If appellant's offense is listed under section 707(b) offense, CYA will retain jurisdiction over him until he turns 25; if it is not, CYA must discharge him when he turns 21. In addition, a section 707(b) offense is also a "strike" under the three strikes law. (*In re Gary B.* (1998) 61 Cal.App.4th 844, 846.)

Given the significance of the proceedings following remand, appellant undoubtedly had a constitutional right to be present. (*Rodriguez, supra,* 17 Cal.4th at p. 260; *Sidney M., supra,* 162 Cal.App.3d at pp. 48-49.)

B. *Defense Counsel's Statement That He Did Not Believe Appellant Needed to Be Present Did Not Constitute an Effective Waiver of Appellant's Presence*

As reflected above, respondent first asserts that appellant's counsel could properly consent to proceed in appellant's absence. In support of that claim, he notes that rule 1410(b) does not state that a minor's counsel cannot consent to proceed without the minor in attendance. Respondent also calls our attention to *People v. Horton* (1995) 11

Cal.4th 1068 (*Horton*) and *People v. Pride* (1992) 3 Cal.4th 195 (*Pride*) in an effort to persuade us that counsel's statement to the court that appellant's presence was not required constitutes effective consent to appellant's absence from postremand proceedings. Neither case establishes the principle advocated by respondent.

In *Horton*, the defendant's attorney stipulated that testimony could be read back in the absence of court and counsel; in addition, his counsel did not seek to have the defendant attend several in camera conferences. On appeal, Horton challenged the "effectiveness" of counsel's "express or implied" waiver of his presence at those points in the trial. (*Horton, supra*, 11 Cal.4th at p. 1120.) The Supreme Court first cited the rule that a defendant is not entitled to be personally present at proceedings that bear "no reasonable, substantial relation to his or her opportunity to defend the charges against him [or her] . . . ." (*Id.* at pp. 1120-1121.) The court observed that a readback of testimony was not an event that bore a substantial relation to a defendant's ability to defend. (*Id.* at p. 1121.) The court applied the same analysis to in camera conferences. (*Id.* at pp. 1121-1122.)

In *Pride*, the defendant advanced a challenge to his counsel's consent to his and counsel's absence during readbacks of testimony. The Supreme Court noted that a defendant may waive the right to be present at even "'critical stages'" of a trial. (*Pride, supra*, 3 Cal.4th at p. 251.) The court stated that a readback of testimony was not such a critical stage. The court then rejected the notion that counsel could not properly consent to a readback in the absence of Pride's personal waiver. (*Ibid.*)

Considered together, *Horton* and *Pride* establish a rule that the readback of testimony does not constitute a critical stage of proceedings at which a defendant's presence has a significant relation to his ability to defend. As such, the defendant need not personally waive his right to be present, and counsel may properly consent to proceed in the defendant's absence. *Horton* and *Pride* are obviously distinguishable from the case before us. As determined in part III.A., *supra*, the postremand hearings here were of critical importance to appellant. Thus, counsel's purported "consent" did not serve as a waiver of appellant's statutory and constitutional right to attend the hearings.

A minor may waive his or her constitutional rights—including the right to be present during critical portions of juvenile court proceedings. Indeed, this Division has held that a minor may be found to have waived that right "if the juvenile court finds a knowing and intelligent waiver, considering the minor's age and other relevant circumstances, including intelligence, education, experience, and ability to comprehend the meaning and effect of his or her acts. [Citations.]" (*Sidney M., supra,* 162 Cal.App.3d at p. 48.) The question then becomes whether or not counsel's statement constitutes a waiver by *appellant* of his right to attend the postremand hearings.

"A waiver is an 'intentional relinquishment or abandonment of a known right or privilege.' [Citation.]" (*Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 672.) Here, the record does not demonstrate that appellant was made aware of his right to be present at the postremand proceedings. Thus, we have no basis for concluding or inferring that appellant intentionally relinquished a "known" right. Indeed, if we assume that counsel communicated his "belie[f]" to appellant, appellant would likely have assumed that he did *not* have a right to be present.

We further observe that the procedures for waiver of a criminal defendant's presence are stringent. Pursuant to Penal Code section 977, subdivision (b)(1), a defendant charged with a felony is required to be present at certain proceedings; for all other proceedings, he may waive his right to be present, if he signs a written waiver of his appearance in open court. An acceptable waiver form is described in Penal Code section 977, subdivision (b)(2). That form includes a recitation by the defendant that he has been advised of his right to be present and waives it. The procedures described in Penal Code section 997 are not statutorily required in juvenile court proceedings. However, we are unable to see how a juvenile court could determine that a juvenile has made a knowing and intelligent waiver of his right to be present, given the juvenile's age, intelligence, education, experience, and ability to comprehend the meaning and effect of his or her acts (*Sidney M., supra,* 162 Cal.App.3d at p. 48.), if the juvenile is not present in court at the time the purported waiver is made. Here, of course, appellant was not present at any postremand proceedings.

In sum, counsel's statement of "belie[f]" did not constitute an effective waiver of appellant's right to be present at the postremand hearings. We now turn to the standard by which the error associated with appellant's absence must be assessed.

C. *Standard of Review*

Respondent argues that *appellant* must establish that any error involved in his absence from the postremand hearings was prejudicial beyond a reasonable doubt. However, that standard only applies in contexts in which a defendant's presence is not constitutionally required at a particular proceeding, and he or she asserts on appeal that prejudice resulted from exclusion from that proceeding. (*Horton, supra,* 11 Cal.4th at pp. 1120-1121; *People v. Bloyd* (1987) 43 Cal.3d 333, 360.) Here, as analyzed above, appellant's presence was constitutionally required. Thus, we must reverse unless it can be demonstrated that the error in excluding him from the proceedings was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271.)

D. *The Error in Excluding Appellant From All Postremand Hearings Was Not Harmless Beyond a Reasonable Doubt*

Appellant argues the error in excluding him from the postremand hearings cannot be considered harmless beyond a reasonable doubt. He notes that the hearings following remand involved much more than a mere reexamination of evidence that was already before the court. He argues that he "was present during the incident, was familiar with some of the people whose statements were given to the police, and apparently knew [Jason], the only witness whose statement implied that [he] had personally used the firearm at any point during the incident." He concludes that his personal presence was crucial to his counsel's efforts to establish that he had not personally used a firearm during the conspiracy to carjack.

Respondent asserts that appellant's trial counsel had "ample opportunity" to personally contact appellant to obtain his assistance in "defending against any factual finding that he personally used a firearm." Respondent argues, as well, that appellant's trial counsel "actively represented appellant's interests and argued favorable ambiguities

in the record." Respondent finally contends that the most "damning [rejoinder to appellant's argument that his absence does not constitute harmless error] is the fact that percipient witness Jason . . . knew appellant from prior contact and positively identified him as using a weapon." Thus, respondent can see no possible prejudice to appellant stemming from his absence from the postremand proceedings.

We begin our analysis by noting the unusual nature of the postremand proceedings in the juvenile court. In our first opinion, we observed that the same police report had led two different probation officers to reach two apparently conflicting conclusions about whether appellant or T.B. used the gun during the attempted carjacking. We also noted that the court, with defense counsel's consent, had examined at least part of the report in making its dispositional choice. However, based on the record on appeal—which did not include a copy of the police report—we were unable to determine whether or not the juvenile court's apparent conclusion that appellant had personally used a firearm during the attempted carjacking was supported by substantial evidence. Thus, on remand, we charged the juvenile court with *re*examination of the police report. We also left open the possibility that the prosecution might present additional evidence by means of "readjudicat[ion]" of appellant's sentence.

What actually occurred at the postremand hearings involved, in essence, a completely new section 707(b) determination, based on evidence never considered by the juvenile court at the first dispositional hearing. As the court candidly noted on August 1, 2000, it reviewed only 10 pages of the 74-page report at the November 1998 dispositional hearing. More importantly, the court stated that it suspected that is had not relied on that portion of the report in making its (implied) section 707(b) finding in 1998. The court specifically concluded that it had relied on "improper" materials—namely, the allegations of the amended petition—in making its original section 707(b) determination.

Thus, the postremand hearings involved more than a simple reexamination of materials previously considered and relied upon by the court. They involved *de novo* consideration of materials (the police report) that were not relied upon by the court in 1998. In a sense, the court wound up conducting a new dispositional hearing.

Considered from that perspective, it is evident that appellant's presence at the hearings was important to his own interests from a number of perspectives. First, as argued by appellant, he was admittedly present when the attempted carjacking took place. Thus, he could have provided counsel—and potentially the court—with input about everything from the sequence of events during and after the attempted carjacking to the locations of witnesses at the times they observed or purportedly observed his or T.B.'s possession of the firearm.

Respondent correctly points out that Jason identified appellant as having pointed a gun at one of the carjacking victims and that Jason knew appellant from previous contacts with him. However, the police report contains no information about how far away Jason was from the altercation when he observed appellant, nor does it indicate how well lit the area of the altercation was. Both such pieces of information, which could potentially have been provided by appellant to his counsel, might have cast doubt on Jason's ability to perceive the events of June 13, 1998. We also observe that Jason told the police that he saw appellant point a gun at a White male that night. The police report indicates that Williams is Black, and Hernandez is Hispanic. Such a discrepancy, coupled with other information about Jason's ability to perceive events, could conceivably have influenced the court's conclusions about appellant's personal use of a firearm.

The fact that Jason knew appellant from previous contacts may, as implied by respondent, enhance the validity of Jason's identification of appellant. However, the fact that appellant was a part of the carjacking conspiracy was (is) an admitted fact. The question is: did he personally use the firearm in furtherance of the conspiracy? Jason's ability to perceive what appellant, as opposed to T.B. or someone else, did that night was not necessarily enhanced by his having known appellant before June 13, 1998.

Two other points merit discussion. If indeed Jason had numerous contacts with appellant before June 13, 1998, appellant might have been able to provide counsel with information about (a) Jason's eyesight, (b) possible bias toward appellant arising out of those contacts, or (c) other matters affecting the credibility of Jason's statement to the police. In addition, Jason's wife, Sharon, told police that she observed appellant use a

gun, possibly pulled from his pants, to hit a man in the head during the course of the altercation. However, on the night of June 13, 1998, she told police that she did not know either of the two young men that appeared to be the aggressors that night. The inconsistency in her reports to the police could conceivably impact on the credibility of her account, as well as her husband's account, as it appears as if they were together when they observed the events of June 13, 1998. Again, appellant could potentially have provided input to his counsel about Sharon's ability to perceive the events of June 13, as well as Sharon's potential bias toward him.

In sum, the 74-page police report, taken as a whole, is ambiguous. Moreover, as analyzed above, we do not see Jason's account as quite so "damning" to appellant as does respondent. Most importantly, however, we are unable to tell what input appellant could have provided to shake the juvenile court's confidence in Jason's account of appellant's use of a firearm on the night of June 13, 1998, because appellant was not present in court to provide that input. Accordingly, we cannot conclude that his absence from the postremand hearings was harmless beyond a reasonable doubt. (*Bustamante v. Eyman*, *supra*, 456 F.2d at p. 271.)

IV. CONCLUSION AND DISPOSITION

The juvenile court's finding that appellant's offense was one described in section 707(b) is reversed. This matter is remanded for a new hearing on the issue of his personal use of a firearm during the course of the conspiracy to carjack. Appellant must be present at that hearing, or he must knowingly and intelligently waive his personal attendance at the hearing.

McGuiness, P.J.

We concur:

Corrigan, J.
Parrilli, J.