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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ANDREW W., a Person Coming Under the Juvenile Court Law.	B181532 (Los Angeles County Super. Ct. No. JJ12055)
THE PEOPLE, Plaintiff and Respondent, v. ANDREW W., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. H. Kirkland Jones, Commissioner. Affirmed.

Cheryl B. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

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Andrew W. appeals from the order entered (Welf. & Inst. Code, § 777)[1] modifying the previous order of home on probation and ordering appellant committed to the camp-community program after his admission that he was not in compliance with the previous orders for home supervision.

On appeal, he contends that he was denied due process and that the juvenile court's order violated the doctrine of the separation of powers because the juvenile court, not the prosecutor, ordered the initiation of the section 777 proceedings.

THE FACTS

On June 28, 2004, 18-year-old appellant admitted a robbery and was adjudicated a ward of the juvenile court. (§ 602, Pen. Code, § 211.) He was placed home on probation. The facts underlying the robbery were that when appellant was age 17, he and a cousin took by force another teenager's motorized scooter. To accomplish the robbery, appellant twice socked the victim in the stomach. He also threatened to kill the victim if the victim told anyone about the robbery. Appellant and his cousin took the scooter in order to purchase marijuana. At adjudication, appellant admitted smoking marijuana and that he had been expelled and was not attending school. At that time, appellant was in the 11th grade.

At disposition, the juvenile court ordered home on probation. It additionally ordered appellant to attend school, not to possess or use controlled substances, and to stay away from places where users congregate.

On December 28, 2004, the probation department filed a progress report indicating that in November 2004, appellant had failed to report to the probation officer, as required. Also, on August 23, 2004, appellant had stopped attending school and had failed to provide proof to the probation officer that he had completed the court-ordered community service. The results of his October 20, 2004, narcotic testing indicated that he was using marijuana. The probation officer reported that appellant was attempting to find

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[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

employment. The probation officer recommended admonishment and continuing appellant home on probation and suggested that a section 777 petition be filed in the event that appellant continued to ignore the juvenile court's orders.

At the hearing, the juvenile court observed that appellant had two problems: he was not attending school, and he was "doing drugs." The prosecutor said, "We'll be giving the minor notice of section 777." The juvenile court asked appellant's counsel how he wished to proceed. Counsel said that appellant would admit that he had violated the conditions of his probation.

There was a pause in the proceedings as appellant and his counsel conferred.

The juvenile court inquired whether appellant had previously attended camp. Appellant said, "No." Addressing appellant, the juvenile court told him "You're falling apart in six months? How old are you now?" Appellant replied that he was 18 years of age.

The juvenile court inquired of appellant's mother as to whether appellant was having a hard time "trying to put it together." The mother replied, "Yes." The juvenile court asked the mother whether she recalled its orders at disposition. The mother said that one order was that appellant had to attend school and had to obtain a diploma. Also, appellant was not to use drugs. Further, if appellant did not obey its orders, the juvenile court had said that it would order camp placement.

The juvenile court raised the issue of appellant's physical condition, and it mentioned its records showed that appellant had asthma. The mother replied that appellant had a heart murmur.

The trial court again asked appellant's counsel how he wanted to proceed. Appellant's counsel indicated that appellant wanted to admit that he had violated probation and that appellant's current goal was to become employed.

The juvenile court took care of an unrelated matter, then took appellant's admission that he had violated the juvenile court's orders.

During the admission procedure, the juvenile court advised appellant of his right to have a hearing as to whether or not he had complied with the terms of the earlier order

of home on probation. It advised appellant of, and obtained a waiver of, appellant's right to remain silent. It asked appellant personally whether he wanted to admit the violation, and appellant replied, "Yes, sir." The juvenile court told appellant that it intended to order camp placement, and it asked whether appellant understood the proposed disposition. Appellant replied in the affirmative.

The juvenile court then took appellant's formal section 777 admissions that he was not attending school and that he was smoking marijuana. Appellant's counsel joined in the admissions and waivers, and counsel stipulated that there was a factual basis for modifying the juvenile court's previous orders.

After the admission, appellant explained to the juvenile court that he felt "stupid." The juvenile court replied that there was no reason why appellant should not complete his education. Also, it commented that appellant's heart murmur and asthma would not be helped by smoking marijuana. The juvenile court ordered appellant to spend nine months in Camp Holton.

THE DISCUSSION

1. The Separation of Powers Issue

Citing *In re Eddie M.* (2003) 31 Cal.4th 480, appellant contends that he was denied due process and that the juvenile court acted improperly in violation of the doctrine of the separation of powers by initiating an increase in the level of disposition without compliance with procedural protections afforded by section 777.[2]

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[2] Section 777, entitled, "Removal of minor from physical custody of parent . . . ; placement or commitment; noticed hearing," provides as follows: "An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after a noticed hearing. [¶] (a) The notice shall be made as follows: [¶] (1) By the probation officer where a minor has been declared a ward of the court or a probationer under Section 601 in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the minor has violated an order of the court. [¶] (2) By the probation officer or the prosecuting attorney if the minor is a court

"The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "[T]he constitutional statement of the doctrine of the separation of powers (art. III, § 3) protects the executive branch from encroachment" of its powers. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 115.)

In *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552, the court explained the following: "'[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from "'the complex considerations necessary for the effective and efficient administration of law enforcement.'" [Citations.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to

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ward or probationer under Section 602 in the original matter and the notice alleges a violation of a condition of probation not amounting to a crime. The notice shall contain a concise statement of facts sufficient to support this conclusion. [¶] (3) Where the probation officer is the petitioner pursuant to paragraph (2), prior to the attachment of jeopardy at the time of the jurisdictional hearing the prosecuting attorney may make a motion to dismiss the notice and may request that the matter be referred to the probation officer for whatever action the prosecuting or probation officer may deem appropriate. [¶] (b) Upon the filing of such notice, the clerk of the juvenile court shall immediately set the same for hearing within 30 days, and the probation officer shall cause notice of it to be served upon the persons and in the manner prescribed by Sections 658 and 660. [¶] (c) The facts alleged in the notice shall be established by a preponderance of the evidence at a hearing to change, modify, or set aside a previous order. The court may admit and consider reliable hearsay evidence at the hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in *People v. Brown*, 215 Cal.App.3d (1989) and any other relevant provision of law. [¶] (d) An order for the detention of the minor pending adjudication of the alleged violation may be made only after a hearing is conducted pursuant to Article 15 (commencing with Section 625) of this chapter."

supervision by the judicial branch. [Citations.]' (*People v. Birks* (1998) 19 Cal.4th 108, 134.) 'When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature.' (*People v. Tenorio* (1970) 3 Cal.3d 89, 94.) The judicial power to choose a particular sentencing option, however, may be eliminated by the Legislature and the electorate. [Citation.]"

A similar division of the traditional powers of the executive and judicial branches applies to these juvenile proceedings.

We conclude that appellant's contention lacks merit as the record fails to support his claims. His contention is predicated upon the mistaken premise that the record shows that it was the juvenile court that initiated the section 777 proceedings and an increased level of disposition. As we read the record, however, it was the prosecutor who spontaneously gave appellant notice that the People wished to proceed pursuant to section 777. The deputy district attorney is as much a part of the executive during these proceedings as is the probation officer.

When the prosecutor indicated that he was giving notice of proceedings to modify the juvenile court's previous order pursuant to section 777, appellant and his counsel agreed to forego the statutory formalities necessary before the juvenile court could make that order and increase the level of disposition. At the hearing, it appears that everyone agreed, including appellant, that appellant's rehabilitation required the camp commitment so he could obtain his high school diploma and so that he would avoid marijuana use. In the circumstances, the juvenile court did not act in violation of the constitutional requirement for a separation of powers. With appellant's consent, the juvenile court was entitled to engage in the admission procedure and then make an order elevating the level of appellant's disposition.

The decision in *In re Eddie M.*, *supra*, does not require a different result. The decision in *Eddie M*. does not discuss the doctrine of the separation of powers. That decision merely upheld the new provisions of section 777 as it was contained in the Gang

Violence and Juvenile Crime Prevention Act of 1998 (Proposition 21). (See *In re Eddie M.*, *supra*, 31 Cal.4th at pp. 497-501.)

The decision in *Parker v. Riley* (1941) 18 Cal.2d 83 is also not on point. There, the plaintiff challenged the constitutionality of the California Commission on Interstate Cooperation as it violated the separation of powers provision in the California Constitution. (*Id*. at p. 89.)

The decision in *Manduley v. Superior Court*, *supra*, 27 Cal.4th at page 552 does not assist appellant. In *Manduley*, the minor complained that the Legislature had violated the constitutional doctrine of the separation of powers and invaded the power of the judiciary by granting the local prosecutor the authority to make the decision pursuant to section 707, subdivision (d), as to whether to initiate a proceeding in criminal court or juvenile court. The court concluded that when a prosecutor decides whether to charge a minor as an adult or to proceed in the juvenile court, the prosecutor is not exercising a judicial power. (*Manduley*, *supra*, 27 Cal.4th at p. 561.) Here, it was apparently the prosecutor who decided that the elevated disposition was necessary for appellant's rehabilitation. Even if it was the juvenile court that intiated the new order, it acted with the concurrence of the prosecutor, and thus, the doctrine of the separation of powers is not implicated.

2. Due Process

There is no indication that defendant's right to due process was violated on grounds other than the separation of powers.

In 2000, Proposition 21 was passed. It prevented the use of section 777(a)(2) to produce new criminal adjudications and to thereby increase the maximum term of confinement for the original section 602 offense. New misconduct is now treated, under section 777(a)(2), only as a probation violation. If a violation is found, the violator may, at most, receive a more restrictive juvenile placement within the original maximum term. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 165; *In re Eddie M.*, *supra*, 31 Cal.4th 480. The changes put into effect by Proposition 21 make the operation of section 777

analogous to what occurs when an adult offender is on probation and violates the terms and conditions of his probation. (See *In re Jorge Q.* (1997) 54 Cal.App.4th 223, 230-237 [explaining the procedures required by the former provisions of section 777].)[3]

By participating in the proceedings and admitting that he was in violation of probation, appellant waived his statutory rights pursuant to section 777, as well as any due process rights he possessed pursuant to *Morrisey v. Brewer* (1972) 408 U.S. 471, 489. (See *People v. Rodriguez* (1990) 51 Cal.3d 437, 441 [due process requirements during adult probation violation proceedings].) By agreeing to admit the violations, defendant waived a concise written statement of the specific allegations of a violation of the previous order and the 30 days that he was afforded by statute to prepare for a hearing. He expressly waived the required hearing before the juvenile court. There is no requirement during an admission procedure that a minor expressly waive the notice required by section 777. All that was required here for a valid admission was appellant's waiver of the requisite constitutional rights and his express waiver of the hearing provided for in section 777.

The trial court did become sidetracked when it advised appellant about, and obtained waivers of, the hearing and the requisite constitutional rights. (See *In re Jorge Q.*, *supra*, 54 Cal.App.4th at pp. 230-231.) During the admission, the juvenile court advised appellant that he had a right to have a hearing on his violation of the juvenile court's orders, and appellant waived his right to a hearing. The juvenile court also advised appellant that he had a right to remain silent, which the juvenile court explained meant "you don't have to admit it if you don't want to" and "if you decide to admit it, you . . . give up your right to remain silent." Appellant waived his right to remain silent.

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[3] In some respects, the decision in *In re Jorge Q.*, *supra*, is superseded by the changes to section 777 contained in Proposition 21.

The juvenile court did fail to advise appellant of his constitutional right to confrontation. However, the juvenile court's advice to defendant that he had a right to a hearing was sufficient to explain to appellant that he had a right to contest the violation and to produce evidence and to examine witnesses during the hearing while contesting the violations. Furthermore, defendant's counsel would have fully explained to appellant the requisite constitutional rights and the proceedings. Also, a mere six months earlier, appellant had admitted the original petition during proceedings. At that time, he would have received a full explanation of his constitutional rights. Under the totality of circumstances, the record shows that his current admission was intelligent and voluntary. (*People v. Mosby* (2004) 33 Cal.4th 353, 361 [the proper test is whether the totality of circumstances demonstrates that the defendant's admission is intelligent and voluntary].)

Appellant had actual notice of the grounds for the imposition of a more restrictive dispositional order. Immediately upon appellant's appearance, the juvenile court told appellant in direct and simple terms that he was there because he was not attending school and because he had testified positive for "marijuana metabolite" during narcotic testing. Subsequently during the admission procedure, these were the only admissions that the juvenile court required of appellant. On this record, defendant has not demonstrated any violation of the procedures required by section 777 or a violation of due process.

DISPOSITION

The order under review is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST