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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JOHN L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOHN L., Defendant and Appellant.	A112505 (San Mateo County Super. Ct. No. 70883)

Following a dispositional hearing, the juvenile court continued John L. as a ward of the court and committed him to the California Youth Authority (CYA) for a maximum term of eight years and four months.[1]

Appellant objects to his commitment to the CYA, arguing that the court failed to exercise its discretion when it decided to sentence him to the maximum term of confinement. Alternatively, he argues that the court's sentence constitutes an abuse of discretion and that his counsel at trial was deficient for not objecting to the length of the term. We affirm the judgment, however, we agree with the parties that four months must be stayed resulting in the maximum term being reduced to eight years.

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[1] The California Youth Authority was renamed, effective July 1, 2005, the Division of Juvenile Justice of the Department of Corrections and Rehabilitation. (Gov. Code, §§ 12838, subd. (a), 12838.13.) However, for the sake of clarity we will use the designation CYA because that is the designation used below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In December 2002, a petition was filed under Welfare and Institutions Code section 602,[2] alleging that appellant, then age 14, had possessed marijuana for sale (Health & Saf. Code, § 11359) and that he had possessed marijuana on school grounds (Health & Saf. Code, § 11357, subd. (e)). Later that same month, a second petition was filed alleging possession of marijuana for sale and cocaine base for sale (Health & Saf. Code, §§ 11359, 11351.5). Appellant admitted to the charge of possessing cocaine base for sale and was placed on supervised probation. The other charges were dismissed.

In April 2003, a petition was filed alleging that appellant had made criminal threats (Pen. Code, § 422), brandished a firearm (Pen. Code, § 417, subd. (a)(2)), and driven without a license (Veh. Code, § 12500, subd. (a)). He admitted to making a criminal threat and the remaining charges were dismissed.

In July 2003, appellant was reported to be in violation of his probation for having brought a loaded firearm to school and for having left his guardian's home without permission. In August 2003, a petition was filed alleging possession of cocaine base for sale (Health & Saf. Code, § 11351.5), possession of a concealable firearm by an unaccompanied minor (Pen. Code, § 12101, subd. (a)), and carrying a concealed weapon (Pen. Code § 12025, subd. (a)(2)). An additional petition filed in September 2003 alleged possession of a firearm in a school zone. (Pen. Code, § 626.9, subd. (b).)

The juvenile court dismissed the probation violation and sustained the counts in the last two petitions. The court placed appellant in the CYA for a 90-day diagnostic study. After the study was completed, he was placed in the Rite of Passage program in Nevada. He remained in that program for about a year until March 2005.

In September 2005, a petition was filed alleging that appellant had resisted arrest (Pen. Code, § 148, subd. (a)(1)), used a vehicle to evade a police officer (Veh. Code,

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

§ 2800.1, subd. (a)), and committed a hit and run (Veh. Code, § 20002, subd. (a)). The court sustained the charge of resisting arrest.

At the November 2005 dispositional hearing, the court committed appellant to the CYA. The court set the maximum term of confinement at eight years and four months based on the seven sustained counts in the aforementioned petitions. This appeal followed.

DISCUSSION

I. Imposition of the Maximum Term of Confinement

Appellant contends the court failed to exercise its discretion pursuant to recently amended section 731, subdivision (b).[3] That section provides the juvenile court with discretion to impose a maximum term of commitment that is less than the statutory upper term for an adult offender. (*In re Sean W.* (2005) 127 Cal.App.4th 1177, 1185.)

At the dispositional hearing in this case the juvenile court stated, "I am committing you to the [CYA] for the maximum confinement time available to this court based on your record, which is eight years and four months." Defense counsel asked, "[y]our Honor, one point of clarification. Is the court indicating for the record that it's exercised discretion to possibly reduce the amount of maximum time?" The court replied, "I am electing to impose the maximum time on him because it's going to take a long time to reform him, and society will be safe in the interim. Thank you."

This exchange clearly demonstrates that the juvenile court exercised its discretion under section 731, subdivision (b). "[W]hile the statute does not require a recitation of the facts and circumstances upon which the trial court depends, or a discussion of their relative weight, the record must reflect the court has considered those facts and

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[3] Section 731, subdivision (b) (as amended by Stats. 2003, ch. 4, § 1 (Sen. Bill No. 459), eff. Apr. 8, 2003, operative Jan. 1, 2004), provides, in part: ". . . A minor committed to the Department of the Youth Authority . . . may not be held in physical confinement for a period of time in excess of the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section."

circumstances in setting *its* maximum term of physical confinement even though that term may turn out to be the same as would have been imposed on an adult for the same offenses." (*In re Jacob J.* (2005) 130 Cal.App.4th 429, 438, italics in original.) In this case, the juvenile court stated in response to a *direct* question that it was "*electing* to impose the maximum time."

Moreover, the record reveals that the court fully considered the facts and circumstances of this case, including the six previously sustained petitions. Prior to sentencing, the court recited the facts of the case, including appellant's prior offenses, his failures in previous dispositions, the circumstances of the present offense, his poor conduct in custody, and his psychological profile prepared after his 90-day diagnostic study at the CYA. The court did not merely mechanically designate the maximum term that could have been imposed on an adult for the same offenses. (Cf. *In re Sean W., supra,* 127 Cal.App.4th 1177, 1182.)

Appellant speculates that the fact that the court chose to impose the maximum amount of time must mean that it did not exercise its discretion. He observes that the court "did not express awareness of its recently-conferred discretion" on the record, nor did any of the participants in the hearing specifically bring up the newly amended statute.

We note that the hearing was conducted in November 2005. By that date, the amended statute had been effective for almost two years. We will not presume that the court would be unaware of such a significant statutory change almost two years after its effective date. We also do not believe that in amending section 731, subdivision (b), the Legislature intended to mandate that juvenile courts expressly state on the record in every case that they are aware of their discretion to impose less than the maximum term. Moreover, the exchange quoted between the court and counsel above amply demonstrates to us that the court did, in fact, exercise its discretion and that it made a conscious decision to impose the maximum term. The court clearly stated that it was "electing" to impose the maximum term. The use of the word "electing" indicates to us that the juvenile court did consider alternatives before making its decision. We find no error.

Alternatively, appellant argues that even if the court was aware of, and exercised, its discretion, it abused its discretion in sentencing him to the maximum term. He argues that his offenses are "unremarkable" and therefore "do not warrant the aggravated (maximum) term of confinement." He also argues that the court did not consider factors other than his criminal history when arriving at his sentence.

In determining the appropriate disposition for a delinquent minor, the overriding concerns are public protection and the minor's best interests. (*In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684.) We disagree that possession for sale of marijuana and cocaine base on school grounds and bringing loaded guns to school are "unremarkable" offenses. The record shows that the court recognized the seriousness of the offenses and properly considered its obligations both to protect the public and to facilitate appellant's rehabilitation. We also find that the record shows the court heard relevant testimony from appellant, his fiancée, and his guardian regarding the circumstances of his life and his progress (or lack thereof) towards rehabilitation while a ward of the court. We find no abuse of discretion.

II. Ineffective Assistance of Counsel

Appellant contends that his trial counsel was ineffective in failing to object to the imposition of the maximum term of physical confinement. "In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) The defendant has the burden of establishing ineffective assistance of counsel. (*Ibid.*)

Appellant has failed to demonstrate that his trial counsel was deficient in failing to object to the court's sentencing. His counsel asked the court not to follow the probation officer's recommendation and argued in favor of several alternative placement options. And even if we were to find that counsel was deficient, we do not believe that there is a reasonable probability that by objecting to the maximum term appellant would have

received a more favorable result. The court very clearly stated its reasons for imposing the sentence that it did, and there is nothing in the record to suggest that an objection would have altered the outcome.

III. Error in Computing Term of Confinement

The Attorney General concedes that the court erred in imposing separate terms for the two offenses involving concealed weapons because the offenses arose from a single act. In calculating appellant's sentence, the court included two consecutive four-month terms for possession of a concealable firearm by an unaccompanied minor (Pen. Code, § 12101, subd. (a)) and possession of a concealed firearm (Pen. Code, § 12025, subd. (a)(2)). We agree that one of the four-month terms must be stayed.

The court is directed to stay one of the four-month terms and reduce the maximum term of confinement to eight years. The court is further directed to modify the commitment to reflect the stay and is to then forward a copy of the amended commitment to the California Youth Authority. In all other respects, the judgment is affirmed.

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Swager, J.

We concur:

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Stein, Acting P. J.

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Margulies, J.