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D.K., a minor, appeals from the juvenile court's order continuing his wardship (Welf. & Inst. Code, § 602) entered following the court's findings that he committed second degree commercial burglary (Pen. Code, § 459) and received stolen property (Pen. Code, § 496, subd. (a)). D.K. was ordered placed in a camp community placement program with a maximum period of physical confinement (MPPC) of seven years.

On appeal, D.K. contends the juvenile court improperly imposed a term for first degree burglary and failed to stay the term for stolen property pursuant to Penal Code section 654. We conclude that although the court did not impose a term for first degree burglary, it did err in calculating the term of confinement. We agree that the court should have stayed the term for receiving stolen property under Penal Code section 654. Finally, we remand for proper calculation of any predisposition credit to which he is entitled.

BACKGROUND

In May 2006, D.K. was charged in a petition under section 602 of the Welfare and Institutions Code with committing three offenses: (1) second degree robbery (Pen. Code, § 211); (2) assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)); and (3) assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) (the 2006 Petition).[1] The 2006 Petition further alleged a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(B)) with respect to all three counts. In June 2006, the court dismissed the first count on its own motion and found the allegations in counts 2 and 3 to be true. D.K. was adjudged and declared to be a ward of the court. The court specified the MPPC was five years, that is, four years, on count 2 and one year on count 3. The court ordered D.K. suitably placed at an open facility.

In September 2007, the court terminated the prior suitable placement order and ordered D.K. placed in the camp community placement program, short term. On December 28, 2007, he was ordered released into his cousin's custody.

In re D.K.

2009 | Cited 0 times | California Court of Appeal | July 13, 2009

In the petition under section 602 of the Welfare and Institutions Code at issue here, which was filed in April 2008 (the 2008 Petition), D.K. was charged with committing first degree burglary (§ 459) and receiving stolen property (§ 496, subd. (a)). The 2008 Petition further stated that the People sought to have him confined "on all sustained counts of this petition, other petitions currently before the court, and all previously sustained petitions with detention time remaining." He denied the charges and remained detained at Juvenile Hall.

The testimony at the adjudication revealed the following:

On April 16, 2008, Betty Frazier was in the process of moving from a duplex on 96th Street to a new apartment. Although she was staying at the new apartment, she had not yet moved a number of items from the duplex. On April 16th, she returned to the duplex for about 30 minutes, making sure the unit was secure. Frazier told her neighbor, Michela Balga, that she would not return that day.

When Balga arrived home after 11 p.m., the lights in Frazier's duplex were on. Balga contacted Frazier, then stepped out of her house. She saw a man she later described as black, between five feet two inches and five feet five or six inches tall, thin build, wearing a white T-shirt and black shorts, standing at the open back door of Frazier's apartment. He was holding a black box. Balga went back inside to get her car keys so she could pick up Frazier. When Balga stepped back out of the house, Frazier's house lights were off, and the back door was closed.

Balga and Frazier returned several minutes later; the police (whom Frazier had called) were already on site. Frazier noticed that the window screen from her daughter's room was on the ground outside. Inside, she saw "every cabinet, every door, everything was open." The back door was also open when the police arrived. Frazier discovered that her three video games, valued at $25-30 each, were missing.

Los Angeles County Deputy Sheriff Wayne Brown and his partner, Deputy Joshua Bardon, responded to Frazier's call on April 16. Frazier told Deputy Brown that some items had been stolen from her house and that she thought the people gathered behind her house might be responsible. Balga described the man she had seen at the rear entrance to Frazier's apartment. Brown stated that Balga told him the man wore dark shorts and a white T-shirt and was carrying a plastic bag.

Deputy Brown saw a group of four individuals gathered on the driveway behind Frazier's duplex, one of whom (D.K.) was wearing gray shorts and a blue shirt, with a white T-shirt beneath the blue shirt. No one else was wearing shorts. D.K. was the thinnest of the group and held a plastic bag. As Deputy Brown walked toward the group, D.K. dropped the bag near the tire of a parked car and began to walk away. Deputy Brown detained everyone and recovered the plastic bag, which contained Frazier's missing video games.

Deputy Brown gave D.K. the Miranda warnings, spoke with him, talked with Frazier, then placed D.K. under arrest. D.K. waived his rights and agreed to speak with the deputies. D.K. denied going

into "that lady's house," and "said something about some guy named Rascal" being the culprit.

After hearing the testimony of Balga, Frazier, and Brown, the trial court granted D.K.'s motion to reduce the first degree burglary count to second degree burglary. D.K. then testified, denying that he was one of the individuals the deputies spoke with on April 16. He had only peeked out the door to see what was going on and was then ordered to come outside. He denied entering Frazier's house or having a bag in his hand.

On May 12, 2008, the trial court found the allegations in the 2008 Petition to be true as to both counts and sustained the petition.

At the disposition on June 5, 2008, the trial court found D.K. in violation of probation. The court terminated the December 28, 2007 suitable placement order, took custody from the guardian, and placed custody with the probation department for placement in a camp community placement program. The court added that the commitment would be for the midterm. On count 1 (second degree burglary), the court imposed a 16-month term, and on count 2 (receiving stolen property), imposed eight months. Added to the MPPC of five years on the 2006 Petition, the new MPPC was seven years.

DISCUSSION

A. The Burglary Sentence

D.K. contends the trial court erred by imposing a dispositional order based on first degree rather than second degree burglary and argued the correct term was eight months, not 16 months. The People maintain that under Penal Code section 18, both counts 1 and 2 are "punishable by imprisonment in any of the state prisons for 16 months, or two or three years." (Pen. Code, § 18.) The People argue the trial court selected count 1 as the principal term and imposed the low term of 16 months for the offense. On count 2 (receiving stolen property), the trial court properly treated it as the "subordinate term" under Penal Code section 1170.1, subdivision (a), and imposed a term of one-third of the middle term prescribed for the offense, that is, eight months. Neither argument is correct.

Where, as here, a minor is declared a ward of the court under Welfare & Institutions Code section 602 and ordered removed from the custody of a parent or guardian, the court is required to specify the maximum period the minor may be held in physical confinement. (Welf. & Inst. Code, § 726, subd. (c).) The MPPC is the "maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." (Ibid.) When multiple offenses have been adjudicated in one or more proceedings, however, section 726 "gives the court discretion to run the terms consecutively or concurrently." (In re Jesse F. (1982) 137 Cal.App.3d 164, 168.) Section 726 further provides that when the juvenile court

chooses to impose consecutive rather than concurrent terms, the MPPC shall be computed according to the formula for consecutive adult sentences set forth in Penal Code section 1170.1, subdivision (a). Under that formula, a sentence for multiple felonies comprises the "principal" term, "subordinate" term, and any additional term imposed for applicable enhancements. The principal term consists of the greatest term of imprisonment imposed by the court for any of the crimes. (Pen. Code, § 1170.1, subd. (a).) The subordinate term for each consecutive offense consists of one-third of the middle term of imprisonment prescribed for each felony conviction. (Ibid.)

In calculating the MPPC, the court must credit the minor for all days of actual predisposition confinement. (In re Eric J. (1979) 25 Cal.3d 522, 533--536; In re Emilio C. (2004) 116 Cal.App.4th 1058, 1067.) When the juvenile court elects to aggregate the maximum period of confinement based on multiple petitions, the predisposition credits attributable to those petitions must be aggregated as well. (In re Eric J., supra, 25 Cal.3d at pp. 533--536; In re Emilio C., supra, 116 Cal.App.4th at pp. 1067--1068.) This court can correct a legally unauthorized sentence or dispositional order whenever the error comes to our attention. (In re Ricky H. (1981) 30 Cal.3d 176, 191; People v. Serrato (1973) 9 Cal.3d 753, 763--765, disapproved on another point in People v. Fosselman (1983) 33 Cal.3d 572, 583, fn. 1.)

The record here shows that when the court stated the upper term was six years (that is, the upper term sentence for first degree burglary), D.K.'s counsel promptly reminded the court that it had struck the residential portion of the original burglary count, making the offense a second rather than first degree burglary. The court acknowledged this fact, stating that the upper term for the offense was thus three years. The court further noted the need to recalculate the MPPC. There is no support in the record for D.K.'s contention that the court used the wrong sentencing triad.

The People's argument that the court merely designated the burglary sentence as the principal term and treated the sentence for receiving stolen property as the subordinate term also finds no support in the record. Notably, the minute order states: "CT 1 FEL ADDS 16 MONTHS CT2 FEL ADDS 8 MONTHS, PREVIOUS CONFINEMENT TIME 5 YEARS = 7 YEARS." A fair reading of the record is that the court regarded the five-year MPPC on the 2006 Petition as the principal term, to which it added the 2008 Petition's subordinate terms. While we agree that the court plainly elected to aggregate the terms in the 2006 and 2008 Petitions, its calculation was nevertheless incorrect.

As noted, the principal term consists of the greatest term of confinement imposed for any of the crimes. (Pen. Code, § 1170.1, subd. (a).) Here, that term was four years on count 2 in the 2006 Petition, not the five-year MPPC. All of the remaining terms were "subordinate," to be calculated as one-third of the midterm. The court appears to have made the appropriate calculation on count 3 of the 2006 Petition, imposing a term of one year. The subordinate terms on the 2008 Petition, however, should have been reduced to one-third of the two year midterm sentence: eight months each. This would result in an MPPC of four years plus one year plus eight months plus eight months: six years four months. This calculation does not end the analysis, however, as discussed in the next section.

B. Penal Code Section 654

D.K. contends the trial court erred in failing to stay the term on count 2 (receiving stolen property), pursuant to Penal Code section 654, subdivision (a). He maintains his sole purpose was to take Frazier's personal property, and he cannot be subjected to multiple punishments for the same act. The People respond that a stay is improper because D.K. had two criminal intents: to commit a burglary by taking Frazier's personal property and to conceal or withhold the stolen property.

Penal Code section 654 provides that a defendant may not be punished more than once for the same act. This section applies when a single act results in violation of multiple criminal statutes or where the defendant violates multiple criminal statutes in pursuit of one criminal objective. (People v. Harrison (1989) 48 Cal.3d 321, 335.) Section 654 applies to aggregated terms calculated under Welfare and Institutions Code section 726, subdivision (c). (In re Michael B. (1980) 28 Cal.3d 548, 556, fn. 3 [following 1977 amendment to Section 726, "Penal Code section 654 does apply to juvenile court sentencing, since section 726 requires aggregate confinement in accordance with Penal Code section 1170, subdivision (a), which, in turn, specifies such consecutive sentencing is subject to Penal Code section 654"].)

Here, there was no evidence that D.K. entered Frazier's dark, uninhabited, and largely empty duplex to commit any offense other than theft of property. The offenses occurred in close temporal proximity. (People v. Evers (1992) 10 Cal.App.4th 588, 603, fn. 10 [temporal proximity is relevant, although not determinative, in ascertaining the offender's number of objectives].) Aside from the temporal proximity of the offenses, Balga's statement to the deputy that she saw D.K. holding a plastic bag as he stood at Frazier's open back door and the deputy's own observation that D.K. carried a plastic bag which he was trying to discard, together with the fact that the plastic bag contained the only items Frazier said were missing and the lack of any evidence indicating D.K. had multiple objectives, support the conclusion that D.K.'s intent in committing the burglary was to obtain the stolen property, one and the same objective. The crimes were merely incidental to, or were the means of accomplishing or facilitating one objective. (People v. Latimer (1993) 5 Cal.4th 1203, 1208.) Section 654 thus precludes double punishment. Our Supreme Court has similarly so concluded (albeit in the adult context) with respect to the two offenses involved here. (See People v. Allen (1999) 21 Cal.4th 846, 866--867 [finding section 654 applicable to the offenses of burglary and receiving the property stolen in the burglary]; see also People v. McFarland (1962) 58 Cal.2d 748, 762 [finding section 654 applicable to the offenses of burglary and grand theft where objective of burglary was to commit grand theft].)

The trial court erred in failing to stay execution of the term for receiving stolen property. The MPPC should thus be reduced by eight months to five years eight months.

C. Credit for Time Served

Our review of the documents regarding the 2006 Petition indicate that D.K. served time in a suitable open placement from approximately June 2006 until September 2007. From approximately September 2007 until December 2007, he served time in a camp community placement program. In December 2007, he was released into the custody of his cousin. It thus appears D.K. was physically confined for at least a portion of the then-five-year MPPC. There is no indication, though, that D.K. received credit for all of his time served. While neither side raised this issue, it is appropriate for us to correct a legally unauthorized sentence or dispositional order when it comes to our attention. (See In re Ricky H., supra, 30 Cal.3d at p. 191; People v. Serrato, supra, 9 Cal.3d at pp. 763-- 765.)

Welfare and Institutions Code section 726 provides that a juvenile's maximum term of confinement cannot exceed the maximum term of imprisonment that could be imposed upon an adult convicted of the offense or offenses. (Welf. & Instit. Code, § 726, subd.(c).) The California Supreme Court held in In re Eric J., supra, 25 Cal.3d at pp. 533--536, that where the juvenile court elects to aggregate the maximum confinement based on multiple petitions, the predisposition credits attributable to those petitions must be aggregated as well. (See also In re Emilio C., supra, 116 Cal.App.4th at pp. 1067--1068.) Here, the record reflects that the minor was confined for at least some portion of his MPPC under the 2006 Petition, but the record is incomplete. We therefore remand the matter to the juvenile court with instructions to calculate the predisposition credit D.K. earned while confined pursuant to the 2006 Petition and revise the minute order accordingly. (In re Emilio C., supra, 116 Cal.App.4th at p. 1068; In re Antwon R. (2001) 87 Cal.App.4th 348, 353.)

DISPOSITION

The matter is remanded to the juvenile court with directions to calculate the amount of precommitment custody credits on the record, set forth the maximum confinement terms based upon the current and prior sustained petitions on the record, and correct the minute order to reflect these calculations. The wardship order is affirmed in all other respects.

We concur: MALLANO, P. J., ROTHSCHILD, J.

1. The record, even as augmented, is incomplete. Notably, there are references to a suitable placement order made on February 27, 2006 and to a Welfare and Institutions Code section 777 petition filed on September 7, 2007, neither of which has been made part of the record before the court.

2. Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.