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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

In re JOEY V., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEY V.,

Defendant and Appellant.

F062051

(Super. Ct. No. 09CEJ601172-1V5)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. David A. Gottlieb, Judge.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

Joey V. is a ward of the juvenile court, having committed acts that would be crimes if committed by an adult. After a series of probation violations, he was removed from his parents' custody and placed at a juvenile detention center pending a foster care placement. He argues now that his case must be remanded to the juvenile court because the court, although notified that he possibly is an Indian child, did not comply with the inquiry and notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) and Welfare and Institutions Code section 224.3.<sup>1</sup> We agree and will reverse and remand.

### **FACTUAL AND PROCEDURAL HISTORY**

Joey V., now 16 years old, is a mentally ill child, having been diagnosed with schizophrenia, bipolar disorder, depression and ADD/ADHD. He has been prescribed antipsychotic and other medications. In September 2009, he had a dispute with his mother about attending a high school football game, leading to his mother calling the police and reporting that he had shoved her and pulled her by her shirt. The district attorney filed a juvenile wardship petition (§ 602, subd. (a)) and Joey admitted one count of misdemeanor battery (Pen. Code, § 242). He was placed under the supervision of the probation department and the Behavioral Health Court program and required to live with his grandmother.

In 2010 and 2011, the juvenile court sustained four separate supplemental petitions alleging that Joey violated conditions of his probation.<sup>2</sup> Each petition included allegations arising from conflicts he had with his mother or his stepfather. These resulted in two charges of misdemeanor battery (Pen. Code, § 242) and one charge of misdemeanor vandalism (Pen. Code, § 594, subd. (b)(2)). The vandalism charge, which

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<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code unless otherwise noted.

<sup>2</sup> An additional petition alleging probation violations was dismissed.

was in the final petition leading to the juvenile detention placement that gave rise to this appeal, was based on Joey's breaking of a glass bowl. Other probation violations alleged in the supplemental petitions included not complying with his parents' instructions, missing meetings with his probation officer, and refusing to attend therapy sessions.<sup>3</sup>

After sustaining the final supplemental petition, the juvenile court concluded that Joey should not remain at home. It set a maximum confinement period of six months, ordered Joey to be placed at the Juvenile Justice Campus, and directed the probation department to locate a suitable foster home or group home. A determination of whether Joey should be returned home or permanently placed elsewhere was to be made later.

The juvenile court received information on several occasions that Joey is or might be an Indian child. The probation department's memo submitted for the jurisdictional hearing on September 15, 2009, reported that Joey's stepfather said Joey's mother was a member of the Cahuilla tribe and had a roll number of 2504. For the same hearing, Joey's mother filed Judicial Council Form No. ICWA-020, the "Parental Notification of Indian Status" form. She checked boxes indicating that at least one of her parents was a member of a federally recognized tribe, and that she and Joey were or might be members of or eligible for membership in the Cahuilla tribe. Probation reports dated January 7, 2010, January 5, 2011, and January 20, 2011, and submitted to the court, all stated that Joey's mother had reported that she and Joey might have Native American ancestry. These statements were under the heading "INDIAN CHILD WELFARE ACT (I.C.W.A.) INFORMATION." There is nothing in the record indicating that the juvenile court or the probation department ever took any action to follow up on this information.

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<sup>3</sup> The petition that was dismissed also alleged that Joey used marijuana, skipped school, and failed to complete community service hours that had been imposed as a condition of probation.

## **DISCUSSION**

ICWA states that it does not apply to a case resulting in “a placement based upon an act which, if committed by an adult, would be deemed a crime.” (25 U.S.C. § 1903(1).) Welfare and Institutions Code section 224.3, subdivision (a), however, imposes a duty “to inquire whether a child ... is or may be an Indian child ... in *any* juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.” (Italics added.)

ICWA provides that “[i]n any State court proceeding for foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have the right to intervene at any point in the proceeding.” (25 U.S.C. § 1911(c).) To make intervention possible, “the party seeking the foster care placement ... or termination of parental rights ... shall notify the parent or Indian custodian and the Indian child’s tribe ... of the pending proceedings” if “the court knows or has reason to know that an Indian child is involved.” (25 U.S.C. § 1912(a).) The court has “an affirmative and continuing duty to inquire” whether the child “is or may be an Indian child.” (Welf. & Inst. Code, § 224.3, subd. (a).) “[R]eason to know” that an Indian child is involved can arise from “information *suggesting* the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s biological parents, grandparents, or great-grandparents are or were a member of a tribe.” (§ 224.3, subd. (b)(1), italics added.) If the court knows or has reason to know that an Indian child is involved, then “the social worker or probation officer is required to make further inquiry” by interviewing the parents, Indian custodian, and extended family members, contacting the Bureau of Indian Affairs and the State Department of Social Services to obtain tribal contact information, and contacting tribes. (§ 224.3, subd. (c).)

In a definitions section, ICWA creates an exception for juvenile delinquency proceedings in which the child is found to have committed an act that would be a crime if committed by an adult. The term “foster care placement” is defined to exclude “a

placement based upon an act which, if committed by an adult, would be deemed a crime ....” (25 U.S.C. § 1903(1).) California law, however, imposes inquiry and notice requirements more broadly. Welfare and Institutions Code section 224.3, subdivision (a) provides:

“The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 is to be, or has been, filed is or may be an Indian child in all dependency proceedings and in *any* juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care.” (Italics added.)

ICWA and the Welfare and Institutions Code agree that if state law provides a higher standard of protection than ICWA, then the higher standard controls:

“In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided by this title, the State or Federal court shall apply the State or Federal standard.” (25 U.S.C. § 1921.)

“In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child’s tribe, than the rights provided under the Indian Child Welfare Act, the court shall apply the higher standard.” (Welf. & Inst. Code, § 224, subd. (d).)

Joey argues that because he was at risk of entering foster care and the court received information that he might be an Indian child, the court had a duty to ensure that inquiries were made to determine whether he is a member of a tribe or eligible for membership and, if so, to ensure that the appropriate tribe was provided with notice of the proceedings. Because the record contains no indication that the court did these things, Joey argues that we must remand. There is no indication in the record that any objection was made below, but “the issue of ICWA notice is not waived by the parent’s failure to first raise it in the trial court.” (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 849.)

The People concede Joey was at risk of entering foster care, the court received information that he might be an Indian child, and the record contains no indication that the court ensured compliance with the inquiry and notice requirements. In their brief, the People request that the judgment be affirmed, but they concede, “[a]ssuming, arguendo, ICWA is applicable to delinquency proceedings ... the matter should be remanded” to the juvenile court with instructions to comply with ICWA. The People’s brief contains no arguments about why ICWA procedures might *not* be applicable.<sup>4</sup> Points that are not supported by analysis of the facts and citation to legal authority are deemed forfeited. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) Accordingly, we will reverse and remand for compliance with ICWA.

#### **DISPOSITION**

The judgment is reversed and the case is remanded to the juvenile court. The juvenile court is directed to ensure compliance with the requirements of ICWA as made

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<sup>4</sup> A case pending before the California Supreme Court presents the question of whether section 224.3, subdivision (a) is preempted by ICWA (25 U.S.C. § 1903(1)). (*In re W.B.* (2010) 182 Cal.App.4th 126, review granted May 12, 2010, S181638.) The grant of review in that case did not preclude the People from advancing the same arguments here. They are precluded only from citing the case as authority. However, the People did not assert those arguments here.

applicable to these proceedings by the Welfare and Institutions Code. Appellant's request for judicial notice filed October 21, 2011, is granted.

WE CONCUR:

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LEVY, J.

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WISEMAN, Acting P.J.

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GOMES, J.