

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KJ 2000

STATE OF LOUISIANA IN THE INTEREST OF J.C.

Judgment Rendered: JUL 15 2010

APPEALED FROM THE CITY COURT OF SLIDELL
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2009 JC 3603, JUVENILE DIVISION

THE HONORABLE JAMES "JIM" LAMZ, JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Handwritten notes:
RAP by [signature]
JEK by [signature]

McDONALD, J.

J.C., a child, was alleged to be delinquent by a petition filed on June 29, 2009, pursuant to the Louisiana Children's Code. The petition alleged that he committed seven counts of the felony-grade delinquent act of simple burglary, a violation of La. R.S. 14:62, and one count of the felony-grade delinquent act of theft of a firearm, a violation of La. R.S. 14:67.15. He pled true to the allegations and was adjudicated a delinquent child as alleged in the petition. At the disposition hearing, the juvenile court committed J.C. to the custody of the Department of Public Safety and Corrections, Division of Youth Services, Office of Juvenile Justice, for six years, with a recommendation for secure custody. The court ordered the first three years to be served without the benefit of parole, probation, or suspension. J.C. appeals the adjudications and disposition.

Finding some merit in the assigned errors, we affirm the juvenile court's adjudications, but modify the disposition and remand the case with instructions.

FACTS

Slidell law enforcement officers responded to a complaint that four juveniles were shooting a gun in the woods behind Fritchie Park. Upon contact, an officer performed a weapons search of J.C., during which he recovered a ring. The officer learned that the ring was stolen in a residential burglary and arrested all four juveniles. J.C. admitted to seven burglaries and to shooting a gun in the woods. The police subsequently found hidden in the woods a gun identified as stolen during one of the burglaries.

FACTUAL BASIS TO SUPPORT THE PLEA

In his first assignment of error, J.C. alleges that the juvenile court failed to ascertain that a factual basis existed for each accusation. He asserts that the record does not contain legally sufficient evidence to support his plea of true to seven counts of simple burglary and argues that an apparent error in the petition, wherein

it alleges three of the burglaries occurred on the same date and at the same residence, shows the pleas to be without sufficient factual basis.

La. Ch.C. art. 856A(3) provides that, after being advised of his rights, a child may admit the allegations of the petition. The court “shall further inquire to determine whether there is a factual basis for adjudication.” J.C. acknowledges that testimony from a prior evidentiary hearing may provide the factual basis to support a plea. See State v. Trahan, 98-1442, p. 7 (La. App. 4th Cir. 12/1/99), 752 So.2d 921, 926, rev’d on other grounds, 99-3470 (La. 10/5/01), 797 So.2d 38 (per curiam). He contends, however, that no such pre-plea proceedings exist in this case. We disagree.

On June 25, 2009, the juvenile court judge signed the affidavit finding probable cause to support J.C.’s arrest. That affidavit detailed how the officer came to arrest J.C. and the fact that J.C. gave a taped confession to seven residential burglaries. Four days later, the court held a hearing to determine whether probable cause existed to believe J.C. had committed the delinquent acts charged. At that time, J.C. stipulated to probable cause. J.C. entered his plea of true on July 29. All of these events occurred before the same court. We find that the record shows a sufficient factual basis to support J.C.’s adjudication.

This assignment of error is without merit.

ILLEGAL DISPOSITION

In his second assignment of error, J.C. contends that the juvenile court imposed an illegal disposition on him when it ordered a portion to be served without benefit of parole or suspension. J.C. admits that his commitment was an understandable decision, considering his guardians “abandon[ed] him to the system.” However, he argues that the court made the choice of “punishment,” *i.e.*, secure care, rather than “education, counseling and stability.” J.C. contends that the court’s restrictions against parole equate to locking him up with no future

opportunities.

After a child has been adjudicated a delinquent, the juvenile court may commit him to the custody of the Department in accordance with La. Ch.C. art. 901C when the following conditions exist:

1. There is an undue risk that during the period of a suspended commitment or probation the child will commit another crime.
2. The child is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment.
3. A lesser disposition will deprecate the seriousness of the child's delinquent act.
4. The delinquent act involved the illegal carrying, use, or possession of a firearm.

When such a disposition is made, Article 903C provides, in part:

The order of commitment may require the department to take physical custody of a child adjudicated a delinquent, committed to its custody pursuant to Article 897(D) [for a felony-grade delinquent act] or Article 899(D) [for a misdemeanor-grade delinquent act], and recommended by the court or the department for assignment to a secure program or facility, within fourteen days from the date of the court's signing of the judgment of disposition when the child is in or is going to be placed in the physical custody of a parish juvenile facility.

Thus, the court has the authority to recommend secure placement.

Article 898 governs the duration of a disposition based on a felony-grade adjudication:

A. No judgment of disposition shall remain in force for a period exceeding the maximum term of imprisonment for the felony forming the basis for the adjudication. The court shall give a child credit for time spent in secure detention prior to the imposition of disposition.

B. When modification and parole is not prohibited by Article 897.1, if an order of commitment to custody of the Department of Public Safety and Corrections is subsequently modified and the child is placed on parole, the maximum term of parole shall be the remainder of the sentence originally imposed.

Although this article provides maximum disposition limitations, Article 898 does not authorize the juvenile court to place limitations on a child's parole eligibility at

the time of the initial disposition. Such limitations are authorized and mandated only for the enumerated offenses set forth in Article 897.1. Furthermore, once a child has been committed to the custody of the Department, the Department has **sole** authority over the placement, care, treatment, or any other considerations deemed necessary. La. Ch.C. art. 908A.

In this case, the court ordered that:

the juvenile be placed in the care of the . . . Office of Juvenile Justice . . . for six years.

The first three years are to be without benefit of parole or probation.

Furthermore, for the first three years, the Court recommends secure care.

And the Court notes: This is a recommendation. If OJJ wants to place this young man in non-secure, they are free to do so as is consistent with their recommendation. But the Court is recommending secure . . . care for the reasons . . . stated.

Based on our interpretation of Article 898 *in pari materia* with Article 897.1, we find the juvenile court legally erred in ordering the first three years of custody to be served without benefit of parole. Accordingly, we amend the custody order to delete this restriction.

EXCESSIVE DISPOSITION

J.C. also contends that the disposition imposed is excessive. Article I, Section 20 of the Louisiana Constitution prohibits "cruel, excessive, or unusual punishment." Where excessive commitment is complained of in juvenile proceedings, the record must be reviewed to determine whether the court imposed the least restrictive disposition consistent with the circumstances of the case, the child's needs, and the best interest of society. La. Ch.C. art. 901B; **State in the Interest of J.W.**, 95-1131, pp. 3-4 (La. App. 1st Cir. 2/23/96), 669 So.2d 584, 586, writ denied, 96-0689 (La. 4/26/96), 672 So.2d 911. The court must state for the record the factual basis and the considerations taken into account in imposing the disposition. La. Ch.C. art. 903A(1).

The penalty for simple burglary is imprisonment with or without hard labor for up to twelve years. La. R.S. 14:62B. The penalty for first-offense theft of a firearm is imprisonment with or without hard labor for not less than two years nor more than ten years, without benefit of probation, parole, or suspension of sentence. La. R.S. 14:67.15C(1). In a juvenile disposition, the judgment may not remain in force for a period exceeding the maximum term of imprisonment for the felony forming the basis for the adjudication. La. Ch.C. art. 898A. The disposition in this case of six years does not exceed the maximum term of imprisonment for the felonies forming the basis for the adjudication of delinquency.¹

A predisposition report was prepared by the Office of Juvenile Justice, which was introduced at the disposition hearing. The report recommended that J.C. be placed in the custody of the Office of Juvenile Justice for a period not to exceed three years, with a recommendation for placement in a non-secure residential facility.

In stating the basis and considerations taken into account in imposing the disposition, the court emphasized J.C.'s prior delinquent history, including the fact that JC continued to commit violations of the law while on probation. The court found an undue risk that J.C. would commit another offense, that J.C. is in need of corrective treatment, and that a less restrictive disposition would deprecate the seriousness of the delinquent acts. The court further noted that J.C. is a danger to himself and others and that his welfare and that of the community could not adequately be safeguarded unless J.C. was placed in the care of the Office of Juvenile Justice.

The disposition imposed was not grossly disproportionate to the severity of

¹ Although the commitment order references six years for each of two separate offenses constituting delinquent acts, only one disposition was imposed, as evidenced by the transcript and the commitment order.

the offenses committed. The court carefully considered the circumstances of the case, the needs of the child, and the best interest of society. We do not find that the disposition imposed was excessive.²

This assignment of error is without merit.

ERRORS APPARENT FROM THE RECORD

In his next assignment of error, J.C. contends that the court erred in failing to provide a disposition for each individual count for which J.C. pled true and in failing to indicate credit for time served on the commitment order. J.C. also contends that the custody order fails to reflect that the judge's recommendation of secure care is merely a recommendation and not an order. Our review of the record, however, shows that the custody order does label the secure confinement notation as a "recommendation."

J.C. contends that La. C.Cr.P. arts. 871 and 879 demand a determinate sentence for each count in an adult criminal proceeding. Although no similar demands are found in the Children's Code, J.C. nevertheless argues that the same requirement is mandated for juvenile proceedings pursuant to Article 104, which states that, "[w]here procedures are not provided in this Code, or otherwise by law, the court shall proceed in accordance with . . . [t]he Code of Criminal Procedure in a delinquency proceeding and in a criminal trial of an adult." With respect to J.C.'s argument, the Third and Fifth circuits have so held. See State in the Interest of S.C.J., 2009-1272, p. 14 (La. App. 3d Cir. 2/3/10), 28 So.3d 1206, 1215, writ denied, 2010-0496 (La. 4/5/10), 31 So.3d 363. State in the Interest of J.G., 94-194, pp. 10-11 (La. App. 5th Cir. 7/26/94), 641 So.2d 633, 639. However, we decline to follow them. In so doing, we note the unique nature of juvenile

² As the court noted, the decision as to whether J.C. is actually placed in secure confinement rests completely with the Office of Juvenile Justice and is not reviewable in this appeal. See La. Ch.C. arts. 903C and 908A. Thus, although J.C. complains about his current security level, we do not address this issue.

proceedings. They are quasi-criminal, non-jury, ideally intimate, informal, protective proceedings, wherein the only factfinder is the juvenile court. See State ex rel. D.J., 2001-2149, pp. 4-6 (La. 5/14/02), 817 So.2d 26, 29-30. Because juvenile law is a hybrid of civil and criminal law, the juvenile court operates differently from the criminal court's procedure.

The primary aim of the juvenile court is to effectuate whatever action would be in the best interest of the child or children involved. In furtherance of this objective, the court is given greater leeway to accomplish its goals. See State v. Thomas, 579 So.2d 1086, 1087 (La. App. 4th Cir.), writ denied, 586 So.2d 535 (La. 1991). Separate sentences must be imposed for each conviction in an adult criminal proceeding in order for those convictions to be appealable. See La. C.Cr.P. art. 912C(1); State v. Chapman, 471 So.2d 716 (La. 1985) (per curiam). A child, however, may be adjudicated a delinquent based upon the commission of one or more offenses. Thus, it is appropriate for the court to declare a single adjudication and a single disposition based upon the commission of one or more offenses. The Children's Code requires the court to impose the least restrictive disposition authorized by Articles 809 through 900 "consistent with the circumstances of the case, the needs of the child, and the best interest of society." La. Ch.C. art. 901B. To that end, the court must exercise its discretion in determining the manner in which to adjudicate a child and the disposition appropriate. See La. Ch.C. art. 318.

Here, the transcript and minutes reflect that the court ordered J.C. into the custody of the Office of Juvenile Justice for six years. The minutes also include the notation, "Sentence to run concurrent." The custody order reflects J.C. was adjudicated delinquent for seven counts of simple burglary and for theft of a firearm. Although the custody order referenced the length of disposition as being

six years for each of the two offenses, only one disposition was actually imposed. The court did not err in ordering only one disposition.

We do, however, find merit in J.C.'s contention that the court failed to give him credit for time spent in secure custody. The transcript of the disposition hearing, the minutes, and the custody order all fail to reflect that J.C. is entitled to receive credit for time spent in secure detention prior to the imposition of disposition. J.C. asks that we order the juvenile court to amend the disposition to reflect credit for time served.

Article 898A provides, in pertinent part, that "[t]he court shall give a child credit for time spent in secure detention prior to the imposition of disposition." Under the Code of Criminal Procedure, the granting of credit for time served has long been self-operating. See La. C.Cr.P. art. 880; **State v. Roberts**, 98-1706, p. 12 (La. App. 1st Cir. 5/14/99), 739 So.2d 821, 829-30. Thus, it is no longer necessary for an appellate court to amend a defendant's sentence to reflect credit for time served. However, the self-operating language is absent from Article 898A. Thus, we amend the disposition to reflect credit for time served, remand this matter to the juvenile court, and order the court to give J.C. credit for time spent in secure detention prior to the imposition of disposition. The court shall also amend the court minutes and custody order to reflect that credit.

We find some merit in this assignment of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In addition to challenging counsel's effectiveness in the original brief, J.C. raises two additional assignments of error in a supplemental brief in which he contends that counsel failed to challenge an unlawful search, illegal arrest, and subsequent involuntary statement, failed to advise J.C. regarding his plea of true, failed to object to the illegality of the dispositions, and failed to ask for reconsideration of the dispositions.

At the outset, we note that J.C. did not, at the time of entering his plea of true, expressly reserve any issues to appeal, waiving all non-jurisdictional defects occurring prior thereto, and precluding review thereof either by appeal or by post-conviction remedy. **State v. Crosby**, 338 So.2d 584, 588 (La. 1976).

Furthermore, J.C. bases his allegations of ineffective assistance of counsel on the affidavit of the arresting officer provided to the court to establish probable cause for J.C.'s arrest. Without more, the record is insufficient to establish that the initial search, arrest, or taking of J.C.'s confession occurred in violation of the law. Further, while we did find that the parole restriction was illegal, the disposition was otherwise found to be not excessive. Lastly, we will not second guess counsel's decision in not asking for reconsideration of the disposition. The investigation of strategy decisions requires an evidentiary hearing and, therefore, cannot possibly be reviewed on appeal.

This assignment of error is without merit.

CONCLUSION

Having found some merit in the assignments of error, the adjudication of delinquency is affirmed and the disposition is modified to delete the restriction that the first three years of custody be served without benefit of parole and to reflect that J.C. receive credit for time served in secure detention prior to the imposition of disposition. Imposition of a new disposition is unnecessary. We simply remand this matter to the juvenile court with instructions to amend the custody order and minutes to reflect these modifications. The juvenile court shall forward a certified copy of these modifications to the Department.

ADJUDICATION OF DELINQUENCY AFFIRMED; DISPOSITION MODIFIED; CASE REMANDED WITH INSTRUCTIONS.