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OPINION	:	No. 81-1008
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THE HONORABLE ANTONIO AMADOR, DIRECTOR OF THE CALIFORNIA YOUTH AUTHORITY, has requested an opinion on the following questions:

1. May the Youth Authority use the description of the offense in a probation officer's report in determining whether the offense upon which the finding of wardship is based is an offense described in Welfare and Institutions Code section 707(b)?

2. Is every violation of Penal Code section 245 an offense described in Welfare and Institutions Code section 707(b)?

CONCLUSIONS

1. The Youth Authority may use the description of the offense in a probation officer's report only as it may be relevant in ascertaining whether the juvenile court made findings, expressed or implied, on the facts necessary to determine that the offense upon which the finding of wardship is based is an offense described in Welfare and Institutions Code section 707(b).

2. Every violation of Penal Code section 245 is an offense described in Welfare and Institutions Code section 707(b).

ANALYSIS

Welfare and Institutions Code section 602[1] provides:

> "Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Section 603 provides:

> "No court shall have jurisdiction to conduct a preliminary examination or to try the case of any person upon an accusatory pleading charging such person with the commission of a public offense or crime when such person was under the age of 18 years at the time of the alleged commission thereof unless the matter has first been submitted to the juvenile court by petition as provided in Article 7 (commencing with Section 650), and said juvenile court has made an order directing that such person be prosecuted under the general law."

Section 707 authorizes the juvenile court to make an order directing such a person be prosecuted under the general law when it finds after investigation and hearing that the person is not a fit and proper subject to be dealt with under the Juvenile Court Law.

In 1976, section 707 was amended to provide that for certain serious crimes committed by a minor over 16 years of age the minor was presumed not a fit and proper subject to be dealt with under the Juvenile Court Law unless the juvenile court made certain

[1] All unidentified section references are to the Welfare and Institutions Code.

findings regarding the minor's fitness. Section 707, as amended to date, is set forth in full in footnote 2.[2] The effect of the 1976 amendment was to reduce the age of adult

[2] Section 707 provides:

"(a) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

"(1) The degree of criminal sophistication exhibited by the minor.

"(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

"(3) The minor's previous delinquent history.

"(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

"(5) The circumstances and gravity of the offense alleged to have been committed by the minor.

"A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such hearing.

"(b) The provisions of subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses:

"(1) Murder;

"(2) Arson of an inhabited building;

"(3) Robbery while armed with a dangerous or deadly weapon;

"(4) Rape with force or violence or threat of great bodily harm;

"(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm;

"(6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code;

"(7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm;

"(8) Any offense specified in Section 289 of the Penal Code;

"(9) Kidnapping for ransom;

"(10) Kidnapping for purpose of robbery;

"(11) Kidnapping with bodily harm;

"(12) Assault with intent to murder or attempted murder;

"(13) Assault with a firearm or destructive device;

"(14) Assault by any means of force likely to produce great bodily injury;

"(15) Discharge of a firearm into an inhabited or occupied building;

"(16) Any offense described in Section 1203.09 of the Penal Code.

"(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

"(1) The degree of criminal sophistication exhibited by the minor.

"(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

"(3) The minor's previous delinquent history.

"(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

"(5) The circumstances and gravity of the offenses alleged to have been committed by the minor.

"A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at such hearing."

responsibility for the specified serious crimes unless the minor could demonstrate that he should be treated as a juvenile.

(*Sheila O.* v. *Sup. Ct.* (1981) 125 Cal.App.3d 812, 817.)

Even when the minor is retained in juvenile court a finding that he has committed one of the serious crimes listed in section 707(b) after he was 16 years of age has serious consequences if he is made a ward and committed to the California Youth Authority (CYA). Section 1769 provides:

> "(a) Every person committed to the authority by a juvenile court shall, except as provided in subdivision (b), be discharged upon the expiration of a two-year period of control or when the person reaches his 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800).
>
> "(b) Every person committed to the authority by a juvenile court who has been found to be a person described in Section 602 by reason of the violation, when such person was 16 years of age or older, of any of the offenses listed in subdivision (b) of Section 707, shall be discharged upon the expiration of a two-year period of control or when the person reaches his or her 23rd birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800)."

Thus the ward committed for a section 707(b) offense committed when he was over 16 is subject to two years more CYA control than when committed for other offenses.

A difficulty has arisen with some CYA commitments in determining whether the offense for which the ward was committed is a section 707(b) offense. This difficulty arises out of a variance between the way the offense is described in the commitment documents and the way offenses are described in section 707(b)[3] The petition for wardship and commitment order usually describe the offense committed by the ward in terms of violation of a specified code section, e.g., violation of Penal Code section 451(b) (arson).

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[3] While the California Rules of Court, title 4, require the juvenile court to make findings on the allegations of a petition (rule 1355(f)), the degree of the offense (rule 1355(f)), whether the offense would be a felony or misdemeanor if committed by an adult (rule 1373(a)), and the maximum period of confinement (rule 1373(b)), there is no rule that requires a specific finding as to whether a ward's offense is a section 707(b) offense.

Arson in violation of Penal Code section 451(b) may be committed by causing an inhabited structure or inhabited property to burn. (For the purposes of the arson statute the term "inhabited structure" includes buildings, commercial and public tents, bridges, tunnels and powerplants currently being used for dwelling purposes. (Pen. Code, § 450(a) & (d).) "Inhabited property" includes personal property other than a structure currently being used for dwelling purposes. (Pen. Code, § 450(c) & (d).)) Of course under section 707(b)(2) only a ward committed to CYA for arson of an inhabited *building* is subject to extended CYA control under section 1769(b). A petition for wardship based on a violation of Penal Code section 245(b) may but need not allege that the subject of the arson was an inhabited building. The commitment order may or may not refer to the type of property burned. Similar difficulty has arisen in determining whether other offenses for which wards are committed are those described in section 707(b).

We are asked how the determination whether the offense for which the ward is committed is a section 707(b) offense is to be made when this is not clear from the description of the offense in the commitment order. Of course such a determination must be made for the purpose of determining the duration of CYA control under section 1769.

The extended CYA control provided by section 1769(b) applies only to a "person committed to the authority by a juvenile court *who has been found* to be a person described in section 602 by reason of the violation, when such person was 16 years of age or older, of any of the offenses listed in subdivision (b) of section 707." The words "has been found" indicate the Legislature contemplated the finding would be made prior to the ward's commitment. We conclude that the finding requirement in section 1769(b) refers to a finding by the juvenile court before commitment of the ward and not to a finding by some other agency after commitment.

The only responsibility CYA has in determining whether a ward was committed for a section 707(b) offense is to ascertain whether the juvenile court made the finding contemplated by section 1769(b). If the court made such a finding the extended control provided by section 1769(b) applies. If no such finding was made the duration of CYA control over the ward is governed by section 1769(a).

The finding of the juvenile court on whether the ward is committed for a section 707(b) offense need not be expressed in the commitment but may be found elsewhere in the record of the case in the juvenile court. (See *In re Bausino* (1943) 22 Cal.2d 247, 251; *In re Bramble* (1947) 31 Cal.2d 43, 50; *People* v. *Burke* (1956) 47 Cal.2d 45, 52.) Thus if the determining fact (the type of property burned in our arson example) is alleged in the petition for wardship and the allegations of the petition are found true by the court such a finding would include the finding contemplated by section 1769(b) though the commitment order made no reference to it.

In re Dexter (1979) 25 Cal.3d 921 is a significant case demonstrating how the entire record of a case, including the probation report, may be used to ascertain findings of a court which do not appear in the judgment. Dexter was given an indeterminate sentence for first degree robbery after a plea bargain in which he pleaded guilty after other counts and allegations of the personal use of a firearm by a principal in the offense were stricken. Penal Code section 1170.2 provided for the retroactive application of the determinate sentence law to Dexter's case. The Community Release Board (CRB) was required to fix the term "utilizing the middle term of the offense . . . of which the prisoner was convicted increased by any enhancements justified by matters *found to be true* and which were imposed *by the court* at the time of sentencing." (Emphases added.) By resorting to the probation officer's report the CRB determined that one of the principals was armed with a pistol when the crime was committed and added a one year enhancement to Dexter's term. The Supreme Court reversed a lower court order to strike the enhancement from Dexter's term. The court noted that the abstract of judgment reflected a first degree robbery conviction[4], dismissal of all other counts, striking of use allegations and "no findings" on the standard weapons issues (p. 928). The court observed that striking the use allegation did not constitute a finding that no weapon was used in the crime (p. 929). The court acknowledged that there was no express finding that a principal in the crime was armed with a firearm but stated "nevertheless, petitioner was unquestionably found to have been armed" (p. 929). The transcript of the sentencing showed that the sentencing court had characterized the offense as "armed robbery." The probation officer's report stated that Dexter and another had robbed two golfers at gunpoint. No exception was taken to the recital in the probation report that the weapon used was a firearm. The Supreme Court held that this information in the record was a sufficient indication of a finding by the trial court that a principal in the crime was armed with a firearm to justify the enhancement. To counsel's argument that the CRB did not hold a hearing on the arming question the court simply noted that Penal Code section 1170.2(a) "requires a finding by the trial court to justify enhancement and thus provides an accurate factual determination of the underlying issue" (p. 930). Thus it is clear that the Supreme Court concluded that the record indicated the sentencing court made a finding (not express in explicit language but implied from the record in the sentencing court) that a principal in the crime was armed with a firearm.

It should be emphasized that the use of the probation report in *Dexter* which was approved by the Supreme Court was not simply to use the statement in the report that the robbery was "at gunpoint" as a finding, in and of itself, as to the type of weapon used. Rather it was the use of such statement coupled with the equally significant fact that no exception was taken to the statement as the context which explained the sentencing court's

[4] At the time Dexter was convicted, robbery was of the first degree only if perpetrated by torture or by a person armed with a dangerous or deadly weapon (not necessarily a firearm) or if the victim was the operator of a vehicle for hire. (Former Pen. Code, § 211a.)

finding that it was an "armed robbery" and indicated what type of weapon the judge contemplated when he used the word "armed." Any use made by a probation officer's report or other document in the juvenile court case record to determine whether a finding of wardship is based on an offense described in section 707(b) must similarly be confined to its relevance to whether the juvenile court made a finding (express or implied) which resolved the facts necessary to determine if the offense is one so described.

The second question presented is whether every violation of Penal Code section 245 is an offense described in section 707(b). Those portions of Penal Code section 245 defining offenses provide:

> "(a) Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison for two, three or four years, . . .
>
> "(b) Every person who commits an assault with a deadly weapon or instrument or by any means likely to produce great bodily injury upon the person of a peace officer or fireman, and who knows or reasonably should know that such victim is a peace officer or fireman engaged in the performance of his duties, when such peace officer or fireman is engaged in the performance of his duties shall be punished by imprisonment in the state prison for three, four, or five years."

First we note that subdivision (a) describes an offense which is necessarily included in the offense described in subdivision (b). Since peace officers and firemen are persons it follows that a violation of subdivision (b) must, of necessity, also constitute a violation of subdivision (a). (*People* v. *Baca* (1966) 247 Cal.App.2d 487, 495.) Thus if every violation of subdivision (a) is a section 707(b) offense, so is every violation of subdivision (b).

The offense defined by subdivision (a) of Penal Code section 245 was described in *People* v. *Perales* (1904) 141 Cal. 581, 583 as follows:

> "The term 'deadly weapon' has a precise, well-recognized meaning, and the nature of such weapon as being one likely to produce great bodily injury is well understood. It is expressly declared by the statute a specific means, the use of which in making an assault shall constitute an offense, and, therefore, under the general rule, an assault with it may be pleaded in the language of the statute. The term, however, 'or by any means of force' likely to produce great bodily injury, immediately following in the section, is a

> general and comprehensive term designed to embrace many and various means or forces, which, aside from a deadly weapon or instrument, may be used in making an assault. What these means or forces may be, other than that they must be such as are likely to produce great bodily injury, the statute does not declare or define. As an example of such means it specifies a deadly weapon; as to any other means its language is general and indefinite."

(See also *People* v. *Hinshaw* (1924) 194 Cal. 1, 17.) Thus the words "assault on the person of another . . . by any means of force likely to produce great bodily injury" describes every offense embraced by the section though, as the court in *Perales* points out, not with sufficient particularity to meet pleading requirements. A "deadly weapon" is one likely to produce death or great bodily injury. (*People* v. *Morlock* (1956) 46 Cal.2d 141, 145.) The words "with a deadly weapon or instrument "in subdivision (a) simply describe one of the many possible "means of force likely to produce great bodily injury."

We conclude that the words "Assault by any means of force likely to produce great bodily injury" set forth in section 707(b)(14) include every violation of Penal Code section 245.

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