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Juvenile Law - Jury Recommendation under Penal Code Section 264 Does Not Preclude Trial Court from Committing Defendant to the Youth Authority Recent Cases

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RECENT CASE

JUVENILE LAW—JURY RECOMMENDATION UNDER PENAL CODE SECTION 264 DOES NOT PRECLUDE TRIAL COURT FROM COMMITTING DEFENDANT TO THE YOUTH AUTHORITY—*People v. Mackey*, 46 Cal. App. 3d 755, 120 Cal. Rptr. 157 (1975).

David Earl Mackey was accused of committing unlawful sexual intercourse with a female under the age of eighteen in violation of Penal Code section 261.5.[1] At the time of the offense, the defendant was 17 years of age, and the prosecuting witness was 14 years of age. Penal Code section 264[2] provides in part:

> Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison . . . .[3]

The jury found the defendant guilty and recommended that he be punished by confinement in the county jail.[4] The superior court disregarded the jury's recommendation and, applying Welfare and Institutions Code section 1731.5,[5] committed the defendant to the Youth Authority.

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1. CAL. PEN. CODE § 261.5 (West Supp. 1975) provides:
Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

2. CAL. PEN. CODE § 264 (West Supp. 1975).

3. *Id.* § 264.

4. People v. Mackey, 46 Cal. App. 3d 755, 757, 120 Cal. Rptr. 157, 158 (1975).

5. CAL. WELF. & INST. CODE § 1731.5 (West 1972) provides in relevant part:

> [A] court may commit to the authority any person convicted of a public offense who comes within subdivision (a), (b), and (c), or subdivisions (a), (b), and (d) below;
> (a) Is found to be less than 21 years of age at the time of apprehension.
> (b) Is not sentenced to death, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.
> (c) Is not granted probation.
> (d) Was granted probation and probation is revoked and terminated.

On appeal from the order, the defendant contended that in committing him to the Youth Authority rather than following the jury's recommendation, the trial court exceeded its jurisdiction. The California Court of Appeal affirmed the trial court's order.[6]

Unlawful sexual intercourse is an alternative sentence offense: Penal Code section 264 provides for a jury recommendation of incarceration either in state prison or in the county jail.[7] In determining whether the trial court is bound by the jury's recommendation, the *Mackey* court discussed and ultimately distinguished a line of cases which held that a trial court is without jurisdiction to impose a prison sentence when the jury recommends confinement in the county jail.

In *People v. Rombaud*,[8] the court of appeal vacated defendant's prison sentence and held that the trial court was required to sentence the defendant to jail, in accord with the jury verdict. A similar case, *In re Ferguson*,[9] held that

> the recommendation of the jury that the defendant shall be punished by imprisonment in the county jail is binding upon the court, and it may not, in disregard thereof, impose a sentence of imprisonment in the state prison.[10]

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6. The defendant also claimed a denial of equal protection of the law, in that the statute under which he was convicted makes an unconstitutional classification of minor females to the exclusion of minor males. Section 261.5 prohibits sexual intercourse with a female under the age of 18; the statute does not bar sexual activity with a minor male. CAL. PEN. CODE § 261.5 (West Supp. 1975). The court dismissed this argument very briefly, apparently finding no violation of either the United States or the California Constitution. The United States Supreme Court, in Reed v. Reed, 404 U.S. 71 (1971), held that legislative classifications by sex are not violative of equal protection guarantees, so long as the classification is related to the objective of the statute and is not arbitrary:

> [T]his court has consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. [It] does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ."

404 U.S. at 75-76 (citations omitted).

The California Supreme Court has held that sex is a suspect class for purposes of the equal protection clause of the California Constitution. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). However, the court apparently had no difficulty determining the existence of a compelling state interest in section 261.5.

7. CAL. PEN. CODE § 264 (West Supp. 1975) prescribes the punishment for violation of section 261.5:

> Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years, and in such case the jury shall recommend by their verdict whether punishment shall be by imprisonment in the county jail or in the state prison.

8. 78 Cal. App. 685, 248 P. 954 (1926).

9. 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965).

10. *Id.* at 81, 43 Cal. Rptr. at 327.

Again, in *People v. Brown*,[11] the trial court imposed a sentence of imprisonment in the state prison, notwithstanding the jury's recommendation of confinement in the county jail. The Attorney General conceded that "the sentence was erroneous under a long-standing rule that when the jury recommends county jail, the trial court may not impose a state prison sentence."[12]

Another case, *People v. Pantages*,[13] presented a slightly different situation. The trial judge failed to instruct the jury to make the sentencing recommendation as required by section 264.[14] The California Supreme Court considered whether the recommendation is in fact a part of the verdict of the jury and as such is binding upon the trial court. It concluded that the recommendation by the jury as to the place where the defendant shall be imprisoned "is an essential, inseparable part of the verdict and as such is conclusive and binding upon the trial court as far as pronouncement by it of the ensuing judgment is concerned,"[15] and remanded the case for a new trial.

The gist of these cases is simply stated in *Brown*: "When the jury recommends county jail, the trial court may not impose a state prison sentence."[16] The rationale appears to be that when a statute provides for alternative punishments, as does section 264, the recommendation by the jury as to the place and length of confinement is a statement of its opinion as to the seriousness of the offense, and must be recognized as such by the court in sentencing the defendant.[17]

The *Mackey* court conceded that the *Rombaud* line of cases clearly establishes that a court may not treat a defendant with more severity than the jury recommends; it concluded, however, that the trial court, in its discretion "*may* treat a defendant with more *leniency* than the jury recommends."[18] The jury's recommendation of confinement in a county jail "fixed" Mackey's offense as a misdemeanor.[19] In addition, Penal Code section 17(b)(2) provides that where an offense is alternatively punishable as

11. 35 Cal. App. 3d 317, 110 Cal. Rptr. 854 (1973).
12. *Id.* at 328, 110 Cal. Rptr. at 861.
13. 212 Cal. 237, 297 P. 890 (1931).
14. CAL. PEN. CODE § 264 (West Supp. 1975). *See* note 7 *supra*.
15. 212 Cal. at 270, 297 P. at 904.
16. People v. Brown, 35 Cal. App. 3d 317, 328, 110 Cal. Rptr. 854, 861 (1973).
17. People v. Pantages, 212 Cal. 237, 297 P. 890 (1931); People v. Brown, 35 Cal. App. 3d 317, 110 Cal. Rptr. 854 (1973); *In re* Ferguson, 233 Cal. App. 2d 79, 43 Cal. Rptr. 325 (1965); People v. Rombaud, 78 Cal. App. 685, 248 P. 954 (1926).
18. People v. Mackey, 46 Cal. App. 3d 755, 758, 120 Cal. Rptr. 157, 158 (1975) (emphasis added).
19. *Id.* at 759, 120 Cal. Rptr. at 159.

a felony or a misdemeanor, commitment of the offender to the California Youth Authority shall be considered misdemeanor disposition.[20] Thus the judge and jury concurred in their evaluation of the seriousness of the offense. The appellate court reasoned that since the judge may properly "recommend the placing of a defendant in an honor camp rather than in the county jail,"[21] the trial court did not exceed its jurisdiction in committing Mackey to the Youth Authority.[22]

In deciding this issue the court of appeal considered the interrelationship of Penal Code sections 261.5 and 264, and the commitment power granted in the Youth Authority Act.[23] Defendant Mackey contended that once the jury had made its recommendation, the court was without discretion as to the sentence. Therefore, Mackey reasoned, section 264, by providing for a binding jury recommendation, created an exception to the general power of juvenile commitment given the court by the Youth Authority Act. The court rejected this argument, concluding that the effect of the jury recommendation was merely to fix the degree of the crime as a misdemeanor, precluding a state prison sentence. It neither fixed the length of the sentence nor prevented the court from exercising its discretion as to the appropriate misdemeanor disposition. The critical point is that the crime of unlawful sexual intercourse is punishable under section 264 either as a felony or a misdemeanor; the court of appeal determined that it is irrelevant whether the judge or the jury makes that determination. Once the degree of the crime is fixed, the court may commit to the Youth Authority any defendant who qualifies under Welfare and Institutions Code section 1731.5.[24]

In distinguishing the *Rombaud* line of cases from the instant case, the court clearly viewed commitment to the Youth Authority as a more lenient sentence than the alternative of confinement in a county jail for not more than one year.[25] It saw the Youth

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20. CAL. PEN. CODE § 17(b)(2) (West 1970). *See also* 4 OP. ATT'Y GEN. 25 (1944):

> [A] commitment to the Youth Authority is a judgment imposing a penalty other than imprisonment in the state prison. In our opinion the conviction is therefore to be considered as a misdemeanor.

21. 46 Cal. App. 3d at 758, 120 Cal. Rptr. at 158.

22. *Id.* at 759, 120 Cal. Rptr. at 159.

23. CAL. WELF. & INST. CODE § 1700 *et seq.* (West 1972). The commitment provisions are set forth in note 5 *supra.*

24. *See* note 5 *supra.*

25. 46 Cal. App. 3d at 758, 120 Cal. Rptr. at 158. The court stated:

> [W]e reject the concept that the judge may not recommend the placing of a defendant in an honor camp rather than in the county jail.
>
> Although the court may treat a defendant with more leniency than the jury recommends, the court may not treat a defendant with more severity than the jury recommends.

Authority as the equivalent of an "honor camp,"[26] stating that "while the period of time to be spent under the jurisdiction of the Authority might be longer than a year, a much earlier parole is also a possibility."[27] The court of appeals' strong reliance on this leniency argument may be illusory; a juvenile committed to the Youth Authority may actually receive harsher treatment than the *Mackey* jury recommended. Had the trial court followed the jury's recommendation, Mackey would have been confined in the county jail for not more than one year.[28] Under Welfare and Institutions Code section 1765(a), the Youth Authority may

> keep under continued study a person in its control and shall retain him . . . under supervision and control *so long as in its judgment such control is necessary* for the protection of the public.[29]

Section 1770 provides for the discharge of a person convicted of a misdemeanor "upon the expiration of a *two-year* period of control or when the person reaches his *23rd birthday*, whichever occurs *later*."[30] While it is true that Mackey could have received an almost immediate discharge, it is conceivable that he could have been confined for as long as six years by the Youth Authority. In addition, the place of confinement is left to the discretion of the Youth Authority. In *People v. Zaccaria*,[31] it was found that

> under the Youth Authority Act, and under Section 1766 of the Welfare and Institutions Code, the commitment vests in the Authority a power over the person committed so broad that it ranges from permission of liberty under supervision to confinement in the state prison. There may be such confinement even though the offense is a misdemeanor, which would not have been punishable, in the court's discretion by imprisonment in the state prison.[32]

Clearly, commitment to the Youth Authority will not always result in the placing of the defendant in an "honor camp." The court of appeal may have left its decision open to a future challenge on the grounds that commitment to the Youth Authority could be, in actual effect, a harsher sentence than that recommended by the jury, and thus in conflict with the settled principle that "a court may not treat a defendant with more severity than

26. *Id.* at 758, 120 Cal. Rptr. at 158 (1975).
27. *Id.* at 759, 120 Cal. Rptr. at 159.
28. CAL. PEN. CODE § 264 (West Supp. 1975). *See* note 7 *supra*.
29. CAL. WELF. & INST. CODE § 1765(a) (West 1972) (emphasis added).
30. *Id.* § 1770 (emphasis added).
31. 216 Cal. App. 2d 787, 31 Cal. Rptr. 383 (1963).
32. *Id.* at 790, 31 Cal. Rptr. at 385.

the jury recommends."[33]

The court also based its decision on legislative intent and purpose, which is perhaps a stronger argument for affirmation of the trial court's commitment. Section 1700 states that the purpose of the Youth Authority Act is to

> protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. To this end it is the intent of the Legislature that the chapter be liberally interpreted in conformity with its declared purpose.[34]

Several courts have held that in every criminal case involving juveniles eligible for Youth Authority commitment, the court should, on its own motion if necessary, consider whether the defendant could benefit from referral to the Youth Authority.[35] In view of the legislative intent, these decisions indicate not only that a trial judge is within his jurisdiction in making a commitment to the Youth Authority, but that it would be an abuse of discretion not to consider the Youth Authority as an alternative to a jail term.

It was held in *Wetteland v. Superior Court* that the power of the court to commit a defendant to the Youth Authority "can only be exercised at the time of the judgment of conviction and imposition of the sentence."[36] Under Penal Code section 264, the jury can recommend imprisonment either in the county jail or state prison, while only the court has the option to comit a defendant to the Youth Authority.[37] It is highly unlikely that by providing for a jury recommendation but withholding from the jury the power to recommend Youth Authority commitment, the legislature meant completely to exclude minors guilty of this crime from consideration for commitment to the Youth Authority.

The proper sequence of conviction, sentencing and commitment is detailed by the California Supreme Court in *Ex parte Ralph*:[38]

> [A] proper interpretation of the pertinent statutory provisions contemplates that sentence be pronounced prior to tentative commitment of a defendant to the Youth Authority; that should the defendant be rejected by the Youth Authority such

33. People v. Mackey, 46 Cal. App. 3d 755, 758, 120 Cal. Rptr. 157, 158 (1975).
34. CAL. WELF. & INST. CODE § 1700 (West 1972) (Youth Authority Act).
35. *See, e.g.*, People v. Moran, 1 Cal. 3d 755, 463 P.2d 763, 83 Cal. Rptr. 411 (1970); People v. Sparks, 262 Cal. App. 2d 597, 68 Cal. Rptr. 909 (1968).
36. 251 Cal. App. 2d 607, 610, 59 Cal. Rptr. 605, 606 (1967).
37. *See* note 5 *supra*.
38. 27 Cal. 2d 866, 168 P.2d 1 (1946).

> sentence be executed as originally pronounced, and that pronouncement of a new sentence is unnecessary.[39]

Applying this to *Mackey*, the trial judge was within his jurisdiction in committing the defendant to the Youth Authority. If Mackey is rejected by the Authority, then it appears likely that the jury's recommendation of confinement in county jail would take effect. The intent of the legislature will have been satisfied by the court's consideration and referral to the Youth Authority.

Unfortunately, Mackey's problem remains unsolved. It is clear from the Youth Authority Act that the legislature views commitment to the Authority as a privilege, available only to eligible persons. The Act offers no option to a defendant who would prefer confinement in the county jail, as Mackey obviously would. It appears, however, that so long as a judge exercises his discretion within the limits set forth in *Mackey*—that is, the punishment imposed is consistent with the jury's recommendation of misdemeanor treatment—a defendant has no basis for complaint.

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39. *Id.* at 871, 168 P.2d at 4.