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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN G. MEDINA,

Defendant and Appellant.

A134376

(Sonoma County
Super. Ct. No. SCR-601414)

Appellant John G. Medina appeals from an order granting probation following a no contest plea to felony stalking and misdemeanor making criminal threats. (Pen. Code, §§ 646.9, subd. (a), 422.) Medina argues that the gang-related conditions of his probation are unconstitutionally vague and overbroad. Specifically, he maintains that the conditions are defective for two reasons: (1) the prohibited conduct is not qualified by his explicit personal knowledge; and (2) there is no definition of the term “gang.” Absent these two elements, established case law requires us to conclude that the conditions fail to give Medina advance notice of behavior that would violate his probation. We thus remand this case with instructions to modify the conditions of probation, and as modified, affirm.

I. BACKGROUND

On April 15, 2011, a police officer responded to a call regarding a possible domestic incident at the home of Medina’s ex-wife. When the officer arrived, Medina’s ex-wife stated that she and Medina had engaged in a verbal argument, culminating when

Medina slapped her across the face. The victim also informed the officer that Medina had been following her for several days and threatened to kill her. According to the victim's statements, police records, and his own admissions after his arrest, Medina has a history of gang association.

Medina entered his no contest plea to stalking and making criminal threats. A misdemeanor charge of domestic battery was dismissed with a *Harvey* waiver.¹ The trial court suspended imposition of sentence and placed Medina on formal probation for three years. Among other probation conditions, the judge instructed Medina “not to associate with known street gang members, nor wear, display street gang colors, nor possess any gang paraphernalia, and not frequent places known as locations where street gang members congregate.” Medina asserts the conditions must be modified to contain an express scienter requirement and a statutory definition of the term “gang” to render them constitutional.

II. DISCUSSION

Medina contends his gang-related conditions of probation are unconstitutionally vague and overbroad because they lack (1) an express personal knowledge element and (2) a definition of the term “gang.” To survive a vagueness challenge, a condition of probation “ ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.’ ” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Closely related is the rule that to survive an overbreadth challenge, a condition that limits a probationer's constitutional rights “must closely tailor those limitations to the purpose of the condition.” (*Ibid.*)

A. *Personal Knowledge Requirement*

Medina's probation conditions proscribing association, possession, and presence are very similar to those that have consistently been held unconstitutionally vague or overbroad without an express requirement that is premised on the probationer's personal

¹ *People v. Harvey* (1979) 25 Cal.3d 754, 758.

knowledge. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 892 [knowing association “with anyone ‘known to be disapproved of’ ” by probation]; *People v. Moses* (2011) 199 Cal.App.4th 374, 377 [knowing possession of sexually explicit material, association with minors, and presence in places frequented by minors]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 622, 628–629 (*Lopez*) [knowing association with gang members and displays of gang insignia].) These courts have reasoned that an express knowledge element is necessary to provide the probationer with advance notice that certain conduct will violate probation, and thus prevent the invalidity of a condition for vagueness or overbreadth. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 913. (*Victor L.*.)

Moreover, courts have also held that conditions merely including the word “known,” such as the condition in this case, are still unconstitutionally vague because the term does not specify that the probationer must actually possess the knowledge of prohibited activity or associations. (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070–1072 [modified condition including “known” to “known to you”]; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 245, 247–248 (*Vincent G.*) [modified condition including “known” to “whom you know, or whom the probation officer informs you”].) The passive use of the word “known” raises the possibility that Medina could unintentionally violate his probation in a situation where, for instance, law enforcement knows that a person Medina associates with is a gang member but Medina does not. This is precisely the situation the doctrine of vagueness aims to prevent. Although both the word “known” and the factual context may *imply* a probationer is aware of proscribed conduct, “the rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this factor should not be left to implication.” (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

Established case law requires us to hold that without an express personal knowledge requirement the conditions fail to provide Medina with advance notice of

whom and what he must avoid in order to comply with his probation. Accordingly, the conditions must be modified to include this element.

B. “Gang” Definition

Cases are less clear regarding whether the undefined term “gang” used in a condition of probation contains similarly fatal vagueness and overbreadth. In *Victor L.*, the condition at issue contained a reference to Penal Code section 186.22, and the court expressed that “[t]his definition need not be included in every gang condition for its meaning to be clear.” (*Victor L.*, *supra*, 182 Cal.App.4th at p. 914.) Likewise, the court in *In re Justin S.* in dictum suggested modification to define “gang” would be unnecessary. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 816, fn. 3 [noting that “[t]he definition is . . . fairly implied in the condition”].)

Conversely, in *Lopez* the court determined that the word is, “on its face, uncertain in meaning” because it has both “sinister” and “benign connotations.” (*Lopez*, *supra*, 66 Cal.App.4th at p. 631.) The court acknowledged that when “gang” is considered in the context of a probation condition, “it is apparent the word was intended to apply only to associations which have for their purpose the commission of crimes.” (*Id.* at pp. 631–632.) Yet, because the definition stated in Penal Code section 186.22 has withstood constitutional scrutiny for ensuring that the term only refers to the intended criminal groups, the court held that the condition should be modified to include the statutory definition. (*Id.* at p. 634.)

Because including a more precise definition of the word “gang” in the condition better assures that Medina will be “unambiguously notified of the standard of conduct required of him,” (*Lopez*, *supra*, 66 Cal.App.4th at p. 634) we conclude the condition should also be modified to incorporate the definition contained in Penal Code section 186.22, subdivisions (e) and (f).

III. DISPOSITION

The case is remanded with instructions to modify the gang-related conditions of probation to read: “You are not to associate with any person whom you know, or whom the probation officer informs you, is a gang member. For purposes of these conditions, the word ‘gang’ means a ‘criminal street gang’ as defined in Penal Code section 186.22, subdivisions (e) and (f). You are not to possess, wear, or display any jewelry, clothing, or other paraphernalia that you know, or that the probation officer informs you, is evidence of affiliation with or membership in a criminal street gang. You are not to visit or remain in any specific location which you know to be, or which the probation officer informs you, is an area of gang-related activity.” As modified, the order is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.