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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JACQUELINE MARIE BURROW,

Defendant and Appellant.

A136222

**(Humboldt County
Super. Ct. No. CR1104776A)**

Jacqueline Marie Burrow appeals from an order placing her on felony probation following her guilty plea to second degree burglary. (Pen. Code, § 459.) She argues that some of the probation conditions imposed by the court must be modified because they do not include an express scienter, or knowledge, requirement. The People agree that the challenged conditions are defective, but suggest that we follow the approach of *People v. Patel* (2011) 196 Cal.App.4th 956, 960 (*Patel*) and deem those conditions to include the missing knowledge requirement, thus obviating the need for modification. We decline to do so and instead order the conditions modified.

BACKGROUND

On November 9, 2011, appellant and her stepsister Clara Woods entered a Target store and placed a number of small appliances in a shopping cart, sifting through receipts as they did so. They walked to the customer service desk, where Woods presented a receipt and exchanged the items for \$104.94 in cash. When confronted, Woods initially attempted to leave the store, but then spoke to a loss prevention officer and admitted that she and appellant had discussed entering the store to steal some merchandise. The

following day, Target loss prevention officers provided the police with reports and surveillance DVDs of fraudulent merchandise returns in which appellant and Woods were suspects.

Appellant was charged by information with second degree burglary and petty theft based on the November 9, 2011 incident. (Pen. Code, §§ 459, 488.) She agreed to plead guilty to the burglary charge in exchange for a dismissal of the theft count and a grant of probation. The court accepted the plea and placed appellant on felony probation, subject to a number of conditions that included the following:

“9. Defendant shall not own, possess, have in her vehicle or residence, any firearm, any ammunition that can be used in a firearm, or any other deadly weapon, whether owned by defendant or not.

“10. Defendant shall not own, possess, have in her vehicle or residence any instrument or device which a reasonable person would believe to be capable of being used as a firearm.

“11. Defendant shall not own, possess, or have in her vehicle any knife with a blade longer than 2 inches, except kitchen knives which must be kept in her residence and knives relating to her employment.

.....

“13. Defendant shall totally abstain from the use of alcoholic beverages and shall not have in her possession or under her custody or control any alcoholic beverage.

.....

“15. Defendant shall not enter places where alcohol is the chief item of sale.

“16. Defendant shall not use, have in her possession or under her custody or control any non-prescribed controlled substance.

“17. Defendant shall not traffic in controlled substances nor associate with any person using or trafficking in controlled substances.”

DISCUSSION

Appellant argues that the probation conditions set forth above are constitutionally vague and overbroad because they do not provide her with fair warning of what would

constitute a violation. She notes that the conditions prohibit certain conduct, but do not require her to act *knowingly*. The People agree that omission of a knowledge requirement renders the conditions defective, although they disagree on the appropriate remedy.¹

A probation condition that forbids certain conduct, but that lacks a knowledge requirement, is impermissibly vague and overbroad. (See, e.g., *Patel, supra*, 196 Cal.App.4th 960; *In re Victor L.* (2010) 182 Cal.App.4th 902, 911-912; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) When a probation condition is defective in this respect, the customary remedy on appeal is modification of the condition to include the missing knowledge requirement. (See e.g., *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752.)

The People argue that modification is unnecessary and urge us to follow the procedure adopted by our colleagues in the Court of Appeal, Third District in *Patel, supra*, 196 Cal.App.4th 956. There, after conducting an independent review of the appellate record under *People v. Wende* (1979) 25 Cal.3d 436, the court concluded that a probation condition prohibiting the defendant from drinking alcohol, possessing it, or being in a place where it was the chief item of sale was invalid because the condition lacked a knowledge requirement. (*Patel*, at p. 959.) The court ordered the condition modified to provide that the defendant “shall abstain from the consumption of any alcoholic beverage *knowingly* in any amount whatsoever, and shall not *knowingly* possess alcohol, nor be in places where he knows alcohol is the chief item of sale.” (*Id.* at p. 961, italics added.) But it expressed its frustration with routine appellate challenges to probation conditions lacking a knowledge requirement, and implemented a new procedure for addressing such defects: “Since at least 1993, appellate courts have issued opinions consistently holding that conditions of probation must include scienter requirements to prevent the conditions from being overbroad. [Citations.] However,

¹ Although appellant did not object on this ground in the trial court, her argument may be addressed on appeal because it involves a pure question of law that can be resolved without regard to the sentencing record in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 884 (*Sheena K.*)) The People do not contend otherwise.

with dismaying regularity, we still must revisit the issue in orders of probation, either at the request of counsel or on our own initiative. The latter in particular is a drain on the public fisc that could be avoided if the probation departments at fault would take greater care in drafting proposed probation orders. [¶] [W]e . . . now give notice of our intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. We construe every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement.” (*Id.* at p. 960.)

While we, too, are frustrated by the frequency of appeals challenging probation conditions that lack a knowledge requirement, we respectfully decline to adopt the procedure set forth in *Patel*. Unlike the Third District of the Court of Appeal, the First District operates in five discrete, differentiated divisions, and we do not presume to speak for our colleagues who are not involved in the disposition of this case. Moreover, we can anticipate many situations in which the probation condition at issue will require a case-specific modification to provide the defendant with adequate notice. (See *People v. Moore* (2012) 211 Cal.App.4th 1179, 1188, fn. 7 [choosing to modify probation conditions on a case-by-case basis rather than adopting *Patel* approach]; *People v. Moses* (2011) 199 Cal.App.4th 374, 380–381.) We will therefore modify the terms of probation challenged by appellant.

DISPOSITION

Probation Conditions 9, 10, 11, 13, 15, 16, and 17 are modified to read as follows (with modifications highlighted in bold typeface):

“9. Defendant shall not **knowingly** own, possess, have in her vehicle or residence, any firearm, any ammunition that can be used in a firearm, or any other deadly weapon, whether owned by defendant or not.”

“10. Defendant shall not **knowingly** own, possess, have in her vehicle or residence any instrument or device which a reasonable person would believe to be capable of being used as a firearm.”

“11. Defendant shall not **knowingly** own, possess, or have in her vehicle any knife with a blade longer than 2 inches, except kitchen knives which must be kept in her residence and knives relating to her employment.”

“13. Defendant shall totally abstain from the **knowing** use of alcoholic beverages and shall not **knowingly** have in her possession or under her custody or control any alcoholic beverage.”

“15. Defendant shall not enter places where **she knows** alcohol is the chief item of sale.”

“16. Defendant shall not **knowingly** use, have in her possession or under her custody or control any non-prescribed controlled substance.”

“17. Defendant shall not **knowingly** traffic in controlled substances nor associate with any person **she knows is** using or trafficking in controlled substances.”

As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

SIMONS, J.