

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re R. A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

R. A.,

Defendant and Appellant.

A136658

(Napa County
Super. Ct. No. JV15470)

Minor R. A. appeals from a juvenile court finding that he violated terms of his probation. He argues that his probation officer impermissibly imposed a condition of probation that was not ordered by the juvenile court. He also says his due process rights were violated when the court permitted the People to amend the charging petition according to proof, that a prohibition that he not use sexually arousing material could not support a violation because it was unconstitutionally vague, and that statements he made to a polygraph examiner were used against him in violation of his Fifth Amendment privilege against self-incrimination. He also argues that a new condition of probation imposed following the court's adjudication that he violated probation is unconstitutionally overbroad.

We conclude that the evidence obtained from the polygraph examiner that R.A. said he viewed pornography over the internet supports the juvenile court's decision that

he violated the terms of his probation. We also conclude that the prohibition against R.A.'s contact with minors under the age of 18 is not overbroad. We modify the condition of probation restraining R.A. from viewing sexually arousing material to those materials he knows are intended to be sexually arousing. As modified, we affirm the dispositional order.

BACKGROUND

In March 2008, R.A. admitted a single count contained in a juvenile petition charging that he violated Penal Code section 288, subdivision (a), by engaging in lewd and lascivious conduct with a child under the age of 14. Two other counts were dismissed. R.A. was then 15 years old. His victim was three.

The court sentenced R.A. to juvenile hall for 30 days and placed him on probation. Among the court ordered conditions of probation, R.A. was ordered to stay away from children under 10 years old, he was not to go near or loiter around elementary or middle schools or "places primarily used by children under the age of 14," he was to follow all reasonable and proper directives of his probation officer, and submit to any requested psychological assessment, including post disposition polygraph examinations. He was also directed not to "own, use, or possess any form of sexually arousing materials, which include computer based movies, videos, magazines, books, games, sexual aids or devices, or any material which depicts partial or complete nudity or sexually explicit language."

In July 2012, R.A. was charged with three probation violations. It was alleged that he viewed pornography, that he had been in contact with a 14-year-old minor, and that he had been alone with a minor under the age of 14. At the hearing on the violations, a polygraph examiner testified that in the course of preparing R.A. for a polygraph examination related to his probation, R.A. stated that he viewed pornography on his cell phone the previous day. R.A. also told the polygraph examiner that he had contact with two young girls under the age of 14 when they socialized together at a Target store and went to the movies.

R.A.'s probation officer also testified. When she first met with R.A. in January 2012, the probation officer told him that she was changing his conditions of probation to

require him to avoid contact with any minor under the age of 14 rather than under the age of 10. The requirement at that time had not been approved by the court, but the probation officer imposed it because she considered it to be a reasonable restriction. R.A. was 15 years old when the court originally ordered him to stay away from children under the age of 10, and he was 19 years old in 2012, so a condition requiring him to stay away from kids under 14 seemed reasonable to the probation officer.

The court determined that all three allegations were proven, and that R.A. violated the terms of his probation. He was reinstated to probation with a 50 day commitment to the County Department of Corrections with credit for 40 days already served. Among other conditions of probation, R.A. was prohibited from contacting anyone under the age of 18 unless supervised by an adult over the age of 21, and the previous prohibition against use or possession of sexually arousing materials remained in effect.

He appealed.

DISCUSSION

I.

An alleged violation of probation must be proved in a juvenile proceeding by a preponderance of the evidence. (Welf. & Inst. Code § 777, subd. (c).) We review the juvenile court's findings of fact under a substantial evidence standard that begins and ends with whether, on the entire record, there is evidence, contested or not, that can support the juvenile court's determination. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We review the imposition of a condition of juvenile probation for an abuse of discretion, and consider whether the condition reasonably bears upon the minor's reformation and rehabilitation. (*In re Luis F.* (2009) 177 Cal.App.4th 176, 188–189.)

Here, one of the grounds for the juvenile court's conclusion that R.A. violated probation is that he viewed pornography over the internet. The court based this conclusion on the testimony of a polygraph examiner who reported that in preparation for a polygraph examination, R.A. stated he viewed pornography on the internet via his cell phone the day before the interview.

R.A. challenges this finding on several grounds. He says the court's reliance on his statements to the polygraph examiner violated his Fifth Amendment privilege against self-incrimination, and that the statements did not provide sufficient evidence of the violation. He also argues that the condition of probation directing him to refrain from using sexually arousing material was impermissibly vague and not explicitly based upon his personal knowledge. None of these grounds compels reversal of the juvenile court's order.

R.A. is mistaken in his assertion that his statements to the polygraph examiner could not be used against him in these proceedings. The question about internet usage was relevant to the terms of R.A.'s probation, and whether he viewed adult pornography over the internet could not have been an independent subject of criminal prosecution. No valid claim of privilege may be based on the fact that the information sought could be used against R.A. in the probation revocation proceedings. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn.7.)

The case R.A. relies upon to claim a violation of the privilege is distinguishable. In *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073, the Fifth Amendment privilege was self-executing because a probationer's answers to questions related to his possession of a firearm and would also constitute admission of a crime. In such circumstances, the court determined that requiring a probationer to answer such questions put the probationer in a penalty situation. (*Id.* at pp. 1078–1080.) That is not the case here. R.A.'s answer did not implicate his possible criminal liability.

The testimony of the polygraph examiner also provided sufficient evidence that R.A. viewed sexually arousing material over the internet. R.A. told the examiner that "he had viewed adult pornography by way of his cell phone use of internet." The rational inference that can be drawn from this statement is that R.A. intentionally used his cell phone to access pornography for his sexual gratification or interest. There is no evidence, nor anything in this testimony, to suggest he unwittingly received a pornographic e-mail or a link to a pornographic website. There is nothing to suggest he considered the images to be anything but, as he said, pornography. Reviewing the evidence with proper

deference to the juvenile court, as we must, we conclude the evidence was sufficient to sustain an allegation that R.A. intentionally and knowingly used the internet to access sexually arousing material.

R.A. does not argue he has a constitutional right to view sexually arousing materials. But he challenges the condition that he refrain from using sexually arousing materials on the grounds that the prohibition is unconstitutionally vague and, as drafted, a violation need not be premised on his personal knowledge. “However, there is a fundamental principle of judicial restraint which prevents us from reaching constitutional issues ‘unless absolutely required to do so to dispose of the matter before us.’ Here, we need not decide whether the challenged probation condition is unconstitutionally vague or overbroad because (1) the subject matter of the condition is one upon which a properly tailored condition may be imposed, and (2) defendant’s conduct was such that it would breach the condition regardless of how narrowly or precisely worded. Simply put, even if there was constitutional error, as defendant asserts, any such error would be harmless beyond a reasonable doubt.” (*People v. Urke* (2011) 197 Cal.App.4th 766, 773–774.)

Although R.A.’s probation was properly revoked for his use of the internet to access pornography, we will modify condition of probation number 29 in the order of May 12, 2008, to prohibit his knowing use of sexually arousing materials. In light of our determination that R.A.’s probation was permissibly revoked for his viewing of pornography, we will not address his other challenges to revocation.

II.

When the juvenile court found R.A. violated his probation, it added a new term in the dispositional order that directed R.A. to refrain from contact with anyone under the age of 18, except for his brother, without the permission of his probation officer. R.A. is now 20 years old.

R.A.’s offense involved sexual contact with a minor. During the unsuccessful period of his probation he reported contacts with minors as young as 14. We cannot conclude this new requirement was so unrelated to the crime he committed that it was an abuse of discretion.

CONCLUSION

Condition of probation number 29, in the order of May 12, 2008, is modified to read as follows:

29. The minor shall not knowingly own, use, or possess any form of sexually arousing materials which include computer based movies, videos, magazines, books, games, sexual aids or devices, or any material which depicts partial or complete nudity or sexually explicit language, nor frequent any establishment where such items are the primary commodity for sale.

As so modified, the order finding appellant in violation of the terms of his probation and imposing the penalty is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.