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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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN DIMEN DELEON,

Defendant and Appellant.

A141605

(Solano County
Super. Ct. No. FCR302185)

ORDER MODIFYING OPINION
AND DENYING REHEARING;
CHANGE IN JUDGMENT

BY THE COURT:

It is ordered that the opinion filed March 30, 2016, be modified as follows:

1. On page 2, between the paragraphs numbered 51 and 91, the following paragraph is inserted:

52. You shall not possess or have access to children’s clothing, toys, games, or other similar material related to children’s interests.

2. On page 7, above the word “DISPOSITION,” the following section is inserted:

IV.

DeLeon also challenges Condition No. 52 that prohibits him from possessing items of interest to children as overbroad and vague. The Attorney General does not object to modification of this condition to allow DeLeon’s parole officer to assist him in identifying objects that would violate this condition. We agree that this condition should be modified.

The prohibition against DeLeon's possession of "material related to children's interests" is overbroad and vague without further clarification. Accordingly, we will modify it to reflect both a scienter requirement and possible instruction by DeLeon's parole officer.

3. On page 9, between the paragraphs numbered 51 and 91, the following paragraph is inserted:

52. You shall not possess or have access to children's clothing, toys, games, or other similar material you know or reasonably should know will appeal to children's interests unless approved in writing by your parole agent.

This order affects a change in the judgment.

The petition for rehearing is denied.

Dated: _____

McGuiness, P.J.

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Following the revocation of his parole, Allen DeLeon challenges specified conditions that do not explicitly contain a scienter requirement, or are otherwise vague or overbroad. We modify certain conditions to require scienter, modify others to cure any possible vagueness or overbreadth, and affirm the revocation of DeLeon’s parole.

BACKGROUND

DeLeon was first released to parole on July 25, 2010, following his conviction of lewd and lascivious acts with a minor as proscribed by Penal Code section 288, subdivision (a).¹ As a sex offender, DeLeon was subject to, and acknowledged, special conditions of parole. The following were among a lengthy list of special conditions:

3. You shall not enter a business whose primary purpose is to sell or serve alcoholic beverages.

13. You hereby agree to waive psychotherapist-patient privilege, and agree to polygraph examinations while in treatment during parole.

¹ Further statutory references are to the Penal Code unless otherwise noted.

20. You shall not enter or loiter within 100 yards of the perimeter of places where children congregate; i.e., day care centers, schools, parks, playgrounds, video arcades, swimming pools, state fairgrounds, county fairgrounds, etc.

21. You shall not enter any park where children regularly gather without prior written approval from your parole agent. The written approval must be kept with you while you are in the park.

22. You shall not date, socialize or form a romantic interest or sexual relationship with any person who has physical custody of a minor.

25. You shall not enter the premises, unnecessarily travel past, or loiter near where your victim frequents, resides, is employed, or attends classes.

29. You shall not associate with any sex offenders except when approved in writing by your parole agent.

34. You shall not enter or loiter within 100 yards of areas of sexual or pornographic activity; i.e., adult bookstores, massage parlors, nude or topless bars, sex shops, etc.

48. You shall not possess, or have access to any sexually oriented or sexually stimulating objects and/or devices.

49. You shall not view, possess, or have access to any pornographic material; i.e., movies, photographs, drawings, literature, etc.

50. You shall not view, possess, or have access to any material; i.e., periodicals, newspapers, magazines, catalogs, that depict adults or children in undergarments, nude, partially nude, etc.

51. You shall not possess or have access to sexually oriented devices, handcuffs, handcuff keys, restraint equipment, or any other items that could be used for bondage, restraint, control, or confinement.

91. You shall not use the computer for any purpose which might further sexual activity involving minor children; i.e., possession of sexually explicit material in any

form; sexually related “chat” or e-mail exchange; visiting or joining “chat rooms” which contain sexually explicit conversations; visiting/viewing sexually explicit material on web sites; downloading text or video files, digital images in any format, text files or multi-media material that is sexual in nature; or visiting and/or subscribing to usergroups, newsgroups, or list servers which contain sexual content.

DeLeon was charged with violating his parole by loitering in a children’s playground in Fairfield on March 1, 2014, possessing nude pictures of children and possessing an item that would be appealing to a child. Following a contested hearing, he was found to have violated the terms of his parole and sentenced to 180 days in jail with 74 days credit. He does not challenge the finding that he violated parole. This appeal is timely.

DISCUSSION

I.

This is the second time DeLeon has been charged with a violation of parole and has appealed. (See, *People v. DeLeon*, A140050.) He made no claim in the prior appeal that any of the conditions of parole were constitutionally infirm. While the issues he raises here are technically forfeited (see e.g., *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420–1421), due to their importance and constitutional nature we will exercise our discretion and address them. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn.7.)

II.

DeLeon contends that many of the conditions of his parole are unconstitutional because each of them lacks a specific requirement that he knowingly engage in prohibited conduct. The attorney general agrees that certain conditions must be modified to add a scienter requirement, and so do we.

The criteria for assessing the legality of conditions of parole are the same as those assessing conditions of probation. (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1233.) The conditions must be sufficiently precise for a parolee to know what is required of him.

(*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Conditions that otherwise may be considered vague may be made constitutional by the insertion of a requirement that the parolee must knowingly violate them. (*Id.* at p. 890–891.)

Accordingly, special conditions 3, 20, 21, 25, 29, 34, 48, 49, 50, 51 and 91, must each be modified to add a knowledge requirement for any violation of those conditions.

II.

DeLeon also challenges special condition 13 that requires him to waive the psychotherapist-patient privilege and agree to polygraph examinations while he is in therapeutic treatment. He contends the waiver of the privilege is overbroad, unreasonable and violates his right to privacy. He argues the polygraph examination provision is overbroad because there are no restrictions on the scope of questions that may be asked during any examination. We disagree that the waiver of the psychotherapist-patient privilege is unreasonable or violates DeLeon's right to privacy when viewed in light of his conviction under Penal Code section 288 for a lewd act upon a child under the age of 14, but agree with DeLeon that condition 13 must be modified to narrow its scope to his conviction offense and questions about his treatment required as a condition of parole.

In *People v. Gonzales* (2013) 56 Cal.4th 353 (*Gonzales*), our Supreme Court considered whether a parole condition mandating outpatient psychological evaluation and treatment as directed by a parole agent resulted in waiver of the psychotherapist-patient privilege. In concluding there was no waiver that would require disclosure of the substantive details of the parolee's treatment, the court was careful to differentiate the circumstances there under review from situations where the information is sought by parole officials as a result of the parolee's explicit waiver or consent. (*Id.* at pp. 375–377.) Here, we have an explicit waiver of the privilege as a condition of parole.

The legislature has recognized that in appropriate cases such a waiver of the psychotherapist-patient privilege is not only proper, but is required. In legislation enacted in 2010, inmates convicted of specified sex offenses, including those convicted

under section 288, and released to parole after July 1, 2012, are required under section 3008, subdivision (4) (d) to waive any “psychotherapist-patient-privilege to enable communication between the sex offender management professional and supervising parole officer” to facilitate participation in the sex offender management program and the offender’s evaluation under the State-Authorized Risk Assessment Tool for Sex Offenders. (§§ 3008, subd. (d)(4), 290.09.) While, this requirement was not effective when DeLeon first paroled in 2010, we have no reason to question that requiring such a condition was permissible at that time.

In *Gonzales*, the court assumed, without deciding, that the psychotherapist-patient privilege is rooted in a constitutional right to privacy. (*Gonzales, supra*, 56 Cal.4th at p. 384–388). In light of this assumption, the court went on to consider whether violation of the state recognized psychotherapist-patient privilege could constitute federal constitutional error. The court concluded that while violation of the privilege could trigger a constitutional level of scrutiny in some cases, it did not in *Gonzales*. The court balanced the substantial limitations on the privacy rights of parolees, against the state’s particularly strong and legitimate interest in authorizing the disclosure and use of a parolee’s prior statements in parole mandated therapy. This balancing led the court to conclude the disclosure of therapy records and the admission of a therapist’s testimony without the parolee’s consent did not violate his federal constitutional right of privacy. The same considerations that motivated the balancing analysis in *Gonzales* lead us to conclude that California’s conditions of parole may require waiver of the statutory psychotherapist-patient privilege.² Accordingly, the psychotherapist-patient privilege is

² However, our Supreme Court has granted review in several cases presenting the issue of waiver of the psychotherapist-patient privilege as a condition of release in conjunction with polygraph examinations of parolees. See, *People v. Klatt*, review granted July 16, 2014, S218755; *People v. Friday*, review granted July 16, 2014, S218288; *People v. Garcia*, review granted July 16, 2014, S218197; *People v. Rebulloza*, review granted June 10, 2015, S225503.

waived to permit questions of DeLeon during polygraph examinations and to permit mental health clinicians to discuss DeLeon's participation in parole related treatment with parole officials.

Although DeLeon could be required to waive the psychotherapist-patient privilege as a condition of parole, he is correct in arguing that any waiver and polygraph examination must be limited to those subjects of inquiry that bear upon his crime and parole related therapy. (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.) Accordingly, condition 13 must be modified to expressly permit the waiver only in connection with questions pertaining to his conviction offense or successful completion of parole related treatment.

III.

DeLeon argues special condition 22 that forbids him from socializing, dating or entering into an intimate relationship with a person who has physical custody of a minor violates his constitutional rights to free association and privacy. The Attorney General agrees that the prohibition against DeLeon's socializing with someone who has custody with a minor is overbroad and unworkable, but argues that prohibitions against dating, sexual or romantic involvement with such a person unless approved by a parole officer would be reasonable and enforceable. We agree.

The obvious intention behind this condition is to prevent DeLeon's contact with children. A condition that limits a person's constitutional rights must closely tailor the limitations to the purpose of the condition. (*In re Sheena K, supra*, 40 Cal.4th at p. 890.) In light of his criminal history as a sex offender with a child victim, a prohibition against DeLeon's contact with children under age 18 is neither unreasonable nor overbroad. But to the extent special condition 22 seeks to prevent him from "socializing" or forming "a romantic interest" with any person who has custody of a minor it is overbroad. The proscription against "socializing" pulls within its scope countless possible interactions between DeLeon and other adults whether or not their children are present and

irrespective of the purpose for the contact. The proscription against “forming a romantic interest” can potentially punish DeLeon for his thoughts without any manifestation of conduct or interaction with another human being. Thus, the terms “socialize” and “forming a romantic interest” must be stricken from special condition 22.

But the prohibition against dating, or forming a sexual relationship with a person who has custody of a minor is not vague. The terms “dating” and “sexual relationship” have commonly understood meanings. Each is understood to involve more than passing social acquaintance and requires a level of intimacy that exceeds that experienced in most interpersonal relationships. It seems entirely reasonable to expect that DeLeon would understand what it means to date or have a sexual relationship with another person.

Any remaining overbreadth is also readily cured. First of all, the number of people with whom DeLeon may seek such an intimate relationship is much more limited than the number of people he may socialize with. It seems highly likely that if DeLeon is involved in such a relationship with another person, he would have contact with the minor in that person’s custody. Moreover, special condition 22 must be limited to require that DeLeon knows the person has custody of a minor, and to prohibit his pursuit of a relationship if he has not obtained the consent of his parole officer. In this way, special condition 22 would both inform DeLeon of the conduct expected of him, and be narrowly tailored to prohibit him from gaining access to a minor through a relationship with an adult who may not be aware of his criminal history. (See, *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890–891.)

DISPOSITION

The following special conditions of parole imposed on appellant Allen Dimen DeLeon shall be modified to read as follows:

3. You shall not enter a business that you know primarily sells or serves alcoholic beverages.

13. You hereby waive psychotherapist-patient privilege for polygraph examinations concerning your criminal offense of conviction and compliance with parole related treatment and to allow mental health clinicians to discuss your participation in parole related treatment with parole officials.

20. You shall not enter or loiter within 100 yards of the perimeter of places where you know or should know children congregate without prior written approval from your parole agent; i.e., day care centers, schools, parks, playgrounds, video arcades, swimming pools, state fairgrounds, county fairgrounds, etc.

21. You shall not enter any park where you know or should know children regularly gather without prior written approval from your parole agent. The written approval must be kept with you while you are in the park.

22. You shall not date or form a sexual relationship with any person who has physical custody of a minor unless approved in writing by your parole officer.

25. You shall not enter the premises, unnecessarily travel past, or loiter near any places you know or should know your victim visits, resides in, is employed at, or attends classes.

29. You shall not associate with any person you know or should know to be a sex offender except when approved in writing by your parole agent.

34. You shall not enter or loiter within 100 yards of places you know or should know market sexual or pornographic activity; i.e., adult bookstores, massage parlors, nude or topless bars, sex shops, etc.

48. You shall not possess, or have access to any objects or devices you know or should know are sexually stimulating or sexually explicit.

49. You shall not view, possess, or have access to any material you know or reasonably should know is pornographic; i.e., movies, photographs, drawings, literature, etc.

50. You shall not knowingly view, possess, or have access to any material; i.e., periodicals, newspapers, magazines, catalogs, that primarily depict adults or children in undergarments, nude, partially nude, etc.

51. You shall not possess or have access to any device you know or should know is sexually oriented, handcuffs, handcuff keys, restraint equipment, or any other items that are intended to be used for bondage, restraint, control, or confinement.

91. You shall not knowingly use the computer for any purpose which might further sexual activity involving minor children; i.e., possession of sexually explicit material in any form; sexually related “chat” or e-mail exchange; visiting or joining “chat rooms” which contain sexually explicit conversations; visiting/viewing sexually explicit material on web sites; downloading text or video files, digital images in any format, text files or multi-media material that is sexual in nature; or visiting and/or subscribing to usergroups, newsgroups, or list servers which contain sexual content.

As modified, the conditions and revocation of parole are affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Pollak, J.

People v. DeLeon, A141605