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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES SALVADOR ALVAREZ
ANDERSON,

Defendant and Appellant.

A141942

(Lake County
Super. Ct. No. CR932185)

James Salvador Alvarez Anderson appeals from a judgment upon his plea of no contest to felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor possession of metal knuckles (Pen. Code, § 21810). He contends that the probation condition requiring him to stay away from places where alcohol is dispensed is unconstitutionally vague because it lacks a knowledge requirement, and that the condition requiring him to maintain gainful employment is unreasonable. We affirm the latter condition but modify the condition concerning places serving alcohol to include a knowledge element. In all other respects, we affirm the judgment.

I. FACTUAL BACKGROUND

On April 16, 2013, the police responded to a dispute concerning the ownership of a vehicle and found defendant. They noticed an object in defendant's rear pants pocket that looked consistent with metal knuckles. In searching defendant, they found metal knuckles and approximately 4.1 grams of methamphetamine.

On September 9, 2013, defendant pled no contest to felony possession of methamphetamine and misdemeanor possession of metal knuckles with the understanding that he would be placed on probation for three years on conditions including up to a year in the county jail.

On March 25, 2014, the court denied defendant's motion to withdraw his plea. It found that defendant's testimony, that he did not understand the plea, lacked credibility.

On April 14, 2014, the court suspended imposition of sentence and placed defendant on probation, with conditions including 180 days in the county jail, that he "not be in or about any place where the primary item sold or dispensed is an alcoholic beverage," and that he maintain full-time, gainful employment except when he is prevented from doing so due to physical or mental limitations, any custody time, or as a result of any residential drug treatment requirements.

II. DISCUSSION

Defendant contends that the probation condition requiring that he stay away from places where the primary item sold or dispensed is alcohol is unconstitutionally vague because it does not include a requirement that he must knowingly do so.¹ He argues that he might not know that he is violating the condition until he has already entered a place where the primary item sold or dispensed is alcohol.

The Attorney General concedes that the condition must be modified to include a knowledge requirement. We agree.

"A probation condition '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,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated

¹ The condition, No. 10, in its entirety reads as follows: "The defendant will abstain from any use of intoxicating liquor and will not be in or about any place where the primary item sold or dispensed is an alcoholic beverage and will not possess or have under his control any alcoholic beverage."

as unconstitutionally overbroad.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)) In *Sheena K.*, the court held that a probation condition requiring that the defendant “ ‘not associate with anyone disapproved of by probation’ ” was both vague and overbroad because it did not notify the defendant in advance of which persons were disapproved by the probation officer. (*Id.* at p. 890–891.) Appellate courts have followed *Sheena K.* and required a constructive knowledge element to eliminate vagueness. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 588; *People v. Moses* (2011) 199 Cal.App.4th 374, 381–382.)

In *Rodriquez, supra*, 222 Cal.App.4th 578, the court held that to avoid a constitutional challenge of vagueness, a probation condition that restricts the right of association by requiring avoidance of persons, based on some status that may not be readily apparent, requires an explicit mental element. (*Id.* at p. 587.) The court concluded that a constructive knowledge element in the probation condition, e.g. that the defendant must either know or reasonably should know, eliminated any vagueness. (*Id.* at pp. 588–589; and see *People v. Mendez* (2013) 221 Cal.App.4th 1167, 1174–1178 (*Mendez*) [probation condition referencing constructive knowledge not unconstitutionally vague].)

The Attorney General thus argues that defendant’s suggestion that the condition be modified only to include actual knowledge is insufficient to eliminate vagueness. We agree that the condition should be modified to include both actual and constructive knowledge. Defendant’s arguments to the contrary speculate that he might unknowingly ingest alcohol or enter a place he later discovers sells alcohol. Defendant, however, is required to abide by the conditions of probation and “[w]illful ignorance of warning signs should not be rewarded by the conclusion that a probation condition was not violated because the probationer did not actually, subjectively recognize [that alcohol is being dispensed at a location he enters].” (*Mendez, supra*, 221 Cal.App.4th at p. 1177.) “We foresee no difficulty either with a probationer understanding what is required by such a condition or with a court determining whether such a condition has been violated. It may in fact be easier to establish what a probationer reasonably should know than to delve

into the epistemological depths of what the probationer actually knows.” (*Id.* at p. 1178.) Accordingly, we modify the alcohol probation condition to include both an actual and constructive knowledge requirement.

Defendant also argues that the probation condition requiring him to maintain gainful employment is unreasonable. He argues that the court did not consider his individual circumstances, which include some health issues and the present economy.

Defendant did not object to this condition and has waived it on appeal. (*People v. Kim* (2011) 193 Cal.App.4th 836, 841 [challenge to probation condition that defendant seek and maintain employment forfeited by defendant’s failure to question it in the trial court].) He contends that if an objection was required, his trial counsel was ineffective for failing to object.

The Attorney General argues that trial counsel was not deficient because gainful employment conditions are commonly imposed on probationers and are constitutional where the probationer is employable. (See *People v. Hodgkin* (1987) 194 Cal.App.3d 795, 807–811.) Indeed, a gainful employment condition is a standard condition of probation. Penal Code section 1203.1, subdivision (d), provides: “In all cases of probation the court may require as a condition of probation that the probationer go to work and earn money for the support of his or her dependents or to pay any fine imposed”

At the sentencing hearing, defendant’s counsel told the court that defendant was willing to comply with all of the terms of probation and was concerned only about the requirement that he serve 180 days in the county jail, as he could lose his job. In addition, the probation report reflected that defendant, who was 22 at the time of sentencing, had job skills in maintenance, landscaping, and cashiering and that he had a pending job application with AutoZone. Moreover, the record includes defendant’s letter to the court expressing his intent to support his family and explaining his current part-time work schedule and his enrollment in Yuba College for certifications in auto brakes and welding. The trial court was thus well aware of defendant’s circumstances. On this record, trial counsel was not ineffective in failing to challenge the employment condition.

III. DISPOSITION

Probation condition No. 10 is modified to read: “The defendant will abstain from any use of intoxicating liquor he knows or reasonably should know to be alcoholic, will not be in or about any place where he knows or reasonably should know the primary item sold or dispensed is an alcoholic beverage, and will not possess or have under his control any beverage he knows or reasonably should know to be alcoholic.” In all other respects, the judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.