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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re Anthony V., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY V.,

Defendant and Appellant.

A144086

(Contra Costa County  
Super. Ct. No. J14-01131)

Appellant Anthony V. appeals the juvenile court's orders adjudging him a ward of the court under Welfare and Institutions Code section 602, removing him from the custody of his parents, and imposing various conditions of probation. Appellant contends conditions prohibiting him from unsupervised contact with minors under 14 years old and prohibiting him from possessing pornography are unconstitutionally vague and overbroad. We will strike the challenged conditions and remand with directions that the juvenile court enter modified conditions that include knowledge requirements and clear descriptions of the prohibited conduct.

**BACKGROUND**

In December 2014, the Contra Costa District Attorney's Office filed an amended Welfare and Institutions Code section 602 petition alleging in two counts that appellant,

born in May 2000, committed lewd acts upon a child under the age of fourteen (Pen. Code, § 288, subd. (a)),<sup>1</sup> with substantial sexual conduct (§ 1203.066, subd. (a)(8)).<sup>2</sup> The petition was based on allegations that appellant had, among other things, repeatedly touched the genitals of a four or five year old girl who attended appellant's mother's in-home daycare. Appellant pled no contest to one of the counts and the accompanying enhancement. The court dismissed the second count.

In January 2014, the juvenile court declared appellant a ward of the court, removed him from the custody of his parents, and placed him on probation. The court directed probation to consider a sex offender treatment program in Stockton as a placement for appellant. The court imposed various probation conditions, including (as relevant in the present appeal) that appellant: (1) have “no contact with minors under the age of 14 years old without adult supervision approved by probation” (the no-contact provision); and (2) “not possess any type of pornography, including written pornography, pictures, videotapes, or electronic computer application, or telecommunications access to such applications” (the pornography condition).

This appeal followed.

## DISCUSSION

Appellant claims the no-contact and pornography conditions are unconstitutionally vague and overbroad. We will strike the conditions and remand for modification and clarification.

“Under Welfare and Institutions Code section 730, subdivision (b), a juvenile court may impose ‘any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’ In spite of the juvenile court’s broad discretion, ‘[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

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

<sup>2</sup> Additional counts in the petition were dismissed upon the prosecutor’s motion.

limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] A defendant may contend for the first time on appeal that a probation condition is unconstitutionally vague or overbroad on its face when the challenge presents a pure question of law that the appellate court can resolve without reference to the sentencing record." (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357.)

At the outset, respondent agrees it is appropriate to include a knowledge requirement in both conditions. As to the no-contact provision, "[i]t is established that, when a probation condition restricts the right of association by requiring avoidance of persons based on some status that may not be readily apparent (e.g. . . . [status as a] minor), the condition requires an explicit mental element." (*People v. Rodriguez* (2014) 222 Cal.App.4th 578, 587; see also *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.) Furthermore, the meaning of the term "pornography" is sufficiently subjective and unclear that the condition must require appellant's knowledge that material is pornographic or that he was so informed by his probation officer. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1353; *Turner*, at p. 1437.)

Appellant contends the no-contact provision is vague because it fails to define "contact." We agree. Literally, "no contact" could be understood to prohibit physical contact, communication in person, and communication at a distance—whether by telephone, e-mail, texting, social media, or mail. The ambiguity is demonstrated by respondent's construction of the term, which does not include communication at a distance, but does include being in the same room or within 50 feet, even though that does not literally constitute contact.

Appellant also contends the no-contact provision is overbroad because it appears to apply in both public and private places, and because it applies to minors who are close to appellant's age (currently 15). It is difficult to assess appellant's overbreadth claim without knowing the meaning of the word "contact." Would appellant violate probation by standing next to an 8 year old on a bus, by sitting 10 feet from a 10 year old at a public library, or by using the same bathroom as a 13 year old at school? How can appellant be

expected to obtain his probation officer's approval of the multiplicity of supervising adults present in public places? On remand, the juvenile court should consider the reasonableness of the place and age restrictions based on the meaning given to the term contact, and the court should consider the reasonableness of the requirement of the probation officer's approval of the supervising adult in light of the determinations made on those issues. The court should keep in mind that probation conditions must be " 'narrowly drawn and specifically tailored,' " so as to not overly burden appellant's rights, including the " 'basic constitutional rights of freedom of travel, association and assembly.' " (*Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1181 (*Alex O.*).

As to the pornography condition, appellant does not dispute the appropriateness of prohibiting his possession of pornography, but he argues the condition is vague because "[t]he phrase restricting appellant from possessing 'electronic computer applications, or telecommunications access to such applications' . . . is unintelligible and overbroad." We agree. People of "common intelligence must necessarily guess at" the meaning of the phrase in this context. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 ["The vagueness doctrine bars enforcement of ' 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' "']). What is a pornographic "electronic computer application"? In the computer context, an application is "a program . . . that performs one of the major tasks for which a computer is used" (Merriam-Webster's Collegiate Dict. (11th ed. 2003) at p. 60, col. 2), while pornography is generally thought of as being a form of sexually explicit media.<sup>3</sup> It would seem that any pornographic "electronic computer application" would necessarily include pornographic writings or images and thus be prohibited by the other, and clearer, language of the condition. The meaning of the phrase "telecommunications access to such applications" is equally

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<sup>3</sup> It may be the court sought to reference the types of applications that are used to facilitate sexual encounters and may, therefore, include sexually explicit language. It is unclear whether such applications would ordinarily be considered pornographic, but, if the court sought to prohibit use of such applications, it may consider on remand how to do so in clear language.

mysterious. On its face, it seems to prohibit use of a telephone or computer that can access the internet, because the internet is a computer application capable of accessing pornography. Respondent asserts the condition does not prohibit appellant from using the internet to do homework, but respondent does not explain how access to the internet would not constitute “telecommunications access to” pornographic applications, whatever such applications might be. On remand, the juvenile court should consider whether it is necessary to prohibit more than possession of “written pornography, pictures, videotapes” and, if so, how to do so clearly and in a manner that is “narrowly drawn and specifically tailored,” so as to not overly burden appellant’s constitutional rights. (*Alex O.*, *supra*, 174 Cal.App.4th at p. 1181; see also *In re Sheena K.*, at p. 890.)

#### DISPOSITION

The no-contact and pornography probation conditions are stricken from the juvenile court’s orders. On remand, the juvenile court is directed to modify those conditions to include knowledge requirements and to address the vagueness and overbreadth problems described in this decision. The juvenile court’s orders are otherwise affirmed.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.