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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re DARRYL M., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRYL M.,

Defendant and Appellant.

A144831

(Alameda County
Super. Ct. No. SJ15024123)

Darryl M., a minor, appeals from a dispositional order issued pursuant to Welfare & Institutions Code section 602¹ after he admitted allegations of driving without a license and possessing an alcoholic beverage. He contends the juvenile court abused its discretion when it declared him a ward of the court and challenges various probation conditions under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and constitutional principles of vagueness and overbreadth. In addition, Darryl seeks remand for the juvenile court to calculate and apply predisposition credits and to correct a clerical error in the minute order. We modify Darryl’s probation conditions and affirm as modified.

BACKGROUND

The El Dorado County Probation Department’s detention report detailed the circumstances of Darryl’s offenses as follows. “[O]n November 29, 2014, at 12:09 a.m.,

¹ Further statutory citations are to the Welfare & Institutions Code.

an officer observed a vehicle traveling without the headlights on. The officer pulled in behind the vehicle and activated emergency lights. The driver, later identified as the minor, continued driving several blocks before stopping his vehicle. The minor was slow to respond to the officer[']s directives and displayed multiple symptoms of alcohol intoxication. The minor admitted he did not have a driver's license but had a learning permit, though he was not carrying it. Due to the traffic offense and objective signs of intoxication the minor was asked to perform standardized field sobriety tests. The minor performed poorly on the field sobriety tests and refused to submit to a PAS test. The minor was placed under arrest. A search, incident to arrest, revealed the minor had a beer in his pocket. A breath test was administered which resulted in .07% blood alcohol content.”

Darryl was staying at a casino hotel in South Lake Tahoe with his adult brother at the time. The brother said he did not know Darryl was drinking and did not give him permission to take his car. “He said, ‘I dozed off or something and he took my keys and left.’ ”

The El Dorado County District Attorney filed a juvenile wardship petition alleging one count of driving under the influence (count one), one count of driving without a license (count 2), and one count of possession of an alcoholic beverage by a minor (count 3). Darryl admitted counts two and three and the court dismissed count one. Darryl was a resident of Alameda County, so the case was transferred to Alameda for disposition.

The Alameda County Probation Department's dispositional report recommended that Darryl be placed on probation without a declaration of wardship. Darryl lived with his parents and extended family. It appeared he had a positive support system. His mother described him as “very smart” and “ ‘a very good kid’ ” who always had good grades. She believed his behavior had deteriorated the previous year because his girlfriend broke up with him.

Darryl was passing all of his classes at Skyline High School and had no discipline reports for two years, but his grades had fallen and his attendance needed improvement. He used to smoke marijuana on a daily basis, but he had gone to therapy to help him stop

and said he had not smoked for approximately three months. The probation officer noted “concern that the minor may be displaying what appears to be depression and was possibly self-medicating with drugs and alcohol.” An assessment for recidivism risk placed Darryl in the moderate category for reoffending within a year. His highest risk factors were “substance abuse and leisure/recreation.”

Darryl’s attorney recommended to his probation officer that “a 4C order is appropriate.” It is undisputed that “4C” is a term used by the Alameda County Superior Court for “care, custody, control and conduct,” to mean probation with wardship. At the disposition hearing, without objection, the court indicated its intent to follow defense counsel’s recommendation and require Darryl to complete 40 hours of community service, a drug course and drug counseling. Darryl was adjudged a ward of the court and placed on probation in his parents’ home subject to various probation conditions.

Darryl moved to set aside a probation condition requiring him to submit to searches of his electronic devices and turn over his passwords, which he argued lacked a factual nexus to his offenses or the prevention of future criminality. The juvenile court disagreed, citing its concerns about Darryl’s drug and alcohol use. “So this is clearly a concern and not just a concern of abuse of alcohol but there’s clearly a concern about the use of marijuana and drugs. And in order to be able to supervise him properly it’s not just a matter of testing him on a regular basis when he has appointments with the probation officer and not just randomly testing him. [¶] . . . [¶] [I]t’s been my experience from other cases I’ve had here and four years of being in Juvenile Court that I have had many cases where minors have shown themselves smoking marijuana on the Internet; posting photos of themselves smoking marijuana; with drug paraphernalia. Clearly, it’s very historically known that purchases of marijuana are done on the Internet or done with electronic devices. So it’s clear to the Court that in order to properly supervise [Darryl] that we need to supervise his electronic devices, and we can’t properly supervise electronic devices without his passwords.”

Darryl filed this timely appeal.

DISCUSSION

I. Wardship

Darryl argues the court abused its discretion when it rejected the probation department's recommendation for non-wardship probation and adjudged him a ward of the court. The argument is meritless.

If the juvenile court finds a minor is a person described by section 602, it may either adjudge the minor to be a ward of the court or, with exceptions not relevant here, place the minor on non-wardship probation for not more than six months. (§ 725, subs. (a),(b).) In determining the disposition “the court shall consider, in addition to other relevant and material evidence, (1) the age of the minor, (2) the circumstances and gravity of the offense committed by the minor, and (3) the minor’s previous delinquent history.” (§ 725.5.) We review the juvenile court’s determination for abuse of discretion, indulging in all reasonable inferences from the evidence and the record to support it. (*In re Darryl T.* (1978) 81 Cal.App.3d 874, 877.) “ ‘[W]here a trial court has discretionary power to decide an issue, a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.’ ” (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421)

We have no cause to question the juvenile court’s decision here because Darryl forfeited his challenge or invited possible error when his counsel advised the court that wardship was appropriate and later failed to object at the dispositional hearing. “As a general rule, only ‘claims properly raised and preserved by the parties are reviewable on appeal.’ ” (*People v. Smith* (2001) 24 Cal.4th 849, 852.) But even if he had preserved his appeal, we would affirm. The court was reasonably concerned about Darryl’s history of marijuana use, possible depression, and recent underperformance at school. The probation department assessed him at a moderate risk to reoffend. On this record the juvenile court’s decision to adjudge Darryl a ward of the court was neither “ ‘arbitrary, capricious, [n]or patently absurd.’ ” (*In re Geoffrey G., supra*, 98 Cal.App.3d at p. 421.)

II. Electronics Search Condition

Darryl asserts the electronics search condition is invalid under *Lent, supra*, 15 Cal.3d 481, is unconstitutionally vague and overbroad, and violates his constitutional right to privacy. We agree it must be stricken.

A. Background

The juvenile court imposed this search condition: “You must submit to a search of your person, any containers you may have or own, your vehicle or residence including electronics and all your passwords day or night upon the request of a Probation Officer or peace officer.” The court explained, “I find that most minors communicate via the electronics—Internet and other electronics. That’s the main form of communication. In order to properly supervise [Darryl], we have to make sure we have supervision of his electronics and passwords; [¶] Also, with regards to drugs, minors do post themselves on electronics showing themselves with paraphernalia smoking. That’s what they use very often to purchase their drugs and even alcohol.” The court later reiterated its view that Darryl’s history and potential for drug and alcohol use warranted monitoring his electronic devices when it denied the motion to strike the condition.

B. Legal Principles

The juvenile court has broad discretion to formulate reasonable probation conditions. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81, overruled on another point in *In re Jaime P.* (2006) 40 Cal.4th 128, 130; *In re Josh W.* (1997) 55 Cal.App.4th 1, 5 (*Josh W.*)) Because juvenile probation conditions are imposed on the minor to ensure his rehabilitation, “ ‘[a] condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court.’ ” (*In re Frankie J.* (1988) 198 Cal.App.3d 1149, 1153.) Indeed, a juvenile court may impose a condition of probation that would be unconstitutional in an adult context, “so long as it is tailored to specifically meet the needs of the juvenile.” (*Josh W., supra*, at p. 5.) “This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor’s constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a

minor, stands in the shoes of the parents. And a parent may ‘curtail a child’s exercise of the constitutional rights . . . [because a] parent’s own constitutionally protected “liberty” includes the right to “bring up children” [citation] and to “direct the upbringing and education of children.” [Citation.]’ [Citations.]” (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.)

But the juvenile court’s discretion is not unlimited. As stated in *Lent*, a probation condition is unreasonable if it: “ ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.’ ” (*Lent, supra*, 15 Cal.3d at p. 486.) All three prongs of the *Lent* test must be satisfied to render a probation term invalid. (*People v. Olguin* (2008) 45 Cal.4th 375, 379; *In re D.G.* (2010) 187 Cal.App.4th 47, 52 (*D.G.*) [*Lent* standard applies to juveniles].) In addition, a juvenile court may not adopt probation conditions that are unconstitutionally vague or overbroad. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889–891 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*.) Under the overbreadth doctrine, “conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.” (*Victor L.* at p. 910.)

While we generally review the court’s imposition of a probation condition for abuse of discretion, we review constitutional challenges to probation conditions de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) In an appropriate case, a probation condition that is not sufficiently precise or narrowly drawn may be modified in this court and affirmed as modified. (See, e.g., *Sheena K.*, *supra*, 40 Cal.4th at p. 892; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629.)

II. Analysis

The People, appropriately, do not suggest the electronics search condition has any relationship to Darryl’s adjudicated offenses. It is also undisputed that the use of electronic devices and social media is not itself criminal. Rather, the focus for our

review is the third *Lent* factor—whether the condition is “reasonably related to future criminality.”

Citing the juvenile court’s concerns about substance abuse, the People assert the search condition withstands scrutiny under *Lent* because access to Darryl’s electronic devices would facilitate the monitoring and enforcement of his drug-related conditions by “for example, allowing text messages or Internet activity to be reviewed to assess whether [he] is communicating about drugs or with people associated with drugs.” This court has rejected that rationale. In *In re J.B.* (2015) 242 Cal.App.4th 749, a minor with a history of marijuana use committed petty theft. As here, the juvenile court imposed an electronic search condition to help the probation officer monitor the minor’s compliance with drug-related probation conditions. We held the condition violated *Lent*. (*Id.* at p. 755–756.)

We explained: “In *Erica R.*,² another division of this court rejected this argument under circumstances strikingly similar to those in the present case. [Citation.] There, the court observed, ‘the record does not support a conclusion that the electronic search condition is reasonably related to future criminal activity by Erica. The juvenile court justified the electronic search condition solely by reference to its experience that “many juveniles, many minors, who are involved in drugs tend to post information about themselves and drug usage.” However, “[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.” [Citation.] There is nothing in this record regarding either the current offense or Erica’s social history that connects her use of electronic devices or social media to illegal drugs. In fact, the record is wholly silent about Erica’s usage of electronic devices or social media. Accordingly, “[b]ecause there is nothing in [Erica’s] past or current offenses or [her] personal history that demonstrates a predisposition” to utilize electronic devices or social media in connection with criminal activity, “there is no reason to believe the current restriction will serve the rehabilitative function of precluding

² *In re Erica R.* (2015) 240 Cal.App.4th 907, 913 (*Erica R.*).

[Erica] from any future criminal acts.” ’ [Citation.] Essentially the same can be said of the minor’s offense and social history in the present case.” (*J.B., supra*, 242 Cal.App.4th at p. 755; see also *In re Erica R., supra*, 240 Cal.App.4th 907.)³

Here, on strikingly similar facts and for the same reasons, we reach the same conclusion. Nothing about Darryl’s offenses or social history connects his use of electronics to illegal drug or alcohol use or, more generally, to his possible future criminality. The condition is thus invalid under *Lent* and must be stricken. In light of this conclusion, we do not reach Darryl’s constitutional arguments.

III. Good Behavior Condition

Darryl contends probation conditions that require him to “be of good conduct” and “[b]e of good citizenship and good conduct” are impermissibly vague. We agree.

A probation condition is unconstitutionally vague if it is not “ ‘sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.’ ” [Citation.] A restriction failing this test does not give adequate notice—‘fair warning’—of the conduct proscribed. [Citations.]” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) “ ‘In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that “abstract legal commands must be applied in a specific context,” and that, although not admitting of “mathematical certainty,” the language used must have “ ‘reasonable

³The primary cases supporting the People’s contrary position were rendered unciteable when Supreme Court review was granted before revisions to California Rules of Court, Rule 8.1105(e) became effective on July 1, 2016. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted and briefing deferred February 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted and briefing deferred March 9, 2016, S232240; see also *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted and briefing deferred April 13, 2016, S232849 [following *Erica R.*].) The Supreme Court’s order in *Patrick F.* described the issue in *Ricardo P.* as follows: “Did the trial court err in imposing an ‘electronics search condition’ on minor as a condition of his probation when it had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (20008) 45 Cal.4th 375 because it would facilitate his supervision?”

specificity.’ ” ’ [Citation.]” (*In re Shaun R.*, *supra*, 188 Cal.App.4th at p. 1144, italics omitted.) Darryl’s challenge to his probation conditions as facially vague presents a pure question of law appropriate for de novo review despite the lack of an objection before the juvenile court. (*Sheena K.*, *supra*, 40 Cal.4th at p. 888–889; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

The requirements that Darryl “be of good citizenship” and “good conduct” do not satisfy these standards because they fail to provide meaningful guidance to Darryl, his probation officer or the court. The People do not contend otherwise, but propose that these condition withstand scrutiny because they do no more than duplicate other probation conditions that require Darryl to obey the law and attend school or work on time. We disagree. The “good citizenship” and “good conduct” requirements are substantially less specific than those latter requirements, and could reasonably be interpreted to require or prohibit a much broader range of behavior that cannot be discerned from their wording or context. In any event, if, as the People say, these requirements merely reiterate more specific requirements spelled out in Darryl’s conditions of probation, there is no reason not to strike them. We do so.⁴

IV. Drug-related Conditions

The court ordered Darryl not to be under the influence of any illegal or intoxicating substances or possess “associated paraphernalia.” The minute order and printed conditions of probation state he must not use or possess alcoholic beverages or “narcotics, drugs, other controlled substances, related paraphernalia or poisons unless prescribed by a physician.”

Darryl contends the terms “associated paraphernalia,” “related paraphernalia” and “poisons” are unconstitutionally broad and vague, and that these problems could be remedied by adding a scienter requirement. Again, the People do not contest his right to

⁴ Although Darryl does not explicitly mention it in this context, the printed conditions of probation also require that Darryl be “of good behavior.” We think this condition is analytically indistinguishable from the “good conduct” and “good citizenship” conditions, and so order it stricken as well.

raise this argument on appeal despite the lack of an objection before the juvenile court and it raises only a pure question of law, so we will not deem it forfeited. (*In re Sheena K.*, *supra*, 40 Cal.4th at pp. 888–889 [overbreadth and vagueness challenge was not forfeited by failure to object in juvenile court].)

Darryl’s challenges echo a common concern, and our Supreme Court has granted review to decide whether an explicit knowledge requirement is mandated in a probation condition that prohibits possession of weapons, drugs and paraphernalia and to address whether a condition very similar to the one at issue here is unconstitutionally vague. (*People v. Hall* (2015) 236 Cal.App.4th 1124, review granted Sept. 9, 2015, S227193.)⁵ Since probation may not be revoked unless the probationer’s conduct constitutes a willful violation of the terms of probation (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983), it may not be necessary to include an express knowledge requirement to protect against enforcement of unwitting violations. However, we see no harm in adding such a requirement pending our Supreme Court’s resolution of the issue.

Darryl also contends the proscription against possessing drugs unless prescribed by a physician is overbroad because it would preclude him from purchasing over-the-counter medications without a prescription. Here, we disagree. Darryl’s supposition that he would be held on a probation violation for taking aspirin assumes a wholesale departure from the commonly understood meaning of drug use or possession in this penal context, which we decline to take.

However, there is merit in Darryl’s challenge to the prohibition against using or possessing “poisons.” Darryl argues that, while the court “surely” meant only to prohibit

⁵The summary of the issues under review in the Supreme Court in *People v. Hall*, *supra*, 236 Cal.App.4th 1124 states, “This case presents the following issues: (1) Are probation conditions prohibiting defendant from: (a) ‘owning, possessing or having in his custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on his person’; and (b) ‘using or possessing or having in his custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription,’ unconstitutionally vague? (2) Is an explicit knowledge requirement constitutionally mandated?” (See also *People v. Gaines* (2015) 242 Cal.App.4th 1035, review granted Feb. 17, 2016, S231723.)

him from using or possessing substances that could be used as intoxicants, such as glue or paint thinner, the condition is so vague as to encompass even innocuous substances like bleach, gasoline or insect repellent. The People agree that “[i]n context, a ‘poison’ is any substance that [Darryl] knows or should know can intoxicate him.” So do we. The condition is unacceptably vague as written. In the analogous context of weapons prohibitions, courts have held that items like pencils, screwdrivers and pillows qualify as dangerous or deadly weapons only where the probationer intends to use them as such. (See *People v. Page* (2004) 123 Cal.App.4th 1466, 1471–1473; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 ; *People v. Helms* (1966) 242 Cal.App.2d 476, 486–487.) The principle that an otherwise innocuous object qualifies as a weapon only if used with that intent should, as a matter of common sense, guide the interpretation of the “poisons” condition here. The prohibition should apply only to substances that Darryl intends to use as intoxicants. But because this meaning is neither established nor self-evident, the condition must be modified to expressly prohibit Darryl only from using or possessing substances that he intends to use as intoxicants.

V. Conditions Regarding School and Employment

The court orally imposed as probation conditions that Darryl “[a]ttend school on a regular basis” and “[s]eek and maintain employment as directed.” The probation order signed by Darryl and his mother directs him to “[a]ttend classes or job on time and regularly.” The minute order requires him to “[a]ttend school everyday [*sic*], obey school rules and regulations, and not leave the school campus during school hours without permission of school officials or the probation officer.” Darryl asserts these conditions are contradictory and unconstitutionally vague and overbroad. Here, we disagree.

Darryl maintains the requirements that he attend school and seek employment are contradictory because he cannot do both at the same time and “[t]here is no direction to Darryl as to whether he is to do one of these things [or] both at the same time.” We disagree. “ ‘A probation condition should be given “the meaning that would appear to a reasonable, objective reader.” ’ [Citation.] Also, the probation condition should be

evaluated in its context, and only reasonable specificity is required.” (*People v. Forrest* (2015) 237 Cal.App.4th 1074, 1080.)

With these principles in mind, there is no contradiction. Darryl’s complaint that the condition fails to identify who is to direct him about employment ignores common sense. This is a probation condition. It requires Darryl to seek and maintain employment “as directed.” It is obvious in this context that the condition refers to direction by the court or probation officer and that Darryl is under no obligation to work until and unless he is so directed. Nor, common experience teaches us, is it “impossible” for Darryl to hold a job while completing his education, were he directed to do so. Indeed, he would certainly not be the first high school student to have a job.

Darryl also contends the conditions that he attend school “regularly,” “on a regular basis,” and “everyday” are unconstitutionally vague because they fail to articulate a standard for assessing his compliance, and overbroad because he could be punished for excused absences or a family emergency. Here too, we disagree. The “reasonable, objective meaning” of these requirements is that Darryl must be at school when it is in session, unless his absence is excused. That is what is expected of all students, and nothing in the conditions of probation suggests the court intended to impose additional or different requirements on Darryl. We need not modify a probation condition to avoid an absurd interpretation.

VI. Predisposition Credits and WETA requirement

Darryl contends the juvenile court erred by not awarding him predisposition credits for five days he spent in Juvenile Hall after his arrest. It did not err.

Under section 726, subdivision (d)(1), “If the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.” To implement this provision, a minor must be credited for time previously spent in physical confinement when such

confinement is subsequently selected as a disposition. (*In re Randy J.* (1994) 22 Cal.App.4th 1497, 1503, 1505.) “Physical confinement” means “placement in a juvenile hall, ranch, camp, forestry camp or secure juvenile home pursuant to Section 730, or in any institution operated by the Department of Corrections and Rehabilitation, Division of Juvenile Justice.” (§ 726, subd. (d)(5).)

Here, as the People observe, the court was not required to calculate Darryl’s predisposition custody credit because it did not order him physically confined within the meaning of section 726, subdivision (d)(5). Rather, Darryl was placed in his parents’ home under the supervision of the probation officer. When physical confinement is not ordered, there is no need to calculate credits *against* physical confinement.

Finally, it is undisputed that the printed probation conditions form fails to reflect that the court stayed imposition of a condition requiring 26 weeks of Weekend Training Academy (WETA) unless Darryl violates the terms of his probation. We agree the form must be amended to reflect that the condition was stayed.

DISPOSITION

The disposition order is modified to strike the probation conditions requiring Darryl to (1) submit to searches of his electronic devices and divulge his passwords, and (2) be of good conduct, good citizenship, and good behavior. The probation conditions concerning drugs and paraphernalia are modified to read: “You must not possess or be under the influence of alcohol or of drugs that you know or should know are illegal, or knowingly use or possess any paraphernalia related to illegal drug use.” The prohibition against possessing poisons is modified to read: “You must not possess or use substances that you intend to use as intoxicants.” The printed probation conditions form must be amended to reflect that the WETA condition was stayed. With these modifications, the dispositional order is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

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