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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE CARL McGUIRE,

Defendant and Appellant.

A146479

(Lake County  
Super. Ct. No. CR931847)

Defendant Jesse Carl McGuire appeals a postjudgment order revoking his probation and sentencing him to a county jail term followed by a period of mandatory supervision. On appeal, defendant contends that two of the conditions of his mandatory supervision are unconstitutionally vague and must be modified to prohibit him from knowingly violating them. The underlying issue is currently pending before our Supreme Court in *People v. Hall* (2015) 236 Cal.App.4th 1124, review granted September 9, 2015, S227193.<sup>1</sup> Therefore, although we question the need to do so, we shall, in the interest of prudence and avoiding the prolongation of these proceedings, modify the challenged

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<sup>1</sup> The 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.)

conditions to include a knowledge requirement and affirm the judgment in all other respects.

### **Background<sup>2</sup>**

On July 29, 2013, defendant was placed on probation for three years after pleading no contest to one count of buying or receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)).

On August 10, 2015, after defendant admitted that he violated several terms of his probation, the court revoked defendant's probation and executed a split sentence of two years six months in the county jail followed by six months of mandatory supervision, subject to certain conditions.

Defendant timely appealed.

### **Discussion**

Defendant challenges the following conditions of his mandatory supervision: “10) The defendant shall abstain from any use of intoxicating beverage/substance containing alcohol 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. [¶] 11) The defendant will not possess, use, nor have in his control any type of illegal drug, controlled substance, or marijuana without legal authorization.” Defendant contends these conditions are unconstitutionally vague because they fail to contain an express knowledge requirement, so that he “could easily violate either condition—completely unwittingly and despite his best efforts to remain in full compliance with the terms of his mandatory supervision.”

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ ” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) To survive a challenge for vagueness, “[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

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<sup>2</sup> The underlying facts of defendant's offenses are not relevant to the issue raised on appeal. We therefore provide only a summary of the relevant procedural history.

been violated.’ ” (*Ibid.*) A probation condition passes constitutional muster so long as it spells out with “reasonable specificity” what is prohibited in such a way that persons of common intelligence need not guess at its meaning or differ as to its application. (*Ibid.*)

The two challenged conditions, in our opinion, give defendant adequate notice of the conduct that is prohibited. Condition number 10 prohibits defendant from entering a “place where the primary item sold or dispensed is an alcoholic beverage.” A reasonable person would understand this condition as prohibiting his entry into a bar or liquor store and not a “bowling alley, pool hall, or football stadium” as suggested by defendant. Likewise, condition number 11 prohibits defendant from possessing, using or having in his control “any type of illegal drug, controlled substance, or marijuana without legal authorization.” The prohibited substances are clearly those proscribed by statute. Adding the word “knowingly” to these conditions does little if anything to provide guidance as to the types of establishment he may not enter or the substances he may not possess.

Defendant’s primary contention is that the challenged conditions must include an explicit knowledge requirement to avoid the possibility of an unwitting violation of the conditions. We recognize, as do the parties, a split in authority as to whether the scienter requirement must be expressly included in a probation condition. (See *In re Kevin F.* (2015) 239 Cal.App.4th 351, 365 [requiring modification to add a scienter requirement]; *People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [same]; *People v. Moore* (2012) 211 Cal.App.4th 1179, 1185 [modification to add scienter requirement is unnecessary because a knowledge requirement is already “manifestly implied.”]; *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 591 [Challenged probation condition contains implicit scienter requirements, and due process does not require making them explicit.]; *People v. Kim* (2011) 193 Cal.App.4th 836, 847 [“[I]t is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute.”].) As the Attorney General states, defendant can violate the conditions of his supervision only if he does so willfully, “which in this instance means that appellant would have to know he was in a place where the primary item sold or dispensed is an alcoholic beverage” or that he was

possessing or using a beverage or substance containing alcohol or any illegal drug or controlled substance. (See *People v. Rodriguez, supra*, 222 Cal.App.4th at p. 594 [It “is implicit . . . that possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance.”]; *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [“there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter”].)

Although the Attorney General’s position has much to commend it, until the Supreme Court provides further guidance we see no reason to prolong these proceedings and consider it most expedient to simply require that the term “knowingly” be inserted in the challenged conditions.

### **Disposition**

The matter is remanded to the trial court with the direction to modify probation condition numbers 10 and 11 to read as follows: “10) The defendant shall abstain from any *knowing* use of intoxicating beverage/substance containing alcohol and will not *knowingly* be in or about any place where the primary item sold or dispensed is an alcoholic beverage and will not *knowingly* possess or have under his control any alcoholic beverage. 11) The defendant will not *knowingly* possess, use, nor have in his control any type of illegal drug, controlled substance, or marijuana without legal authorization.”

The order is affirmed in all other respects.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.

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