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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re BRYAN C.,
A Person Coming Under the Juvenile Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

BRYAN C.,
Defendant and Appellant.

No. A146522

(San Mateo County
Super. Ct. No. 84449)

Minor Bryan C. appeals from that portion of a San Mateo County juvenile court’s order imposing certain gang-related probation conditions, issued in a proceeding initiated pursuant to Welfare and Institutions Code section 602. Minor contends that two aspects of these conditions are unconstitutionally vague and/or overbroad. We agree that the first condition is impermissibly vague and order that it be modified. As modified, the order is affirmed.

BACKGROUND

I.

The Petition

In May 2015, the San Mateo County District Attorney filed a juvenile wardship petition alleging minor committed two misdemeanors, for battery (Pen. Code, § 242) and for disturbing the peace while fighting (*id.*, § 415(1)).

II.

The Probation Department Report

In preparation for a contested jurisdictional hearing, the county's probation department reported to the court about a January 22, 2015 incident at El Camino High School in South San Francisco, California. Police indicated that they received a report from school officials about juveniles fighting that day. The school officials had detained a victim and two of his attackers. Wrote the probation department, "[t]he incident appeared to be gang-related." The victim had a red mark below his eye, a four-inch scratch on his arm, and a swollen knuckle. He "admitted to being associated with a gang out of San Francisco called 'TMB.'" The victim further stated that after one of the attackers came after him, he started punching back and "all the subjects that were with [the attacker] started to 'jump' him." The victim covered up to protect himself.

The police stated in a later report that school officials subsequently told them the January 22 incident had been video-recorded. This video showed "four subjects getting into the altercation with the victim." Minor was one of the attackers.

The police interviewed minor, who at first denied he was involved in the altercation or depicted in the video. However, later, he "admitted to hitting the victim as shown on the video and stated, 'Yeah, I hit him (the victim), that was me in the video. I hit him a couple of times.'" When asked why he was involved, the Minor said that he wanted to 'get his boys back,' " and was unwilling to provide further detail. Minor denied to the reporting probation officer that he was involved in the incident and did not wish to discuss it.

The probation department reported that minor's only prior delinquent offense was a citation for possessing marijuana on school grounds. He completed a drug and alcohol program and the matter was closed in September 2013. Minor denied using alcohol, said he had used marijuana since he was 13 years old, and said he used it weekly by himself.

Minor's parents described him "as a good boy, athletic and talkative." They had discussed the case with him, the probation department wrote, "and support his denial statement. The parents have not had major issues with Minor's behavior. Occasionally,

he comes home late for curfew and occasionally ‘mouths off.’ ” The parents were not aware of all of minor’s friends, but did not think he was involved with gangs.

Minor attended El Camino High School for two years but, due to poor grades, transferred to another school, and was now attending a third school. He had received special education services since middle school, was maintaining “a .33 grade point average,” and had earned 20 credits to date.

In its evaluation, the probation department stated that minor was in the video and emphasized his admission that he struck the victim. The department further stated, “There are aggravating circumstances to be considered in this matter. According to the police report, the Minor participated in an unprovoked, senseless act of gang-related violence on a vulnerable, outnumbered victim. The Minor told police that he was there to serve as a ‘back up’ and punched the victim ‘a couple of times’ while his companion was engaged in fighting with the victim.”

The department also stated that, according to test results, minor was a low risk to re-offend and would respond best to “Selective Intervention, supervision strategy.” Although the department considered recommending he be placed on informal probation because of his minimal referrals and lack of problematic behavioral history, “due to the aggravating elements . . . [the department] believes a firm consequence is warranted at this time.” It recommended he be placed on probation supervision and, as a sanction for his actions, be ordered to serve 30 days therapeutic detention in the Youth Services Center and pay a restitution fine. The department also recommended certain probation conditions, including certain gang-related conditions.

III.

The Contested Jurisdictional Hearing

The September 30, 2015 contested jurisdictional hearing featured a number of witnesses whose testimony focused on whether or not minor was one of the attackers of the victim in the January 22, 2015 incident. Witnesses identified him as such based significantly on the video and the clothes he was wearing that day, which the evidence indicated included a red beanie, red underwear that showed over sagging pants, and a

sweatshirt with red among its features. One such witness, the school's assistant principal, also testified that "[e]very incident that I had any interaction with [minor] or I saw [minor] he had his red basketball shorts underneath his sagging pants and he often carried a red beanie or was wearing a red beanie on campus."

At the conclusion of the hearing, the court concluded there was proof beyond a reasonable doubt that minor had committed the alleged offenses, including minor's own admission that "not only did he hit [the victim] twice, but he was doing it to back his guy or whatever. That's exactly what it looks like. This wasn't a single person acting; it looks like somebody backing his guy." Accordingly, the court adjudged minor to be a ward of the court.

With minor's counsel's permission, the court then turned to disposition. The court adopted most of the probation department's recommendations, including that minor be detained for 30 days in the Youth Service Center and be placed on probation subject to certain terms and conditions. These include two gang-related conditions that we will shortly discuss further.

Minor filed a timely appeal from the court's September 30, 2015 ruling.

DISCUSSION

Minor challenges each of the court's gang-related conditions on constitutional grounds. Minor did not challenge the probation conditions on grounds of vagueness or overbreadth at the dispositional hearing. However, the People concede that a specific objection is not required if the claim raises pure questions of law (*In re Sheena K.* (2007) 40 Cal.4th 875, 888–889 (*Sheena K.*)), and have chosen not to argue forfeiture here. Therefore, we proceed to the merits of minor's arguments.

I.

The First Gang-Related Condition Should Be Modified.

The first gang-related condition ordered by the juvenile court was: "The Minor shall not participate in any gang-related activity or any activity the Minor knows is prohibited by the probation officer as gang-related activity."

Minor argues this condition is unconstitutionally vague in the absence of any references to minor's knowledge in the first clause of the order. In other words, to pass constitutional muster, minor contends, it must be modified to state: "The Minor shall not *knowingly* participate in any gang-related activity or any activity the Minor knows is prohibited by the probation officer as gang-related activity." The People contend the order is sufficient because of its reference to the knowledge of the probation officer. We agree with minor.

The parties agree on the applicable law. A juvenile court may impose on a probationer "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile. [Citation.] That discretion will not be disturbed in the absence of manifest abuse." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.)

"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." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Further, "a court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.'" (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

Minor contends the court's first probation condition suffers from the same flaw as that found in *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*). We agree. The *Leon* court found that a probation condition prohibiting the defendant from "frequent[ing] any areas of gang-related activity" was unconstitutionally vague because it lacked a knowledge requirement. (*Id.* at p. 952.) Thus, defendant could inadvertently be in an area where there was gang activity and violate his probation. The court concluded that a

knowledge requirement was necessary for the condition to comply with constitutional due process requirements. (*Ibid.*)

Here, the subject condition in part forbids minor from participating in “any gang-related” activity. It does not require that minor know that the activity is gang-related. Thus, minor could engage in activity that he does not know is gang-related and nonetheless violate this probation condition, as could the *Leon* defendant.

The People argue the condition is constitutionally permissible because, “[g]iven the requirement that the probation officer notify appellant of what constitutes gang-related activity, it is implicit that any activity violating the condition must be known to appellant to be gang-related.” We disagree. The condition contains two independent clauses, as indicated by the term “or” that separates them.

The condition should be modified to specify that Bryan not “*knowingly* participate in any gang-related activity or any activity the Minor knows is prohibited by the probation officer as gang-related activity.”

II.

The Second Gang-Related Condition Is Constitutionally Permissible.

The second gang-related probation condition ordered by the juvenile court was: “The Minor shall not wear, possess, or display any clothing or item or display any hand signs with gang significance or which are indications of gang membership, e.g., colors, symbols, insignias, numbers, monikers, patterns, etc., known by the Minor to be such, as may be identified as such by law enforcement or probation officers.”

Minor contends this condition is vague and overbroad, and the People disagree. We conclude it is constitutionally permissible.

We have already discussed what constitutes a constitutionally vague condition. To avoid imposing a constitutionally overbroad condition, a court may impose only those limitations on a person’s constitutional rights that are “closely tailor[ed] . . . to the purpose of the condition.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Thus, “[t]he essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s

constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

We see nothing vague or overbroad about this second probation condition. It requires minor to refrain from a variety of specifically identified gang-related activities, and limits the condition’s reach to those activities “known by the Minor” to be gang-related and “as may be identified as such by law enforcement or probation officers.”

Minor contends the “condition fails to tell [minor] and the probation officers monitoring his compliance exactly what is forbidden.” He further contends that the broad conditions on his clothing do not pass constitutional muster because “[t]he vast number of criminal street gangs, and the frequency with which gang colors or symbols can change, means that to order [minor] from wearing any gang colors or symbols is an order that could include virtually any color or any symbol[,]” putting him “in constant jeopardy of violating probation.” Minor further protests that the order prohibits him from wearing clothing that suggests an association with any gang, making it overbroad, and that there was no evidence presented that he “had any gang ties that would justify the imposition of such a broad condition.” He also contends that probation officers are not required to inform minor of the clothing that is prohibited, since the condition refers only to those items “as *may* be identified as such by law enforcement or probation officers.” (Italics added.)

Minor’s arguments are unpersuasive. We do not find the reference to “may” confusing; the terms of the order obviously only extend to those matters probation officers tell minor.

Further, there was substantial evidence presented at the jurisdictional hearing that minor engaged in gang-related activity. The probation department report indicated the attack was gang-related, and witnesses pointed out the prominence of the color red in minor’s clothing that day and on other days; no one disagrees that this color is one employed by some gangs.

Finally, minor's overbreadth argument was essentially rejected by the *Leon* court in its consideration of a similar condition. The court upheld the constitutionality of the following condition, as modified by the court: “ ‘You are not to possess, wear or display any clothing or insignia, tattoo, emblem, button, badge, cap, hat, scarf, bandanna, jacket or other article of clothing that you know or that the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang.’ ” (*Leon, supra*, 181 Cal.App.4th at p. 951.) It reasoned that “a probation condition must be aimed at the rehabilitation of the defendant and it is necessary and appropriate that the term ‘gang’ be more fully defined” than by the identification of only one gang. (*Ibid.*)

The probation condition in this case is comparable to, and no broader than, the condition upheld in *Leon*. Therefore, we conclude that it too is constitutionally permissible.

DISPOSITION

The juvenile court is ordered to modify the first gang condition of probation discussed herein to read as follows: “The Minor shall not knowingly participate in any gang-related activity or any activity the Minor knows is prohibited by the probation officer as gang-related activity.” As modified, the order appealed from is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

In re Bryan C. (A146522)