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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re MITCHELL W., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

MITCHELL W.,

Defendant and Appellant.

C067718

(Super. Ct. No. 68111)

After the minor, Mitchell W., violated juvenile probation by possessing child pornography on his laptop computer, the juvenile court ordered the computer destroyed, over the minor's objection that destroying the hard drive would suffice. The court stayed the order pending appeal.

The minor contends that the court's order violated constitutional due process, was overbroad, and was not specifically tailored to his needs.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 17, 2010, the San Joaquin County District Attorney filed a juvenile wardship petition as to the minor, then age 16. (Welf. & Inst. Code, § 602, subd. (a).) The petition alleged that the minor had violated Penal Code sections 422, criminal threats, and 242, battery. His mother, Lisa W., was the alleged victim on both counts.

The detention report stated that after Lisa W. had told the minor he could not play video games because he was not attending school regularly, he struck her several times and repeatedly threatened to kill her. Lisa W. sustained swelling and bruises on her arm and pain to her hand. The minor's conduct also endangered his seven-year-old sister, who was nearby. Lisa W. said the minor had made similar threats before.

On May 20, 2010, the minor admitted the charges. On July 7, 2010, the juvenile court declared him a ward of the court, placed him on probation with a maximum period of confinement set at one year two months, directed him to follow all laws and court orders, and subjected him to unlimited search and seizure.

On September 21, 2010, the probation officer filed a probation violation petition, alleging that the minor had repeatedly missed school and that his mother had said he was "out of control."

On September 22, 2010, the minor admitted the violations. The juvenile court released him to his mother's custody.

On November 18, 2010, the police seized the minor's computer and found child pornography on it. The minor's mother had caught the minor viewing child pornographic images on the computer two years prior and had admonished the minor about collecting such images. She had recently caught him again. A court-ordered psychological evaluation of the minor stated that the minor had a history of watching child pornography on his computer. The evaluation also stated that the minor's mother described the minor as manipulative and said the minor previously had stolen a credit card from her and used it to make online purchases.

The minor's mother reported an incident that occurred in early February 2011 to the probation officer. On February 8, the minor was verbally abusive to his sister and kept increasing the volume of the television over the volume of his sister's voice as she played. He refused to turn the volume down when the minor's mother requested he do so, so the minor's mother turned the television off and unplugged it. The minor plugged the television back in. When his mother unplugged it again, the minor cornered his mother, situated himself a few inches from her and told her that she did not want to find out what would happen if she disabled the television. The minor continued his verbal assault on his sister and threatened to "get her" if she made another sound. He called his mother "every swear word in the book" and told her she was "worthless" because she could not control his sister or him. The police were called. The minor's

mother reported that "[h]e kept trying to stare us down which made me very uncomfortable about what he would do."

On February 14, 2011, the probation officer filed a second probation violation petition, alleging the minor's possession of child pornography and the minor's mother's reports of the minor's threatening behavior. The probation officer recommended that the minor's computer be seized and destroyed and that he be allowed computer and Internet access only under responsible adult supervision.

On February 17, 2011, the minor admitted the violations in return for the People's agreement not to file a new petition based on the allegations underlying the February 14, 2011 violation of probation.

On March 10 and March 17, 2011, the juvenile court heard argument on the People's request for an order to destroy the minor's computer.

At the March 10 hearing, a deputy public defender filling in for the minor's assigned counsel asked whether technicians could simply "erase the offending materials or files." Counsel also told the court that the minor had told her there is a "file shredder application already on the computer" and the material could be deleted beyond recovery. The minor told the court that the file shredder application "overwrites it numerous times." Unpersuaded, the court ordered the computer destroyed, but

stayed the order so the minor's assigned counsel could argue the matter.¹

At the March 17 hearing, the minor's assigned counsel informed the court that the computer at issue was a laptop computer. The minor's counsel asserted it would make more sense to remove the hard drive than to force the minor's mother to pay to replace the computer, which the entire family used. Counsel said that he or an investigator from his office could take the computer containing child pornography to a computer store to have the illegal images removed. Counsel cited no authority that would except him or his investigator from what would be possession of illegal material. Counsel further suggested the probation department could test the computer to confirm that the material had been removed. Counsel contended that removing the hard drive would not only remove the criminal matter, but would serve "the rehabilitative purpose of the order and prevention of future crimes" just as well as destroying the entire computer.

The prosecutor asserted that the police department routinely destroyed computers when "the instrument of the crime itself is a computer" and urged that engaging in crime should have consequences. He further expressed reluctance to release a computer containing child pornography to anyone.

¹ The court also ordered, as requested, that the minor be allowed computer and Internet access only under adult supervision. When the court suggested that the minor's mother "put some Internet blocks on there[,] " the minor's mother said she had already done that, but "the kids know how to get around them."

The juvenile court found that destroying the computer was in the minor's best interest because it was "part of [the minor's] rehabilitative process," which included learning that "there had to be a consequence" for his misconduct. Therefore, the court reinstated the order, but stayed it again pending appeal.

DISCUSSION

The minor contends, "The juvenile court abused its discretion by imposing an unconstitutional condition of probation which was not specifically tailored to meet [the minor's] needs by ordering destruction of his entire computer." He asserts two theories -- unconstitutional taking and overbreadth. We are not persuaded.

I. Applicable Law

"When the juvenile court determines a minor is a ward of the court under Welfare and Institutions Code section 602, it has a variety of dispositional options. Should the court decide to place the minor on probation, '[t]he juvenile court has broad discretion in formulating conditions of probation.' [Citations.] Some conditions, like the requirement the minor attend school, are mandatory absent an express finding that such a condition would be inappropriate. [Citations.] Other conditions, like one requiring participation in an alcohol or drug education program, are triggered when the minor's misconduct involves specific conduct. [Citation.] In deciding what conditions to place on a juvenile probationer, ''the juvenile court must consider not only the circumstances of the

crime, but also the minor's entire social history'
. . ."' [Citations.]"

"The juvenile court's broad discretion to fashion appropriate conditions of probation is distinguishable from that exercised by an adult court when sentencing an adult offender to probation. Although the goal of both types of probation is the rehabilitation of the offender, '[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.' [Citations.]

"In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.]" (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81 (*Tyrell J.*), overruled on another ground in *In re Jaime J.* (2006) 40 Cal.4th 128, 130, 139; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*).

"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.'" (*Victor L., supra*, 182 Cal.App.4th at p. 910.)

"A condition of [juvenile] probation will not be held invalid unless 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. . . ."

[Citations.] All three factors must be present to invalidate a condition of probation. [Citation.]” (*In re R.V.* (2009) 171 Cal.App.4th 239, 246 (*R.V.*)). We review a juvenile court’s order of probation conditions for abuse of discretion. (*Ibid.*)

“Of course, the juvenile court’s discretion is not boundless. . . . [¶] [T]he overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation. [Citations.]” (*Victor L.*, *supra*, 182 Cal.App.4th at p. 910.) “If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used.” (*In re Luis F.* (2009) 177 Cal.App.4th 176, 189.) However, no court has required that probation conditions must be limited in number when no one condition can fully satisfy the contemplated purposes.

II. Analysis

Given the minor’s history of continuing to watch child pornography on his computer even after being caught by his mother and his defiance to parental supervision even after receiving probation, the juvenile court’s order easily passes the test for a valid probation condition. (*R.V.*, *supra*, 171 Cal.App.4th at p. 247.) The court’s order, which was carefully tailored to the minor’s offenses, will serve the “compelling state interest in [the minor’s] reformation and rehabilitation” (*Victor L.*, *supra*, 182 Cal.App.4th at p. 910)

by limiting his opportunity to reoffend and impressing on him that misconduct can have serious consequences. Thus, the order is "consistent with the rehabilitative purpose of probation and constitutional parental authority." (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1243 (*Frank V.*).

While conceding the child pornography on the laptop was contraband the government could lawfully seize and detain, the minor contends the order unconstitutionally deprived him of a property interest, his possessory interest in his computer, without due process of law. (Cf. U.S. Const., 5th Amend.; Cal. Const., art. I, § 7.)² He asserts that the juvenile court violated due process because it failed to determine that destroying the contraband required destroying his computer (which was not unlawful to possess), rather than simply destroying the hard drive. (See *People v. Lamonte* (1997) 53 Cal.App.4th 544, 547, 551-553 [trial court erred by denying defendant's motion to return seized telephone and computer equipment allegedly used to commit crimes]; *Porno, Inc. v. Municipal Court* (1973) 33 Cal.App.3d 122 [video projectors allegedly used to exhibit obscene matter, but usable for legal purposes, improperly seized].) We reject this contention.

² We note that counsel for the minor repeatedly indicated that the laptop had been purchased by the minor's mother and that it belongs to her. The Attorney General does not question the minor's standing to contest the destruction of the laptop here, and we express no opinion on that issue.

First, because the minor did not object on this due process ground in the juvenile court, this contention is forfeited. Although his counsel argued in effect that the proposed order was overbroad, counsel did not make a due process objection grounded on the theory of unconstitutional taking. A constitutional claim may be forfeited by failure to raise it in the trial court. (*People v. Partida* (2005) 37 Cal.4th 428, 433-438.)³ Such is the case here.

Second, even if the court's order might have posed a due process problem in an adult criminal case, the minor cites no authority from the juvenile justice context to support his due process claim, and we know of no such authority. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889; *Tyrell J.*, *supra*, 8 Cal.4th at p. 81.)

Finally, we see no due process violation here. The minor received a hearing on his assertion that the contraband could be destroyed *beyond recovery* without destroying the computer. Indeed, the juvenile court continued the matter specifically for that purpose and to allow assigned counsel to address the issue. However, counsel offered no testimony, evidence, declaration or

³ This case is in contrast with cases involving facial challenges to probation conditions grounded on claims of unconstitutional vagueness and overbreadth. When a facial challenge grounded on constitutional vagueness or overbreadth involves a pure question of law and can be resolved without reference to the sentencing record developed in the trial court, the forfeiture rule does not apply. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

even an offer of proof grounded on statements from a qualified technician who would be available to remove the hard drive. Nor did counsel explain how he or an investigator could legally possess a computer containing child pornography while transporting it to such a technician. Therefore, the court impliedly determined the issue adversely to the minor.

In this context, the minor asserts that Penal Code section 312.3, a forfeiture statute, authorizes a trial court to destroy only the hard drive of a seized computer which contains child pornography, even if there has been no trial or conviction of the computer's owner.⁴ This statute is inapposite. It applies in plain terms only to forfeiture proceedings, and

⁴ Penal Code section 312.3 provides in pertinent part:

"(a) Matter that depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct as defined in Section 311.4 and that is in the possession of any city, county, city and county, or state official or agency is subject to forfeiture pursuant to this section.

"(b) An action to forfeit matter described in subdivision (a) may be brought by the Attorney General, the district attorney, county counsel, or the city attorney. Proceedings shall be initiated by a petition of forfeiture filed in the superior court of the county in which the matter is located.
[¶] . . . [¶]

"(h) As used in this section, 'matter' means any . . . representation . . . of information, data, or image, including, but not limited to, any . . . *computer hardware*, computer software, . . . or any other computer-generated image that contains or incorporates in any manner any film or filmstrip."
(Italics added.)

the minor cites no authority applying it to juvenile proceedings under Welfare and Institutions Code section 602.

Moreover, even if the statute could be applied to limit the type of property the juvenile court could order destroyed as a condition of probation, the statute would be of no help to the minor. The minor focuses on the statutory language which permits the forfeiture of "computer hardware" and "computer software" and contends that since the statute does not reference forfeiture of an "entire computer" or "laptop computer," there is no basis to order destruction of his laptop. The minor fails to explain why the term "computer hardware," a shorthand commonly used to describe the various components of a computer (e.g. monitor, motherboard, processor, RAM, optical disc drive, hard drive, keyboard, mouse), combined with the term "computer software," does not equate to the entire computer. The computer hardware represents virtually the entirety of the computer, with the exception of the software.

The minor contends the juvenile court's order is unconstitutionally overinclusive because it goes beyond what is necessary "to achieve the state's interest in destroying the unlawful images." However, that is not the only state interest involved here. In a Welfare and Institutions Code section 602 proceeding, the fundamental state interest is its "compelling . . . interest in reformation and rehabilitation." (*Victor L.*, *supra*, 182 Cal.App.4th at p. 910.) As we have explained, the court's order is carefully tailored to that end.

Last, the minor contends the order is unconstitutionally overbroad because it is not reasonably tailored to his needs, which could have been satisfied by destroying the hard drive containing the unlawful matter and by the probation condition requiring that he use a computer only under parental supervision. Again, we disagree. There is no requirement that the juvenile court impose less restrictive conditions when those conditions present less effective means to satisfy the underlying purpose. And nothing prevents the juvenile court from imposing two conditions of probation narrowly tailored to achieve the same purposes when neither condition, in and of itself, can ensure achievement of those purposes.

Here, the juvenile court could legitimately have been concerned that the search of the minor's house did not turn up other data media that could be played in the computer, such as optical discs or flash drives, even if the original hard drive was destroyed. The prosecutor told the court that an optical disc drive containing child pornography had been found, but that does not mean other easily concealed media was not found.

As for the supervision condition, parental supervision of the minor had already proven difficult for the minor's mother. Indeed, defendant came into the system because he used and threatened violence against his mother when she attempted to curtail his video game use. He threatened violence against her when she unplugged the television because he refused to decrease the volume. His mother described him as manipulative. The

minor had taken her credit card to make online purchases without her consent.

Also, given the mobile nature of the laptop, the court legitimately could have concluded its destruction was necessary to prevent the minor from secretly using it, notwithstanding the mother's best efforts. (See *Victor L.*, *supra*, 182 Cal.App.4th at pp. 921-922 [a complete ban on portable devices serves a legitimate purpose in juvenile probation in that it is easier for parents, school officials, and the probation department to detect and supervise a youth's communications].)

Finally, as we have noted, the minor's need for reform and rehabilitation was further served by demonstrating that his misconduct has negative consequences. The court's order is, thus, consistent with the rehabilitative purpose of probation and the court's parental authority over the minor. (*Frank V.*, *supra*, 233 Cal.App.3d at p. 1243.)

DISPOSITION

The juvenile court's order is affirmed.

MURRAY, J.

I concur:

NICHOLSON, Acting P. J.

I concur because the minor was playing video games on the computer, which was interfering with his school attendance. This is reason enough to sustain the forfeiture of the entire computer, even if he had not been using it for viewing pornography.

ROBIE _____, J.