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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON V.,

Defendant and Appellant.

D059892

(Super. Ct. No. J228468)

APPEAL from a judgment of the Superior Court of San Diego County, Carolyn M. Caietti and Carlos O. Armour, Judges. Affirmed and remanded with directions.

Brandon V. was convicted of misdemeanor battery and, pursuant to Welfare and Institutions Code section 602,¹ was adjudicated a ward of the juvenile court. In its disposition, the juvenile court ordered that the minor be placed on probation subject to a

¹ All statutory references are to the Welfare and Institutions Code unless otherwise specified.

variety of conditions. In this appeal Brandon contends the juvenile court imposed an unconstitutionally vague and overbroad probation condition concerning possession of utensils used for graffiti and that the stay away probation condition orally imposed by the juvenile court at the disposition hearing is inaccurately stated in the minutes. We order the correction of the minutes, but otherwise affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2010, between noon and 1:00 p.m., Benjamin Adler was on his way to work at his furniture store in National City. As he pulled into the alley behind his business, he saw a crowd of youngsters in what appeared to be the beginning of a brawl. There was a fight between two boys at the center of the crowd. Adler got out of his truck and yelled, "What the hell is going on here?" He broke apart the fight and told the youngsters to leave.

Brandon, who was part of the group, picked up a bicycle handlebar and threw it at Adler. The handlebar stuck Adler's right arm. Adler called the police and later, when police brought Brandon back, identified the minor as the one who threw the handlebar.

On February 28, 2011, the People filed a petition pursuant to section 602 alleging Brandon unlawfully used force and violence upon another, in violation of Penal Code section 242, a misdemeanor. The petition was sustained at the contested adjudication hearing. At disposition, Brandon was adjudged a ward and was placed on probation with various terms and conditions.

II

DISCUSSION

On appeal Brandon contends that the juvenile court imposed an unconstitutionally vague and overbroad probation condition that he "not be in possession of any utensils which can be used for vandalizing (graffiti) any property, including: spray paint, etching tools, or marking pens, unless under the supervision of a parent, teacher or adult mentor" ("possession probation condition").² He also contends the stay away probation condition imposed by the court at the disposition hearing is inaccurately stated in the minutes. We address each contention in turn.

A. *The Possession Probation Condition*

When the state asserts jurisdiction over a minor, it stands in the shoes of the parents, thereby occupying a unique role in caring for the minor's well being. In keeping with this role, the court may impose any and all reasonable probation 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. (§ 730, subd. (b).) The permissible scope of discretion in formulating terms of juvenile probation is greater than that allowed for adults, as "juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed." (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) Thus, "'a condition of probation that would

² Brandon makes a preliminary argument that he did not forfeit his claim by failing to object to the condition in the lower court. The People agree, as do we. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*.)

be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.'" (*Sheena K.*, *supra*, 40 Cal.4th at p. 889; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242-1243, [rule derives from court's role as *parens patriae*].)

However, the juvenile court's discretion in ordering conditions of probation is not boundless: it must not order conditions that are unconstitutionally vague or overbroad. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *In re Luis F.* (2009) 177 Cal.App.4th 176, 186.)

Although challenges to the constitutionality of probation conditions on the basis of vagueness and overbreadth are frequently made together, the concepts are distinct.

The underpinning of a vagueness challenge is the due process concept of fair warning. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; see *In re H.C.* (2009) 175 Cal.App.4th 1067, 1070; U.S. Const, Amends. 5, 14; Cal. Const., art. I, § 7.) A restriction 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.'" (*Sheena K.* at p. 890; *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) "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 specificity.'" (*Sheena K.* at p. 890, citing *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116-1117 (*Gallo*).)

In contrast, a probation restriction is unconstitutionally overbroad if it impinges on constitutional rights, and is not tailored carefully and reasonably related to the compelling

state interest in reformation and rehabilitation. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "The 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.)

Appellant's challenge is primarily one of vagueness, not overbreadth. He contends the possession probation condition is unconstitutionally vague because the list of prohibited utensils is "potentially endless" and not sufficiently precise for him to know what is required.³ We disagree.

"[A]bstract legal commands must be applied in a specific *context*. A contextual application of otherwise unqualified legal language may supply the clue to a [probation condition's] meaning, giving facially standardless language a constitutionally sufficient concreteness." (*Gallo, supra*, 14 Cal.4th at p. 1116.) Moreover, a probation condition need only be reasonably specific. (*Id.* at p. 1117.) A probation condition "'will not be held void for vagueness "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.'" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) Here, a contextual application reveals the probation condition only prevents Brandon from possessing those

³ We review appellant's claim de novo. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 888.)

utensils "*which can be used for vandalizing (graffiti) any property.*" (Italics added.) While it is true that the type of utensils Brandon may not possess except with adult supervision is illustrated by a nonexclusive list, the term is fairly defined, albeit not within a definition labeled as such as in Penal Code section 594.2. Subdivision (a) of section 594.2 provides a more complete list of prohibited implements or utensils used to commit graffiti or vandalism, and subsection (c) further defines the meaning of the listed items.⁴ Thus, reference to law provides sufficient notice of what "utensils" Brandon may not possess unless he is supervised. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815 [reference to existing law can provide sufficient notice of prohibited conduct]; *Lopez* at pp. 630-631.) Finally, a probation condition is to be interpreted as it would be understood by a reasonable person. (*People v. Olguin* (2008) 45 Cal.4th 375, 382 (*Olguin*); *People v. Bravo* (1987) 43 Cal.3d 600, 606-607.) It is not reasonable, as Brandon suggests, to construe the possession probation condition to mean that Brandon cannot possess a fork, spoon or knife with which to eat, or to possess a pencil, pen or crayon with which to do his homework. Accordingly, we decline Brandon's request to strike the possession probation condition.

⁴ Penal Code section 594.2 states in relevant part: "(a) Every person who possesses a masonry or glass drill bit, a carbide drill bit, a glass cutter, a grinding stone, an awl, a chisel, a carbide scribe, an aerosol paint container, a felt tip marker, or any other marking substance with the intent to commit vandalism or graffiti, is guilty of a misdemeanor. [¶] . . . [¶] (c) For the purposes of this section: (1) 'Felt tip marker' means any broad-tipped marker pen with a tip exceeding three-eighths of one inch in width, or any similar implement containing an ink that is not water soluble. (2) 'Marking substance' means any substance or implement, other than aerosol paint containers and felt tip markers, that could be used to draw, spray, paint, etch, or mark."

Brandon's constitutional challenge to the possession probation condition on the grounds of overbreadth is derivative. Brandon does not contend the possession condition unnecessarily infringes on any constitutional right. Rather, he asserts "[b]ecause the list of prohibited utensils includes items commonly used on a day-to-day basis, [the possession condition] does not closely tailor the probations to the purpose of the condition, which is not to engage in vandalism or graffiti," and is therefore overbroad. Again, we disagree.

As Brandon has failed to identify how the possession probation condition infringes upon his constitutional rights, we review the possession probation condition for abuse of discretion — that is, for an indication that the condition is arbitrary, capricious or otherwise exceeds the bounds of reason. (*Olguin, supra*, 45 Cal.4th at p. 384; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Here there is no indication the juvenile court abused its discretion in issuing the possession probation condition. First, we have already rejected the factual premise of Brandon's argument, namely, that the probation condition includes items commonly used on a day-to-day basis. Second, as we have construed the language, the probation condition is specifically tailored to prevent Brandon from possessing, absent adult supervision, those implements typically used by minors to commit graffiti or property vandalism. Third, and finally, the probation officer's social study states the minor struggles with engaging in delinquent activities. According to the study, Brandon's mother reported his neighborhood friends are a negative influence on Brandon, as they use drugs and are "'taggers.'" While Brandon denied any gang or tagging crew affiliation, his mother reported Brandon often tags on papers at home.

Given the probation officer's social study, not only is the possession probation condition closely tailored to preventing Brandon from possessing those utensils typically used by juveniles to deface property, it is specifically tailored to preventing Brandon from escalating his tagging activities. Thus, the possession condition is carefully and reasonably related to the compelling state interest in Brandon's reformation and rehabilitation, and we decline to strike it.

B. *The Stay Away Probation Condition*

At the May 26, 2011 disposition hearing, the juvenile court entered a stay away order that Brandon was allowed to walk past Adler's furniture store as needed but was prohibited from entering it (probation condition 30).⁵ The minutes of that hearing, however, state Brandon is barred from being within two blocks of Adler's furniture store.

Brandon contends the minutes should be amended to accurately reflect probation condition 30 as set forth orally by the court at the disposition hearing. The People agree. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-389 [the clerk's minutes must accurately reflect what occurred at the hearing]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [if the judgment entered in the clerk's minutes fails to reflect the judgment pronounced, the error is clerical, and the record can be corrected at any time to reflect the true facts].) Accordingly, we remand the case to the lower court with

⁵ The court stated: "As far as being within two blocks of Adler's furniture, just for incidental travel through the neighborhood but don't go into the furniture store and he is not to have any contact with the victim, Mr. Adler, or his companion Rider Flores."

directions to correct the minutes of the May 26, 2011 disposition hearing to accurately reflect the stay away order as orally pronounced by the court.

DISPOSITION

The case is remanded to the juvenile court with instructions to correct the minutes of the disposition hearing to reflect the stay away order as orally pronounced by the court.

In all other respects the judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P.J.

O'ROURKE, J.