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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN PEREZ,

Defendant and Appellant.

D070173

(Super. Ct. No. JCF35772)

APPEAL from a judgment of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Ted Cropley and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Perez challenges the condition of his probation that prohibits him from possessing any firearms or dangerous weapons as unconstitutionally vague because it does not contain an express knowledge requirement.<sup>1</sup> We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Perez was an inmate at the Imperial County Jail. A corrections officer noticed another inmate hand Perez a bag. The officer searched the bag and found substances that later tested positive for heroin and methamphetamine. Perez pleaded no contest to unauthorized possession of a controlled substance in jail (Pen. Code, § 4573.6, subd. (a)). The trial court placed Perez on three years of formal probation with various terms and conditions, including that "[d]efendant shall not possess any firearms or dangerous weapons" (the weapons condition).

#### DISCUSSION

Perez contends the weapons condition is unconstitutionally vague because it does not expressly provide that he "knowingly" possess the prohibited items. Thus, he argues it does not provide adequate notice of what is required of him, and he risks being punished even for unknowing possession. Because the condition notifies Perez and the trial court with sufficient particularity of what is required of Perez, we conclude the condition need not be modified.

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<sup>1</sup> Perez also asserts the weapons condition is unconstitutionally overbroad. Because he neither argues nor provides any authority in support of this assertion, we deem the issue of overbreadth forfeited and address only the issue of vagueness. (See *People v. Whalen* (2013) 56 Cal.4th 1, 72, fn. 28 [issue forfeited when appellate brief mentions related contention but does not provide supporting argument or authority], disapproved on another ground in *People v. Romero* (2015) 62 Cal.4th 1, 44.)

"[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 (*Sheena K.*), quoting *People v. Castenada* (2000) 23 Cal.4th 743, 751.) Fair warning involves both providing adequate notice to the probationer and preventing arbitrary law enforcement. (*Sheena K.*, at p. 890.) A probation condition gives fair warning when it is " 'sufficiently precise for the probationer to know what is required of him, and for the [trial] court to determine whether the condition has been violated.' " (*Ibid.*, quoting *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) "[A] trial court may not revoke probation unless the defendant willfully violated the terms and conditions of probation." (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1186 (*Moore*)). We review constitutional challenges to probation conditions de novo. (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901.)

There is a split of authority regarding whether due process requires that a weapons condition include an express knowledge requirement. (Compare *Moore, supra*, 211 Cal.App.4th at p. 1189 [express knowledge provision not required] with *People v. Freitas* (2009) 179 Cal.App.4th 747, 752 (*Freitas*) [express knowledge provision required].)<sup>2</sup> We are persuaded that no express knowledge provision is required.

In *Moore, supra*, 211 Cal.App.4th at page 1183, the defendant challenged as vague a probation condition that required he " 'not own, use, or possess any dangerous or deadly weapons, including firearms, knives, and other concealable weapons.' " The appellate court upheld this condition despite its lack of an express knowledge

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<sup>2</sup> The California Supreme Court has taken up the matter in *People v. Hall* (2015) 236 Cal.App.4th 1124, review granted September 9, 2015, S227193.

requirement. (*Id.* at p. 1189.) First, the *Moore* court reasoned the condition gave adequate notice to the defendant because there was no ambiguity in terms of what conduct it prohibited. (*Id.* at p. 1186.) The court noted that even its sister court in *Freitas*, which modified a similar weapons condition to include an express knowledge requirement, acknowledged that the prohibited items were easily recognizable and that the condition need not specify the probationer " 'know a gun is a gun.' " (*Moore*, at p. 1185, quoting *Freitas, supra*, 179 Cal.App.4th at pp. 751-752.) Second, the court reasoned the condition would not cause arbitrary enforcement because the trial court could not revoke the defendant's probation absent a willful violation, and when a probationer does not know he possesses a firearm or other dangerous weapon, his possession cannot be considered willful. (*Moore*, at pp. 1186-1187.) In other words, a knowledge requirement was implied in the condition; therefore, the defendant was not subject to revocation of probation for unknowing possession. (*Id.* at p. 1189.)

Applying that reasoning here, the weapons condition need not be modified to include an express knowledge requirement. The condition provides Perez and the trial court with adequate notice of what is required of Perez. As with the condition in *Moore*, the condition here leaves no ambiguity in terms of what conduct it prohibits. (See *Moore, supra*, 211 Cal.App.4th at p. 1186.) Although Perez makes the conclusory statement that he has not received adequate notice, he does not explain what about the directive not to possess firearms or other dangerous weapons he does not understand.

Perez's true concern is arbitrary enforcement. However, the weapons condition will not cause arbitrary enforcement because, as the court made clear in *Moore*, a

knowledge requirement is implied in the condition by virtue of the fact a violation of the condition must be willful. (See *Moore, supra*, 211 Cal.App.4th at pp. 1185-1186.) Therefore, the trial court may not revoke Perez's probation for an unknowing—i.e., unwillful—violation. (See *id.* at pp. 1186-1187.)

Perez argues we should not follow *Moore* because the court erred by conflating the terms "willfully" and "knowingly." Perez cites *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 (*Cervantes*) to support the proposition that a trial court may find a defendant violated a probation condition simply for acting willfully, as opposed to knowingly. He asserts, for example, that without an express knowledge requirement, he would violate the weapons condition—and thus be subject to arbitrary enforcement—if he were to willfully possess a firearm that he genuinely believes to be a toy or willfully carry a friend's backpack that, unbeknownst to him, contains a dangerous weapon.

Perez's fears are unfounded. *Cervantes* makes clear that a probationer must *willfully violate* a term or condition of his probation to face revocation, not merely *act willfully*. (See *Cervantes, supra*, 175 Cal.App.4th at p. 295; *Moore, supra*, 211 Cal.App.4th at pp. 1186-1187.) Willfully means purposefully. (See Pen. Code, § 7, subd. (1).) One cannot purposefully violate a probation condition without knowingly doing so; therefore, a trial court may not revoke probation for an unknowing violation. (*Moore*, at pp. 1186-1187.)

Despite the fact the *trial court* may not revoke Perez's probation for an unknowing violation, Perez fears his *probation officer* may still treat the weapons condition as a strict liability offense, which Perez characterizes as a form of arbitrary enforcement. However,

the possibility a probation officer may enforce a weapons condition as a strict liability offense does not render the condition unconstitutional. (*In re R.P.* (2009) 176 Cal.App.4th 562, 569.) Indeed, we would expect a probation officer to examine with healthy skepticism a probationer's claim that he mistakenly believed a gun found in his possession was a toy or that he was unaware there was a gun inside a backpack in his possession. Should Perez find himself in the unlikely scenario of unknowing possession, his remedy is to assert the affirmative defense of lack of knowledge in the trial court. (See *Moore, supra*, 211 Cal.App.4th at pp. 1186-1187.)

Because the weapons condition here clearly identifies the items Perez is prohibited from possessing, and because he cannot, as a matter of law, be punished for unknowing possession of those items, the condition is not unconstitutionally vague as written.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.