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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

THE PEOPLE,

Plaintiff and Respondent,

v.

P.V.,

Defendant and Appellant.

E055066

(Super.Ct.No. J235967)

OPINION

APPEAL from the Superior Court of San Bernardino County. William
Jefferson Powell IV, Judge. Affirmed as modified.

Brendan M. Hickey, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Stephanie
H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

P.V. (hereafter, the minor) was adjudicated a ward of the court for possession of marijuana with intent to sell, in violation of Health and Safety Code section 11359. She was placed on formal probation in the custody of her mother. The minor appeals, alleging that a number of the conditions of her probation are improper. We agree with the minor, and we shall order some conditions of probation modified, and another provision partially stricken. With these modifications, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In October 2010, police officers conducted a traffic stop of a vehicle the minor's mother was driving. As a result of the stop, police discovered two large jars of harvested marijuana, bearing the minor's name. The minor told police that she grew the marijuana at a friend's house; one of the residents there had a medical marijuana card. The minor said that she had sold marijuana a number of times, and that many of her friends liked to smoke marijuana.

The San Bernardino County District Attorney filed a juvenile petition under Welfare and Institutions Code section 602, alleging that the minor had violated Health and Safety Code section 11359, by possessing marijuana for sale. The minor was initially placed on informal probation, but she did not perform successfully, so probation was revoked. The court conducted a contested hearing and found the allegation of the petition to be true. The court declared the minor a ward of the juvenile court, and placed her on formal probation. The minor was also placed in the custody of her parents.

Among the terms and conditions of the minor's probation were provisions that the minor must:

"5. Not leave the [S]tate of California without first obtaining prior approval and a valid travel permit from the Probation Officer. [¶] . . . [¶]

"10. Not use or possess any controlled substance or toluene-based substance without medical prescriptions and shall notify the probation officer of prescription medication.

"11. Neither use nor possess any drug paraphernalia as described in Health and Safety Code section 11014.5 or Health and Safety Code section 11364.5(d).

"12. Neither possess nor consume any alcoholic beverages. [¶] . . . [¶]

"14. Not possess any dangerous or deadly weapons, including but not limited to any knife, gun, or any part thereof, ammunition, blackjack, bicycle chain, dagger or any weapon or explosive substance or device as defined in Penal Code section 12020 and/or Penal Code section 626.10."

The minor filed a timely notice of appeal, raising certain objections to the conditions of probation listed above.

ANALYSIS

I. Knowledge or Scierter Requirements Must Be Added to Probation Terms Requiring a Probationer's "Presence, Possession, Association, or Similar Actions"

The minor contends that the five conditions of probation identified, above, must be modified to include a scierter, or knowledge, requirement. As the minor correctly observes, conditions of probation must generally include a requirement of knowledge,

in order to avoid unconstitutional overbreadth. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960.)

Thus, the minor proposes that the challenged probation conditions be modified as indicated in bold below:

“5. Not **[knowingly]** leave the [S]tate of California without first obtaining prior approval and a valid travel permit from the Probation Officer. [¶] . . . [¶]

“10. Not **[knowingly]** use or possess any controlled substance or toluene-based substance without medical prescriptions and shall notify the probation officer of prescription medication.

“11. Neither **[knowingly]** use nor possess any drug paraphernalia as described in Health and Safety Code section 11014.5 or Health and Safety Code section 11364.5(d).

“12. Neither **[knowingly]** possess nor consume any alcoholic beverages. [¶] . . . [¶]

“14. Not **[knowingly]** possess any dangerous or deadly weapons, including but not limited to any knife, gun, or any part thereof, ammunition, blackjack, bicycle chain, dagger or any weapon or explosive substance or device as defined in Penal Code section 12020 and/or Penal Code section 626.10.”

In *People v. Patel, supra*, 196 Cal.App.4th 956, the Third District Court of Appeal adverted to a long line of cases, stretching back nearly 20 years, which had consistently held that a knowledge requirement must be included in certain kinds of probation conditions to avoid unconstitutional overbreadth. Despite the regular

repetition of the Courts of Appeal that a scienter element was required, the trial courts continued to impose probation conditions without any scienter requirements, thus compelling the reviewing courts to expend precious resources on repetitive issues. “[W]ith dismayingly regularity, we still must revisit the issue in orders of probation, either at the request of counsel or on our own initiative. The latter in particular is a drain on the public fisc that could be avoided if the probation departments at fault would take greater care in drafting proposed probation orders.” (*Id.* at p. 960.) The court held that a substantial body of law established that a probationer could not be punished without knowledge as a requirement with respect to the salient types of probation conditions, and determined that it no longer would address the issue. The Third District court thus gave “notice of our intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. We construe every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement.” (*Id.* at pp. 960-961, fn. omitted.)

Other courts have declined to follow the Third District’s lead, however, in simply implying a knowledge requirement in terms of probation. Division Three of this court, in *People v. Moses* (2011) 199 Cal.App.4th 374, noted that, “All of the challenged probation conditions were drawn directly from a four-page form entitled ‘Superior Court of California, County of Orange Sex Offender Terms and Conditions of Probation-Addendum’; the footer on the form identifies it as a ‘Mandatory Local

Form’ and states it was revised ‘6/5/03,’ more than eight years ago. The Superior Court of the State of California for the County of Orange should modify the standard probation condition form to comply with constitutional mandates. Particularly with respect to terms and conditions that require a knowledge element, it has unfortunately become routine for us to address the need for modification of the probation conditions on appeal.” The court determined that, although it “could” simply “declare that a knowledge requirement shall be read into all probation conditions,” it instead opted to “modify and strike certain challenged probation conditions in this case and by this opinion state that the superior court should revise its standard probation conditions form to meet constitutional requirements.” (*Id.* at p. 381.) In other words, it chose to require the trial court to conform its practice to prevailing legal standards, rather than to excuse the lower court’s failure to bring its probation orders into compliance with established legal norms. The minor urges this court to adopt the latter approach, rather than the *Patel* court’s approach, of implying a scienter requirement into the relevant probation conditions.

In the interest of clarity, we conclude that the approach of the *Moses* court is preferable, and we therefore order the probation conditions modified as requested, to include an express requirement of knowledge.

II. The Probation Condition Requiring the Minor to Notify the Probation Officer of All Prescription Medications Is Overbroad

The minor contends that probation condition No. 10 is unconstitutionally overbroad in an additional way: Requiring her to inform the probation officer of all

medicines she is prescribed by her physician unduly invades her right to medical privacy.

As noted, probation condition No. 10 required the minor to “Not [knowingly] use or possess any controlled substance or toluene-based substance without medical prescriptions *and shall notify the probation officer of prescription medication.*”

(Italics added.)

The minor objected below to the imposition of the requirement that she inform the probation officer of all her prescription medications. The trial court overruled the objection, stating, “It does appear to me that number 10 is appropriate given the underlying facts of the case. The facts are that the minor was actively selling marijuana. If my memory is correct, she was doing it in order to buy her mother a birthday present. [¶] The indication from the probation officer’s report here is that the minor’s mother knows of at least the marijuana use that [the minor] has. She is basically self-medicating for depression. And her mother has told her to stop; it’s not good for her. Given all of those circumstances I think it’s appropriate that the probation officer keep tabs on not only which controlled substances she is using, but perhaps which substances she is using based on prescription. [¶] I will note that in my experience there are quite a few people who think that they could buy a medical marijuana card from some person off the street and that would justify their use of marijuana. I have yet to actually have seen a case, a legitimate case, of a prescription for smoking marijuana. . . .”

The minor contends, first, that she has a clearly established right to privacy under the Fourteenth Amendment of the United States Constitution (see *Griswold v. Connecticut* (1965) 381 U.S. 479, 485), which extends to the preservation of privacy concerning one's body and health, including maintaining confidentiality of medical records and prescriptions. (See, e.g., *Doe v. Delie* (3d Cir. 2001) 257 F.3d 309, 315 ["The right to privacy in one's medical information extends to prescription records."].) The California Constitution expressly provides for a right to privacy. (Cal. Const., art. 1, § 1.) The right to medical privacy is supported most familiarly through statutory recognition in the Evidence Code of a privilege between patients and their doctors and psychotherapists. (Evid. Code, §§ 990-1006, 1010-1028.)

The minor argues that these principles support the conclusion that she has a reasonable expectation of privacy in her medical information, including medical prescriptions, and that any intrusion into that privacy must therefore be justified by a compelling interest, under a strict scrutiny standard of review. The minor contends that the state's interest in disclosure of her medical prescription information is not sufficiently compelling to justify invasion of her privacy rights. The minor suggests that there are a number of less intrusive measures that could address the concerns articulated by the trial court as the justification for imposing the condition of probation. The minor articulates the state's interest as the prevention of the minor's marijuana use, and then argues that the court could have imposed conditions which, for example, prohibited her from using marijuana, whether with or without a medical prescription, or to notify the probation officer of any marijuana prescription the minor

might obtain. To the extent that the juvenile court's concerns were the minor's mental health (depression and self-medication), other probation conditions addressed those aspects of the minor's rehabilitation: condition No. 13 required regular drug testing, and condition No. 16 required mental health counseling. If the drug tests show a positive result for any prescription medication, then the minor could defend against an alleged violation of probation by producing a valid prescription, but, the minor argues, unless and until that eventuality arises, there is no compelling interest that would justify a preemptive requirement of disclosure of all prescription medications. The minor points out that she is protected from disclosing, even to her parents, certain medical information concerning women's health care, such as access to contraception or to abortion services. (See, e.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 318 [children's privacy rights include the right to obtain an abortion without state notification to parents].) Because the charged offense involved the sale and use of marijuana, the probation conditions should be narrowly tailored to address the concerns of illegal marijuana use or sales; probation condition No. 10 is overbroad, the minor contends, because it reaches into matters that have no relation to the charged offense.

The People respond that probation condition No. 10 is neither unreasonable nor unconstitutional. Initially, the People point out that the minor's focus on the constitutional right to privacy, specifically including a right to privacy in medical information and prescriptions, is somewhat misdirected. Even when general citizens unquestionably have a constitutional right, such as a right to privacy, or a right to

medical privacy, probationers are not similarly situated to citizens who have not been convicted of a crime. For example, probationers may constitutionally be subject to warrantless searches at any time, despite the specific constitutional guaranty against warrantless searches. Thus, the primary issue is not whether there is a fundamental right to privacy, or whether such a right includes the right of privacy in personal physical functioning (encompassing privacy of medical records, including prescriptions), or even whether a probation condition affects or impinges upon a probationer's privacy. Rather, the proper inquiry is whether, under the factors set forth in the leading case, *People v. Lent* (1975) 15 Cal.3d 481, the probation condition is reasonable.

Penal Code section 1203.1 authorizes a trial court to impose any “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer.” (Pen. Code, § 1203.1, subd. (j).) Under the *Lent* test, a condition of 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.”” (*People v. Lent, supra*, 15 Cal.3d at p. 486.)

It is questionable whether the requirement that the minor inform the probation officer of *all* her prescription medications was related to the crime of which she was convicted.

The minor's offense was possession of marijuana for sale. There was also some evidence before the court that the minor used marijuana herself, as a "self-medication" for depression. The minor's mother knew about the minor's marijuana use, but was apparently ineffective in stopping the minor's law violation. The minor obtained the marijuana by cultivating and harvesting it on premises occupied by someone who allegedly had a medical marijuana card. To the extent that the holder of the medical marijuana card had any legal prescription for or authorization to cultivate or possess marijuana for personal medical use, the minor's activities were well beyond the legitimate scope of that prescription or authorization.

As it relates to the offense and the minor's circumstances, the minor used marijuana, for which it would be highly unlikely that she would have, or be able to procure, a valid medical prescription. The minor also apparently abused—by attempting to operate under cover of—another person's prescription for medical marijuana. Because the minor was evidently "self-medicating" with marijuana to treat her depression, the probation officer might have some interest in the details of the minor's counseling treatment for depression, including the use of any anti-depression medications. In addition, because the minor's offense related to the sale and unlawful use of drugs, the probation officer would have a legitimate interest in monitoring the minor's access to and use of commonly abused controlled substances.

To meet the goals of the minor's supervision and rehabilitation with respect to these issues, probation condition No. 9 required the minor not to associate with known users and sellers of controlled substances, or to be in a place where she knew or had

reason to know drugs would be used or sold. The first clause of condition No. 10 would require the minor not to knowingly possess any controlled substance, or toluene-based substance, without a lawful medical prescription. Condition No. 11 prohibited the minor from knowingly possessing any drug paraphernalia. She was required by condition No. 13 to submit to drug tests at the probation officer's direction. In addition, condition No. 16 required her to attend a counseling program. These provisions, already included in the minor's terms and conditions of probation, would fully permit the probation officer to monitor the minor's use of marijuana, to monitor the minor's use of other commonly abused controlled substances, and the minor's course of treatment for depression, including the use of any relevant prescribed medication for that condition.

Otherwise, however, the requirement that the minor inform the probation officer of all other prescribed medications could well intrude into areas that have nothing to do with the minor's offense or rehabilitation.

The requirement—that the minor inform the probation officer of all her prescription medications—clearly involves conduct that is not itself criminal. When a patient has a valid and lawful medical prescription for a medication or treatment, virtually by definition the conduct is not itself criminal.

The third *Lent* factor—that the probation condition requires or forbids conduct not reasonably related to future criminality—presents a close question. On the one hand, the minor's use of some prescription drugs might relate to future criminality, or to preventing future criminality. Some controlled substances present a high risk of

leading to addiction or abuse. Others do not. Some prescription medications may relate to the minor's treatment for depression, which may have played a role in the minor's offense. However, many other prescription medications would have no relevance to either the minor's offense (abuse of controlled substances) or to the conditions underlying or contributing to the minor's offense (depression).

The "overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and [such conditions must be] reasonably related to the compelling state interest in reformation and rehabilitation," of a probationer. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) And, while the court has broad power to fashion reasonable probation conditions in criminal cases, the power of the juvenile court is even broader. (See *In re Christopher M.* (2005) 127 Cal.App.4th 684, 692.)

In *In re Christopher M.*, *supra*, 127 Cal.App.4th 684, the juvenile court considered the constitutionality of a probation condition, similar to that here, which required a juvenile probationer to disclose to the court all of his medical and psychological records on request. There, Christopher M. had been charged with a robbery of one victim, assault with a deadly weapon and attempted robbery of another victim, and possession of hallucinogenic mushrooms. The robbery, assault, and attempted robbery charges each were enhanced with hate crime allegations; Christopher had targeted his victims based on race, religion, nationality, ancestry, gender, disability, or other protected characteristics. Eventually, Christopher had

agreed to an adjudication as to the robbery charge, and the other charges were dismissed. (*Id.* at p. 689.)

Christopher's background, including his criminal record and his social history, involved the commission of a series of crimes, during which he acted in concert with others and even videotaped the crime. Christopher admitted to committing and videotaping similar crimes, aimed at transients, undocumented aliens, and a mentally disabled man. Christopher had been an active gang member, and described himself as "ruthless," and without empathy for anyone while he was a member of the gang. He had not completed any programs he had been ordered to participate in during an earlier probation, including substance abuse treatment and counseling. The court held that, "the court's decision to impose conditions of probation Nos. 45 and 46 is reasonably tailored to fit Christopher's reformatory and rehabilitative needs, given his demonstrated lack of empathy toward others, his history of gang banging activity and participation in criminal conduct that involved violence against innocent victims, his unwillingness to take full personal responsibility for his antisocial behavior, his substance abuse problems, and his refusal to meaningfully participate in counseling and a substance abuse program as he had promised to do as a condition of a prior grant of probation. The probation conditions at issue here, and the access to Christopher's treatment records they provide, will assist the probation officer and the court to determine whether Christopher is fully complying with the numerous conditions of his new grant of probation, and whether, in the interest of rehabilitation and reformation,

treatment is succeeding in helping him to overcome his psychological, behavioral, and substance abuse problems.” (*In re Christopher M., supra*, 127 Cal.App.4th at p. 694.)

With respect to Christopher’s claims that the probation conditions violated his constitutional privacy rights, the court held that, under *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, “to prove a violation of this constitutional guarantee, the complaining party must show (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct constituting a serious invasion of the privacy interest. [Citation.] The *Hill* court also held, however, that even if these three elements are established, a violation of the right to privacy will not be found where the invasion of the privacy interest is justified because it substantially furthers one or more legitimate competing or countervailing privacy or non-privacy interests. [Citation.] ¶ Here, it is undisputed that Christopher has a privacy interest in his medical and psychological treatment records. However, the state has a legitimate countervailing interest in (1) protecting the public against Christopher’s violent and antisocial conduct, and (2) determining both whether he is fully complying with the numerous conditions of his new grant of probation, and whether treatment is succeeding in helping him to gain empathy for others, renounce completely his gang affiliation, and overcome his substance abuse problem. We conclude the court did not violate Christopher’s right to privacy by imposing conditions of probation Nos. 45 and 46.” (*In re Christopher M., supra*, 127 Cal.App.4th at p. 695.)

The minor here urges that her case is distinguishable from *Christopher M.*; she does not have a history of violence, nor participation in hate crimes, and there is no reason to think that she would not be amenable to or cooperate in mental health treatment or drug rehabilitation treatment. “Simply put, prescription medications bear no relationship to [the minor’s] crime, so requiring [her] to disclose all of her legitimate medical prescriptions to the probation officer does not bear any reasonable relationship to either the underlying offense or a reduction in future criminality.”

The People assert, contrary to the minor, that the probation condition does serve the state’s interests in rehabilitation. However, like the trial court below, the People fail to establish an analytical bridge between the specific requirements of this probation condition and the particular means and goals of rehabilitation, which the probation is designed to foster. The juvenile court noted that the minor had sold marijuana, that she may have used marijuana, and that she may have done so because of her depression. The concerns raised by the offense and by the minor’s circumstances were addressed by probation conditions to attend counseling, to test for drugs at the probation officer’s direction, not to use any controlled substances without a valid prescription, not associate with drug users or sellers, not possess paraphernalia, stay away from places where drugs are sold or used, and to submit to a search at any time. There was no reason to think, in contrast to the probationer in *Christopher M.*, that the minor would refuse to go to counseling, or that she was sociopathic or lacking in empathy, or that she would be actively violent toward anyone. While the probation officer might have some concern whether the minor might begin to abuse other

commonly abused addictive drugs, as well as marijuana, that concern was already addressed by the drug testing and search terms. If a drug test reveals the use of controlled substances for which a prescription is required, the minor could defend an allegation of violation by producing a lawful prescription. Other kinds of medications, which do not pose a significant risk of abuse, have nothing to do with the minor's offense, nor her rehabilitation, and as to such types of medication, the minor is entitled to retain the privacy of her medical information. The condition, requiring the minor to affirmatively disclose *all* prescription medications, potentially including many medications that have no relationship to either the offense or to the minor's rehabilitation, is overbroad. Accordingly, we shall order that provision of probation condition No. 10 stricken.

DISPOSITION

For the reasons stated, *ante*, we order the conditions of probation modified in the following respects:

Probation condition No. 5 is modified to read: "5. Not knowingly leave the [S]tate of California without first obtaining prior approval and a valid travel permit from the Probation Officer."

Probation condition No. 10 is modified in part and stricken in part, to read: "10. Not knowingly use or possess any controlled substance or toluene-based substance without medical prescriptions."

Probation condition No. 11 is modified to read: “11. Neither knowingly use nor possess any drug paraphernalia as described in Health and Safety Code section 11014.5 or Health and Safety Code section 11364.5(d).”

Probation condition No. 12 is modified to read: “12. Neither knowingly possess nor consume any alcoholic beverages.”

Probation condition No. 14 is modified to read: “14. Not knowingly possess any dangerous or deadly weapons, including but not limited to any knife, gun, or any part thereof, ammunition, blackjack, bicycle chain, dagger or any weapon or explosive substance or device as defined in Penal Code section 12020 and/or Penal Code section 626.10.”

As so modified, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.