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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.D., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.D.,

Defendant and Appellant.

E055087

(Super.Ct.No. J239569)

OPINION

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

Jesse W.J. Male, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Kevin Vienna, Garrett Beaumont and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

The San Bernardino County District Attorney's Office filed a Welfare and Institutions Code section 602 petition alleging that defendant and appellant A.D. (minor) committed misdemeanor sexual battery. (Pen. Code, § 243.4, subd. (e)(1).) A juvenile court placed him on informal probation, in the custody of his parents. Minor violated one of the terms of his probation, so the court revoked the informal probation and reinstated the petition. Minor then admitted the allegation in the petition. The court declared him a ward of the court and placed him on formal probation, in the custody of the probation officer. Minor was ordered to await placement in a suitable foster care facility in juvenile hall.

On appeal, minor contends that several of the probation conditions imposed must be modified. The People concede that some of the probation conditions should be modified, but argue that one of them should be imposed as ordered. We modify minor's contested probation conditions, but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

On June 2, 2011, minor's mother called the police to report that she was awakened by her son rubbing her bare thigh. Minor was 16 years old. He pretended that he was asleep, but then got up and ran to his room. Minor's 19-year-old sister reported that approximately two months before, she and minor were asleep in the same bed, when she felt something touching her buttocks. Minor's 13-year-old sister reported that on two separate occasions, while sleeping next to minor, she felt him rubbing her buttocks.

¹ These facts are taken from the probation officer's report.

When minor's brother confronted minor regarding the allegations, minor stabbed him with a knife. Minor's brother reported that minor was part of a gang in Rialto and had threatened their family with violence.

On June 24, 2011, the San Bernardino County District Attorney's Office filed a section 602 petition, alleging misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1)), regarding the incident with minor's 19-year-old sister. The juvenile court placed him on informal probation, on certain terms, including that he not enter his sister's bedroom.

On October 18, 2011, the probation officer reported that minor had violated his informal probation. It was reported that minor entered his sister's bedroom, got into her bed, and poked her with his penis from behind. Furthermore, minor was not attending school, as required by his probation terms.

The court revoked the informal probation and reinstated the original petition. Minor voluntarily admitted the allegation in the petition, and the court sustained the petition.

The probation officer filed a report and stated that minor was interviewed at juvenile hall. He said that, at the time of the offense, he was under the influence of methamphetamine. He said that drugs were his "primary issue" and that they were controlling his mind and actions. He also reported that he was a member of a tagging crew.

On November 15, 2011, the court declared minor a ward of the court, and placed him on formal probation, in the custody of the probation officer. Minor was ordered to await placement in a suitable foster care facility in juvenile hall.

ANALYSIS

The Probation Conditions Imposed Should Be Modified

Minor contends condition Nos. 12, 14, 16, 24, 27, 29, and 31 should be modified. The People agree that condition Nos. 12, 14, 16, 27, and 29 should be modified as suggested by minor, and that condition No. 24 should be modified. However, the People contend that condition No. 31 should be upheld as written. We conclude that all of the contested probation conditions should be modified.

At the outset, we note that the juvenile court “has wide discretion to select appropriate conditions and may impose “any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’” [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) “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.’ [Citation] ‘[J]uvenile probation is not an act of leniency, but is a final order made in the minor’s best interest.’ [Citation] [¶] 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, 81-82, disapproved on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130.)

A. *Condition Nos. 12, 14, and 16*

Minor argues, and the People agree, that the condition No. 12 is vague and/or overbroad. It reads: “Not associate or communicate with anyone not specifically approved by the probation officer.”

Minor specifically asserts that condition No. 12 prohibits him from associating or even communicating with anyone not approved by the probation officer, such as grocery clerks, mail carriers, etc. (See *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713.) Minor’s contention is well taken. “Requiring advance approval is impractical.” (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1017.) However, “[r]equiring advance *disapproval* makes the probation condition workable and saves it from overbreadth.” (*Ibid.*, italics added.) Therefore, we shall grant minor’s request to modify condition No. 12 to read as follows: “Not associate or communicate with anyone minor knows to be disapproved by the probation officer.”

Minor next contends that condition No. 14 is vague and overbroad. The People agree. The condition states: “Not associate with any personally known user or seller of controlled substances or be in a location known by the probationer to be a place where controlled substances are used or sold.”

Minor asserts that the term “controlled substances” could include many commonly prescribed medications. (See Health & Saf. Code, §§ 11054, 11055.) He argues that the

condition is so vague and overbroad that it could be interpreted to include not associating with pharmacists or persons using prescription medication, and banning his presence in pharmacies and hospitals. We agree and grant minor's request to modify condition No. 14 to read: "Not associate with any personally known user or seller of illegal controlled substances or be in a location known by minor to be a place where illegal controlled substances are used or sold."

Minor also contends, and the People agree, that condition No. 16 is overbroad. It states: "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)." Minor asserts that these two code sections include any means of "introducing into the human body a controlled substance." (Health & Saf. Code, §§ 11014.5, subd. (a), 11364.5, subd. (d).) He argues that there is no rehabilitative interest in preventing him from using instruments that may be necessary for taking prescription medication. We agree and grant minor's request to modify condition No. 16 to read as follows: "Neither use nor possess any drug paraphernalia as described in Health & Safety Code section 11014.5 or Health and Safety Code section 11364.5, subdivision (d), except for any item used to administer a medication minor was prescribed."

B. Condition Nos. 24, 27, and 29

Defendant asserts that conditions Nos. 24, 27, and 29 all use the word "gang," without providing a definition of the word "gang." They read as follow:

"24. Not associate with any person he/she personally knows to be a probationer, parolee or gang member."

“27. Not wear articles of clothing, display any item or use an item which he/she knows is associated with membership or affiliation in a gang.”

“29. Not be present in any area, which he/she knows to be a gang gathering area.”

Minor requests that the probation conditions be modified to include a reference to Penal Code section 186.22, which defines a “criminal street gang.” The People assert that minor was a member of a tagging crew, and that he had a tendency to get into fights that were “tagging-crew related.” Thus, since tagging crews “may or may not meet the statutory requirements for a criminal street gang,” the People oppose modifying the probation conditions to include a reference to Penal Code section 186.22. We agree with minor that it is appropriate to order modification of the probation conditions to incorporate the definitions contained in Penal Code section 186.22, subdivisions (e) and (f). (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 634.) We note that tagging crews that have felony vandalism as one of their primary activities fit into the definition of criminal street gangs. (Pen. Code, § 186.22, subd. (e)(20).)

Minor further contends, and the People concede, that condition No. 24 is overbroad since it precludes his participation in any placement or treatment program where probationers, parolees, or gang members may be present. We agree.

Thus, the conditions should be modified to read as follows:

“24. Not associate with any person minor personally knows to be a probationer, parolee, or gang member, not including association with persons, or during activities, approved by the probation officer. For purposes of this paragraph, the word “gang”

means a “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f).”

“27. Not wear articles of clothing, display any item or use an item which minor knows is associated with membership or affiliation in a gang. For purposes of this paragraph, the word “gang” means a “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f).”

“29. Not be present in any area, which minor knows to be a gang gathering area. For purposes of this paragraph, the word “gang” means a “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f).”

C. Condition No. 31

Minor finally contends that condition No. 31 is vague and overbroad. That condition reads as follows: “Not associate with (persons/females/males) under the age of 18, unless in the presence of a responsible adult who is aware of the nature of your background and current offense, and who has been approved by the probation officer.”

Minor argues that this condition should have a knowledge requirement, since a person may not reasonably know whether the person he is associating with is under the age of 18. We agree that the term should be modified to require that minor must either know or reasonably should know that persons are under 18 before he is prohibited from associating with them. (See *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.)

Minor further contends that the condition is vague because it does not “indicate how much of his background, or what key events, other than his current offense, must be disclosed to the supervising adult.” We disagree, in that the condition states the adult

must be aware of “the nature of [his] background *and* current offense.” (Italics added.)

As minor acknowledges in his opening brief, the term was imposed to address his touching of his mother and sisters. The condition makes it clear that the adult must simply be aware of minor’s background, as it relates to his current offense, and not other “key events.”

Minor also argues that the condition is not narrowly tailored since it “infringes on minor’s ability to associate with all persons under the age of 18, not just sleeping females.” Therefore, he suggests that the condition be modified to only prohibit “close proximity to sleeping females” or females, like his sister, who are under the age of 14. Minor objected to this condition in court on the grounds that it violated his first amendment right to freedom of association. The court acknowledged that his objection was reasonable, but found that, under the circumstances of minor’s conduct, “he [did] need that term.” As noted by the probation officer, minor was “displaying tendencies of being a sexual predator.” Accordingly, we conclude that the condition is tailored and “reasonably related to the compelling state interest in [minor’s] reformation and rehabilitation.” (*In re Luis F.* (2009) 177 Cal.App.4th 176, 189.)

We will modify condition No. 31 to read as follows: “Not associate with (persons/females/males) minor knows or reasonably should know are under the age of 18, unless in the presence of a responsible adult who is aware of the nature of minor’s background and current offense, and who has been approved by the probation officer.”

DISPOSITION

Minor's probation terms are modified as followed:

Probation condition No. 12 is modified to read: "Not associate or communicate with anyone minor knows to be disapproved by the probation officer."

Probation condition No. 14 is modified to read: "Not associate with any personally known user or seller of illegal controlled substances or be in a location known by minor to be a place where illegal controlled substances are used or sold."

Probation condition No. 16 is modified to read: "Neither use nor possess any drug paraphernalia as described in Health & Safety Code section 11014.5 or Health and Safety Code section 11364.5, subdivision (d), except for any item used to administer a medication minor was prescribed."

Probation condition No. 24 is modified to read: "Not associate with any person minor personally knows to be a probationer, parolee, or gang member, not including association with persons, or during activities, approved by the probation officer. For purposes of this paragraph, the word "gang" means a "criminal street gang" as defined in Penal Code section 186.22, subdivisions (e) and (f)."

Probation condition No. 27 is modified to read: "Not wear articles of clothing, display any item or use an item which minor knows is associated with membership or affiliation in a gang. For purposes of this paragraph, the word "gang" means a "criminal street gang" as defined in Penal Code section 186.22, subdivisions (e) and (f)."

Probation condition No. 29 is modified to read: "Not be present in any area, which minor knows to be a gang gathering area. For purposes of this paragraph, the word

“gang” means a “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f).”

Probation condition No. 31 is modified to read: “Not associate with (persons/females/males) minor knows or reasonably should know are under the age of 18, unless in the presence of a responsible adult who is aware of the nature of minor’s background and current offense, and who has been approved by the probation officer.”

In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.