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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re J.N., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.N.,

Defendant and Appellant.

E055580

(Super.Ct.No. RIJ1100779)

OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge.

Reversed in part and remanded; affirmed in part as modified.

Jesse W.J. Male, 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, Steve Oetting and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A juvenile wardship petition was filed alleging that appellant and defendant J.N. (minor)<sup>1</sup> drove a vehicle while under the influence of an alcoholic beverage and a drug and was under their combined influence. (Veh. Code, § 23152, subd. (a).) Minor admitted the allegation. A juvenile court declared him a ward and released him to his father's custody on probation, under the terms recommended by the probation department. Minor subsequently committed numerous other offenses and probation violations. The court continued him as a ward, committed him to the Youthful Offender Program (YOP) for a period not to exceed one year, and ordered him to enroll in the substance abuse program at YOP. The court also imposed modified probation conditions. Thereafter, minor admitted to committing two more offenses, and the court continued him as a ward and ordered all prior orders to remain in effect.

On appeal, minor contends that: (1) two of his probation conditions are unconstitutionally overbroad; and (2) the \$1,660 fine that the court ordered him to pay should be stricken. We reverse the judgment in part and remand with directions for the juvenile court to clarify the statutory authority for the \$1,660 fine. We also modify the probation conditions at issue. Otherwise, we affirm.

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<sup>1</sup> Minor turned 18 on November 4, 2011. ,Although he is legally an adult, he is under the continuing jurisdiction of the juvenile court. (Welf. & Instit. Code, § 607.) For the sake of consistency, we will refer to him as “minor” in this opinion.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 31, 2011, a Welfare and Institutions Code<sup>2</sup> section 602 petition was filed alleging that minor violated Vehicle Code section 23152, subdivision (a), when he drove a vehicle after smoking marijuana and ingesting four Norcos (narcotics). On August 22, 2011, minor admitted the allegation. The court adjudged him a ward and placed him on probation, adopting the recommendations of the probation department. He was released to his father's custody. Minor's probation conditions included the following: (1) "Not associate with anyone known to the minor to be in possession of, sells, or uses any controlled substances or any related paraphernalia"; (2) "Not knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other controlled substances, poisons, illegal drugs, including marijuana[,] nor possess related paraphernalia"; and (3) "Pay a total fine of \$1,660.00, which includes a fine/fee and penalty assessment pursuant to [section] 23645 [of the vehicle code], payable to the Courts as directed by the Enhanced Collections Division."

On October 20, 2011, a section 777 notice of hearing was filed, alleging that minor violated conditions of his wardship by being outside his home after his 10:00 p.m. curfew, testing positive for marijuana, failing to report to his probation officer, and failing to provide proof that he was enrolled in substance abuse counseling.

On October 31, 2011, a subsequent section 602 petition was filed, alleging that minor committed burglary (Pen. Code, § 459) and petty theft (Pen. Code, § 490.5).

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<sup>2</sup> All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

On November 10, 2011, another section 602 petition was filed, alleging that minor committed another burglary (Pen. Code, § 459) and petty theft (Pen. Code, § 490.5).

At a hearing on November 14, 2011, minor admitted the first two allegations in the section 777 petition, and the court dismissed the second two allegations. Minor also admitted the two burglary allegations in the subsequent section 602 petitions, and the court dismissed the petty theft allegations. On November 30, 2011, the court continued minor as a ward, committed him to YOP, and imposed modified probation conditions. The above-described probation conditions and the \$1,660 fine/fee from the August 22, 2011 disposition continued in place.

On December 14, 2011, minor admitted that he unlawfully took a vehicle (Veh. Code, § 10851, subd. (a)), and drove a vehicle while under the influence of alcohol and a drug (Veh. Code, § 23152, subd. (a)), as alleged in a subsequent section 602 petition. The court set minor's maximum time of confinement at four years eight months, continued minor as a ward, and ordered all prior orders to remain in effect.

## ANALYSIS

### I. The Probation Conditions Should Be Modified

Minor contends that two of his probation conditions, terms p. and q.<sup>3</sup>, should be modified since they are unconstitutionally vague and overbroad. The People contend that the conditions should be upheld as written. We conclude that the contested probation conditions should be modified.

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<sup>3</sup> We will refer to the probation conditions at issue according to the letter designations used in the probation officer's report.

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 (*Sheena K.*)). “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] . . . [¶] 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 that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, at p. 890.)

Term p. states that minor shall “[n]ot knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other controlled substances, poisons, illegal drugs, including marijuana, nor possess related paraphernalia.” Term q. states that minor shall “[n]ot associate with anyone known to the minor to be in possession of, sells, or uses any controlled substances or any related paraphernalia.” Minor argues that these two conditions are overbroad because they would prohibit him from using commonly prescribed

medications, and would prohibit him from associating with pharmacists or persons using medically necessary prescriptions.

The People assert that there is no constitutional right to use or possess any drug and, thus, term p. is “not overbroad in the constitutional sense” since it does not infringe on constitutionally protected conduct. (*Sheena K., supra*, 40 Cal.4th at p. 891.) As to term q., the People contend that since minor has a serious substance abuse problem, it was reasonably related to his rehabilitation and, under a reasonable interpretation, a probation officer would allow him to associate with someone who possesses or sells controlled substances, if necessary.

The conditions at issue have the apparent purpose of protecting minor from drug abuse and the influence of drug dealers and abusers. However, they include the term “controlled substances,” which is very broad. Controlled substances are defined and listed in Health and Safety Code sections 11054-11058. The lists include not only illegal substances like heroin and marijuana (Health & Saf. Code, § 11054, subds. (c)(11), (d)(13)), but many commonly prescribed medications. Thus, the probation conditions, as written, may prohibit minor from possessing or using prescription medication, or associating with persons using or selling prescription medication. We ascertain no rehabilitative purpose in such restrictions. “California Courts have traditionally been wary of using the probation system for any nonrehabilitative purpose, no matter how superficially rational.’ [Citation.]” (*People v. Tilekooh* (2003) 113 Cal.App.4th 1433, 1444, superseded by statute on other grounds, as stated in *People v. Moret* (2009) 180 Cal.App.4th 839, 853.) With regard to term p., assuming, without deciding, that a constitutional right is not involved, we

nonetheless conclude that it should be modified. A rehabilitative purpose is not served when the probation condition proscribes the lawful use of a prescription drug. (See *Tilekooch*, at p 1444.)

Therefore, we shall modify the probation conditions to include the concept of the illegality of the controlled substances. Term p. shall be modified to read: “Not knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other illegal controlled substances, poisons, or illegal drugs, including marijuana, nor possess related paraphernalia.” Term q. shall be modified to read: “Not associate with anyone known to the minor to be in possession of, sells, or uses any illegal controlled substances or any related paraphernalia.”

II. The Matter Should Be Remanded for the Court to Clarify the Imposition of the \$1,660 Fine, and to Determine Minor’s Ability to Pay

As part of his probation, the court ordered minor to “[p]ay a total fine of \$1,660.00, which includes a fine/fee and penalty assessment pursuant to [Vehicle Code section] 23645 . . . .” Minor contends that the basis of the \$1,660 fine/fee that the court ordered him to pay is unclear, and that the court did not make an express finding that he had the ability to pay it. He further asserts that there was insufficient evidence he had the ability to pay. Minor thus claims that the \$1,660 fine/fee should be stricken. The People’s only response is that minor has forfeited his argument for failure to object at any of his dispositional hearings and by “acquiescing to the terms and conditions of his probation.” We conclude that the matter should be remanded for the court to clarify the basis of the \$1,660 fine/fee and to determine minor’s ability to pay.

We first consider the People’s contention that minor has forfeited his claim by failing to object to the fee below. We recognize that some courts have found that a defendant forfeits any objection to a fee by failing to object in the lower court. (e.g., *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072.) However, minor’s contention is based, at least in part, on the insufficiency of the evidence to support the order. “[S]uch claims do not require assertion in the court below to be preserved on appeal. [Citations.]” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*); see also *In re Brian P.* (2002) 99 Cal.App.4th 616, 623; *In re K.F.* (2002) 173 Cal.App.4th 655, 660-661.)<sup>4</sup> Furthermore, to forestall any claim by minor that he received ineffective assistance of counsel when his counsel failed to object, we will address his claim.

Welfare and Institutions Code section 730.5 states that when a minor is adjudged a ward of the court, the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. The court here stated that the \$1660 imposed “includes a fine/fee and penalty assessment pursuant to [Vehicle Code section] 23645.” Vehicle Code section 23645 provides that “[e]xcept as otherwise provided in subdivision (c), any person convicted of a violation of Section 23152 or 23153 shall, in addition to any other fine, assessment, or imprisonment imposed pursuant to law, pay an alcohol abuse education and prevention

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<sup>4</sup> We recognize that the Supreme Court is currently reviewing the question of whether a failure to object to the imposition of a booking fee at sentencing forfeits a claim on appeal that the evidence is insufficient to support a finding of the defendant’s ability to pay. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.)

penalty assessment in an amount not to exceed fifty dollars (\$50) . . . .” Since minor admitted that he violated Vehicle Code section 23152, the court was authorized to impose a fine under Vehicle Code section 23645. However, the Vehicle Code section 23645 fine is only \$50. The basis of the rest of the \$1,660 fine/fee is thus unclear. The People characterize the fine/fee as a restitution fine, but the record reflects that the court imposed separate \$50 and \$200 restitution fines.

Furthermore, both Welfare and Institutions Code section 730.5 and Vehicle Code section 23645 state that the court must make a finding of minor’s ability to pay. Welfare and Institutions Code section 730.5 provides that the court can levy the fine “if [it] finds that the minor has the financial ability to pay the fine.” Vehicle Code section 23645, subdivision (c), similarly states that the court “shall determine if the defendant has the ability to pay a penalty assessment.” The court here failed to make any such finding.

Moreover, there was insufficient evidence to support a finding that minor had the ability to pay the \$1,660 fine/fee. There was no evidence in the record of his financial status, or any means of income from which the court could have made a determination of his ability to pay. As minor points out, the evidence showed that he was stealing to pay his drug debts, which was an indication that he did not have money and would not have been able to pay the \$1,660.

In sum, the juvenile court’s intent in imposing the total \$1660 fine/fee is unclear, and the court did not make a finding on minor’s ability to pay. Rather than strike the fine/fee, we will instead reverse the judgment in part and remand with directions for the juvenile court to clearly state the nature of the fine/fee and the statutory authority for it. The court

should also make a finding on minor’s ability to pay before imposing the fine/fee, consistent with the applicable statutes. (See *Pacheco, supra*, 187 Cal.App.4th at p. 1403.)

DISPOSITION

The judgment is reversed as to the \$1,660 fine/fee. The matter is remanded for the juvenile court to clearly state the nature of the \$1,660 fine/fee and the statutory authority for it. The court should also determine, in accordance with the applicable statutes, minor’s ability to pay any such fines or fees before imposing them. Furthermore, probation term p. shall be modified to read: “Not knowingly possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other illegal controlled substances, poisons, or illegal drugs, including marijuana, nor possess related paraphernalia.” Probation term q. shall be modified to read: “Not associate with anyone known to the minor to be in possession of, sells, or uses any illegal controlled substances or any related paraphernalia.” In all other respects, the judgment is affirmed.

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HOLLENHORST  
Acting P. J.

We concur:

RICHLI  
J.

KING  
J.