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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO J.,

Defendant and Appellant.

F064179

(Super. Ct. No. JL003147)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Merced County. David W. Moranda, Judge.

Kristen Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

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\* Before Kane, Acting P.J., Detjen, J. and Franson, J.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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This is an appeal from an order for continuing wardship. Appellant Francisco J., a minor, contends several of the probation conditions imposed upon him are unconstitutionally overbroad. He asks that we modify these conditions to ensure their constitutionality. Respondent concurs with minor's request. In three instances, we modify the conditions of probation. In a fourth instance, we remand the matter for imposition of a modified condition if the juvenile court determines that such condition is appropriate.

### **FACTS AND PROCEDURAL HISTORY**

While minor, an admitted gang member, was incarcerated in juvenile hall, corrections officers discovered marijuana concealed on his person. This resulted in a Welfare and Institutions Code section 602 petition, filed October 11, 2011. A few days later, a search of minor's cell resulted in recovery of two metal shanks from beneath his mattress. This resulted in a subsequent petition, filed October 24, 2011. After the court found true both petitions, the court continued minor's wardship, placed him in a custodial program, and imposed terms and conditions of probation. Among the general terms of probation were orders that minor:

“Have no contact of any type with individuals known to you to be ... gang members ....”

“Do not wear or possess any item of gang clothing known to be such by you including gang insignia, moniker, or pattern, jewelry with gang significance nor may you display any gang insignia, marker or other markings of gang significance known to be such by you on your person or property as may be identified by Law Enforcement or Probation Officer. You will not display any gang signs or gestures known to you to be

associated with gangs. Do not associate with any person(s) known to you as being gang member(s). For the purpose of this condition the word ‘gang’ means a criminal street gang as defined in [P]enal [C]ode section 186.22, subdivisions (e) and (f).”

In addition to those unobjectionable terms of probation, the court also imposed additional conditions from a standardized listing entitled “PROBATION/WARDSHIP CONDITIONS FOR GANG IDENTIFIED MINORS.” These additional conditions included the following three conditions minor challenges in this appeal:

“You are not to associate with any known gang members including, but not limited to ‘Surenos,’ ‘Winton Varrio Parque.’”

“You are not to wear or display any clothing or insignias, emblems, badges, or buttons which are evidence of affiliation with or membership in a gang or display any gang signs or gestures.”

“You shall not be in any privately owned vehicle with more than one person under the age of eighteen (18) unless accompanied by a parent or guardian or with permission of the Probation Officer.”

Minor contends these three conditions are defective because they do not include personal knowledge requirements. Minor also contends a fourth condition imposed upon him in the standard gang conditions is overbroad: “You are not to appear in or about any court unless you are party to a proceedings [*sic*] or have been subpoenaed to appear at a hearing.”

### **DISCUSSION**

Minor contends, and respondent concedes, that he is permitted to raise objections to the constitutionality of the probation conditions, even though he failed to object to the conditions in the trial court, pursuant to *In re Sheena K.* (2007) 40 Cal.4th 875, 885-889.

It is well established in California law that conduct, in order to constitute a violation of probation, must be knowing or willful. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [collecting cases].) In accordance with this established legal standard, it appears that Merced County has modified its general conditions for juvenile probation to include a requirement that minors avoid persons and behavior “known to

you” to be gang related. In addition, in the gang-specific conditions of probation, minors are ordered “not to be an occupant of any vehicle known to you, or that you should have reasonably known was stolen.” (*Sic.*) Nevertheless, as minor and respondent recognize, those modifications have not consistently been incorporated in Merced County’s standardized juvenile gang-related probation order so as to render the gang-specific conditions constitutional. Accordingly, we modify the conditions imposed in this case to include a requirement of knowing violation. In addition, in accordance with *In re Vincent G.* (2008) 162 Cal.App.4th 238, 245-246, we modify the otherwise-undefined term “gang” in the standardized order to incorporate the definition of criminal street gang from Penal Code section 186.22, subdivisions (e) and (f).<sup>1</sup> Accordingly, the following numbered paragraphs of the probation/wardship conditions for gang identified minors imposed in this case on November 17, 2011, are modified as follows:

2. You are not to associate with any *persons known to you to be, or identified to you by the probation officer as*, gang members including, but not limited to “Surenos,” “Winton Varrío Parque.” “Gang,” *as used in this condition and in condition number 3 means a criminal street gang as defined in Penal Code section 186.22, subdivisions (e) and (f).*

3. You are not to wear or display any clothing or insignias, emblems, badges, or buttons which are *known to you to be* evidence of affiliation with or membership in a gang, *as defined in condition number 2*, or display any gang signs or gestures *known to you to be associated with gangs.*

7. You shall not be in any privately owned vehicle with more than one person *known to you to be, or identified to you by the probation officer as being*, under the age of eighteen (18) unless accompanied by a parent or

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<sup>1</sup> As set forth above, Merced County has already modified the general conditions of juvenile probation to include this further definition. While we are under no illusion that incorporation of a statutory gang definition will, in itself, provide information that can guide the conduct of a minor who wishes to conform to the terms and conditions of probation, incorporation of the definition does provide a basis for the probation officer to explain to the minor the conduct expected of him or her.

guardian or with permission of the Probation Officer. You are not to be an occupant of any vehicle known to you, or that you should have reasonably known was stolen.

Finally, minor was ordered in condition number 4 of the gang-related conditions “not to appear in or about any court unless you are party to a proceeding[] or have been subpoenaed to appear at a hearing.” Minor contends this condition constitutes an overly broad impingement on his constitutionally protected right of access to the courts. Several recent decisions support this contention. (See *In re E.O.* (2010) 188 Cal.App.4th 1149, 1154, 1157; *People v. Leon* (2010) 181 Cal.App.4th 943, 952; *People v. Perez* (2009) 176 Cal.App.4th 380, 383.) These cases have suggested somewhat inconsistent language for a modified condition. (See *In re E.O.*, *supra*, 188 Cal.App.4th at p. 1157, fn. 5; *People v. Leon*, *supra*, 181 Cal.App.4th at p. 954.)

We will strike gang-related condition number 4 and remand the matter for imposition of a new condition. We believe the language of a condition restricting courthouse access should, in the first instance, be crafted by the juvenile court. There are two reasons for this. First, the juvenile court, which has more experience and information concerning local conditions and needs, will be better able to craft a narrow probation condition that protects court participants and staff from intimidation and interference by juvenile gang members. To take one example, while we find the suggested language in *In re E.O.*, *supra*, 188 Cal.App.4th at page 1157, footnote 5 particularly clear and thorough in the context of prohibiting attendance at any gang-related court proceeding, it may be that particular considerations in Merced County require that the prohibition apply to a wider or narrower range of cases. The second consideration in deciding to remand the matter for initial imposition of the probation condition by the juvenile court is the fact that the probation officer may possess additional information concerning minor’s gang activities that would justify restrictions on courthouse access that are more particularized than the restrictions contained in the revised, standardized condition the juvenile court may adopt. In formulating both a

standard probation condition for juvenile gang members and in modifying that condition, if appropriate, in the present case, the juvenile court will seek to establish a probation condition that has the least impact on the right of access to the court for legitimate purposes consistent with the rehabilitation and reformation of the juveniles who are subject to the condition. (See *id.* at pp. 1152-1153.)

### **DISPOSITION**

Conditions number 2, 3, and 7 of the probation/wardship conditions for gang identified minors imposed on November 17, 2011, are modified as set forth in this opinion. Condition number 4 is stricken. The matter is remanded for further hearing on imposition of a courthouse-access condition of probation in accordance with the views expressed in this opinion, such hearing to occur within 30 days after this court issues its remittitur, unless the date for hearing is extended by the juvenile court for good cause. In all other respects, the November 17, 2011, order for wardship, as modified, is affirmed.