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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN FRANCIS DAVILA,

Defendant and Appellant.

G044123

(Super. Ct. No. 05HF0339)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.
Michael Hayes, Judge. Affirmed as modified.

Marilee Marshall, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Lilia
E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant John Francis Davila challenges his probation revocation. He contends the probation condition that he avoid “places where minors congregate, including but not limited to . . . parks” was overbroad as applied to a soccer field in a park. He also contends the court failed to award him custody credits. Only the second contention has merit. We modify the judgment to correct the custody credits, and affirm.

FACTS

Defendant pleaded guilty in 2005 to committing a lewd act on a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ The court granted him three years of probation on the condition he serve 300 days in county jail, with 289 total days of custody credit. As a condition of probation, the court ordered defendant not to “associate with minors or frequent places where minors congregate, including but not limited to . . . parks [and] playgrounds” The court also required defendant to register as a sex offender.

In April 2008, defendant appeared at a probation revocation hearing. After a chambers conference, the court stated, “if [defendant] admits his violation, I intend to impose credit time served, place him back on probation and, when, in fact, he should go, according to the current rules that we follow, he should be in prison if he violates.” Defendant admitted violating probation — the record does not identify the specific violation. The court reinstated probation on the condition defendant serve 469 days in county jail — “313 actual days, 1[5]6 good time/work time.” It told him, “You are going to stay at the county level, not going to go on to state prison unless you mess up like you did the other violations.”

¹

All further statutory references are to the Penal Code.

In July 2009, defendant's probation officer filed a petition to revoke probation. He alleged defendant (1) failed to re-register as a sex offender within five days of his birthday (§ 290.012, subd. (a)), (2) failed to "violate no law" by willfully failing to register as a sex offender (*ibid.*, § 290.018, subd. (b)), and (3) frequented a place minors congregate by going to Marina Hills Park in Laguna Beach.

At the probation revocation hearing, the probation officer testified about defendant's alleged parole violations. He testified defendant last registered as a sex offender on June 4, 2009. Defendant did not register again within five days of his June 27 birthday. The probation officer further testified defendant admitted playing soccer with adults in Marina Hills Park on the night of June 18. Marina Hills Park is "a big park" with "two soccer fields . . . , two baseball fields and a playground." Defendant told the probation officer he saw children playing on the other fields and the playground, but he had no contact with them. The probation officer acknowledged he had given defendant permission earlier to play in an adult soccer league at "a club soccer field" in Anaheim. But they did not discuss whether defendant could play soccer anywhere else.

An investigator also testified defendant admitted playing soccer at Marina Hills Park, on a soccer field next to a playground. The investigator had driven by the park on other occasions and seen children playing there after 5:30 p.m.

A community services officer testified defendant had registered with him back in 2008, though he had no independent recollection of speaking with defendant. If defendant had asked him, he would have told defendant that he could register "early." By this, he would have meant defendant could register within five days before his birthday.

Defendant testified he knew he was required to register whenever he changed residences and each year within five days of his birthday. But when he went to register back in June 2008, the community service officer had told him he could register early. Defendant acknowledged he knew he should avoid places where minors

congregate, including parks. But he did not believe that barred him from playing soccer with adults at Marina Hills Park. The probation officer had given him “the impression” he could play soccer without violating probation. And he did not see any minors on the soccer field on June 18, 2009. He did see a minor playing on the playground, as well as someone who might have been a minor on a baseball field that “overlaps” the soccer field. There were also people playing on another soccer field, though they were too far away to see clearly.

The court revoked defendant’s probation. It found he failed to register within five days of his birthday, and frequented a place where minors congregate. It found defendant did not violate any law, though, because he had not been convicted of any crime.

After the hearing, defense counsel asked the court to continue the sentencing date. Defense counsel wanted to “gather the documents, the dates for all the times that [defendant] did comply with his probationary conditions. That, of course, is a matter that the court should consider for sentencing” When the court asked why that was necessary, defense counsel asked the court “not to sentence the defendant to state prison.” The court replied: “Well, there’s no local time left, as I understand it. [Defendant] couldn’t get anything but a state prison sentence based on the information you supplied to me during the trial. Looks like he’s got over 700 days credit minimum. So there is no local time left in his future. The question is how much prison time does he get sent to?” Defense counsel asked for time to submit a sentencing brief, which the court granted.

At the sentencing hearing, the court sentenced defendant to three years in state prison — “That’s the minimum I can give him.” It noted a “running debate” about defendant’s custody credits. The prosecutor initially stated defendant “was in custody, a total of 769 days,” but then agreed with the court it was 387 days. The court granted 445

days of credits to defendant, comprising 387 days of presentence custody credit and 58 days of conduct credit.

DISCUSSION

The Probation Condition is Constitutional as Applied to Defendant

Defendant concedes he saw at least one minor at Marina Hills Park when he played soccer there. But he contends the probation condition that he avoid “places where minors congregate, including but not limited to . . . parks,” was vague and overbroad as applied to a soccer field being used at that time by only adults.²

“A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation 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.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

The probation condition was not unconstitutionally vague. It plainly advised defendant to avoid “places where minors congregate, including but not limited to . . . parks” This gave sufficient notice to defendant to avoid playing soccer in a public park, in which the soccer field is surrounded by playing fields and a playground. Defendant should have reasonably known not to play soccer at Marina Hills Park even if

² Defendant does not challenge the probation condition for failing to contain a knowledge requirement. But any error would be harmless because he saw a child on the playground next to the soccer field. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 775-776 [where undisputed testimony shows the defendant “played with several children,” it was harmless whether his probation condition should have barred “‘associating’ with minors, rather than being in their ‘presence’”]; see also *id.* at p. 775, fn. 4 [court permissibly modified probation condition to include knowledge requirement before finding defendant “was ‘in the knowing presence of a minor’”].)

no children happened to be on the field at that time. In any event, defendant conceded seeing at least one child on the adjacent playground — and possibly more children on the other soccer field and the baseball field that overlapped his field. Defendant reasonably should have known to avoid the soccer field at Marina Hills Park.³

Nor was the probation condition overbroad. The legitimate purpose of the probation condition is to deter future criminality by barring defendant — who pleaded guilty to committing a lewd act on a minor — from “a probable situs at which [he] might duplicate [his] offense.” (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.) And “the state has a compelling interest in the protection of children which justifies the restriction on [defendant’s] freedom of association.” (*Ibid.*) A condition barring a probationer from frequenting places where minors congregate is not overbroad if “applied to such places as elementary schools, day-care centers, and parks.” (*Ibid.*) A sufficiently close fit exists between barring defendant from locations where he might find children to abuse and barring him from playing soccer at a public park with playing fields and a playground.

Because the court permissibly revoked probation on this ground, we need not determine whether it erred by finding defendant failed to register by registering three weeks too early. (But see *People v. Galvan* (2007) 155 Cal.App.4th 978, 983 [“A trial court abuses its discretion by revoking probation if the probationer did not willfully violate the terms and conditions of probation”]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1069 [reversing conviction for failure to register where court did not instruct jury that defendant must know of his duty to register in both cities in which he

³ Defendant claims he did not know playing soccer at Marina Hills Park was forbidden because his probation officer had previously allowed him to play soccer. But defendant merely testified that he got “the impression” he could play soccer anywhere. The probation officer testified he approved only a club soccer field in Anaheim, and did not discuss any other place with defendant. Thus, the record sufficiently supports an implied finding defendant had no reason to believe he could play soccer anywhere he wanted.

resided — “An omission is neither purposeful nor willing if it is based upon ignorance of the requirements of the law”].)

No Substantial Evidence Showed Defendant Waived His Custody Credits

Defendant contends the court wrongly denied him some of his custody credits. The court awarded defendant 445 days of custody credit for time served between his arrest on the July 2009 probation violation petition and sentencing. He contends he is further entitled to an additional 769 days of custody credit for time served in county jail as a condition of the initial grant of probation in 2005 (300 days) and as a condition of reinstating probation in 2008 (469 days).

“[W]hen the defendant has been in custody . . . all days of custody . . . including days served as a condition of probation . . . shall be credited upon his or her term of imprisonment” (§ 2900.5, subd. (a).) Thus, “actual time previously served in county jail, including time served as a condition of probation” is “credited against any new ‘term of imprisonment’ served in the county jail for the same offense, including any new jail term imposed as a condition of continuing or reinstating the defendant on probation.” (*People v. Arnold* (2004) 33 Cal.4th 294, 300-301 (*Arnold*).

But “Penal Code section 19.2 has long imposed a one-year limitation on the time that can be served in county jail as a condition of probation upon conviction of a felony or misdemeanor, or upon recommitment to the county jail as a condition of reinstatement of probation.” (*Arnold, supra*, 33 Cal.4th at pp. 299-300, fn. omitted.) Thus, the statutes “created a dilemma for sentencing courts *in those cases in which the defendant had already served a year or more in county jail as a condition of probation before subsequently violating probation*. In such cases, if the sentencing court desired to reinstate the defendant on probation, the interplay of the two statutes forced the sentencing court to choose between sentencing the defendant to state prison or imposing

no additional jail time as a condition of reinstatement of probation—because applying custody credit for the earlier one year of county jail time against the new county jail term would result in the defendant’s having already served the maximum one-year county jail term permitted under section 19.2 for the new violation.” (*Id.* at p. 301.)

To resolve this dilemma, “a defendant [may] waive custody credits . . . for county jail time previously served, in order to permit a sentencing court to reinstate probation conditioned on service of an additional period of up to one year in county jail for [a] new probation violation, without running afoul of section 19.2’s one-year limitation on county jail terms” (*Arnold, supra*, 33 Cal.4th at p. 302.) This is referred to as a *Johnson* waiver. (*Id.* at p. 297; see *People v. Johnson* (1978) 82 Cal.App.3d 183.) Thus, “a trial court has discretion to condition a grant or extension of probation upon a defendant’s express waiver of past and future custody credits.” (*People v. Johnson* (2002) 28 Cal.4th 1050, 1055.)

“As with the waiver of any significant right by a criminal defendant, a defendant’s waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent.” [Citation.] The gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled under section 2900.5.” (*Arnold, supra*, 33 Cal.4th at p. 308.) “[A] custody credit waiver may be found to have been voluntary and intelligent from the totality of the circumstances, even if the sentencing court failed to follow the “better course” of specifically advising the defendant regarding the scope of his waiver.” (*Id.* at p. 306.)

A *Johnson* waiver waives custody credits “for all purposes” and “will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed.” (*Arnold, supra*, 33 Cal.4th at p. 309.) Otherwise, in cases with multiple *Johnson* waivers, “the waived credits for the aggregate time served in county jail will equal or be greater than the suspended prison sentence for the original offense. In

such cases, if the credits can permissibly be ‘recaptured’ [citation] by the defendant when his own misconduct ultimately leads to revocation of probation and imposition of a prison term, he will have no prison term left to serve.” (*Id.* at p. 308.) That would unfairly allow “those probationers who have repeatedly been shown the most leniency . . . to violate probation with impunity, secure in the knowledge that the specter of an actual prison sentence is no longer hanging over their heads” (*Ibid.*)

This general rule would bar defendant from recapturing any custody credits he had waived in order to obtain or reinstate probation — assuming the waiver was knowing and intelligent. Defendant asserts he “did not waive his credits for time served in county jail following his first probation violation.”

The Attorney General concedes “the record is unclear as to whether [defendant] waived his prior custody credits as a part of a negotiated probation.” It is. When would defendant have entered into a *Johnson* waiver? Not in October 2005, when the court first granted probation. The court granted probation on the condition defendant serve 300 days in county jail — less than the one-year maximum. What about in April 2008, when the court reinstated probation on condition defendant serve 469 days in county jail? Presumably, those 469 days equaled 313 actual days defendant served after his arrest on that probation violation, plus 156 days of conduct credits. The court stated it would “impose credit [(for?)] time served.” And the court seems to have assumed defendant was waiving any prior custody credits — i.e., the 300 days he served in 2005 — when it reinstated probation. It told him he was “going to stay at the county level, not going to go on to state prison,” “when, in fact, he should go, according to the current rules that we follow, he should be in prison if he violates.” But the record lacks any express statement that defendant was knowingly and intelligently waiving his custody credits, as might be contained in a written plea agreement. (Cf. *Arnold, supra*, 33 Cal.4th at p. 310 [“As part of the plea form, [the defendant] then executed a written waiver” of “ALL CREDITS”].) Finally, did defendant enter a knowing *Johnson* waiver at the 2009

parole revocation hearing? The record shows none, which makes sense — the court imposed no additional county jail time. And the court initially noted defendant had “over 700 days credit minimum,” before later telling counsel defendant had only 387 days credit.

Should we hold the record’s silence against defendant? The Attorney General asserts “[i]t is [defendant’s] burden to provide the court with a complete record on appeal.” But defendant met his burden. He provided us with the reporter’s transcript of each relevant hearing, including the April 2008 hearing. On their faces, these transcripts show no waiver. Defendant further provided us with the clerk’s transcript index from a prior appeal from the denial of his petition for a writ of coram nobis, which identifies documents through April 2008 but does not identify a written plea agreement. This shifted the burden to the Attorney General. But the Attorney General has failed to provide any written document or other evidence showing defendant made a knowing and intelligent *Johnson* waiver in April 2008 or at any other time.

The Attorney General contends the best course would be to remand the matter to the trial court to “clarify . . . whether [defendant] waived prior custody credits in exchange for his grant of probation and reinstatement of probation.” We disagree. If “[t]he record does not reveal a knowing and intelligent waiver of defendant’s right to custody credits under section 2900.5,” the proper course is to modify the judgment to award them. (*People v. Urke, supra*, 197 Cal.App.4th at p. 778.)

DISPOSITION

The judgment is modified to award an additional 769 days of custody credits to defendant, for a total credit of 1,156 days. The court is directed to prepare a new abstract of judgment accordingly and forward it to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.