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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY J.,

Defendant and Appellant.

G050180

(Super. Ct. No. DL049150)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed as modified.

Frank J. Torrano, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Randall Einhorn, Stacy Tyler and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, a minor, was placed on probation for possessing a knife on school grounds. He contends the knife was unlawfully seized and one of his probation conditions is unduly vague. Other than to modify the subject probation condition to include an explicit knowledge requirement, we affirm the judgment.

#### FACTS

On February 5, 2014, appellant left behind a notebook in one of his classes at Santa Ana High School. The notebook got the attention of school officials because it had the letters “SCK” written on it in gang-style writing. Officials suspected the letters stood for the “Sick Crime Krew,” which is one of the criminal street gangs that operates around – and has members at – the school. In fact, at the time this case arose, several buildings at the school had recently been “tagged” with SCK graffiti. Gang members at the school were known to engage in assaultive behavior and drug and weapon activity.

Appellant’s possible gang involvement was not the only thing that troubled school officials. He also had several “disciplinary referrals” pending against him.<sup>1</sup> So on the morning of February 6, the day after the notebook discovery, vice-principal Thomas Hummel sent out a radio dispatch to the school’s safety officers to find appellant and bring him to his office.

Toward the end of first period, around 8:45 a.m., safety officer Lazaro Pita spotted appellant with two other students. Although appellant was wearing his gym clothes, he was not at the outdoor basketball courts, where gym classes are held. Instead, he was in an open area in the middle of the school known as the quad, where students socialize and eat lunch. Pita knew gym teachers sometimes let their students out three to five minutes before the period ends, so they have time to go back to their lockers and change. However, Pita spotted appellant in the quad about 15 minutes before the first period ended. Pita also knew that students cannot get to the locker room from the

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<sup>1</sup> The referrals are made when a student misbehaves, but the record does not disclose what appellant did to get his.

basketball courts by walking through the quad. Therefore, he suspected appellant “wasn’t where he was suppose[d] to be.” This concerned Pita because his experience had taught him that students sometimes acquire drugs, weapons or other prohibited items when they are not in class.

Pita contacted appellant and took him to Hummel’s office. When they arrived there, Hummel instructed Pita to pat appellant down and check his backpack for contraband. Although appellant was respectful during the encounter and did not have a history of violent behavior, Hummel was concerned he might be in possession of gang paraphernalia, a weapon, or tagging tools, all of which are prohibited under the school’s safety policy.

Before starting the patdown, Pita had appellant spread his legs and put his hands behind his back. Then, moving from low to high, he began feeling the outside of appellant’s clothing. While doing so, Pita asked appellant if he had anything he wasn’t supposed to have, and appellant admitted he had a lighter. However, before coming across the lighter, Pita felt a hard object near appellant’s waist. Appellant did not say anything when Pita asked him what the object was, but suspecting it might be a weapon, Pita lifted appellant’s shirt and discovered a knife in his waistband. The knife was attached to a metal clip and had a four-inch retractable blade. After seizing the weapon, Pita continued the patdown and found two lighters, which like the knife, are prohibited under the school’s rules. In response to Hummel’s questioning, appellant admitted associating with SCK and said his moniker was “Wicked.”

Appellant moved to suppress the knife on the basis there was no justification to pat him down. The court found the patdown was reasonable under the circumstances. It therefore denied appellant’s motion and found he unlawfully possessed a weapon on school property. At the disposition hearing, the court put him on probation subject to various conditions, including that he not possess any drugs or alcohol.

## DISCUSSION

### *Legality of the Patdown*

Appellant contends the seizure of his knife violated the Fourth Amendment because it resulted from an unlawful patdown that was not supported by reasonable suspicion of wrongdoing. We disagree.

It is well established that “the Fourth Amendment applies to searches conducted by school authorities . . . .” (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 337.) However, “[o]ur courts have recognized that the special need of schools to maintain a safe and orderly environment for learning requires different rules regarding search and seizure than those employed in the public in general.” (*In re Jose Y.* (2006) 141 Cal.App.4th 748, 752.) For example, “[s]earches of students on campus do not require probable cause to believe the student violated the law, but rather reasonable suspicion the student is violating or has violated a law, school rule, or regulation.” (*Ibid.*, citing *In re William G.* (1985) 40 Cal.3d 550, 564.)

School officials can also adopt policies that permit searches without individualized suspicion in certain circumstances. (See *In re Latasha W.* (1998) 60 Cal.App.4th 1524, 1527 [noting school search policies “do not violate the Fourth Amendment where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable.”].) However, the Attorney General does not attempt to justify appellant’s search under any school policy. Instead, she argues the search was lawful because appellant had gang-style writing on his notebook, and he was not in class when Pita found him on the morning of the search. In the state’s view, these facts, combined with the other circumstances presented, created reasonable suspicion appellant was involved in gang-related graffiti activity, and therefore it was reasonable to search him for evidence of such. Because appellant attacks respondent’s argument on both factual and legal grounds, we begin our analysis by reciting the standard of review applicable to this appeal.

““In reviewing a suppression ruling, “we defer to the superior court’s express and implied factual findings if they are supported by substantial evidence, [but] we exercise our independent judgment in determining the legality of a search on the facts so found.” [Citation.]” [¶] Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court. ‘As the finder of fact . . . the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable.’ [Citation.] We review its factual findings ““under the deferential substantial-evidence standard.”” [Citation.] Accordingly, ‘[w]e view the evidence in a light most favorable to the order denying the motion to suppress’ [citation] and ‘[a]ny conflicts in the evidence are resolved in favor of the superior court’s ruling.’ [Citation.]” (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

This last point is particularly important in this case, because appellant’s arguments are primarily targeted at the factual underpinnings of the trial court’s ruling. For example, appellant claims the record does not support the trial court’s implied factual finding he was not in his gym class when Pita went looking for him on the morning of the search. However, that claim does not withstand scrutiny under the deferential standard set forth above.

Pita did not know appellant’s class schedule, but when he found appellant on the morning of the search, he was in the school quad, which is a place where students go to eat and socialize, not attend classes. Because appellant was wearing gym clothes, defense counsel questioned Pita about the possibility he contacted appellant while he was walking from the basketball courts – where gym classes are held – to the locker room in order to change his clothes. To defense counsel’s chagrin, Pita testified students cannot even get to the locker room by walking through the quad. And although it is possible for them to walk from the basketball courts to the quad, Pita said they would have to take

“the long route” to do so. Moreover, while Pita knew gym teachers sometimes let their students out of class a few minutes early so they have time to go the locker room and change, he saw appellant in the quad about 15 minutes before the first period ended. Viewing this evidence in the light most favorable to the trial court’s ruling, it constitutes substantial evidence from which the trial court could infer appellant was cutting class when Pita contacted him in the quad.

So, what is the significance of that? Appellant claims it is sheer speculation to believe his absence from gym class was cause for concern. But Pita testified appellant’s absence was very important in terms of deciding whether or not to search him. Pita explained that if a student is not in class, “we don’t know what they are doing.” They might be “seeing somebody through the fence” or meeting someone in the bathroom and getting something “they are not suppose[d] to have,” like drugs, weapons or other “inappropriate” items. Pita said he had found such items on truant students in the past, and that in order “to keep the campus safe,” he “always bring[s] truancy issues to an administrator’s attention.”

Appellant points out there was no direct evidence he had actually obtained any contraband from anyone on the morning of the search. However, among the facts and circumstances that can give rise to reasonable suspicion are the searching officer’s awareness of particular methods used in past criminal activity. (*United States v. Mendenhall* (1980) 446 U.S. 544, 563.) In fact, we expect law enforcement officers to utilize and draw on their past experience in detecting and ferreting out possible criminal activity. (*United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 885.) That they may lawfully do so underscores the point that reasonable suspicion is not some theoretical concept divorced from reality and commonsense but is based on practical considerations grounded in everyday life. (*New Jersey v. T.L.O.*, *supra*, 469 U.S. at p. 346; *Ornelas v. United States* (1996) 517 U.S. 690, 700.)

Pita not only knew that students who cut class sometimes bring contraband onto campus, he was also aware of the gang culture at the school. Particularly, he knew: 1) the Sick Crime Krew is a gang that operates in and around the school; 2) the gang goes by the initials “SCK,” which were found on appellant’s notebook the day before the search; 3) at the time of the search, SCK graffiti was located on several buildings throughout the school; and 4) in fact, some of the gang’s graffiti appeared around the area where appellant was located the morning of the search.

Knowing all of this, Pita suspected appellant was affiliated with SCK and might be in possession of graffiti markers or a weapon. This belief was hardly unreasonable considering, as vice-principal Hummel testified, there had been “drug[], assault, graffiti [and] weapons possession” issues with gang members on campus in the past. Again, focusing on the lack of evidence showing he had ever been involved in any of those activities, appellant claims these generalized concerns were irrelevant to the legality of his search. Indeed, he claims the gang concerns surrounding him were largely misplaced because he was respectful to Pita on the day of the search, and he had no history of violent behavior at the school.

But appellant’s putative imminent canonization is undermined by the fact he had about half a dozen disciplinary referrals pending against him at the time of the search. Moreover, his focus on the lack of a “smoking gun” connecting him to any particular, concrete criminal activity misses the mark because, in assessing the legality of his search, the “totality of the circumstances – the whole picture – must be taken into account.” (*United States v. Cortez* (1981) 449 U.S. 411, 417-418.) The issue is not whether there was unmistakable evidence appellant had engaged in any particular wrongdoing but whether the *degree* of suspicion surrounding his behavior was sufficient to create a reasonable belief he was violating or had violated a law or school rule. (*New Jersey v. T.L.O.*, *supra*, 469 U.S. at p. 346 [“the requirement of reasonable suspicion is not a requirement of absolute certainty,” and the fact a student’s conduct is consistent

with both suspicious and unsuspecting behavior does not negate reasonable suspicion]; *Safford Unified School Dist. No. 1 v. Redding* (2009) 557 U.S. 364, 371 [describing the legal standard for searching students as “a moderate chance of finding evidence of wrongdoing”]; *In re William G.*, *supra*, 40 Cal.3d at p. 564.) This question is measured by an objective standard, regardless of what Pita and Hummel were subjectively thinking at the time of the search. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 153; *People v. Conway* (1994) 25 Cal.App.4th 385, 388.)

Considering all the facts in this case, we believe there was reasonable suspicion to search appellant. The gang-style writing on his notebook strongly suggested he was affiliated with a criminal street gang that was responsible for an extensive amount of graffiti at the school, and at the time he was contacted by school officials, appellant was not only out of class, he was in an area that had been the target of recent graffiti efforts by that very gang. In fact, according to Pita, there had been at least five, and perhaps more than ten, SCK tagging incidents in that area just in the week leading up to appellant’s search. The objective circumstances were such as to raise a reasonable suspicion appellant was involved in gang and/or graffiti activity at the school.

In arguing otherwise, appellant relies on *In re William G.*, *supra*, 40 Cal.3d 550, which invalidated the search of a high school student’s bag for lack of reasonable suspicion. The fact the bag appeared to have an odd bulge in it and the student tried to hide it when the assistant principal approached him were simply not enough to support the belief the case contained drugs or other contraband. (*Id.* at pp. 555, 566-567.) In the present case, however, there was evidence connecting appellant to a gang that was recently involved in graffiti activity near the site where he was contacted. In addition, there was good cause to believe appellant was cutting class and not supposed to be in the area where the contact occurred. These circumstances were not only more incriminating than those involved in *William G.*, they were on par with those found to be sufficient to search students in other cases. (See, e.g., *In re William V.* (2003) 111 Cal.App.4th 1464,

1472 [student's possession of colored bandana warranted a patdown because, inter alia, the bandana signaled gang affiliation and there had been recent gang activity at the school]; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1740-1742 [search of student's backpack upheld even though it was based on a tip that may have been anonymous].)

At bottom, we are convinced the facts and reasonable inferences therefrom created reasonable suspicion appellant was violating a school rule by possessing contraband. Therefore, Pita had every right to pat him down and seize his knife, and the trial court properly denied his motion to suppress. We discern no violation of appellant's Fourth Amendment rights.

#### *Probation Conditions*

In reciting the conditions of appellant's probation, the trial court told him he was not allowed to use, possess or be under the influence of alcohol, narcotics or illegal drugs. Appellant contends this condition is unconstitutionally vague because it does not contain an explicit knowledge requirement. We agree.

To survive a vagueness challenge, probation terms ““must be sufficiently precise for the probationer to know what is being required of him, and for the court to determine whether the condition has been violated.”” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific *context*,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have ““*reasonable specificity*.”” [Citation.]” (*Ibid.*) “[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item].” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [modifying probation condition to prohibit knowing possession of a firearm or ammunition].)

The Attorney General does not dispute that, on its face, the subject probation condition has no scienter requirement. Consequently, appellant could be

hauled into court on suspicion of violating his probation even if he unwittingly used, possessed or was under the influence of one of the proscribed substances. Although the state urges us to simply imply a knowledge requirement into the condition, as some courts have done (see, e.g., *People v. Hall* (2015) 236 Cal.App.4th 1124, 1135-1137; *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 589-594; *People v. Moore* (2012) 211 Cal.App.4th 1179, 1183-1189), we will adhere to our standard practice of modifying the subject condition to contain an express knowledge requirement. (*People v. Moses* (2011) 199 Cal.App.4th 374, 381, following *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 891-893; accord, *People v. Piralì* (2013) 217 Cal.App.4th 1341, 1351.) As the Attorney General admits, there is no harm in doing so. Moreover, that is the best way to prevent arbitrary law enforcement and ensure appellant knows what conduct is expected of him, which is what the vagueness doctrine is all about. (*Ibid.*)

#### DISPOSITION

The sixth condition of appellant's probation is modified to state he shall not *knowingly* use, possess or be under the influence of alcohol, narcotics or any illegal drug. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.