

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ERIC V., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC V.,

Defendant and Appellant.

G050897

(Super. Ct. No. DL043386)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Deborah C. Servino, Judge. Reversed in part and affirmed in part.

Richard Power, 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, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Minor, Eric V.,¹ was found in violation of his probation. He argues the gang probation conditions he was found to have violated were unconstitutional in that the probation conditions impinged on his right to travel, right of association, and that the conditions were vague and overbroad. He also contends the evidence was insufficient to support a finding that he violated his probation. We find the minor forfeited the constitutional claims other than vagueness, the probation conditions were not vague or overbroad, and the evidence supported the juvenile court's finding the minor violated his probation on all but one of the grounds.

I

PROCEDURAL SETTING AND FACTS

On August 30, 2012, the district attorney filed a petition in juvenile court to declare the minor a ward of the court for violating Health and Safety Code² section 11350, subdivision (a), possession of hydrocodone. Minor initially denied the petition allegation and on January 4, 2013, the petition was amended by interlineation to allege as count two, a violation of Business and Professions Code section 4060, possession of a controlled substance, which the minor admitted. The Health and Safety Code charge was dismissed. The court found the offense admitted by the minor to be a misdemeanor and placed the minor on probation.

A little over two months later, the probation department filed a probation violation alleging the minor violated Penal Code section 29610, possession of a concealable firearm on his person. That conduct resulted in another petition being filed

¹ We realize Eric is no longer under 18 years of age, but we use the word "minor" here for consistency.

² All further undesignated statutory references are to the Health and Safety Code unless otherwise indicated.

against the minor. It alleged the minor possessed a firearm while on probation (Pen. Code, §29815, subd. (a); count one), possessed ammunition (Pen. Code, § 29650; count two), and possessed drug paraphernalia (former § 11364.1, subd. (a), repealed by Stats. 2014, ch. 331, § 9 (former § 11364.1); count three). The petition further alleged the minor committed the charged offenses for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)), the Krazy Proud Criminals. Minor admitted he possessed a firearm while on probation (count one) and the gang enhancement allegation as to count one. Counts two and three of the petition were then dismissed.

The court placed the minor on probation and ordered him to spend 90 days in juvenile hall. The probation terms included provisions prohibiting the minor from: 1) associating “with anyone who you know is disapproved of by the Court, your parent/guardian, or probation officer, or anyone who you know is on probation or parole, or a member of a criminal street gang or member of a tagging crew, or anyone who you know is illegally using/selling/possessing, or under the influence of alcohol or illegal controlled substances.” This probation term specifically referred to Krazy Proud Criminals; and 2) being “in any area as indicated by the court/probation officer where you know any gang members congregate.” This term also specifically included reference to Krazy Proud Criminals.

On October 29, 2013, the probation department obtained a warrant for the minor’s arrest based on an allegation that the minor absconded from probation, i.e., did not, as he had previously been informed to do, notify his probation officer within 48 hours of a change of address. The warrant notice further stated the minor failed to report to probation on July 23, 2013, and August 21, 2013, as the minor had been directed. Minor denied the allegations in the probation violation petition.

On November 26, 2013, yet another petition was filed against the minor. This one alleged he violated Vehicle Code section 12500, subdivision (a), driving without a license. Minor admitted the allegation in the petition and admitted he had absconded from probation. The court found him in violation of his probation, continued the minor as a ward of the court, ordered him to serve 120 days in juvenile hall, and continued him on probation with the previously imposed terms and conditions.

On June 4, 2014, the court issued a notice of hearing on yet another probation violation. This one alleged the minor: 1) failed to alert his probation officer of his arrest on April 24, 2014; 2) possessed methamphetamine and a methamphetamine pipe on April 24, 2014; 3) was arrested for possession of methamphetamine on that date; 4) failed to report to the probation officer on May 7, 2014, as directed; and 5) associated with two individuals after being directed by the probation officer not to associate with those individuals. In June 2014, the minor admitted the probation violation allegations. The court continued the minor as a ward of the court, committed him to juvenile hall for 30 days, and kept all prior orders in full force and effect.

In September 2014, the minor was alleged to have violated probation again. It was alleged: 1) on July 30, 2104, the minor associated with an individual he had been told not to associate with; 2) on August 27, 2014, the minor associated with known gang members; 3) on or about August 27, 2014 and September 15, 2014, the minor associated with a known gang member; 4) the minor failed to report to his probation officer on September 3, 2014, as directed; 5) the minor failed submit to a search or seizure on September 15, 2014; 6) the minor was present in a known gang gathering area on September 15, 2014; and 7) the minor violated former section 11364.1 on September 15, 2014.

Prior to the probation violation hearing on this matter, the court struck the first three alleged violations on the district attorney's motion. The hearing was held on the alleged violations in paragraphs four through seven. The court took judicial notice of the electronic minutes in Orange County Superior Court case No. 14CM08033, wherein the minor pled guilty to possession of methamphetamine and possession of narcotic paraphernalia.

Deputy Probation Officer Lawrence Ibarra, a member of the probation department's Santa Ana gang unit, supervised the minor. Ibarra said his notes indicate he indoctrinated the minor as to the terms and conditions of the minor's probation on June 19, 2013, including not to be present in any gang gathering area, but he does not specifically remember doing so.

Ibarra filed the probation violation against the minor. He said the minor failed to report on September 3, 2014, as directed. Additionally, Ibarra said he was on duty on September 15, 2014, assisting a Santa Ana police officer working a gang suppression shift. They were on patrol in an area known as the neighborhood of the Alley Boys gang. Ibarra supervised juvenile and adult Alley Boys members on probation. He saw a group of males "milling around" in a circle in a courtyard adjacent to an apartment complex. Gang members Eric Trujillo, Jesus Martinez, Ramon Lopez, and Gabriel Magianez were present. Ibarra recognized two of the males as having been on probation.

Ibarra did not immediately see the minor. As Ibarra and the police drove by, Jose Villa yelled, "police," and a number of individuals fled in different directions. Three of the subjects headed north. Ibarra contacted two of them and his partner chased after the minor and brought him back to Ibarra. Ibarra's partner had called out for the

minor to stop, but the minor did not comply. Ibarra placed a probation hold on the minor for his “accumulated violations” of probation.

The court found the minor violated his probation as alleged in paragraphs four through seven and continued the minor as a ward of the court and imposed a 180-day commitment to juvenile hall as a condition of continuing him on probation.

II

DISCUSSION

A. *Constitutional Challenges*

1. *Forfeiture*

The minor’s probation grants in this matter included the condition that he “not be in any area as indicated by the court/probation officer where you know any gang members congregate—specifically including Krazy Proud Criminals.” He argues on appeal that this probation condition is unconstitutional for three reasons. First, he asserts the probation condition violates his constitutional right to travel. Next, he contends the probation condition violates his right to association. Lastly, he argues the probation condition is unconstitutionally vague. The Attorney General maintains the minor forfeited these arguments by failing to make them below.

The contested probation condition was initially imposed on the minor in March 2013, when he admitted he possessed a firearm while on probation and that he did so for the benefit of a criminal street gang. The minor did not object to the imposition of the probation condition when it was imposed. Neither does it appear he appealed the juvenile court’s imposition of the contested probation condition. The minor did not object when the probation condition was continued in effect after he twice admitted other petitions filed against him. Additionally, the minor did not object at the probation

violation hearing from which he has now appealed. Rather, the Attorney General correctly points out, the only time the issue of the right to travel was brought up was in the closing argument of the minor's counsel. And then, it was mentioned only in the context of arguing the district attorney failed to prove the minor *knew* the location he was found in was a gathering place for gang members.

The minor also argues the probation condition violated his right of association. He does not cite to the record where such an objection was made at any time, including when the condition was initially imposed, when it was subsequently ordered to remain in effect after other violations by the minor, or at the hearing on the present probation violation. Neither has the minor claimed to have objected to the probation condition on vagueness or overbreadth grounds. He contends he did not forfeit the constitutional challenges and that in *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*), the Supreme Court held a fundamental constitutional right may be raised for the first time on appeal.

As a general rule, a criminal defendant's failure to object in the trial court to an unreasonable probation condition forfeits the claim. (*People v. Welch* (1993) 5 Cal.4th 228, 234-238.) However, when the purported sentencing error involves a pure question of law not dependent on a record developed in the trial court, the appellate court may decide to hear the issue, "particularly where the defendant might otherwise spend too much . . . time in custody." (*Id.* at pp. 235-236.)

The Supreme Court granted review in *Sheena K.* "to resolve the conflict among appellate decisions concerning whether the doctrines of forfeiture or waiver applies to a challenge to a condition of probation, raised for the first time on appeal, when the challenge is based on the ground the condition is vague or overbroad and thus facially

unconstitutional.” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 878.) The court found that applying forfeiture rules to “appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case.” (*Id.* at p. 885.) On the other hand, the court found in favor of not applying the forfeiture rule where the appellate claim amounts “to a ‘facial challenge’” that the probation condition is overbroad or vague, because decision on that issue “does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts.” (*Ibid.*) Although the high court concluded the minor in *Sheena K.* did not forfeit her vagueness and overbreadth challenges, the court cautioned that its conclusion “does not apply in every case in which a probation condition is challenged on a constitutional ground.” (*Id.* at p. 889.) The court “also emphasize[d] that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction.” (*Ibid.*)

Because the minor had multiple opportunities to object to the probation condition as a violation of his right to travel and association, and did not object, we find he forfeited those claims.³ We address his vagueness challenge because it presents a pure

³ “Prohibitions against a variety of gang-related activities have been upheld when imposed upon juvenile offenders. [Citations.] Because ‘[a]ssociation with gang members is the first step to involvement in gang activity,’ such conditions have been found to be ‘reasonably designed to prevent future criminal behavior.’ [Citation.] Whether the minor was currently connected with a gang has not been critical. Thus, probation terms have been approved which bar minors from being present at gang gathering areas, associating with gang members, and wearing gang clothing. [Citation.]”

question of law and resolution of the issue does not require reference to the juvenile court record. (See *In re Ramon M.* (2009) 178 Cal.App.4th 665, 676-677 [with the exception of vagueness, failure to object forfeited the minor's other constitutional challenges to probation condition].)

2. *Vagueness*

The minor claims the contested probation condition was “void for vagueness” because it did not provide him adequate notification of what constituted a probation violation. We disagree.

“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.]” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The condition in this matter was not vague. It specifically prohibited the minor from being where *he knows* gang members congregate. In *In re Justin S.* (2001) 93 Cal.App.4th 811, 816, the appellate court found a probation condition “[p]rohibiting association with gang members without restricting the prohibition to *known* gang members is “a classic case of vagueness.” [Citation.]” The “remedy is to modify the condition . . . to narrow its reference to persons known to the probationer to be associated with a gang.” (*Ibid.*, fn. omitted; see also *People v. Lopez*, *supra*, 66 Cal.App.4th 615.) No such modification is required here, because the probation condition was already limited to locations the minor *knows* gang members congregate.

(*People v. Lopez* (1998) 66 Cal.App.4th 615, 624, fn. omitted [upholding gang a probation condition prohibiting association with known gang members].)

B. *Sufficiency of Evidence*

The court found four allegations or probation violations were proven. Specifically, it found the evidence supported finding the minor in violation of his probation for: 1) failing to report to probation on September 3, 2014, as directed by his probation officer; 2) failing to submit to search and seizure on September 15, 2014; 3) violating sections 11377, subdivision (a) (possession of methamphetamine), and former section 11364.1 (possession of narcotic paraphernalia) on September 15, 2014; and 4) being in a known gang gathering area on September 15, 2014. As a result of the probation violations, the court found the minor in violation of probation, imposed a 180-day sentence and placed him back on probation with all previous terms and conditions to remain in effect. The minor does not contend the evidence was insufficient to support a finding he violated two sections of the Health and Safety Code, but he argues the evidence did not support finding the other violations.

The standard of proof in a juvenile probation violation hearing is preponderance of the evidence. (*In re Eddie M.* (2003) 31 Cal.4th 480, 505-506.) Our review is restrained to determining whether the court's finding is supported by substantial evidence. "Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted.)

1. *Failure to report on September 3, 2014*

The minor's probation officer testified at the probation violation hearing. He said his notes indicate he indoctrinated the minor as to the terms and conditions of his probation. According to the probation officer, the minor was told to report to probation on September 3, 2014, and he failed to appear on that date. This evidence supports a finding that the minor was directed to appear at probation and willfully failed to do so.

The minor argues his indoctrination was on June 19, 2013, and reasons that that indoctrination would not have included a reporting date of September 3, 2014. That is pure speculation. In any event, the court was entitled to rely on the probation officer's testimony that the minor was directed to report on September 3, 2014, and he did not report as directed. The violation for failing to report was supported by the evidence.

2. *Failure to Submit to Search and Seizure on September 15, 2014*

On January 4, 2013, when the minor was placed on probation for possession of a controlled substance, the court imposed a number of conditions, including that the minor "submit his person, residence, and property to search and seizure by any peace officer, probation officer or school official anytime day or night, with or without a warrant, probable cause or reasonable suspicion." The evidence from the probation violation hearing demonstrated that when the police and probation officers were spotted by one of the individuals in the area that person yelled, "police," and the others, including the minor scattered. Probation Officer Ibarra's partner chased the minor after he called out for the minor to stop. The minor did not comply. This act on the minor's part violated his search and seizure condition of his probation.

"A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza*

(1994) 9 Cal.4th 224, 229.) Ibarra’s partner attempted to seize the minor, but the minor ran away. This violated his probation term requiring him to submit his person to seizure by a probation officer “anytime day or night, with or without a warrant, probable cause or reasonable suspicion.”

3. *The Health and Safety Code Violations*

As noted above, the minor does not contend the evidence did not support the finding that he possessed methamphetamine and narcotic paraphernalia. After all, he pled guilty to those offenses in adult court in Orange County Superior Court case No. 14CM08033. This evidence supported a finding that the minor violated his probation.

4. *The Gang Gathering Place*

On September 15, 2014, the minor’s probation officer, Ibarra, saw a group of males gathered in a circle in a courtyard adjacent to an apartment complex in Santa Ana, a location *he* knew to be a gathering place for members of the Alley Boys gang, i.e., the gang claims the area as part of its turf. Ibarra learned it was a meeting place for the Alley Boys gang as the result of “numerous contacts” with members and associates of the Alley Boys gang.⁴ The minor lived approximately two miles from that location.

A number of males were gathered in a circle. Jose Villa yelled, “police,” and several of the males, including the minor, scattered. The minor was caught by Ibarra’s partner. Ibarra said Eric Trujillo,⁵ Jesus Martinez, Ramon Lopez, and Gabriel Magianez were present and are gang members. Ibarra conceded he did not know if the

⁴ The minor was affiliated with the Krazy Proud Criminals gang.

⁵ The court reporter indicated this individual’s name was spelled phonetically.

minor knew anything about the courtyard where the group was. Neither did he know whether the minor knew the other individuals.

The Attorney General argues that it was not Eric Trujillo who was present, but Eric Trejo, a member of the minor's gang, Krazy Proud Criminals, and that as a member of the minor's own gang was present, the court had reasonable cause to find the minor in violation of his probation. As proof that it was Trejo, not Trujillo, who was present, the Attorney General asserts the court took judicial notice of the minor's prior admission that he violated his probation by associating with Trejo.

First, there was no evidence admitted at the hearing that Trejo was present at the gathering. Next, while the minor had previously been found to have violated his probation for associating with "Erik Trejo" on January 4, 2013, the fact that the court took judicial notice of the minor's court file does not support a reasonable inference that Eric Trujillo was in reality Erik Trejo.

Additionally, the Attorney General argues Ibarra used the notice of hearing on probation violation to refresh his memory and that document listed Trejo's gang membership. While the petition did note the minor was instructed not to associate with "Eric Trejo" and that Trejo is a known gang member, a document used to refresh a witness's memory, is not evidence unless admitted into evidence by the court. (See Evid. Code, §771, subd. (b) ["the adverse party may, *if he chooses*, inspect the writing, cross-examine the witness concerning it, and introduce in evidence *such portion of it* as may be pertinent to the testimony of the witness," italics added].) Additionally, we note the allegations concerning the minor associating with Trejo not only did not involve the same date as the violations in this matter, but those allegations were dismissed and played no part in the probation violation hearing. Accordingly, there is no substantial evidence to

support finding the minor in violation on this term of probation. There was no evidence the minor knew any of the individuals present were gang members. The finding is therefore reversed.

That brings us to the issue of the appropriate remedy. The court found the minor violated four terms of his probation and reinstated probation on the condition that he serve 180 days in juvenile hall. We have upheld three of the four grounds for violating the minor's probation. Although the court could have revoked probation solely on any of the three grounds we affirm and impose the six-month term it did, we cannot conclude the court did not consider the fourth ground for violation—the violation we reverse—in reaching the 180-day figure. (See *People v. Self* (1991) 233 Cal.App.3d 414, 419 [matter remanded for resentencing although one ground for finding the defendant violated his probation was upheld].) However, as the minor has already served his sentence and a remand for resentencing would not provide him any relief, we have provided him the only relief we can: reversing the probation violation for knowingly gathering with gang members.

III

DISPOSITION

The order finding the minor violated probation by knowingly being at a gang gathering is reversed. The judgment is otherwise affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.