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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JESUS T., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS T.,

Defendant and Appellant.

G051098

(Super. Ct. No. DL049560)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on March 8, 2016, be modified in the following particulars:

1. On page 17 of the slip opinion, add the following sentence as the first sentence of the disposition:

“The juvenile court’s true finding on the petty theft allegation is reversed.”

2. On page 18 of the slip opinion, the last sentence of the disposition, delete the phrase “As so modified,” and replace with “In all other respects,” so that the last sentence reads: “In all other respects, the judgment is affirmed.”

This modification does not effect a change in the judgment.

The petition for rehearing is DENIED.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.

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(Super. Ct. No. DL049560)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed in part, reversed in part and 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, Arlene A. Sevidal, Minh U. Le and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus T. was placed on probation after the juvenile court found he committed petty theft and possessed alcohol as a minor. On appeal, he contends: 1) The evidence used to prove his crimes was illegally obtained; 2) he did not know his actions were wrong; 3) the corpus of the theft charge was not established independently of his admissions; and 4) the terms of his probation are unduly vague. We agree with the last two contentions. Accordingly, we will reverse the theft finding and modify appellant's probation. In all other respects, we affirm the judgment.

FACTS

On December 20, 2013, Anaheim Police Officer Michael Cunha noticed appellant, then age 13, and another teenage boy sitting on a bench in Ponderosa Park in the middle of the day. Cunha knew the park was a "high crime area" where "a lot of truant kids go[.]" Because it was a school day, and because there had been recent reports of drug and alcohol activity in the park, Cunha contacted the boys to see what they were up to. He asked them why they were not in school, and appellant said he was out sick. Cunha then asked them about a backpack that was on the ground near appellant. When the boys denied owning the backpack, Cunha asked them, "Who's out here smokin' marijuana? . . . 'cause I've been gettin' complaints." Neither boy responded audibly to the question.¹

Next, Cunha asked the boys for identification and ordered them to empty their pockets. He also told them not to move. The boys produced school I.D. cards showing appellant was in eighth grade and his companion was a high school sophomore. Appellant also gave Cunha a container of pills. He told Cunha he found the pills, but Cunha was skeptical of this and chided appellant for thinking he was stupid. Cunha also directed the boys' movements and reiterated his suspicion they were smoking marijuana. Although it is unclear to which boy his statements were directed, Cunha told them,

¹ The conversation was recorded on an audio device Cunha activated as he approached the boys. Our facts are derived from that recording and Cunha's testimony regarding the encounter.

“Stand up. Get over here . . . you, sit down. You, sit down . . . you, sit here . . . scoot over a little bit . . . sure you’re not smokin’ bud (marijuana)? . . . hmm . . . smells like bud to me.”

Cunha then asked appellant if his parents knew he was at the park. When appellant said yes, Cunha told him, “So, I’m gonna call your mom . . . and find out. [And] if she knows you’re here, then I’m gonna arrest your mom . . . for . . . contributing to the delinquency of a minor.” At that point, appellant admitted his mother did not know where he was, and Cunha asked him, “Why you throw your mom under the bus like that?”

Cunha then picked up the backpack, noticing it was heavy and its contents made a clanging sound. He told the boys, “I’m going to ask you guys again . . . who does this belong to? ‘Cause, when I open it . . . ‘cause if it’s abandoned, then I find any of your name’s on it . . . the bottle or whatever’s in here . . . or the spray paint . . . is gonna belong to you guys . . . and, if it’s not, then I’m gonna bust both of ya’s.” Hearing that, appellant admitted the backpack was his. Cunha told appellant he respected his honesty and thanked him for “being a man.” He asked appellant if the backpack contained alcohol, and appellant responded in the affirmative. Cunha then opened the backpack and discovered two unopened bottles of vodka.

In seizing the booze, Cunha exclaimed, “Dude? Smirnoff? Where’d you get this?” Appellant said he got it from Walmart but did not elaborate. Cunha told appellant he seemed like a nice kid and wondered aloud why he was in the park with alcohol when he was supposed to be in school. While Cunha was going on about this, he noticed an unopened bottle of Jack Daniels on the bench near appellant. Appellant said he got the whiskey from the Walmart on Anaheim Boulevard. Asked by Cunha if he stole “all” of the alcohol, appellant answered, “Yeah.”

Cunha told appellant he appreciated his truthfulness. He said that because appellant was being “cool” with him, he was going to release him to his mother instead of

taking him to juvenile hall. Cunha also made it clear he was aware appellant's sister had cancer. He told appellant he wanted to "make it easy on [his mother] 'cause she's already got enough to deal with." While inventorying the evidence, Cunha asked appellant about the pills again. Appellant said they were sleeping pills. He said he got them from a friend and had taken half of one that morning, but he was not feeling any effects from it. Although Cunha believed the pill container smelled like marijuana, appellant denied having any other drugs, and none were found.

As the encounter continued, Cunha reported his findings to the vice principal of appellant's school. During the call, Cunha reiterated that, even though appellant was in possession of pills and alcohol, he was not going to take him to juvenile hall because appellant was being "honest," "cooperative" and "a good guy right now." Cunha also called appellant's mother to come and pick him up, but she did not answer her phone, so Cunha decided to drive appellant home himself.

Before placing appellant in his squad car, Cunha formally arrested him and read him his *Miranda* rights. (See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) After appellant said he understood each of his rights, Cunha asked him when he acquired the alcohol. Appellant said he stole it that morning, and he got the pills from a guy named Erick. Because appellant was under the age of 14, Cunha asked him if he knew the difference between right and wrong. Appellant said that he did. And to prove he knew the difference between the truth and a lie, he correctly said it was a lie when Cunha described his black pants as being red. The encounter ended with Cunha driving appellant home and releasing him to his mother.

Although appellant was released from custody, the prosecution charged him with petty theft from Walmart, possessing alcohol as a minor, and possessing a controlled substance (the sleeping pills) without a prescription. Before the jurisdictional hearing, appellant moved to suppress all evidence obtained during the encounter on the basis it was illegally obtained. In response, the People moved to dismiss the drug count, and the

court granted the motion. However, after hearing all of the evidence, the court denied appellant's suppression motion, found the remaining allegations true and sentenced him to six months' probation.

DISCUSSION

Legality of Officer Cunha's Actions

In a wide-ranging argument, appellant contends all of the evidence acquired during his encounter with Cunha should have been suppressed because it was obtained in violation of *Miranda*, due process and the Fourth Amendment. Exercising independent review over the issue (*People v. Hughes* (2002) 27 Cal.4th 287, 327), we find the evidence was lawfully acquired.

1. Appellant's statements were not violative of *Miranda* or due process²

Appellant targets four of his statements in particular. The first three – that he owned the backpack, there was alcohol in the backpack and he stole the alcohol – were made before he was Mirandized. And the fourth – his repeated admission he stole the alcohol – came after Cunha read him his *Miranda* rights. Appellant argues the statements were involuntarily obtained because Cunha was intimidating and improperly induced him to confess. He also contends Cunha should have read him his *Miranda* rights before he admitted owning the backpack and stealing the alcohol.

Taking the *Miranda* issue first, the law is clear, "*Miranda* advisements are required only when a person is subjected to 'custodial interrogation.' [Citations.] The *Miranda* opinion itself permits '[g]eneral on-the-scene questioning as to facts surrounding a crime. . . .' [Citation.] A custodial interrogation does not occur where an officer detains a suspect for investigation and the questioning is limited to the purpose of identifying a suspect or 'to obtain [sufficient] information confirming or dispelling the

² Although appellant forfeited his right to challenge the admissibility of his statements by failing to challenge them in the trial court (*People v. Rundle* (2008) 43 Cal.4th 76, 116), we will consider his arguments because he contends his trial attorney was ineffective for failing to do so (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1130).

officer's suspicions. [Citation.]' [Citations.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970.) Rather, custody occurs only when there has been a formal arrest or restraint on the suspect's freedom of movement to the degree associated with a formal arrest. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

Prior to admitting the backpack and alcohol were his and that he stole the alcohol, appellant had not been formally arrested or told he was under arrest, nor was he subjected to restraints associated with a formal arrest. Cunha did tell appellant to empty his pockets, where to stand, and not to move around, but these commands were indicative of a temporary detention as opposed to a formal arrest. Since Cunha was outnumbered and the encounter took place in a public setting, it was not unreasonable for him to exercise a certain amount of control over the situation while he was questioning appellant on the scene. His doing so did not transform the investigative detention into a custodial situation for *Miranda* purposes. (See *People v. Clair* (1992) 2 Cal.4th 629, 679 [officer's actions in questioning suspect at gunpoint did not amount to custodial interrogation]; *In re Joseph R.* (1998) 65 Cal.App.4th 954 [*Miranda* warnings not required even though minor was temporarily handcuffed in the back of a police car]; *In re A.J.* (D.C. App. 2013) 63 A.3d 562, 566-569 [detention and questioning of minor on suspicion of truancy did not trigger *Miranda*].)

In coming to this conclusion, we recognize that because Cunha knew appellant was a minor, appellant's age is a legitimate factor in the custody analysis. (*J.D.B. v. North Carolina* (2011) 564 U.S. 261; *People v. Nelson* (2012) 53 Cal.4th 367, 383, fn. 7.) However, appellant was with a friend in an open area, and Cunha's behavior and temperament was really not that much unlike a suspicious parent or schoolteacher. It is also quite apparent that, notwithstanding his youthfulness, appellant obviously was not so intimidated by the encounter that he immediately confessed or crumbled in response to Cunha's questioning; rather, he kept his cool and did his best to talk his way out of the situation.

At times, Cunha's questioning was pointed and accusatorial, but it was relatively brief, and the overall tenor of the encounter was conversational in nature. It is fair to say that Cunha's sternness with respect to the investigative aspect of the encounter was offset by his many expressions of caring and concern for appellant and his family. It is also clear Cunha did not physically restrain appellant in any fashion until the very end of the encounter when he formally arrested appellant and placed him in his squad car. Because this was well after the time appellant made the subject admissions, and there was no formal or defacto arrest before then, there was no *Miranda* violation.

We now turn to appellant's claim his statements were involuntarily rendered in violation of due process. “““The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were ‘such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined.’ [Citation.]” [Citation.] In determining whether or not an accused’s will was overborne, “an examination must be made of ‘all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.’ [Citation.]” [Citation.]’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 404; accord *Colorado v. Connelly* (1986) 479 U.S. 157.)

Appellant was young when the encounter occurred, but the record shows he had been arrested and faced the prospect of going to juvenile hall in the past. And while he told Cunha had had taken half a sleeping pill on the morning of the encounter, he said it was not affecting him, and there is nothing in the record to indicate otherwise. Appellant claims Cunha's threat to arrest his mother was unduly coercive. However, because appellant lied about his parents knowing where he was, there was nothing wrong with Cunha informing appellant that his parents could get in trouble if they let him skip school.

Nor was there anything wrong with Cunha complimenting appellant and telling him he appreciated his honesty after appellant admitted the backpack was his.

While appellant contends these statements softened him up and improperly induced him to confess, “‘there is nothing inherently wrong with efforts to create a favorable climate for confession.’ [Citation.]” (*United States v. Santos-Garcia* (8th Cir. 2002) 313 F.3d 1073, 1079.) The police cannot extract a confession by using threats or undue influence (*People v. Benson* (1990) 52 Cal.3d 754, 778), but “‘mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]” (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.)

For the reasons set forth above, we do not believe Cunha’s questioning of appellant crossed the line between persuasion and coercion. Nor do we believe appellant’s free will was overcome at the time he initially confessed to stealing the alcohol. Therefore, his admissions were not involuntary. (Compare *In re Shawn D.* (1993) 20 Cal.App.4th 200 [minor’s confession obtained after lengthy interrogation deemed involuntary where police overstated minor’s culpability, told him his girlfriend would get in trouble if he did not confess, and promised him leniency if he did].)

In any event, appellant repeated his confession after Cunha read him his *Miranda* rights. Appellant claims his Mirandized confession was inadmissible because it was “‘tainted” by his earlier involuntary statements. However, as we have explained, none of appellant’s statements were involuntary, and there is no evidence Cunha deliberately manipulated the timing of the *Miranda* warning to undermine appellant’s constitutional rights. Therefore, appellant’s claim is unavailing. (*Missouri v. Seibert* (2004) 542 U.S. 600; *Oregon v. Elstad* (1985) 470 U.S. 298; *People v. Scott* (2011) 52 Cal.4th 452, 478.)

Appellant also argues the *Miranda* warning was meaningless because he did not *expressly* waive his rights. However, the record shows Cunha read appellant his *Miranda* rights one-by-one, and after each one, appellant said he understood what it

meant. Then, without any hesitation, appellant proceeded to freely answer Cunha's questions without an attorney. Under these circumstances, it is reasonable to presume appellant was aware of his rights but simply chose not to exercise them. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-250; *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Davis* (1981) 29 Cal.3d 814, 823-826; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 680-683.) We discern no basis for excluding the statements appellant made during the course of the encounter, so defense counsel was not ineffective for failing to challenge them.

2. Cunha did not violate appellant's Fourth Amendment rights

Appellant also contends the evidence obtained during the encounter was the "fruit of a series of unlawful searches." Even though the prosecution dropped the charge of unlawfully possessing sleeping pills, appellant contends Cunha had no right to make him empty his pockets (where the pills were apparently located) because there was no reasonable suspicion he was armed and dangerous. Appellant claims Cunha's search of the backpack was unlawful for the same reason, and his admissions about the backpack and alcohol were the product of those unlawful searches. In addition, appellant argues those searches cannot be justified based on the search incident to arrest doctrine. As we now explain, appellant is wrong about the last point, and because of that we need not address his other arguments.

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*People v. McKay* (2002) 27 Cal.4th 601, 607, quoting *Atwater v. Lago Vista* (2001) 532 U.S. 318, 354.) Incident to arrest, the officer may also search the area within the offender's immediate control. (*Chimel v. California* (1969) 395 U.S. 752, 763.) The timing of the search vis-à-vis the arrest is not "particularly important." (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 111.) If there is probable cause to arrest, the search will be deemed lawful so long as it is reasonably

contemporaneous with the suspect's arrest, even if it precedes the arrest. (*Ibid.*; *Cooper v. California* (1967) 386 U.S. 58; *People v. Summers* (1999) 73 Cal.App.4th 288, 295.)

Appellant acknowledges these principles. He also admits Cunha had probable cause to arrest him for truancy "before starting the first search." However, appellant contends the search incident to arrest exception doctrine is inapt because 1) he was never actually arrested, and 2) truancy is not a crime that authorizes a custodial arrest. The first claim warrants little attention. Even though Cunha had not planned on arresting appellant, he did so after it became apparent appellant's mother was not available to come and get him at the park. Therefore, the necessary prerequisite of an actual arrest has been satisfied. (See generally *Knowles v. Iowa* (1998) 525 U.S. 113, 115-116 [the search incident to arrest doctrine does not apply if the officer does not in fact arrest the offender].)

The secondary issue as to whether truancy is an offense that authorizes a custodial arrest was addressed in *In re Humberto O.* (2000) 80 Cal.App.4th 237. Based on the fact Education Code section 48264 authorizes the police to "arrest or assume temporary custody" of a minor who is absent from school without a valid excuse, the court determined that when the police have probable cause to believe a minor is in violation of this section, they may arrest the suspect for truancy and search him incident to arrest. (*Id.* at pp. 240-244.)³

The *Humberto O.* court reached this conclusion even though our Supreme Court has stated, "The effect of an arrest under [Education Code] section 48624 is very different from the effect of a typical criminal arrest. The emphasis is not on punishment but on correction of truancy, i.e., to promote attendance in order that students may be

³ Education Code section 48264, entitled "Arrest of Truants," provides in its entirety as follows: "The attendance supervisor or his or her designee, a peace officer, a school administrator or his or her designee, or a probation officer may arrest or assume temporary custody, during school hours, of any minor subject to compulsory full-time education or to compulsory continuation education found away from his or her home and who is absent from school without valid excuse within the county, city, or city and county, or school district."

educated.” (*In re James D.* (1987) 43 Cal.3d 903, 910.) As appellant does here, the minor in *Humberto O.* argued the limited scope of a truancy arrest takes it outside the search incident to arrest doctrine. However, we agree with *Humberto O.* that “[t]he circumscribed nature of an arrest under [Education Code] section 48264 . . . does not preclude a search of the minor’s body” and his belongings incident to such arrest. (*In re Humberto O., supra*, 80 Cal.App.4th at pp. 243-244.)

This conclusion is consistent with United States Supreme Court’s decisions that authorize the police to make a custodial arrest for an infraction or fine-only offense without violating the Fourth Amendment. (See, e.g., *Knowles v. Iowa, supra*, 525 U.S. 113 [seatbelt violation].) It is also consistent with cases in other jurisdictions that have upheld searches conducted incident to an arrest for minor transgressions such as the one involved in this case. (See, e.g., *In re W.R.* (D.C. Ct. App. 2012) 52 A.3d 820 [upholding warrantless search of minor who was in custody on suspicion of truancy]; *State in the Interest of R.D.* (La. Ct. App. 1999) 749 So.2d 802 [same].)

In light of these authorities, and in recognition of the fact that *every* arrest poses a potential danger to the arresting officer (*Washington v. Chrisman* (1982) 455 U.S. 1, 7), we hold the searches of appellant’s pockets and backpack were permissible under the search incident to arrest doctrine. And because a search conducted incident to a lawful arrest does not violate the Fourth Amendment (*People v. McKay, supra*, 27 Cal.4th at p. 607), there is no basis for excluding the evidence that was found during those searches.

Did the Prosecution Rebut the Presumption of Incapacity?

Appellant argues there is insufficient evidence to support the trial court's finding he understood the wrongfulness of his actions. Viewing the evidence in the light most favorable to the judgment, we uphold the court's finding as being supported by substantial evidence. (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52.)

Children under the age of 14 are presumed to be incapable of committing a crime. (Pen. Code, § 26.) To overcome this presumption, the prosecution must present clear and convincing evidence the child knew the wrongfulness of his acts when he committed them. (*Ibid.*; *In re Manuel L.* (1994) 7 Cal.4th 229.) "Although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 378.)

At the time this case arose, appellant was two months shy of his 14th birthday. He had been in trouble with the law before, and he lied to Cunha about being sick and having his parents' permission to be out of school. He also lied about the sleeping pills and was reluctant to admit ownership of the alcohol-laden backpack. And he proved he knew the difference between a lie and the truth by correctly labeling as a lie Cunha's false statement about the color of his pants. Taken together, this evidence clearly established appellant knew it was wrong to steal and to be in possession of alcohol. (*People v. Lewis, supra*, 26 Cal.4th at p. 379.)⁴

⁴ Appellant also told his probation officer he knew his actions were illegal. However, that statement could not be used to prove appellant had the capacity to commit and was thus guilty of the charged offenses. (*In re Wayne H.* (1979) 24 Cal.3d 595, 602.)

Corpus Delicti Rule

Appellant also contends there is insufficient evidence apart from his admissions to prove the theft allegation. We agree.

At trial, Cunha testified that based on the information he received from appellant during the encounter in the park, he attempted to confirm appellant's claim that he stole the alcohol that was found in his possession. However, in undergoing his investigation, Cunha did not obtain any information to corroborate appellant's claim in that regard. In light of this, defense counsel argued that with respect to the theft charge, the state failed to satisfy the corpus delicti rule, which necessitates proof apart from the defendant's admissions to support a criminal conviction. The corpus delicti rule is not particularly stringent; it merely requires a "slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) Nevertheless, defense counsel argued that minimal standard was not met in this case because without "the minor's words," there was not a shred of evidence he stole the alcohol he had with him.

The prosecutor disagreed. He asserted, "when you see a young person, a minor, somebody who's 13 years old, with three bottles of booze, the reasonable inference, the only reasonable inference is that those bottles were taken from someone. [¶] There is no analog[y] to drugs. With drugs or marijuana perhaps they could have purchased it. There is no black market for booze, bottles of Smirnoff. It's bottles of alcohol. They had to have been taken from someone, and that's the reasonable inference. [¶] If they had [not] been stolen, how else would a 13-year-old, someone so small, someone absolutely under the age of 21, come into possession? The only reasonable inference is they were stolen."

The trial court did not comment on this argument. It simply determined there was sufficient evidence to support the charges against appellant.

In defending that decision, the Attorney General echoes the prosecutor's remarks. She claims, "As [appellant] was 13 years old at the time, it was reasonable to infer the existence of criminal agency because appellant could not legally purchase the alcohol bottles. Further, it was also reasonable to infer that a loss or injury has occurred because appellant could not legally be given alcohol. Indeed, it is not reasonably likely that someone would mistakenly give someone of appellant's appearance and stature – an 80 pound student with a backpack – three unopened alcohol bottles. Thus, there was independent evidence to prove appellant committed petty theft by stealing the alcohol bottles."

Although the issue is close, we disagree. The state assumes appellant obtained the subject alcohol by illicit means, but someone could have purchased the alcohol for appellant or given it to him, or he may have been holding it for someone else, such as the high school student he was sitting with in the park. That does not mean appellant was legally entitled to possess the alcohol. But to suggest, as the prosecutor did below, that teenagers do not have access to alcohol as ready as their access to other drugs is to ignore the fact "[a]lcohol is the drug most commonly used by youth – more than tobacco and *far* more than marijuana or any other illicit drug." (Prevention Research Center, in association with the University of California, Berkeley, Preventing Underage Alcohol Access: Essential Elements for Policy, Deterrence and Public Support (2004), p. 2, fn. omitted <http://resources.prev.org/documents/resource_pub_pud.pdf> [as of Jan. 25, 2016] (Essential Elements).) In fact, "[a]lthough drinking by persons under the age of 21 is illegal, people aged 12 to 20 years drink 11% of all alcohol consumed in the United States." (Center for Disease Control and Prevention, Fact Sheet on Underage Drinking <<http://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm>> [as of Jan. 25, 2016].)

Given these statistics, it is simply not reasonable to assume that all or even a majority of the alcohol possessed by teens is acquired by means of theft. Perhaps that is

why proposals aimed at reducing underage drinking often emphasize the need to “deter illegal provision of alcohol to minors.” (Essential Elements, *supra*, at p. 15.) This emphasis stems from the realization that minors “obtain alcohol from a variety of sources” and that oftentimes it “is purchased for them by adults, including strangers, older friends and relatives.” (*Ibid.*)

Of course, just because there are plausible explanations for how appellant could have come into possession of the alcohol without stealing it does not necessarily mean there was insufficient evidence to satisfy the corpus delicti rule. Indeed, the law is clear that, in order to satisfy the rule, an inference of criminality need not be “the only, or even the most compelling, one” that could be drawn from the facts presented. (*People v. Jennings* (1991) 53 Cal.3d 334, 367.) Nonetheless, the independent evidence will not suffice unless it gives rise to a *reasonable* inference a crime has been committed. (*Ibid.*) Where the inference of criminality is merely speculative or conjectural, no charges can be sustained. (See, e.g., *Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 395-396 [defendant’s presence and ruffled appearance at crime scene were insufficient to prove corpus of attempted robbery or false imprisonment]; *People v. McChristian* (1966) 245 Cal.App.2d 891, 897 [officer’s opinion that the balloons in defendant’s possession contained heroin was “speculative and conjectural” and thus insufficient to prove corpus of drug charge]; *People v. Schuber* (1945) 71 Cal.App.2d 773, 776 [although girl had a lacerated vagina and slept in the same bed as the defendant, corpus of molestation allegation was not satisfied because apart from the defendant’s admissions “there was absolutely no competent evidence to show how she received that injury”].)

In *People v. Jennings, supra*, 53 Cal.3d 334, the California Supreme analyzed a fact pattern that tested the outer limits of the quantum of proof that could survive a corpus delicti challenge. The victim in that case was a prostitute whose naked body was found in an irrigation ditch several weeks after she was last seen with the defendant. Although the advanced decomposition of her body made it impossible to

determine whether she had been sexually assaulted, the prosecution alleged the defendant had raped her before killing her. (*Id.* at pp. 350-351.) The Supreme Court conceded the evidence of rape was “thin,” even for purposes of the corpus delicti rule. (*Id.* at p. 369.) Nevertheless, it ruled that “[w]hen the body of a young women is found unclothed in a remote locale, an inference arises that some sexual activity occurred, thus satisfying the requirement that there be some showing of a loss, injury, or harm.” (*Id.* at p. 367.) This ruling demonstrates a close case can withstand a corpus delicti challenge, but only if the underlying facts are reasonably indicative of criminal wrongdoing.

Here, there is nothing about the particular manner in which appellant possessed the alcohol in question that gives rise to an inference he acquired the same by means of theft. Sure, appellant tried to hide the alcohol from Officer Cunha, but that merely proves he knew it was wrong for him to have booze, not that he stole it. The only circumstance the state can point to as supporting an inference of theft is appellant’s age. But the Attorney General fails to cite to any cases which would authorize us to draw an inference of criminality based solely on the *status* of the offender. In fact, while respondent’s recitation of the corpus delicti rule is accompanied by a multitude of legal citations, the state does not cite a single decision in support of its position that *the particular facts of this case* are sufficient to satisfy the rule. Having examined the issue from every angle, we simply cannot subscribe to the view that appellant’s tender age justifies the inference he stole the alcohol that was found in his possession. Therefore, the true finding on the theft allegation cannot stand.

Appellant’s Probation Conditions

The wording of some of appellant’s probation conditions is also problematic. Condition number six states appellant may not “use, possess or be under the influence of alcohol or illegal drugs or narcotics,” and condition number eight states appellant may not “have any illegal, dangerous or deadly weapons in [his] possession, or knowingly be in the presence of any illegally armed person.” While these conditions are

laudably intended to keep appellant out of trouble, we agree with appellant that they are unduly vague from a legal perspective.

As our Supreme Court has stated, “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.* (2007) 40 Cal.4th 875, 890.) However, except for the prohibition against being in the presence of an illegally armed person, the probation conditions appellant challenges do not contain any scienter requirement. Consequently, appellant could be hauled into court on suspicion of violating his probation even if he unwittingly possessed alcohol, drugs or a deadly weapon. Although the state urges us to imply a knowledge requirement into the conditions, as some courts have done (see, e.g., *People v. Hall* (2015) 236 Cal.App.4th 1124, 1135-1137; *People v. Patel* (2011) 196 Cal.App.4th 956, 960-961), “the law has no legitimate interest in punishing an innocent citizen who has no knowledge of” the particular person, place or object he is required to avoid. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752 [modifying the defendant’s probation conditions to prohibit his *knowing* possession of a firearm or ammunition].)

Therefore, we will adhere to our standard practice of modifying the subject conditions to include 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; *In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913; *People v. Freitas*, *supra*, 179 Cal.App.4th at p. 752; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) That is the best way to prevent arbitrary law enforcement and ensure appellant knows what conduct is expected of him.

DISPOSITION

The sixth condition of appellant’s probation is modified to state he may not “knowingly use, possess or be under the influence of alcohol or illegal drugs or

narcotics.” And the eighth condition of his probation is modified to state he may not “knowingly have any illegal, dangerous or deadly weapons in his possession, or knowingly be in the presence of any illegally armed person.” As so modified, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.