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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADELSON PEREZ HUERTA,

Defendant and Appellant.

H037455

(Monterey County

Super. Ct. No. SS110842)

Defendant Adeslo Perez Huerta appeals a judgment following his no contest plea to felony assault by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1).¹

On appeal, defendant asserts he is entitled to additional conduct credits pursuant to the October 2011 amendment to section 4019 on equal protection grounds. He also challenges certain probation conditions on the basis that they are overbroad.

STATEMENT OF THE FACTS AND CASE

On April 29, 2011, defendant and Juan Diego Cordero began arguing after Cordero's dog bit defendant's son on the hand. After Cordero hit defendant in the mouth with a baseball bat, defendant wrestled the bat away and hit Cordero with it on the head. Cordero fell to the ground and was bleeding from his head. When Salinas police arrived

¹ All further statutory references are to the Penal Code.

on the scene, Cordero was lying on the ground unconscious. Although defendant initially said that that he had only punched Cordero using his hand, he later admitted swinging the bat. Both men required medical treatment.

While he was receiving several stitches in his lip at the medical center, police officers learned that defendant was on parole supervision and had two misdemeanor warrants for his arrests, including one for a January 2011 domestic violence incident involving his girlfriend.

The Monterey County District Attorney charged defendant by complaint with one felony count of assault by means of force likely to produce great bodily injury or with a deadly weapon (§ 245, subd. (a)(1)), with enhancements that defendant used a dangerous and deadly weapon, a baseball bat (§§ 667 and 1192.7), that he personally inflicted great bodily injury upon Cordero (§ 12022.7, subd. (a)), and that he had served a prior prison term (§ 667.5, subd. (b)).

On July 26, 2011, in return for a promise of a grant of felony probation, defendant entered a plea of no contest to an amended charge of felony assault by means of force likely to produce great bodily injury.² He also entered a plea of no contest to a misdemeanor violation of section 243(e), battery on a former spouse or cohabitant. The sentencing hearing was held on October 4, 2011. As to the misdemeanor case, the court suspended imposition of a sentence for three years, but placed defendant on formal probation. The court also ordered a county jail term of 236 days, with credit for 236 days (158 actual and 78 conduct credits, earned at a rate of 33 percent). As to the felony case, the court sentenced defendant to four years in state prison with the execution of the sentence suspended. The court ordered defendant to serve 180 days in county jail, with conduct credits earned at a rate of 33 percent. Because the court ordered that the jail terms in the felony and misdemeanor cases should run consecutively, presentence credits

² The prosecution agreed to delete the “deadly weapon” language from the charge.

were applied only to the sentence in the misdemeanor case. Pursuant to his plea agreement, the court also placed defendant on three years of formal probation. The oral probation conditions relevant to this appeal are as follows:

Number 8: “Totally abstain from the use of alcoholic beverages, not purchase or possess alcoholic beverages, and stay out of places when it is the main item of sale.”

Number 9: “Not use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons you know, or have reason to suspect, use or traffic in narcotics or other controlled substances.”

Number 12: “Not possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement (P.C. § 12021).” ~(CT 47)~

Number 21: “Not have access to, use, or possess any police scanner device or surveillance equipment on your person, vehicle, place of residence, or personal effects.”

Number 23: “Do not obtain new gang related tattooing upon your person while on probation supervision. You shall permit photographing of any tattoos on your person by law enforcement.”

Defendant appealed the judgment of conviction, challenging the sentence or other matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

DISCUSSION

Defendant asserts he is entitled to additional presentence conduct credit under section 4019 based on the principles of equal protection. He also asserts certain probation conditions ordered by the court were vague and overbroad.

Presentence Conduct Credit

While defendant acknowledges that section 4019 “only applies to prisoners whose crimes occurred after October 1, 2011,” he claims that he is entitled to earn additional conduct credits under section 4019 based on equal protection principles. Rather than earn two credits for every four days served, as calculated under former section 4019, defendant argues that the statutory changes to section 4019 should apply retroactively, thus entitling him to “two-for-two” credits under the current version of section 4019.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner’s good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4554 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state’s ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (Former § 4019, subds. (b)(2) & (c)(2).) These

amendments to section 4019 effective January 25, 2010 did not state whether they were to have retroactive application.

Section 4019 was amended two more times subsequent to January 2010. However, these amendments, which were effective in September 2010 and October 2011 respectively, contain specific provisions declaring they only apply *prospectively* to crimes committed after their effective dates. (See Sept. 2010 amend to § 4019, subd. (g); current § 4019, subd. (h)). Defendant's crime was committed on April 29, 2011, before the effective date for the October 2011 amendment. At defendant's sentencing on October 4, 2011, the court awarded defendant presentence conduct credit using the two-for-four formula in place prior to October 2011.

Defendant argues the October 2011 amendment to section 4019 violates the principles of equal protection, because it treats a defendant who committed a crime before October 1, 2011 differently than if he or she committed the same crime after the statute's effective date. Defendant cites *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*) in support of his equal protection argument.

In *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), the California Supreme Court expressly determined that neither *Kapperman* nor *Sage* supports an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 329-330.) In rejecting the inmate's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra*, 54 Cal.4th at pp. 329-330.)

Addressing the inmate's equal protection claims, the California Supreme Court distinguished *Kapperman* on the grounds that it addressed custody credits, rather than conduct credits. (*Brown, supra*, 54 Cal.4th at p. 330.) Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*Ibid.*)

With respect to *Sage*, the California Supreme Court acknowledged that "one practical effect of [that decision] was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them." (*Brown, supra*, 54 Cal.4th at p. 330.) However, the California Supreme Court declined to read *Sage* as implicitly holding that prisoners serving time before and after a conduct credit statute takes effect are similarly situated for purposes of equal protection, because that proposition was not considered in the case. (*Id.* at p. 330)

The *Brown* court finally resolved the equal protection issue, stating, "the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) do not require retroactive application[]" of section 4019. ." (*Brown, supra*, 54 Cal.4th at p. 330.) Although the *Brown* decision concerned the January 2010 version of section 4019, we recently held in *People v. Kennedy* (Sept. 14, 2012, H037668) ___ Cal.App.4th ___ [2012 LEXIS 982, *17-26] (*Kennedy*) that there is no reason why the reasoning and holding in *Brown* cannot be extended to the October 1, 2011 amendment to section 4019. Therefore, defendant is not entitled to

additional presentence conduct credit under section 4019 based on a claim that the statute violates equal protection.

Probation Conditions

Defendant argues that five of the probation conditions imposed by the court do not have a scienter requirement and are, therefore, overbroad. The Attorney General agrees that one of the conditions—instructing defendant not to obtain new gang-related tattoos while on probation—should be modified to “require defendant to have knowledge of certain facts before a violation may be found.” The remaining conditions, according to respondent, are sufficiently clear as to not require modification.

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121; *People v. Leon* (2010) 181 Cal.App.4th 943, 948 (*Leon*.) However, probation conditions may be challenged on the grounds of unconstitutional vagueness and overbreadth. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) A probation condition may be “ ‘overbroad’ ” if in its reach it prohibits constitutionally protected conduct. (*Ibid.*) “The underlying concern of the vagueness doctrine is the core due process requirement of adequate notice.” (*Ibid.*, italics omitted.) A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process. To avoid being void for vagueness, a probation condition “ ‘must be sufficiently precise for the probationer to know what is required of him’ [Citations.]” (*Ibid.*)

Beginning with *People v. Garcia* (1993) 19 Cal.App.4th 97, 102, California appellate courts have regularly found probation conditions to be unconstitutionally vague or overbroad when they do not require the probationer to have knowledge of the prohibited conduct or circumstances. Thus, in order to be sufficiently precise for a

probationer to know what is required of him or her, a requirement of knowledge should be included in some probation conditions prohibiting the possession of specified items. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752.)

For the reasons stated below, we will order modifications to the various conditions challenged by defendant.

No-Alcohol and No-Drugs Conditions

A probation condition “must be sufficiently precise for the probationer to know what is required of him.” (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324.) Absent a requirement that defendant know he is disobeying the condition, he is vulnerable, and unfairly so, to punishment for unwitting violations of it. (See *People v. Lopez, supra*, 66 Cal.App.4th at pp. 628-629.) An appellate court is empowered to modify a probation condition in order to render it constitutional. (*In re Sheena K.* (2007) 40 Cal.4th 875, 892 (*Sheena K.*)) In this case, we will modify probation condition 8, which prohibits the possession of alcohol, to include a knowledge requirement. For the same reasons, we will also modify probation condition 9, relating to drugs.

No-Firearms/Ammunition Condition

Defendant contends that probation condition 12, stating that he “[n]ot possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon,” is overbroad because it does not include a knowledge requirement. Further, he argues that, unlike the probation conditions at issue in *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*), the probation condition in his case does not explicitly reference sections 12021 or 12316, and does not “track the language” of either of those statutes. Accordingly, defendant argues, he is not “informed that the trial court intended to import the knowledge requirements” of those statutes to the probation condition.

With regard to the probation condition at issue in this case, the court orally pronounced that defendant is “not to possess, receive, transport any firearm or

ammunition.” Contrary to defendant’s assertion, the signed minute order explicitly references section 12021. However, neither the signed minute order nor the probation report mentions section 12316. The California Supreme Court has stated that the preferred rule, when the clerk’s and reporter’s transcripts cannot be harmonized, is to favor the part of the record that is entitled to greater credence in the circumstances of the case. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Harrison* (2005) 35 Cal.4th 208, 226.) Specifically, with respect to probation conditions, we are mindful of the importance of the written order in ensuring a defendant’s compliance, and that such “conditions need not be spelled out in great detail in court as long as the defendant knows what they are; to require recital in court is unnecessary in view of the fact the probation conditions are spelled out in detail on the probation order.”³ (*People v. Thrash* (1978) 80 Cal.App.3d 898, 901-902.) In this case, the trial court signed and dated the minute order, which gives rise to an inference that the court intended the order as the most complete statement of the conditions the court intended to impose.

Accordingly, we believe the minute order is, in the circumstances of this case, the best reflection of the order intended by the trial judge.

In *People v. Kim, supra*, 193 Cal.App.4th 836, this court held that an explicit knowledge requirement is not a required element of every probation condition. In *Kim*, the defendant was prohibited as a condition of probation from owning, possessing, or having within his custody or control “ ‘any firearm or ammunition for the rest of [his] life under Section[s] 12021 and 12316 [subdivision] (b)(1) of the Penal Code.’ ” (*Id.* at p. 840.) On appeal, the defendant contended that the probation condition lacked a knowledge requirement. This court concluded that “where a probation condition implements statutory provisions that apply to the probationer independent of the

³ Moreover, the court advised appellant at his plea hearing that, as a convicted felon, he would be subject to a life-time prohibition against owning or possessing a firearm or ammunition.

condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement which is necessarily implied in the statute.” (*Id.* at p. 843.) With regard to the probation condition at issue, the rationale of *Kim* is applicable. As in *Kim*, defendant, as a felon, has no constitutional right to bear arms. (§§ 12021, 12316; *People v. Flores* (2008) 169 Cal.App.4th 568, 573-577.) The probation condition in this case is the same as the statutory provisions in sections 12021 and former 12316 prohibiting a person convicted of a felony from possessing any firearm or ammunition. Because the firearms and ammunitions prohibitions in this case implement statutory provisions that apply to defendant independent of the conditions, they do not require the addition of a knowledge requirement. As this knowledge requirement is implicit in these provisions, due process does not require making it explicit.

We recognize, however, that in addition to firearms and ammunition, the written minute order also prohibits appellant from possessing, receiving or transporting “any deadly or dangerous weapon,” a prohibition that does not mirror the language of section 12021 or 12316. In view of its uncertain scope, we will modify this condition to prohibit defendant from possessing, receiving or transporting he knows or reasonably should know to be a deadly or dangerous weapon.

Further modification of the written minute order, which references section 12021, is required in this case. Section 12021 was repealed effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) The statute forbidding, among other things, a felon to be in possession of a firearm is now contained in section 29800. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.) Accordingly, to avoid any confusion, we will direct the clerk of the court to amend probation condition 12 by deleting the reference to section 12021 and inserting section 29800. Moreover, to accurately reflect the court’s intention in imposing this probation condition, we will also modify probation condition 12 to add a reference to

section 30305 (former § 12316), prohibiting defendant from owning or possessing ammunition.⁴

No-Scanner Condition

In contrast to *Kim*, probation condition 21, relating to police scanners and surveillance equipment does not explicitly reference statutory provisions that contain a scienter requirement. However, the Attorney General argues that the condition does not need a knowledge requirement to obviate guessing what conduct is prohibited because it prohibits possession of identifiable items.

In *Leon, supra*, 181 Cal.App.4th 943, this court confronted an implicit possession prohibition which stated, “ ‘No insignia, tattoos, emblem, button, badge, cap, hat, scarf, bandana, jacket, or other article of clothing which is evidence of affiliation with or membership in a gang.’ ” (*Id.* at p. 950.) The Attorney General had no objection to adding a knowledge requirement. (*Ibid.*) We agreed with the parties that the condition is constitutionally defective because it lacks an explicit knowledge requirement. As with the previous contested gang condition, absent that qualification the condition renders defendant vulnerable to criminal punishment for possessing paraphernalia that he did not know was associated with gangs. (*People v. Garcia, supra*, 19 Cal.App.4th at p. 102.) Accordingly, we will modify the order to include a knowledge requirement.” (*Leon, supra*, 181 Cal.App.4th at p. 951.) Thus, this court added a knowledge requirement to a probation condition implicitly prohibiting possession of specified items.

In stark contrast to the inherent vagueness of “gang paraphernalia” is the condition in this case, relating to police scanners or surveillance equipment, items which are sufficiently identifiable as to not require defendant to guess at the probation condition’s meaning. That said, however, this condition also prohibits defendant from having *access*

⁴ Effective January 1, 2012, former section 12316 was repealed and reenacted without substantive changes as section 30305. (Stats.2010, ch. 711, § 4 [repealed]; Stats.2010, ch. 711, § 6 [reenacted].)

to police scanner devices or surveillance equipment. Even if defendant knows *which* items are off-limits to him, the requirement that he not have access to them must include knowledge. Otherwise, defendant could unwittingly violate this probation condition by using a borrowed cellular telephone with a police scanner downloaded as an application. Accordingly, we will modify this probation condition to clarify that defendant is prohibited from knowingly having access to a police scanner device or surveillance equipment.

No-Gang-Related Tattoos Condition

In addition to arguing that it is overbroad because it lacks a scienter requirement, defendant argues that probation condition 23, prohibiting gang-related tattoos, infringes on his constitutional rights to freedom of expression and association.

In general, the United States Constitution protects freedom of speech, certain symbolic or expressive conduct and the liberty to make certain intimate personal choices. (See *Kelley v. Johnson* (1976) 425 U.S. 238, 244 [assuming for purposes of deciding the case that “the citizenry at large has some sort of ‘liberty’ interest within the Fourteenth Amendment in matters of personal appearance”]; *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 505, 511 [wearing of an armband to express viewpoint is symbolic act generally protected by First Amendment]; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 750 [recognizing liberty interest in personal dress and appearance].) Nevertheless, reasonable probation conditions may infringe upon constitutional rights provided they are closely tailored to achieve legitimate purposes. (*People v. Olguin* (2008) 45 Cal.4th 375, 384; *Sheena K., supra*, 40 Cal.4th at p. 890; *U.S. v. Knights* (2001) 534 U.S. 112, 119 [“Inherent in the very nature of probation is that probationers ‘do not enjoy “the absolute liberty to which every citizen is entitled.” ’ ”].)

In *People v. Lopez, supra*, 66 Cal.App.4th at page 622, one of the defendant's probationary terms barred him from among other things, displaying any gang markings, or wearing of gang clothing. The *Lopez* court found the term suffered from constitutionally fatal vagueness and overbreadth, in that it failed to put defendant on proper notice of what he could wear. (*Id.* at pp. 628-631.) Moreover, the *Lopez* court found an implied requirement of knowledge on the part of defendant insufficient to overcome the constitutional infirmities: "Without at least the insertion in this aspect of the condition of a knowledge element, [the defendant] was subject to being charged with an unwitting violation of the condition because nothing in it required the police or the probation office to apprise [the defendant] of the 'identified' items of gang dress before he was charged with a violation." (*Id.* at p. 634.) Accordingly, the court modified the defendant's conditions of probation to require that defendant not wear clothing known by him to be gang attire. (*Id.* at p. 638.) With this minor modification, the court found the defendant's probationary terms passed constitutional muster. (*Ibid.*)

Likewise, insertion of a knowledge requirement into defendant's probation condition 23 will pass constitutional muster.

DISPOSITION

The judgment is modified to reflect the following changes to the probation conditions:

Number 8: "Totally abstain from the use of beverages you know, or reasonably should know, to be alcoholic; do not purchase or possess any beverage you know, or reasonably should know, to be alcoholic; stay out of places where you know, or reasonably should know, that alcohol is the main item of sale."

Number 9: "Not knowingly use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or

associate with persons you know, or reasonably should know, use or traffic in narcotics or other controlled substances.”

Number 12: “Not possess, receive or transport any firearm or ammunition, or any item you know or reasonably should know to be a deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement (Penal Code, §§ 29800, 30305).”

Number 21: “Not use, possess or knowingly have access to any police scanner device or surveillance equipment on your person, vehicle, place of residence, or personal effects.”

Number 23: “Not obtain any new tattoo upon your person that you know, or reasonably should know, is gang related while on probation supervision. You shall permit photographing of any tattoos on your person by law enforcement.”

As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

DUFFY, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.