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

IN RE R.S., a Person Coming Under the  
Juvenile Court Law.

H037470

(Monterey County  
Super. Ct. No. J43288)

THE PEOPLE,

Plaintiff and Respondent,

v.

R.S.,

Defendant and Appellant.

Following a contested jurisdictional hearing, the juvenile court sustained a petition under Welfare and Institutions Code section 602, finding true the allegation that the minor, R.S., had cultivated marijuana (Health & Saf. Code, § 11358). The minor was placed on probation with various terms and conditions. On appeal, the minor contends that six of the probation conditions are unconstitutionally vague and/or overbroad.

For reasons that we will explain, we will modify the challenged probation conditions and affirm the judgment as so modified.

## **BACKGROUND**

On May 17, 2011, the district attorney filed a petition under Welfare and Institutions Code section 602 alleging that the minor, then age 17, cultivated marijuana (Health & Saf. Code, § 11358). A second petition filed the same day alleged additional counts. The second petition was later dismissed by the juvenile court without prejudice to the district attorney refiling the matter at a later time.

At the contested jurisdictional hearing, the following evidence was presented. The Seaside Police Department went to the minor's residence after receiving a complaint about certain activity at the residence. Upon approaching the residence, Sergeant Nicholas Borges saw marijuana growing in a pot or planter. It was later determined that the pot contained 1.32 grams of marijuana. The minor admitted to Sergeant Borges that the plant belonged to him, that he had been maintaining it, and that it was a "clone." Sergeant Borges testified that a clone is a "cutoff of a branch of a female plant" and that a female plant flowers and produces "marijuana buds." The minor, who had walked out of the garage when the police arrived, consented to a search of the garage. The police found " 'bongs' or smoking paraphernalia associated with marijuana" inside the garage. After hearing argument from counsel, the juvenile court found true the allegation in the petition that the minor cultivated marijuana (Health & Saf. Code, § 11358).

On October 12, 2011, the minor was declared a ward of the court and placed on probation. With exceptions not relevant here, the juvenile court adopted the recommended terms and conditions of probation, including the following:

"11. Your associates are to be approved by your parents/guardians, and you shall not associate/communicate with any individuals identified by your Probation Officer as a threat to your successful completion of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).

"12. You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including

marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. Do not inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.

“13. You are not to possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications.

“14. You are to submit to chemical test or blood, breath, or urine as directed by your Probation Officer or any other peace officer.

“15. You shall not possess any weapons or any type of ammunition.

“16. You are not to be in possession of any scale used to measure ounces or grams.”

## **DISCUSSION**

On appeal, the minor challenges the above-listed six probation conditions on the grounds that they are unconstitutionally vague and/or overbroad. We first consider whether the minor has forfeited his objections on appeal. We then set forth the applicable legal principles concerning probation conditions before considering the particular probation conditions that the minor has challenged on appeal.

### ***Forfeiture***

Although the minor did not raise any objection to these probation conditions in the juvenile court, he asserts on appeal that the objections are not forfeited because the probation conditions are unconstitutional on their face. The Attorney General agrees that

the constitutionality of a probation condition may be considered on appeal without an objection below if the issue “can be resolved as a matter of law without reference to the sentencing record.”

Our Supreme Court has determined that the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*); see also *People v. Leon* (2010) 181 Cal.App.4th 943, 949 (*Leon*)). In this case, the minor’s arguments on appeal present pure questions of law without reference to the sentencing record, and therefore we will consider the substance of those arguments.

### ***Legal Principles Regarding Probation Conditions***

“A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *Leon*, *supra*, 181 Cal.App.4th at pp. 948-949.) In addition, “[a] probation condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,’ if it is to withstand a [constitutional] challenge on the ground of vagueness.” (*Sheena K.*, *supra*, at p. 890; *Leon*, *supra*, at p. 949; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750 (*Freitas*)). “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. [Citations.]’ [Citation.] The vagueness doctrine bars enforcement of ‘“a statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application.” [Citation.]’ [Citation.] A vague law ‘not

only fails to provide adequate notice to those who must observe its strictures, but also “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” [Citation.]’ [Citation.] 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.]” (*Sheena K., supra*, at p. 890.)

### ***Probation Conditions Challenged by the Minor***

#### **Condition No. 11**

Condition No. 11 states: “Your associates are to be approved by your parents/guardians, and you shall not associate/communicate with any individuals identified by your Probation Officer as a threat to your successful completion of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).”

The minor contends that this probation condition is vague and overbroad. He argues that an express knowledge requirement should be added to it, and that the probation condition should require advance disapproval, rather than advance approval, of his associates. The minor suggests that the first sentence of the probation condition be replaced with the following two sentences: “*You are not to associate with individuals you know your parents have disapproved of. You are not to associate with individuals you know your Probation Officer has disapproved of* as a threat to your successful completion of probation.” (Italics added.) The minor also deletes the word “any” throughout the proposed probation condition but does not articulate a reason for doing so.

The Attorney General does not specifically object to modifying the probation condition, but does contend that the minor’s proposed phrasing is “awkward and grammatically incorrect.” The Attorney General suggests that the phrasing used in

*Sheena K.*, *supra*, 40 Cal.4th at page 892, regarding the disapproval of associates, be used in this case instead.

In *Sheena K.*, the California Supreme Court concluded that a probation condition prohibiting the defendant from associating with “ ‘anyone disapproved of by probation’ ” was unconstitutionally vague. (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) The court determined that “modification to impose an explicit knowledge requirement is necessary to render the condition constitutional. [Citations.]” (*Id.* at p. 892.) The court reasoned that, without “an express requirement of knowledge,” “the probation condition did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer.” (*Id.* at pp. 891-892, fn. omitted.) The court suggested that “form probation orders be modified so that such a restriction explicitly directs the probationer not to associate with anyone ‘known to be disapproved of’ by a probation officer or other person having authority over the minor.” (*Id.* at p. 892.)

Because our Supreme Court has already determined that the “known to be disapproved of” phrasing is constitutionally valid, we will order the first sentence of condition No. 11 modified to state: “You are not to associate with any individuals known to be disapproved of by your parents/guardians. You shall not associate/communicate with any individuals identified to you by your Probation Officer as a threat to your successful completion of probation.” The identification requirement in the second sentence of the modified probation condition is an approved method of ensuring that the probationer has knowledge of whom to avoid. (Cf. *In re Vincent G.* (2008) 162 Cal.App.4th 238, 247-248; *Leon*, *supra*, 181 Cal.App.4th 943, 954.)

### **Condition No. 12**

Condition No. 12 states: “You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or

possessing any illegal intoxicants, narcotics or drugs. Do not inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.”

The minor contends that this probation condition should include an explicit knowledge requirement regarding possession of the prohibited items and regarding the character of the prohibited substance. The minor also suggests that it was a typographical error for the probation condition to state in the second sentence “anyone known to you *who is* using” drugs, and that the sentence should instead state “anyone ‘known to you *to be* using’ ” drugs. (Italics added.) The minor proposes the following italicized modification: “*Do not knowingly possess or consume anything you know are* intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you *to be* using or possessing any illegal intoxicants, narcotics or drugs. Do not *knowingly* inhale or attempt to inhale or consume any substance of any type or nature which you know is used as paint, plant material, or which is an aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to *knowingly* consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.” (Italics added.)

The Attorney General does “not dispute” the minor’s request to add a knowledge requirement. However, the Attorney General objects to changing the phrase “who is” in the second sentence.

As we stated above, “[a] probation condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine

whether the condition has been violated,’ if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *Leon*, *supra*, 181 Cal.App.4th at p. 949; *Freitas*, *supra*, 179 Cal.App.4th at p. 750.) In order to be sufficiently precise for the probationer to know what is required of him or her, a requirement of knowledge should be included in probation conditions prohibiting the possession of specified items. (*Freitas*, *supra*, at pp. 751-752.) “[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of [the prohibited items].” (*Id.* at p. 752.)

In this case, we shall modify the probation condition by including a knowledge requirement. The knowledge requirement is satisfied by inserting the word “knowingly” in three places, as indicated in italics: “You are not to *knowingly* consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. Do not *knowingly* inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to *knowingly* consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.” We are not persuaded by minor’s argument that the original probation condition contains a typographical error regarding the phrase “who is,” and the minor otherwise fails to articulate why modification of the phrase is constitutionally compelled. Consequently, we will not order modification of that phrase.

### **Condition No. 13**

The first sentence of condition No. 13 states: “You are not to possess or consume any prescription medications unless directed to do so by a medical doctor.”

The minor contends that this sentence should be modified to include an explicit knowledge requirement.

The Attorney General does not object to the minor's proposed modification.

We shall modify the first sentence of condition No. 13 by including a knowledge requirement as indicated in italics: "You are not to *knowingly* possess or consume any prescription medications unless directed to do so by a medical doctor." (See *Freitas, supra*, 179 Cal.App.4th at p. 752.)

#### **Condition No. 14**

Condition No. 14 states: "You are to submit to chemical test or blood, breath, or urine as directed by your Probation Officer or any other peace officer."

The minor contends that this probation condition is unconstitutionally vague due to an apparent typographical error with respect to the use of the first "or" in the probation condition. The minor requests that this probation condition be modified to state, "You are to submit to chemical test *of* blood, breath, or urine as directed by your Probation Officer or any other peace officer." (Italics added.)

The Attorney General disputes that the modification is constitutionally compelled. However, "in light of the other conceded modifications," the Attorney General agrees that the probation condition should be corrected as requested by the minor.

We agree with the Attorney General and shall further modify the probation condition as indicated in italics: "You are to submit to *a* chemical test *of your* blood, breath, or urine as directed by your Probation Officer or any other peace officer."

#### **Condition No. 15**

Condition No. 15 states: "You shall not possess any weapons or any type of ammunition."

The minor contends that an express knowledge requirement should be added to this probation condition. He also argues that the reference to "weapons" is unconstitutionally vague and overbroad because it fails to provide notice of the types of

items he is prohibited from possessing. The minor requests that the probation condition be modified to state as follows: “You shall not *knowingly* possess any type of ammunition. You shall not *knowingly* own, use, or possess any object that *you know is a dangerous or deadly weapon* or any object that *you know can be used to cause bodily injury or death where you intend such harm.*” (Italics added.)

Although the Attorney General does “not dispute” the minor’s request for modification of the condition, the Attorney General proposes a “simpler version” instead: “You shall not *knowingly* possess any *deadly or dangerous* weapons or any type of ammunition.” (First italics added.)

We shall modify the probation condition by including an explicit knowledge requirement. (See *Freitas, supra*, 179 Cal.App.4th at p. 752.)

We further determine that the probation condition is vague and overbroad with respect to prohibiting possession of “any weapons.” The probation condition does not adequately identify the items that may fall within the prohibition, and the probation condition potentially applies to innocuous objects used in everyday life. With respect to modification of the “any weapons” phrase, the parties agree that the probation condition should be modified to prohibit possession of *dangerous or deadly* weapons. As noted, the minor in his opening brief also requests that the probation condition include language explicitly prohibiting possession of any object that “you know can be used to cause bodily injury or death where you intend such harm.”

In *In re R.P.* (2009) 176 Cal.App.4th 562, the Court of Appeal considered whether a probation condition prohibiting possession of any “ ‘dangerous or deadly weapon’ ” was unconstitutionally vague. (*Id.* at p. 565.) After examining statutory authority, case law, jury instructions, and Black’s Law Dictionary, the Court of Appeal concluded as follows: “legal definitions of ‘deadly or dangerous weapon,’ ‘deadly weapon,’ ‘dangerous weapon,’ and use in a ‘dangerous or deadly’ manner, consistently include the harmful capability of the item and the intent of its user to inflict, or threaten to inflict,

great bodily injury. As a result of these well-defined terms, the phrase ‘dangerous or deadly weapon’ is clearly established in the law. Accordingly, the ‘no-dangerous-or-deadly-weapon’ probation condition is sufficiently precise for [the minor] to know what is required of him.” (*Id.* at p. 568.)

In this case, we do not decide the issue of whether additional language beyond the “no-dangerous-or-deadly-weapon” prohibition is necessary. As noted, the Attorney General does not offer any specific objection to inclusion of the additional language proposed by the minor and contends only that prohibiting possession of “deadly or dangerous weapons” is a “simpler version” of the probation condition.

Accordingly, we shall modify the probation condition to state as follows: “You shall not knowingly possess any type of ammunition, any object that you know is a dangerous or deadly weapon, or any object that you know can be used to cause bodily injury or death where you intend such harm.”

#### **Condition No. 16**

Condition No. 16 states: “You are not to be in possession of any scale used to measure ounces or grams.”

The minor contends this condition should be modified to include an explicit knowledge requirement.

The Attorney General does “not dispute” the minor’s requested modification.

We shall modify the probation condition by including a knowledge requirement as follows: “You are not to knowingly possess any scale used to measure ounces or grams.” (See *Freitas, supra*, 179 Cal.App.4th at p. 752.)

#### **DISPOSITION**

The dispositional order of October 12, 2011, is ordered modified as follows.

Probation condition No. 11 shall read: “You are not to associate with any individuals known to be disapproved of by your parents/guardians. You shall not associate/communicate with any individuals identified to you by your Probation Officer

as a threat to your successful completion of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).”

Probation condition No. 12 shall read: “You are not to knowingly consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you who is using or possessing any illegal intoxicants, narcotics or drugs. Do not knowingly inhale or attempt to inhale or consume any substance of any type or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to knowingly consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.”

Probation condition No. 13 shall read: “You are not to knowingly possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications.”

Probation condition No. 14 shall read: “You are to submit to a chemical test of your blood, breath, or urine as directed by your Probation Officer or any other peace officer.”

Probation condition No. 15 shall read: “You shall not knowingly possess any type of ammunition, any object that you know is a dangerous or deadly weapon, or any object that you know can be used to cause bodily injury or death where you intend such harm.”

Probation condition No. 16 shall read: “You are not to knowingly possess any scale used to measure ounces or grams.”

As so modified, the order is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.\*

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\*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.