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

IN RE D.H., a Person Coming Under the
Juvenile Court Law.

H037485
(Santa Cruz County
Super. Ct. No. J22375)

THE PEOPLE,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellant.

1. INTRODUCTION

On appeal, minor D.H. challenges a probation condition requiring him to stay away from his next-door neighbor and her house, which he burglarized.¹ Minor’s opening brief challenges the juvenile court’s oral statement of the condition at the dispositional hearing on October 12, 2011: “Stay away from the victim Ms. Gonzales, her property at [a street address], Watsonville.” He contends that this condition is

¹ To protect the neighbor’s privacy, our opinion will not give her street address. We will spell her last name as both Gonzales and Gonzalez as it appears in the record we are quoting. She was asked to spell her first name, not her last, when she testified.

unconstitutionally vague and overbroad, as it should include a knowledge requirement and specify a certain distance that he must stay away.

The Attorney General contends that both of these problems are solved by the written terms and conditions of minor's probation filed with the dispositional orders, which state: "Do not knowingly contact or approach . . . Cедelia Gonzalez [street address,] Watsonville. . . . Do not knowingly come within 100 yards of this person(s)/place(s)." While arguing that the written condition is generally constitutional, the Attorney General proposes that the 100 yard distance should be modified to account for the minor living next door to the victim.

For the reasons stated below, we will reverse the order after concluding that it requires an express knowledge condition and another modification that the record does not allow us to make.

2. THE JUVENILE COURT PROCEEDINGS

On January 7, 2011, an amended juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) was filed charging the minor, born in April 1995, with the felonies of carrying a concealed dirk or dagger (former Pen. Code, § 12020, subd. (a)(4)) on November 5, 2010 and burglary of his neighbor's house (Pen. Code, § 459) on December 20, 2010.

At minor's initial appearance in juvenile court on January 10, 2011, he was ordered to attend school and stay away from an address that is his next door neighbor's house.

After a contested jurisdictional hearing on September 2, 2011, the knife charge was not sustained, but the juvenile court found minor within the court's jurisdiction after sustaining the felony burglary charge. There was evidence at the hearing that minor and other young males had taken several items from the Watsonville house of minor's next door neighbor Gonzales on the morning of December 20, 2010. She had returned home that morning to find minor in her garage carrying a box. He jumped the fence and went inside his house, leaving the box with one of her saws on the fence. She told him she would call the police and did so. She saw three other young males, two in a truck and

one in minor's yard. Minor was immediately arrested and the police recovered some of Gonzales's property from minor's back yard and the back seat of a vehicle parked in his garage. Minor admitted to the police that he, with friends, had taken a bottle of tequila. He denied taking anything else.

On September 9, 2011, a second juvenile wardship petition was filed charging minor with three offenses on August 22, 2011, the misdemeanors of driving without a license (Veh. Code, § 12500, subd. (a)), and evading a police officer (Veh. Code, § 2800.1, subd. (a)), and the infraction of driving with a blood alcohol level of at least 0.05 percent (Veh. Code, § 23140, subd. (a)).

At a hearing on September 26, 2011, the minor admitted evading a police officer on the condition that the other charges would be dismissed but could be considered for disposition.

At the dispositional hearing on both petitions on October 12, 2011, the juvenile court announced that it had read and considered the probation report dated October 5, 2011. The clerk's transcript reveals that the court initialed that report. The probation report contained 21 separately numbered recommendations, including 18 that qualify as conditions of probation. Recommendation No. 11 stated (as later corrected by handwriting): "The minor shall stay away from victim Cedula Gonzalez and her property on [a street address] in Watsonville."

At the hearing, minor's counsel objected to several conditions by the recommendation number provided in the probation report. Before ruling on these objections, the juvenile court had an extended discussion with the minor's parents about his school attendance, the impact of juvenile felony charges, and the nature of the services offered by the Wrap Program.

After this discussion, the juvenile court declared minor to be a ward of the court and placed him in his parents' custody subject to a number of terms and conditions of probation, generally tracking the recommendations of the probation report. The court omitted provisions to which minor had objected. The court for the most part did not give the numbers in the probation report, but regarding the stay away order, the court asked

for the victim's real last name. After receiving it, the court stated: "Correct Number 11. Stay away from the victim Ms. Gonzales, her property at [street address], Watsonville."

The clerk's transcript contains a Judicial Council of California form Disposition – Juvenile Delinquency order and a Santa Cruz County Superior Court Terms and Conditions form on which various boxes are checked to reflect the court's orders of October 12, 2011. Among the written conditions in the Terms and Conditions form is a checked box stating: "Do not knowingly contact or approach," followed by six lines, followed by "Do not knowingly come within 100 yards of this person(s)/place(s)." Handwritten on the lines are several names, including Gonzalez and her street address in Watsonville. The form provides lines for the date and the signature of the "Judge of the Juvenile." In place of a signature appear two handwritten backslashes, but not the juvenile judge's signature or initials. At the hearing, the juvenile court made no reference to this form or this wording of the probation condition.

3. SCOPE OF REVIEW

The conflict between the oral and written probation conditions raises the question of which part of the record is controlling: what the trial court stated orally or what was written in the court's order. In *People v. Gabriel* (2010) 189 Cal.App.4th 1070, this court stated, "When there is a discrepancy between the minute order and the oral pronouncement of judgment, the oral pronouncement controls." (*Id.* at p. 1073.) In *People v. Freitas* (2009) 179 Cal.App.4th 747, in the absence of argument on the point, the appellate court elected to review "the more inclusive oral pronouncement," rather than the written probation order signed by the judge. (*Id.* at p. 750, fn. 2.)

People v. Smith (1983) 33 Cal.3d 596 explained that the older rule gave preference to the reporter's transcript in the case of a conflict, but the modern rule is that when the clerk's and reporter's transcripts cannot be harmonized, the part of the record will prevail that is entitled to greater credence in the circumstances of the case. (*Id.* at p. 599; *People v. Harrison* (2005) 35 Cal.4th 208, 226; *People v. Freitas, supra*, 179 Cal.App.4th at p. 750, fn. 2.)

We agree with the observations in *People v. Thrash* (1978) 80 Cal.App.3d 898 that probation “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.” (*Id.* at pp. 901-902.)

The Attorney General recognizes this authority and argues that we should treat the written form condition as controlling because probation and law enforcement officers charged with enforcing probation conditions will refer to the written form and not the reporter’s transcript of the court’s oral order.

In this case, we are unable to treat the written condition as controlling in light of the following circumstances. The juvenile judge signed and dated the probation report, but not the form conditions. At the hearing the juvenile judge referred to and ordered modified the stay away condition in the probation report and imposed the condition in the words of the probation report, not the form conditions. Unlike the probation report, the judge did not acknowledge having read and reviewed the form conditions or otherwise mention them at the hearing. We cannot regard this unsigned form as reflecting a judicial intent to modify or clarify the court’s oral order.

Having established the terms of the order under review, we will apply the scope of review this court summarized in *People v. Barajas* (2011) 198 Cal.App.4th 748, 753 (*Barajas*): “An appellate court generally will not find that a trial court has abused its broad discretion to impose probation conditions so long as a challenged condition relates either generally to criminal conduct or future criminality or specifically to the probationer’s crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Olguin* (2008) 45 Cal.4th 375, 379-380.) A Court of Appeal will review the reasonableness of a probation condition only if the probationer has questioned it in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*.)

“A Court of Appeal may also review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as

a matter of law without reference to the sentencing record. (*Sheena K., supra*, 40 Cal.4th at pp. 888-889.)

“Inherent in the very nature of probation is that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled.’” [Citations.] Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.’ (*United States v. Knights* (2001) 534 U.S. 112, 119.) Nevertheless, probationers are not divested of all constitutional rights. ‘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 [constitutional] challenge on the ground of vagueness. [Citation.] 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 constitutionally overbroad.’ (*Sheena K., supra*, 40 Cal.4th at p. 890.)”

4. THE VALIDITY OF THE PROBATION CONDITION

Barajas, supra, 198 Cal.App.4th 748 surveyed precedent pertaining to a probationer’s right to travel with particular emphasis on gang probation conditions. “Probationers have been recognized as still enjoying a constitutional right to intrastate travel (*In re White* (1979) 97 Cal.App.3d 141, 148), but courts have allowed some restrictions of that right through gang probation conditions.” (*Barajas, supra*, at p. 755.) Probation conditions that include express knowledge conditions as to specified areas have been upheld. (*Id.* at pp. 755-756.) However, “[w]hen a gang area restriction has lacked an explicit knowledge requirement, appellate courts have required modifications.” (*Id.* at p. 756, and cases there cited.)

The jurisprudential trend is toward requiring that a term or condition of probation explicitly require knowledge on the part of the probationer that he is in violation of the term in order for it to withstand a challenge for unconstitutional vagueness. “[P]robation conditions that implicate constitutional rights must be narrowly drawn” and the knowledge requirement in these circumstances “should not be left to implication.”

(*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) Absent modification of the condition, minor remains vulnerable to arrest and punishment for unwittingly violating the probation term. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 634.) While naming the neighbor's home address provides minor with the specific knowledge of one location to avoid, how can minor be expected to know all the locations to which his neighbor will travel? We conclude that a stay away probation condition centered on a mobile individual must include an express knowledge requirement to give minor fair warning of what locations he must avoid.

Though it helps to achieve clarity to name a specific address to avoid, we do not believe that it goes far enough to cure the constitutional defects in an order to “stay away” from a specified address. The problem is essentially the same one this court described in considering an order requiring a probationer to “not to be adjacent to any school campus.” (*Barajas, supra*, 198 Cal.App.4th at p. 760.) After considering dictionary definitions of “adjacent,” this court stated: “We believe that the meanings of ‘adjacent’ and ‘adjacent to’ are clear enough as an abstract concept. They describe when two objects are relatively close to each other. The difficulty with this phrase in a probation condition is that it is a general concept that is sometimes difficult to apply. At a sufficient distance, most reasonable people would agree that items are no longer adjacent, but where to draw the line in the continuum from adjacent to distant is subject to the interpretation of every individual probation officer charged with enforcing this condition. While a person on the sidewalk outside a school is undeniably adjacent to the school, a person on the sidewalk across the street, or a person in a residence across the street, or two blocks away could also be said to be adjacent. To avoid inviting arbitrary enforcement and to provide fair warning of what locations should be avoided, we conclude that the probation condition requires modification.” (*Id.* at p. 761.)

How far away is “away” is also in the eye of the beholder and, as the Attorney General acknowledges, any distance specification in this case should take into account that minor and his victim are next door neighbors. The form order identifies 100 yards as an all-purpose avoidance distance, but this may be not only unreasonable but

unconstitutional as applied to circumstances such as these. Minor may need to travel on the street directly outside his neighbor's house to come home. Minor's front yard may not be 100 yards or even 50 feet from the neighbor's house. The appellate record provides no information as to the distances between the neighboring houses, garages, driveways, or yards, or minor's customary routes of travel. Under these circumstances, identifying an appropriate distance that is not overly restrictive of minor's right to travel is not a question that we may resolve as a matter of constitutional law. While a distance such as 50 feet may be an appropriate accommodation of minor's rights and law enforcement concerns, this type of question is properly answered based on the kind of specific facts absent in our record and is more a question of reasonableness than constitutionality. Accordingly, we will remand this case to allow the juvenile court an opportunity to tailor this condition to minor's individual circumstances.

5. DISPOSITION

The judgment is reversed and the case is remanded for the juvenile court to tailor a stay away order to the circumstances of this case. Any such order must also include a specific knowledge requirement.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, 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.