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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re S.Q., a Person Coming Under the
Juvenile Court Law.

H037649
(Santa Clara County
Super. Ct. No. JV38556)

THE PEOPLE,

Plaintiff and Respondent,

v.

S.Q.,

Defendant and Appellant.

S.Q. was declared a ward of the juvenile court (see Welf. & Inst. Code, § 602) and placed on probation. One condition of his probation was that he “not be on or adjacent to any school campus unless enrolled or with prior administrative approval.” S.Q. contends that the condition is unconstitutionally vague and overbroad. We modify the order to correct the vagueness problem and as modified, affirm.

A. Background

A juvenile wardship petition alleged that S.Q. had committed assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1) and that he had been in possession of a knife on school grounds in violation of Penal Code section 626.10. According to the police and probation reports, S.Q. and his friends assaulted the victim as he was walking from school. When S.Q. was taken into custody two days after the

incident he had a “four inch blade dagger” in his pocket. S.Q. admitted having possession of the knife on school grounds. The juvenile court dismissed the assault allegation. After declaring S.Q. to be a ward of the court, the juvenile court placed him on probation with specified conditions, including the condition that he “not be on or adjacent to any school campus.” S.Q. objected to several of the probation conditions but did not include the “adjacent to” condition among his objections.

B. Standard of Review

A court of appeal may 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. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*)) Our review of such a question is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

C. Vagueness

S.Q. asserts that the condition that he not be adjacent to any school is unconstitutionally vague because it does not define the meaning of “adjacent” and does not include a knowledge requirement. The Attorney General effectively concedes that the condition is overly vague.

“ ‘Inherent in the very nature of probation is that probationers “do not enjoy ‘the absolute liberty to which every citizen is entitled.’ ” [Citation.] 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. . . .’ (*Sheena K.*,

supra, 40 Cal.4th at p. 890.)” (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753 (*Barajas*).

Citing this court’s opinion in *Barajas, supra*, 198 Cal.App.4th at pages 761-763, S.Q. asks that we correct the vagueness problem by modifying the condition to more precisely describe the prohibited behavior. In *Barajas*, the trial court’s order stated that the defendant was “ ‘not to be adjacent to any school campus during school hours’ ”¹ (*Id.* at p. 760.) As *Barajas* observed: “[T]he 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.” (*Id.* at p. 761.) In responding to the vagueness argument in *Barajas*, the Attorney General suggested that the court modify the condition to state, “ ‘Do not knowingly be on or within 50 feet of a school campus during school hours unless enrolled or with prior administrative permission or prior permission of the probation officer.’ ” (*Ibid.*) Concluding that the suggestion gave the probationer sufficient guidance, *Barajas* adopted it.

A modification like the one adopted by *Barajas* would give S.Q. fair notice of what is prohibited and would minimize the potential for arbitrary enforcement. The Attorney General reiterates the recommendation made in *Barajas* and does not object “to a modification of the condition that requires appellant to remain some determinate distance from a school campus.” Accordingly, we will modify the condition to require

¹ The probation condition in *Barajas* stated in full: “ ‘You’re not to be adjacent to any school campus during school hours unless you’re enrolled in or with prior permission of the school administrator or probation officer.’ ” (*Barajas, supra*, 198 Cal.App.4th at p. 760.)

that S.Q. “not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval.”

D. Overbreadth

S.Q. further argues that even if we make the condition more definite it is still constitutionally infirm because it impinges on his constitutional right to travel. S.Q. suggests that the condition be that he be restricted from “stopping or loitering” within 50 feet of a school campus because, as written, the condition prevents him from simply passing by a school. The Attorney General argues that S.Q. has forfeited the argument by failing to object below. We agree with the Attorney General.

“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.) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights--bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Although a probation condition may be overbroad when considered in light of all the facts, only those constitutional challenges presenting a pure question of law may be raised for the first time on appeal. (*Sheena K., supra*, 40 Cal.4th at pp. 888-889.) The Supreme Court has made it clear that not all constitutional defects in conditions of probation may be raised for the first time on appeal; some questions cannot be resolved without reference to the particular sentencing record developed in the trial court. (*Id.* at p. 889.) Such questions are subject to the traditional objection and forfeiture principles that encourage the parties to develop the record and allow the lower court to properly exercise its discretion. S.Q.’s overbreadth argument is such a question since its resolution requires an assessment of the factual circumstances, including, among other

things, the purposes the condition was designed to serve and the degree to which it actually restricts his ability to travel. Consequently, the forfeiture rule applies and we do not reach the merits of the challenge. (*Ibid.*)

E. Disposition

The order of probation is modified to require S.Q. “not knowingly be on or within 50 feet of any school campus unless enrolled or with prior administrative approval.” As modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.