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

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

H037837
(Monterey County
Super. Ct. No. J45844)

THE PEOPLE,

Plaintiff and Respondent,

v.

A.A.,

Defendant and Appellant.

I. STATEMENT OF THE CASE

On August 12, 2011, the Monterey County District Attorney filed a delinquency petition under Welfare and Institutions Code section 602, subdivision (a) alleging that 16-year-old A.A., a minor, committed residential burglary.¹ (Pen. Code, §§ 459, 460.) On December 13, 2011, after a contested jurisdiction hearing, the court sustained the petition. At the disposition hearing, the court declared the minor a ward of the court for 24 months, allowed him to remain in his home, and placed him on probation for two years under certain terms and conditions.

¹ All unspecified statutory references are to the Welfare and Institutions Code.

On appeal from the jurisdiction finding and disposition order, the minor claims the court erred in failing to conduct a proper inquiry concerning whether he was suitable for deferred entry of judgment (DEJ) and in failing to exercise its discretion concerning whether to grant it. The minor further claims that some of the conditions of probation are vague and overbroad and thus constitutionally defective.

We reverse the disposition order and remand for further DEJ proceedings.

II. DEFERRED ENTRY OF JUDGMENT²

Section 790, subdivision (b) requires that when a minor is before the juvenile court on a delinquency petition alleging the commission of a felony, the prosecutor must review the file to determine the minor's eligibility for DEJ; and if the minor is eligible, prosecutor must file a written declaration or state on the record the basis for that determination and provide notice of that determination to the minor or the minor's attorney. (See Cal. Rules of Ct., rule 5.800(b)(1) & (e).)³ If the court finds that the minor is eligible and would benefit from education, treatment, and rehabilitation efforts, the court may grant DEJ. In this regard, the court must either summarily grant DEJ or hold a suitability hearing. (§ 790, subd. (b).)

Section 790, subdivision (a) lists six requirements for eligibility, all of which must apply. They are: (1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense; (2) the offense charged is not one of the

² Given the issues raised on appeal, we need not summarize the evidence presented at the jurisdiction hearing. It suffices to say that the court found that the minor aided and abetted others in burglarizing a residence on evidence that he was aware of others' plans to commit the burglary, he was with them in the backyard of the residence around the time of the burglary, he was later seen running down the street and in and out of backyards, and he allowed the others to hide from police in a shed at his home. The court disbelieved the minor's testimony that he did not know that others had planned to commit a burglary, he was never in the victim's backyard, he did not want to be involved in the burglary, and he was not acting as a lookout

³ All rule references are to the California Rules of Court.

offenses enumerated in subdivision (b) of Section 707; (3) the minor has not previously been committed to the custody of the Youth Authority (YA); (4) the minor's record does not indicate that probation has ever been revoked without being completed; (5) the minor is at least 14 years of age at the time of the hearing; and (6) the minor is eligible for probation pursuant to Section 1203.06 of the Penal Code. (§ 790, subd. (a)(1)-(6).)

The minor contends that all six circumstances apply, and therefore the prosecutor erred in failing to submit a declaration of eligibility and provide requisite notice, and the court erred in failing to hold a suitability hearing or otherwise determine his suitability. Accordingly, the minor claims the matter must be remanded for DEJ suitability hearing. The Attorney General concedes that the matter must be remanded for such a hearing.

The probation report reveals that the minor had no prior record, he had never been in YA, and he had never had probation revoked. Moreover, residential burglary is not among the offenses listed in section 707, the minor was over 14 years old when the suitability hearing should have taken place, and he is not ineligible for probation under Penal Code section 1203.06. Thus, the minor appears to be eligible for DEJ. For this reason, we find that neither the prosecutor nor the juvenile court complied with their statutory duties under section 790. Accordingly remand is necessary. (E.g., *In re C.W.* (2012) 208 Cal.App.4th 654, 659-663 [reversing and remanding for failure to comply with § 790, subd. (b)]; *In re D.L.* (2012) 206 Cal.App.4th 1240, 1243-1246 [same]; *In re Luis B.* (2006) 142 Cal.App.4th 1117, 1121-1123 [same].)

III. PROBATION CONDITIONS

The minor contends that three of the probation conditions are vague and overbroad and thus constitutionally defective.⁴

⁴ The Attorney General argues that since the case must be remanded, we should decline review of the probation conditions and allow the juvenile court to consider the minor's claims. As the minor points out, the juvenile court could impose the same conditions of probation even if it grants him DEJ. Thus, in the interests of judicial

A juvenile court “may make any and all reasonable orders for the conduct of the ward” and “may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.” (Welf. & Inst.Code, § 730, subd. (b).) Nevertheless, the juvenile court’s discretion is not boundless. “Under the void for vagueness doctrine, based on the due process concept of fair warning, an order ‘ “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.” ’ [Citation.] The doctrine invalidates a condition of probation ‘ “ ‘so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” ’ [Citation.] By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an ‘ “ ‘ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ ” ’ [Citation.]” (*In re Victor L.* (2010) 182 Cal.App.4th 903, 910 (*Victor L.*), quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*.) In addition, “[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. [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

A. Association and Communication

Probation condition 11 provides: “Your associates are to be approved by your parents[], and you shall not associate/communicate with [two named persons] or any individual identified by your Probation Officer as a threat to your successful completion

economy, we consider it appropriate to address the minor’s challenges now and thereby avoid the possibility of another appeal based on the same claims.

of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile).”⁵

The minor claims that this condition is vague because it does not require that he know whom his probation officer has identified. The Attorney General agrees that the condition should be modified to provide that the minor “is not to intentionally associate or communicate with persons that the probation officer has identified to him as being a threat to his successful completion of probation.”

“In a variety of contexts . . . California appellate courts have 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.” (*People v. Kim* (2011) 193 Cal.App.4th 836, 843.) In particular, when a condition prohibits association with a type of person, the condition must include a knowledge requirement. (*Sheena K., supra*, 40 Cal.4th at p. 892 [disapproving condition as unconstitutionally vague and revising it to require knowledge]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *In re H.C.* (2009) 175 Cal.App.4th 1067, 1070–1072; cf. *People v. Leon* (2010) 181 Cal.App.4th 943, 949-951 [modifying adult probation condition to require knowledge].)

We agree with the parties that to pass constitutional muster, condition 11 must include a knowledge requirement concerning the persons identified by the minor’s probation officer, and we approve the Attorney General’s suggested modification.

The minor further claims that the condition is also vague because it does not sufficiently define the term “communicate with.” According to the minor, “[t]his could mean that something as minor as uttering an apology after accidentally bumping into someone. Conceivably, he could be placed in a group situation during a classroom activity with someone whom his probation officer views as a threat to his successful completion of probation.” Moreover, the minor claims the condition is overbroad

⁵ The two named individuals were brothers, whom the minor knew and who were implicated in the burglary or the circumstances leading to it.

because it “essentially prohibits him from saying so much as one word to anyone unless he knows that the person is *not* someone who would be found objectionable by his probation officer.” We find these claims unpersuasive.

“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.” ’ ” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “Absolute certainty and precision are not required to avoid a claim of unconstitutional vagueness; ‘ “ “[r]easonable certainty” ’ ’ ’ and ‘ “reasonable specificity” ’ are all that is required. [Citations.]” (*Victor L.*, *supra*, 182 Cal.App.4th at p. 914.) In other words, we understand a condition in context and give its terms the common sense meaning that would appear to a reasonable, objective reader. (See *People v. Olguin* (2008) 45 Cal.4th 375, 382; *People v. Bravo* (1987) 43 Cal.3d 600, 606; *In re Ramon M.* (2009) 178 Cal.App.4th 665, 677.)

When viewed in light of the purpose of the condition—to ensure the successful completion of probation—the prohibition against *communicating* with certain types of persons is reasonably specific and not impermissibly vague. The meaning of “communicate” is not complicated or ambiguous, and in context of this probation condition, a reasonable person would know what it is intended to prohibit because it is coupled with a prohibition against associating with the same types of persons. (Cf. *People v. Keister* (2011) 198 Cal.App.4th 442, 448-449 [rejecting claim that “communicate” was vague and rendered statute unconstitutional].)

Likewise, in reviewing a probation condition, we note that in *People v. Ballard* (1988) 203 Cal.App.3d 311, the court opined that in reviewing a criminal statute for vagueness, courts are not obliged “to consider every conceivable situation which might arise” in order to find that the statute is neither vague nor overbroad, as long as the statute can be given a reasonable and practical construction. (*Id.* at p. 316; see *People v. Smith*

(1984) 35 Cal.3d 798, 810; *United States v. Williams* (2008) 553 U.S. 285, 305, 306 [“the mere fact that close cases can be envisioned” does not “render[] a statute vague”].)

We need not consider every possible hypothetical scenario that might arise under the condition or every way that theoretically it could be enforced. In our view, no reasonable person would read this condition and consider it a violation if (1) a probationer apologized for accidentally or inadvertently bumping into someone who had been identified by the probation officer; (2) a probationer was required to participate in a group activity or discussion at school, and an identified person was also in the classroom group; or (3) a probationer said one word to an identified person.

Finally, with the inclusion of a knowledge requirement, the probation condition is no more overbroad than the prohibition against associating with persons identified by the minor’s probation officer. In our view, prohibiting associating *and* communicating with persons who could jeopardize the minor’s successful completion of probation are reasonably related to the minor’s rehabilitation and narrowly draw to avoid the impermissible infringement of his constitutional rights of association and free speech.

B. Illicit Substances

Probation condition 13 provides: “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 used as a paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent . . . ; you are only to use the prescribed dosage as indicated on the package.” (Italics added.)

The minor claims that the condition is vague because it does not require that any of the proscribed activities be done knowingly. The Attorney General implicitly

concedes that the condition should include a knowledge requirement. We agree. As it stands, the minor could be found in violation of the condition if he unknowingly delivers a bag of groceries containing a bottle of cooking sherry; or if he unknowingly eats a liqueur-filled chocolate. For the reasons that a knowledge requirement is needed to save condition 11 from being unconstitutionally vague, a knowledge requirement must be added to the various prescriptions of this condition. (See *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752 (*Freitas*); *Victor L.*, *supra*, 182 Cal.App.4th at p. 912.)

The minor further claims that even with a knowledge requirement, certain terms are impermissibly vague and overbroad. In particular, he argues that the prohibition concerning “controlled substances” is vague because without further definition, it would apply to medications prescribed by a doctor or dentist that he needs to take.

Although the condition also refers to “illegal drugs,” its reference to “controlled substances” is broad enough to cover drugs and medication properly and legally prescribed to treat medical conditions or alleviate pain. However, as the Attorney General points out, there is another probation condition that specifically addresses prescription medication and provides that the minor may “not possess or consume any prescription medication unless directed to do so by a medical doctor” and requires him to “notify your Probation Officer within 24 hours of receiving any medications and identify all medications.” Given this specific condition, we do not consider the more general prohibition against possessing or consuming “controlled substances” to be confusing or otherwise problematic concerning whether the minor may possess and take prescribed medication.

In our view, the general prohibition is directed at illegal drugs and “controlled substances” *that the minor cannot legally possess or consume*, including medications that have not been prescribed for him. For clarity and to avoid further constitutional challenges, the reference to “controlled substances” should be expressly qualified in this way.

The minor also challenges the proscription concerning possession of “poisons” as vague and overbroad because he could be found in violation of probation for possessing and properly using common herbicides, pesticides, rodenticides, and many household cleaning products.

We fail to see how preventing the proper use of these products is rationally related to the goals of public safety, crime prevention, and rehabilitation, especially when the minor’s offense did not involve poisons and the social study does not reveal that the minor had ever possessed or used poisons. In our view, the only rational and valid reason for the condition consistent with the legitimate goals of a probation is to prevent the minor from possessing and using poisons *for an illicit or illegal purpose or for any purpose other than that for which they designed and intended*. Accordingly, to provide sufficient notice and prevent arbitrary enforcement, the condition should be so qualified. (See *Sheena K*, *supra*, 40 Cal.4th at p. 890.)

The minor next claims that even with a knowledge requirement, the condition advising him not to “inhale or attempt to inhale or consume any substance of any type used as a paint, glue, plant material, or any aerosol product” is vague and overbroad.

Given the broad, unqualified use of the terms paint, glue, plant material, or any aerosols, the minor would not know whether he would violate the condition if he breaths while using a child’s basic washable paint set, working on a paint-by-numbers picture of a schooner, fixing a broken dinner plate with superglue, or using air freshener in the bathroom; or whether he would violate the statute by knowingly smelling flowers or eating arugula.

Moreover, its vague and general terms also render it overbroad. The social study report states that the minor smoked marijuana and did so regularly. The minor implies, and we agree, that the apparent purpose of this condition is to prevent the minor getting, or trying to get, intoxicated by sniffing or eating paint, glue, aerosols, or plant material. Although this purpose is reasonably related to the goals of probation, the condition

applies regardless of whether the minor inhales or consumes for the purpose of getting intoxicated. Thus, the condition would prohibit the minor from properly using paints, glues, aerosols, and plant material for their intended purposes and working at occupations where it would be difficult for him to avoid inhaling the fumes of paint, glues, and aerosols, such a commercial painting, cabinet making, hairdressing, and gardening. Indeed, it would prohibit the minor from going to a place where such work is taking place because he would be exposed to, and thus have to inhale, the paint, glue, and aerosol fumes.

For this reason, we find that the condition unnecessarily infringes on constitutionally protected activity—right to employment (*People v. Burden* (1988) 205 Cal.App.3d 1277, 1281 [restriction on the defendant’s constitutional right to employment was overbroad]) and right to travel (*In re White* (1979) 97 Cal.App.3d 141, 149-150 [probation condition violated constitutional right to travel]) and thus is not sufficiently tailored to achieve the legitimate goals of public safety, crime prevention, and rehabilitation to pass constitutional muster. Accordingly, we agree with the minor, that even with a knowledge requirement, the condition, as written, is fatally defective and should not be used.

The minor implicitly acknowledges that a condition preventing intoxication would serve the purposes of probation, and he suggests a condition that prohibits him from inhaling or consuming paint, glue, or plant material with the intent of achieving some level of intoxication. The Attorney General asserts that “the condition would be proper with the addition of scienter and intentionality elements.”

Preventing the minor from getting intoxicated and even from trying to do so with any substance, not just those enumerated in the condition, constitutes a legitimate goal and subject of a probation condition. Moreover, we agree with the parties that adding knowledge and intent elements would cure the vagueness and overbreadth defects suffered by the condition as written. Accordingly, we find that a proper condition would

prohibit the minor from (1) knowingly getting intoxicated by inhaling or consuming any substance and (2) purposefully attempting to get intoxicated by doing so. Expanding the condition to “any substance” would prevent the minor from taking prescription drugs that he otherwise may legitimately possess for the purpose of getting intoxicated.

We acknowledge that prohibiting defendant from simply *attempting* to get intoxicated renders him liable even if the substance he uses could not possibly have an intoxicating effect—e.g., smoking banana peels or drinking dihydrogen monoxide (i.e., H₂O). However, where, as here, the minor has a history of using marijuana, addressing the minor’s impulse to get intoxicated is just as important as preventing him from doing so. Thus, we consider it proper and appropriate for a condition to prohibit attempts to get intoxicated with any substance, regardless of whether the attempt could have been successful.

C. Weapons

Probation condition number 16 prohibits the minor from possessing “any weapons or any type of ammunition.”

The minor claims this provision is vague because it does not sufficiently define “weapons.” He argues that because virtually anything can be used as a weapon—a candlestick, bottle, or rope—the condition fails to provide adequate notice of what he may possess and gives authorities unfettered discretion to decide whether what he possesses violates the provision. For this reason, the minor suggests that the condition could be modified to prohibit possession of any deadly or dangerous weapon and possession of any item that may be used as a weapon with the intent of using it to inflict bodily injury.

The Attorney General concedes that “some modification, including a knowledge requirement, would be appropriate.” However, she disagrees with the minor’s suggested modification and proposes that the condition prohibit the minor from the purposeful

possession of any instrument which the minor knows could be used in either a defensive or offensive way to inflict bodily injury.

We agree with the minor that condition is vague and overbroad. The term “weapons” obviously includes to inherently deadly and dangerous weapons such as guns, knives, dirks, and blackjacks that are specifically designed as weapons. However, it does not obviously refer to things that can be used as weapons such as a baseball bat, a hammer, an ice pick, or, as defendant suggests, a candlestick, bottle, or rope. Moreover, because the possession and use of these items and innumerable other common objects and instruments for their intended purpose is legal, the condition is overbroad in that it imposes liability for otherwise lawful conduct and thus is not sufficiently tailored to achieve the purposes of probation. On the other hand, as the minor concedes, a condition could properly prohibit him from possessing non-inherently deadly or dangerous items for the purpose of using them as a weapon.

In *In re R.P.* (2009) 176 Cal.App.4th 562, the court upheld a juvenile probation condition prohibiting possession of any “dangerous or deadly weapon” against a challenge that it was unconstitutionally vague. (*Id.* at pp. 566-568; accord, *People v. Moore* (2012) 211 Cal.App.4th 1179, 1186.) The court cited the definitions of a deadly or dangerous weapon in statutes, case law, jury instructions, and Black’s Law Dictionary. Given all of these sources, the court concluded that the “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.” (*In re R.P.*, *supra*, 176 Cal.App.4th at p. 568, italics added.)

Given the vagueness and overbreadth of the term “weapons,” we believe that constitutional issues can be avoided if the condition prohibited (1) the possession of dangerous and deadly weapons and (2) the purposeful possession of items capable of being used as weapons.

Finally, we agree with the Attorney General that this probation condition must also have a knowledge requirement so that the minor cannot be found in violation if he is in possession of deadly or dangerous weapon without knowing it. (*Freitas, supra*, 179 Cal.App.4th 747, 752 [adding knowledge element to adult probation condition prohibiting possession of firearms].)

IV. DISPOSITION

The jurisdiction finding and disposition order are vacated, and the matter remanded to the juvenile court for DEJ proceedings in compliance with section 790 and rule 5.800. If the juvenile court denies DEJ, then it shall reinstate its jurisdiction finding and disposition order with modifications to the probation conditions as discussed above. If the court grants DEJ and considers it appropriate to impose

probation conditions like those previously imposed, those conditions must reflect the modifications discussed above.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.