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

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIO DIAZ JR.,

Defendant and Appellant.

H037952

(Monterey County  
Super. Ct. No. SSC110232A)

In this appeal, Elio Diaz Jr. (appellant) challenges as unconstitutionally vague and overbroad "probation conditions,"<sup>1</sup> which he asserts were imposed by the trial court after he entered into a negotiated plea agreement. Appellant argues that the conditions, which require him to not possess alcohol and drugs or frequent places where alcohol is the main item for sale, are vague and overbroad for lack of a knowledge requirement. For reasons that follow, we agree with appellant that some parts of these conditions must be modified.

*Background*

On November 29, 2011, appellant entered into a negotiated plea agreement whereby he agreed to plead guilty to one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and admit that he has served a prior prison term

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<sup>1</sup> Technically, the condition is not a condition of probation; rather it is a condition of mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).)

(Pen. Code, § 667.5, subd. (b)). In exchange for his guilty plea and admission, appellant was promised a "split" sentence of two years in county jail and one year on mandatory supervision.<sup>2</sup> (Pen. Code, § 1170, subd. (h).)

In sentencing appellant, the court imposed a two-year county jail sentence for the possession charge plus one year for the prison prior (§§ 1170, subd. (h)(5), 667.5, subd. (b)). However, pursuant to the plea agreement the court suspended one year of the three year term and ordered that appellant be released on mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).) In sentencing appellant, the court ordered that the mandatory supervision be "under the terms and conditions as set forth on pages 16 to 18 of the [probation officer's] report."

Relevant here, on page 16 of the probation officer's report, appellant is directed to "[t]otally abstain from the use of alcoholic beverages, not purchase or possess alcoholic beverages, and stay out of places [he] know[s] alcohol to be the main item of sale" (this condition is designated as "9"); and "[n]ot use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons known to defendant to use or traffic in narcotics or other controlled substances" (this condition is designated as condition "10").<sup>3</sup>

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<sup>2</sup> In sentencing a defendant to county jail under section 1170, subdivision (h)(1) or (2), the trial court has an alternative to a straight commitment to jail for the term specified by statute (*id.*, subd. (h)(5)(A)). That is, it can impose a hybrid sentence in which it suspends execution "of a concluding portion of the term" and sets terms and conditions for mandatory supervision by the county probation officer. (*Id.*, subd. (h)(5)(B).) We assume that is what defense counsel was referring to when he outlined the terms of the plea agreement as being for a "split" sentence.

<sup>3</sup> The court's minute order, which Judge Iglesia signed and dated on February 7, 2012, indicates that when appellant is on mandatory supervision he must "[t]otally 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"; and "[n]ot use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons [he] know[s], or [has] reason to suspect, use or traffic in narcotics or other controlled substances." As can be seen the conditions are similar. However, the wording of the conditions in the probation

First, it is important to note that appellant was not granted probation. Rather, appellant was sentenced pursuant to Penal Code section 1170, subdivision (h). Subdivision (h)(5) of section 1170 provides that the court "may commit the defendant to county jail as follows: . . . [¶] (B) For a term as determined in accordance with the applicable sentencing law, but suspend execution of a concluding portion of the term selected in the court's discretion, during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. . . ." We stress that a defendant sentenced under this scheme is not actually "on probation" rather he or she is on supervised release from custody, "akin to probation." (*People v. Griffis* (2013) 212 Cal.App.4th 956, 963, fn. 2.) Accordingly, the terms and conditions of appellant's mandatory supervision are not probation conditions.

That being said, we refer to the conditions at issue here as conditions of mandatory supervision, but treat them as akin to probation conditions.

#### *Discussion*

As noted, appellant contends that the lower court erred when it imposed unconstitutionally vague and overbroad conditions. Specifically, appellant argues that the condition that states that he must "[t]otally 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" is vague and overbroad as it does not include a requirement that he

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officer's report controls because this is what the court ordered orally. The minute order does not control. Any discrepancy is deemed to be the result of clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Price* (2004) 120 Cal.App.4th 224, 242.) "[T]he clerk's minutes must accurately reflect what occurred at the hearing." (*People v. Zachery* (2007) 147 Cal.App.4th 380, 388.)

"know the circumstances which would violate his probation." He makes the same argument with respect to the condition that he "not use o[r] possess alcohol/narcotics, intoxicants, drugs or other controlled substances without a prescription of a physician."

In *In re Sheena K.* (2007) 40 Cal.4th 875, 888–889 (*Sheena K.*) the California Supreme Court held that the forfeiture rule of *People v. Welch* (1993) 5 Cal.4th 228, 232–238, (*Welch*),<sup>4</sup> did not apply to a probation condition that was challenged as unconstitutionally vague or overbroad on its face. Despite this rule, respondent contends that appellant has forfeited his challenge to the conditions of his mandatory supervision. Respondent argues that on direct appeal we should restrict challenges to only conditions implicating First Amendment rights.

Alternatively, respondent invites this court to adopt the approach of the Third District Court of Appeal in *People v. Patel* (2011) 196 Cal.App.4th 956, 960, wherein the court concluded that it will no longer entertain challenges to probation conditions lacking an explicit knowledge requirement and will simply "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly."

As to respondent's argument that we should restrict challenges to conditions of mandatory supervision to only those implicating First Amendment rights, we decline so to do.<sup>5</sup> Nothing in *Sheena K* expressly or implicitly restricts the exception to the

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<sup>4</sup> In *Welch, supra*, 5 Cal.4th at pages 234–238, the Supreme Court extended the forfeiture rule to a claim that probation conditions are unreasonable, when the defendant fails to object on that ground in the trial court. The Supreme Court reasoned that an adult probationer who elects to receive probation in lieu of incarceration fairly may be charged with the need to timely challenge any conditions imposed and that application of the forfeiture doctrine would deter the promulgation of invalid conditions in the trial court and decrease the number of appeals contesting such conditions. (*Id.* at pp. 235–237.)

<sup>5</sup> Respondent's reliance on *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*), for the proposition that not all conditions are created equal, is misplaced. In *Olguin*, the Supreme Court considered a challenge to a probation condition that required the defendant to notify his probation officer of any pets that were present in the home. (*Id.* at

forfeiture rule to only conditions that impinge on First Amendment rights. The forfeiture analysis was not based on the subject matter of the condition. Rather, the forfeiture analysis turned on the ease with which an appellate court can remedy an unconstitutional condition. (*Sheena K.*, *supra*, 40 Cal.4th at p. 888, [a facially vague or overbroad condition presents an asserted error that is a pure question of law easily remedied on appeal].)

As to respondent's argument that we should take the approach of the Third District Court of Appeal in *People v. Patel*, *supra*, 196 Cal.App.4th 956 (*Patel*), again, we decline so to do. In *Patel*, the court expressed its frustration with the "dismaying regularity" with which "we still must revisit the issue in orders of probation" that do not include a qualification that the defendant must commit the proscribed conduct knowingly. (*Id.* at p. 960.) Noting that "there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter" (*ibid.*), the *Patel* court announced that it would "no longer entertain this issue on appeal" (*ibid.*) and, moving forward, it would "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken

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p. 378.) The condition was challenged on various grounds such as not being reasonably related to future criminality, that it limited the defendant's fundamental rights, and was unconstitutionally overbroad. (*Ibid.*) The defendant invited the court to determine whether the condition was closely tailored to achieve its legitimate purpose of his rehabilitation and protection of the probation officer. The court refused to apply such close scrutiny in the absence of a showing that the probation condition infringed upon a constitutional right. The court noted that absent such a showing, the court simply reviewed such a condition for abuse of discretion. (*Id.* at p. 384.) Respondent seizes upon this to argue that the Supreme Court has recognized that not all probation conditions merit equal scrutiny. Nothing in *Olguin* invalidates the holding in *Sheena K.*, *supra*, 40 Cal 4th 875. The fact that the Supreme Court believes that different levels of scrutiny are available for conditions that are challenged on reasonableness grounds does not support imposition of a forfeiture rule unless the condition implicates First Amendment rights. Appellant is not asking for a heightened level of constitutional scrutiny. Rather, he is asking that his due process rights be protected.

knowingly" (*ibid.*), without modifying a probation order that "fails to expressly include such a scienter requirement" (*id.* at p. 961). In *People v. Moses* (2011) 199 Cal.App.4th 374, 381, the Fourth District declined to adopt the *Patel* approach, choosing instead to modify probation conditions to include a knowledge requirement.

While we too are frustrated by how frequently this issue arises and, in these days of strained budgets, we agree that the interests of fiscal and judicial economy are critical, we decline to follow the Third District's approach in *Patel*. We can anticipate several situations in which the probation condition at issue will require a case-specific modification to provide the defendant with adequate notice. (See *People v. Moore* (2012) 211 Cal.App.4th 1179, 1188, fn. 7 [choosing to modify probation conditions on a case-by-case basis rather than adopting *Patel* approach].)

We continue to adhere to the view that in order to pass constitutional muster, a requirement of knowledge should be included in some conditions of mandatory supervision prohibiting the possession or use of specified items. The law has no legitimate interest in punishing a defendant on mandatory supervision who has no knowledge that he is using or possessing a prohibited item. Knowledge requirements in conditions of mandatory supervision "should not be left to implication." (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

That being said, we take this opportunity to direct that the Superior Court of the State of California for the County of Monterey take steps to ensure that its conditions of mandatory supervision both as announced by the court and in the court's minute order meet constitutional requirements by including "know or reasonably should know" in the conditions.

We do find the two conditions at issue here to be vague rather than suffer from overbreadth. "The concept of unconstitutional vagueness is related to the concept of unconstitutional overbreadth, but 'there are important differences.' [Citation.] 'A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits

constitutionally protected conduct." ' [Citation.] The underlying concern of the vagueness doctrine is the core due process requirement of adequate *notice*." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) Conditions of mandatory supervision must be sufficiently precise for a defendant to know what is required of him or her.

As noted *ante*, appellant is subject to the alcohol condition as detailed in the probation officer's report as condition "9," which as to being in places where alcohol is the main item for sale does include a knowledge requirement. Nevertheless, the first part of the alcohol condition lacks a knowledge requirement. Accordingly, we will modify condition nine.

As to condition "10," it prohibits appellant from using or possessing "alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons known to defendant to use or traffic in narcotics or other controlled substances."<sup>6</sup> As to the reference to alcohol in this condition, it is not only superfluous considering that condition nine deals with using and possessing alcohol, it is also nonsensical; it allows appellant to use or possess alcohol with a physician's prescription. There is no indication in the record that the trial court intended any such result. Furthermore, unless we assume the trial court used the word "drugs" as a synonym for controlled substances, the condition can be understood to include within its ambit legal nonprescription medications such as aspirin. Again, there is no indication in the record that the trial court intended any such result. Inserting the adjective "unlawful" before "drugs" renders the probation condition unintelligible because it would forbid appellant from using, or possessing unlawful drugs unless he had a prescription from a physician. The reference to "drugs" as a synonym for controlled substances adds nothing to the probation condition. Therefore, for the sake of clarity, in

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<sup>6</sup> Again, the second half of this condition, which forbids appellant from associating with persons that use or traffic in narcotics or other controlled substances, does contain a knowledge requirement.

addition to adding a knowledge requirement we will modify the condition to delete the superfluous references to "alcohol" and "drugs" in condition 10.

The part of condition 10 that prohibits appellant from trafficking in narcotics also needs a knowledge requirement added. As written, appellant is susceptible to breaking this condition unwittingly.

Just as an appellate court is empowered to modify a probation condition in order to render it constitutional (*Sheena K., supra*, 40 Cal.4th at p. 892), we see no reason that the same logic should not apply to conditions of mandatory supervision.

*Disposition*

Supervised release condition number nine is modified to read as follows:

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.

Supervised release condition number 10 is modified to read as follows:

Do not knowingly use or possess narcotics, intoxicants, or other controlled substances without the prescription of a physician; do not knowingly traffic in narcotics or other controlled substances, or associate with persons known to you to use or traffic in narcotics or other controlled substances.

As so modified the judgment is affirmed. The clerk of the court is directed to amend the sentencing minutes to reflect these modifications.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.