

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN CASTANEDA RUIZ,

Defendant and Appellant.

H038020

(Monterey County

Super. Ct. No. SS112332)

Defendant Adrian Castaneda Ruiz pleaded no contest to felony possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and misdemeanor possession of burglary tools (Pen. Code, § 466). The trial court suspended sentence and placed defendant on three years formal probation, subject to various terms and conditions. Defendant appealed, arguing that the trial court failed to determine his ability to pay prior to imposing certain fees, that his probation condition forbidding association with “gangs” is unconstitutionally vague, and that his probation condition prohibiting possession of firearms lacks a knowledge requirement.

We modify the clerk’s minute order to reflect the \$864 fee for the preparation of the probation report and the \$81 fee for the cost of supervised probation as orally pronounced by the trial court. We also modify the probation condition prohibiting association with gangs to specify that for the purposes of the condition the word “gang” means “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f). In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Offense

The circumstances of defendant's offense are taken from the probation officer's report, which is based upon a Monterey County Sheriff's Office report. On December 6, 2011, a deputy conducted a pedestrian check on defendant in Pajaro, California. Defendant identified himself as "Adrian Ruiz Castaneda," and gave his consent to the deputy to have his person and his backpack searched. The deputy found a pair of bolt cutters, a pair of vice grips, flashlights, a glass cutter, and a glass smoking pipe in defendant's backpack. The deputy also found a plastic bindle which contained a milky white substance in defendant's left front pocket. After a records check, it was determined that defendant was on probation. Defendant was arrested and transported to the Monterey County jail.

In an interview with his probation officer, defendant admitted that he had been a Sureno gang member since the age of 12. Defendant's gang membership was documented, and during his time in the Monterey County jail defendant was housed in an active gang member housing unit. Defendant has several tattoos, including the letters "SUR" on his right arm and "PSW" (Poor Side Watsonville) on his left arm. Defendant also wrote the name of his gang on his jail sandals.

The Plea

The district attorney charged defendant by complaint on December 13, 2011, with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count 1), possession of burglar's tools (Pen. Code, § 466, count 2), and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364, subd. (a), count 3).¹ On January

¹ Defendant was also charged with a misdemeanor stemming from this offense in a separate case. After his arrest for possession of a controlled substance in December 2011, defendant was released on his own recognizance and was scheduled to appear in (continued)

17, 2012, defendant entered a plea of no contest to counts 1 and 2. The trial court then dismissed all remaining counts.

On February 28, 2012, the trial court suspended imposition of sentence and placed defendant on probation for three years subject to various terms and conditions. Among these conditions was the condition that defendant “[n]ot associate with any individuals you know or are told by the Probation Officer to be gang members, drug users, or on any form of probation or parole supervision.” Defendant was also subject to the condition that he “[n]ot possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement. (PC 12021).” The trial court also orally imposed fines and fees, including \$864 for probation services based on his ability to pay, and \$81 per month for probation supervision. There is nothing in the record that suggests the court advised defendant of his right to an ability to pay hearing, or that defendant waived this right. Defendant filed a notice of appeal on the same day.

DISCUSSION

Defendant raises three issues on appeal. First, defendant argues that the \$864 probation services fee, the \$81 per month probation supervision fee, and the booking fees imposed by the trial court should be vacated because the trial court failed to make a determination of his ability to pay as required by law. Second, defendant argues that the probation condition requiring him to stay away from gang members is unconstitutionally vague, as there is no clear definition of what constitutes a “gang.” Lastly, defendant argues that the probation condition prohibiting him from owning or possessing firearms

court on December 15, 2011. Defendant failed to appear at court, and a bench warrant was issued. Defendant was thereafter charged with a violation of Penal Code section 1320, subdivision (b), for his failure to appear. This misdemeanor offense is not a subject of this current appeal.

must be modified because it fails to include an express knowledge requirement. We address each of these contentions in turn.

A. *Probation-Related Fees and Booking Fees*

Probation-Related Fees

When the trial court placed defendant on probation, it also separately imposed fines and fees, including \$864 for probation services and \$81 per month for probation supervision. Defendant now argues that these fees should be vacated, and the matter should be remanded because the trial court imposed these fees without advising him of his right to an ability to pay hearing, and that he never intelligently waived this right. Defendant additionally contends that there is insufficient evidence of his ability to pay the probation supervision fees. It is unclear from the record under which statute the trial court imposed these probation-related fees, but it can be presumed that it did so under Penal Code section 1203.1b, as that is the section of the Penal Code dealing with fees stemming from probation supervision and the preparation of the probation report.

Procedurally, Penal Code section 1203.1b sets forth a process that must be followed before a trial court may impose fees for the cost of supervised probation or for the preparation of the probation report. A court must first order a defendant report to the probation officer, who will then make a determination of defendant's ability to pay. (Pen. Code, § 1203.1b, subd. (a).) The court must then inform the defendant of his or her right to a hearing, during which the court will make a determination of defendant's ability to pay. (*Ibid.*) A defendant may waive his or her right to this hearing, but this waiver must be made knowingly and intelligently. (*Ibid.*) If a defendant does not waive his or her right to a hearing, the matter will be remanded to the trial court that will then determine defendant's ability to pay. (*Ibid.*)

In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, Pacheco appealed the imposition of a probation supervision fee that he argued was imposed without a

determination of his ability to pay.² (*Id.* at p. 1400.) After review of the record, this court determined that there was no evidence indicating that the probation officer or the court ever “made a determination of Pacheco’s ability to pay the \$64 per month probation supervision fee.” (*Id.* at p. 1401.) Nor was there “any evidence that probation advised him of his right to have the court make this determination or that he waived this right.” (*Ibid.*) We found that “[i]n short, it appears that the statutory procedure provided at [Penal Code] section 1203.1b for a determination of Pacheco’s ability to pay probation related costs was not followed” and concluded that the monthly probation fee could not stand. (*Ibid.*)

We find that here, like in *Pacheco*, the trial court did not follow the statutory procedure set forth in Penal Code section 1203.1b. As defendant argues, there is nothing in the record that suggests that defendant was ever advised of his right to have a hearing on his ability to pay, nor did he ever waive his right to a hearing. We therefore find that the probation supervision fee and the cost of preparation of the probation report ordered by the trial court cannot stand. We remand the imposition of these fees to the trial court with directions that it comply with the statutory requirements set forth in Penal Code section 1203.1b by ordering a determination be made of defendant’s ability to pay such fees.³ (*People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1067-1068.)

² Our Supreme Court recently disapproved of *Pacheco* on another point in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*). The *McCullough* court held that a defendant forfeited the argument that insufficient evidence supported his ability to pay a booking fee under Government Code section 29550.2 if he failed to object below. (*McCullough, supra*, at p. 599.)

³ Since we remand these fees on the basis that the statutory procedures set forth under section 1203.1b were not followed, we need not address defendant’s other claim that there was insufficient evidence of his ability to pay the fees.

Booking Fees

Defendant similarly objects to the imposition of booking fees, despite his failure to object below. During sentencing, the trial court orally imposed booking fees without specifying an amount, instead stating that he would be required to “pay booking fees based on your ability to pay.” The trial court’s minute order reflects the trial judge’s oral pronouncement, as it states: “Defendant shall pay, in accordance with his ability to pay, the criminal justice administration fee incurred in Defendant’s arrest and booking in accordance with section[s] 29550.1/29550.2 [of the] Government Code.”

From the facts in the record, it appears the county sheriff arrested defendant. Accordingly, it seems that the booking fee should have been imposed under Government Code section 29550, as that is the code that applies when the county makes arrests. Government Code section 29550.1, cited by the trial court in its minute order, applies when a local agency, such as a city, makes an arrest. We therefore amend the line in the minute order referencing the fee to refer to Government Code section 29550, as it is a clerical error that this court may correct without request by either party. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187.)

Defendant challenges the imposition of the booking fee, as he claims that the booking fee was imposed without consideration of his ability to pay, and that the trial court’s qualification that the booking fee would be imposed based on his ability to pay does not cure any alleged defects, as all it does is “parrot the statutory requirement” that defendant have an ability to pay. However, we find no error with the trial court’s order. The trial court simply imposed the booking fee, subject to defendant’s ability to pay. Defendant’s argument, that insufficient evidence existed to support the trial court’s imposition of the fees, is premature. There is no indication from the record that the trial court conducted a determination into defendant’s ability to pay, or that he was ordered to pay a certain fine without such a prior determination. Without the imposition of an actual

booking fee, there is no error. Furthermore, even if the trial court has specifically imposed booking fees, under the reasoning set forth by our Supreme Court in *McCullough*, since defendant failed to object to the imposition of the fees below, he would have forfeited his claim on appeal. (*McCullough, supra*, 56 Cal.4th at p. 599.) Accordingly, we affirm the trial court's order of the booking fee as pronounced.

B. *The Challenged Probation Conditions*

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.)

Oral Pronouncement of the Probation Conditions

Preliminarily, we note that the trial court in this case did not orally recite each of the conditions of probations imposed on defendant. In lieu of an oral pronouncement, the trial court referenced the probation conditions proposed by defendant's probation officer, which are included in the probation report. Prior to imposition of the probation conditions, the trial court asked defendant, "[w]ould it be fair to say that you reviewed these terms and conditions . . . with your lawyer; is that correct?" The trial court then ordered, in reference to the recommended conditions in the probation report, that "[t]erms and conditions for the [offense] would be one through--one through 13; also, term and condition 14; term and condition . . . I would not impose the term and condition 15 [*sic*] . . . condition 16; 17 is in; term and condition 18; term and condition 19, four days in the Monterey County Jail, credit for time served of four days; term and condition 20, 21, 22"

As other courts have held, probation conditions need not be pronounced verbatim, so long as the defendant is advised of the conditions and knows of their existence. In *People v. Thrash* (1978) 80 Cal.App.3d 898 (*Thrash*), the trial court placed a defendant on probation subject to conditions set forth in the probation report. (*Id.* at p. 900.) Thrash was not orally advised of a probation condition that included a travel restriction, though the condition was included in an amended probation order that he received. (*Ibid.*) Thrash later violated the travel restriction condition, and his probation was revoked. Thrash appealed, and the Fourth Appellate District affirmed the order revoking probation, holding 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 and the probationer has a probation officer who can explain to him the contents of the order.” (*Id.* at pp. 901-902.)

Similarly, though the probation conditions imposed on defendant were not orally pronounced in court, they were contained within the probation report and in the signed minute order. Defendant was aware of the imposed conditions, and therefore oral recitation of the conditions in court was not necessary. (*Thrash, supra*, 80 Cal.App.3d at pp. 901-902.) We therefore find that the probation conditions were properly imposed, and when analyzing defendant’s challenges to the probation conditions we reference the conditions set forth in the minute order, which are the same as the recommended conditions in the probation officer’s report.

Condition No. 17: Prohibition Against Associating with Gang Members

Condition No. 17, as imposed by the trial court, reads: “Not associate with any individuals you know or are told by the Probation Officer to be gang members, drug users, or on any form of probation or parole supervision.” Defendant challenges the probation condition because it fails to define “gang.”

“ ‘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.)

Defendant argues that we should follow the decision in *People v. Lopez* (1998) 66 Cal.App.4th 615 (*Lopez*), and amend the probation condition to include the definition of “gang” contained in the STEP Act.⁴ The defendant in *Lopez* challenged one of his

⁴ The STEP Act stands for the California Street Terrorism Enforcement and Protection Act. (Pen. Code, § 186.20 et seq.) Penal Code section 186.22 “(1) criminalizes active participation in any ‘criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang’ (§ 186.22, subd. (a)); and (2) mandates the imposition of an enhanced term of punishment upon a person convicted of a felony ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members’ (§ 186.22, subd. (b)(1)). For purposes of this statute, the phrase ‘criminal street gang’ is defined as: ‘any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [23 identified crimes], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.’ (§ 186.22, subd. (f).) [¶] ‘Pattern of criminal gang activity’ under the statute means: ‘the commission of, attempted commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain identified crimes], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the (continued)

probation conditions prohibiting from associating with gang members on the basis that the condition was unconstitutionally vague. (*Id.* at p. 623.) The appellate court agreed, modifying the probation condition to include a definition of “gang.” (*Id.* at p. 638.) First, the court noted that though the word “gang” certainly had “sinister implications,” it also had “considerable benign connotations.” (*Id.* at p. 631.) Then, it determined that in the context of Lopez’s probation condition, it is apparent that “gang” was “intended to apply only to associations which have for their purpose the commission of crimes.” (*Id.* at p. 632.) However, the court decided to amend the probation condition to include the statutory definition of “gang” codified at Penal Code section 186.22, as it has “withstood attack on the same constitutional grounds advanced here by Lopez,” and because “[b]y so amending the condition, any due process concerns about it will be eliminated and Lopez will be unambiguously notified of the standard of conduct required of him.” (*Lopez, supra*, at p. 634.)

The People argue that no modification is necessary because the definition of “gang” is defined in statutes that criminalize gang activity, thereby eliminating the need for the probation condition itself to contain a definition of “gang.” In support of its argument, the People erroneously rely on this court’s decision in *People v. Kim* (2011) 193 Cal.App.4th 836, 843-847 (*Kim*). In *Kim*, we held that a probation condition prohibiting a defendant from possessing or owning firearms need not be modified to include an express knowledge requirement because the challenged condition explicitly referenced former Penal Code sections 12021 and 12316. (*Kim, supra*, at p. 846.) We reasoned that “[i]mplicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm. We believe the same

offenses were committed on separate occasions, or by two or more persons[.]’ (§ 186.22, subd. (e).)” (*Lopez, supra*, 66 Cal.App.4th at pp. 632-633, fn. omitted.)

is true of a probation condition prohibiting possession of a firearm, and, by logical extension, possession of ammunition.” (*Ibid.*)

The reasoning applied in *Kim* does not extend to cure a defect with respect to the vagueness of a probation condition that lacks a clear definition of one of its key terms, “gang.” Our holding in *Kim* is best understood as imputing a scienter requirement in a probation condition when the condition references or tracks a statute that includes an express scienter requirement. This is not the scenario presented in defendant’s case. Here, the challenged condition does not specifically reference or track a statute that references a definition of “gang.” Without a clear definition of who is considered a “gang member,” defendant could unknowingly violate the condition.

We therefore disagree with the People’s position, and under the same rationale set forth by the appellate court in *Lopez*, we order the probation condition modified to include a provision that for the purposes of the condition the word “gang” means “criminal street gang” as defined in Penal Code section 186.22, subdivisions (e) and (f).

Condition No. 13: Prohibition Against Possessing Firearms

Condition No. 13, as imposed by the trial court, reads: “Not possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement. (PC 12021).” Defendant claims this condition is unconstitutionally vague as it does not include an express scienter requirement, arguing that this court’s decision in *Kim*, as described *ante*, is inapplicable, as the statutes contemplated in *Kim* were repealed and therefore cannot apply.

Our determination in *Kim* was not limited to expressly only apply to those probation conditions that specifically cite to former Penal Code sections 12021 and 12316. In *Kim*, we declined to modify a probation condition to include an express scienter requirement because it referenced the statute prohibiting felons from possessing

firearms, which itself contains the requirement that a violation must be willful and intentional. (*Kim, supra*, 193 Cal.App.4th at p. 846.) Here, defendant's challenged probation condition is substantively the same as the challenged condition in *Kim*, as it explicitly referenced former Penal Code section 12021, which then codified the prohibition against felons owning firearms. As we reasoned in *Kim*, implicit in a probation condition prohibiting a felon from possessing a firearm is the requirement that the individual know that the forbidden item is in his possession, and that the item is a firearm. (*Kim, supra*, at pp. 846-847.) As such, the probation condition need not be modified to include an express scienter requirement.

Contrary to defendant's claims, the fact that the statutes discussed in *Kim* were repealed does not weaken our court's determination in the case, and nor does it negate the rationale supporting our decision. The Legislature repealed former Penal Code section 12021 effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) This means that at the time the trial court imposed defendant's probation conditions, former Penal Code section 12021 was still in effect, and as a result, the condition's reference to statute effectively imputed a scienter requirement into defendant's probation condition. Nonetheless, to avoid any unnecessary confusion that may stem from a probation condition referencing a repealed statute, we will modify the condition to include a reference to Penal Code section 29800. Penal Code section 29800 now contains the provisions previously located in former Penal Code section 12021 that forbid felons from possessing or owning firearms. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

DISPOSITION

The order directing defendant to pay \$864 for the cost of preparation of the probation report and \$81 per month for the cost of supervised probation is remanded to the trial court for a determination of defendant's ability to pay pursuant to Penal Code section 1203.1b.

The minute order is amended to reflect that defendant's criminal justice administration fee is imposed pursuant to section 29550 of the Government Code.

Probation condition No. 17 is modified to read: "Not associate with any individuals you know or are told by the Probation Officer to be gang members, drug users, or on any form of probation or parole supervision. For the purposes of this condition, the word 'gang' means 'criminal street gang' as defined in Penal Code section 186.22, subdivisions (e) and (f)."

Probation condition No. 13 is modified to read: "Not possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement. (Pen. Code, § 29800.)"

In all other respects, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.