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

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

H038060
(Monterey County
Super. Ct. No. J46053)

THE PEOPLE,

Plaintiff and Respondent,

v.

D.E.,

Defendant and Appellant.

In this delinquency proceeding (see Welf. & Inst. Code, § 602),¹ the court declared D.E. a ward of the court and placed him on probation for a period of 24 months on certain terms and conditions. D.E. now challenges six probation conditions.

We modify five of the challenged probation conditions to avoid any facial constitutional invalidity and affirm the dispositional orders as modified.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

I

Procedural History

A juvenile wardship petition, filed November 22, 2011, alleged that, on or about November 17, 2011, D.E. committed an assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). Following a contested jurisdiction hearing, the court found the petition's allegation to be true beyond a reasonable doubt and declared the violation to be a felony.

A probation report described the incident, which occurred on November 17, 2011, as follows. During a break between class periods, a student, R.R., was assaulted by three students, one of whom was identified as D.E., after R.R. left the gym at Los Arboles Middle School. Another assailant was identified as G.S. When R.R. fell to the ground, D.E. started kicking him. R.R. was hit, kicked and punched and an open knife was held to his neck. R.R. had "one inch marks resembling cuts with dried blood across his chin" and "red marks on his neck," which R.R. indicated had been made by the knife. A witness, J.B., identified D.E. as the person who was kicking R.R. J.B. stated that D.E. was not the person holding the knife. D.E. was 14 years old at the time of the incident; the victim was 11 years old.

The disposition hearing was uncontested. In its dispositional orders, dated March 14, 2012, the court ordered D.E. ("minor") to remain in the custody of his parents or guardians under the supervision of the probation officer. The court imposed the terms and conditions of probation recommended by the probation officer. Minor indicated that he had read and understood them. When asked whether there were any terms or conditions that he did not understand or needed clarification, minor answered, "No." Minor's counsel did not raise any objections to the probation conditions.

II

Discussion

A. Facial Constitutional Challenges

"The juvenile court has wide discretion to select appropriate conditions and may impose 'any reasonable condition that is fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1015 . . . ; Welf. & Inst.Code, § 730, subd. (b); see [*People v. Welch* (1993) 5 Cal.4th 228,] 233 . . .)." (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (" *Sheena K.*").) Any objection to the reasonableness of a probation condition is forfeited if not raised at the time of imposition. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 814; see also *Sheena K.*, *supra*, 40 Cal.4th at p. 883, fn. 4; *People v. Welch* (1993) 5 Cal.4th 228, 237.) Constitutional challenges to probation conditions on their face, however, may be raised on appeal without objection in the court below. (*Sheena K.*, *supra*, 40 Cal.4th at pp.887-889.)

"[A]n appellate claim—amounting to a 'facial challenge'—that phrasing or language of a probation condition is unconstitutionally vague and overbroad . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Id.* at p. 885.) A constitutional challenge to a probation condition based upon vagueness or overbreadth presents a pure question of law where the term or condition is "capable of correction without reference to the particular sentencing record developed in the trial court" (*Id.* at p. 887.)

Not every constitutional challenge is facial; "a probation condition may not be patently unconstitutional but may suffer nonetheless from vagueness or overbreadth." (*Sheena K.*, *supra*, 40 Cal.4th at p. 887.) "[I]n some instances, a constitutional defect may be correctable only by examining factual findings in the record or remanding to the trial court for further findings." (*Ibid.*) Challenges to probation conditions that do not

present pure questions of law are subject to the ordinary rule of forfeiture. (See *id.* at p. 889.)

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' (*People v. Castenada* (2000) 23 Cal.4th 743, 751) The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' (*ibid.*), protections that are 'embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).' (*Ibid.*) The vagueness doctrine ' "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " [Citations.]' (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115) A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' (*Id.* at p. 1116) 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.*" ' (*Id.* at pp. 1116–1117 . . . , italics in original.)" (*Sheena K., supra*, 40 Cal.4th at p. 890.) "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 challenge on the ground of vagueness. [Citation.]" (*Ibid.*)

"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. (See [*In re White* (1979) 97 Cal.App.3d 141,

149-150 . . .)"² (*Ibid.*) With respect to probation conditions, "[c]ertain intrusions by government which would be invalid under traditional constitutional concepts may be reasonable at least to the extent that such intrusions are required by legitimate governmental demands." (*In re White* (1979) 97 Cal.App.3d 141, 149-150 [probation condition violated constitutional right to travel].)

B. *Condition 11—Restrictions on Association*

Condition 11 provides: "Your associates are to be approved by your parent/guardians, and you shall not associate/communicate with [G.S.] [and/or] any individuals identified by your Probation Officer as a threat to your successful completion of probation. You are not to associate with any individuals *known by you* to be on Probation or Parole (adult or juvenile)." (Italics added.)

To correct for an omitted conjunction, minor asks this court to modify the probation condition by inserting the word "and" after the named individual in the first sentence. He does not state any authority for this request.

² The California overbreadth doctrine does not parallel federal overbreadth doctrine. Under the federal "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." (*U.S. v. Williams* (2008) 553 U.S. 285, 292 [128 S.Ct. 1830].) Such a challenge is an exception to the traditional rule that " 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' [Citation.]" (*Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32, 38 [120 S.Ct. 483].) Even "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' [Citation.]" (*Osborne v. Ohio* (1990) 495 U.S. 103, 112 [110 S.Ct. 1691].) "The fact that [a particular law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since [the U.S. Supreme Court has] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment. [Citation.]" (*U.S. v. Salerno* (1987) 481 U.S. 739, 745 [107 S.Ct. 2095].) Federal "overbreadth analysis does not normally apply to commercial speech [citations]" (*Board of Trustees of State University of New York v. Fox* (1989) 492 U.S. 469, 481 [109 S.Ct. 3028].)

As to its constitutionality, minor argues that the condition is defective because it lacks a knowledge requirement with respect to persons with whom he is prohibited from associating or communicating by a parent or his probation officer. He also maintains that the condition "imposes an impractical advance parental approval requirement" and "should have been worded to prohibit association with individuals 'disapproved' of by [his] parents or probation."

In addition to the foregoing vagueness claims, minor challenges the condition as overbroad because "it delegates unfettered discretion to the probation officer, giving power to preclude the minor's association with virtually anyone, including grocery clerks, mail carriers, and health care providers. [Citations.]" Minor further states that condition 11 is "overbroad because it curtails [his] constitutional right of association without being specifically tailored to the circumstances of this case. [Citation.]"

The People argue that this condition contains no facial constitutional defect requiring rectification by this court. If this court chooses to insert a clarifying conjunction, however, the People maintain that the word should be "or" and not "and."

This court may correct a clerical error at any time and will correct for the omitted conjunction. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We conclude that "or" is the more appropriate choice because it better conveys that association or communication with any prohibited person constitutes a violation of condition 11. We turn to minor's constitutional challenges.

An individual's "freedom of association" under the federal Constitution "receives protection as a fundamental element of personal liberty" and as a component of the First Amendment. (*Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 617-618 [104 S.Ct. 3244].) Even if not coextensive with an adult's right of association, a child still enjoys constitutionally protected freedom of association. (See *Brown v. Entertainment Merchants Ass'n* (2011) ___ U.S. ___, ___ [131 S.Ct. 2729, 2741] ["Even where the protection of children is the object, the constitutional limits on governmental action

apply"]; *Bellotti v. Baird* (1979) 443 U.S. 622, 633 [99 S.Ct. 3035] (plur. opn. of Powell, J.) ["A child, merely on account of his minority, is not beyond the protection of the Constitution"], 635 ["although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.' [Citation.]"]; see also *Tinker v. Des Moines Independent Community School Dist.* (1969) 393 U.S. 503, 511 [89 S.Ct. 733] ["Students in school as well as out of school are 'persons' under our Constitution" and "[t]hey are possessed of fundamental rights which the State must respect"].) Consequently, a probation condition limiting the right of association must be narrowly drawn to avoid constitutional infirmity. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

In *Sheena K.*, *supra*, 40 Cal.4th 875, a probation condition prohibiting association with "anyone disapproved of by probation" was challenged on grounds of vagueness and overbreadth. (*Id.* at pp. 878, 889.) The Supreme Court agreed that the probation condition was unconstitutionally vague "in the absence of an express requirement of knowledge." (*Id.* at p. 891.) The court approved the appellate court's modification of the condition "to require that defendant refrain from associating with anyone whom *she knew* was disapproved of by her probation officer." (*Id.* at pp. 880, 891.) The Supreme Court further stated: "In the interest of forestalling future claims identical to defendant's based upon the same language, we suggest that form probation orders be modified so that such a restriction explicitly directs the probationer not to associate with anyone 'known to be disapproved of' by a probation officer or other person having authority over the minor." (*Id.* at p. 892.)

We agree with minor that knowledge requirements must be added to the condition to render it constitutional under *Sheena K.* We do not agree, however, that the delegation of authority to the probation officer in this case resulted in an unconstitutionally overbroad condition.

In *Sheena K.*, the Supreme Court determined that by "inserting the qualification that [Sheena] have knowledge of who was disapproved of by her probation officer," the appellate court had "secur[ed] the constitutional validity of the probation condition." (*Id.* at p. 892.) The Supreme Court found it unnecessary to decide whether "the probation condition also is unconstitutionally overbroad" (*id.* at p. 892, fn. 8). Its conclusion implies that such delegation of authority to a minor's probation officer to disapprove a minor's associates in a delinquency probation condition does not render it overbroad.

Delinquency cases stand on a different footing than adult probation cases. In *People v. Leon* (2010) 181 Cal.App.4th 943, 953, which minor cites on appeal, this court observed that "[a] probation condition that in effect delegates unfettered discretion to a probation officer to determine its scope at the very least risks being unconstitutionally overbroad." In that case, in partial reliance upon *People v. O'Neil* (2008) 165 Cal.App.4th 1351, we concluded that a probation condition generally banning an adult defendant from appearing in any court proceeding, except if the defendant was a party or witness, was "not saved because it allows defendant to attend court proceedings with the probation officer's permission." (*People v. Leon, supra*, 181 Cal.App.4th at p. 953.)

In *People v. O'Neil, supra*, 165 Cal.App.4th 1351, which minor also cites, the court imposed the following condition: " 'You shall not associate socially, nor be present at any time, at any place, public or private, with any person, as designated by your probation officer.' " (*Id.* at p. 1354.) The reviewing court observed that, "[a]s written, there are no limits on those persons whom the probation officer may prohibit defendant from associating with." (*Id.* at p. 1357.) The condition did not "identify the class of persons with whom defendant may not associate" or "provide any guideline as to those with whom the probation department may forbid association." (*Id.* at pp. 1357-1358.) The reviewing court explained that a trial court "may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation" but "the court's order cannot be entirely open-ended."

(*Id.* at pp. 1358-1359.) "It is for the court to determine the nature of the prohibition placed on a defendant as a condition of probation, and the class of people with whom the defendant is directed to have no association." (*Id.* at p. 1359.) "Without a meaningful standard, the order is too broad and it is not saved by permitting the probation department to provide the necessary specificity." (*Id.* at p. 1358, fn. omitted.) The court in *O'Neil* noted, however, that it was dealing with conditions of adult probation and "[c]onditions of juvenile probation may confer broader authority on the juvenile probation officer than is true in the case of adults (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1016 . . . ; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242 . . .)." (*Id.* at p. 1358, fn. 4.)

In *In re Frank V.* (1991) 233 Cal.App.3d 1232, the minor "challenge[d] as overbroad the condition limiting his right of association to those approved by his probation officer or parents." (*Id.* at p. 1243.) The juvenile court had explained to Frank that, if his mother, father, or probation officer had told him to not associate with certain persons, he could not "hang around" or "hang out" with them. (*Id.* at p. 1241.) The appellate court recognized that a juvenile court acts in *parens patriae*. (*Id.* at p. 1243.) It upheld the probation condition, stating: "The juvenile court could not reasonably be expected to define with precision all classes of persons which might influence [the minor] to commit further bad acts. It may instead rely on the discretion of his parents, and the probation department acting as parent, to promote and nurture his rehabilitation." (*Ibid.*)

In *In re Byron B.* (2004) 119 Cal.App.4th 1013, the minor challenged a probation condition prohibiting contact with any person disapproved by a parent or probation officer. (*Id.* at p. 1015.) The reviewing court in *Byron B.* rejected the argument that the condition was unconstitutionally overbroad, distinguishing the condition at issue from the condition struck down in *In re Kacy S.* (1998) 68 Cal.App.4th 704. (*In re Byron B.*, *supra*, 119 Cal.App.4th at pp. 1017-1018.) A probation condition in *Kacy S.* required a minor to " 'not associate with any persons not approved by his probation officer' " (*In re Kacy S.*, *supra*, 68 Cal.App.4th 704, 712.) The reviewing court in *Kacy S.* stated that the

probation condition "literally requires the probation officer to approve [the minor's] 'associat[ion]' with 'persons' such as grocery clerks, mailmen and health care providers." (*Id.* at p. 713.) The *Byron B.* court observed that "[a] parent or probation officer can hardly be expected to specify all of the innocuous people with whom the minor may come into contact." (119 Cal.App.4th at p. 1017.) It determined that "[r]equiring advance disapproval makes the probation condition workable and saves it from overbreadth." (*Ibid.*) It concluded that "[t]he juvenile court, acting in *parens patriae*, could limit appellant's right of association in ways that it arguably could not limit an adult's." (*Id.* at p. 1018.)

People v. O'Neil, supra, 165 Cal.App.4th and *People v. Leon, supra*, 181 Cal.App.4th 943, both adult probation cases, are not controlling authority. Moreover, unlike *O'Neil*, the probation officer's power to prohibit association is not completely open-ended and contains a "standard by which the probation department is to be guided." (*People v. O'Neil, supra*, 165 Cal.App.4th at p. 1359.) As stated, minor cannot associate with a person who the probation officer identifies "as a threat to [his] successful completion of probation."

We are persuaded, however, that the condition's provision imposing parental approval as a prerequisite to minor's association with all persons is overbroad. Its implicit prohibition, forbidding association with all unapproved persons, is sweeping and in all likelihood will include any number of unintended persons who pose no harm to minor's reformation and rehabilitation. Restating this aspect of condition 11 as a prohibition against associating with any person whom he knows his parents disapprove, impliedly because those associates might be a bad influence, will accomplish the salutary

objective of preventing harmful associations but avoid unnecessary governmental interference with associational rights.³

Insofar as minor is arguing that condition 11 is not specifically tailored to the particular circumstances of this case, this is not a pure question of law that is reviewable absent objection at the dispositional hearing. This aspect of his challenge was forfeited by his failure to object below. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 880-881, 889.)

Accordingly, we modify condition 11 as follows: "You are not to associate with anyone whom you know has been disapproved by either parent. You are not to associate or communicate with G.S. or any individuals whom you know have been identified by your Probation Officer as threats to your successful completion of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile)."⁴

C. Condition 12—No Contact

Condition 12 states: "You are not to have direct or indirect contact with victim [R.R.], [J.B.] or anyone *known to you* to be a member of the victim's family. Stay at least 100 yards away from the victim, victim's residence, vehicle, school, and place of employment." (Italics added.)

Minor claims this condition suffers from a number of defects. To avoid unconstitutional vagueness, minor argues that this court must add a knowledge requirement to the stay away order and clarify or strike unclear language. He expresses a

³ Our determination does not in any way limit parental oversight of minor's associates. "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (*Troxel v. Granville* (2000) 530 U.S. 57, 66 [120 S.Ct. 2054]; see *id.* at p. 78, (conc. opn. of Souter, J.) ["The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character"].)

⁴ We do not use G.S.'s full name in the opinion but we refer to the same individual originally named by the court below.

concern that he may "unwittingly walk within 100 yards of the victim's home." He maintains that "since the victim is too young to own or drive a vehicle," it is not clear whether the stay away condition "pertains to the vehicles of the victim's parents." If the stay away condition actually applies to parental vehicles, minor asserts that "the provision must be either stricken or modified to provide that [he] must know what vehicles the victim's parents own or drive." Minor further complains that the stay away condition is unclear because it includes the victim's "place of employment" even though "the victim is presumably not employed." He is concerned that police or a probation officer might interpret the provision to mean the places of employment of the victim's parents.

The People concede and we agree that condition 12 should be modified to add additional knowledge elements to prevent unconstitutional vagueness. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.) But insofar as minor is arguing that condition 12 does not make sense based on the facts, such as minor's age or lack of employment, these contentions are not facial challenges and are forfeited. (*Id.* at pp. 880-881, 889.) The stay away order plainly refers to only the minor victim; no mention is made of parents or family members. If the court below intended it to apply to the parents or other family members it was up to that court to be explicit. If the victim presently is not employed, this aspect of the order will be irrelevant unless and until the victim has a job. With regard to the court's command to stay away from the victim's vehicle, we think that the most reasonable interpretation is that minor must stay away from any vehicle in which he knows the victim is an occupant and we will so modify the condition to avoid any facial vagueness problem.

Minor also complains that the stay away condition does not conform to the trial court's oral order with respect to the victim's school. Although this latest argument is not a constitutional contention, we will address it briefly. We may correct a court's written order or judgment that does not accurately reflect its oral pronouncement. (See *People v. Mitchell*, *supra*, 26 Cal.4th at p. 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

At the dispositional hearing, after the court read condition 12, the court informed minor of a further condition providing, "You are not to be at the Los Arboles Middle School." The Deputy District Attorney (D.D.A.) asked the juvenile court to add the youth center to that condition since the youth center and the school were essentially "on the same piece of property." Minor's counsel indicated that minor sometimes participated in activities at the youth center and the D.D.A. responded that the victim and the witness might be participating in programs at the youth center as well and the youth center was immediately adjacent to Los Arboles Middle School. The court stated that it was not going to extend the school condition to the youth center but, if a protected party was at the youth center, the no-contact condition still applied and would prevent minor from going into the youth center. As evident from the record, the court's conversation with counsel concerned probation condition 13, which we address below, and not probation condition 12. The court did not alter condition 12.

In accordance with our determinations, we modify condition 12 to read: "You are not to knowingly have direct or indirect contact with victim [R.R.], [J.B.] or anyone known to you to be a member of the victim's family. Stay at least 100 yards away from any spot where you know the victim to be, from any place that you know to be the victim's residence, school, or place of employment, and from any vehicle in which you know the victim is an occupant."⁵

D. Condition 13—Los Arboles Middle School

Condition 13 states: "You are not to be in the following areas or businesses: Los Arboles Middle School."

Minor maintains that this condition must be modified to include a knowledge requirement to avoid unconstitutional vagueness. In addition, he argues that the

⁵ We do not use J.B.'s full name in the opinion but we refer to the same individual originally named by the court below.

condition should be modified because the words "areas or businesses" make it unclear whether the area surrounding the school is off-limits. The People state that no modification is constitutionally required. We agree with the People.

The school is explicitly named and therefore minor has advanced notice of the specific place to be avoided. We find that the introductory words "areas or businesses" do not render condition 13 unconstitutionally vague. The use of a colon makes clear that the area or business that is off-limits is the named school. There is no language, such as "surrounding" or "adjacent to," suggesting that any area outside the school is included within the condition's prohibition. Any factual issue as to the exact boundaries of the school or any latent constitutional issue was not preserved for appellate review. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 880-881, 887-889.)

E. Condition 14—Prohibited Substances

Condition 14 states: "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 or nature, used as paint, glue, plant material, or any aerosol product. You are not to inject anything into your body unless directed to do so by a medical doctor. You are not to consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package." (Italics added.)

Minor argues that this condition must be modified to include an explicit knowledge requirement as to possession of the prohibited substances and the character of those substances. He suggests that a person cannot be held culpable of unlawful possession unless the person knows of the "illegal nature" of the thing possessed. He also points out that constructive possession means that a person knowingly maintains control or the right to control a thing. In support of his argument, minor cites to several cases

addressing the elements of particular crimes. (See *People v. King* (2006) 38 Cal.4th 617, 627-628 [as interpreted, statute required the prosecution to "prove that a defendant charged with possession of a short-barreled rifle knew the rifle was unusually short" but the prosecution was not required to prove that the defendant knew "the rifle's precise length," "the defendant knew there was a law against possessing the item," or "the defendant intended to break or violate the law"]; *People v. Glass* (1975) 44 Cal.App.3d 772 [conviction of possession of amphetamines for sale reversed where evidence insufficient to establish that defendant had actual or constructive possession of amphetamines under a couch]; *People v. Williams* (1971) 5 Cal.3d 211, 215 ["The elements of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug"], 217 [conviction of possession of a restricted dangerous drug reversed where evidence insufficient to establish that defendant knew the narcotic character of tablets in a car].)

Minor proposes the addition of explicit knowledge requirements. The People agree that knowledge requirements should be added.

We recognize that, generally speaking, criminal liability for unlawful possession of a controlled substance must be based upon either actual or constructive possession. (See *People v. Rogers* (1971) 5 Cal.3d 129, 134.) "Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another. [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403, 417.) As a general rule, such criminal culpability requires knowledge of the nature and presence of the substance. (See *Rideout v. Superior Court of Santa Clara County* (1967) 67 Cal.2d 471, 475.) In evaluating the facial constitutionality of probation conditions, however, courts should take care not to conflate the separate concepts of due process notice and the

elements of a given statutory offense.⁶ The focus of a vagueness analysis must be fair warning.

"It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.' *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939)." (*U. S. v. Batchelder* (1979) 442 U.S. 114, 123 [99 S.Ct. 2198].) "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732

⁶ "As a general rule, no crime is committed unless there is a union of act and either wrongful intent or criminal negligence. [Citations.] This rule, which is 'firmly embedded' in 'the principles of Anglo-American criminal jurisprudence' [citation] is so basic that wrongful intent or criminal negligence 'is an invariable element of every crime unless excluded expressly or by necessary implication' [citations], and 'penal statutes will often be construed to contain such an element despite their failure expressly to state it' [citations]." (*People v. King, supra*, 38 Cal.4th at pp. 622-623; see Pen. Code, § 20 ["To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"]; see also Pen. Code, § 7, subd. 2. [defining "negligence"].) "Criminal negligence is 'aggravated, culpable, gross, or reckless . . . conduct . . . [that is] such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . .'" (*People v. Penny* (1955) 44 Cal.2d 861, 879 . . .) (*People v. Valdez* (2002) 27 Cal.4th 778, 783.) In *People v. King, supra*, 38 Cal.4th 617, cited by minor, the language of former section 12020, subdivision (a)(1), did not "specifically mention a culpable mental state" and the issue was "whether the Legislature intended section 12020(a)(1) to be a public welfare offense, or whether the Legislature intended the prosecution to prove that the defendant had a culpable mental state, or mens rea . . ." (*Id.* at p. 622.) "Proof of a culpable mental state is . . . not required for 'public welfare offenses.' These crimes generally involve the violation of statutes that are purely regulatory in nature and seek to protect the health and safety of the public. [Citations.]" (*Id.* at p. 623.) It is important to remember that the conduct prohibited by a probation condition is not required to be a crime. (See *People v. Lent* (1975) 15 Cal.3d 481, 486 ["a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality"].)

120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); see also *Grayned v. City of Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)." (*U.S. v. Williams* (2008) 553 U.S. 285, 304 [128 S.Ct. 1830].) "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." (*Id.* at p. 306.) "[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. [Citations.]" (*U.S. v. National Dairy Products Corp.* (1963) 372 U.S. 29, 32 [83 S.Ct. 594].) "Condemned to the use of words, we can never expect mathematical certainty from our language." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110 [92 S.Ct. 2294], fn. omitted.) These due process principles also apply to probation conditions. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

We do recognize, however, that courts consider a law's scienter or mental state requirements in evaluating whether it is impermissibly vague. (See *Skilling v. U.S.* (2010) ___ U.S. ___, ___ [130 S.Ct. 2896, 2933] ["statute's mens rea requirement further blunts any notice concern"]; *Holder v. Humanitarian Law Project* (2010) ___ U.S. ___, ___ [130 S.Ct. 2705, 2720] ["[T]he knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement. [Citations.]"; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 499 [102 S.Ct. 1186] ["a scienter requirement may mitigate a law's vagueness"].) Contrariwise, a statute's uncertainty may be aggravated by the absence of a scienter requirement. (See *Colautti v. Franklin* (1979) 439 U.S. 379, 390-401 [99 S.Ct. 675].)

In light of these general principles, we are persuaded that the addition of knowledge requirements with respect to the prohibited acts and nature of the substance are necessary to prevent impermissible vagueness and provide fair notice of the behavior

required from minor to comport with condition 14. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 890-892.)

Minor further complains that condition 14 is unconditionally vague because he "could be found in violation for simply using paint or glue for a legitimate purpose" and "[a]ny normal use of these items is virtually impossible without inhaling." Minor further states that the condition is "vague because it does not adequately apprise [him] of what conduct is forbidden" since he could inhale "[p]aint, glue, plant material, or any aerosol product" "simply by being in the same room where they are being used." He suggests that he could be found in violation of this condition by smelling flowers since flowers are "plant material."

We disagree that the condition prohibits the smelling of ordinary flowers. The term "inhale" means to draw into the lungs by breathing. (American Heritage College Dict. (3d ed. 1997) p. 699; see Webster's New College Dict. (4th ed. 2008) p. 735.) The word "smell" means "[t]o perceive the scent of (something) by means of the olfactory nerves." (American Heritage College Dict. (3d ed. 1997) p. 1285; see Webster's New College Dict. (4th ed. 2008) p. 1353 ["to be or become aware of by means of the nose and the olfactory nerves . . ."].) Minor is not knowingly inhaling "plant matter" when he smells the aroma of a flower.

As to his complaint that he might violate the condition during the legitimate, normal use of paint or glue and therefore the condition is unconstitutional vague, that objection is not cognizable as part of a facial vagueness challenge. It is a factual question whether legitimate, normal use of paint or glue creates fumes or vapor or fine particles that the user might inhale and whether all such products present that risk. Moreover, the addition of a knowledge requirement affords him adequate notice of the prohibited conduct and avoids probation violations for inadvertent inhalation of the specified substances. Insofar as minor's objection is that the condition unreasonably limits the ordinary uses of paint and glue for their intended purposes, he forfeited the claim by

failing to raise it below. (See *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 814; see also *Sheena K.*, *supra*, 40 Cal.4th at p. 883, fn. 4.)

As to unconstitutional overbreadth, minor claims that condition 14 improperly restricts his right to travel by prohibiting him from going into places, such as auto shops, hair salons, or "any gardener's place," where he might inhale a prohibited substance. He indicates that the inhalation provision should be stricken or modified to prohibit him from inhaling the named substances "with the intent of achieving some level of intoxication." With respect to the third sentence regarding inhalation, attempted inhalation, or consumption, minor specifically proposes the addition of the phrase, "with the intent of becoming intoxicated."

We first examine minor's assertion that the condition impinges upon his right to travel. Although "[t]he word 'travel' is not found in the text of the [federal] Constitution," "the 'constitutional right to travel from one State to another' is firmly embedded in [U.S. Supreme Court] jurisprudence. *United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966)." (*Saenz v. Roe* (1999) 526 U.S. 489, 498 [119 S.Ct. 1518].) "The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." (*Jones v. Helms* (1981) 452 U.S. 412, 418-419 [101 S.Ct. 2434]; see *Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898, 902 [106 S.Ct. 2317] (plur. opn. of Brennan, J.) ["textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration" "has been variously assigned to the Privileges and Immunities Clause of Art. IV," "to the Commerce Clause," "to the Privileges and Immunities Clause of the Fourteenth Amendment," and "has also been inferred from the federal structure of government adopted by our Constitution"].) "The 'right to travel' discussed in [the U.S. Supreme Court] cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien

when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State ." (*Saenz v. Roe, supra*, 526 U.S. at p. 500.)

We fail to see how the probation condition abridges any right to travel safeguarded by the federal Constitution. We recognize, however, that freedom of movement appears to be an aspect of liberty protected by the due process clause of the Fourteenth Amendment of the U.S. Constitution (*City of Chicago v. Morales* (1999) 527 U.S. 41, 53-54 [119 S.Ct. 1849]) and by the California Constitution. "The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution. (*In re White* (1979) 97 Cal.App.3d 141 . . .)" ⁷ (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100; see *In re White* (1979) 97 Cal.App.3d 141, 148 ["the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole"].)

Even if condition 14 as written incidentally limits minor's ability to move from place to place as he wishes, the condition as modified will not unconstitutionally interfere with those rights. The added knowledge requirements will narrow its restriction and protect him from being held culpable for inadvertent inhalation or consumption of prohibited matter as he moves from place to place.⁸ (Cf. *Sheena K., supra*, 40 Cal.4th at p. 892, fn. 8.)

⁷ Article I, section 7 of the California Constitution provides in part: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws [¶] (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. . . ." Article I, section 24, states: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

⁸ The condition's prohibition of the consumption of "plant material," if applied literally, outlaws eating healthy fruits and vegetables as well as substances that may be abused. Minor did not argue that this aspect of the condition was unreasonable in the court below and, therefore, any such claim was not preserved for appeal. (See *In re Justin S., supra*, 93 Cal.App.4th at p. 814; see also *Sheena K., supra*, 40 Cal.4th at p. 883,

In accordance with our conclusions, we modify condition 14 as follows: "Do not knowingly consume or possess any matter that you know to be intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you to be using or possessing any illegal intoxicants, narcotics or drugs. Do not knowingly inhale or attempt to inhale or consume any substance of any type or nature that you know is used as paint, glue, plant material, or any aerosol product. Do not inject anything into your body unless directed to do so by a medical doctor. Do not knowingly consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package.

F. *Condition 15—Prescription Medications*

Condition 15 states: "You are not to possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications."

fn. 4; *People v. Welch, supra*, 5 Cal.4th at p. 237.) Further, minor advanced no argument that this aspect of the condition was unconstitutionally overbroad because it unnecessarily limited his freedom to make personal food choices. (Cf. *Kent v. Dulles* (1958) 357 U.S. 116, 125-126 [78 S.Ct. 1113] ["The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."]; *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 750 [enforcement of county fair's dress code deprived fair visitor of a liberty interest in his personal dress and appearance], 772 ["a person's choice of dress and manner of appearance" is "entitled to some protection against arbitrary governmental suppression"].) In general, appellate courts address only those points specifically raised by an appellant and all others are deemed waived or abandoned. (*Title Guarantee & Trust Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 363.) Consequently, the problematic "plant material" language remains in the modified condition.

Minor argues, and the People concede, that a knowledge requirement must be added to the first sentence. We agree this change is warranted. (Cf. *Sheena K.*, *supra*, 40 Cal.4th at pp. 890-892.)

We modify condition 15 to read: "You are not to knowingly possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications."

G. *Condition 17--Weapons*

Condition 17 provides: "You shall not possess any weapons or any type of ammunition."

Minor insists that "[t]he word 'weapon' in the probation condition is unconstitutionally vague and overbroad because it does not give [him] notice about what types of items [he] is prohibited from possessing." He contends that condition should be modified to either "specify particular types of weapons" or refer to "dangerous and deadly weapons." In addition, he argues that the condition must "address other objects that are not 'dangerous . . .' per se . . . but that could be used as such." He mentions a baseball bat as an example. Lastly, citing *Sheena K.*, minor asserts that an intent requirement and "an express knowledge requirement must be added to address constitutional concerns with regard to those objects that have innocent uses and purposes."

Minor suggests the following language: "You shall not knowingly possess any type of ammunition. You shall not knowingly own, use, or possess any object that you know is a dangerous or deadly weapon or any object that you know can be used to cause bodily injury or death where you intend such harm." The People agree that a knowledge requirement should be added to condition 17 and propose the following language. "You shall not *knowingly* possess any *deadly or dangerous* weapons or any type of

ammunition." Minor asserts that this wording does not resolve the issue whether the condition prohibits the possession of "common objects—a baseball bat, cooking utensils, pens or pencils, or a letter opener—that are not weapons but that can be used as deadly or dangerous weapons."

The Supreme Court has explained: "Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 ["deadly weapon" as used in assault statute means an object extrinsic to the human body and does not include bare hands or feet].) Objects that are not ordinarily used as weapons were discussed in *People v. Graham* (1969) 71 Cal.2d 303, disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32: " . . . The instrumentalities falling into the second class, such as ordinary razors, pocket-knives, hatpins, canes, hammers, hatchets and other sharp or heavy objects, which are not weapons in the strict sense of the word and are not "dangerous or deadly" to others in the ordinary use for which they are designed, may not be said as a matter of law to be "dangerous or deadly weapons." When it appears however, that an instrumentality other than one falling within the first class is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a "dangerous or deadly weapon" may be thus established, at least for the purposes of that occasion.' [Citation .]" (*Id.* at pp. 327-328.)

The People's formulation supplies a knowledge requirement and makes the term "weapon" more definite. We recognize that there are numerous statutes that criminalize, or more seriously punish, conduct involving a dangerous or deadly weapon. (See e.g. Pen. Code, §§ 245, subd. (a)(1), 245.2, 245.3, 245.5, subd. (a), 417, subd. (a)(1), 417.8, 1192.7, subd. (c)(23), 12022, subd. (b)(1); see also Pen. Code, §§ 667, subd. (a), 667, subd. (b)-(i), 1170.12.) Minor has not cited any case invalidating such a law on vagueness grounds. The cases cited by minor involved an insufficiency of the evidence claim, not a claim of unconstitutional vagueness. (See *People v. Henderson* (1999) 76 Cal.App.4th 453, 467 [defendant's exhibition of his pit bulls, not an inherently deadly weapon, was sufficient evidence of exhibiting a "deadly weapon" to support his convictions under Penal Code section 417.8, which makes it a crime to draw or exhibit "any firearm, whether loaded or unloaded, or other deadly weapon, with the intent to resist or prevent the arrest or detention of himself or another by a peace officer"]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [defendant's exhibition of a screwdriver, not an inherently deadly weapon, constituted the exhibition of a deadly weapon for purposes of Penal Code section 417.8 since the evidence showed that "the screwdriver was capable of being used as a deadly weapon" and "defendant intended to use it as such if the circumstances required"].)

On the other hand, we are concerned that the condition as written does not provide fair warning to a young person such as minor with regard to those objects whose ordinary use is not for the purpose of inflicting bodily injury or death yet are capable of being used to inflict bodily injury or death if so intended. To avoid any constitutional vagueness or overbreadth problem, we make explicit the prohibition against possessing such objects with wrongful intent. (But see *In re R.P.* (2009) 176 Cal.App.4th 562, 570 [" 'dangerous or deadly weapon' has a plain commonsense meaning sufficient to put [minor] on notice of the conduct prohibited by the probation condition"].)

We modify condition 17 as follows: "You shall not knowingly possess any object that you know is a dangerous or deadly weapon, any object that you know can be used to cause bodily injury or death where you intend such harm, or any type of ammunition."

DISPOSITION

Probation conditions 11, 12, 14, 15, and 17 are modified as specified in our opinion:

Condition 11: "You are not to associate with anyone whom you know has been disapproved by either parent. You are not to associate or communicate with G.S. or any individuals whom you know have been identified by your Probation Officer as threats to your successful completion of probation. You are not to associate with any individuals known by you to be on Probation or Parole (adult or juvenile)."

Condition 12: "You are not to knowingly have direct or indirect contact with victim [R.R.], [J.B.] or anyone known to you to be a member of the victim's family. Stay at least 100 yards away from any spot where you know the victim to be, from any place that you know to be the victim's residence, school, or place of employment, and from any vehicle in which you know the victim is an occupant."

Condition 14: "Do not knowingly consume or possess any matter that you know to be intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana. You are not to be with anyone known to you to be using or possessing any illegal intoxicants, narcotics or drugs. Do not knowingly inhale or attempt to inhale or consume any substance of any type or nature that you know is used as paint, glue, plant material, or any aerosol product. Do not inject anything into your body unless directed to do so by a medical doctor. Do not knowingly consume any over the counter medication without prior approval of your parent or guardian; you are only to use the prescribed dosage as indicated on the package."

Condition 15: "You are not to knowingly possess or consume any prescription medications unless directed to do so by a medical doctor. You must notify any treating

physician of your substance abuse problems before accepting any medication. You must notify your Probation Officer within 24 hours of receiving any prescription medications and identify all medications."

Condition 17: "You shall not knowingly possess any object that you know is a dangerous or deadly weapon, any object that you know can be used to cause bodily injury or death where you intend such harm, or any type of ammunition."

As modified, the dispositional orders are affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.