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

IN RE D.P., a Person Coming Under the
Juvenile Court Law.

H038856
(Santa Clara County
Super. Ct. No. JV38910)

THE PEOPLE,

Plaintiff and Respondent,

v.

D.P.,

Defendant and Appellant.

D.P. was adjudged a ward of the juvenile court following contested hearings. (See Welf. & Inst. Code, §§ 602, 725, subd. (b).) On appeal from the August 10, 2012 disposition (see Welf. & Inst. Code, § 800, subd. (a)), he seeks the modification of a probation condition prohibiting possession of drug paraphernalia on the ground that it is unconstitutionally vague and overbroad on its face because it lacks an express knowledge requirement.

We modify the probation condition to include an explicit knowledge requirement and affirm.

I

Procedural History

On January 27, 2012, a juvenile wardship petition was filed against D.P. The petition alleged that minor committed second degree robbery when he took a cell phone in the possession of another (see Pen. Code, §§ 211-212.5, subd. (c)).

Following the contested jurisdiction hearing, respondent moved to amend the petition to conform to proof, specifically to allege that D.P. committed felony theft from a person instead of second degree robbery (see Pen. Code, §§ 484, 487, subd. (c)). D.P.'s counsel had no objection. The juvenile court accepted the amendment and sustained the petition as amended.

At the disposition hearing on August 10, 2012, the juvenile court adjudged D.P. to be a ward of the court. It adopted the probation officer's dispositional recommendations with modifications not relevant here. One of the probation conditions imposed by the court provided "[t]hat said minor not be in possession of any drug paraphernalia."

D.P. timely filed a notice of appeal.

II

Analysis

A. Legal Principles Governing Validity of Probation Conditions

"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.*)) "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, *and* (3) requires or forbids conduct which is not reasonably

related to future criminality' [Citation.] Conversely, 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." (*People v. Lent* (1975) 15 Cal.3d 481, 486, italics added, fn. omitted.)

The forfeiture rule applies to any claim that a probation condition is unreasonable. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 882.) In other words, the failure to timely challenge a probation condition on *Lent* grounds in the court below waives such an attack on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

In *Sheena K.*, the Supreme Court refused to extend the forfeiture rule to a facial challenge to a probation condition on the ground the condition is unconstitutionally vague or overbroad. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 884-889.) The court reasoned that such a claim presents a pure question of law that is "easily remediable on appeal by modification of the condition." (*Id.* at p. 888.) But the Supreme Court cautioned: "[W]e do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*People v. Welch*, *supra*, 5 Cal.4th at p. 235) In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." (*Id.* at p. 236)' [Citation.]" (*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)" (*Id.* 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.*)

"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.)" (*Ibid.*)

As to overbreadth, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Ibid.*) "If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used [citations]." (*In re White* (1979) 97 Cal.App.3d 141, 150.) "A probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition. (*In re White* (1979) 97 Cal.App.3d 141, 146) It is not enough to show the government's ends are compelling; the means must be carefully tailored to achieve those ends." (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641-642.)

In *Sheena K., supra*, 40 Cal.4th 875, our Supreme Court concluded that a probation condition requiring appellant to " 'not associate with anyone disapproved of by probation' " was unconstitutionally vague because it did not notify her "in advance with whom she might not associate through any reference to persons whom [she] knew to be disapproved of by her probation officer." (*Id.* at pp. 878, 891-892.) The court advised: "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 892.) The court found that, in light of its approval of the appellate court's modification of the probation condition to include an explicit knowledge requirement, it was unnecessary to decide whether the probation condition was also unconstitutionally overbroad. (*Id.* at p. 892, fn. 8.)

B. Probation Condition Prohibiting Possession of Drug Paraphernalia

Minor contends that "the lack of an express knowledge requirement . . . makes the condition unconstitutionally vague and overbroad in two respects: there is no requirement that [he] know that the item he possesses is a prohibited one, and there is no requirement that he *knowingly* possess the prohibited items." He argues, for example, that "possession can be constructive" and "under the current condition, [he] could violate his probation by borrowing a car and driving it without knowing that there are prohibited paraphernalia items in the trunk"

In *People v. Freitas* (2009) 179 Cal.App.4th 747, a case cited by minor, the appellant challenged a probation condition prohibiting the possession of stolen property. (*Id.* at pp. 750-751.) "[T]he People concede[d] the 'stolen' nature of property is not always apparent and the probation condition should be modified to specify that defendant must know the property is stolen." (*Id.* at p. 751.) The Court of Appeal, Third District, recognized there is a constitutional right to possess property but no right to possess stolen property and the crime of receiving stolen property in violation of Penal Code section 496 includes "an express scienter requirement" (*Ibid.*) The court refused to leave the knowledge requirement to implication and modified the probation condition to require appellant to not knowingly possess property that he knows is stolen. (*Id.* at pp. 751, 753.)

Respondent does not disagree that knowledge is an element of the probation condition but asserts that a knowledge requirement may be inferred. Respondent

acknowledges that the purpose of deterring minor's use of illegal substances is "not served by a condition that prohibits the unknowing possession of paraphernalia." But respondent contends that a knowledge requirement should be implied because violation of the probation condition would violate a criminal statute requiring proof of knowledge and points to Health and Safety Code section 11364, subdivision (a).

Health and Safety Code section 11364, subdivision (a), does not criminalize simple "possession of drug paraphernalia." That subdivision states that "[i]t is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully *injecting or smoking* (1) a controlled substance specified in subdivision (b), (c), or (e) or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (2) of subdivision (d) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V."¹ (Italics added.)

It is true that to prove a violation of this statute, the People must prove that the person knew of the object's presence and knew it to be an object used for unlawfully injecting or smoking a controlled substance specified in Penal Code section 11364. (See CALCRIM No. 2410; Health & Saf. Code, § 11364.) But not every drug or controlled substance is covered by Health and Safety Code section 11364, subdivision (a). For example, marijuana is not one of the substances enumerated by Health and Safety Code section 11364. (See Health & Saf. Code, § 11054, subd. (d)(13) [Marijuana].) It has been held that the possession of a device for smoking marijuana, without more, is not a crime in California. (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 897 [possession of

¹ Current Health and Safety Code section 11364 is inoperative until January 1, 2015. (Health & Saf. Code, § 11364, subd. (d).) Health and Safety Code section 11364.1, subdivision (a), which presently is in effect (Health & Saf. Code, § 11364.1, subd. (d)), is identical to Health and Safety Code section 11364, subdivision (a).

bongs].) In addition, Health and Safety Code section 11364, subdivision (a), does not cover paraphernalia used for introducing a drug to a human body by means other than injecting or smoking, for example, snorting or inhaling.

Respondent has not shown that the conduct prohibited by the challenged probation condition is coextensive with a criminal statute that has an explicit knowledge element and, therefore, such a knowledge requirement is implicit in the probation condition.² (Cf. *People v. Shiseop Kim* (2011) 193 Cal.App.4th 836, 847 ["the conduct proscribed by [Penal Code] sections 12021 and 12316 is coextensive with that prohibited by a probation condition specifically implementing those statutes" and "[a]s the statutes include an implicit knowledge requirement, the probation condition need not be modified to add an explicit knowledge requirement"].)

Further, juvenile courts are not limited to imposing probation conditions that parallel criminal statutes. "A probation condition may regulate or prohibit otherwise lawful conduct that 'is reasonably related to the crime of which the defendant was convicted or to future criminality.'" (*People v. Lent, supra*, 15 Cal.3d at p. 486)" (*People v. Bianco* (2001) 93 Cal.App.4th 748, 753-754.) We do not think that the language of the challenged probation condition, understood in its ordinary sense, necessarily implies a knowledge requirement. We agree that it should include an explicit knowledge requirement. (See *Sheena K., supra*, 40 Cal.4th at pp. 891-892.)

² We observe that Health & Safety Code, section 11364.7, subdivision (a), criminalizes possession of "drug paraphernalia," but it also requires a further specific intent to "deliver, furnish, or transfer." It provides: "Except as authorized by law, any person who delivers, furnishes, or transfers, *possesses with intent to deliver, furnish, or transfer*, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, except as provided in subdivision (b), in violation of this division, is guilty of a misdemeanor." (Italics added.)

Respondent urges this court to follow the Third Appellate District's approach announced in *People v. Patel* (2011) 196 Cal.App.4th 956. In that case, the appellate court stated that henceforth it would "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly" and it would "no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement" (*Id.* at pp. 960-961, fn. omitted). The Court of Appeal, Fourth District, Division 3, declined to follow *Patel*, stating that "the superior court should revise its standard probation conditions form to meet constitutional requirements." (*People v. Moses* (2011) 199 Cal.App.4th 374, 381.) The Court of Appeal, Second District, Division 3, also concluded that it was more appropriate to modify probation conditions on a case-by-case basis and did not adopt the *Patel* approach. (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1188, fn. 7.) This court has likewise declined to adopt the *Patel* approach. (See *People v. Piralì* (2013) 217 Cal.App.4th 1341, 1351.) It is the superior court's duty to fashion appropriate probation conditions and it is our role as a reviewing court to remedy, if we can, any facial constitutional defect challenged on appeal. Accordingly, we will continue to individually consider probation conditions challenged on appeal.

As indicated, "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. 'No 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, 83 L.Ed. 888 (1939)." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 58 [119 S.Ct. 1849] (plur. opn. Stevens, J).) "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 499 [102 S.Ct. 1186]; *Posters 'N' Things, Ltd. v. U.S.* (1994) 511 U.S. 513, 526 [114 S.Ct. 1747] [the court's inference of a

scienter requirement assisted in avoiding any vagueness problem with the Mail Order Drug Paraphernalia Control Act].)

In *Posters 'N' Things, Ltd. v. U.S.*, *supra*, 511 U.S. 513, the U.S. Supreme Court resolved the scienter requirement for conviction under the Mail Order Drug Paraphernalia Control Act and then determined whether the act was unconstitutionally vague as applied. The court observed that "[t]he objective characteristics of some items establish that they are designed specifically for use with controlled substances." (*Id.* at p. 518.) But it also recognized that vagueness concerns might arise with respect to "multiple-use items -- such as scales, razor blades, and mirrors" since such "items may be used for legitimate as well as illegitimate purposes, and 'a certain degree of ambiguity necessarily surrounds their classification.' [Citation.]" (*Id.* at p. 526.) The court concluded, however, that it did not have to deal with that issue because the petitioners in that case "operated a full-scale 'head shop,' a business devoted substantially to the sale of products that clearly constituted drug paraphernalia." (*Ibid.*)

In this case, minor's main concern is that common household items can be "drug paraphernalia" (for example, razor blades and safety pins) and he may possess them for legitimate purposes unrelated to drugs and be ignorant of their use as drug paraphernalia. Respondent maintains that the term is not vague but rather is defined by statute, citing Health and Safety Code sections 11364.5, subdivision (d), and 11014.5, subdivision (a).

Health and Safety Code section 11364.5, subdivision (a) provides in part: "Except as authorized by law, no person shall maintain or operate any place of business in which drug paraphernalia is kept, displayed or offered in any manner, sold, furnished, transferred or given away unless such drug paraphernalia is completely and wholly kept, displayed or offered within a separate room or enclosure to which persons under the age of 18 years not accompanied by a parent or legal guardian are excluded." Subdivision (d) of Health and Safety Code section 11364.5 expansively defines "drug paraphernalia"

"[a]s used in this section"³ That statutory definition is similar, but not identical, to the broad definition of "drug paraphernalia" provided by Health and Safety Code section 11014.5, subdivision (a).⁴

³ Health & Safety Code section 11364.5, subdivision (d), defines "drug paraphernalia" to mean "all equipment, products, and materials of any kind which are intended for use or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." The definition "includes, but is not limited to, all of the following: [¶] (1) Kits intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived. [¶] (2) Kits intended for use or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances. [¶] (3) Isomerization devices intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance. [¶] (4) Testing equipment intended for use or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances. [¶] (5) Scales and balances intended for use or designed for use in weighing or measuring controlled substances. [¶] (6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, intended for use or designed for use in cutting controlled substances. [¶] (7) Separation gins and sifters intended for use or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana. [¶] (8) Blenders, bowls, containers, spoons, and mixing devices intended for use or designed for use in compounding controlled substances. [¶] (9) Capsules, balloons, envelopes, and other containers intended for use or designed for use in packaging small quantities of controlled substances. [¶] (10) Containers and other objects intended for use or designed for use in storing or concealing controlled substances. [¶] (11) Hypodermic syringes, needles, and other objects intended for use or designed for use in parenterally injecting controlled substances into the human body. [¶] (12) Objects intended for use or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as the following: [¶] (A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls. [¶] (B) Water pipes. [¶] (C) Carburetion tubes and devices. [¶] (D) Smoking and carburetion masks. [¶] (E) Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand. [¶] (F) Miniature cocaine spoons, and cocaine vials. [¶] (G) Chamber pipes. [¶] (H) Carburetor pipes. [¶] (I) Electric pipes. [¶] (J) Air-driven pipes. [¶] (K) Chillums. [¶] (L) Bongos. [¶] (M) Ice pipes or chillers."

Health and Safety Code section 11364.5 applies to items "intended for use or designed for use . . ." (Health & Saf. Code, § 11364.5, subd. (d)) whereas Health and Safety Code section 11014.5 applies to items "designed for use or marketed for use . . ." (Health & Saf. Code, § 11014.5, subd. (a)). Both statutes provide a nonexclusive list of items that qualify as "drug paraphernalia" but, while their lists significantly overlap, they are not exactly the same. (See Health & Saf. Code, §§ 11014.5, subd. (a); 11364.5, subd. (d).)

In addition, Health and Safety Code section 11014.5 provides: "In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following: [¶] (1) Statements by an owner or by anyone in control of the object concerning its use. [¶] (2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body. [¶] (3) Descriptive materials accompanying the object which explain or depict its use. [¶] (4) National and local advertising concerning its use. [¶] (5) The manner in which the object is displayed for sale. [¶] (6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products. [¶] (7) Expert testimony concerning its use." (Health & Saf. Code, § 11014.5, subd. (c).)

As indicted, these two statutes do not provide an entirely uniform definition of "drug paraphernalia." The juvenile court did not refer to these statutes and the appellate

⁴ Health and Safety Code section 11014.5, subdivision (a), provides: " 'Drug paraphernalia' means all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division."

record does not indicate that the court had either of those statutory meanings in mind in imposing the condition.⁵ We have no reason to believe that the court intended the phrase "drug paraphernalia" to have anything other than its ordinary, usual, and commonly understood meaning, that is any item needed for or associated with drug use for other than legitimate medicinal purposes. (See OED Online <<http://www.oed.com/view/Entry/137567?redirectedFrom=paraphernalia#eid>> [as of July 25, 2013] ["paraphernalia" includes "miscellaneous items needed for or associated with a particular activity"]; OED Online <<http://www.oed.com/view/Entry/57982?rskey=7OjPMH&result=1#eid>> [as of July 25, 2013] ["drug" includes "[a] substance with intoxicating, stimulant, or narcotic effects used for cultural, recreational, or other non-medicinal purposes"]; *In re R.P.* (2009) 176 Cal.App.4th 562, 566-567 ["A condition is sufficiently precise if its terms have a 'plain commonsense meaning, which is well settled' [Citations.]"]; Code Civ. Proc., § 1865 ["A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms"].) Such definition is constitutionally sufficient when coupled with an explicit knowledge requirement and obviates the need to incorporate either statutory definition of "drug paraphernalia" cited by respondent.

Where minor knowingly possesses a common item that has a legitimate purpose but he is truly unaware that it is intended for use as drug paraphernalia by someone, he will not be in violation of the condition.⁶ But we do not accept minor's assertion that the

⁵ The record does not reflect that minor's theft violation was related to drugs. The probation officer's report indicates that minor has no substance abuse history involving alcohol or drugs. Minor admitted that he once inadvertently consumed marijuana when he ate a brownie. The record contains no evidence that minor was involved in the manufacture or sale of illicit drugs or drug paraphernalia as statutorily defined.

⁶ Of course, the juvenile court remains free in the future to reject a disclaimer of knowledge if circumstantial evidence persuades it that the minor knew a common household article, which he knowingly had in his possession, was intended for use as "drug paraphernalia." A person's actual knowledge may be proved by circumstantial

condition must be further narrowed to prohibit his possession of drug paraphernalia "for the purpose of using it in such a manner." The condition is aimed at minor's knowing possession of drug paraphernalia, whether or not he personally intended to use a particular item as drug paraphernalia. Our addition of an express knowledge requirement makes the probation condition sufficiently definite to provide minor with fair notice of what is expected of him and avoids the alleged constitutional infirmity.

As to the claim of unconstitutional overbreadth, minor does not discuss the constitutional right that is allegedly burdened by the probation condition. But since we are modifying the probation condition to include an explicit knowledge requirement and he does not assert that the condition is otherwise unconstitutionally overbroad, we do not consider whether the probation condition should be further narrowed.

evidence notwithstanding the person's denial of such knowledge. (See *People v. Williams* (1971) 5 Cal.3d 211, 215.)

DISPOSITION

The challenged probation condition is modified to read as follows: "That said minor not knowingly be in possession of any item that he knows is drug paraphernalia." The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.