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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN DANIEL ROBERTS,

Defendant and Appellant.

H040091

(Santa Cruz County

Super. Ct. No. F23222)

After denial of his motion to suppress, defendant Sean Daniel Roberts pleaded guilty to two charges of drug possession for sale (Health & Saf. Code, §§ 11351, 11378) and admitted two allegations pursuant to a plea agreement. The court indicated that the remaining counts and allegations would be dismissed at the time of sentencing. The court sentenced defendant to a five-year term consisting of two years in county jail followed by three years of mandatory supervision (a so-called “split sentence”) pursuant to former Penal Code section 1170, subdivision (h)(5)(B),<sup>1</sup> but it did not orally dismiss the remaining counts and allegations.

On appeal, defendant argues that the trial court erred in denying his motion to suppress and failing to dismiss the remaining charges and allegations in accordance with his plea agreement. He also challenges several conditions of mandatory supervision as unconstitutionally vague and overbroad.

We conclude that the matter must be remanded.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

*Procedural History*

By information filed September 18, 2012, defendant was charged with seven felonies and one misdemeanor. Count 2 charged defendant with possession of heroin for sale in violation of Health and Safety Code section 11351 on or about August 10, 2012. The enhancement allegation attached to count 2 indicated that “pursuant to Health and Safety Code section 11370.2(a) . . . and Penal Code section 1203.07(a)(3),” defendant was convicted of violating Health and Safety Code section 11352 in 2007 and in 2009.<sup>2</sup> Count 4 charged defendant with possessing methamphetamine for sale in violation of Health and Safety Code section 11378 on or about August 10, 2012. The enhancement allegation attached to count 4 indicated that “pursuant to Health and Safety Code section 11370.2(c) and Penal Code section 1203.07(a)(11) [*sic*],”<sup>3</sup> defendant was convicted of violating Health and Safety Code 11352 in 2007 and in 2009.

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<sup>2</sup> Health and Safety Code section 11370.2, subdivision (a), provides in pertinent part: “Any person convicted of a violation of . . . Section 11351 . . . shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of . . . Section . . . 11352 . . . , whether or not the prior conviction resulted in a term of imprisonment.” Section 1203.07, subdivision (a), provides in pertinent part: “Notwithstanding Section 1203, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons: ¶ (1) Any person who is convicted of violating Section 11351 of the Health and Safety Code by possessing for sale 14.25 grams or more of a substance containing heroin.”

<sup>3</sup> Health and Safety Code section 11370.2, subdivision (c), states in pertinent part: “Any person convicted of a violation of . . . Section 11378 . . . with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of . . . Section . . . 11352 . . . whether or not the prior conviction resulted in a term of imprisonment.” The information’s reference to section 1203.07(a)(11) appears to be a typographical error. Section 1203.07, subdivision (a) provides in pertinent part: “Notwithstanding Section 1203, probation shall not be granted to, nor shall the execution or imposition of sentence (continued)

Defendant filed a written plea form indicating that he was pleading guilty to counts 2 and 4 and admitting an allegation under Health and Safety Code section 11370.2, subdivision (c), and an allegation under section 1203.07, subdivision (a)(11), which were the allegations attached to count 4. The plea form indicated he understood that, as part of the plea bargain agreement, counts 1, 3, and 5 through 8 would be dismissed after sentencing.

On January 11, 2013, the trial court accepted defendant's guilty pleas to counts 2 and 4 and his admissions of an allegation under Health and Safety Code section 11370.2, subdivision (c) and an allegation under section 1203.07, subdivision (a)(11). The court stated that the remaining counts and allegations would be dismissed at the time of sentencing.

At the time of sentencing, the court orally imposed a mitigated term of two years on count 2 and then added a three-year consecutive term under Health and Safety Code section 11370.2, subdivision (c), for a total term of five years.<sup>4</sup> As to count 4, the court orally imposed a concurrent, middle term of two years. The court did not orally dismiss the remaining charges and allegations. The court ordered defendant to serve two years in county jail and three years on mandatory supervision under specified conditions.

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be suspended for, any of the following persons: . . . [¶] (11) Any person convicted of violating Section 11378 of the Health and Safety Code by possessing for sale . . . methamphetamine . . . and who has one or more convictions for violating Section . . . 11352 . . . of the Health and Safety Code. For purposes of prior convictions under Sections 11352 . . . of the Health and Safety Code, this subdivision shall not apply to the transportation, offering to transport, or attempting to transport a controlled substance.”

<sup>4</sup> The admitted allegation under Health and Safety Code section 11370.2, subdivision (c), was attached to count 4 rather than count 2. (See fns. 2 & 3, *ante*.) We asked the parties to submit supplemental briefs addressing whether the sentence was unauthorized. Defendant's appellate counsel informs us that, subsequent to our briefing request, the trial court corrected the sentence.

## II

### *Discussion*

#### *A. Motion to Suppress*

##### *1. Hearing on Motion*

Defendant filed a written motion to suppress all evidence obtained as a result of the warrantless traffic stop conducted by Deputy Nicholas Baldrige on August 10, 2012. Defendant contended that the deputy did not have the legal authority to stop his vehicle because he “failed to conclusively identify the vehicle and the driver prior to the stop.” He asserted that the deputy “stopped an unidentified vehicle being driven by an unidentified driver/citizen without cause or reasonable suspicion.” Defendant also maintained that the deputy’s knowledge concerning his vehicle and silhouette was stale because it was based on an arrest and prosecution that occurred about two years before the stop.

The following evidence was adduced at the hearing on the motion to suppress. Deputy Baldrige worked for the Santa Cruz County Sheriff’s Office. Just after midnight on August 10, 2012, Deputy Baldrige conducted a traffic stop. The driver of the vehicle was Sean Roberts, whom Baldrige had arrested for selling heroin approximately a “couple of years” earlier. In the interim, Deputy Baldrige and defendant had no direct contact and the deputy had not seen defendant but the deputy had “kept up to date about his activities.” The deputy did not have an updated description of defendant’s appearance and he did not have information concerning defendant’s current hair length or facial hair or his weight.

On August 10, 2012, Deputy Baldrige had been investigating defendant for a number of weeks. He had two citizen informants and two criminal informants “keeping [him] up to date on [defendant’s] narcotic sales, where he was living, and what he was driving.” Deputy Baldrige had last communicated with an informant on August 9, 2012, the day before the vehicle stop.

Before August 10, 2012, Deputy Baldrige had received information from the confidential informants that defendant drove a particular truck, no one else drove that truck, and the female with whom defendant lived did not have a driver's license and she did not drive. The information that nobody but defendant drove the truck had come from three of the informants. Deputy Baldrige had driven by defendant's house on two or three occasions to obtain information about the vehicles on the street. The truck reportedly driven by defendant was typically parked on the street.

Approximately a couple of weeks before August 10, 2012, Deputy Baldrige had checked and confirmed defendant's parole status and was generally aware of his parole "discharge date." On August 10, 2012, the deputy knew that the expiration of defendant's parole status was well beyond that date.

On August 10, 2012, Deputy Baldrige had already drafted a search warrant and was driving to defendant's Mar Vista residence to get a legal description of it for the search warrant. The deputy first saw defendant's truck while the deputy was traveling on Soquel Drive and approaching Mar Vista. He saw defendant's truck turn in front of him from Mar Vista onto Soquel Drive. Deputy Baldrige did not actually see the truck leave the Mar Vista address reported to be defendant's home. The deputy followed behind the truck. He did not drive alongside it. It was dark and there were "not too many" streetlights along Soquel Drive. Only the back of the truck was illuminated.

Following behind the truck, the deputy saw a single occupant in the truck and based on the occupant's "stature, the hair length," and appearance, he concluded the driver was male. The deputy did not observe the driver of the truck commit any kind of traffic violation.

Deputy Baldrige decided he would initiate a vehicle stop because he knew defendant was on parole. When the vehicle made a quick left turn onto Ledyard Way about a quarter to a half mile from where the deputy first saw it, the deputy initiated the stop.

Following the stop, Deputy Baldrige arrested defendant and placed him in handcuffs.<sup>5</sup> The deputy asked dispatch to request a parole hold to keep defendant in custody.

During the motion hearing, Deputy Baldrige testified that he had a reasonable suspicion that defendant was the driver of the vehicle. Defendant's counsel asked Deputy Baldrige to identify the informants and the deputy responded that he was "going to exercise [his] right under [sections] 1040 and 1042 of the Evidence Code." The court ruled that the informants' identities were irrelevant.

The trial court denied the motion to suppress. It stated: "I think there's sufficient evidence presented, at least by a preponderance, for the identity as testified to by the deputy and the fact that defendant was on parole."

## 2. *Governing Law*

"A defendant may move to suppress evidence on the ground that '[t]he search or seizure without a warrant was unreasonable.' (§ 1538.5, subd. (a)(1)(A).) A warrantless search is presumed to be unreasonable, and the prosecution bears the burden of demonstrating a legal justification for the search. (*People v. Williams* [(1999)] 20 Cal.4th 119, 127.) 'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]' (*People v. Glaser* (1995) 11 Cal.4th 354, 362 (*Glaser*); see *People v. Laiwa* (1983) 34 Cal.3d 711, 718.)" (*People v. Redd* (2010) 48 Cal.4th 691, 719, fn. omitted.)

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<sup>5</sup> The probation report indicates that, during the search of defendant and the vehicle, Deputy Baldrige found \$393 in cash in several denominations, 15 hypodermic syringes, heroin, methamphetamine, 12 individually packaged strips of sublingual Suboxone, and numerous prescription pills.

“A warrantless search is unreasonable under the Fourth Amendment unless it is conducted pursuant to one of the few narrowly drawn exceptions to the constitutional requirement of a warrant. (U.S. Const., 4th Amend.; *Arizona v. Gant* (2009) 556 U.S. 332, 338 (*Gant*); [*People v.*] *Woods* [(1999)] 21 Cal.4th [668,] 674; *People v. Bravo* (1987) 43 Cal.3d 600, 609.) California’s parole search clause is one of those exceptions. (*Samson v. California* (2006) 547 U.S. 843, 846, 850-857 (*Samson*).)” (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

“Both [the California Supreme Court] and the United States Supreme Court have concluded that [parole] searches are reasonable, so long as the parolee’s status is known to the officer and the search is not arbitrary, capricious, or harassing. (See *Samson, supra*, 547 U.S. at pp. 846, 850-856; *People v. Sanders* (2003) 31 Cal.4th 318, 332-334 (*Sanders*); *People v. Reyes* (1998) 19 Cal.4th 743, 750-754 (*Reyes*).)” (*People v. Schmitz, supra*, 55 Cal.4th at p. 916.) “[A] parolee does not have a legitimate expectation of privacy that would prevent a properly conducted parole search. (*Samson, supra*, 547 U.S. at p. 852; *Reyes, supra*, 19 Cal.4th at p. 754)” (*Id.* at p. 917.) “Warrantless, suspicionless searches are a vital part of effective parole supervision (*Reyes, supra*, 19 Cal.4th at p. 752; *Samson, supra*, at p. 854), and are mandated in California as a condition of every parolee’s release (Pen.Code, § 3067, subd. (b)(3); Cal.Code Regs., tit. 15, § 2511, subd. (b)(4)).” (*Id.* at p. 924.)

In *Reyes*, the California Supreme Court concluded that “a parole search may be reasonable despite the absence of particularized suspicion.” (*Reyes, supra*, 19 Cal.4th. at p. 753.) The court observed: “The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches.” (*Ibid.*) It held that “even in the absence of particularized suspicion, a search conducted under the auspices of a

properly imposed parole search condition does not intrude on any expectation of privacy ‘society is “prepared to recognize as legitimate.” ’ [Citations.]” (*Id.* at p. 754.)

Parole searches have constitutional limits. In *Reyes*, the California Supreme Court warned: “ ‘[A] parole search could become constitutionally “unreasonable” if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.’ ([*People v. Clower* (1993) 16 Cal.App.4th 1737,] 1741; *United States v. Follette* (S.D.N.Y.1968) 282 F.Supp. 10, 13; see *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1062 [unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment].)” (*Reyes, supra*, 19 Cal.4th at pp. 753-754.) The California Supreme Court subsequently held that “an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted.” (*Sanders, supra*, 31 Cal.4th at p. 335, fn. omitted.)

In *Samson, supra*, 547 U.S. 843, the United States Supreme Court held that “the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.” (*Id.* at p. 857.) *Samson* involved the suspicionless search of a California parolee conducted under the authority of former section 3067, subdivision (a).<sup>6</sup> (*Samson, supra*, at p. 846.)

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<sup>6</sup> Former section 3067, subdivision (a), provided: “Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” (Stats. 1996, ch. 868, § 2, p. 4656.) Section 3067 now provides in pertinent that “[a]ny inmate who is eligible for release on parole pursuant to this chapter” must be advised that “he or she is subject to search or (continued)

The Supreme Court began its analysis in *Samson* by observing: “ ‘[U]nder our general Fourth Amendment approach’ we ‘examin[e] the totality of the circumstances’ to determine whether a search is reasonable within the meaning of the Fourth Amendment. [*United States v. Knights* (2001) 534 U.S. 112,] 118 (internal quotation marks omitted). Whether a search is reasonable ‘is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’ *Id.*, at pp. 118-119 (internal quotation marks omitted).” (*Samson, supra*, 547 U.S. at p. 848.)

The United Supreme Court recognized that “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.” (*Samson, supra*, 547 U.S. at p. 850.) “Examining the totality of the circumstances pertaining to petitioner’s status as a [California] parolee, ‘an established variation on imprisonment,’ *Morrissey [v. Brewer]* (1972)] 408 U.S. [471,] 477, including the plain terms of the parole search condition, [it] conclude[d] that petitioner did not have an expectation of privacy that society would recognize as legitimate.” (*Id.* at p. 852, fn. omitted.)

The Supreme Court recognized that, in contrast, California’s state interests were substantial and stated: “This Court has repeatedly acknowledged that a State has an ‘overwhelming interest’ ’ in supervising parolees because ‘parolees . . . are more likely to commit future criminal offenses.’ *Pennsylvania Bd. of Probation and Parole [v. Scott]* (1998)] 524 U.S. [357,] 365 (explaining that the interest in combating recidivism ‘is the very premise behind the system of close parole supervision’). Similarly, this Court has repeatedly acknowledged that a State’s interests in reducing recidivism and thereby

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seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.” (§ 3067, subs. (a), (b)(3).)

promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment. See *Griffin* [*v. Wisconsin* (1987)] 483 U.S. [868,] 879; *Knights, supra*, at [p.] 121.” (*Samson, supra*, 547 U.S. at p. 853.)

Although the United States Supreme Court was urged to impose a reasonable suspicion requirement on parolee searches (*Samson, supra*, 547 U.S. at p. 854), it did not do so. The court stated that “[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.” (*Id.* at p. 855, fn. 4.)

The court rejected the notion that “California’s suspicionless search system gives officers unbridled discretion to conduct searches.” (*Samson, supra*, 547 U.S. at p. 856, fn. omitted.) It emphasized “California’s prohibition on ‘arbitrary, capricious or harassing’ searches. See *Reyes*, 19 Cal.4th, at [pp.] 752, 753-754; *People v. Bravo*, 43 Cal.3d 600, 610 (1987) (probation); see also Cal. Penal Code Ann. § 3067(d) (West 2000) (‘It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment’).” (*Samson, supra*, 547 U.S. at p. 856, fn. omitted.)

### 3. *Analysis*

Defendant now argues that the trial court improperly denied his motion to suppress because the prosecution presented no evidence as to the reliability of the information provided to Deputy Baldrige by the informants and, even with the informant’s information, the deputy did not have a reasonable belief that defendant was driving the truck at the time of the stop,. He does not dispute that the purpose of the vehicular stop was to conduct a parole search and, if the truck was properly stopped, the deputy was entitled to conduct a suspicionless parole search because he was a parolee. The critical question is whether the deputy acted unreasonably in stopping the vehicle based on the level of certainty that the vehicle’s driver was defendant.

“The law is settled that in Fourth Amendment terms a traffic stop [to conduct an investigatory detention] entails a seizure of the driver ‘even though the purpose of the stop is limited and the resulting detention quite brief.’ *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); see also *Whren v. United States*, 517 U.S. 806, 809-810 (1996).”<sup>7</sup> (*Brendlin v. California* (2007) 551 U.S. 249, 255].) Likewise, a vehicular stop to conduct a parole search of the driver constitutes a seizure of the driver.

“To determine the constitutionality of a seizure ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’ *United States v. Place*, 462 U.S. 696, 703 (1983); see *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).” (*Tennessee v. Garner* (1985) 471 U.S. 1, 8.) In striking the balance in this case, we are mindful of minimal intrusion occasioned by a vehicular stop to confirm or dispel whether a driver, whom the officer suspects is a person he knows to be a parolee, is in fact that person and the state’s overwhelming interest in supervising parolees (*Samson, supra*, 547 U.S. at p. 853).

We are also cognizant that certainty is not “the touchstone of reasonableness under the Fourth Amendment.” (*Hill v. California* (1971) 401 U.S. 797, 804.) For example, in the context of a warrantless arrest of a person believed to have been a driver reportedly

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<sup>7</sup> Under *Terry v. Ohio* (1968) 392 U.S. 1, 30, “the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” (*United States v. Sokolow* (1989) 490 U.S. 1, 7.) “The officer, of course, must be able to articulate something more than an ‘inchoate and unparticularized suspicion or ‘hunch.’” [Citation.] The Fourth Amendment requires ‘some minimal level of objective justification’ for making the stop. *INS v. Delgado* (1984), 466 U.S. 210, 217. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.” (*Ibid.*) Similarly, “if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion.” (*United States v. Hensley* (1985) 469 U.S. 221, 229.)

driving under the influence, the officers' lack of absolute certainty that the defendant was the driver did not preclude a finding of probable cause. (*People v. Thompson* (2006) 38 Cal.4th 811, 820.) “ “[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.” ’ (*Maryland v. Garrison* (1987) 480 U.S. 79, 87.)” Thus, “if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect’s description, neither the seizure nor an accompanying search of the arrestee would be unlawful. See *Hill v. California*, 401 U.S. 797, 802-805 (1971).” (*Heien v. North Carolina* (2014) \_\_\_ U.S. \_\_\_, \_\_\_ [135 S.Ct. 530, 536].)

“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” (*Alabama v. White* (1990) 496 U.S. 325, 330 (*Alabama*).) The standard of reasonable suspicion likewise does not require absolute certainty. (See *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 346.)

“Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the ‘totality of the circumstances—the whole picture,’ [citation], that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The *Gates* Court applied its totality-of-the-circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach

applies in the reasonable-suspicion context, the only difference being the level of suspicion that must be established.”<sup>8</sup> (*Alabama, supra*, 496 U.S. at pp. 330-331.)

In this case, we must decide whether the vehicular stop or initial seizure of defendant, who Deputy Baldrige knew was a parolee, for the specific purpose of conducting a parole search was arbitrary, capricious or harassing. The standard for seizure and search of a parolee is less demanding and requires a lesser showing than the reasonable suspicion standard for conducting an investigatory stop. In this context, the unknown reliability<sup>9</sup> of the informants’ tips received by Deputy Baldrige is a factor to be considered as part of the totality of the circumstances.

Those circumstances also include the fact that Deputy Baldrige was receiving information from multiple informants, the deputy was currently conducting a narcotics investigation of defendant and preparing to seek a search warrant against defendant, and the deputy had canvassed the street on which defendant was reportedly residing more

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<sup>8</sup> “*Illinois v. Gates*, 462 U.S. 213 (1983), dealt with an anonymous tip in the probable-cause context. The Court there abandoned the ‘two-pronged test’ . . . in favor of a ‘totality of the circumstances’ approach to determining whether an informant’s tip establishes probable cause. *Gates* made clear, however, that those factors that had been considered critical . . .—an informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’—remain ‘highly relevant in determining the value of his report.’ [Citation.] These factors are also relevant in the reasonable-suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard.” (*Alabama, supra*, 496 U.S. at pp. 328-329.)

<sup>9</sup> In general, “private citizens who are witnesses to or victims of a criminal act, absent some circumstance that would cast doubt upon their information, should be considered reliable.” (*People v. Ramey* (1976) 16 Cal.3d 263, 269; see *People v. Smith* (1976) 17 Cal.3d 845, 852 [“untested citizen-informant who has personally observed the commission of a crime is presumptively reliable”].) “[N]either a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities.” (*People v. Ramey, supra*, 16 Cal.3d at p. 269, fn. omitted.) Although Deputy Baldrige described two of the informants as “citizen-informants” at the hearing, he provided no information about them to establish whether his label was legally accurate.

than once and noted that the truck reportedly being driving by defendant was typically parked on that street. In addition to the information regarding defendant's residence and truck and defendant's exclusive driving of the truck, the deputy had previously arrested defendant for selling heroin, and the deputy knew defendant was on parole. The deputy's suspicion on August 10, 2012 that the driver of the truck was defendant was not baseless. The stop was not conducted for an arbitrary, capricious, or harassing purpose and the level of intrusion in making the stop to confirm whether the driver was defendant, who the deputy knew was a parolee, was de minimis. We conclude that, under the totality of circumstances, the degree of Deputy Baldrige's suspicion that the driver of the truck was defendant was constitutionally sufficient to stop the vehicle to confirm or dispel it.

The driver of the truck was in fact defendant, whom Deputy Baldrige knew was on parole.<sup>10</sup> Accordingly, the deputy had the authority to conduct a suspicionless parole search of him. Neither probable cause nor reasonable suspicion is required to conduct a parole search. (See *Samson, supra*, 547 U.S. at p. 857; *Reyes, supra*, 19 Cal.4th at p. 754.)

We conclude the vehicular stop and the ensuing parole search of defendant and his vehicle were constitutionally sound. The trial court did not err in denying defendant's motion to suppress the evidence obtained as a result of the parole search following the vehicular stop of defendant.

#### *B. Plea Agreement Required Dismissal of Remaining Charges and Allegations*

Defendant asks this court to dismiss the remaining charges and enhancements in accordance with his plea agreement to prevent a violation of his Fourteenth Amendment right to due process.

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<sup>10</sup> Once stopped, Deputy Baldrige presumably recognized defendant or confirmed his identity or did both before conducting the parole search. Defendant does not suggest otherwise.

## 1. *Background*

Although the court had indicated at the time of defendant's negotiated plea that it would dismiss the remaining counts and allegations at the time of sentencing, it did not orally do so. The minute order, which was not signed by the judge, stated: "Ct(s) 1 3 5 6 7 8 dismissed in the interest of justice. Allegation of remaining priors is stricken."

## 2. *Analysis*

The parties are in agreement that the trial court intended to dismiss remaining charges and allegations. Defendant insists that the minute order is inaccurate and this court must dismiss the remaining charges to avoid a due process problem. The People acknowledge that nothing in the record suggests that the trial court intended to deviate from the plea agreement but argue that the minute order controls. They agree that, if the minute order does not control, this court should dismiss the remaining charges and enhancements without any remand.

As a general rule, "the abstract of judgment is not itself the judgment of conviction, and cannot prevail over the court's oral pronouncement of judgment to the extent the two conflict. (§§ 1213, 1213.5; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.)" (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) Consequently, when there is a discrepancy between the oral pronouncement of a sentence and the sentencing minute order or abstract of judgment, the oral pronouncement ordinarily governs. (See *People v. Price* (2004) 120 Cal.App.4th 224, 242; *People v. Mitchell, supra*, at p. 185; *People v. Mesa, supra*, at pp. 471-472.) Under certain circumstances, however, courts will "deem the minute order and abstract of judgment to prevail over the reporter's transcript. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1426-427.)" (*People v. Cleveland* (2004) 32 Cal.4th 704, 768.) For example, where a sentencing court misstates a term but the minute order and abstract of judgment correctly state the term, the court's misstatement may be of no effect and the minute

order and abstract of judgment may control. (See *Id.* at p. 768 [court incorrectly referred to one-year term under section 667.5 but defendant was charged with and admitted only a prior serious felony conviction under section 667]; *People v. Thompson* (2009) 180 Cal.App.4th 974, 977 [court misstated that one-third of the middle term for a violation of Vehicle Code section 23153 was one year, four months].)

In this case, however, the trial court completely overlooked the remaining counts and allegations and failed to dismiss them in accordance with the plea bargain. “ ‘When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.’ (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; see *In re Troglin* (1975) 51 Cal.App.3d 434, 438 [both the People and the accused should be held to the terms of a plea bargain].)” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80; see *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [overruling *People v. Walker, supra*, at p. 1013 on another point].) “[T]he requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy. [Citations.]” (*People v. Mancheno* (1982) 32 Cal.3d 855, 860.)

We conclude that this matter should be remanded to the trial court. In addition to the trial court’s oversight in failing to dismiss the remaining counts and allegations in accordance with defendant’s negotiated plea, the appellate record reflects that defendant admitted the enhancement allegation attached to count 4 (Health and Saf. Code, § 11370.2, subd. (c)) and he did *not* admit the enhancement allegation attached to count 2 (Health and Saf. Code, § 11370.2, subd. (a)). Although we have been informed that the trial court has now corrected what appears to be an unauthorized sentence, the soundest approach is to return the matter to the trial court to implement the plea agreement and ensure that an authorized sentence has been imposed. (See fns. 2-4, *ante.*)

### C. *Challenged Terms of Mandatory Supervision*

#### A. *Background*

The probation report recommended that the trial court impose certain condition of mandatory supervision, including the following requirements: “4. Totally abstain from the use of controlled substances. Do not possess any drug paraphernalia for the use of ingestion or injection of drugs. [¶] 5. Do not possess any drug indicia for sales.”

At sentencing on February 28, 2013, the trial court imposed certain conditions of mandatory supervision,<sup>11</sup> including the following: “Totally abstain from the use of controlled substances. Do not possess any controlled substances or paraphernalia for the use or ingestion of drugs. Do not possess any indicia of drug sales.” Defendant did not raise any objection to those conditions at the time of sentencing.

The minute order, which was not signed by the judge, worded the mandatory supervision conditions differently than the judge’s oral pronouncement. The minute order stated in part: “Do not knowingly possess paraphernalia for the use of ingestion or injection of drugs”; “Do not possess or use controlled substances”; “Do not possess indicia of drug sales.”

Nothing in the appellate record indicates the court subsequently modified the conditions of mandatory supervision it had orally imposed at the time of sentencing. Any discrepancy between reporter’s transcript of the sentencing hearing and the sentencing minute order with respect to the challenged conditions was likely attributable to clerical error. (See *People v. Mitchell, supra*, 26 Cal.4th at p. 185; *People v. Mesa, supra*, 14 Cal.3d at pp. 470-471; § 1207 [“the clerk must enter the judgment [of conviction] in the

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<sup>11</sup> “[D]uring [the period of mandatory supervision,] the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court.” (Stats. 2012, ch. 828, § 1, p. 6535 [former § 1170(h)(5)(B)]; see § 1170, subd. (h)(5)(B).)

minutes”]; Gov. Code, § 69844 [“The clerk of the superior court shall keep the minutes and other records of the court, entering at length . . . any order, judgment, and decree of the court which is required to be entered . . . .”]

## B. *Analysis*

Defendant argues that certain conditions related to drug possession or drug sales are unconstitutionally vague and overbroad in violation of his Fourteenth Amendment rights.

### 1. *Governing Law*

There is no dispute that the constitutional principles articulated with respect to probation conditions are equally applicable to conditions of mandatory supervision imposed under realignment.

“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.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)) “[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.*)” (*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.]’ [Citation.] 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.]’ [Citation.] 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.”’ [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

“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.)” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

## 2. *Facial Challenges Not Forfeited*

The People contend that *Sheena K.* is limited to conditions infringing upon First Amendment rights, which are not at stake here. We are not persuaded.

*Sheena K.* established that facial vagueness or overbreadth challenges to probation conditions are *not* subject to the usual forfeiture rule and a defendant can raise such challenges for the first time on appeal.<sup>12</sup> (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) It observed that “an 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

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<sup>12</sup> Since defendant did not object to any condition of mandatory supervision at sentencing, he is limited to arguing that each of the challenged conditions is unconstitutional on its face. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.)

abstract and generalized legal concepts—a task that is well suited to the role of an appellate court.” (*Id.* at p. 885)

Although Sheena K. “contended that the probation condition restricting her association with other persons was vague and overbroad, violating her rights under the First and Fifth Amendments to the federal Constitution” (*Sheena K.*, *supra*, 40 Cal.4th at p. 878), we find nothing in *Sheena K.* that limits the forfeiture rule exception for facial constitutional challenges to conditions that implicate the First Amendment to the United States Constitution. In addition, *Sheena K.* did not say that vagueness doctrine applies to only conditions infringing First Amendment rights.

“Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.” (*United States v. Williams* (2008) 553 U.S. 285, 304.) “Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).” (*F.C.C. v. Fox Television Stations, Inc.* (2012) \_\_\_ U.S. \_\_\_, \_\_\_ [132 S.Ct. 2307, 2317].) Like its counterpart, the due process clause of the Fourteenth Amendment requires the state to provide fair notice of “what the State commands or forbids.” (*Lanzetta v. State of New Jersey* (1939) 306 U.S. 451, 453; see *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269.)

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391, (1926) (‘[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, violates the first essential of due process of law’); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (‘Living

under a rule of law entails various suppositions, one of which is that “[all persons] are entitled to be informed as to what the State commands or forbids” ‘. . . .’)” (*F.C.C. v. Fox Television Stations, Inc.*, *supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2317].) “A conviction or punishment fails to comply with due process if the statute or regulation 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.’ [Citation.] [A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. [Citation.] ” (*Ibid.*)

As this court observed in *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*), “[p]robation conditions are analyzed according to the same standards for determining whether penal statutes are unconstitutionally vague, as discussed in *Sheena K.*, *supra*, 40 Cal.4th 875, 890.” (*Id.* at p. 590.) The same constitutional precepts apply to conditions of mandatory supervision as well.

As to unconstitutional overbreadth, it appears that the United States Supreme Court has not recognized a constitutional overbreadth doctrine outside the limited context of First Amendment (see *United States v. Salerno* (1987) 481 U.S. 739, 745).<sup>13</sup> The California Supreme Court in *Sheena K.* has made clear, however, that “[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 *White*, *supra*, 97 Cal.App.3d at pp. 149-150.)” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; see *People v. Olguin*, [(2008)] 45 Cal.4th [375,]

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<sup>13</sup> The First Amendment “overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute’s plainly legitimate sweep.’ *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973).” (*City of Chicago v. Morales* (1999) 527 U.S. 41, 52 (plur. opn. of Stevens, J.).)

384.) In *re White, supra*, at p. 141 (*White*), the case cited by *Sheena K., supra*, at p. 875, involved the constitutional right of intrastate travel (*White, supra*, at p. 148), not a First Amendment right. Defendant has not cited any authority that limits California’s overbreadth doctrine to probation conditions implicating First Amendment rights.

In *People v. Olguin, supra*, 45 Cal.4th 375, the California Supreme Court indicated that a probation condition is not scrutinized to determine whether it is closely tailored to achieve legitimate probationary purposes as required by the overbreadth doctrine “in the absence of a showing that the probation condition infringes upon a constitutional right.” (*Id.* at p. 384.) To the extent that the People are claiming that challenged conditions do not implicate any constitutional right, we reject the argument. Article I, section 1, of the California Constitution provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, *acquiring, possessing, and protecting property*, and pursuing and obtaining safety, happiness, and privacy.” (Italics added.)

As an intermediate court, we are bound by the decisions of the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant’s facial attacks on the specified conditions of mandatory supervision are cognizable on appeal.

### 3. *Possession of Indicia of Drug Sales*

At sentencing, the court ordered: “Do not possess any indicia of drug sales.” Defendant complains that the prohibition against possessing any indicia of drug sales “does not specify whether possessing a cell phone, plastic baggies, or cash . . . may constitute a violation of this condition.” He emphasizes that “[a] variety of mundane, commonplace items could potentially be indicia of drug sales—for example, cell phone, cash, or plastic bags.” He points out that possession of such indicia is prohibited regardless whether he has “drugs on his person.” He argues that the prohibition is

unconstitutional vague and overbroad and, therefore, must be stricken or at least modified by addition of a knowledge requirement.

We agree that common personal or household items may sometimes constitute indicia of drug sales. Some of the items typically recognized as indicia of drug sales are packaging materials, large amounts of cash, a cell phone, a pager, a police scanner, a scale, records of amounts paid or owing, a safe, and weapons or ammunition. (See e.g., *People v. Engstrom* (2011) 201 Cal.App.4th 174, 181; *People v. Kelly* (2010) 47 Cal.4th 1008, 1019; *People v. Murphy* (2004) 124 Cal.App.4th 859, 861; *People v. Souza* (1993) 15 Cal.App.4th 1646, 1650; *People v. Earls* (1992) 10 Cal.App.4th 184, 188.) Of course, the surrounding circumstances are highly relevant to whether such items are in fact indicia of drug sales. For example, a digital scale and plastic baggies found in an ordinary kitchen may not be indicia of drug sales but a digital scale and packaging material found in a different context, such as a motel room, may be indicia of drug sales.

Defendant argues that the addition of an explicit knowledge requirement “does not cure the problem because it still places the burden on [him] to guess what items fall within the condition’s scope.” The inclusion of 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.” (See *Village of Hoffman Estates v. Flipside, Hoffman Estates*, (1982) 455 U.S. 489, 499; see also *Hill v. Colorado* (2000) 530 U.S. 703, 732 [knowledge requirement]; *Posters ‘N’ Things, Ltd. v. United States* (1994) 511 U.S. 513, 526 [the court’s inference of a scienter requirement assisted in avoiding any vagueness problem with the Mail Order Drug Paraphernalia Control Act].)

Since there are an endless variety of circumstances that might arise, a knowledge requirement is essential to clarify and narrow the prohibition to avoid facial unconstitutional vagueness and overbreadth. Once an express knowledge requirement is added to the condition prohibiting possession of indicia of drug sales, defendant will violate it only if he knows, not guesses, that he possesses indicia of drug sales. (See

*Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892 & fn. 8; cf. *People v. Lopez* (1998) 66 Cal.App.4th 615, 629 [knowledge requirement added to probation condition that “suffer[ed] from constitutionally fatal overbreadth because it prohibit[ed] [the defendant] from displaying indicia not known to him to be gang related.”].) In addition, since this case is being remanded, the court will have an opportunity to provide greater guidance, if it so wishes, on what items may fall within this prohibition.

#### 4. *Possession and Use of Controlled Substances and Possession of Drug Paraphernalia*

At sentencing, the trial court orally ordered defendant to “[t]otally abstain from the use of controlled substances” and to “not possess any controlled substances or paraphernalia for the use or ingestion of drugs.” The minute order forbids defendant from “knowingly possess[ing] paraphernalia for the use of ingestion or injection of drugs” and from “possess[ing] or us[ing] controlled substances.”

Defendant contends that the restrictions related to possession and use of controlled substances and paraphernalia must all include express knowledge requirements. He suggests that he should be required to “knowingly abstain from the use of controlled substances,” “not knowingly possess any controlled substances,” and “not knowingly possess any controlled substances or paraphernalia for the use of [*sic*] ingestion of drugs.” (Emphasis omitted.) One of his concerns is that he “could be found in violation of probation for unknowingly eating a marijuana-laced brownie or for unknowingly driving a car that contains controlled substances or paraphernalia.”

Citing *Rodriguez*, *supra*, 222 Cal.App.4th 578, the People argue that the conditions prohibiting possession of controlled substances do not need to be modified to add express knowledge requirements because they “mirror the Uniform Controlled Substances Act and contain an implicit knowledge requirement.” In *Rodriguez*, probation condition No. 8 stated in part: “[Do] [n]ot use or possess alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician.” (*Id.* at p. 583.) This court determined: “*To the extent* condition 8 reinforces defendant’s

obligations under the California Uniform Controlled Substances Act, the same knowledge element which has been found to be implicit in those statutes is reasonably implicit in the condition. What is implicit is that possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance.” (*Id.* at p. 593, italics added.)

In *People v. Kim* (2011) 193 Cal.App.4th 836, a probation condition provided: “You shall not own, possess, have within your custody or control any firearm or ammunition for the rest of your life under Section[s] 12021 and 12316 [, subdivision] (b)(1) of the Penal Code.” (*Id.* at p. 840.) As this court explained, “where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute.” (*Id.* at p. 843.) We concluded that the statutorily proscribed conduct was “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.” (*Id.* at p. 847.)

In contrast to *Kim*, the challenged conditions of mandatory supervision in this case do not refer to any statutory offense. The People have not shown those conditions of mandatory supervision are completely coextensive with specific statutory crimes that have knowledge elements that are impliedly imported into those conditions. For example, although marijuana is a controlled substance (Health & Saf. Code, §§ 11007, 11054, subd. (d)(13)), it may be lawfully possessed under California law under limited circumstances (see e.g., Health & Saf. Code, §§ 11362.5, subd. (d), 11362.77). Methadone is also a controlled substance (Health & Saf. Code, §§ 11007, 11055, subd. (c)(14)) but it is authorized for use in narcotic replacement therapy by licensed narcotic treatment programs (Health & Saf. Code, § 11839.2). In instances of lawful possession or use of a controlled substance, there is no criminal statute from which a knowledge

requirement may be derived. In this case, the court entirely prohibited possession of any controlled substance, impliedly regardless of its legality. The court may regulate or prohibit otherwise lawful conduct. (See *People v. Olguin, supra*, 45 Cal.4th at pp. 379-380.)

Moreover, with respect to the challenged conditions that lack an express knowledge requirement, the requisite mental state to establish a violation is unclear. They could be construed to hold defendant liable for mere unknowing possession or use. To prevent arbitrary enforcement and provide clear notice of the conduct and mental state that will constitute a violation, those conditions must be modified to include a knowledge requirement.

On remand, the trial court will have the opportunity to consider the competing versions of the challenged conditions, clarify the specific language that will govern defendant's conduct while under mandatory supervision, and add express knowledge requirements to them.

#### DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings to implement the plea agreement, to ensure an authorized sentence has been imposed, and to clarify and add an express knowledge requirement to each of the challenged conditions of mandatory supervision.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.