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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES FLORES, JR.,

Defendant and Appellant.

H040288

(Santa Clara County

Super. Ct. No. C1108340)

Defendant James Flores, Jr. pleaded guilty to a count of bringing a controlled substance into a jail (Pen. Code, § 4573)¹ and a count of being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). The trial court sentenced him to a term of four years in prison with execution of the sentence suspended. Defendant was placed on three years of formal probation, subject to various terms and conditions. On appeal, he argues the probation condition prohibiting him from possessing or consuming illegal drugs and owning or possessing a firearm or ammunition is unconstitutionally vague. He also argues his restitution fine must be reduced to the statutory minimum. For the reasons set forth below, we modify the judgment to reduce defendant's restitution fine, matching probation revocation fine, and county administrative fee. As modified, we affirm the judgment.

¹ Further unspecified statutory references are to the Penal Code.

PROCEDURAL BACKGROUND²

On October 20, 2011, the Santa Clara County District Attorney's office filed an information charging defendant with a count of bringing a controlled substance to prison (§ 4573; count 1), a count of being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a); count 2), and a count of possession of a hypodermic needle or syringe (Bus. & Prof. Code, § 4140; count 3). It was further alleged that defendant had suffered one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) and had served a prior prison term (§ 667.5, subd. (b)).

On May 6, 2013, defendant pleaded guilty to counts 1 and 2 and admitted the prior strike and prior prison term. The court dismissed count 3 pursuant to section 1385, subdivision (a). Defendant filed a *Romero* motion, which the court granted.³

On October 17, 2013, the trial court sentenced defendant to four years in prison with execution of sentence suspended. Defendant was placed on three years of probation, subject to various terms and conditions including that he spend 365 days in county jail. The trial court also imposed a probation condition that stated: “[D]o not possess or consume illegal drugs or knowingly be where they are present. [¶] . . . [¶] You shall not own or possess a firearm or ammunition for life.” The court also imposed a \$240 restitution fund fine.

Defendant filed a timely notice of appeal.

² The factual circumstances of defendant's offense are not relevant to the issues he has raised on appeal. We therefore dispense with a recitation of the facts and provide only a summary of the relevant procedural history.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

1. *Unconstitutionality of Probation Conditions*

At sentencing, the trial court imposed a probation condition that stated: “[D]o not possess or consume illegal drugs or knowingly be where they are present. [¶] . . . [¶] You shall not own or possess a firearm or ammunition for life.”⁴ Defendant argues this condition must be modified to include an express knowledge requirement to render it constitutional.

Standard of Review

Defendant did not object to the imposition of the condition during his sentencing hearing. However, “[a] Court of Appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*)) Our review of such a question is de novo.” (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345.) Here, defendant raises a facial vagueness challenge to the probation condition at issue.

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ ” (*In re 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.” (*Ibid.*) That is, the defendant must know in

⁴ The People contend the trial court incorporated the probation report’s recommended conditions by reference. The probation report recommended a condition that defendant be prohibited from “knowingly possess[ing] or hav[ing] within his/her custody or control any firearm or ammunition for the rest of his/her life pursuant to Section 29800 and Section 30305 of the Penal Code.” However, there is nothing in the record that indicates the trial court incorporated this recommended probation condition. During the sentencing hearing, the court did not mention the report nor did it assert it was adopting its recommendations.

advance when he may be in violation of the condition. “[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item].” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 752.)

Illegal Drugs

There are two components of the challenged condition. The first component prohibits defendant from consuming or possessing illegal drugs. Defendant argues that an express knowledge requirement must be added to the condition, such that it would prohibit him from *knowingly* consuming or possessing illegal drugs. We disagree.

This court considered the constitutionality of a similar condition in *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*). In *Rodriguez*, the defendant challenged a probation condition that stated: “ ‘Not use or possess alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician.’ ” (*Id.* at p. 592.) We concluded that “[t]o the extent [the condition] reinforces defendant’s obligations under the California Uniform Controlled Substances Act, the same knowledge element which has been found 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.)

However, *Rodriguez* determined the probation condition at issue was not “limited to substances regulated by statute, but extend to alcohol and the generic ‘intoxicants.’ ” (*Rodriguez, supra*, 222 Cal.App.4th at p. 594.) The court held that “[b]ecause the latter category is susceptible of different interpretations, which may include common items such as adhesives, bath salts, mouthwash, and over-the-counter medicines, the addition of an express knowledge requirement [would] eliminate any potential for vagueness or overbreadth in applying the condition.” (*Ibid.*, fn. omitted.)

Unlike the condition challenged in *Rodriguez*, defendant's probation condition prohibits possession or consumption of only those drugs that are *illegal*. The condition is limited to drugs regulated by statute and is not susceptible to various interpretations. Therefore, implicit in this condition is the requirement that defendant *know* the nature of the prohibited item in order to be found in violation. Under the reasoning set forth in *Rodriguez*, defendant's argument that he could be found in violation due to an unknowing possession or consumption of illegal drugs is without merit.

Defendant acknowledges our decision in *Rodriguez*. However, he contends that *Rodriguez* is flawed, because the statutes prohibiting consumption and use of illegal drugs read as strict liability offenses. For example, Health and Safety Code section 11350, subdivision (a) states in pertinent part: "[E]very person who possesses . . . any controlled substance . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code." A knowledge element is not written into the statute, and defendant asserts an implied knowledge requirement is only found in the case law interpreting the code section. Accordingly, he insists that " "men of common intelligence" ' ' --those who are not lawyers--would be unable to " "guess at its meaning and differ as to its application." ' ' (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

Essentially, defendant contends that probation conditions warrant greater clarity and specificity than the penal statutes they echo. However, defendant cites no authority for this proposition. Furthermore, we find it dubious that probation and police officers need more clarity to enforce a probation condition that merely reinforces a penal statute than a police officer who is tasked with enforcing the penal statute itself.

Nonetheless, defendant insists that probation conditions are unlike penal statutes that contain fixed language. Trial courts have the discretion to craft probation conditions to reasonably fit each defendant and the crimes he or she is convicted of committing. Therefore, there may be circumstances in which a probation condition that purports to

implement a certain statute deviates from the statutory language, rendering it impossible to infer a scienter element or to find it otherwise constitutionally sound. Or, a probation condition may be broadly worded so that it regulates or prohibits lawful as well as unlawful conduct. However, defendant's case does not present this type of situation. Possession and use of *illegal* drugs is specifically proscribed by statute and there is no indication the condition seeks to prohibit anything other than criminal conduct.

Accepting defendant's contention that an express knowledge requirement is necessary in this situation is tantamount to modifying the probation order that a defendant must "obey all laws" to read that a defendant must "*knowingly* obey all laws." The law prohibits possession and use of illegal drugs. Modification of a probation condition that merely reinforces these legal obligations does not add additional clarity. "Superfluity may not vitiate [(Civ. Code, § 3537)], but neither does it enlighten." (*People v. Kim* (2011) 193 Cal.App.4th 836, 847 (*Kim*).

Defendant opines that an express knowledge requirement is required, because advance notice must be given to a probationer. He insists that a probationer's ability to litigate a wrongful arrest in a probation revocation hearing does not remedy the vagueness of the probation condition.

Indeed, appellate courts have acknowledged that "a court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.'" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 913.) Furthermore, "[w]hile the requirement of proof of willfulness may save [a probationer] from an unconstitutional finding of guilt based on an unknowing probation violation, that is cold comfort to a probationer who suffers from an unfounded arrest and detention based on the whim or vengeance of an arbitrary or mean-spirited probation officer. [Citation.] [¶] Due process requires more. It requires that the

probationer be informed *in advance* whether his conduct comports with or violates a condition of probation.” (*Ibid.*)

However, since we conclude that a knowledge element is reasonably implicit in the condition, defendant’s due process rights are not at risk. The Second District addressed a similar argument in *People v. Moore* (2012) 211 Cal.App.4th 1179, stating: “In regard to *Victor L.*’s concern about arbitrary enforcement [*People v. Patel* (2011) 196 Cal.App.4th 956], has explained: ‘We . . . do not discern how addressing this *specific* issue on a repetitive case-by-case basis is likely to dissuade a probation officer inclined to act in bad faith from finding some *other* basis for harassing an innocent probationer.’ ” (*Id.* at p. 1188.) Likewise, we cannot discern how adding an express knowledge requirement to a probation condition that we find already contains an implicit knowledge requirement would alleviate defendant’s concerns about arbitrary enforcement.

Lastly, defendant insists that cases, including *Rodriguez*, incorrectly distinguished between probation conditions that affect constitutionally protected conduct (such as prohibitions against associations) and conditions that do not (such as those prohibiting possession of illegal drugs). He argues this distinction was not employed by the Supreme Court in *Sheena K.* and therefore places an impermissible restriction on the applicability of its holding. *Sheena K.* stated that “[a] probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purposes of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Although *Sheena K.* discussed the distinction between conditions that regulate constitutionally protected conduct and conditions that do not, this discussion was in the context of constitutional *overbreadth*, not *vagueness*. *Sheena K.* did not conclude that the probation condition at issue there was impermissibly overbroad; the court based its decision on the void for vagueness doctrine. (*Id.* at pp. 889-893.)

We do not find that *Rodriguez* improperly narrowed the Supreme Court precedent set forth in *Sheena K*. The *Rodriguez* defendant had argued that the probation condition prohibiting him from possessing ammunition or firearms was overbroad because it was not narrowly tailored. The *Rodriguez* court concluded that “[t]his overbreadth claim fails because [Rodriguez] does not identify what constitutional right is impacted by a condition restricting a felon’s possession of ammunition and deadly weapons.” (*Rodriguez, supra*, 222 Cal.App.4th at p. 592.) A similar distinction was drawn by this court in *Kim, supra*, 193 Cal.App.4th 836. *Kim* concluded that although probation conditions must be narrowly tailored to avoid infringing on an individual’s constitutional rights--an argument of constitutional overbreadth--“a convicted felon has no constitutional right to bear arms.” (*Id.* at p. 847.)

We agree with defendant that a discussion of overbreadth requires a different analysis than a discussion concerning vagueness. However, we fail to find merit in his conclusion that cases such as *Kim* and *Rodriguez* impermissibly conflated these two distinct concepts. Many probation conditions are challenged on the basis of constitutional overbreadth and vagueness. Accordingly, the appellate decisions determining the constitutionality of these conditions, including *Kim* and *Rodriguez*, often discuss both doctrines.

In sum, we reject defendant’s claim that an express knowledge requirement is necessary and adhere to the reasoning set forth in *Rodriguez*.

Possession of firearms and ammunition

Defendant also challenges the portion of the probation condition that states: “You shall not own or possess a firearm or ammunition for life.” Defendant asserts this condition is unconstitutionally vague due to its lack of an express knowledge requirement.

We reject his contentions for the same reasons articulated above. This court upheld the constitutionality of a similarly worded probation condition in *Kim, supra*, 193 Cal.App.4th 836. In *Kim*, we concluded the no-firearms and ammunition probation condition, which lacked an express knowledge requirement, needed no modification to render it constitutional. (*Id.* at p. 847.) The statutes prohibiting felons from possessing firearms and ammunition contain an implicit knowledge requirement. (*Ibid.*) Therefore, a probation condition that reinforces these statutory obligations does not need an express knowledge requirement. (*Ibid.*)

This court reached the same conclusion in *Rodriguez, supra*, 222 Cal.App.4th 578, reasoning: “The statutes prohibiting possession of firearms, ammunition, and deadly weapons are understood to have implicit scienter requirements. We understand the challenged probation condition, which uses the same language, to reinforce those prohibitions. When a probation condition intended to prohibit criminal conduct uses words and phrases with established meanings in statutes, we will interpret the words as having those meanings, rather than imposing a different set of obligations on a probationer. We conclude that the challenged probation condition contains those implicit scienter requirements, and due process does not require making them explicit.” (*Id.* at p. 591.)

Following the reasoning set forth in *Rodriguez* and *Kim*, the probation condition prohibiting defendant from possessing firearms and ammunition requires no modification.

2. *Restitution Fine*

Lastly, defendant challenges the trial court’s imposition of a \$240 restitution fine pursuant to section 1202.4, subdivision (b). Defendant argues this restitution fine must be reduced to \$200, because at the time defendant committed his offense in May 2011 the applicable statute provided for a minimum fine of \$200. (Stats. 2010, ch. 351, § 9, eff.

Sept. 27, 2010 [former § 1202.4, subd. (b)(1)].) Defendant maintains the record demonstrates the trial court intended to impose the statutory minimum.

When defendant entered his plea, the trial court informed him that there were “certain fines that are mandatory, and I will keep them to the minimum.” During the sentencing hearing, the court imposed a restitution fine of \$240. Defendant’s attorney asked the court if the restitution fine should be less than \$240, because defendant’s committed his offense in 2011. The courtroom clerk responded that the restitution fine “goes by date of conviction.” Defendant’s attorney objected “to the imposition of \$240 based upon the conviction” and reiterated that he believed the fine should be calculated based on the date of the offense.

“A restitution fine qualifies as punishment for the purposes of the prohibition against ex post facto laws.” (*People v. Saelee* (1995) 35 Cal.App.4th 27, 30.) Accordingly, defendant is correct that the amount of the restitution fine to be imposed under section 1202.4 is determined by the date of the offense, not the date of conviction. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) Defendant committed the offense in May 2011, when the minimum restitution fine for a felony conviction was \$200.⁵

Given the trial court’s statement that it intended to keep the fines to the “minimum,” the People do not oppose modifying the restitution fine to \$200. We agree that the statements made by the trial court indicates it intended to impose the statutory

⁵ Former section 1202.4, subdivision (b)(1) provided in pertinent part: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars (\$100), and not more than one thousand dollars (\$1,000) if the person is convicted of a misdemeanor.” (Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010.)

minimum fine but erred in concluding that the fine should be determined based on the date of the conviction instead of the date of the offense. Accordingly, we modify the restitution fine imposed pursuant to section 1202.4, subdivision (b) to \$200.

Additionally, we modify the matching probation revocation fine (§ 1202.44) to \$200.

The county administrative fee (§ 1202.4, subd. (l)), calculated as \$24 (10 percent of the original \$240 restitution fine) shall be reduced to \$20.

DISPOSITION

The judgment is modified to impose a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$200 probation revocation fine (Pen. Code, § 1202.44), and a \$20 county administrative fee (Pen. Code, § 1202.4, subd. (l)). As modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.