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

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN PASCACIO GARCIA,

Defendant and Appellant.

H040883

(Monterey County

Super. Ct. No. SS131522)

**I. INTRODUCTION**

Defendant Ruben Pascacio Garcia appeals after pleading no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). He was placed on probation for three years.

On appeal, defendant challenges a probation condition that requires him not to “use or possess any controlled substances that are illegal or any controlled substance paraphernalia.” Defendant contends that this probation condition is vague and overbroad because it does not include a knowledge element. We will modify the challenged probation condition and affirm the judgment as modified.

**II. BACKGROUND**

On August 2, 2013, a police officer approached defendant in a park after witnessing what the officer believed to be nervous behavior. The officer noticed burn

marks on the defendant's hands which he believed were consistent with methamphetamine use. Upon questioning, defendant acknowledged a prior arrest for possession of methamphetamine. The officer found a bundle of methamphetamine beneath the bleacher where defendant was previously sitting.

Defendant was charged with possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) On November 12, 2013, defendant pleaded no contest to the charge as a misdemeanor, with the agreement that he would receive credit for time served. On that same date, the trial court suspended imposition of sentence and placed defendant on probation for three years.

The trial court imposed various probation conditions, including the following:

“You are not to use or possess any controlled substances that are illegal or any controlled substance paraphernalia.”

### **III. DISCUSSION**

Defendant contends the probation condition regarding illegal controlled substances and controlled substance paraphernalia is unconstitutionally vague and overbroad because it does not include a knowledge element.

The “underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)) “The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [Citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. [Citation.]’ ” (*Ibid.*) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], 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.*)

In *Sheena K.*, the California Supreme Court considered a probation condition requiring the defendant not “ ‘associate with anyone disapproved of by probation.’ ”

(*Sheena K.*, *supra*, 40 Cal.4th at p. 880.) The court held that “in the absence of an express requirement of knowledge,” the probation condition was unconstitutionally vague because it “did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer.” (*Id.* at pp. 891-892.)

Appellate courts have held that a knowledge element was required in numerous other probation conditions. For instance, in *People v. Kim* (2011) 193 Cal.App.4th 836, this court observed that “California appellate courts have found probation conditions to be unconstitutionally vague . . . when they do not require the probationer to have knowledge of the prohibited conduct or circumstances.” (*Id.* at p. 843.) Similarly, when considering probation conditions regarding possession of firearms and stolen property in *People v. Freitas* (2009) 179 Cal.App.4th 747, the court held that to survive a vagueness challenge, a probation condition that prohibits possession of particular items must “specify that defendant not *knowingly* possess the prohibited items.” (*Id.* at p. 752.)

The Attorney General asserts that it is unnecessary to include a knowledge requirement in the challenged probation condition. The Attorney General contends that because the probation condition challenged here encompasses crimes prohibited under Division 10 of the Health and Safety Code, a knowledge requirement is reasonably implicit in the condition. The Attorney General cites to *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*), where 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.) This court observed that case law had interpreted the California Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.) as including an implicit knowledge requirement. (*Rodriguez, supra*, at p. 593.) Thus, *Rodriguez* reasoned that to the extent that the challenged probation condition reinforced the defendant’s statutory obligations, “the same knowledge element which ha[d] been found to be implicit in those statutes [was]

reasonably implicit in the condition.” (*Ibid.*) Nevertheless, this court ordered that the entire condition be modified to add an express knowledge requirement because the condition was not limited to substances regulated by statute. (*Id.* at pp. 593-594.)

We agree with defendant that a knowledge element should be added to the challenged probation condition, which states: “You are not to use or possess any controlled substances that are illegal or any controlled substance paraphernalia.” Our conclusion comports with the observation in *Rodriguez, supra*, 222 Cal.App.4th 578, that “the addition of an express knowledge requirement will eliminate any potential for vagueness or overbreadth in applying the condition.” (*Id.* at p. 594.) To prevent arbitrary enforcement and provide clear notice of what conduct will constitute a violation, we will modify the condition to read as follows: “You are not to knowingly use or possess any controlled substances that are illegal or any controlled substance paraphernalia.”

#### **IV. DISPOSITION**

The judgment (order of probation) is modified as follows:

The probation condition reading, “You are not to use or possess any controlled substances that are illegal or any controlled substance paraphernalia” is modified to read: “You are not to knowingly use or possess any controlled substances that are illegal or any controlled substance paraphernalia.”

As so modified, the judgment (order of probation) is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.