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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND ANTHONY CARDENAS,

Defendant and Appellant.

H041361

(Santa Clara County

Super. Ct. No. C1364562)

After he pleaded no contest to charges arising out of his commission of robbery of a Safeway store, defendant Raymond Cardenas was granted probation on specified conditions. On appeal, he challenges two of those conditions as unconstitutionally vague. We will modify one of the probation conditions and otherwise affirm the judgment.

Background

In a complaint filed September 4, 2013, defendant was charged with second degree robbery (count 1, Pen. Code, §§ 211, 212.5, subd. (c)), resisting or deterring an officer (count 2, Pen. Code, § 69), and three misdemeanor counts of exhibiting an imitation firearm (counts 3-5, Pen. Code, § 417.4). The charges arose when defendant brandished a firearm at a Safeway clerk and left with a six-pack of beer without paying for it. He then stood on the street, pointing the gun at passing cars. When confronted by

police, he pulled out a large gun and pointed it at the officers. An officer fired on him, he dropped to the ground uninjured, and after a brief struggle he was arrested.¹

On May 14, 2014, defendant pleaded no contest to counts one through three, in exchange for dismissal of counts four and five, a grant of probation, and one year in county jail.

The sentencing hearing took place on July 11, 2014. The court suspended imposition of sentence and ordered defendant to comply with several conditions of probation, including chemical testing, completion of a substance abuse treatment program, and the following conditions that he now challenges on appeal: (1) “You shall not possess or consume alcohol or illegally controlled substances or go to places where alcohol is the major item of sale”; and (2) “You shall remain 300 yards away from [the] Safeway located at 1300 West San Carlos Street in San Jose, California.” Defendant filed a timely notice of appeal on August 11, 2014.

Discussion

On appeal, defendant contends that the two probation conditions set forth above are unconstitutionally vague, in violation of his due process right to be fairly warned of the conduct that would violate his probation. He urges modification to incorporate an element of each condition that he know he is in violation.

“The due process concept of fair warning is the underpinning of the vagueness doctrine, which ‘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.” ’ ” (*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’

¹ These facts are taken from the probation report and a forensic evaluation report prepared for sentencing.

[citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions.’ ” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) To comport with this principle, “[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.*) Thus, in order to provide adequate notice, the language used in the condition must have “ ‘ “reasonable specificity.” ’ ” (*Ibid.*, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.)

The People respond that the challenged conditions “implicitly incorporate a knowledge requirement.” They recognize that this court, among others, has held otherwise. (See *People v. Piralì* (2013) 217 Cal.App.4th 1341, 1351 [condition modified to prohibit defendant from “*knowingly*” accessing the Internet]; see also *People v. Moses* (2011) 199 Cal.App.4th 374, 381 [rejecting suggestion that knowledge requirement be read into all probation conditions].)

We are unconvinced by the People’s request to depart from *Piralì* with respect to the alcohol condition. In *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 592, the defendant challenged as unconstitutionally vague and overbroad a probation condition that he “ ‘[n]ot use or possess alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician’ ” This court suggested that “a scienter element is reasonably implicit in this condition” with respect to controlled substances. (*Id.* at p. 593.) We nevertheless ordered that the entire condition be modified to add an express knowledge requirement because “the addition of an express knowledge requirement will eliminate any potential for vagueness or overbreadth in applying the condition.” (*Id.* at pp. 594.) Likewise, to provide clear notice of the proscribed conduct in this case, we will modify the condition to direct that defendant not knowingly possess or consume the prohibited substances or go to places where he knows alcohol is the major item of sale.

As to the condition ordering defendant to stay 300 yards away from the designated Safeway, we reach a different conclusion. Defendant does not explain how he could come within the 300 yards of that location without knowing it, short of being blindfolded. We also cannot see how a condition specifying the exact location of the place he must avoid—"1300 West San Carlos Street in San Jose, California"—fails to provide adequate notice to defendant, requiring him to “ “guess at its meaning,” ’ ” or how it could promote arbitrary law enforcement. (*People v. Castenada, supra*, 23 Cal.4th at p. 751.) In short, no conceivable vagueness is presented by the condition requiring defendant to stay away from the store where he committed the robbery. Defendant offers no other basis on which to overturn either of the conditions challenged on appeal.

Disposition

The condition stating, “You shall not possess or consume alcohol or illegally controlled substances or go to places where alcohol is the major item of sale” is modified as follows: “You shall not knowingly possess or consume alcohol or illegally controlled substances or go to places where you know that alcohol is the major item of sale.” As so modified, the judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.

The People v. Cardenas

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