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

IN RE JOSEPH G., a Person Coming
Under the Juvenile Court Law.

H041949
(Santa Clara County
Super. Ct. No. 314JV40749A)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH G.,

Defendant and Appellant.

In this Welfare and Institutions Code section 602 proceeding, the minor Joseph G. admitted two counts of engaging in conduct that if committed by an adult would constitute lewd or lascivious conduct with a child under the age of 14 under Penal Code section 288, subdivision (a)(1). (Further unspecified statutory references are to the Penal Code.) At the disposition hearing, the court declared the minor a ward of the court, ordered him to remain in the custody of his parents under the supervision of the probation officer, and imposed several conditions of probation. The minor challenges the condition of his probation that requires him to “not knowingly be within his arm’s reach of any minor twelve years of age or under in any non-public place unless he is under competent

adult supervision and is within the sight or hearing range of that adult.” The minor argues the condition’s reference to a “non-public place” is unconstitutionally vague and overbroad. We agree the condition is unconstitutionally vague and will remand for the trial court to consider imposing a similar probation condition that is not unconstitutionally vague.

FACTS

In May 2014, the minor’s mother (Mother) contacted the police and reported that the minor had been molesting his sister (Victim). Mother reported the minor had engaged in sexual conduct with Victim on multiple dates between May 2012 and May 2014, when the minor was between the ages of 10 and 12 and Victim was between the ages of five and seven. According to the police report, the conduct included (1) the minor having Victim touch his penis, (2) the minor having Victim orally copulate his penis, (3) the minor orally copulating Victim, (4) the minor digitally penetrating Victim’s vagina and anus with his thumb, (5) rape, and (6) sodomy. The minor allegedly threatened to physically harm Victim if she ever told anyone about the conduct. The minor also told the Victim he would get in trouble if anyone found out.

The minor was arrested in May 2014 and spent two days in juvenile hall. The minor was subsequently released to his parents under the supervision of the probation department with a “safety plan.” Under the safety plan, Mother and Victim moved to the home of a friend, and the minor and his father remained in the family home. This living arrangement continued for almost six months.

PROCEDURAL HISTORY

On June 20, 2014, the district attorney filed a wardship petition (Welf. & Inst. Code, § 602) alleging that the minor engaged in conduct that, if committed by an adult, would constitute: (1) forcible lewd or lascivious conduct with a child under the age of 14

(§ 288, subd (a)(2)) between May 16, 2014 and May 17, 2014; (2) forcible lewd or lascivious conduct with a child under the age of 14 (§ 288, subd (a)(2)) on or about May 17, 2012;¹ (3) forcible oral copulation of a child under the age of 14 (§ 288a, subd. (c)(2)(B)) on or about May 17, 2012; and (4) sexual penetration of a person under the age of 18 (§ 289, subd. (h)) on or about May 17, 2012.

The jurisdictional hearing was continued several times to permit the probation department and the family to explore reunification services, for the family to obtain counseling, and for both sides to investigate the allegations of the petition. In July 2014, the trial court directed the minor not to have any contact of any kind with Victim, and in August 2014, the court issued a restraining order prohibiting any such contact. In October 2014, the court modified the restraining order to permit the minor and Victim to be together for family therapy. In November 2014, the probation department presented the court with a reunification plan, which allowed the family to start living together again. The court approved the reunification plan and modified the restraining order to permit peaceful contact between the minor and Victim. Counseling services included: (1) separate treatment services for each family member starting in May 2014; and (2) a one-year sex offender treatment program for the minor beginning in August 2014.

On January 8, 2015, the district attorney moved to amend counts 1 and 2 of the petition to strike allegations that the lewd or lascivious conduct was committed “by use of force, violence, duress, menace, and fear” and to change the date on count 2 from May 17, 2014 to “between May 17, 2012, and May 17, 2014.” The minor admitted the allegations of counts 1 and 2 as amended (§ 288(a)(1)). The court accepted the

¹ The record does not contain a copy of the original petition, only the petition as amended in January 2015. But the reporter’s transcript of the January 8, 2015 jurisdictional hearing states that counts 1 and 2 were originally charged as forcible lewd or lascivious acts.

admissions and sustained the petition. Counts 3 and 4 were dismissed at the request of the district attorney.

At the disposition hearing on January 29, 2015, the probation officer reported that based on preliminary risk assessment testing, the minor's recidivism risk was low. The probation officer recommended the minor remain in the custody of his parents under the supervision of the probation officer and that the court impose 28 conditions of probation, including that the minor complete a sex offender program, a family counseling program, and a victim awareness workshop.

The court declared the minor a ward of the court and imposed most of the conditions recommended by the probation officer. At issue on appeal is condition No. 18 (Condition 18), which directs the minor to "not knowingly be within his arm's reach of any minor twelve years of age or under in any non-public place unless he is under competent adult supervision and is within the sight or hearing range of that adult."

The minor's counsel objected to Condition 18 as unconstitutionally overbroad and vague and stated that the minor was involved in school activities and played "soccer with a team." The minor's counsel suggested the condition be modified to prohibit "any inappropriate sexual contact with any minor." The court observed that Condition 18 is difficult to enforce. The probation officer argued that the condition was appropriate to protect other minors, given the offenses. The district attorney stated this same condition was a condition of the safety plan. The court then stated, "Well, we really don't want him to be alone with any minor without adult supervision, I think. I think it is a rather difficult provision." Nonetheless, the court stated: "Well, I don't mind it. I've adopted it before. I think it's a difficult thing to enforce and to keep track of, but I don't have a problem with it. I'm willing to adopt it." After discussing enforcement concerns further, the court stated: "So [the minor] is going to have to know that he's not to get himself into compromising situation[s] which might be construed as being alone with a minor.

[¶] . . . I’ve never had it come back to me with any violation; so let’s leave it in and see how it works.”

DISCUSSION

The minor contends the term “non-public” in Condition 18 is unconstitutionally vague because it does not adequately notify him of the locations where the condition applies and it “could apply to a school because schools have been found to be both ‘private’ and ‘public’ places.” He argues the condition is unconstitutionally overbroad because it does not limit its application to situations where he is alone with another child, and because it does not exclude a school setting.

General Rules Governing Probation Conditions; Standard of Review

“The California Legislature has given trial courts broad discretion to devise appropriate conditions of probation, so long as they are intended to promote the ‘reformation and rehabilitation’ of the probationer. (. . . § 1203.1, subd. (j).)” (*In re Luis F.* (2009) 177 Cal.App.4th 176, 188 (*Luis F.*)). In cases involving juvenile offenders, Welfare and Institutions Code section 730, subdivision (b) provides that when a minor who is adjudged a ward of the court “is placed under the supervision of the probation officer . . . , the court may make any and all reasonable orders for the conduct of the ward The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”

Welfare and Institutions Code “ [s]ection 730 grants courts broad discretion in establishing conditions of probation in juvenile cases. [Citation.] “[T]he power of the juvenile court is even broader than that of a criminal court.” ’ [Citation.] As the court explained in *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941 . . . , ‘juvenile [probation] conditions may be broader than those pertaining to adult offenders. This is because

juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may "curtail a child's exercise of the constitutional rights . . . [because a] parent's own constitutionally protected 'liberty' includes the right to 'bring up children' [citation] and to 'direct the upbringing and education of children.'" Even conditions that infringe on constitutional rights may be valid if they are specifically tailored to fit the needs of the juvenile. (*Ibid.*)" (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1142 (*Shaun R.*.)

The California Supreme Court has acknowledged a distinction between the permissible exercise of discretion in probationary dispositions by the juvenile court and grants of probation in "adult court," stating: "Although the goal of both types of probation is the rehabilitation of the offender, '[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.'" (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81, overruled on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130.) " 'In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. . . . [¶] . . . [N]o choice is given to the youthful offender [to accept probation]. By contrast, an adult offender "has the right to refuse probation, for its conditions may appear to defendant more onerous than the sentence which might be imposed.'" " (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*.)

"[W]e review constitutional challenges to a probation condition de novo." (*Shaun R.*, *supra*, 188 Cal.App.4th at p. 1143.)

Vagueness and Overbreadth

"A probation condition, whether in an adult or juvenile case, may be challenged as unconstitutionally vague or overbroad. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 887.)

Although the two objections are often mentioned in the same breath, they are conceptually quite distinct. A restriction is unconstitutionally vague if it is not “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.”’ (*Id.* at p. 890,) A restriction failing this test does not give adequate notice—‘fair warning’—of the conduct proscribed. (*Sheena K., supra*, 40 Cal.4th at p. 890; [citation].)” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

“A restriction is unconstitutionally overbroad, on the other hand, if it (1) ‘impinge[s] on constitutional rights,’ and (2) is not ‘tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.’ [Citations.] 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., supra*, 188 Cal.App.4th at p. 1153.) “‘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.’” (*Luis F., supra*, 177 Cal.App.4th at p. 189, quoting *Sheena K., supra*, 40 Cal.4th at pp. 889-890.) In short, vagueness involves the condition’s clarity while overbreadth involves its scope.

When interpreting a condition of probation, we give it “‘the meaning that would appear to a reasonable, objective reader.’” (*People v. Olguin* (2008) 45 Cal.4th 375, 382.) “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*.’”’ (*Sheena K., supra*, 40 Cal.4th at p. 890; original italics.)

Vagueness

The minor argues Condition 18 is unconstitutionally vague because the term “non-public” does not give him adequate notice of the locations where the condition applies. Citing *In re Fernando C.* (2014) 227 Cal.App.4th 499 (*Fernando C.*), he argues “the law currently defines schools as both ‘public’ or ‘private’ venues (regardless of whether or not the school is in fact a publically funded school).” The minor argues that because schools have been held to be both “public” and “private,” he does not know whether the condition applies when he is at school or other venues that have restricted access. At the time of the disposition hearing in January 2015, the minor was in the seventh grade and attended a public middle school.

In *Fernando C.*, the court considered whether section 415, subdivision (1)—which punishes “[a]ny person who unlawfully fights in a public place or challenges another person in a public place to fight”—is a lesser included offense of the crime of fighting on school grounds (§ 415.5, subd. (a)(1)). (*Fernando C.*, *supra*, 227 Cal.App.4th at pp. 502, 504.) The court construed the phrase “public place” in section 415 and considered whether a school is a public place within the meaning of that code section. (*Id.* at p. 503, fn. 3.)

The Attorney General argues the minor’s citation to *Fernando C.* is “unhelpful” because that case involved a question of statutory interpretation, while this case involves the “common sense interpretation of a probation condition.” In spite of this difference, we find the discussion in *Fernando C.* instructive, since it interprets the phrase “public place” and considers its meaning in the context of a school, which is the minor’s primary area of concern.

The *Fernando C.* court stated that the phrase “public place” “ ‘is not used in the Penal Code with a clear and uniform legislative meaning.’ [Citation.] ‘The meaning of the phrase “public place” . . . is ambiguous . . . and the phrase, as a matter of common

parlance, bears multiple meanings.’ ” (*Fernando C.*, *supra*, 227 Cal.App.4th at p. 504, quoting *In re Danny H.* (2002) 104 Cal.App.4th 92, 100 (*Danny H.*). The *Fernando C.* court observed that “public” has many definitions: “ ‘The word “public,” as an adjective, includes such meanings as “of or relating to a government,” “of, relating to, or being in the service of the community or nation,” “of or relating to people in general[,]” “general, popular,” “of or relating to business or community interests as opposed to private affairs[,]” “accessible to or shared by all members of the community,” and “exposed to general view: open.” ’ ” (*Fernando C.*, at p. 504, quoting *Danny H.*, at p. 97 & fn. 5 [citing Webster’s New Collegiate Dictionary (9th ed. 1986) page 952].)

The minor in *Fernando C.* argued that “a school is not a public place because the public’s access to it is restricted.” (*Fernando C.*, *supra*, 227 Cal.App.4th at pp. 504-505, citing §§ 627.2 [“No outsider shall enter or remain on school grounds during school hours without having registered with the principal or designee”], 627.4 [principal may refuse entry to outsider or revoke outsider’s permission to be there], and 626.8, subd. (a) [person entering school property must have “lawful business” to conduct].) The Attorney General responded that “despite these restrictions, a school is a ‘public place’ as defined in Black’s Law Dictionary: ‘ “A place to which the general public has a right to resort; not necessarily a place devoted solely to uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. . . . Also, a place in which the community has an interest as affecting the safety, health, morals, and welfare of the community. . . .’ (Black’s Law Dictionary (West rev. 4th ed. [1968]) p. 1394.)” (*Fernando C.*, at p. 505.) The court concluded that “[v]iewed in the abstract, a school has both public and nonpublic aspects. It is not open to all who wish to enter, as is a public square or park. That said, it is not a private place, but is populated by students, teachers and other employees, and may be visited by outsiders having legitimate business on the grounds.” (*Ibid.*)

The minor argues that the term “non-public” as used in Condition 18 is open to interpretation and may include schools or portions of schools where public access is limited. He notes that when he is at school, he “is in regular close proximity to children his age or younger, in situations where there may not be direct adult supervision,” and that he “has little or no control over his relative adult supervision in any given situation.”

We agree that the use of the phrase “non-public place” in Condition 18 is vague in that it does not notify the minor with reasonable specificity of the types of places he is to avoid unless an adult is present to supervise his conduct. The minor attends a “public” middle school with other minors, many of whom are twelve years of age or under. Is every location in his public school, or any other public school he may visit while participating in school sports or other school activities, a public place? The minor may assume that since he attends a “public” school, Condition 18 does not apply there since it only applies to “non-public” places. What about the restroom or the locker room at school? Most people would say those are non-public places because one expects a certain degree of privacy in the restroom or a locker room. But they are also used by more than one student at a time, and it is not hard to envision situations where the minor will be in arm’s length of another minor without an adult present while using the restroom or a locker room. Does Condition 18 require that the minor be supervised by an adult every time he uses the restroom or the locker room at school?

It is also common to refer to restrooms in places like movie theaters, sports venues, malls, parks, and arcades as “public” restrooms. Does the fact that such facilities are open to the public and referred to as “public” make them a “public place” for the purpose of Condition 18? What about a park? Most people would agree that a park is a public place, but there may be areas within a park that may be considered “non-public” under Condition 18 because they are secluded and not exposed to general view.

Given the variety of definitions and uses of the word “public,” we agree that the reference to a “non-public place” in Condition 18 is not reasonably specific and is therefore vague.

Overbreadth

The minor also argues Condition 18 is unconstitutionally overbroad to the extent it applies to him at school. He contends that since he has no control over the level of supervision he receives at school, he must either withdraw from the classroom if left without supervision or risk a probation violation, and the condition therefore infringes upon his access to education and his freedom of association. He also asserts the condition restricts him from participating in educational and recreational activities if supervision cannot be guaranteed, and it places unreasonable restrictions on his freedom of association.

We are not persuaded that Condition 18 is overbroad if applied at school. Since the minor spends several hours a day at school and his school is the place where he is likely to come into contact with the largest number of minors, to exempt the minor from Condition 18 while at school would frustrate the protective purpose of the condition.

Modification of Condition 18

The minor’s appellate counsel argues that the condition “must be revised . . . to further define [its] application . . . to school or educational activities,” but does not propose any specific revisions. Alternatively, appellate counsel suggests the condition be amended to “make an exception for school or educational setting[s],” or be stricken. In the juvenile court, the minor’s attorney suggested the condition be modified to prohibit “any *inappropriate* sexual contact with any minor.” (Italics added.) We question the use of the word “inappropriate” in the proposed revision, since it implies there are situations in which it may be appropriate for the minor to have sexual contact with another minor.

The probation officer told the juvenile court the purpose of Condition 18 is to protect other minors, in light of the minor's offenses. The court stated, "Well, we really don't want him to be alone with any minor without adult supervision." But Condition 18 does not instruct the minor that he is not to be "alone" with other minors.

The record reflects that the probation officer assigned to this case was experienced in dealing with youth sex offenders. We also note that at the disposition hearing, the court expressed confidence that the minor would not violate Condition 18, stating: "This is not going to be a test case for your objections because [the minor] has been doing very well." For these reasons, we believe the trial court and the probation officer supervising the minor's rehabilitation are in a better position than this court to craft a probation condition that serves the protective purpose of Condition 18 and provides more clarity regarding the types of places and situations the minor needs to avoid, specifically considering its application in a school setting. The probation officer may wish to inquire into the minor's experience with this condition as part of the safety plan. We will therefore remand this case to the trial court for the limited purpose of considering whether to impose an amended version of Condition 18 that is not unconstitutionally vague.

Finally, we note that Condition 18 requires the minor to "not knowingly be within his arm's reach of any minor twelve years of age or under in any non-public place unless he is under *competent* adult supervision" (Italics added.) Although not challenged on appeal, the term "competent" lacks clarity. Does it mean adults who are not drunk, or under the influence of drugs, or irresponsible, or untrained? On remand, the juvenile court may wish to clarify what it means by "competent" if it imposes an amended version of Condition 18.

DISPOSITION

The dispositional order is reversed and remanded to the juvenile court to consider whether to impose an amended version of Condition 18 that provides sufficient clarity regarding the places and situations where the condition applies.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Premo, J.