

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re VANESSA G., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

VANESSA G.,

Defendant and Appellant.

A144616

(City & County of San Francisco
Super. Ct. No. JW13-6205)

Vanessa G. challenges conditions of probation imposed following her admission to a single felony allegation of battery in violation of Penal Code section 242,¹ enhanced on the basis that the crime was committed for the benefit of a criminal street gang as specified in section 186.22, subdivision (d). We conclude that the challenged probation conditions must be modified to cure possible overbreadth and vagueness. A condition allowing the search of Vanessa’s electronic devices must be limited in scope to those efforts necessary to ensure Vanessa’s compliance with a condition that forbids her from communicating or associating with specified individuals. Conditions prohibiting her use of drugs, alcohol or weapons must be modified to contain a clear scienter requirement. As modified, the order of probation is affirmed.

¹ Further statutory references are to the Penal Code unless otherwise designated.

BACKGROUND

Vanessa and two companions were walking in Westlake Shopping center when they encountered the victim. They asked the victim if he was in a gang. When he did not respond and continued to walk away from them, Vanessa and her friends accused him of being a “scrap”, meaning he was affiliated with a certain criminal street gang. As the victim continued to walk away, Vanessa and her group continued to make accusations of the victim’s possible gang involvement and physically assaulted him. During the assault, they shouted slogans associated with a Daly City criminal street gang.

A wardship petition was filed in San Mateo County alleging Vanessa had committed assault with sufficient force to produce great bodily injury in violation of section 245, and felony battery in violation of section 242. Each of the crimes was alleged to have been committed for the benefit of a criminal street gang as described in section 186.22. Pursuant to an agreement, Vanessa admitted the battery allegation as a felony, enhanced because it was committed for the benefit of, or in association with, a criminal street gang. The case was transferred to San Francisco County for disposition.

The juvenile court in San Francisco released Vanessa to home detention pending her placement in a group home. She left her placement without permission in June 2013, and was at large until she was arrested in February 2015. At the disposition hearing in March 2015, the court observed that Vanessa’s behavior had improved considerably during the two years she was out of custody. She stayed out of trouble, did community service, continued her education and had prospects for employment. As a result, the court followed the probation department’s recommendation and placed Vanessa on probation in her parents’ home with conditions. Her appeal is timely.

DISCUSSION

I.

Vanessa challenges a condition of probation that allows her cell phone, computer or other electronic devices to be searched without probable cause. Initially, she argues that the court’s oral pronouncement of the search condition that did not mention

electronic devices must control over the printed conditions that appear in the court's order. We disagree.

When the clerk's and reporter's transcripts cannot be harmonized, the modern rule is to give effect to the portion of the record that has greater credence in the circumstances of the case. (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.) Here, although the court did not mention electronic devices when it orally advised Vanessa of the search condition of her probation, it seems clear from the court's articulation of no contact conditions that it intended such devices would be subject to search. When the court told Vanessa of various individuals she was to stay away from, it specifically stated that the prohibition included "no telephone contact, no internet contact." In context, we are convinced the court intended that Vanessa's electronic devices would be covered by the search condition as reflected in the clerk's transcript and that the written condition should be given effect.

The written search condition appearing in the clerk's transcript provides that Vanessa must: "Submit herself, any vehicle she is riding in, her residence, her property, cell phone, computer, pass word [sic], and electronic devices to search at any time by a peace officer with or without probable cause." Vanessa challenges this condition to the extent it permits searches of her electronic devices on the ground that it is overbroad and unnecessarily intrudes on her constitutional right to privacy. Here, she has a point.

A ward of the juvenile court placed on probation is subject to "any and all reasonable conditions that [the court] may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code § 730, subd.(b).) Thus, to effect an offender's rehabilitation the juvenile court has broad discretion to fashion the conditions of probation, and may even impose conditions that are unconstitutional or otherwise improper so long as they are tailored to meet a juvenile's specific needs. (*In re J.B.* (2015) 242 Cal.App.4th 749, 753–754.)

Probation conditions are invalid when they (1) have no relationship to the crime committed by the probationer, (2) relate to conduct which is not in itself criminal, and (3) require or forbid conduct which is not reasonably related to the probationer's future

criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.) “This test is conjunctive —all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) “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.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

“While we generally review the court’s imposition of a probation condition for abuse of discretion, we review constitutional challenges to probation conditions de novo.” (*In re Malik J.* (2015) 240 Cal.App.4th 896, 901.) We previously held search provisions covering electronic devices to be constitutionally overbroad and ordered them stricken when there was no connection between the minor’s use of electronic devices and past or potential future criminality. (*In re J.B., supra*, 242 Cal.App.4th at pp. 756–757.) Here, there is no indication that Vanessa’s offense was facilitated by her use of any electronic device or broadcast or otherwise trumpeted on social media or the internet. Thus, like in *In re J. B.*, the condition has no apparent connection to her past criminality. But the electronic search provision nonetheless bears upon her rehabilitation and possible future criminality.

Vanessa’s conditions of probation require that she avoid any contact with the other participants in her crime and any person she knows to be a member of a criminal street gang. The no-contact condition specifically precludes contact through “telephone voice mail, email, page code, letter or by sending a message through someone else.” Vanessa does not challenge these prohibitions. Nor would such a challenge have merit. In the circumstances, the stay away conditions are entirely justified. So too, are means to effectively police Vanessa’s compliance with them. A condition of probation that enables a probation officer to effectively supervise a probationer is reasonably related to the probationer’s rehabilitation and deterring future criminality. (*People v. Olguin, supra*, 45 Cal.4th at pp. 380–381.) In this way, the electronic search condition in this case bears upon Vanessa’s future criminality and rehabilitation because it will facilitate

probation officers' ability to ensure her compliance with the stay-away orders. Vanessa's electronic devices may be subject to warrantless search.

But to avoid any possible unconstitutional overbreadth, the search condition must be closely tailored to its purpose. (*People v. Olguin, supra*, 45 Cal.4th at p. 384, *In re Sheena K., supra*, 40 Cal.4th at 890.) Here, the electronics search condition intrudes upon Vanessa's limited right to privacy. In an appropriate case, a probation condition that is not sufficiently precise or narrowly drawn may be modified in this court and affirmed as modified. (*In re Malik J., supra*, 240 Cal.App.4th at p. 901.) Accordingly, we will order the electronic search condition modified to allow searches of Vanessa's text messages, e-mail, telephone call history, voice mail, or other communication programs like FaceTime or Skype, and social media accounts. But the search condition will not permit access to other accounts or data stored or accessed by Vanessa on any electronic device.

While in fashioning a search condition courts should be sensitive to the privacy rights of third parties who may be impacted by such a provision (*In re Malik J., supra*, 240 Cal.App.4th at p. 903.), we agree with the appellate courts that have concluded a probationer does not have standing to assert the privacy rights of those third parties when challenging a condition of probation. (*In re J.B., supra*, 242 Cal.App.4th at p. at 759.) Thus, we reject Vanessa's argument that the search conditions may allow illegal eavesdropping or impair the privacy rights of third parties.

II.

Vanessa also challenges conditions of probation designed to prohibit her from using illegal drugs and weapons on the grounds that these conditions are unconstitutionally vague because they do not contain explicit scienter requirements. This is a common concern, and our Supreme Court has granted review to decide whether an explicit knowledge requirement is mandated in a probation condition that prohibits possession of weapons and to address whether a condition very similar to the one at issue here is unconstitutionally vague. (*People v. Hall* (2015) 236 Cal.App.4th 1124 [187 Cal.Rptr.3d 301], review granted Sept. 9, 2015, S227193.) Since probation may not be

revoked unless the probationer's conduct constitutes a willful violation of the terms of probation (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983), it may not be necessary to include an express knowledge requirement to protect against enforcement of unwitting violations. However, we see no harm in adding such a requirement pending our Supreme Court's resolution of the issue.

We will assume without deciding that the conditions prohibiting possession or consumption of alcohol or drugs or possession of anything that looks like a weapon or that someone might consider to be a weapon are impermissibly vague. We will add scienter requirements in order to clarify those conditions.

DISPOSITION

The condition of probation that requires Vanessa to: "Submit herself, and any vehicle she is riding in, her residence her property, cell phone, computer, pass word [sic], and electronic devices to search at any time by a peace officer with or without probable cause" shall be modified. As modified the condition shall state Vanessa is to: "Submit herself, and any vehicle she is riding in, her residence and her property to search at any time by a peace officer with or without probable cause. Submit all electronic devices under her control to a search by a peace officer of any text messages, email, telephone call history, voice mail, or other communication programs like Face Time or Skype, and social media accounts with or without probable cause and provide the peace officer with any passwords necessary to access the information specified."

The condition that provides Vanessa is: "Not to use, possess or consume any narcotics, controlled substances, alcohol, marijuana or other intoxicants. This means no drugs without a lawful prescription form a physician" shall be modified. As modified, Vanessa is: "Not to knowingly use, possess or consume any narcotics, controlled substances, alcohol, marijuana or other intoxicants. This means no drugs without a lawful prescription from a physician."

The condition that provides Vanessa: "Not possess any dangerous or deadly weapons of any kind or anything that looks like a weapon, can be used as a weapon or could reasonably be considered by someone else to be a weapon; weapons include guns,

knives, clubs, brass knuckles, attack dogs and ammunition” shall be modified. As modified, Vanessa shall: “Not knowingly possess any dangerous or deadly weapons of any kind or anything that looks like a weapon, anything you intend to use as a weapon or you know could reasonably be considered by someone else to be a weapon; weapons include guns, knives, clubs, brass knuckles, attack dogs and ammunition.”

As modified, the order of probation is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.