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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUKE ELLIS MIRACLE,

Defendant and Appellant.

B270851

(Los Angeles County
Super. Ct. No. MA066791)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed as modified.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Luke Ellis Miracle (defendant) pled no contest to burglary, making criminal threats, and driving with a .08 percent or more blood alcohol level. The trial court placed him on formal probation for five years. Defendant appeals a condition of his probation that requires him to stay out of places where alcoholic beverages are the chief items of sale, contending the condition is unconstitutionally vague. The Attorney General concedes, and we agree, that the challenged probation condition must be modified to include an explicit knowledge requirement.

I. BACKGROUND

Defendant was involved in a hit and run traffic accident on August 22, 2015, in which he collided with another car and fled the scene on foot. Defendant then went to a house demanding to see a woman who did not live there. He “verbally threatened to physically harm” the occupant of the house, attempted to kick the door in to force it open, and ultimately kicked in a window and attempted to enter the house.

Defendant was charged with felony counts of burglary, making criminal threats, and vandalism causing over \$400 in damage. In addition, defendant was charged with misdemeanor counts of driving under the influence of an alcoholic beverage, driving with a .08 percent or more blood alcohol content (with a further allegation that defendant had a blood alcohol level above .15 percent), and hit and run resulting in property damage.

Pursuant to a plea agreement, defendant pled no contest to the burglary, making criminal threats, and driving with a .08 percent or more blood alcohol level charges. The trial court imposed a suspended prison sentence of six years and eight months, and placed defendant on five years formal probation,

with a condition that he serve 365 days in county jail. Another of the defendant's probation conditions—the one at issue on appeal—requires him to abstain from the use of all alcoholic beverages and “stay out of places where they are the chief items of sale.”

II. DISCUSSION

Defendant challenges the constitutionality of the aforementioned probation condition as unconstitutionally vague and a violation of his due process rights. He contends that the condition as written makes it impossible for him to determine what places are covered under its terms. We hold he is correct and modify the condition accordingly.

Where a vagueness challenge to a probation condition is capable of correction without reference to the sentencing record, the condition is subject to de novo review. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.) The “underpinning of a vagueness challenge is the due process concept of fair warning” which prevents arbitrary law enforcement and provides “adequate notice to potential offenders.” (*Id.* at p. 890.) To pass constitutional muster, 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.” (*Ibid.*)

The condition barring defendant from entering places where alcohol is the chief item of sale prohibits otherwise constitutionally protected behavior. We follow numerous cases holding ambiguity in such a probation condition requires an explicit knowledge term to avoid violating constitutional due process guarantees. (*In re Sheena K., supra*, 40 Cal.4th at pp.

891-892 [probation condition prohibiting defendant from associating with persons disapproved by her parole officer was unconstitutionally vague absent a knowledge requirement]; *People v. Moses* (2011) 199 Cal.App.4th 374, 377 [explicit knowledge requirement necessary to render constitutional a condition prohibiting defendant from frequenting any establishment where sexually explicit material is “viewed or sold”]; *In re Victor L.* (2010) 182 Cal.App.4th 902, 913-914 [probation condition restricting defendant’s presence “where dangerous or deadly weapons or firearms exist” is unconstitutionally vague absent an explicit knowledge requirement].)

Defendant requests that we modify the challenged condition to include an actual knowledge requirement. The Attorney General agrees the condition must be modified, but urges any revision should incorporate both an actual knowledge element and a constructive knowledge element (i.e., that defendant must stay out of places he reasonably should know offer alcoholic beverages as the chief items of sale). Defendant has not filed a reply brief objecting to the Attorney General’s proposed formulation, and we believe revising the probation condition in that manner appropriately remedies the constitutional defect. (See, e.g., *People v. Mendez* (2013) 221 Cal.App.4th 1167, 1177-1178; *People v. Moses, supra*, 199 Cal.App.4th at pp. 377-378, 381.) We will order the condition so modified.

DISPOSITION

The trial court is directed to modify both its January 26, 2016, minute order and defendant's probation condition No. 20 to read: "Abstain from the use of all alcoholic beverages, including beer and wine, and stay out of places where you know or reasonably should know they are the chief items of sale." The judgment is affirmed in all other respects.

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BAKER, J.

We concur:

TURNER, P.J.

KRIEGLER, J.