Filed 3/14/17 P. v. Nichols CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN NEIL NICHOLS, Defendant and Appellant.	B271650 (Los Angeles County Super. Ct. No. MA067137)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew E. Cooper, Judge. Affirmed in part, reversed in part, with directions.

Julia J. Spikes, 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, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Jonathan Neil Nichols of possession of heroin for sale in count 1. (Health & Saf. Code, § 11351.) It found defendant not guilty of possession of methamphetamine for sale in count 2, but guilty of the lesser included offense of misdemeanor possession of methamphetamine. (Health & Saf. Code, § 1377, subd. (a).) Defendant waived trial and admitted the allegation that he suffered a prior conviction for possession for sale of a controlled substance. (Health & Saf. Code, § 11370.2, subd. (a); Pen. Code, § 1203.07.)

The trial court sentenced defendant to six years in county jail, comprised of the middle term of three years in count 1, a concurrent one-year sentence for the misdemeanor possession of methamphetamine conviction, and a consecutive term of three years for the prior conviction allegation. The court imposed a split sentence, committing defendant to county jail for four years, with mandatory supervision for two years. (Pen. Code, § 1170, subds. (h)(1) & (h)(5).)

Defendant contends the trial court abused its discretion by admitting the record of his no contest plea in a prior prosecution to prove knowledge of the nature of the controlled substances and an intent to sell in the current case. He also contends the court imposed unconstitutionally

overbroad and vague terms of mandatory supervision. The parties agree that the abstract of judgment incorrectly indicates defendant was sentenced pursuant to Penal Code section 667, subdivisions (b)–(i), and section 1170.12, and must be corrected.

We order that the mandatory supervision conditions in the minute order dated November 20, 2015, be modified in accordance with this opinion, and that the reference to Penal Code sections 667, subdivisions (b)–(i), and 1170.12, be stricken from the abstract of judgment. We affirm the judgment as modified.

FACTS

Deputies Adam Nelson and Christopher May conducted a search of defendant and his vehicle at about 6:30 p.m. on September 2, 2015. The search took place in an area of Lancaster where Deputy Nelson, a designated drug recognition expert, had made numerous narcotics-related arrests. Defendant was parked in a hotel parking lot when contacted by the deputies. His girlfriend, Sarah Chatterson, and friend, Rayelynn Israel, were exiting the car as the deputies approached. Deputy Nelson spoke with defendant, and Deputy May spoke with the two women.

Deputy Nelson asked defendant to step out of the car. He conducted a search of defendant's person. Deputy Nelson discovered a capped hypodermic syringe containing a clear fluid and a clear plastic baggie containing a substance in

defendant's pants pocket. The deputy believed both the liquid and the substance were methamphetamine. Defendant was advised of his rights, handcuffed, and placed in the patrol car.

The deputies then searched defendant's car. They found a cell phone in the center console, which defendant later claimed as his. On the passenger floorboard they found a clear plastic container holding 13 hypodermic syringes and a plastic baggie with a dark substance in it stowed inside a black sock. He recognized the dark substance in the sock as heroin. In his experience, both heroin and methamphetamine can be ingested by syringe. Deputy Nelson did not subject defendant to field sobriety tests because defendant did not appear to be under the influence of a stimulant or depressant.

Deputies Nelson and May searched the cell phone. There were several text messages related to street-level narcotics sales. At 4:03 p.m., Jess M. texted, "'Could I please get a bowl from you, and I will promise to give you money tomorrow.'" In Deputy Nelson's experience, a "bowl" is a measure used in narcotics sales. He believed Jess M. was asking to purchase drugs from defendant. Defendant did not reply to Jess M.'s message.[1]

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[1] The syringes were not tested for blood or other substances or booked into evidence. They were photographed and discarded in accordance with routine safety practices.

At 5:48 p.m., Danielle W. texted "WYA," which Deputy Nelson testified was slang for "where you at[?]" Defendant texted back, "'What do you need?'" and "'What can I do for you?'" Danielle W. had not responded to the texts at the time the deputies discovered defendant's cell phone. Deputy May surreptitiously texted Danielle W. in attempt to elicit a response. He asked, "'What's up? Do you need anything?'" They exchanged several text messages. In one text Danielle W. referred to a "'dime'"—slang for a specific amount of narcotics.

Sheriff's Department Criminalist John Bever analyzed the substances found on defendant's person and in his car. He concluded that the substances consisted of approximately 0.1371 grams of a powder containing methamphetamine, and approximately 2.5560 grams of heroin, respectively.

Sheriff's Detective Roger Izzo testified as an expert on possession of narcotics for sale. Based on a hypothetical scenario mirroring the facts of this case, he opined that the methamphetamine and heroin were possessed for sale. Detective Izzo based his opinion on several factors. The individual in the hypothetical possessed two very different types of narcotics, but most users have a drug of preference. It would be unusual for a person to use both methamphetamine, a stimulant, and heroin, a depressant. The fact that the drugs were packaged and sealed and that the individual also had multiple syringes in his possession indicated sale. Serious users do not generally use a new needle each time they take drugs, but drug dealers

sometimes sell needles. The text messages led Detective Izzo to believe that the individual would have possessed the drugs for sale. It is common for sellers and buyers to communicate by text message, and a "bowl" as referenced in the text from Jess M. is a common term for a tenth of a gram of methamphetamine. Similarly, a "dime" as referenced in the text from Danielle W. is a very common term for $10 worth of methamphetamine, heroin, or cocaine. The amount of prepackaged methamphetamine recovered was about a tenth of a gram, and the amount of heroin recovered was approximately 25 uses—far more heroin than the typical addict would possess.

Detective Izzo also testified that the heroin had a street value of approximately $250. Sellers do not normally keep all their narcotics with them, so as to avoid robbery and detection by law enforcement officers. Methamphetamine sellers are often methamphetamine users as well.

DISCUSSION

Prior Conviction

Background

Before trial, the prosecutor requested to admit into evidence the certified copy of a minute order dated February 20, 2015, showing defendant's prior conviction for possession of methamphetamine for sale by plea of no

contest, and a certified copy of the complaint in that case. The prosecutor offered the exhibits as proof of defendant's knowledge of the nature and character of the controlled substances and his intent to sell them. Defense counsel opposed admission of the record of the prior conviction—as contrasted to evidence of the underlying conduct—because it was proof of a conviction, and had no tendency to demonstrate intent or knowledge. Counsel argued the prior conviction was inadmissible character evidence, and more prejudicial than probative under Evidence Code section 352.[2] The prosecutor responded that the conviction was for conduct identical to the present charges, and therefore relevant. The prior conviction was not more inflammatory than the pending charges. The jury would be unlikely to punish defendant for his past offense because he had already been convicted.

With respect to the underlying conduct, the trial court found the prior conviction evidence admissible under section 1101, subdivision (b), for purposes of demonstrating intent and knowledge.[3] The court found the prior conviction was for an identical offense, and in particular, an offense requiring specific intent. It would not be likely to evoke

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[2] All further statutory references are to the Evidence Code unless otherwise indicated.

[3] The prosecution represented that if the record of conviction was deemed inadmissible it would seek to introduce other evidence of the underlying conduct.

emotional bias or be more prejudicial than probative under section 352. Assuming the prosecution intended to introduce the underlying conduct, it would be admissible. The court tabled the issue of whether the record of conviction could be admitted as evidence of the commission of the prior offense, and requested that the prosecution provide further authority regarding the specific issue of whether a record of conviction could be admitted under section 1101, subdivision (b).

The prosecutor provided the court with section 452.5, Penal Code section 1016, *People v. Rauen* (2011) 201 Cal.App.4th 421 (*Rauen*), and *People v. Wesson* (2006) 138 Cal.App.4th 959 (*Wesson*), which the court considered as offering "guid[ance]" on the issue. The court stated that under section 452.5, Penal Code section 1016, and *Rauen*, a conviction based on a plea of no contest is admissible to establish the fact of the underlying criminal conduct. *Wesson* held that documentary evidence was admissible to demonstrate propensity under section 1108 on this basis. Although the statutes differed significantly, the court found the analysis under section 1108 in *Wesson* instructive. The court ruled the record of conviction admissible under section 1101, subdivision (b), for purposes of demonstrating intent. The court also ruled the evidence admissible under section 352. The record of conviction was relevant because it showed defendant's intent to sell methamphetamine on an earlier occasion, it was not remote in time, and it was not likely to confuse or mislead the jury.

Defense counsel argued section 1101 requires facts that are sufficiently similar to establish intent, and that the record of conviction did not establish whether the crimes were similar. The court agreed similarity was required, and stated that its analysis had taken similarity into account. The court then clarified that the record of conviction would be admitted for the purpose of establishing knowledge as well as intent, and that it would instruct the jury to consider the evidence for these purposes only.

The court gave a modified version of CALCRIM No. 375, which instructed the jury to consider the record of conviction for the limited purposes of determining whether defendant had knowledge of the character of the controlled substances found in his possession, and whether he intended to sell the controlled substances. The instruction also stated a "certified copy of a conviction" "prove[s] the commission of an offense," utilizing the language of section 452.5.

Proof of Knowledge and Intent

"Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745–1746 [(*Meza*)]; *People v. Parra* (1999) 70 Cal.App.4th 222, 225–226.)" (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.) "To obtain a conviction for possession of a controlled substance for sale, the prosecution

must prove that the defendant had knowledge of both the presence of the contraband and its illegal character. (*Meza*[, *supra*, at pp.] 1745–1746.) Prior incidents of possession of an illegal drug are relevant to prove the knowledge element. (*People v. Pijal* (1973) 33 Cal.App.3d 682, 691.)" (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754 (*Ghebretensae*).) "Whether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 241.)

Sections 1101 and 352

Section 1101, subdivision (b), permits the introduction of evidence that "a person committed a crime, civil wrong or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." The connection of the evidence of prior crimes with the crime charged must be clearly perceived, and it has sufficient probative value only when it ""[tends] logically, naturally, and by reasonable inference, to establish any fact material for the [P]eople, or to overcome any material matter sought to be proved by the defense."' [Citation.]" (*People v. Haston* (1968) 69 Cal.2d 233, 247.) "'[A]dmissibility [of other crimes evidence]

depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence.' [Citation.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879, superseded by statute on another ground as stated in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13.)

"'Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." [Citation.]'" (*Ghebretensae, supra,* 222 Cal.App.4th at p. 754.) "'The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . ." [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]' (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)" (*People v. Harris* (2013) 57 Cal.4th 804, 841.) "'We have long recognized "that if a person acts similarly in

similar situations, he probably harbors the same intent in each instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution. [Citations.]' [Citations.]" (*Ghebretensae*, *supra*, at p. 754.)

The court may nonetheless exclude such evidence under section 352 "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Section 352 is intended to prevent undue prejudice—that is, ""'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues,'"—not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under sections 1101 and 352." (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) The trial court's decision "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd

manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

Analysis

In the absence of any indication of the facts involved in the prior case, we have doubts as to whether the records relating to defendant's prior conviction were admissible to prove knowledge and intent for purposes of section 1101, subdivision (b). Evidence admitted pursuant to section 1101, subdivision (b), requires the jury to analyze the facts of the prior and current cases to determine whether to draw an inference of knowledge or intent. Absent some factual context, the prior conviction proves disposition, which is prohibited under section 1101, subdivision (a). For example, the jury in this case had no idea of the circumstances of the possession in defendant's prior case, including the quantity of controlled substance involved. The jury was not informed whether the prior case involved a larger, smaller, or similar quantity of contraband than the charged offenses. The evidence also did not disclose whether defendant personally possessed the controlled substance in the prior action, or whether he was an aider and abettor. Based on these uncertainties, we assess the introduction of the evidence for prejudicial error.

Harmless Error

Assuming the trial court erred in admitting evidence of defendant's prior conviction, it is not reasonably probable that the result would have been more favorable to defendant if the evidence had been excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019 ["[T]he erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded"]; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1258 [evaluating error in admitting evidence as harmless under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Although the disputed evidence was offered to prove both knowledge and intent, defendant effectively conceded knowledge of the nature of both controlled substances at trial, and knowledge was not seriously in dispute. His defense was that he possessed the heroin and methamphetamine for his personal use, but did not intend to sell the contraband. Evidence was presented that defendant had a packet of methamphetamine and a syringe that appeared to be filled with the drug in his pockets when the deputies made contact with him. The heroin—which may be ingested by syringe—was found in defendant's vehicle next to a container of new and used syringes. It is highly unlikely that the jury would have found that defendant did not have

knowledge of the nature of the substances in light of these facts.

With respect to intent, the jury found defendant *not guilty of possession of methamphetamine for sale*, which indicates that it was not biased against him on the basis that he had suffered a prior conviction for the same offense. Having not been swayed to convict defendant when the controlled substances were identical, it is unlikely the jury based its guilty verdict on the charge of possession of heroin for sale on the prior conviction.

The facts strongly support defendant's conviction of possession of heroin for sale. Defendant was found with considerably more heroin than methamphetamine in his possession. The quantity of heroin defendant possessed was the equivalent of 25 uses—an amount Detective Izzo testified was much greater than what a heroin user would possess. Evidence was presented that sellers sometimes sell needles with drugs. Unused syringes were found in the same area of the car as the heroin. Defendant was found with methamphetamine and a syringe full of a liquid that appeared to be methamphetamine in his pockets. Detective Izzo testified that drug users do not normally use both depressants and stimulants. It would be reasonable for the jury to infer that defendant used methamphetamine because he had it on his person and had prepared it for ingestion, and that it was therefore unlikely that the heroin was for his personal use. Text messages indicated defendant was selling some form of controlled substance. It is not reasonably

probable that the result would have been more favorable to defendant if the record of prior conviction had been excluded.

"Finally, with respect to defendant's claims of constitutional error, we note that '[t]he "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." [Citation.]' ([*People v.*] *Hovarter*, [(2008)] 44 Cal.4th 983, 1010.)" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289.) We find no exception here.

Mandatory Supervision Conditions

The court imposed the following conditions of mandatory supervision, which defendant now challenges on the constitutional grounds of vagueness and overbreadth:

"Do not own, use, possess, buy or sell any controlled substances or associated paraphernalia except with a valid prescription, and stay away from places where users, buyers, or sellers congregate;

"Do not associate with persons known by you to be controlled substance users or sellers except in an authorized treatment program."

We assess the validity of conditions of mandatory supervision using the same standard applied to conditions associated with other forms of supervised release, including probation or parole. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.) We independently review constitutional challenges to mandatory supervision

conditions. (See *People v. Nice* (2016) 247 Cal.App.4th 928, 945 (*Nice*) [probation conditions].)

"The objections of vagueness and overbreadth are often raised together but are 'conceptually quite distinct.' (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 [(*E.O.*)].)" (*Nice, supra*, 247 Cal.App.4th at p. 944.) "'[T]he underpinning of a vagueness challenge is the due process concept of "fair warning."' (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 [(*Sheena K.*)].) A [mandatory supervision] condition so vague that men and women of common intelligence must guess at its meaning and differ as to its application violates "'the due process concepts of preventing arbitrary law enforcement and providing adequate notice . . .'" (*Ibid.*) . . . . [¶] 'A [mandatory supervision] 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.' (*Ibid.*)

"'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 . . . .' (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153.) 'A [mandatory supervision] 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.' (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) 'A narrow condition that achieves rehabilitation

should be used in place of broad conditions that prevent otherwise lawful conduct and necessary activities.' ([*People v.*] *Perez* [(2009)] 176 Cal.App.4th [380,] 384.)" (*Nice*, *supra*, 247 Cal.App.4th at pp. 944–945.)

Where, as here, a defendant fails to challenge the constitutionality of a mandatory supervision condition in the trial court, the claim is not forfeited. The issues presented can be resolved as a matter of law without reference to the sentencing record in the trial court. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 888–889 [constitutional vagueness challenge to probation condition].)

Defendant first challenges the conditions as unconstitutionally vague because "[he is] subject to a violation of the conditions if he inadvertently owns, uses or possesses a controlled substance without knowledge and/or if he unknowingly happens to be in a location where users, buyers or sellers congregate."[4] Defendant requests that we modify the conditions to include knowledge requirements. The Attorney General argues that the knowledge requirements are implicit, making remand unnecessary.

Our Supreme Court recently addressed the question of whether knowledge requirements must be explicit in *People*

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[4] In his opening brief, defendant does not state whether these challenges are based on unconstitutional vagueness and/or overbreadth. Because his sole substantive argument is that the conditions deprive him of fair notice, we address the issue of vagueness only.

v. Hall (2017) 2 Cal.5th 494 (*Hall*).[5] The Supreme Court considered whether probation conditions providing that defendant "'may not own, possess or have in [his] custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on [his] person,'" and that he "'shall not use or possess or have in [his] custody or control any illegal drugs, narcotics, [or] narcotics paraphernalia without a prescription[]'" were unconstitutionally vague. (*Id.* at pp. 497–98.)

In determining that the conditions did not require an explicit knowledge requirement, the Supreme Court reasoned: "Our analysis begins with the void-for-vagueness doctrine. This doctrine, which derives from the due process concept of fair warning, bars the government from enforcing a provision that 'forbids or requires the doing of an act in terms so vague' that people of 'common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.] To withstand a constitutional challenge on the ground of vagueness, a probation condition must be sufficiently definite to inform the probationer what conduct is required or prohibited, and to enable the court to determine whether the probationer has violated the condition. [Citations.] In determining whether the condition is sufficiently definite, however, a court is not limited to the condition's text. [Citation.] We must also consider other

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[5] Although *Hall* was filed after the parties completed their briefing, both parties were aware that the case was pending before the Supreme Court.

sources of applicable law . . . . Thus, a probation condition should not be invalidated as unconstitutionally vague ""if any reasonable and practical construction can be given to its language."" [Citation.] [¶] Given this legal backdrop, we conclude that the firearms and narcotics conditions are not unconstitutionally vague. California case law already articulates not only a general presumption that a violation of a probation condition must be willful, but also specifically provides that probation conditions barring possession of contraband should be construed to require knowledge of its presence and its restricted nature. [Citation.] The requisite scienter for these probation conditions is thus easily ascertainable by reference to "'other definable sources'" that make sufficiently clear the conditions' scope." (*Hall*, *supra*, at pp. 500–501.)

"As we have previously observed, the vagueness doctrine demands "'no more than a reasonable degree of certainty.'" [Citation.] [¶] That degree of certainty is present in the conditions at issue here. Given the relevant case law, the firearms condition is properly construed as prohibiting defendant from *knowingly* owning, possessing, or having in his custody or control any handgun, rifle, shotgun, firearm, or any weapon that can be concealed on his person. So too with the narcotics condition, which is best read as proscribing defendant from *knowingly* using, possessing, or having in his custody or control any illegal drugs, narcotics, or narcotics paraphernalia, without a prescription. [Citation.] Because no change to the substance of either

condition would be wrought by adding the word 'knowingly,' we decline defendant's invitation to modify those conditions simply to make explicit what the law already makes implicit." (*Hall*, *supra*, at p. 503, fn. omitted.)

Hall is applicable here. The narcotics condition is essentially identical. Likewise, the requisite scienter with respect to the prohibition on presence in a location where users, buyers or sellers congregate is readily discernable, and need not be made explicit.

Defendant additionally contends the conditions are overbroad because they prohibit legal activity. He argues the condition that he "not associate with persons known by you to be controlled substance users or sellers" is overbroad because it encompasses both legally and illegally obtained controlled substances.

We agree. The purpose of the condition is to prevent defendant's association with persons who engage in similar criminal activity. It must be narrowly drawn to proscribe association with those persons known to defendant to be illegally using or selling controlled substances only. We order the condition so modified.[6]

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[6] Defendant also argues that the condition is overbroad because he cannot be expected to know whether the controlled substances his associates are taking have been legally obtained. This argument lacks merit. The condition as imposed included no requirement that he do so. Even following our modification to exclude persons legally using or selling controlled substances, however, defendant is not obligated to ascertain whether his associates illegally use or

Finally, defendant challenges the condition that he "stay away from places where users, buyers, or sellers congregate." He contends the condition is overbroad and should be stricken because he may engage in lawful activity in such places, and the prohibition on association with users, buyers, and sellers is sufficient to prevent future criminality without unduly restricting his right to travel freely. Defendant also argues that the condition is unconstitutionally vague because it does not include any distance, time, or purpose requirements. If we do not strike the condition, defendant requests that we modify the condition to state that he must stay a certain number of yards away from or, alternatively, not loiter in places where he knows persons who illegally use or sell controlled substances to congregate.

Defendant points to no precedent in support of his argument, and the Attorney General does not address the issue. This question was recently addressed by the Sixth District of the Court of Appeal in *Nice*, *supra*, 247 Cal.App.4th at pages 950–951. The defendant in *Nice* made several challenges to the condition that "'[he] shall not possess or use any illegal drugs or illegal controlled substances or *go anywhere* [he] know[s] illegal drugs are not

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sell controlled substances, only to avoid them if he has such knowledge.

prescribed or controlled substances are being used or sold.'"[7] (*Id.* at p. 944, italics added.) Nice argued in relevant part that the condition that he not "go anywhere" did not provide fair notice of which areas were prohibited, failed to specify the scale or scope of the prohibition, and impinged on lawful travel. (*Id.* at pp. 950–951.) The same concerns are implicated here.

The *Nice* court considered the approach taken in *In re Victor L.* (2010) 182 Cal.App.4th 902, 913 (*Victor L.*), which involved a similar condition that "'"Minor shall not be in any . . . areas known by Minor for gang-related activity."' ([*Id.*] at p. 913, fn. 7.)" (*Nice*, *supra*, 247 Cal.App.4th at p. 949.) "*Victor L.* discussed alternative approaches to clarifying the condition, such as providing descriptive or mapped boundaries, restricting the ban to areas of activity of the particular gang involved, and 'focus[ing] on the nature of the activity, rather than the geographic area in which it occurs, thereby forbidding Victor's presence in the immediate vicinity of activities or events likely to attract gang members.' (*Victor L.*, *supra*, 182 Cal.App.4th at p. 917.)" (*Nice*, *supra*, at p. 950.) Ultimately, the *Victor L.* court "modified the probation condition to allow the probation

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[7] As the Court of Appeal noted, the condition was stated somewhat more clearly in the probation report: "'[Nice] shall not possess or use illegal drugs or illegal controlled substances or go anywhere he [ ] knows illegal drugs or non-prescribed controlled substances are used or sold.'" (*Nice*, *supra*, 247 Cal.App.4th at p. 944.)

officer to notify the minor of areas he must avoid or of activity-specific limits[,]" rather than remanding the matter to the trial court for clarification. (*Ibid*.)

The *Nice* court rejected the idea that "assignment of a 'stay away' distance" would sufficiently limit and clarify the probation condition before it. (*Nice*, *supra*, 247 Cal.App.4th at p. 951.) It reasoned that "[w]hereas several hundred yards may be required to put appropriate distance between Nice and an illicit drug transaction taking place in a large open space, such as a public park or the beach, a lesser distance may be reasonable in other circumstances, such as on a light rail car where Nice's options may be limited to abandoning the train or moving to the other end. A distance of some yards therefore may offer precision on paper but would not ensure a reasonable restriction in the context of our dynamic public spaces." (*Ibid*., fn. omitted.) The *Nice* court instead modified the condition to state: "'You shall not possess or use any illegal drugs or illegal controlled substances or visit or remain in any specific location where you know illegal drugs or non-prescribed controlled substances are used or sold.'" (*Id*. at p. 952.) It noted that, as modified, the conditions that Nice not "visit" or "remain" in such places restricted the prohibition to places where he knew the illegal activities were underway. (*Id*. at pp. 951–952.) We agree with this sound approach, and order the condition be modified accordingly.

Abstract of Judgment

We agree with the parties that the abstract of judgment improperly reflects that defendant was sentenced pursuant to Penal Code sections 667, subdivisions (b)–(i), and 1170.12, and must be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187 [appellate court may correct clerical errors in the abstract of judgment].)

DISPOSITION

We order that the mandatory supervision conditions in the minute order dated November 20, 2015, be modified as follows:

(1) The first sentence of the controlled substances condition is modified to read: "Do not use, own, possess, buy, or sell any controlled substances or associated paraphernalia except with a valid prescription, and do not visit or remain in any specific location where illegal or non-prescribed controlled substances are used or sold."

(2) The second sentence of the controlled substances condition is modified to read: "Do not associate with persons known by you to be users or sellers of illegal or non-prescribed controlled substances except in an authorized drug treatment program."

The trial court is directed to amend the abstract of judgment to eliminate the incorrect indication that defendant was sentenced pursuant to Penal Code sections

667, subdivisions (b)–(i) and section 1170.12, and to forward a corrected copy of the abstract to the Department of Corrections. We affirm the judgment as modified.

KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.