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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN ALLEN,

Defendant and Appellant.

2d Crim. No. B267985  
(Super. Ct. No. BA436389)  
(Los Angeles County)

Kevin Allen appeals judgment after conviction by jury of sale/transport of cocaine (Health & Saf. Code, § 11352, subd. (a)). The jury also found true allegations Allen suffered 14 prior felony convictions (Pen. Code, §§ 1170.12 subds. (a)-(d), 667, subds. (b)-(i))<sup>1</sup> for which he served prior prison terms (§ 667.5). The trial court sentenced Allen to six years in county jail, consisting of three years for the sale/transport conviction and one consecutive year for each of his three most recent prior prison

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise stated.

terms. The court ordered Allen to serve three years in local custody followed by three years of mandatory community supervision.

Allen contends that two of the prior prison term sentences should be reversed because the underlying felony convictions were subsequently redesignated as misdemeanors. (§ 1170.18.) He also contends that three conditions of supervision are unconstitutionally vague. We reverse and remand to the trial court to modify two conditions of supervision and otherwise affirm.

### BACKGROUND

Los Angeles Police Officer Luz Bednarchik approached Allen in a public park and asked where she could get a “20.” Allen asked her for the money and she handed over a marked \$20 bill. Allen took the bill and walked over to some men at a park bench. One of the men got up and walked with Allen to a porta-potty, which they entered. Allen emerged and walked back to the officer. He handed her .14 grams of rock cocaine.

After Allen filed this appeal, his applications for Proposition 47 relief were granted in two of the three cases which the trial court used to enhance his sentence here, redesignating his convictions as misdemeanors. Allen did not apply for Proposition 47 relief from the trial court in this case.

### DISCUSSION

#### *This Court Cannot Grant Proposition 47*

#### *Relief in the First Instance*

Allen asks us to amend his sentence to reflect that two of the felony convictions underlying the prior prison terms are now misdemeanors, reducing his sentence from six to four

years. But it is not our role to grant this relief in the first instance.

Section 1170.18, subdivision (a) authorizes a “petition for a recall of sentence before the trial court that entered the judgment of conviction.”

An application for Proposition 47 relief must be filed in the sentencing trial court. (*People v. Awad* (2015) 238 Cal.App.4th 215, 221-222 (*Awad*).) In *Awad*, the defendant was convicted of multiple counts of forgery and grand theft. He filed an appeal shortly before Proposition 47 was passed. The day after Proposition 47 was approved by the voters, he filed an application in the trial court to reduce one of the felony convictions to a misdemeanor. The trial court declined to hear the application because it had no jurisdiction to modify the sentence while an appeal was pending. The defendant then sought relief in the Court of Appeal.

In *Awad*, the court issued a limited remand to the trial court without an opinion on the merits of the appeal. But the court did so to avoid forcing the defendant to make a “Hobson’s choice” between “giv[ing] up any pending appeal in order to obtain speedy Proposition 47 relief from the trial court,” or waiting for resolution of the appeal before seeking Proposition 47 relief, by which time “it may be too late to gain any benefit from a sentencing reduction because [he] already will have served the time in question.” (*Awad, supra*, 238 Cal.App.4th at p. 218.)

Because Allen did not seek interim relief here, and the remaining issues on appeal are ripe for decision, we will decide those remaining issues now without prejudice to an application for relief under Proposition 47 with the trial court upon remand.

### *The Challenged Conditions of Supervised Release*

The conditions of Allen’s supervision prohibit his association with certain categories of persons, presence in certain types of areas, and use or possession of controlled substances. He challenges these conditions as unconstitutionally vague and overbroad. We review these constitutional challenges de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888.) Allen’s failure to object to these conditions below does not forfeit our review of the issues on appeal. (*Id.* at p. 889.)

### *The “Possession” Condition*

Allen contends that the condition requiring him to “not own, use or possess any controlled substances or associated paraphernalia except with a valid prescription” is unconstitutionally vague because it lacks a knowledge requirement. We disagree.

“A probation condition which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process.’ [Citations.]” (*People v. Moore* (2012) 211 Cal.App.4th 1179, 1184 (*Moore*).) A knowledge requirement may be necessary to render prohibitory conditions constitutional if they “prohibit[] association with certain categories of persons, presence in certain types of areas, or possession of items that are not easily amenable to precise definition.” (*Id.* at p. 1185.)

But in *Moore* there was “no ambiguity” in a condition prohibiting the defendant from owning, possessing, or using dangerous or deadly weapons because the phrase “had a plain, commonsense meaning: it prohibited possession of items specifically designed as weapons, and other items not specifically

designed as weapons that the probationer intended to use to inflict, or threaten to inflict, great bodily injury or death.” (*Moore, supra*, 211 Cal.App.4th at p. 1186.) Likewise here, a condition prohibiting the possession of “controlled substances or associated paraphernalia except with a valid prescription” has “a plain commonsense meaning.” The express terms are easily understood through both legal and commonsense definitions. (See Health & Saf. Code, §§ 11014.5 [defining drug paraphernalia], 11054 et seq. [defining controlled substances].)

Our conclusion is bolstered by *Moore*’s statement that the defendant’s “concern that without the express addition of a scienter requirement he could be found in violation of probation for unknowing possession appears unfounded. As the People point out, a trial court may not revoke probation unless the defendant willfully violated the terms and conditions of probation. [Citations.] . . . Thus, in the unlikely event that [the defendant] finds himself in unknowing and inadvertent possession of a firearm or weapon, his lack of knowledge would prevent a court from finding him in violation of probation.” (*Moore, supra*, 211 Cal.App.4th at p. 1186.)

Finally, this case is distinguishable from those cases which involve conditions that potentially infringe on constitutional rights. Like *Moore*, the challenged condition does not impact Allen’s constitutional rights. There is no constitutional right to possess controlled substances or related paraphernalia without a valid prescription.

#### *The “Stay Away” Condition*

Allen contends, and the People concede, that the supervision condition requiring him to “[s]tay away from places where users, buyers or sellers congregate” is unconstitutionally

vague because it does not include a knowledge requirement. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) Allen further contends that this condition of supervision violates his constitutional rights because the condition lacks a distance modifier. The People agree.

Allen requests that we modify the condition as follows: “And stay \_\_\_ yards away from places where you know users, buyers or sellers congregate.” The People do not object to these modifications. Accordingly, we will adopt the proposed language (adding the word “knowingly”) and remand to the trial court for determination of an appropriate distance requirement.

#### *The “Association” Condition*

Allen contends, and the People concede, that the supervision condition that he “not associate with persons known by you to be controlled substance users or sellers unless attending an authorized treatment program” is unconstitutionally vague. He claims that because this condition is not restricted to those persons known by him to be using or selling *illegal* drugs, the condition could include those who have legally purchased (or sold) prescription drugs.

Allen requests the following modification to this condition: “Do not associate with persons known by you to be illegal controlled substance users or sellers unless attending an authorized treatment program.” As the People do not object to this modification, we will adopt the proposed language (adding the word “illegal”).

#### DISPOSITION

The judgment is reversed and remanded to the trial court for modification of the “stay away” and “association” conditions of mandatory community supervision. In all other

respects the judgment is affirmed. Allen may file an application for Proposition 47 relief relating to the sentencing enhancements upon remand to the trial court.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Henry J. Hall, Judge

Superior Court County of Los Angeles

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