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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.

STEVE TALLERINO,

Defendant and Appellant.

2d Crim. No. B235855  
(Super. Ct. No. KA091466)  
(Los Angeles County)

Steve Tallerino appeals from the order revoking his probation and ordering the execution of a previously suspended five-year prison sentence. (Pen. Code, § 1203, subd. (a).)<sup>1</sup> He contends that the probation condition prohibiting his ownership, use or possession of "any type of toy, video game or similar item designed for the purpose of entertainment/attraction of children, without the approval from the probation officer" is unconstitutionally vague and overbroad, and that there is not sufficient evidence to support the trial court's finding that he violated probation. We conclude that appellant waived the constitutional claim because he failed to appeal the order which imposed the challenged probation condition, and he did not challenge it at sentencing. We affirm.

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

## BACKGROUND

Appellant worked in a restaurant for several years. He met the 14-year-old victim there, when he was 48 years old. She declined his invitation to go out with him. She did, however, accept gifts with a collective value of more than \$2,500 from appellant. The gifts included an iPhone, clothing, jewelry, and a gift certificate.

From February through early June 2010, appellant sent the victim frequent text messages. Several said, "I love you babe." She thought he was "weird," but tolerated him because he gave her gifts. In sending an electronic Victoria's Secret \$150 gift certificate to her, appellant included a message that said, "I hope you buy something nice for only my eyes to see." He also sent the victim a photograph of a bed, with a caption that read, "Hopefully you can be here soon." He delivered clothing gifts to her bedroom window one night. She accepted them and sent him away. The text message he sent the next day said, "You didn't let me come in. Maybe next time." On three occasions, he met the victim at her school, and brought her lunch.

On June 3, 2010, La Verne Police Department officers found appellant in his parked truck, waiting to meet the victim outside her school. There were red roses and a bag with soda, snack food and candy, on the truck's front seat. A black bag in the truck held a loaded .38-caliber revolver. Officers later found a computer and a bill for the victim's iPhone in appellant's home. An analysis of the computer disclosed that appellant had visited websites with multiple images of nude children "engaged in sexual acts."

The prosecution filed an eleven-count felony complaint against appellant. On September 30, 2010, he pleaded no contest to five counts: possession of matter depicting minors engaging in sexual conduct (§ 311.11, subd. (a)); sending harmful matter to a minor (§ 288.2, subd. (a)); annoying and molesting a child (§ 647.6, subd. (a)(1)); carrying a loaded firearm (former § 12031, subd. (a)(1)); and meeting a minor for lewd purposes (§ 288.4, subd. (b)).<sup>2</sup> On November 4, 2010, pursuant to the terms of a

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<sup>2</sup> The substance of former section 12031, subdivision (a)(1), is now in section 25850, subdivision (a).

negotiated plea, the court sentenced appellant to state prison for five years four months; suspended imposition of sentence; placed him on formal probation for five years, on multiple conditions, including the condition to which he now objects. It dismissed the six remaining counts.

On July 12, 2011, the prosecution filed a motion asking the court to revoke appellant's probation. The court conducted probation revocation proceedings on August 26, 2011. Los Angeles County Sheriff Deputy Timothy Tallez testified that he participated in a probation compliance search of appellant's home on July 8, 2011. Officers found a remote controlled airplane and a stuffed, furry, battery-operated, dancing, singing gopher toy in his bedroom. They also found ammunition and pornographic materials in a drawer under his bed.

Appellant's brother, Terry Tallerino, testified that he had removed items that appellant could not possess, including guns, from appellant's bedroom in 2010, before his release from jail. When Terry removed those items, he did not see the ammunition or pornographic materials that officers found in appellant's drawer in July 2011. Terry did not think that the dancing, singing gopher toy, based on a character in the *Caddyshack* movie, was a child's toy.

The trial court heard argument regarding appellant's knowledge of the items recovered from his drawer. His counsel also asserted that the gopher toy was designed to appeal to adults rather than children, and that adults use remote-controlled airplanes. The court cited the probation report's reference to appellant's statement during the search that he should have been more thorough. Appellant had stated, "I should have done a better job cleaning out my room." The court noted that the "furry little creature in the box, akin to a little teddy bear . . . let alone its ability to dance, sing and wiggle its hind end" was in plain view in appellant's bedroom. It made no "specific finding as to whether the ammunition" recovered from appellant's bedroom showed that he had violated probation. The court found that the "dancing gopher [met] the specific classic definition of a toy designed for the purpose of entertainment and attraction to children[.]" and that appellant

had violated probation by possessing that toy. It then imposed appellant's previously suspended state prison sentence.

## DISCUSSION

### *Constitutional Challenge*

Appellant claims that the probation condition prohibiting his ownership, use or possession of "any type of toy, video game or similar item designed for the purpose of entertainment/atraction of children, without the approval from the probation officer" is unconstitutionally vague and overbroad. Appellant has waived the claim.

"[A] defendant who elects not to appeal an order granting . . . probation cannot raise claims of error with respect to the grant . . . of probation in a later appeal from a judgment following revocation of probation." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Because appellant did not appeal from the November 4, 2010, order granting probation, he cannot challenge the conditions imposed pursuant to that order in this appeal from the August 26, 2011, order revoking his probation. (*Ibid.*)

In claiming that he can challenge the constitutionality of his probation conditions in this appeal, appellant cites *In re Sheena K.* (2007) 40 Cal.4th 875, 887-889. His reliance on *Sheena K.* is unavailing. Unlike appellant, Sheena K. did not wait until her probation was revoked to challenge a probation condition. She appealed from the order which imposed that condition and challenged its constitutionality for the first time on appeal. (*Id.* at p. 878.) In that context, our supreme court concluded that "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law" and may thus be reviewed on appeal absent an objection in the trial court. (*Id.* at p. 887.) Appellant cites no authority to support his claim that he can challenge a condition of probation following the revocation of probation, although he did not appeal the order which imposed that condition and raise his claim in the sentencing court. (Compare *People v. Ramirez*, *supra*, 159 Cal.App.4th at p. 1421.)

### *Substantial Evidence*

Appellant further contends that there is not sufficient evidence to support the finding that he violated probation by possessing the furry, singing, dancing *Caddyshack* gopher toy and the remote-controlled airplane toy. We disagree.

We apply the substantial evidence standard when reviewing a trial court's finding of a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.) In deciding the sufficiency of the evidence, we draw all reasonable inferences from the record in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "The standard of proof required for revocation of probation is a preponderance of evidence to support the violation. [Citation.] Trial courts are granted great discretion in deciding whether or not to revoke probation. [Citation.] 'Absent abuse of that discretion, an appellate court will not disturb the trial court's findings.' [Citation.]" (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.)

The trial court found that appellant violated his probation by possessing a "toy, . . . designed for the purpose of entertainment/attraction of children, without . . . approval from the probation officer." The evidence, viewed in the light most favorable to the judgment, supports its finding.

Appellant argues that there was insufficient evidence to prove that he violated his probation by possessing a toy "designed for the purpose of entertainment [or] attraction to children" because the *Caddyshack* gopher toy was "marketed in connection with [an] adult movie" and, as the trial court recognized, it could attract adults as well as children. His argument is not persuasive. It is premised on the illogical assumption that appellant is only prohibited from possessing toys that are designed to appeal exclusively to children. The evidence supports the trial court's conclusion that a child's attraction to a furry, dancing animal toy would not be diminished merely because it also attracted adults

and was marketed in connection with an adult movie. Substantial evidence supports the court's finding that appellant violated his probation by possessing that toy.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

George Genesta, Judge  
Superior Court County of Los Angeles

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Defendant and Appellant.

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