Filed 5/28/13 In re Andrew V. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| In re ANDREW V., a Person Coming Under the Juvenile Court Law. | B240838<br>(Los Angeles County<br>Super. Ct. No. JJ19424) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANDREW V.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County. Carol Richardson, Juvenile Court Referee. Modified and affirmed.

Bruce G. Finebaum, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court sustained a January 25, 2012 petition charging minor Andrew V. with the offense of sexual battery, a violation of Penal Code section 243.4, subdivision (e)(1). The court declared minor to be a ward of the court under Welfare and Institutions Code section 602 and found the offense to be a misdemeanor. The court placed minor at home under the supervision of the probation department under various terms and conditions of probation.

Minor appeals on the grounds that the juvenile court abused its discretion in imposing a probation condition requiring minor to remain a certain distance from school grounds.

## FACTS

### Prosecution Evidence

On January 21, 2012, at approximately 7:00 p.m., H. H., who was under 14, was in the parking lot of her Huntington Park apartment building when she saw minor. He asked her to play, and she refused. Minor said, "Okay" and then pulled H.'s left arm and touched her left breast. It hurt H. a little. H. said minor ran his hand down her body as far as her belly button. H. pulled minor's hand and flung it away from her. After touching H., minor said, "Thank you little friend."

H. told her mother about the incident that day, but H. testified that she did not call the police until a week later when minor verbally "assaulted" her again.[1] She meant that minor saw her bend over and said "something like, 'You bent over.'" H. and minor were not friends and she had never flirted with him. H. did not get along with minor. She called the police so that he would stay away from her. She felt he was harassing her.

Both H. and minor had attended a New Year's Eve party in their apartment building. She "sort of" danced with minor, but he was not very good and she danced with someone else. She had never had a romantic relationship with minor.

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[1] The record shows that H. called the police two days after the incident, on January 23, 2012.

Huntington Park Police Officer Patrick Nijland responded to H.'s residence on January 23, 2012, and found her distraught. Nijland detained minor. Nijland interviewed minor for approximately 10 minutes. Minor did not seem frightened or concerned about his detention. Minor initially denied knowing H. and having any contact with her, although he admitted that he knew H. lived in his apartment complex. He said he did not recall any incident on January 21, 2012. Minor told the officer he did not believe he had done anything wrong. He denied touching H.'s breast.

**Defense Evidence**

Huntington Park Police Officer Saul Duran interviewed H. at her residence on January 23, 2012. H. told him that minor approached her from behind, and she felt his hand on her upper back. She looked backwards and felt a hand run up from her lower stomach to her left breast. She did not tell the officer that she threw minor's hand away from her breast.

Minor, who was 15 at the time of the hearing, testified that he knew H. because she lived in the same apartment complex as he did. He never touched H.'s breast, never sexually harassed H., was not friends with H., and never had a romantic relationship with H. H.'s mother was the manager of the apartment building where H. and minor lived. H.'s mother had sometimes yelled at minor. Whenever he broke one of her rules, she would reprimand him in an aggressive manner. This occurred approximately 10 times. Minor did not like H.'s mother.

On January 23, 2012, minor saw H. drop something. Minor told her not to bend down too much in order to "make fun of her." H. said she would tell her mother. Minor's friend, David, joined in the teasing by making a "farting sound." H. seemed upset and went inside her apartment. Approximately 10 minutes later, the police arrived.

Minor said that nothing happened on January 21, 2012, and he did not even see H. that day. He acknowledged that he lied when he told Detective Nijland that he did not remember any verbal exchange between him and H. on January 23, 2012.

## DISCUSSION

### I. Minor's Argument

Minor contends that the probation condition requiring him to remain a block away from any school ground unless certain conditions exist is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). The condition has no legitimate purpose as applied to the facts of his case.

Minor additionally argues that the condition is overbroad and unconstitutionally infringes on his constitutional rights to travel and loiter. Because the condition is unconstitutional on its face and involves a pure question of law, the issue is not forfeited despite minor's lack of objection in the juvenile court.

### II. Relevant Authority

Under Welfare and Institutions Code section 730, subdivision (b), the juvenile court, in placing a ward on probation, "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." "We will only set aside such conditions where the record demonstrates a manifest abuse of discretion. [Citation.]" (*In re Damian M.* (2010) 185 Cal.App.4th 1, 6.)

"While adult criminal courts are also said to have 'broad discretion' in formulating conditions of probation [citation], the legal standards governing the two types of conditions [adults and juveniles] are not identical. Because wards are thought to be more in need of guidance and supervision than adults and have more circumscribed constitutional rights, and because the juvenile court stands in the shoes of a parent when it asserts jurisdiction over a minor, juvenile conditions 'may be broader than those pertaining to adult offenders.' [Citation.]" (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) Thus, "'a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910; see also *Ginsberg v. New York* (1968) 390 U.S. 629, 638

[power of the state to control conduct of children is greater than its authority over adults].)

"While broader than that of an adult criminal court, the juvenile court's discretion in formulating probation conditions is not unlimited. [Citation.] Despite the differences between the two types of probation, it is consistently held that juvenile probation conditions must be judged by the same three-part standard applied to adult probation conditions under *Lent*, *supra*, 15 Cal.3d 481 [, 486]: 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.'" (*In re D.G.*, *supra*, 187 Cal.App.4th at pp. 52-53.) Additionally, juvenile probation conditions are permissible only if "'"'tailored specifically to meet the needs of the juvenile.'"'" (*Id.* at p. 53, quoting *In re Tyrell J.* (1994) 8 Cal.4th 68, 82, overruled on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 139.)

"A [probation] restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.'" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; see *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "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—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, *supra*, 188 Cal.App.4th 1149, 1153.)

## III. Analysis

### *A. Forfeiture*

Because minor failed to object to this probation condition in juvenile court, the People maintain he forfeited any challenge to its validity. Minor concedes that he did not challenge the probation conditions below, but he relies on *Sheena K.* to argue that his constitutional claims may be addressed for the first time on appeal because they present pure questions of law.

To the extent minor's constitutional challenges to this condition raise pure questions of law, which can be addressed without reference to the record, they are not subject to forfeiture. (*Sheena K.*, *supra*, 40 Cal.4th at p. 887; see *In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153, fn. 1 [minor's failure to object at hearing to probation condition keeping him away from courthouses "not fatal" when it amounts to "facial challenge raising pure question of law"].)

We believe that the probation condition at issue in the instant case is overbroad in its literal wording, without reference to the sentencing record, and thus presents a question of pure law. As discussed *infra*, modification is required to narrow the application of the condition. We therefore conclude that minor's ability to appeal has not been foreclosed by his failure to object in the juvenile court.

### *B. Overbreadth*

Probation condition No. 12 is a standard probation condition on the printed Los Angeles County Juvenile Court Conditions of Probation Minute Order form. It provides: "Do not be within one block of any school ground unless enrolled, attending classes, on approved school business, or with school official, parent or guardian." As written, the condition imposed could be accidentally violated should minor's normal travels take him to a location within a block of any school campus, regardless of the relationship of the type of school to his offense. Accordingly, it represents an overbroad restriction on otherwise lawful activity and "sweep[s] unnecessarily broadly and thereby invade[s] the area of protected freedoms." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.)

By referring to "any school," the condition includes a wide range of educational institutions. It includes high schools, colleges, technical schools, and graduate schools. Minor's crime and his presence within a block of a high school or technical school, the latter of which can be found in many business districts, bear no relation because the students in those schools are not vulnerable children. Minor was found to have committed a sexual battery on a child under the age of 14. His probation report revealed that he was arrested in October 2011 for cruelty to a child likely to produce great bodily injury, resulting in his being released into the JOIN program. Thus, minor's record shows that children have been his victims, and students in high school and higher education need not be protected from minor.

Minor's condition as written differs from that of *In re Antonio R.* (2000) 78 Cal.App.4th 937 (*Antonio R.*), where the juvenile court did not prohibit the minor from entering any county, but only the specific county (not his county of residence) where he committed several crimes. (*Id*. at p. 939.) In this case, minor did not commit his crimes on school campuses, yet the probation condition prohibits him from being within a block of any school campus, even though there is no connection between his offenses and, for example, a local community college. Whereas in *Antonio R.* there was a relationship between the place the minor was prohibited from visiting and his crimes, here, the condition is related to minor's offense only to the extent that the condition prohibits him from approaching a school attended by vulnerable children. Even the safety valve provided by the condition—allowing minor to be on a school campus with parental permission, or for legitimate business—cannot cure a constitutionally overbroad probation condition that is partly unrelated to minor's past and possible future criminality.

We believe, however, that, to the extent the probation condition prohibits minor from entering educational institutions and campuses attended by children, his case is sufficiently analogous to that of *Antonio R.* such that the probation condition with its safety valve clause can be upheld. A probation condition limiting minor from being on

elementary school campuses is sufficiently related to his crime to permit banishing him from those campuses, except for the listed exceptions to the ban.

Therefore, we modify minor's probation condition to forbid him from being within one block of any school that has grades 8 or lower, unless minor is enrolled, attending classes, on approved school business, or with a school official or parent. As modified, the condition is reasonably related to the enforcement of those matters as well as his future threat to the safety of the public. (See *Antonio R.*, *supra*, 78 Cal.App.4th at pp. 941-942 [condition requiring permission to leave the county is reasonable despite restrictions on some behavior that does not relate to potential criminality].

**C. Validity of Condition**

We believe minor's probation condition, as modified, is reasonable under *Lent* because it relates to minor's criminal conduct, is reasonably related to future criminality, and is individually tailored to meet his needs. Minor committed sexual battery on a younger child and was arrested for cruelty to a child. A school campus is a logical place to find young children who are vulnerable to abuse. Although minor argues that the abuse did not occur at a school, the location of the abuse is not the significant factor. The probation condition has less to do with the location of the incident than it has to do with the commission of a crime against a defenseless child who could have easily been found at a school rather than at minor's apartment complex. By limiting minor's access to unsupervised children, the risk that minor will repeat this type of conduct is reduced, and it serves to protect other children.

In light of our modification, minor's case is not analogous to *In re E.O.*, upon which minor relies. In that case, a probation condition stated that E.O. could not knowingly come within 25 feet of a courthouse when he knew there were criminal or juvenile proceedings occurring that involved anyone E.O. knew to be a gang member, or where he knew a witness or victim of gang-related activity would be present, except under certain conditions. (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1152.) The reviewing court found this condition overbroad. The court observed that prohibiting the minor from approaching a specific building would prevent the minor from attending other

proceedings, not gang-related, in the same or nearby buildings. (*Id*. at pp. 1155, 1157.) The condition also infringed upon his right under the state Constitution to attend and participate in court proceedings should he or his family members become victims of a crime. (*Id*. at p. 1155.) The court found there was no showing that the condition was narrowly tailored to its objective, and there was no actual indication of what the objective was. (*Ibid*.) The court believed a more direct and narrowly tailored restriction would be equally as effective in allaying any concerns about, for example, witness intimidation by gang members. (*Id*. at pp. 1155-156.) The court struck the condition and gave the People an opportunity to seek a new dispositional hearing. (*Id*. at p. 1158.) The court provided suggestions for the juvenile court in drafting a narrower condition. (*Id*. at p. 1157.)

The condition in the instant case, as modified, is sufficiently narrow. The condition does not impede minor's constitutional rights to travel and loiter, nor does it absolutely deny minor the right to be near a school. Rather, it subjects his right to approach certain types of schools to reasonable conditions. This allows minor to be near such schools for legitimate reasons while at the same time restricting his ability to arbitrarily loiter near a school with young children, where future criminality is a risk. This is similar to the condition upheld in *Antonio R.* (*Antonio R.*, *supra*, 78 Cal.App.4th at p. 939.) The condition thus balances minor's rights to travel and loiter against his record of past criminality and the safety of the public.

Finally we observe that juvenile probation is not an act of leniency in lieu of punishment, but rather an ingredient of a final order for the minor's reformation and rehabilitation. (*In re Tyrell J.*, *supra*, 8 Cal.4th at p. 81.) In planning the conditions of supervision of a minor, the juvenile court must consider the minor's entire social history as well as the circumstances of the crime. (*In re Todd L.* (1980) 113 Cal.App.3d 14, 20.) As modified, minor's probation condition is in the minor's best interest. (*Tyrell J.*, at p. 81.)

**DISPOSITION**

The order of probation is modified to prohibit minor from being within one block of any school where classes of grade 8 or lower are held, unless minor is enrolled,

attending classes, on approved school business, or with a school official or parent. As modified, the order appealed from is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.