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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ZOLTAN IVANYI, JR., Defendant and Appellant.	B278437 (Los Angeles County Super. Ct. No. MA067485)

APPEAL from an order of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Following his conviction for attempted murder pursuant to a negotiated plea agreement, Zoltan Ivanyi, Jr., received a suspended sentence of nine years in state prison and was placed on formal probation for five years. Several months later Ivanyi's probation was revoked for violating the no-contact provision in an unrelated criminal protective order issued in a domestic violence case involving his estranged wife. On appeal Ivanyi argues the court's finding he violated the no-contact provision in the protective order, which had been incorporated by reference as a condition of probation, was not supported by substantial evidence and the no-contact provision was unconstitutionally vague. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Case*

Ivanyi and Christine Poe were married and had three children together, nine-year-old Halie and six-year-old twins, Shane and Ethan. A juvenile dependency case was initiated in Los Angeles Superior Court (case no. DK03590) in 2014. The children were removed from the custody of their parents due to issues of domestic violence and substance abuse. Pursuant to a court ordered case plan entered July 30, 2015 after the court sustained a subsequent petition under Welfare and Institutions Code section 342, the Los Angeles County Department of Children and Family Services (Department) was directed to provide reunification services to both parents. Visitation was initially monitored; the parents were ordered to visit the children separately. Poe's visitation was subsequently modified to unmonitored, and in late July 2016 the children were returned to her care under the supervision of the Department. Ivanyi's visitation remained monitored.

2. *The Domestic Violence Criminal Protective Order*

One of the incidents of domestic violence between Ivanyi and Poe led to a misdemeanor complaint and issuance of a criminal protective order on March 11, 2015. As modified on May 20, 2015, the criminal protective order prohibited Ivanyi, in item 12, from having any personal, electronic, telephonic or written contact with Poe; in item 13, from having contact with Poe through a third party, except an attorney of record; and, in item 14, from coming within 100 yards of her.

Item 16 of the printed Judicial Council form order (CR-160 [Rev. July 1, 2014]) stated Ivanyi "may have peaceful contact with the protected persons named above, as an exception to the 'no-contact' or 'stay-away' provision in item 12, 13, or 14 of this order," and then checked box "a" to specify "the Family, Juvenile, or Probate court order in case number: DK03590." The phrase "only for the safe exchange of children and court-ordered visitation as stated in" appears on the form between the words "item 12, 13, or 14 of this order" and box "a"; that language was crossed out by the trial court.

Page 2 of 2 (the back page) of the two-sided criminal protective order contained a number of "Warnings and Notices." Under the heading "Child Custody and Visitation," the form cautioned, "Child custody and visitation orders may be established or modified in Family, Juvenile, or Probate court. [¶] Unless box a or b in item 16 on page 1 is checked, contact between the restrained and protected persons permitted by a Family, Juvenile, or Probate court order for child custody or visitation must not conflict with the provisions of this order. [¶] If box a or b in item 16 on page 1 is checked, the restrained and protected persons should always carry a certified copy of the most

recent child custody or visitation order issued by the Family, Juvenile, or Probate court."[1]

Ivanyi was personally served with a copy of the modified criminal protective order at the court hearing on May 20, 2015.

3. *Ivanyi's Plea to Attempted Murder*

An information filed December 29, 2015 alleged that Ivanyi had committed attempted willful, deliberate and premeditated murder and two counts of assault with a deadly weapon (an axe) arising from an incident on November 29, 2015 involving his girlfriend and a male friend of hers. (Poe and the children were not present.) On February 24, 2016 Ivanyi pleaded guilty to attempted murder pursuant to a negotiated plea agreement that struck the premeditation allegation. On March 8, 2016 the court imposed and suspended execution of a nine-year upper term state prison sentence and placed Ivanyi on formal probation for five years. The terms of probation included serving 202 days in county jail, equal to Ivanyi's actual time served plus conduct credits, and 120 days of community labor (Caltrans). The aggravated assault charges were dismissed.

The court issued a protective order requiring Ivanyi to stay away from the victims in the case before it. Additional terms of probation required Ivanyi to obey all laws and court orders, including protective orders issued in any other case. At the conclusion of the sentencing hearing, the court admonished Ivanyi, "Make sure you understand, this is to obey all laws and [orders in] other cases. So the nine years state prison has

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[1] Box "a" referred to family, juvenile or probate court orders issued prior to the date of issuance of the criminal protective order; box "b" to court orders issued after the date the criminal protective order was signed.

already been imposed. If probation gets revoked, they are going to be demanding the nine years and I can't change that term. Do you understand?" Ivanyi answered, "Yes, your Honor."

4. *The Probation Violation and Revocation Proceedings*

On May 26, 2016 Ivanyi attended an awards assembly at Halie's elementary school. Several hundred people were present in the auditorium. Ivanyi sat in the back left corner of the auditorium; Poe was in the front right side. Poe estimated the distance between her seat and Ivanyi as approximately 40 feet. At the conclusion of the ceremony Ivanyi approached Halie, who was then close to her mother, to congratulate her on her award. When he was several feet away, Poe took out a copy of the restraining order, cursed at Ivanyi and threatened to call the police if he did not leave immediately. Ivanyi left the school without further incident.

Poe contacted the police the same day to report Ivanyi's violation of the 2015 criminal protective order. The incident report quotes Poe as saying she was in fear for her life because Ivanyi "was just released from jail and is on probation for assault."

Ivanyi told his probation officer about the school incident shortly after it happened. At that point the probation officer was not aware Poe had filed a police report. Nearly two months later, in a July 22, 2016 probation officer's report that was apparently prepared for a status hearing scheduled for August 8, 2016, the probation officer described the incident as a "technical violation" and recommended "no action" be taken.

On July 28, 2016 the district attorney's office filed a motion requesting revocation of probation. Ivanyi's probation was summarily revoked. A revocation hearing was held on

September 28, 2016. Poe, her sister-in-law Shelly Poe, who was the relative caregiver for Halie and the twins during the dependency proceedings, her father Michael Poe, who was present at the awards assembly, and Ivanyi all testified.

According to Poe, Ivanyi looked right at her when he arrived at the assembly on May 26, 2016. When the awards ceremony was over, Ivanyi approached her. Halie was standing two or three feet behind Poe at that point. When Ivanyi was three or four feet away, Poe took a copy of the protective order from her pocket, waved it in the air and threatened to call the police if Ivanyi did not go away. Poe testified Ivanyi said, "Oh, I did not know," and left.

Ivanyi testified Halie asked him to attend the awards ceremony several days before May 26 during a telephone call monitored by Shelly Poe.[2] Shelly Poe and Halie gave him the school's address. Ivanyi said he did not know Poe was going to be at the assembly and did not recognize her when he arrived because her hair was darker and cut differently than before and she was wearing a baseball cap. (Poe confirmed that she and Ivanyi had not seen each other for about nine months except at court hearings.) Ivanyi insisted he did not see Poe until the assembly was over. Ivanyi also explained he believed the restraining order allowed peaceful contact with Poe because they were participating in reunification services through the dependency court.

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[2] According to Ivanyi, Halie also said she was going to be in a play later the same day and asked if he could attend that, as well. Because Poe demanded he leave the school at the conclusion of the awards ceremony, Ivanyi did not stay for the play.

Testifying as a rebuttal witness, Shelly Poe said she told Ivanyi during his telephone call with Halie that Poe was going to be at the awards assembly. She also testified Halie asked Ivanyi not to come because there was a restraining order against him and she did not want him to get in trouble.

The court revoked Ivanyi's probation and imposed the previously stayed nine-year state prison sentence.

DISCUSSION

1. *Governing Law and Standard of Review*

A court may revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her probation . . . ." (Pen. Code, § 1203.2, subd. (a); see *People v. Urke* (2011) 197 Cal.App.4th 766, 772; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) We review a decision to revoke for substantial evidence (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681), according great deference to the trial court's ruling, "bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.'" (*Urke*, at p. 773; accord, *People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) "Before a defendant's probation may be revoked, a preponderance of the evidence must support a probation violation." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197; accord, *People v. Rodriguez* (1990) 51 Cal.3d 437, 447 [standard of proof for finding probation violation is preponderance of the evidence].)

2. *The Criminal Protective Order Is Not Contradictory or Unduly Vague*

Ivanyi argues on appeal that item 16 in the May 2015 criminal protective order permitted him to have peaceful contact with Poe, which is all that occurred at the May 26, 2016 awards ceremony, or, alternatively, failed to provide him with constitutionally required, fair notice that any type of peaceful contact with her was not allowed. Neither argument has merit.

As discussed, after the court struck the words "only for the safe exchange of children and court ordered visitation," item 16 of the criminal protective order provided, as an exception to its no-contact and stay-away provisions, that Ivanyi could have peaceful contact with Poe, and then, with box "a" checked, identified, "the Family, Juvenile, or Probate court order in case number: DK03590" without any connecting phrase between the two portions of the item. As a result, Ivanyi argues, the order inconsistently directed him to stay away from Poe and provided that he could have peaceful contact with her as an exception. According to Ivanyi, the reference to case number DK03590 in item 16 was a non sequitur, which did not restrict or condition the situations in which he could have peaceful contact with Poe.

Ivanyi's contention the specific reference to case number DK03590 in item 16 did not, on its face, limit the peaceful contact exception to circumstances authorized by the dependency court in case number DK03590 defies credulity. The court checked box "a" and inserted by hand the dependency case number. Those actions necessarily had import and produced an order that was easily understood, even if some additional connective language was implicit.

Moreover, Ivanyi's argument entirely ignores the explanatory text on page 2 regarding item 16. That paragraph

expressly advised Ivanyi box "a" was not unrelated (a non sequitur) to the peaceful contact exception: It cautioned that, if neither box "a" or "b" in item 16 were checked, then the stay-away and no-contact provisions of the criminal protective order would not be affected by any child custody or visitation order issued by the family, juvenile or probate court. That language certainly implies, by way of a negative pregnant, that if one of the boxes was checked, a child custody or visitation order (but nothing else) might affect the scope of the protective order. The significance of checking box "a" and inserting the dependency case number, however, was not left to implication. The paragraph continued, if, as in this case, box "a" or "b" was checked and completed, then Ivani was warned he needed to carry with him a certified copy of the most recent child custody or visitation order.

The unmistakable meaning of this section of the criminal protective order is that Ivanyi was permitted to have peaceful contact with Poe to the extent authorized by court orders issued in case number DK03590. Any other contact with Poe would, whether or not peaceful, violate the order. This language warned Ivanyi of the prohibited conduct with the requisite degree of certainty. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 890 ["[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,' if it is to withstand a challenge on the ground of vagueness"].)[3]

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[3] Because we reject Ivanyi's void-for-vagueness constitutional challenge on its merits, we need not address the Attorney General's argument Ivanyi forfeited the issue on appeal by failing to object on this basis in the trial court. (Compare

3. *Substantial Evidence Supports the Finding Ivanyi Violated the Conditions of His Probation*

The evidence at the probation revocation hearing was undisputed that Ivanyi sat within 100 yards of Poe at the awards assembly on May 26, 2016 and had personal contact with her, exchanging words, immediately following the conclusion of the ceremony. In addition, Ivanyi admitted he was aware of the stay-away and no-contract provisions of the May 20, 2015 criminal protective order and acknowledged the dependency court had ordered that he and Poe visit separately with Halie and the twins from July 30, 2015 onward.[4] No court order permitted joint or simultaneous visits at school events.

Notwithstanding this evidence, Ivanyi argues a probation violation was not proved because the May 20, 2015 criminal protective order was reasonably understood as allowing him to engage in any type of peaceful interaction with Poe. For the reasons discussed in the preceding section, that is not a fair reading of the protective order.

At the conclusion of the evidentiary hearing Ivanyi's counsel asked the court to reinstate probation, arguing Ivanyi's

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People v. Welch (1993) 5 Cal.4th 228, 237 [failure to timely challenge a probation condition as unreasonable in the trial court forfeits the claim on appeal] with *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 887-888 [challenge to a term of probation on the ground of constitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court presents a pure question of law that is not subject to forfeiture].)

[4] Apparently joint visitation was permitted prior to the dependency court's July 30, 2105 disposition order.

conduct was peaceful and his immediate departure from the elementary school once Poe asked him to leave demonstrated his good faith. Although we might have granted that request, particularly in light of the harsh consequence of imposing the previously stayed nine-year prison sentence, substantial evidence supported the court's finding; and Ivanyi does not argue on appeal that the decision to revoke probation and impose the sentence was an abuse of discretion.

DISPOSITION

The order revoking probation is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

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