Filed 3/18/15 P. v. Jackson CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SHAUN D. JACKSON, Defendant and Appellant.	B256948 (Los Angeles County Super. Ct. No. MA057781)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. La Forteza, Judge. Affirmed as modified.

Tracy L. Emblem, 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, Assistant Attorney General, Scott A. Taryle and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Defendant Shaun D. Jackson appeals from the order revoking his probation. He contends: (1) the probation condition that he not associate with drug users or sellers was unconstitutionally vague because it did not include a knowledge element; and (2) there was insufficient evidence that he knew the two men he was with when arrested were drug users or sellers. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 20, 2013, defendant pled no contest to violation of Health and Safety Code section 11360, subdivision (a) (marijuana transportation, sale etc.), in exchange for a suspended sentence and three years on formal probation. Among the conditions of probation recommended in the Probation Officer's Report was the following "do not associate" condition:

> "17. Do not own, use, possess, buy, or sell any controlled substance or associated paraphernalia except with a valid prescription, and stay away from places where users, buyers, or sellers congregate. Do not associate with *known* persons *known* by you to be controlled substance users or sellers, except in an authorized treatment program." (Italics added.)

After defendant entered his plea, the trial court included condition No. 17 in its oral pronouncement of the conditions of probation:

> "Do not own, use, possess, buy, or sell any controlled substance or associated paraphernalia except with a valid prescription, and stay [away from] where users, buyers, and sellers congregate. [¶] Do not associate with *known* persons *known* by you to be controlled substance users or sellers, except in an authorized treatment program." (Italics added.)

The minute order that memorialized the trial court's oral pronouncement omitted the word "known" from the do not associate condition:

> "Do not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription and stay away from places were users or sellers congregate. Do not associate with drug users or sellers unless attending a drug treatment program."

In April 2013, defendant's motion to withdraw his plea on the grounds that he was not sufficiently apprised of its consequences was denied. In October 2013, after defendant failed to report to his probation officer, his probation was preliminarily revoked but then reinstated on the same conditions. Neither in April 2013 nor in October 2013 did defendant challenge the omission of the word "known" from the minute order.

In the events leading up to the probation violation, defendant was standing with Le Shawn Jordan and Luther Crayton in front of the apartment complex located at 844 East Avenue J-12 in Lancaster when he was arrested on March 25, 2014. Like defendant, Jordan was on probation. According to the arrest report, the 800 block of East Avenue J-12 was known to authorities as a place where people came to buy and sell marijuana. In particular, patrol officers had seen activity consistent with narcotic sales at 844 East Avenue J-12. On the day defendant was arrested, Deputy Sheriffs Larry Pico and Lee Warren and Sergeant S. Owen were on patrol when they observed defendant, Jordan and Crayton standing together; the odor of marijuana was emanating from the area. All three men were detained pending a marijuana investigation. A key to a burgundy Honda parked nearby was found in defendant's pocket. Inside the Honda, officers found Jordan's wallet in a storage area on the driver's side and a baggie of marijuana on the driver's side floorboard. Defendant and Jordan were both arrested for possession of marijuana for sale; Crayton was released with a warning to avoid loitering in the area. Based on these facts, the trial court granted the People's motion for preliminary revocation of defendant's probation in lieu of filing a new case and set the matter for a probation violation hearing.

At the probation revocation hearing on May 9, 2014, Deputy Warren testified to essentially the same facts as set forth in the arrest report. He described 844 East Avenue J-12 as a "high crime, high narcotic apartment complex" at which the Sheriff's Department had made narcotics-related arrests in the past. Defendant testified that on March 25, he drove his white Pontiac Grand Prix to the apartment complex to visit his cousin, Klena Thompson. While he was outside smoking a cigarette, Jordan and Crayton approached. According to defendant, they "were people from the neighborhood. I was at

[Thompson's] house. They actually walked up and started talking to me." Defendant was familiar with the smell of marijuana and he did not smell it that afternoon. Defendant had the keys to his own car in his pocket; the keys to the Honda in which the deputies found the marijuana were not in defendant's pocket. Defendant speculated the deputies may have confused his Pontiac keys with the Honda keys when they put each of the men's personal belongings on the hood of the patrol car at the same time. Thompson, defendant's cousin, testified that while she was in her apartment cooking, she could see defendant sitting on the porch with "Tucci" and another man. When the police arrived, Thompson went outside. She saw officers looking into cars parked on the street. The officer's opened Tucci's car with a key; they were unable to open defendant's car.

The prosecutor argued that defendant violated the condition of his probation "to not associate with *known* drug users." (Italics added.) Defense counsel's argument focused on defendant's lack of knowledge.

The trial court found, by a preponderance of the evidence, that defendant violated the do not associate condition of his probation. The minute order states: "The court, after review of the testimony and arguments, finds the defendant in violation of probation for failing to obey the terms of probation for association with *known* drug users or sellers." (Italics added.) Defendant was sentenced to three years in county jail. He timely appealed.

DISCUSSION

A. The Do Not Associate Condition Was Not Unconstitutionally Vague

Defendant contends his conviction must be reversed because the "do not associate" condition of his probation was unconstitutionally vague in that it did not specify that defendant had to know the people with whom he was associating were drug users or sellers. We find no error.

The constitutionality of a probation condition may be challenged on appeal for the first time. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 585 (*Rodriguez*).) A

condition of probation that prohibits the probationer from associating with persons who, "unbeknownst to him have criminal records or use narcotics, is ' "overbroad [and therefore] is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights." ' [Citation.]" (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102; see *In re Justin S.* (2001) 93 Cal.App.4th 811, 816 [same vis a vis persons who, unbeknownst to the probationer, are gang members].)

In *Garcia* and *Justin S.*, the appellate courts modified the conditions of probation to include the requisite knowledge requirement. But in *People v. Patel* (2011) 196 Cal.App.4th 956, the Third District expressed impatience with the fact that trial courts continued to omit the knowledge requirement in conditions of probation. The remedy adopted by the *Patel* court was to assume an implied knowledge requirement and if that were not sufficient, appellate counsel could apply to the trial court for modification. (*Id*. at pp. 960–961 & fn. 4.) The court stated it would, going forward, "construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement." (*Id*. at pp. 960-961; but see *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1351 [criticizing *Patel*: " 'Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and concluded that "modification to impose an explicit knowledge requirement is necessary to render the condition constitutional." [Citation.] Until our Supreme Court rules differently, we will follow its lead on this point.' [Citation.]"].)

Here, we need not decide between the *Garcia* and *Patel* approaches because the knowledge requirement was expressly included in the trial court's oral pronouncement of the conditions of probation. As explained by the court in *Rodriguez, supra*, 222 Cal.App.4th 578, conflicts in the Reporter's and Clerk's Transcripts are not unusual and while not automatic, the Reporter's Transcript is usually given more credence under all the surrounding circumstances. (*Id*. at p. 586.) Thus, in that case, the appellate court

found nothing to indicate that the trial judge "intended the signed minute order to modify or correct his prior oral adoption of the conditions as stated in the probation report." (*Ibid*.)

In this case, as in *Rodriguez, supra*, 222 Cal.App.4th 578, there is nothing to indicate the trial court intended by its signed minute order to delete the knowledge element contained in Condition No.17 of the Probation Officer's Report and the trial court's oral statement of the conditions of probation. We will, however, order the minute order corrected to reflect the condition actually imposed.

We also reject defendant's argument that the trial court's failure, at the May 9, 2014, probation revocation hearing, to expressly state it was finding defendant violated his probation by associating with *known* drug users supports his claim of error. That omission was remedied by the minute order of that date, which makes the requisite express finding.

B. Substantial Evidence Supports the Finding that Defendant Violated the "Do Not Associate" Probation Condition

Defendant contends there was insufficient evidence to support the trial court's finding that he violated the "do not associate" condition of his probation. He argues there was no evidence defendant knew that either Jordan or Crayton was a controlled substance user or seller. We disagree.

The standard of proof required at a probation revocation hearing is a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72; see Pen. Code, § 1203.2, subd. (a) [trial court may terminate 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 supervision . . . ."].) "We review a probation revocation decision pursuant to the substantial evidence standard of review [citation], and great deference is accorded the trial court's decision, 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. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

Much like intent, knowledge can rarely be proven by direct evidence. (*People v. Hussain* (2014) 231 Cal.App.4th 261, 273 [intent].) Rather, it is usually proven by circumstantial evidence. (*People v. Fuqua* (1963) 222 Cal.App.2d 306, 312.) Circumstances which may not warrant a conviction may justify revocation of probation. (*Urke, supra,* 197 Cal.App.4th at p. 773.)

Here, there was sufficient circumstantial evidence that defendant knew Jordan was a user and/or seller of marijuana to warrant revocation of defendant's probation on the grounds that he violated the do not associate condition of his probation. This includes the evidence that the apartment complex in front of which defendant was observed standing with Jordan was known to law enforcement as a "high crime, high narcotic apartment complex" and the Sheriff's Department had previously made narcotics-related arrests there. In addition, from the evidence that the odor of marijuana was emanating from three men it could reasonably be inferred both that one or more of them had recently smoked marijuana and that defendant could smell it as distinctly as did the deputies. That no smoking paraphernalia was found in the possession of any of the men and that defendant denied smelling any marijuana are conflicts in the evidence that were for the trial court to resolve, not the appellate court. The location and odor evidence was bolstered by the evidence that the key to the Honda in which a baggie of marijuana was discovered was found in defendant's pocket. Like defendant's claim that he did not smell marijuana, his claim that the Honda key was not found in his pocket was a conflict in the evidence to be resolved by the trier of fact. Finally, it is of note that defendant testified, but did not expressly deny knowing that Jordan was a user or seller of narcotics. Defendant's testimony that Jordan and Crayton "were people from the neighborhood" who "walk[ed] up and started talking to" him does not constitute a denial that defendant knew Jordan's criminal history or that Jordan was in possession of marijuana at the time.

DISPOSITION

The trial court is directed to modify the probation condition restricting association with drug users and sellers to state: "Do not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with a valid prescription and stay away from places were users or sellers congregate. Do not associate with persons known by you to be drug users or sellers unless attending a drug treatment program." In all other respects, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.