

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE B.C.,
A Person Coming Under the Juvenile Court Law.

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

B.C.,
Defendant and Appellant.

No. H912346

(Santa Clara
County Superior
Court No. 0022)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment entered pursuant to Welfare and Institutions Code section 602 and is authorized by Welfare and Institutions Code section 800.

STATEMENT OF THE CASE

On November 19, 2009, a delinquency petition was filed alleging appellant possessed a firearm while a minor (Pen. Code, § 12101, subd. (a)(1)) and was an accessory after the fact (Pen. Code, § 32), both charged as felonies. (1CT 229-234.) At a contested jurisdictional hearing, the charge of being an accessory was dismissed. (2RT 9.) The court found he illegally possessed a firearm, and the offense was a felony. (1CT 288-292; 2RT 95-96.)

On August 9, 2010, the court placed appellant on probation on

condition, among other things, that he serve 210 days in jail with 4 days of presentence credits. (2CT 323-329.) The court also imposed “[s]tandard gang conditions,” including the requirement to: not be “on or adjacent to” a school, “not frequent areas of any areas of gang related activities,” not participate in “gang activities,” not wear or display gang symbols or possess gang paraphernalia, and not appear in court unless subpoenaed or ordered by the court. (2CT 325.)

A notice of appeal was filed on August 19, 2010. (2CT 330-332.)

STATEMENT OF EVIDENCE

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ARGUMENT

GANG CONDITIONS OF PROBATION WERE UNCONSTITUTIONALLY VAGUE AND OVERBROAD

As conditions of probation, the court ordered:

Standard gang conditions shall be imposed . . . :

[1st¹] The minor shall not be on or adjacent to any school campus during school hours unless with prior approval of school officials or probation officers.

[2d] The minor shall not frequent any areas of gang related activities and not participate in gang activities: wear/display logos, insignia, wear clothing, or be in possession of paraphernalia (including binder, books, written graffiti material) identifying gang membership/affiliation.

[3d] The minor shall not obtain gang-related tattoos.

¹ For convenience, appellant has designated the orders as the first gang condition of probation, second gang condition, and so on.

[4th] The minor shall not appear in any Court proceeding unless subpoenaed as a witness or ordered by the Court.

[5th] The minor shall not be in possession of spray paint, markers, chalk, marking pens, or other implements capable of writing graffiti unless authorized by school officials.

[6th] The minor shall not own, possess, or have access to any weapons, items, or artifacts listed in Sections **12020 P.C.** and **12601 P.C.**, or stun guns or OC (pepper spray)/tear gas, or firearms during the wardship.

(2CT 325, emphasis in original.)

The court orally pronounced the following:

Standard gang conditions apply: [1st] Don't be on or near any school unless you have prior approval of school officials or the probation officer. [2d] Do not be in any areas of gang-related activities. Do not participate in gang activities. [3d] Don't get any gang-related tattoos. [2d] Don't wear or display any gang logos, insignia, clothing, or paraphernalia. . . . [5th] Don't possess any implements capable of writing graffiti – spray paint, markers, chalk marking pens – unless authorized. [6th] And do not own or possess or have access to any weapons, items, artifacts, or any stun guns, pepper spray, tear gas during the period of the wardship.

(3RT 107-108.)

The gang conditions of probation are vague and overbroad because they fail to provide proper notice of what is required, provide undue discretion to law enforcement, and prohibit innocent behavior that is not reasonably related to the state's interest of deterring criminal behavior. Further, the fourth condition must be stricken because it was never orally pronounced by the court.

No objection is necessary to correct a condition of probation that is unconstitutionally vague or overbroad on its face. (*In re Sheena K.* (2007) 40 Cal.4th 875, 885-887.)

The Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15 of the California Constitution guarantee no person shall be deprived of life, liberty, or property without due process of law. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A vague probation condition infringes on the defendant's liberty interest because it fails to adequately describe what conduct is prohibited:

The vagueness doctrine bars enforcement of “ ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ [Citation.]” [Citation.] A vague law “not only fails to provide adequate notice to those who must observe its strictures, but also ‘impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ [Citation.]” [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that “abstract legal commands must be applied in a specific *context*,” and that, although not admitting of “mathematical certainty,” the language used must have “ ‘reasonable specificity.’ ” [Citation.]

(*Ibid.*, emphasis in original; see also *Skilling v. United States* (2010) 561 U.S.

___ [130 S.Ct. 2896, 2933]; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)

Further, the need for a clear order that is not overly broad is important when a condition impinges on a constitutional right. (See, e.g., *People v. Bauer* (1989) 211 Cal.App.3d 937, 944.) “A probation condition is constitutionally overbroad when it substantially limits a person’s rights and those limitations are not closely tailored to the purpose of the condition. [Citation.] It is not enough to show the government’s ends are compelling; the means must be carefully tailored to achieve those ends. A state may restrict a constitutional right, but only when the restriction is narrowly drawn Since laws regulating expression pose a particular danger of abuse, they are carefully scrutinized. [Citation.]” (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641-642; see also *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612.)

Thus, 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. [Citation.] A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*Sheena K., supra*, 40 Cal.4th at p. 890.)

A. The Condition not to be on or Near a School was Vague.

The first gang condition, not to be “on or adjacent to any school campus,” is vague and overbroad.

The term “adjacent to” is vague because it is not clear how far appellant must be to still be “adjacent to” the school. Is across the street “adjacent to” a school? A block away? What if the school is not within sight? How near is too near? How far is just far enough?

The requirement not to be adjacent to a school is overbroad. Appellant has a right to travel, and a restriction not to be “adjacent to” a school interferes with his freedom of movement and remain in a place for legitimate purposes.

A person has “the freedom to loiter for innocent purposes as part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this ‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty;’ protected by the Constitution. Indeed, it is apparent that an individual’s decision to remain in a public place of his choice is as much as part of his liberty as the freedom of movement inside frontiers that is ‘a part of our heritage’ [citation], or the right to move ‘to whatsoever place one’s own inclination may direct’” (*City of Chicago v. Morales* (1999) 527 U.S. 41, 53-54, fn. omitted.)

A person also has a right to travel from state to state under the due

process clause of the Fourteenth Amendment. (*United States v. Guest* (1965) 383 U.S. 745, 747.) Court's have recognized there is a related Fourteenth Amendment right to travel within a state. (*In re White* (1979) 97 Cal.App.3d 141, 148-149, citing *King v. New Rochelle Municipal Housing Authority* (2d Cir. 1971) 442 F.2d 646, 658.)

The freedom to loiter or move about in public places as one wills may be restricted only as reasonably necessary to further a compelling government interest. (*White, supra*, 97 Cal.App.3d at pp. 149-150; *People v. Smith* (2007) 152 Cal.App.4th 1245, 1250-1251; see generally *Dunn v. Blumstein* (1971) 405 U.S. 330, 339 [applying the strict scrutiny test to limitations on the right to travel].) Further, the strict scrutiny test requires the state to employ the least restrictive available regulation. (*Shelton v. Tucker* (1960) 364 U.S. 479, 488; see *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084 [a condition which restricts a probationer's constitutional rights must be “narrowly drawn to serve the important interests of public safety and rehabilitation.”].) A probation condition that effectively delegates unfettered discretion to a probation officer can be unconstitutionally overbroad. (See, e.g., *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1358-1359 [a condition to stay away from anyone designated by the probation officer was overly broad]; *People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1244 [a requirement that a gang member

disclose to police “areas frequented” was unconstitutionally vague].)

In *In re D.G.* (2010) 187 Cal.App.4th 47, the court held a requirement not to be within 150 feet of a school was not a reasonable condition of probation under Welfare and Institutions Code section 730, subdivision (b). (*Id.* at pp. 52-54.) The condition would prohibit him from driving by a school on the way to work or from working at a business located near a school.

The condition of probation must be stricken.

B. The Prohibition to “Not Frequent Any Areas of Gang Related Activities” Is Vague and Overbroad.

The first part of the second gang condition to “not frequent any areas of gang related activities” is so vague and overbroad as to impinge on appellant’s constitutional right to loiter or travel. It is vague because it does not define with sufficient clarity which areas are off limits. It is overly broad because it appears to banish appellant from areas where he legitimately might be without any appreciable risk of increase in criminality, and it would ban him from areas where he must be in order to further his rehabilitation.

Again, a person has a right to travel under the due process clause of the Fourteenth Amendment. (*Morales, supra*, 527 U.S. at pp. 53-54; *Guest, supra*, 383 U.S. at p. 747; *White, supra*, 97 Cal.App.3d at pp. 148-149; *King, supra*, 442 F.2d at p. 658.) The strict scrutiny test applies to restrictions on the freedom to loiter or move about in public places as one wills may be restricted

only as reasonably necessary to further a compelling government interest. (*Dunn, supra*, 405 U.S. at p. 339; *Shelton, supra*, 364 U.S. at p. 488; *Smith, supra*, 152 Cal.App.4th at pp. 1250-1251; *White, supra*, at pp. 149-150.)

The condition impinges on appellant's right to loiter and to travel. He cannot remain in a gang area or pass through it on his way to another destination. The condition is vague because it does not require knowledge that appellant know where an area of gang activity is. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 913-914.) Gangs have claimed entire areas of cities to be their territory. (See *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1367.) Is a gang member living in an apartment building sufficient activity for the area to be off limits? If so, what area is off limits: the building? the block? everywhere within 2000 feet? (Cf. Pen. Code, § 3003.5, subd. (b) [prohibiting a sex offender from living within 2000 feet of a school, park, or where children gather which can be an entire city].) What if there were a gang-related crime in an area ten years ago?

The “word ‘frequent’ is also vague, because it is both obscure and has multiple meanings (*People v. Leon* (2010) 181 Cal.App.4th 943, 952; *In re H.C.* (2009) 175 Cal.App.4th 1067, 1072; see also *People v. Sanchez* (2003) 105 Cal.App.4th 1240, 1244 [“areas frequented” for disclosure at gang registration was unconstitutionally vague].)

Further, “the word ‘activity’ is one of surpassing breadth.” (*Victor L., supra*, 182 Cal.App.4th at p. 915.) It is both vague, as it is not clear what “activity” means, and it is overbroad. “[I]f a minor lived within the area described by the gang-related boundaries, his banishment from it would be constitutionally suspect. [Citation.] If he worked or went to school in the district so defined, the condition would need to permit travel as necessary to attend to those aspects of his livelihood or education. [Citation.] Such considerations call for an individualized list of stay-away areas, together with any exceptions necessary to reasonably accommodate the minor’s legitimate work and educational needs.” (*Id.* at pp. 916-917.)

The solution in *Victor L., supra*, 182 Cal.App.4th 902 was to permit the probation office an opportunity to define the areas the probationer must avoid. (*Id.* at p. 918; see also *In re Ramon M.* (2009) 178 Cal.App.4th 665, 678 [the court permitting an order to stay away from gang areas as designated by the probation officer or where gangs gather].) The court did not believe it was delegating to the probation office undue authority. (*Ibid.*) But a law is unconstitutionally vague when it grants too much law enforcement discretion or not provide a person of ordinary intelligence fair notice of what is prohibited. (*Skilling v. United States* (2010) 561 U.S. __ [130 S.Ct. 2896, 2933].) While “probation officers may be given ‘wide discretion to enforce

court-ordered conditions' [citation], they may not create conditions not expressly authorized by the court [citation].” (*O'Neil, supra*, 165 Cal.App.4th at p. 1358.) Here, while the court ordered appellant ordered appellant to stay away from areas of “gang activity,” there is no explanation of what this means. Since no one of ordinary intelligence can determine what this means, leaving it up to the arbitrary guesswork of a probation officer would still be unconstitutional.

Unless the juvenile court can fashion a more precise condition, it must be stricken.

C. The Prohibition from Attending Court was Never Imposed, and it would Infringe on the Right to Free Speech While Failing to Meet a Legitimate State Interest.

The fourth gang condition on the minute order prohibited being at a courthouse unless subpoenaed as a witness or ordered to attend. The condition was not orally pronounced. (3RT 107-108.)

The condition must be stricken because the court never imposed it. “Conflicts between the reporter’s and clerk’s transcripts are generally presumed to be clerical error in nature and are resolved in favor of the reporter’s transcript unless the particular circumstances dictate otherwise.” (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249; accord, *People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Zackery* (2007) 147 Cal.App.4th 380,

385-386.)

Even if it were imposed, it must be stricken because it was unconstitutionally overbroad. The juvenile court's probation condition that appellant not attend court, even if he is a victim, interferes with his state constitutional and statutory right to participate in court proceedings if he or a family member is a victim of a crime. As part of the "Victims' Bill of Rights," the voters approved Proposition 9 (Gen. Elec. (Nov. 4, 2008)). One express purpose of the initiative was to "protect the legitimate rights of victims of crime." (Prop. 9, § 4, amending Cal. Const., art. I, § 28, subd. (a)(8).) If appellant were a victim of a crime, he would have the right to attend and be heard in criminal court and juvenile court. (Cal. Const., art. I, § 28, subds. (b)(7) & (b)(8); Pen. Code, § 1191.1; Welf. & Inst. Code, § 676.5.) This right applies if his parents or siblings are victims, even if he is not a direct victim. (Cal. Const., art. I, § 28, subd. (e).) The juvenile court's order, as written, violates the constitutional and statutory right of victims.

The court in *People v. Perez* (2009) 176 Cal.App.4th 380 held that a condition to stay 500 feet away from a courthouse was unconstitutionally overbroad. (*Id.* at pp. 384-385.) The court stated "[u]nreasonable restrictions 'on access to public property' contravene the First Amendment. [Citation.] [¶] Many courts are located in government complexes that house a variety of

public agencies. These may include a county law library; a public defender's office; a hall of administration, housing a board of supervisors, a city council, or both; a tax collector; and a health department, to name a few.” (*Id.* at p. 385.) The court concluded that “[i]n setting probation conditions, courts should not erect unnecessary barriers that impede the right of lawful and necessary access to the courts to file and pursue civil litigation. [Citation.] ‘Public safety is not threatened if defendant seeks court action. . . . Nor is barring such recourse a proper means of rehabilitation.’ [Citation.]” (*Id.* at p. 385.)

This court in *In re E.O.* (2010) 188 Cal.App.4th 1149 held a similarly broad condition to stay away from courthouses to be unconstitutionally overbroad because it impinges on the right as a victim to attend court proceedings and as a person to appear in court for matters he might be interested in. (*Id.* at pp. 1153-1158.) Further, this court in *People v. Leon* (2010) 181 Cal.App.4th 943 disapproved of a blanket order banning a probationer from a courthouse because other civic offices are often located in courthouses and the order unduly prevented the probationer from participating in these activities. (*Id.* at p. 952-954.)

This court rejected in *E.O.*, *supra*, 188 Cal.App.4th 1149 the claim that appellant had a constitutional right to attend court proceedings. (*Id.* at pp.

1153-1159.) But as the court in *Perez, supra*, 176 Cal.App.4th 380 observed, “[t]he United States Supreme Court has long recognized a constitutional right of access to the courts for all persons, including prisoners.’ [Citation.]” (*Id.* at p. 385.) The probation condition in this case amounts to a blanket ban on viewing all court proceedings without consideration of the individual nature of the case. It is thus invalid.

The United States Supreme Court held in *Presley v. Georgia* (2010) 558 U.S. ___ [130 S.Ct. 721] that banning spectators from court proceedings was unconstitutional unless there was substantial evidence the person was interfering with the administration of justice. (*Id.* at p. 724 (per curiam).) While the Court focused on the defendant’s Sixth Amendment right to a public trial, the Court has recognized that members of the public have a First Amendment right to attend court proceedings (*ibid.*; *Press Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 505-510; *Globe Newspaper v. Superior Court for Norfolk County* (1982) 457 U.S. 596, 605-607), including civil proceedings (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1209; *Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1052; see *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 580, fn. 17; see also Cal. Const., art. I, § 3).

“ ‘The right to an open public trial is not the right of only the criminal

defendant, but is rather a shared right of the accused and the public, the common concern being the assurance of fairness.' ” (*Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247, 251, quoting *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 7; accord *People v. Esquibel* (2008) 166 Cal.App.4th 539, 552.) The federal Constitution does not permit banning a person from court unless there is substantial risk of juries (or witnesses) being influenced by a spectator. (*Presley, supra*, 130 S.Ct. at p. 725.) Further, the court cannot exclude a spectator under Penal Code section 686.2 unless there is not an attempt to threaten or intimidate. (*Esquibel, supra*, at pp. 553-554.)

Although the public's right to view judicial proceedings is not absolute, “the State's justification in denying access must be a weighty one.” (*Globe Newspaper, supra*, at p. 606.) Blanket bans in viewing certain classes of court proceedings without considering the individual nature of the case are not valid. (*Id.* at pp. 606-607 [finding unconstitutional a state law closing criminal sex cases from public viewing].)

“[T]he particular interest, and threat to that interest must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’ *Press-Enterprise I, supra*, [464 U.S.] at 510; see also *Press-Enterprise Co. v. Superior Court of Cal.*,

County of Riverside, 478 U.S. 1, 15 (1986) ('The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]')." (*Presley*, *supra*, 130 S.Ct. at p. 725.)

The juvenile court's order is infirm because there was no evidence to support a finding that banishing appellant from courthouses or any proceeding was necessary to ensure the fairness of court proceedings. There was no evidence of appellant ever trying to intimidate a witness or otherwise tamper with court proceedings.

The only possible justification for banning appellant from court is to prevent some sort of witness intimidation. The court's order, however, was overly inclusive. People have many reasons for attending court hearings without being a party or receiving a subpoena. The person might agree to testify or to speak at a sentencing hearing without the need of a subpoena. The person might be required to attend because of a jury summons. The person might have an interest in a court hearing involving a family member or close friend and could attend without the risk of any detrimental effects in the judicial process. Moreover, the probation condition applies in settings where witness intimidation is unlikely, such as civil cases, traffic cases, arraignment, routine pretrial appearances, and sentencing hearings. The condition could be

used to prohibit appellant from being in a courthouse for legitimate purposes not related to any case. He could be found in violation if he were to view court documents, file papers, or go to government offices in the building. On the other hand, when intimidation might occur at court, the judiciary already has the power to expel potential offenders. (Pen. Code, § 686.2; see also *Presley, supra*, 130 S.Ct. at p. 725.)

The fourth gang condition must be stricken.

D. The Conditions not to Possess Graffiti Materials or Weapons Requires Knowledge.

The fifth gang condition, prohibiting possession of graffiti material, and the sixth gang condition, prohibiting possession of or access to weapons, are unconstitutionally overbroad because there is no requirement that he knowingly possess or have access to the items. (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913.) “Due process requires . . . that the probationer be informed in advance whether his conduct comports with or violates a condition of probation.” (*Id.* at p. 913.) The condition must be modified to require knowledge. (*Ibid.*)

E. The Gang Conditions are Unconstitutionally Vague and Overbroad for Failing to Define “Gang.”

The court failed to define a gang. This leaves the conditions both vague and overbroad. (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070-1071;

People v. Lopez (1998) 66 Cal.App.4th 615, 630; *People v. Garcia* (1993) 19 Cal.App.4th 97, 103.) Courts generally have modified such conditions to define a gang as a criminal street gang as defined by Penal Code section 186.22, subdivisions (e) and (f). (*Ibid.*) “Both *Lopez* and *Garcia* hold that ‘probation conditions that implicate constitutional rights must be narrowly drawn . . .’ and that the knowledge requirement generally ‘should not be left to implication.’ (*Garcia, supra*, 19 Cal.App.4th at p. 102.)” (*H.C., supra*, at p. 1071.)

CONCLUSION

For the foregoing reasons appellant, B.C., respectfully requests that this Court strike or modify the above-mentioned probation conditions.

DATED: December 21, 2010

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Appellant, B.C.

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S
OPENING BRIEF contains 4046 words.

Executed under penalty of perjury at Santa Clara, California, on
December 21, 2010.

Jonathan Grossman