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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE MARY CUSICK,

Defendant and Appellant.

A158101

(Marin County
Super. Ct. No. SC205649A)

Defendant Lee Mary Cusick appeals a judgment finding her guilty of driving under the influence of alcohol and placing her on probation. She contends one of the conditions of her probation is unconstitutionally vague and overbroad. We conclude the condition is not vague and, read correctly, it is not overbroad. We shall accordingly affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was driving on Highway 101 at 10:25 p.m. with her car's headlights and taillights off. Officers of the California Highway Patrol stopped her car. When speaking with her, an officer could smell alcohol; defendant's eyes were red and watery, and her speech was slow and slurred. A passenger had a bottle of alcohol between his legs, and there was an empty bottle on the center console. Defendant performed poorly on field sobriety tests, and a chemical test showed a blood alcohol level of .11 percent.

Defendant was charged with driving under the influence of alcohol (DUI), with a prior DUI conviction (Veh. Code, §§ 23152, subd. (a), 23550.5, subd. (a)(1); count 1) and driving with a blood alcohol level of 0.08 percent or above, with a prior DUI conviction (§§ 23152, subd. (b), 23550.5, subd. (a)(1); count 2), with various prior conviction allegations.

Defendant pled guilty to both counts and admitted some of the prior convictions, and the remaining allegations were dismissed. The trial court suspended imposition of sentence, placed defendant on probation, and ordered her to participate in Adult Drug Court, a drug and alcohol assessment, and treatment as directed by probation.

Among the probation conditions recommended by the probation department was the following: “The defendant shall not use, consume, possess or transport alcohol, marijuana (prescribed or not) *or any non-prescribed or illegal drug or intoxicant of any kind* (or associated paraphernalia) unless specifically authorized by the court during his/her probationary period.” (Italics added.) Defense counsel objected to the italicized language as impermissibly vague, and expressed concern that it would require defendant to obtain court permission to use prescribed medications because many such medications might have an intoxicant effect. Although the prosecutor argued that the condition allowed defendant to take any prescribed medication except marijuana, the court took the position that defendant would have to obtain court permission even for prescribed medications. The court then imposed the condition in language nearly identical to that recommended by the probation department.

DISCUSSION

I. Vagueness

Defendant's first challenge to the condition is that it is unconstitutionally vague. We review constitutional challenges to probation conditions de novo. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754.)

A condition of probation “ ‘must be sufficiently precise for the probationer to know what is required of [her], and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) However, we invalidate a probation condition on this ground only if no “ ‘ ‘ ‘reasonable and practical construction can be given to its language.’ ” ” (*People v. Hall* (2017) 2 Cal.5th 494, 501 (*Hall*).)

Defendant argues the intoxication condition does not meet this standard because she is unable to know what conduct is forbidden. For example, she argues, she might possess or use an intoxicating substance for an innocuous purpose—such as Nyquil to control a cough, or vanilla extract to bake cookies—and she would not know whether the court or her probation officer would consider that a violation of the probation condition. She asks us to strike the bar on use or possession of “intoxicants.”¹

The Attorney General argues, and we agree, that this problem is illusory because our high court in *Hall* ruled that probation conditions include “an implicit requirement of knowing possession,” thus giving the

¹ Although the examples defendant provides are of household or health products that contain alcohol, she makes no challenge to the bar on possession or use of alcohol on this or any other ground. Nor, for that matter, does she suggest either that alcohol-free vanilla flavorings and over-the-counter cold remedies are unavailable or that using them would burden her in any way.

defendant fair notice of the prohibited conduct. (*Hall, supra*, 2 Cal.5th at p. 497.) With this requirement, the condition is proper. We note that the high court in *Hall* cited *People v. Rodriguez* (2013) 222 Cal.App.4th 578, 594, as authority that “knowledge of the contraband’s presence *and of its restricted nature* is implicit in probation conditions restricting . . . narcotics” (although it overruled *Rodriguez* on another point). (*Hall, supra*, 2 Cal.5th at pp. 502 & 503, fn. 2.) *Rodriguez*, in turn, considered a challenge to a condition barring possession of alcohol or “intoxicants.” The court explained, “Because the latter category is susceptible of different interpretations, which may include common items such as adhesives, bath salts, mouthwash, and over-the-counter medicines, the addition of an express knowledge requirement will eliminate any potential for vagueness or overbreadth in applying the condition.” (*Rodriguez*, at p. 594, fn. omitted.) The same is true here, although the knowledge requirement is implicit under *Hall*, rather than explicit. We accordingly reject defendant’s challenge to the condition on this ground.

II. Overbreadth

Defendant also challenges the probation condition as overbroad. A probation condition that limits a person’s constitutional rights “must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K., supra*, 40 Cal.4th at p. 890; see *In re L.O.* (2018) 27 Cal.App.5th 706, 712.)

Defendant contends the condition violates this rule because it forbids her from taking intoxicating medications prescribed by a doctor; as a result, she argues, the condition is overbroad and impinges on her right to privacy in her medical information. (See *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850–851 [recognizing privacy interest in confidential medical information].) For

instance, she argues, she might have to reveal details of a sensitive medical condition before receiving permission to take prescribed pain medication. She asks us to modify the condition to include an exemption for prescription medication.

The Attorney General does not argue that it is permissible in the circumstances before us to require defendant to obtain court approval before taking prescribed medications, whether or not intoxicating. Rather, he argues the condition does not require defendant to do so.

We agree with the Attorney General that the words of the condition, read most naturally, do not require court permission for defendant to take medication her doctor prescribes, even if it may have an intoxicant effect. As proposed by the probation department, the condition read: “The defendant shall not use, consume, possess or transport alcohol, marijuana (prescribed or not) *or any non-prescribed or illegal drug or intoxicant of any kind* (or associated paraphernalia) unless specifically authorized by the court during his/her probationary period.” (Italics added.) The words the trial court used at the sentencing hearing were almost identical: “You are not to use, consume or possess or transport alcohol, marijuana, prescribed or not, or any non-prescribed or illegal drugs or intoxicants of any kind, or associated paraphernalia, unless, specifically, authorized by the Court during the probationary period.” The question is whether the term “any non-prescribed or illegal” modifies only the word immediately following it—drug[s]—or the entire clause “drug[s] or intoxicants[s] of any kind.” In our view, the most natural reading is that the term modifies the entire clause, and, as a result, the prohibition on intoxicants does not extend to substances that are “drug[s] or intoxicant[s]” other than marijuana if they are prescribed by a doctor.

This question is complicated by the fact that the trial court, during the sentencing hearing, seems to have taken the view that the condition required defendant to obtain court permission before using prescription medication. The court made this comment after defense counsel contended that “[a]rguably, any prescribed medication is going to be an intoxicant.” But the words of the condition as imposed do not require defendant to receive court permission before using “drugs or intoxicants” other than marijuana if they are prescribed. Given the privacy concerns defendant raises and the breadth of the condition if it contains this requirement, we decline to read it into the condition the court actually imposed.

Because we conclude the condition does not require court permission for prescription medication, we decline defendant’s request to modify it.

DISPOSITION

The judgment is affirmed.

TUCHER, J.

WE CONCUR:

STREETER, Acting P. J.

BROWN, J.