



## In re M. M.

2009 | Cited 0 times | California Court of Appeal | September 24, 2009

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This appeal arises from the trial court's imposition of terms and conditions of probation following entry of a negotiated plea by M. M., a minor. The minor contends (1) gang-related probation conditions imposed by the court violated his plea agreement, and (2) several of the probation terms imposed by the court are unconstitutionally vague. We shall modify the probation conditions at issue and in all other respects affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Over the course of a three-month period, five separate Welfare and Institutions Code section 602 petitions were filed against the minor, alleging, among other things, vandalism (Pen. Code §§ 594, subds. (a)(2), (b)(1)),<sup>2</sup> participation in a criminal street gang (§ 186.22, subd. (d)), possession of a switchblade knife (§ 653k), possession of burglary tools (§ 466), possession of vandalism tools (§ 594.2, subd. (a)), possession of a dangerous weapon (§ 12020, subd. (a)), resisting arrest (§ 148, subd. (a)(1)), receiving stolen property (§ 496, subd. (a)), and two counts of residential burglary (§ 459).

Pursuant to a negotiated plea agreement, the minor admitted two counts of residential burglary in exchange for dismissal of the criminal street gang charges "outright," dismissal of all other remaining charges "with a Harvey Waiver,"<sup>3</sup> and a maximum term of confinement of seven years four months. The court adjudged the minor a ward of the court and set the maximum term of confinement consistent with the plea agreement, placing the minor on probation subject to a six-month commitment to the San Joaquin County Camp. The court imposed various conditions of probation similar in form to those recommended in the probation report, including, over the minor's objection, the following five gang-related conditions (hereafter referred to as conditions 1, 2, 3, 4, and 5, respectively):<sup>4</sup>

#### Condition 1

"The minor shall not associate with anyone known to the minor to be a member of a criminal street gang or anyone known to be on probation or parole, and Alvin Greer, Bryan Hendry, Jonathan



## In re M. M.

2009 | Cited 0 times | California Court of Appeal | September 24, 2009

Claros, Jesse Gilden [spelled "Glidden" in the probation report], and Kevin Palomarez."

### Condition 2

"The minor shall not be a member of any criminal street gang, or act in furtherance of, in association with, or for the benefit of any criminal street gang."

### Condition 3

"The minor shall not frequent any area where members of a criminal street gang are known to congregate or areas known to the minor for criminal gang-related activity."

### Condition 4

"The minor shall not wear or possess any clothing or item with criminal street gang significance (indicia includes photographs), or display any hand signs with criminal street gang significance. Criminal street gang significance (that is, colors, symbols, insignias, numbers, monikers, patterns) may be determined by law enforcement and probation officers."

### Condition 5

"The minor shall not appear at any Court proceeding at which the minor is aware [that] a member of a criminal street gang is the responsible unless he/she is a co-responsible or subpoenaed as a witness. If the minor is subpoenaed as a witness, the minor shall appear at and testify truthfully at any Criminal or Juvenile Court proceedings in which the minor is lawfully subpoenaed subject to a valid claim of privilege."

The minor filed a timely notice of appeal.

## DISCUSSION

### I.

The minor contends it was implicit in his plea agreement that by dismissing gang-related charges without a Harvey waiver he "would suffer no gang-related sentencing consequences." As such, he urges, the "gang-related probation conditions" -- i.e., conditions 1, 3 and 4 -- violated his plea agreement.<sup>5</sup> We disagree.

When a minor is adjudged a ward under Welfare and Institutions Code section 602 and placed on probation, "the court may make any and all reasonable orders for the conduct of the ward" and "may impose and require any and all reasonable conditions that it may determine fitting and proper to the



## In re M. M.

2009 | Cited 0 times | California Court of Appeal | September 24, 2009

end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "The juvenile court has wide discretion to select appropriate conditions [of probation]." (In re Sheena K. (2007) 40 Cal.4th 875, 889.)

"In determining how best to rehabilitate a minor, the juvenile court should consider the broadest range of information. (In re Robert H. (2002) 96 Cal.App.4th 1317, 1329 [ ].) Consistent with [Welfare and Institutions Code] section 730, the juvenile court `enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile. [Citation.] That discretion will not be disturbed in the absence of manifest abuse. [Citation.]" (In re T.C. (2009) 173 Cal.App.4th 837, 845, quoting In re Josh W. (1997) 55 Cal.App.4th 1, 5.)

First, we note that under Harvey, for purposes of aggravating or enhancing an adult defendant's sentence, a trial court may not consider charges that have been dismissed as part of a plea agreement unless those charges are transactionally related to the offenses admitted or there is a "contrary agreement." (Harvey, supra, 25 Cal.3d at pp. 758-759.) Here, of course, we are faced with probation conditions imposed on a minor, and as such, Harvey does not apply. (In re T.C., supra, 173 Cal.App.4th at p. 842.)

We next turn to the plea agreement itself. The minor agreed to admit two separate burglary charges in two separate petitions. He also agreed that all remaining charges, including attempted burglary; vandalism; possession of a switchblade knife; possession of burglary tools; possession of vandalism tools; possession of a dangerous weapon; resisting arrest; receiving stolen property; and commission of offenses for the benefit of, at the direction of, or in association with a criminal street gang, would be dismissed. With respect to the manner of dismissal, the district attorney represented to the court that the gang counts (i.e., counts 2, 4, and 6 in the June 2008 petition) would be dismissed "outright," and the remaining counts would be dismissed with a Harvey waiver. Minor's counsel confirmed the agreement as stated.

The record reveals little as to the parties' intent with regard to the plea agreement. The imposition of gang-related or other probation conditions was never discussed, and there were no further representations by the minor in that regard regarding his expectations for disposition at the time the plea was entered.

The minor urges that the "only reasonable implication" to be drawn from the plea agreement was that he would suffer no "gang-related sentencing consequences, such as a registration requirement or onerous gang-related probation conditions," and that any ambiguity in that regard must be resolved in his favor. Here, there is no ambiguity. Even if we were to assume the minor intended that Harvey-like consequences apply in this juvenile court proceeding, we cannot overlook the fact that he agreed the counts of vandalism and possession of tools to commit vandalism and graffiti would be



## In re M. M.

2009 | Cited 0 times | California Court of Appeal | September 24, 2009

amongst those dismissed with a Harvey waiver, thus giving the court full authority to consider the full extent of those charges. The probation report, properly considered by the court for purposes of disposition, reveals that those charges arose out of conduct by the minor (e.g., drawing gang signs and symbols on a park bench) that is, at the very least, related to criminal street gang activity. Consideration of those dismissed counts inevitably leads one to consideration of gang-related conduct. Had the minor intended to prohibit the court from considering altogether the conduct underlying those charges, he would not have agreed to dismissal of those charges "with a Harvey waiver."

In any event, the record contains other information that supports the court's imposition of the gang-related probation conditions for purposes of "reformation and rehabilitation." (Welf. & Inst. Code, § 730, subd. (b).) The minor engaged in crimes over the course of a three-month period. As previously discussed herein, the dismissed vandalism charge involved gang-related activity. At least one of the admitted burglaries and several of the dismissed crimes involved conduct by the minor in concert with others. It was even noted during the disposition hearing that the minor displays gang tattoos across his knuckles. According to the probation report, the minor exhibits antisocial attitudes and behaviors, having no respect for authority or empathy for his victims and blaming others for his conduct. The report also notes "[m]oney or material gain, including drugs was the primary purpose of why [the minor] committed the crime(s)." There can be little doubt that probation conditions that prevent the minor from associating with gang members, frequenting gang areas, possessing burglary tools, and possessing or using illegal substances are reasonable under the circumstances and narrowly tailored to meet the needs of this particular minor. There was no abuse of discretion.

## II.

The minor contends conditions 3 and 4 are unconstitutionally vague for lack of an explicit requirement of "advance personal knowledge of the people, places, and activities to be avoided." He makes the same contention with respect to the following two additional conditions (hereafter referred to as conditions 6 and 7, respectively):<sup>6</sup>

### Condition 6

"Minor is not to illegally use or possess or associate with persons known to use drugs, narcotics, marijuana, and/or alcohol."

### Condition 7

"Minor is not to possess or remain in the presence of anyone known to possess any master key, lock pick, dent-puller, 'slim jim', slide hammer or other device known to be used as an auto theft or burglary tool."



## In re M. M.

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Respondent concedes that condition 4 should be modified as requested, but argues the remaining three conditions provide the minor with adequate notice of the proscribed conduct and are narrowly drawn to meet compelling state interests of reformation and rehabilitation. As we shall explain, all four conditions must be modified.

"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.]" (In re Sheena K., *supra*, 40 Cal.4th at p. 890.)

Conditions 3, 4, 6, and 7, as set forth in the minute order, are unconstitutionally vague because each fails to notify the minor in advance what is required of him, or to give the court sufficient information with which to determine whether the condition has been violated. We shall modify the conditions as follows (modified language in *italics*):

### Condition 3

The minor shall not frequent any area where the minor knows, or the probation officer informs the minor, that members of a criminal street gang are known to congregate or areas the minor knows, or the probation officer informs the minor, are for criminal gang-related activity.

### Condition 4

The minor shall not wear or possess any clothing or item the minor knows, or the probation officer informs the minor, has criminal street gang significance (*indicia* includes photographs), or display any hand signs the minor knows, or the probation officer informs the minor, have criminal street gang significance. Criminal street gang significance (that is, colors, symbols, insignias, numbers, monikers, patterns) may be determined by law enforcement and probation officers.

### Condition 6

Minor is not to illegally use or possess or associate with persons the minor knows, or the probation officer informs the minor, use drugs, narcotics, marijuana, and/or alcohol.

### Condition 7

Minor is not to possess or remain in the presence of anyone the minor knows, or the probation officer informs the minor, possesses any master key, lock pick, dent-puller, "slim jim," slide hammer or other device known to be used as an auto theft or burglary tool.



## In re M. M.

2009 | Cited 0 times | California Court of Appeal | September 24, 2009

### DISPOSITION

The juvenile court is directed to modify the probation conditions referred to herein as conditions 3, 4, 6, and 7 as directed in this opinion. As modified, the judgment is affirmed.

We concur: SCOTLAND, P. J., HULL, J.

1. Specific facts will be presented where relevant in the Discussion portion of this opinion.
2. All further statutory references are to the Penal Code unless otherwise indicated.
3. *People v. Harvey* (1979) 25 Cal.3d 754 (Harvey).
4. Conditions 1, 2, 3, 4, and 5 are slightly modified versions of conditions 27, 30, 31, 32, and 37, respectively, recommended in the probation report.
5. Because the minor only identifies conditions 1, 3, and 4 as the "gang-related conditions" with which he takes issue, any claim with respect to conditions 2 and 5 has been forfeited.
6. Conditions 6 and 7 are slightly modified versions of conditions 19 and 23, respectively, recommended in the probation report.

