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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE I. P., a Person Coming Under the Juvenile Court Law.	H033912 (Santa Clara County Super. Ct. No. JV34764)
THE PEOPLE, Plaintiff and Respondent, v. I. P., Defendant and Appellant.	

Appellant I. P. (the minor) admitted an allegation that she had committed felony receiving stolen property (Pen. Code, § 496, subd. (a)), and, after a contested hearing, the court found true an allegation that she had committed an unrelated felony second degree robbery (Pen. Code, §§ 211, 212.5, subd. (b)). The record does not reflect that the juvenile court ever orally declared the receiving stolen property offense to be a felony or a misdemeanor. The minor was granted probation with numerous conditions. On appeal, she contends that a remand is required because the court failed to declare the receiving stolen property offense to be either a felony or a misdemeanor. She also challenges as vague and overbroad two probation conditions concerning weapons and gang activities.

We remand the matter for the court to declare whether the receiving stolen property offense is a felony or a misdemeanor and for the court to modify the probation conditions.

I. Background

The first petition alleged that the minor had committed felony second degree robbery (Pen. Code, §§ 211, 212.5, subd. (b)) in May 2008. The second petition alleged that she had committed felony receiving stolen property (Pen. Code, § 496, subd. (a)) in August 2008.

The minor executed a written waiver and admission in which she admitted the receiving stolen property count as alleged in the second petition. On the waiver form, she acknowledged that she understood that she was charged with felony receiving stolen property and was facing a maximum period of confinement for that offense of three years. The court's signed minute order from the hearing at which the minor admitted the receiving stolen property allegation identified the admitted offense as a felony. After a contested hearing on the first petition, the robbery allegation was found true.

Although the court orally identified the robbery as a felony at the dispositional hearing, the court said nothing about the nature of the receiving stolen property offense. The court's written dispositional order identified both the robbery and the receiving stolen property offenses as felonies.

The minor was declared a ward and placed on probation. One of the probation conditions concerned "dangerous or deadly weapons." "That the minor not own, use, or possess any dangerous or deadly weapons and not remain in any building, vehicle, or the presence of any person where dangerous or deadly weapons exist." Another probation condition concerned "gang activity." "That the minor not frequent any areas of gang related activity and not participate in any gang activity." The court set the maximum

time of confinement at five years and eight months. The minor filed a timely notice of appeal.

II. Discussion

A. Declaration of Felony or Misdemeanor Status

"If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court *shall declare* the offense to be a misdemeanor or felony." (Welf. & Inst. Code, § 702, italics added.) Receiving stolen property is alternatively punishable as a felony or a misdemeanor. (Pen. Code, § 496, subd. (a).) The record does not reflect that the juvenile court ever expressly declared orally that the receiving stolen property offense was a felony rather than a misdemeanor.

In *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy*), the California Supreme Court held that a remand was required where the juvenile court had failed to make an express declaration as to whether the offense was a felony or a misdemeanor. In *Manzy*, the offense had been alleged as a felony, and Manzy had admitted the allegation. (*Manzy*, at p. 1202.) The juvenile court had committed Manzy to the California Youth Authority and set his maximum term of physical confinement at three years, a felony-level term. (*Manzy*, at p. 1203.) Nevertheless, the California Supreme Court held that Welfare and Institutions Code section 702's requirement of an express declaration required a remand. The court's analysis noted that a reference to the offense as a felony in the minutes of the dispositional hearing would not obviate the need for an express declaration by the court. (*Manzy*, at pp. 1207-1208.)

In *Manzy*, the California Supreme Court pointed out that a remand was not "'automatic'" whenever the juvenile court failed to make an express declaration. (*Manzy*, *supra*, 14 Cal.4th at p. 1209.) "[T]he record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised

its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Manzy*, at p. 1209.)

The Attorney General contends that the juvenile court's identification of the receiving stolen property offense as a felony in its minute order from the hearing at which the minor admitted the receiving stolen property allegation establishes that the court made the declaration required by Welfare and Institutions Code section 702. However, the juvenile court's notation in its minute order that the minor had admitted a felony violation tells us only that the minor admitted a felony count as alleged in the petition. It does not tell us whether the juvenile court itself declared that the offense should be classified as a felony rather than a misdemeanor. As noted in *Manzy*, such a notation does not constitute an express declaration.

A remand is required unless the record as a whole establishes that the juvenile court was aware of its discretion to treat the receiving stolen property offense as a misdemeanor. Since the record contains no indication that the juvenile court was aware of its discretion to treat the offense as a misdemeanor, a remand is required to permit the juvenile court to exercise its discretion to treat the receiving stolen property offense as either a felony or a misdemeanor.

B. Probation Conditions

The minor challenges the constitutionality of the probation conditions regarding dangerous or deadly weapons and gang activity. She contends that the weapons condition has three flaws. First, it is unconstitutionally vague because many ordinary

objects could be dangerous or deadly weapons. Second, even if the definition of dangerous or deadly weapons were clarified, she claims that this condition would be overbroad because it would preclude her presence in many public places, such as courthouses, airports, and police stations, where law enforcement personnel ordinarily carry dangerous or deadly weapons. Third, she asserts that this condition is unconstitutional because it lacks a knowledge requirement. The minor asserts that the gang activity condition suffers only from this third flaw, the lack of a knowledge requirement.

The Attorney General agrees with the minor that both conditions should be modified to include knowledge requirements. He maintains that any remaining vagueness or overbreadth may be eliminated by modifying the weapons condition in three respects. First, the Attorney General suggests that the condition specify that it applies only to those weapons that are dangerous or deadly "as a matter of law or . . . other instrumentalities that are capable of being used in a dangerous or deadly manner with the intent to so use them." Second, the weapons condition would be modified to require the minor's *knowledge of the presence* of such a weapon or instrumentality in a place *or its possession* by a person. Third, the condition would be modified to require the minor's *knowledge of the unlawful nature* of the presence or possession of the weapon or instrumentality.

The minor contends that the Attorney General's suggested modifications are inadequate to eliminate the vagueness in the condition. The minor maintains that the Attorney General's suggested "intent to so use" modification would not eliminate the weapons condition's vagueness because "it would be difficult if not impossible" to determine whether the minor harbored such an intent. She also argues that, because many of these items are not unlawful to possess, she would have no way of knowing

whether such an item was present or possessed by another with the requisite intent to make its presence or possession *unlawful*.[1]

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "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."'" (*Ibid.*) "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." (*Ibid.*)

The inclusion of an "intent to so use" requirement in the modified condition does not render it vague. The condition need only be sufficiently precise for the minor to know what is required and for a court to determine whether the condition has been violated. A court would not be unable to determine whether the minor intended to use an item in a dangerous or deadly manner. Courts frequently determine whether a person harbored a required intent, and the modified condition would present nothing unusual in this respect.

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[1] In her reply brief, the minor also complains that her presence where a weapon is possessed is unrelated to her future criminality. She has forfeited this contention, as she failed to raise it in her opening brief. (*People v. Bonilla* (2007) 41 Cal.4th 313, 349-350.)

On the other hand, the Attorney General's suggested reference to the minor's knowledge of the *unlawful* nature of the possession or presence of the item does not clearly inform the minor of what is required. This imprecision is readily remediable. A modification that avoids vagueness would read: That the minor not own, use, or possess any item that she knows to be capable of being used in a dangerous or deadly manner with the intent to use it in such manner, and that the minor not be present in any place where another person unlawfully possesses such an item *and the minor knows that the person intends to use this item in a dangerous or deadly manner*. This modification would obviate the problem of the minor's presence in public places where law enforcement personnel lawfully carry dangerous or deadly weapons. In addition, by specifying that the minor must have knowledge of another's intent to use the item in a dangerous or deadly manner, the modified condition would clearly inform the minor of what was required and would allow a court to readily determine whether the condition had been violated by simply inquiring into the minor's state of knowledge.

III. Disposition

The juvenile court's order is reversed. On remand, the juvenile court shall exercise its discretion to declare the receiving stolen property offense to be either a felony or a misdemeanor and recalculate the maximum time of confinement if necessary. The juvenile court shall also modify the weapons and gang activity conditions as follows. The weapons condition shall be modified to read: "That the minor not own, use, or possess any item that she knows to be capable of being used in a dangerous or deadly manner with the intent to use it in such manner, and that the minor not be present in any place where another person unlawfully possesses such an item and the minor knows that the person intends to use this item in a dangerous or deadly manner." The gang activity condition shall be modified to read: "That the minor not knowingly frequent any areas of gang related activity and not participate in any gang activity."

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.