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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re RUDY S., a Person Coming Under The Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. RUDY S., Defendant and Appellant.	F040309 (Super. Ct. No. 01CEJ601436-001) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gregory Fain, Judge.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Gomes, J.

The court adjudged appellant, Rudy S., a ward of the court (Welf. & Inst. Code, § 602) after Rudy admitted allegations in a petition charging him with attempted vehicle theft (Pen. Code, § 664/Veh. Code, § 10851). On November 29, 2001, the court placed Rudy on probation on various terms and conditions. On March 7, 2002, Rudy admitted allegations that he violated his probation by withdrawing from school, testing positive for marijuana, and leaving his parents' house without permission. On March 21, 2002, the court continued Rudy on probation and ordered him detained until a suitable group home placement was found. On appeal, Rudy contends one of his probation conditions is overbroad. We will find merit in this contention and modify the condition. In all other respects, we will affirm.

FACTS

On November 5, 2001, Rudy was arrested after a security guard found him and another person inside a car with the steering column damaged.

On November 13, 2001, Rudy stopped attending school. On December 26, 2001, he submitted a urine sample that tested positive for marijuana and methamphetamine. On December 31, 2001, Rudy ran away from home and his whereabouts remained unknown until he was arrested on March 6, 2002.

On March 21, 2002, at Rudy's disposition hearing, the court ordered Rudy, as one of his conditions of probation, "not to associate with anyone disapproved of by [his] parents or probation officer."

DISCUSSION

Rudy contends the probation condition requiring him not to associate with anyone disapproved by his parents or probation officer is overbroad because it does not contain a knowledge element. We agree and will modify the condition so it does.

Technically, Rudy waived his right to challenge this probation condition by failing to lodge a timely objection before the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Nevertheless, when a tardily raised constitutional issue involves only a question of

law, the court has discretion to consider the issue. (*In re Tania S*. (1992) 5 Cal.App.4th 728, 735.) We exercise that discretion here to preclude a later ineffective assistance of counsel claim.

In *People v. Garcia* (1993) 19 Cal.App.4th 97, this court found a probation condition constitutionally overbroad where it prohibited the defendant from associating with users and sellers of narcotics, felons or ex-felons, without requiring the defendant to have knowledge that the person he associated with was a member of the prohibited group. (*Id*. at p. 102.) In so finding, we held:

> "A condition of probation that prohibits appellant 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.]" (*Ibid*.)

Similarly, in *People v. Lopez* (1998) 66 Cal.App.4th 615, this court held that a probation condition prohibiting the defendant from associating with gang members was constitutionally overbroad because it prohibited the defendant from associating with gang members even though the defendant did not know of the person's gang affiliation. (*Id*. at p. 628.) In each case, we modified the condition at issue to include a knowledge element and affirmed the judgment as modified. (*Id*. at p. 638; *Garcia*, *supra*, 19 Cal.App.4th at p. 103.)

During Rudy's disposition hearing in November 2001, the court ordered Rudy not to associate with Frank Barajas or anyone whom he knew to be disapproved of by his parents or probation officer. Respondent contends that because at the March 21, 2002, hearing the court continued all prior orders in effect, the association condition continued to have a knowledge element. We disagree.

Although at the March disposition hearing the court ordered that "[a]ll prior orders not modified" would remain in effect, the court specifically reimposed the association

condition, however, without a knowledge element. Thus, even though the association condition had a knowledge requirement when the court first imposed this condition, the court eliminated this element when it reimposed it in March 2002. Moreover, Rudy's most recent probation report contains a recommended "association condition" that expresses this condition with and without the knowledge requirement.[1] Thus, in order to clarify any ambiguity in Rudy's association condition, we find that condition overbroad and we will modify it so it contains a knowledge element.

DISPOSITION

The association condition of probation in the judgment is modified to provide that Rudy is not to associate with persons whom he knows are disapproved of by his parents or probation officer. The juvenile court is directed to correct its paperwork accordingly and to notify the appropriate authorities. In all other respects, the judgment is affirmed.

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[1] The probation report for Rudy's probation violation contains the following recommended association condition: "[The minor is] [n]ot to associate with anyone disapproved of by the probation officer and the minor's parents or anyone whom the minor knows to be disapproved of by the minor's parents or the Probation Officer."