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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re BOBBY B., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY B.,

Defendant and Appellant.

A105098

(Solano County  
Super. Ct. No. J33713)

**I. INTRODUCTION**

This appeal is from a probationary order entered by the juvenile court. Appellant contends that two conditions imposed on him by that order are improper and, indeed, unconstitutional. To their credit, the People agree the challenged conditions are improper, but argue that appellant waived any such contention. We disagree with the People's waiver argument and hence reverse.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On March 5, 2003,<sup>1</sup> two teachers at a high school in Vallejo attempted to stop a fight between two students. As they were doing so, appellant, Bobby B., ran up and struck one of the teachers in the head.

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<sup>1</sup> All further dates noted are in 2003.

On April 30, the Solano County District Attorney filed a petition under Welfare and Institutions Code section 602<sup>2</sup> alleging that appellant had committed a battery. (Pen. Code, § 242.) At a hearing held on June 17, appellant admitted the battery. On August 5, the juvenile court adjudged appellant a ward of the court and placed him on probation. The probationary order contained various terms and conditions including that appellant refrain from the use of drugs and alcohol, submit to drug and alcohol testing, and regularly attend school.

Between October 2 and November 6, appellant was suspended from his high school seven times; he also tested positive for marijuana on five occasions during the same general period.

On November 17, appellant's juvenile probation officer filed a notice that appellant had violated the court's prior probation orders in that he had failed to attend school regularly, failed to behave properly at school, and had tested positive for marijuana, as noted above.

On November 26, appellant admitted these violations of the court's prior orders.

At a dispositional hearing on December 12, the court continued appellant on probation and ordered, as a new condition of probation, that he serve five weekends in juvenile hall at the discretion of the probation officer "if he gets in trouble" and, also, spend a weekend in juvenile hall following each and every subsequent school suspension. Appellant filed a timely notice of appeal three days later.

### **III. DISCUSSION**

As noted above, the sole issue on this appeal is the legal propriety of the probation conditions added by the juvenile court at the December 12 dispositional hearing, namely, that appellant (1) spend the following weekend in juvenile hall as and when "he is suspended from school" and (2) spend five additional weekends in juvenile hall at the discretion of the probation officer.

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

Section 730, subdivision (b), authorizes a juvenile court to impose “any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.” (§ 730, subd. (b).)

Following this, section 777 requires the juvenile court to afford the minor notice and a hearing on an alleged probation violation before removing him from the custody of his parents. The required notice must contain a “concise statement of facts” (§ 777, subd. (a)(1)), the matter must be set for a hearing within thirty (30) days of the filing of the notice of an alleged violation (§ 777, subd. (b)), and “[t]he facts alleged in the notice shall be established by a preponderance of the evidence at a hearing . . . .” (§ 777, subd. (c).)

The legality, as distinguished from the appropriateness, of juvenile probation conditions is an issue of law which we review de novo. (Compare *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033-1034 with *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 623.)

As noted earlier, the People concede that the two challenged probation conditions are, unless waived, improper. They are correct. (See, e.g., *People v. Vickers* (1972) 8 Cal.3d 451, 458-459; *In re Gerald B.* (1980) 105 Cal.App.3d 119, 126-127.) But, they say, appellant waived this argument by failing to object sufficiently explicitly to the challenged conditions. We disagree.

At the December 12 dispositional hearing, the court advised counsel that it was considering one of the two challenged conditions. It stated: “It’s my intention to order that if he is suspended from school, he will serve the next weekend in juvenile hall and that will happen for every suspension from school; and if he is expelled from school, he will go into the hall until such time as a new violation of court order is undertaken and we will have a hearing on that.”

Appellant’s counsel promptly protested this proposed condition, and the following dialogue occurred:

“[Appellant’s counsel]: That would, in effect, allow my client to lose his liberty because the school official felt he should be suspended from school. I would request if

he is suspended and placed in the hall for that suspension, that the normal procedures he followed for filing a VCO and having him appear before the Court. He has a constitutional right to that. [¶] In addition, if he is expelled from school and he is placed in the hall, he has a right under the California law to have filed a VCO within the correct amount of time or he must be released.”

“The Court: I understand that.”

“[Appellant’s counsel]: So if he is suspended from school, his probation officer could certainly file a violation of court order, but I would request that it not be automatic, that he not lose his liberty at that time or it is in violation of his Constitutional rights.”

After a couple of comments from the deputy district attorney on another subject, the court announced the various probation conditions it was imposing, including the challenged duo: “I’m giving probation five discretionary juvenile hall weekends if he gets in trouble. He can return without the necessity of returning to court, and I do order if he is suspended from school, he will serve the following weekend in juvenile hall. That will reoccur for each suspension.”

It is true, as the People note, that no additional objections to these conditions were articulated by appellant’s counsel. But they did not have to be for two reasons. First of all, prior to their imposition, counsel had made clear that she objected to any condition which would “allow my client to lose his liberty because the school official felt he should be suspended from school,” and specifically did so on both statutory and constitutional grounds. Second, when the claim is that the sentence imposed is an “unauthorized sentence,” such “constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Smith* (2001) 24 Cal.4th 849, 852.) This rule applies to statutorily unauthorized juvenile probation conditions such as the two challenged here. (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 982.)

#### **IV. DISPOSITION**

The judgment is reversed and the matter remanded to the trial court with directions to delete the two improper conditions from its probation order. However, and bearing in

mind appellant's poor prior record of compliance with conditions of probation, the court may substitute any conditions which it feels are necessary and appropriate, provided such are consistent with the principles articulated above.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.