Filed 3/1/11 In re Kenny R. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re KENNY R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. KENNY R., Defendant and Appellant.	A128377 (Solano County Super. Ct. No. J39959)

I.

INTRODUCTION

Appellant Kenny R. appeals from jurisdictional and dispositional orders in a Welfare and Institutions Code section 602 proceeding declaring him a ward of the court and granting probation subject to conditions, including that he serve 113 days in juvenile hall. He appeals contending that, during the jurisdictional hearing, the juvenile court violated his constitutional rights by sustaining objections made to his counsel's cross-examination of an eyewitness. He also claims his counsel was ineffective in not seeking to exclude testimony concerning his identification by the eyewitness. Lastly, he challenges two conditions of probation imposed at the dispositional hearing. The Attorney General agrees that the probation conditions must be modified. We order those modifications be made, and otherwise affirm the jurisdictional and dispositional findings of the juvenile court.

II.

PROCEDURAL BACKGROUND

The Solano County District Attorney filed an amended Welfare and Institutions Code section 602 petition charging 16-year-old Kenny R. (appellant) with disturbing the peace by fighting (Pen. Code,[1] § 415, subd. (1); count one), second degree robbery against J.C. (§ 211; count two), and resisting a peace officer (§ 148, subd. (a)(1); count three). As to count two, it was further alleged that appellant had personally inflicted great bodily injury (§ 12022.7, subd. (a)). Appellant denied the allegations.

A contested jurisdictional hearing took place on March 16, 2010. After hearing testimony, the juvenile court sustained count two, alleging robbery, and also found the great bodily injury enhancement had been proved. The court did not sustain count three, alleging resisting arrest. A dispositional hearing was set for April 1, 2010.[2]

At the dispositional hearing, appellant was adjudged a ward of the court, placed on probation in the custody of his parents, and ordered to serve a total of 113 days in juvenile hall (with credit for time served of 53 days), along with other conditions. As is material here, two conditions of probation prohibited appellant from having contact with anyone identified as a member or associate of the "Bristol Boys" gang, and prohibited appellant from having contact with anyone identified by appellant's parents in writing to the probation department.

This appeal followed.

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[1] All subsequent undesignated statutory references are to the Penal Code.

[2] At the dispositional hearing, count one was dismissed by the prosecutor in the interests of justice.

III.

FACTUAL BACKGROUND[3]

The facts underlying the court sustaining count two, alleging second degree robbery with a great bodily injury enhancement, concern an incident occurring in front of the community center in Fairfield on February 10, 2010. The victim was another minor, J.C. , who was with a few of his friends that evening, including Joshua Winkler. J.C. does not remember anything about the incident, because he was hit and knocked out.

Winkler testified that he was with J.C. and others in front of the community center about 6:15 p.m. when two African American youths approached. The two youths were wearing hooded sweatshirts with the hoods up. There was a streetlight nearby and he was able to see the youths' faces. One of them asked to use a cell phone. J.C. said that he had an iPod, at which point one youth wearing a black sweatshirt struck J.C., "pickpocketed him," and ran. He took J.C.'s iPod. This youth was later identified as appellant. Winkler saw appellant's face for about 10 seconds. When appellant struck J.C. he fell to the ground and was knocked out. After appellant ran, his companion told the group that if they did anything, he would come back and "do something." Winkler then walked into the community center to find an adult. When he came back out, both youths were gone.

Police arrived about five to ten minutes later. Fairfield Police Officer Jeremy Nipper asked Winkler to go with him and look at some potential suspects. Winkler told the officer that he could identify the person who hit J.C. because he had a picture of him in his mind. He was told that the suspects would have a flashlight shined on them and Winkler was to "identify if it's him [*sic*] or not." Winkler believed he was only shown two suspects. As to the first person, Winkler told the officer that he looked familiar, but that he could not positively identify him as the one who took the iPod. This person was not appellant. Winkler told the officer that he was about 80 percent sure the first person

[3] Because appellant does not challenge the sufficiency of the factual record to support the juvenile court's findings, we recite the facts only as they relate to the allegations of error made on appeal.

he was shown was involved. He was not told whether or not this suspect had J.C.'s property in his possession.

Nipper pulled up to the second suspect. The second suspect was appellant, and he was handcuffed. Winkler told the officer he was 100 percent sure he was one of the two assailants, and the one who struck J.C. and took his property. Winkler did not feel pressured by the police to pick someone out from the two people he was shown. Winkler testified he was sure he was shown only two people and not four. Before the showup, Nipper told Winkler that of the two people he would be shown, one was at the incident. In quoting Nipper, Winkler recalled him saying, "You are going to identify two people and one of them was the man at the—the man that was at the incident." Winkler then thought to himself he was going to identify which one it was based on the face he remembered, and that at least one of the people he was being shown was involved. He did not remember Nipper telling him that the people he was viewing might or might not be involved.

Nipper testified that he was one of the police officers who responded to the call at the community center. After interviewing Winkler, he drove him to the location where several suspects had been detained in the area shortly after the robbery had been reported. When the police called out for the suspects to halt, the other youths complied, but appellant "started to walk off," and after being told once again to halt, he began running away. When appellant started running, he was wearing a black sweatshirt, but he discarded it before being apprehended. He wore a white T-shirt when he was escorted back to where Nipper's car was parked. Sometime later, a black sweatshirt was found.

Before showing Winkler any suspects, Nipper admonished him using a preprinted card containing admonishments. Nipper opened the rear door of his patrol car and stood next to Winkler. Nipper showed Winkler four individuals. Winkler almost immediately identified appellant as having been involved in the incident. When Winkler saw appellant, he said, "[t]hat's him." He was 100 percent sure that it was appellant who committed the robbery.

Another individual named Bryan Barksdale had been detained. He was wearing a black hooded sweatshirt. Winkler had told Nipper that the robber was wearing a black hooded sweatshirt. The officers knew that Barksdale was on parole and subject to a search condition. Unbeknownst to Winkler, the police had already searched Barksdale and found the stolen iPod and ear buds in his possession. When Winkler saw Barksdale he said he looked familiar but he was not sure if he was the robber. Winkler did not identify anyone else.

In sustaining count two, alleging robbery, and also finding the great bodily injury enhancement had been proved, the court made the following remarks: "The Court finds that the testimony of the witness [Winkler] was believable, credible and the Court finds that the totality of the . . . testimony meets the burden of beyond a reasonable doubt. [¶] . . . [T]he unequivocal nature of the identification, the fact that he identified the minor almost immediately, he was 100 percent certain and this occurred shortly after [the robbery]. In addition[,] the flight of the minor and the suppression of evidence, the Court also takes note of."

IV.

ANALYSIS OF CLAIMED ERRORS

A. The Juvenile Court Did Not Err in Limiting Cross-Examination of Witness Joshua Winkler

Appellant first claims that his Sixth Amendment federal constitutional right to confront witnesses against him was violated when the juvenile court curtailed defense counsel's cross-examination of Winkler about his associations with African Americans. Counsel was allowed to elicit from Winkler that he did not have many African American friends, and no close friends who are African American. However, the court sustained an objection on the ground of relevance to a followup question asking Winkler to rank on a scale from one to ten the amount of association he had had with African Americans. In response to defense counsel's further comment on the line of questioning, the court stated: "If you have an expert on that issue, I would reconsider. If you have an expert on identification that is part of your case in chief, that would be a separate issue and I would

allow that. But if you don't—if there is not an expert at this juncture I don't find that it is relevant."

Assuming that Winkler was not African American,[4] the problems inherent in cross-racial identification were undoubtedly relevant to the court's evaluation of Winkler's identification of appellant. Both of California's standard criminal jury instructions on eyewitness testimony refer to race difference alone as a factor that might affect the accuracy of the witness's identification of a defendant of a different race. For example, CALJIC No. 2.92 includes as a factor "[t]he cross-racial or ethnic nature of the identification." In relevant part, CALCRIM No. 315 states the factor similarly: "Are the witness and the defendant of different races?" Neither instruction states or implies that the degree of accuracy of cross-racial identification increases in proportion to the quantity of contacts the eyewitness has on a daily or regular basis with the defendant's racial group.

Certainly, appellant proffered no such evidence or offer of proof at the jurisdictional hearing on this subject. This appears to be the point the juvenile court was trying to make in observing that in the absence of any expert testimony, no further quantification from Winkler about how many friends he had who were African American was necessary, helpful, or relevant.

Trial judges retain wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or *only marginally relevant.* (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) "[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [Citation.]" (*Delaware v. Fensterer* (1985)

[4] There was no direct evidence of Winkler's race. However, defense counsel referred to the "obvious[]" fact that he was not African American during counsel's closing argument, and neither the prosecutor nor the court commented on this observation.

474 U.S. 15, 20, italics omitted.) Under the circumstances, curtailing Winkler's cross-examination about the number of contacts he may have had with African Americans did not violate appellant's confrontation rights under the Sixth Amendment.

B. Appellant's Counsel Was Not Ineffective For Failing to Seek the Exclusion of Winkler's Eyewitness Testimony

At the jurisdictional hearing, defense counsel attempted to raise a reasonable doubt about Winkler's identification of appellant as the robber by cross-examination and argument about the problems inherent in cross-racial identification; the potentially suggestive aspects of the identification procedures employed by the police in this case; and the fact that when detained, another suspect had the victim's iPod in his possession. Nevertheless, appellant contends he was denied his right to effective assistance of counsel because his counsel did not take the additional step of seeking exclusion of Winkler's identification of appellant on the grounds that the circumstances under which the identification was made were unduly suggestive.

A claim of ineffective assistance of counsel consists of two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.)

Even assuming counsel's failure to seek the exclusion of Winkler's identification of appellant fell below the objective standard of reasonableness, appellant had not satisfied his burden of showing prejudice. Winkler and Officer Nipper testified to two

differing versions of the field showup. Winkler recalls that he was shown only two individuals and was told that one of them was involved in the incident. On the other hand, Nipper explained that he admonished Winkler using a preprinted form, that he showed Winkler four individuals, and Winkler almost immediately pointed out appellant as the assailant with 100 percent certainty.

Thus, as a threshold matter, if appellant had any chance to prevail in excluding testimony about Winkler's identification, the trial court would have had to find that the showup involved the procedure testified to by Winkler and not the procedure explained by Nipper. Appellant has not presented a convincing argument that the trial court would have made such a factual finding.

Moreover, it is far from certain whether the court would have excluded Winkler's identification of appellant, even if Winkler's version of the showup was found by the juvenile court to be more accurate. In general, a pretrial identification procedure will be deemed unfair only if it suggests to the witness, before he or she makes an identification, which person the police suspect. (*People v. Hunt* (1977) 19 Cal.3d 888, 893; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) When something about a lineup causes the defendant to " ' "stand out" from the others in a way that would suggest the witness should select him' [citation]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1045), or when the defendant "stand[s] out as the sole possible or most distinguishable choice" (*People v. Brandon*, *supra*, at p. 1052), the lineup is unduly suggestive.

If a motion to exclude had been made by appellant's counsel, the prosecutor doubtlessly would have argued first that even the procedure testified to by Winkler was not unduly suggestive. Under Winkler's version of the showup, while Nipper allegedly told Winkler that one of the two suspects was involved in the community center incident, Nipper did not say which one.

Furthermore, even if the court decided that Winkler's version was the correct one, and that the procedure he testified to was unduly suggestive, it does not mean the evidence would have been excluded. The determination of whether a pretrial identification procedure violated appellant's due process rights requires a *two-step* analysis of the lineup, or field showup, procedures employed in determining the admissibility of identification testimony. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.)

"The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412; see *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114.) The burden is upon the defendant to show a constitutional violation. (*People v. Ochoa*, *supra*, at p. 412.)

The factors set out in the case law make it likely that Winkler's identification would have withstood challenge, even if the court determined that the showup was unduly suggestive. Winkler had ample opportunity to view appellant's face at the community center, at which time he explained he was focused on the facial "structure" of appellant, his description of appellant was accurate, the time between the crime and the identification was brief, and his identification was made with the highest degree of certainty.

Under these circumstances, even had counsel had chosen the course of seeking the exclusion of the field identification of appellant, appellant has failed in his burden of

showing a reasonable probability of the motion being granted. Accordingly, we reject appellant's ineffective assistance of counsel claim.

C. The Challenged Conditions of Probation are Overly Broad

As his last contention, appellant argues that two probation terms violate his due process rights due to the terms' vagueness and overbreadth. Appellant objects to the following probation terms: Appellant may "[n]ot have contact with [a]nyone identified as a member [or] associate of the 'Bristol Boys,' " or with "[a]nyone identified by parents, to Probation, in writing."

Section 1203.1, subdivision (j), gives a trial court the authority to impose reasonable conditions of probation "as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . ." "Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to . . . section 1203.1.'. . ." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) If a probation condition serves to rehabilitate and protect public safety, the condition may "impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez*, at p. 624.)

"The right to associate . . . 'may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.' [Citations.] Such restrictions are ' "part of the nature of the criminal process. [Citation.]" ' [Citation.] A limitation on the right to associate which takes the form of a probation condition is permissible if it is '(1) primarily designed to meet the ends of rehabilitation and protection of the public, and (2) reasonably related to such ends.' [Citations.]" (*People v. Lopez, supra*, 66 Cal.App.4th at pp. 627-628.)

However, probation conditions must be narrowly tailored and sufficiently precise to avoid unconstitutional overbreadth and vagueness. The "void for vagueness" doctrine

applies to conditions of probation and is concerned with constitutionally adequate notice. (*People v. Lopez, supra*, 66 Cal.App.4th at p. 630; *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) Under the doctrine, 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. [Citation.]" (*People v. Reinertson, supra*, at pp. 324-325; accord, *People v. Lopez, supra*, at p. 630; see also, e.g., *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107.)

The Attorney General concedes that the challenged probation conditions are "vague and overbroad" because they lack "an express personal knowledge requirement" and agrees that the terms should be modified by this court. We agree. Therefore, probation conditions 15 and 22 prohibiting "contact with . . . [a]nyone identified as a member [or] associate of the 'Bristol Boys,' " or with "[a]nyone identified by parents, to Probation, in writing" are hereby ordered to be stricken. Accordingly, in conformance with the language suggested by the Attorney General**,** the two challenged conditions are to be modified as follows: "Appellant may not have contact with the following persons: Anyone *identified to appellant* as being a member or associate of the 'Bristol Boys,' or anyone *whom you know* has been identified as a prohibited person by your parents, to Probation, in writing."

V.

DISPOSITION

The court's jurisdictional and dispositional orders are affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.