NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

18-P-988 Appeals Court

COMMONWEALTH vs. MICHAEL L. HAMILTON.

No. 18-P-988.

Worcester. March 8, 2019. - August 23, 2019.

Present: Wolohojian, Milkey, & Shin, JJ.

Practice, Criminal, Probation, Revocation of probation, Hearsay. Obscenity, Child pornography. Due Process of Law, Vagueness of order.

Indictment found and returned in the Superior Court Department on February 25, 2011.

A motion for a new trial was considered by Daniel M. Wrenn, J.

Barry A. Bachrach for the defendant.
Donna-Marie Haran, Assistant District Attorney, for the Commonwealth.

SHIN, J. A Superior Court judge revoked the defendant's probation after determining that he violated the special condition that he not possess pornography and that he failed to report to probation officers on two occasions. The defendant

now appeals from the denial of his motion for a new trial,[1] arguing that the term "pornography" is vague as applied to his conduct and that the judge's finding that he failed to report to probation was based on unreliable hearsay. We conclude that the defendant had fair warning that at least one of the categories of materials he possessed -- explicit stories describing the rapes of young children -- constituted pornography in violation of the special condition. Although we conclude that the defendant did not have fair warning that some of the other materials he possessed were pornographic, and agree with his contention that the judge's finding of failure to report rested on unreliable hearsay, we need not remand the matter because the judge made clear that in determining the disposition he considered only the fact that the defendant committed a probation violation, along with the underlying crime for which he was on probation. We therefore affirm.

Background. The defendant pleaded guilty in November 2012 to two charges of possession of child pornography and one charge of failure to register as a sex offender. He was sentenced to a

[1] The defendant attempted to appeal from the order revoking his probation, but a panel of this court dismissed the appeal as untimely while explaining that "the defendant's remedy is to file a motion for a new trial under Mass. R. Crim. P. 30 (b)," as appearing in 435 Mass. 1501 (2001). The defendant then returned to Superior Court and filed such a motion, which was denied by the same judge who issued the revocation order. The defendant filed a timely notice of appeal from that denial.

term of incarceration on the child pornography convictions and five years' probation on the failure to register conviction. A special condition of his probation was that he "not possess pornography."

In May 2014 the probation department served the defendant with a surrender notice alleging that he violated several of his probation conditions. After an evidentiary hearing, held in May 2015, the judge made oral findings that the defendant twice failed to report to probation and that he possessed pornography, which the judge defined as "pictures or writings of sexual activity intended solely to excite lascivious feelings of a particularly blatant and aberrant kind." Finding the defendant in violation on these grounds, the judge revoked his probation and sentenced him to State prison for not less than five years and not more than five years and one day.

Discussion. 1. Possession of pornography. The defendant argues that he was not on fair notice that the materials he possessed qualified as pornography in violation of the special condition. The materials in question consisted of letters, photographs, and stories that the defendant sent to various inmates at the house of correction from which he had been recently released. Portions of the letters are nonsexual in nature while others describe, with varying degrees of detail, sexual acts involving the defendant, the letters' intended

recipients, and other adults.[2] The photographs, which accompanied some of the letters, are of fully clothed adults, adults in their underwear, and the defendant unclothed but with his hand covering his genitals. Last, the defendant included with two of the letters what he characterizes as "fantasy stories." We need not discuss the content of these stories (four in total) in detail. Suffice it to say, they graphically describe the rapes, including gang rapes and incestuous rapes, of children as young as eighteen months old.

At the outset we reject the Commonwealth's contention that the defendant waived his vagueness claim by not raising it at the first opportunity. While the defendant did not challenge the special condition as facially vague (or unconstitutional on other grounds)[3] when it was imposed as part of his guilty pleas, he did not waive his as-applied claim because it was not until he received the surrender notice that he knew how the condition was being applied to his behavior. See Commonwealth v. Kendrick, 446 Mass. 72, 75 n.5 (2006). Also, as the defendant

---

[2] The Commonwealth asserts that the letters also describe sexual acts involving children. If one reads between the lines, the letters are susceptible of that interpretation.

[3] For instance, the defendant made no argument that the special condition violated his First Amendment rights because it was not "'reasonably related' to the goals of sentencing and probation." Commonwealth v. Lapointe, 435 Mass. 455, 459 (2001).

correctly observes, although he did not preserve a facial challenge, we must still determine whether any vagueness in the special condition gave rise to a substantial risk of a miscarriage of justice. See Commonwealth v. Pickering, 479 Mass. 589, 596 (2018). Our review in this regard is no different functionally, however, from our review of the defendant's as-applied claim; this is so because, if the special condition is not vague as applied to the defendant's conduct, there can be no substantial risk of a miscarriage of justice.[4] We therefore turn to the merits of that question.

---

[4] For this reason the defendant is not aided by the Federal court cases he cites, which involve facial challenges to special conditions of supervised release prohibiting the possession or viewing of pornography. We note, however, that those cases all conclude that the term "pornography" is too vague to give a defendant reasonable notice of what conduct would constitute a violation. See United States v. Simmons, 343 F.3d 72, 80-82 (2d Cir. 2003); United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002); United States v. Loy, 237 F.3d 251, 263-265 (3d Cir. 2001). Several State courts have concluded likewise. See Diorec v. State, 295 P.3d 409, 417 (Alaska Ct. App. 2013); Foster v. State, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004); Fitzgerald v. State, 805 N.E.2d 857, 867 (Ind. Ct. App. 2004); Smith v. State, 779 N.E.2d 111, 117-118 (Ind. Ct. App. 2002); State v. Sansone, 127 Wash. App. 630, 639-641 (2005).

To the extent judges in future cases find it appropriate to impose a no-pornography condition, they should endeavor to provide more guidance as to what types of material would qualify as pornographic. For example, the probation order could incorporate or borrow from the definitions of child pornography (removing the references to minors) set out in G. L. c. 272, § 29C, or 18 U.S.C. § 2256(8). See Simmons, 343 F.3d at 82 ("When the references to minors are omitted [from 18 U.S.C. § 2256(8)], what remains is the definition of the broader category of pornography," which "avoids reference to subjective

As a matter of due process, a defendant must have "fair warning of conduct that may result in revocation of probation; thus, probation conditions must provide reasonable guidance with respect to what activities are prohibited." Kendrick, 446 Mass. at 75. But "reasonable guidance" does not mean "the fullest warning imaginable." Id. Rather, "[t]he notice requirement can be satisfied by 'an imprecise but comprehensible normative standard so that [people] of common intelligence will know its meaning.'" Id., quoting Commonwealth v. Orlando, 371 Mass. 732, 734 (1977). "[T]he interpretation of a probation condition and whether it affords a probationer fair warning of the conduct proscribed thereby are essentially matters of law . . . ." United States v. Gallo, 20 F.3d 7, 11 (1st Cir. 1994). See Commonwealth v. Medeiros, 95 Mass. App. Ct. 132, 135 (2019).

In his order denying the defendant's motion for a new trial, the judge found that both the writings and the photographs possessed by the defendant constituted pornography. With regard to the photographs, we disagree. The common meaning

---

standards and is sufficiently specific to give adequate notice as to what conduct violates a prohibition on pornographic material"); Loy, 237 F.3d at 267 ("the Constitution would not forbid a more tightly defined restriction on legal, adult pornography, perhaps one . . . that borrowed applicable language from the [F]ederal statutory definition of child pornography located at 18 U.S.C. § 2256[8]"). The probation order could also "clarif[y] whether it extended [to] non-visual materials." Loy, supra.

of pornography is "the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement." Merriam-Webster's Collegiate Dictionary 966 (11th ed. 2007). See American Heritage Dictionary 1367 (4th ed. 2006) (defining "pornography" as "[s]exually explicit pictures, writing, or other material whose primary purpose is to cause sexual arousal"). The photographs here depicted no sexual activity or nudity, and it is unclear whether the intent behind them was to arouse sexual excitement. In our view a reasonable person would not consider the photographs to be pornographic. Certainly, they are not so inarguably pornographic as to put the defendant on fair notice that he was violating his probation by possessing them.

We reach a much different conclusion with regard to the stories, which we think are within the scope of what any person would consider to be pornographic. The stories consist of little else than explicit descriptions of the violent rapes of young children. The defendant does not argue, and no reasonable view would support a conclusion, that they were designed for a purpose other than arousing pedophilic sexual excitement. The stories thus fall squarely within the definition of pornography,[5]

---

[5] In fact, the stories plainly qualify as obscene in that they are materials that, "taken as a whole, appeal to the prurient interest in sex, [that] portray sexual conduct in a patently offensive way, and [that], taken as a whole, do not

and a person of common intelligence would have understood that possessing them was a violation of the special condition.

"Reading the condition with due regard to the circumstances in which it was imposed" reinforces our conclusion. Kendrick, 446 Mass. at 75. The defendant pleaded guilty to possessing child pornography and failing to register as a sex offender. It was in those circumstances that the defendant was ordered not to possess pornography as a condition of his probation. As a consequence the defendant reasonably should have understood that he could not possess materials describing the rapes of children without being in violation. See Farrell v. Burke, 449 F.3d 470, 491 (2d Cir. 2006) ("We find it difficult to imagine that a person convicted of [sexually abusing underage boys] -- and consequently ordered not to possess 'pornographic material' -- could purchase a book containing graphic descriptions of sex between men and boys and think that his parole officer would approve"). Cf. Kendrick, supra at 77 (where "requirement to have 'no contact' with children under sixteen years of age was imposed when the defendant pleaded guilty to molesting children . . . , the order communicated to a reasonable person that the defendant's conduct at the car show [attended by minors] was a probation violation").

---

have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973).

Citing Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), the defendant contends that the stories are not pornography because they are "fantas[ies]" that do not involve actual children. But Free Speech Coalition has no bearing on the issue before us. In that case the United States Supreme Court struck down as facially unconstitutional a statute criminalizing the possession of "sexually explicit images that appear[ed] to depict minors" but that were "created by using adults who look like minors or by using computer imaging." Id. at 239-240. Here, we are not faced with a facial challenge to a criminal statute; rather, we decide the different question whether a reasonable person in the defendant's circumstances would have known that the stories constitute pornography in violation of his probation condition. See Commonwealth v. Lapointe, 435 Mass. 455, 459 (2001) ("A probation condition is enforceable, even if it infringes on a defendant's ability to exercise constitutionally protected rights, so long as the condition is 'reasonably related' to the goals of sentencing and probation"). The discussion in Free Speech Coalition is not germane to that question because the common meaning of pornography is not limited to materials depicting actual people. For example, had the defendant been found in possession of computer-generated images of what appeared to be children engaging in sexual activity, he indisputably would have been in

violation of his probation, even though Free Speech Coalition says that those same images cannot be the basis of a criminal conviction. See id. at 254-256.

To the extent the defendant argues that written materials cannot qualify as pornography, that argument cannot be squared with common understanding. As noted, "pornography" is defined to include "pictures" and "writing." Merriam-Webster's Collegiate Dictionary 966 (11th ed. 2007). See also Webster's Third New International Dictionary, Addenda 120a (2002) (defining "pornography" as "material [as a book] that is pornographic"). The defendant cites no definition of "pornography," and we have found none, that excludes writings.[6] A person of common intelligence would therefore have understood the special condition to cover writings such as the stories.[7]

2. Failure to report. As we explain infra, the defendant's possession of the pornographic stories provides sufficient grounds for us to affirm the judge's decision to revoke his probation. Nonetheless, we briefly address the

[6] The word pornography derives from the Greek word pornographos, which means "writing of harlots." Webster's Third New International Dictionary 1767 (1969).

[7] We do not decide whether the letters the defendant wrote qualify as pornography.

judge's second finding that the defendant failed to report as required to probation officers on two occasions.

The evidence on this issue consisted of the testimony of a probation officer, Raymond Loughlin, reading from the notes of another probation officer, Kathleen Lydon. The notes themselves were not admitted in evidence. Loughlin testified as follows:

> "[Lydon] was able to determine from a contact with the Worcester County Sheriff's Office that around April 18th, [the defendant] was in custody of the Connecticut authorities on [an] outstanding warrant.
>
> "She had subsequent conversations with the interstate compact unit and Connecticut, and later determined that [the defendant] was released from incarceration in Connecticut and failed to report. Did[n't][8] report on April 18, 2014. And then, after arranging with Connecticut to notify [the defendant] that he needed to report to probation forthwith, on April 1st, 2014, according to Connecticut authorities, [the defendant] was due to report the next day, on the 2nd, and failed to report on that day."

"[W]hen hearsay is offered as the only evidence of the alleged violation, the indicia of reliability must be substantial . . . because the probationer's interest in cross-examining the actual source (and hence testing its reliability) is greater when the hearsay is the only evidence offered." Commonwealth v. Durling, 407 Mass. 108, 118 (1990). We agree with the defendant that Loughlin's testimony, which was

[8] The judge ordered this change to the transcript in connection with the Commonwealth's motion to "settle the record."

multileveled hearsay, was not substantially reliable. It is true, as the Commonwealth observes, that in some situations "a probation officer . . . can be reliably informed about circumstances of a violation of probation of which a supervising probation officer . . . has direct knowledge" and can "testify about what the [supervising] officer had reported on the basis of direct knowledge." Commonwealth v. Ivers, 56 Mass. App. Ct. 444, 446 (2002). But the problem here is that Lydon did not have direct knowledge about the defendant's failure to report in Connecticut. Instead of reporting facts observed by law enforcement officers, Lydon's notes provide unexplained conclusions. The evidence does not establish who in Connecticut told the defendant that he had to report, or whether he was even told to report on April 18, 2014. Cf. id. at 446-447 (statement attributed to supervising probation officer that she "had not seen [the defendant] for 'quite some time'" did not support finding of failure to report where "record contain[ed] nothing . . . about the intervals at which [the defendant] was to report"). Moreover, the hearsay statements were internally inconsistent. Loughlin testified (and the surrender notice alleged) that the defendant failed to report on May 2, 2014; but, according to Loughlin's reading of the notes, the defendant failed to report on April 2, 2014.

The hearsay statements therefore did not bear sufficient indicia of reliability and trustworthiness to obviate the need for confrontation. As this was the only evidence of the defendant's alleged failure to report, the Commonwealth did not prove by a preponderance of the evidence that the defendant violated his probation on this basis.

3. Disposition. Upon finding the defendant in violation, the judge turned to the question of disposition and prefaced that stage of the proceeding with the following statement:

> "I want to make clear that while I have reviewed the contents of the exhibits, I have listened to all of the testimony, I will not in any way consider any of that evidence or information in dealing with the disposition . . . . [T]hat decision will only be made based on the underlying crimes for which [the defendant] was on probation."

The parties then presented arguments as to disposition, focusing on the circumstances of the defendant's failure to register as a sex offender, i.e., the crime for which he was serving probation. Other than a passing mention by the Commonwealth, neither party touched on the circumstances of the probation violations. At the end of the arguments, the Commonwealth asked the judge to sentence the defendant to State prison, while defense counsel asked that the defendant be "reprobate[d]."

In light of the judge's statement, and the arguments that followed, we do not need to "speculate" as to "what action the judge would have taken had [he] found the defendant in violation

of probation based" solely on the defendant's possession of the pornographic stories. Commonwealth v. Arroyo, 451 Mass. 1010, 1011 (2008), quoting Commonwealth v. Aquino, 445 Mass. 446, 450-451 (2005). The judge made clear that he was basing the disposition on the fact that the defendant violated his probation (and not on the nature of the violations), coupled with the circumstances of the underlying crime. Remand is not necessary in this situation. Cf. Arroyo, supra at 1011-1012. See Durling, 407 Mass. at 111 (upon finding of probation violation, "[h]ow best to deal with the probationer is within the judge's discretion").

Order denying motion for a new trial affirmed.