FOURTH DIVISION
October 11, 2018

No. 1-18-0334

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re M.M., a Minor	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County
	)	
Petitioner-Appellee,	)	
	)	No. 17 JD 2098
v.	)	
	)	
M.M.,	)	Honorable
	)	Stuart F. Lubin,
Respondent-Appellant).	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride concurred in the judgment.
Justice Gordon concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Affirming in part and reversing in part the judgment of the circuit court of Cook County where (1) the State established petitioner's age beyond a reasonable doubt, (2) the trial court's imposition of gang-related probation conditions did not constitute an abuse of discretion, and (3) the probation conditions prohibiting respondent from associating with individuals he knows are in gangs and from wearing gang colors are both unconstitutionally vague and unconstitutionally overbroad.

¶ 2 Following a bench trial, respondent M.M., a 17-year-old minor, was found guilty of one count of unlawful possession of a firearm (UPF) (720 ILCS 5/24-3.1(a)(1) (West 2016)) and one count of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1)(3)(I) (West 2016)), and adjudicated a delinquent minor pursuant to the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5 *et seq*. (West 2016)). On appeal, respondent contends the State failed to prove him guilty beyond a reasonable doubt of UPF or AUUW because the only evidence of his age constituted inadmissible hearsay. Respondent further contends the trial court abused its discretion by imposing gang-related probation conditions, and argues the conditions are unconstitutionally vague and unconstitutionally overbroad. For the following reasons, we affirm the trial court's adjudication of delinquency, but hold the probation conditions prohibiting respondent from associating with known gang members and from wearing gang colors are both unconstitutionally vague and unconstitutionally overbroad.

¶ 3 I. BACKGROUND

¶ 4 The State filed a petition for adjudication of wardship of 17 year-old M.M., alleging that on November 13, 2017, he committed numerous offenses including one count of UPF based on his possession of a weapon the size of which could be concealed while he was under 18 years of age, and two counts of AUUW based on (1) his possession of a firearm without having been issued a valid firearm owner's identification (FOID) card, and (2) his possession of a firearm while under 21 years of age. At his arraignment hearing, respondent stipulated to the juvenile court's jurisdiction. The matter then proceeded to a bench trial.

¶ 5 At trial, the State presented the testimony of Chicago police officers Alejandro Acevedo (Acevedo) and Garcia[1] (Garcia), and adduced the following evidence. Acevedo, Garcia, and

[1] Garcia's first name is not contained in the record.

Chicago police sergeant Unizycki[2] (Unizycki) were on patrol in an unmarked police vehicle when they observed respondent riding a bicycle on the sidewalk and looking into vehicles. Respondent subsequently turned into an alley, then exited the alley on foot. Garcia exited the vehicle in order to conduct a field interview with respondent, but after making eye contact respondent turned and walked away. Garcia identified himself as a police officer and ordered respondent to stop multiple times, but respondent continued to walk away. Garcia then observed respondent remove a revolver from his waistband, drop it, and commence running. Garcia followed and respondent hurdled a fence, and in the process dropped his cell phone. Respondent then escaped over a larger fence which Garcia was unable to climb due to his police gear. Garcia recovered the cell phone while Unizycki recovered the revolver.

¶ 6 Soon thereafter, respondent's father called the cell phone. Garcia answered and learned respondent's name, which he entered into the police ICLEAR system, a database consisting of criminal records. A photograph of respondent was displayed in the ICLEAR system along with his date of birth—January 2, 2001.

¶ 7 Approximately two weeks after this incident, respondent and his mother met with Acevedo at the police station where respondent was placed in custody.

¶ 8 Garcia testified respondent's date of birth was January 2, 2001.[3] Garcia recalled this information based on his search of respondent in the ICLEAR system as well as the police report he prepared. Defense counsel failed to object to any portion of this testimony, and declined to file a posttrial motion challenging the testimony.

¶ 9 At the close of the State's evidence, respondent moved for a directed verdict. Because the State failed to produce sufficient evidence to prove respondent was not issued a FOID card, the

[2] Unizycki's first name is not contained in the record.
[3] Respondent was thus 16 years old at the time of the offense.

trial court granted the motion as to the AUUW charge based on respondent's possession of a firearm without a valid FOID card. The trial court, however, denied the motion as to the remaining UPF and AUUW charges.

¶ 10 Respondent declined to present any evidence and rested his case. Following closing arguments, the trial court found respondent delinquent for his commission of UPF and AUUW based on his possession of the revolver while under the age of 18 and 21, as required by the UPF and AUUW statutes respectively. The trial court merged the UPF count into the AUUW count.

¶ 11 Prior to the dispositional hearing, respondent's probation officer prepared a "Social Investigation Report." The report indicated that this was respondent's third finding of delinquency; he was twice found guilty of battery in 2015. The report further indicated that in February 2017, when respondent was arrested for a separate unlawful use of a weapon offense (a charge which was unrelated to the instant UPF and AUUW offenses and which was later nol-prossed), respondent's father expressed concern that respondent had begun associating with negative peers. Since February 2017, however, there "had not been any issues" with respondent spending time with the negative peers.

¶ 12 At the dispositional hearing, respondent's probation officer recommended that the trial court impose one year of probation conditioned on mandatory school attendance and that respondent refrain from having any contact with firearms or other illegal weapons. The State requested that the trial court commit respondent to the Department of Juvenile Justice based on the nature of the offense involving the possession of a firearm. The trial court sentenced respondent to 18 months of probation with various conditions. In setting forth the conditions, the trial court stated, "[n]o gang membership. *** So you can't be in a gang; you can't dissociate [*sic*] with people you know are in gangs; you can't represent a gang or wear gang colors." The

probation order contained the handwritten notation "no gangs," but did not reference the prohibition on respondent associating with individuals he knows are in gangs. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, respondent contends the evidence was insufficient to support his delinquency adjudications for UPF and AUUW because the State failed to prove beyond a reasonable doubt that he was under the age of 18 and 21, as required by the UPF and AUUW statutes respectively. Respondent further maintains the trial court abused its discretion by imposing gang-related probation conditions, and argues the conditions are unconstitutionally vague and unconstitutionally overbroad. We discuss each of respondent's contentions below, and for the following reasons, we affirm the trial court's adjudication of delinquency, but find the probation conditions are both unconstitutionally vague and overbroad.

¶ 15 A. Sufficiency of the Evidence

¶ 16 Respondent argues the State failed to prove beyond a reasonable doubt that he was under the age of 18 and 21, as required by the UPF and AUUW statutes respectively. He maintains the only evidence the State produced regarding his age was Garcia's insufficient, inadmissible hearsay testimony concerning respondent's date of birth as it was reported in the Chicago police ICLEAR system and in Garcia's police report. We disagree, and for the reasons that follow we find the State proved the age element of the offenses beyond a reasonable doubt.

¶ 17 After filing a delinquency petition, the State must prove the elements of the substantive offense charged beyond a reasonable doubt. *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004). Thus, "[a] reviewing court will not overturn a trial court's delinquency finding 'unless, after viewing the evidence in the light most favorable to the State, no rational fact finder could have found the

offenses proved beyond a reasonable doubt.' " *In re T.W.*, 381 Ill. App. 3d 603, 608 (2008) (quoting *In re Gino W.*, 354 Ill. App. 3d 775, 777 (2005)). The determination of the weight to be given the testimony, witnesses' credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *People v. Austin M.*, 2012 IL 111194, ¶ 107. When considering the sufficiency of the evidence, it is not the function of the reviewing court to retry the respondent, and we will reverse a conviction only if the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the respondent's guilt. *Id*.

¶ 18 In order to find a respondent guilty of UPF, the State must prove he knowingly possessed a firearm which may be concealed upon his person while he was under the age of 18. 720 ILCS 5/24-3.1(a)(1) (West 2016). In order to find a respondent guilty of AUUW, the State must prove he knowingly possessed a handgun while he was under the age of 21 and not engaged in a lawful activity under the Wildlife Code. 720 ILCS 5/24-1.6(a)(1)(3)(I) (West 2016). Respondent challenges the sufficiency of the evidence with regard to the age elements only.

¶ 19 A respondent's age is typically established when the State introduces a certified birth record, offers the testimony of a close relative of the respondent during the trial, or offers the testimony of a police officer regarding the respondent's response to inquiries concerning his age. *In re S.M.*, 2015 IL App (3d) 140687, ¶ 16. A respondent's age is also established for purposes of proving the age element of an offense when the respondent stipulates to the juvenile court's jurisdiction at his arraignment *In re O.S.*, 2018 IL App (1st) 171765, ¶ 36; *In re Gabriel W.*, 2017 IL App (1st) 172120, ¶¶ 48-50. " 'A stipulation is conclusive as to all matters necessarily included in it,' (34 Ill. L. & Prac. *Stipulations* § 8 (2001)) and '[n]o proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence'

(34 Ill. L. & Prac. *Stipulations* § 9 (2001)).” *People v. Woods*, 214 Ill. 2d 455, 469 (2005). A respondent is therefore precluded from attacking or otherwise contradicting any facts to which he or she has stipulated. *Id*.

¶ 20 Here, contrary to respondent’s assertion, evidence of his age was not limited to Garcia’s testimony. That respondent was under 18 years of age at the time of the offenses was established when he stipulated to juvenile jurisdiction at his arraignment. *O.S.*, 2018 IL App (1st) 171765, ¶ 36; *Gabriel W.*, 2017 IL App (1st) 172120, ¶¶ 48-50. Article V of the Act provides that “[p]roceedings may be instituted under the provisions of this Article concerning any minor who prior to his or her 18th birthday has violated or attempted to violate *** any *** law or ordinance.” 705 ILCS 405/5-120 (West 2016). Thus, “by stipulating to juvenile jurisdiction, respondent was stipulating to the fact that he was under 18 years old on the day of the alleged offense.” *Gabriel W.*, 2017 IL App (1st) 172120, ¶ 48; see also *O.S.*, 2018 IL App (1st) 171765, ¶ 36 (finding that the State satisfied its burden of proof as to the respondents age in part because the respondent stipulated to juvenile jurisdiction at an earlier arraignment).

¶ 21 Moreover, although respondent did not file a motion to dismiss the State’s juvenile petition, we observe that a stipulation is the opposite of procedural silence, and “ ‘[a] criminal defendant may waive, by stipulation, the need to prove all or part of the case that the State has brought against him.’ ” *People v. Toliver*, 2016 IL App (1st) 141064, ¶ 31 (citing *People v. Washington*, 343 Ill. App. 3d 889, 900 (2003)). By conceding the issue of juvenile jurisdiction, which was conclusive as to respondent’s age, “counsel demonstrated the intent of the defense to eliminate that issue from the case and focus on another aspect of the defense ***.” *Id*.

¶ 22 Furthermore, respondent has “forfeit[ed] [his] right to complain of an error where to do so is inconsistent with the position taken by [him] in an earlier court proceeding.” *In re E.S.*, 324

Ill. App. 3d 661, 670 (2001). Forfeiture is especially compelling here "where the juvenile respondent stipulates to his juvenile status in order to gain the benefits of the Act and then, on appeal, argues for reversal because the State failed to introduce [sufficient] evidence of that juvenile status at his bench trial—while still conceding that juvenile jurisdiction applies." *Gabriel W.*, 2017 IL App (1st) 172120, ¶ 50.

¶ 23 We acknowledge that in *Gabriel W.*, the court relied not only on (1) the respondent's stipulation to juvenile jurisdiction, but also on the facts that (2) the respondent testified to his age under oath at a suppression hearing and (3) an officer testified to the respondent's age, which the officer obtained while processing the respondent's arrest. *Id*. ¶¶ 42-52. The court made clear, however, that these were three distinct bases for determining whether the State proved the respondent's age beyond a reasonable doubt and that the respondent's stipulation to juvenile jurisdiction alone was sufficient to prove the age elements of the offenses. *Id*. ¶¶ 48-50. Accordingly, the State proved the age elements of UPF and AUUW beyond a reasonable doubt where respondent stipulated to juvenile jurisdiction. *O.S.*, 2018 IL App (1st) 171765, ¶ 36; *Gabriel W.*, 2017 IL App (1st) 172120, ¶¶ 48-50. We therefore affirm the trial court's adjudication of delinquency.

¶ 24 B. Probation Conditions

¶ 25 Respondent next contends the trial court abused its discretion by imposing probation conditions prohibiting him from associating with individuals he knows are in a gang and from wearing gang colors because the offense was unrelated to gang activity and respondent is not in a gang. Respondent further argues the conditions are unconstitutionally vague and overboard because they violate his first amendment and due process rights where the conditions were not narrowly drawn and leave respondent prone to inadvertent violations. We observe that the

challenges based on vagueness and the challenges based on overbreadth each require a separate constitutional analysis. We therefore discuss each of respondent's three distinct claims—(1) that the trial court abused its discretion in imposing the gang-related conditions, (2) that the conditions are unconstitutionally vague, and (3) that the conditions are unconstitutionally overbroad—in turn below.

¶ 26 1. Abuse of Discretion

¶ 27 Respondent asserts the trial court's imposition of the gang-related probation conditions was unreasonable and constituted an abuse of discretion because the offense at issue was not related to gang activity and the State produced no evidence at trial indicating respondent was a member of a gang.

¶ 28 Respondent acknowledges that he failed to object to his probation conditions at trial and therefore failed to properly preserve this challenge. Respondent, however, requests that we review his contentions under the plain-error doctrine. Illinois Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). In the context of sentencing, this means respondent must

demonstrate either (1) the evidence at the dispositional hearing was closely balanced, or (2) the error was so egregious as to deny the respondent a fair dispositional hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Respondent carries the burden of persuasion under both prongs of the plain-error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). However, "[t]he first step of plain-error review is to determine whether any error occurred." *Id*. Therefore, we will review the issue to determine if there was any error before considering it under the plain-error doctrine.

¶ 29 Generally, the trial court is in the best position to determine which restrictions to apply to a respondent's probation. *In re K.M.*, 2018 IL App (1st) 172349, ¶ 39. In assessing the appropriate disposition for a minor, the trial court may choose among the various alternatives provided for in the Act. *People v. Hugo G.*, 322 Ill. App. 3d 727, 738 (2001). These include requiring the minor to refrain from having any contact with gang members or to comply with other conditions ordered by the court. 705 ILCS 405/5-715(2)(s), (u) (West 2016); *Hugo G.*, 322 Ill. App. 3d at 738. Specifically, section 405/4-715(2)(s) of the Act provides that "[t]he court may as a condition of probation or of conditional discharge require that the minor: *** [ ] refrain from having any contact, directly or indirectly, with certain specified persons or particular types of persons, including but not limited to members of street gangs and drug users or dealers." 705 ILCS 405/5-715(2)(s) (West 2016).

¶ 30 Moreover, the trial court has broad discretion to impose probation conditions, whether expressly enumerated by statute or not, to achieve the goals of fostering rehabilitation and protecting the public. *In re J.W.*, 204 Ill. 2d 50, 77 (2003). This wide latitude in setting conditions of probation, however, is not boundless. *Id*. The trial court's discretion must be exercised in a reasonable manner. *Id*. "[A] probation condition (whether explicitly statutory or not) is reasonable if the trial court believes the condition would be a good idea and the record

contains no indication that the court's imposition of the condition is clearly unreasonable." *In re M.P.*, 297 Ill. App. 3d 972, 976 (1998) (citing *People v. Ferrell*, 277 Ill. App. 3d 74, 79 (1995). A probation condition is not unreasonable "if it has some connection either to the specific crime committed, or to the 'behavior or attitude,' more generally, that needs 'adjusting' if the probationer is to rehabilitate." *In re Jawan S.*, 2018 IL App (1st) 172955, ¶ 16 (quoting *In re R.H.*, 2017 IL App (1st) 171332, ¶ 17).

¶ 31 Like other aspects of sentencing, juvenile-probation conditions are reviewed for an abuse of discretion. *M.P.*, 297 Ill. App. 3d at 976. The trial court abuses its discretion when the ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Jawan S.*, 2018 IL App (1st) 172955, ¶ 16.

¶ 32 Here, the record demonstrates respondent had previously been associating with "negative peers." In addition, this matter represents respondent's third finding of delinquency after respondent was twice found guilty of battery. Respondent was sentenced to probation for these prior offenses, which he violated first by committing the subsequent battery offense and then by committing the instant felony possession of a firearm offense. Both of the prior probation orders were conditioned on "no gangs," which the trial court was in the best position to determine and impose. *K.M.*, 2018 IL App (1st) 172349, ¶ 39. Moreover, since the battery offenses and prior to the instant UPF and AUUW offenses, respondent was arrested for a separate unlawful use of a weapon offense, which was later nol-prossed.

¶ 33 Given the above facts, including respondent's past association with "negative peers," his affinity for criminal behavior, his difficulty obeying his probation conditions, and the offenses at issue, which involved respondent's possession of a firearm, we cannot say "the record contains no indication that the court's imposition of the [gang-related] condition[s] is clearly

unreasonable." *M.P.*, 297 Ill. App. 3d at 976. Furthermore, the record supports the trial court's finding that eliminating any gangs' influence on respondent was a "good idea," and that requiring respondent to refrain from associating with known gang members and from wearing gang colors has "some connection" to respondent's behavior or attitude that the trial court thought "need[ed] adjusting." *Id*. at 976-77. This conclusion is further bolstered by respondent's admission in his opening brief that the trial court "undoubtedly has an interest in preventing minor respondents' contact with gang members as a rehabilitative measure." Accordingly, the trial court's gang-related probation conditions were not arbitrary and the trial court therefore did not abuse its discretion in imposing them. See *Jawan S.*, 2018 IL App (1st) 172955, ¶ 16; *M.P.*, 297 Ill. App. 3d at 976.

¶ 34 Respondent maintains that the record contains no indication he was directly affiliated with a gang or that the offense involved gang activity. There was, however, evidence of respondent's past association with "negative peers," and, regardless, the lack of direct gang involvement does not "lead use to say that the juvenile court abused its discretion in imposing gang restrictions as conditions of respondent's probation. Respondent was seen with a gun ***. If gangs were not already a presence and a 'problem' in his life, *** the juvenile court had [sufficient] reason to worry that they might soon be ***." *Jawan S.*, 2018 IL App (1st) 172955, ¶ 19. Because we find no error in the trial court's probation conditions, we decline to review the issue for plain error. *Lewis*, 234 Ill. 2d at 43.

¶ 35 2. Vagueness of the Gang-Related Probation Conditions

¶ 36 Respondent argues his gang-related probation conditions are unconstitutionally vague. Specifically, respondent contends the condition prohibiting his association with "people [he] know[s] are in gangs" fails to explain what type of association would violate the condition,

leaving him prone to committing inadvertent violations. Respondent further argues the condition prohibiting him from wearing gang colors is unconstitutionally vague because it fails to specify what color combinations respondent can or cannot wear.

¶ 37 An argument based on vagueness implicates the due process clauses of the fifth and fourteenth amendments of the United States Constitution and of the Illinois constitution. U.S. Const. amends. V, XIV; Ill. Const. 1970, art. I, § 2; see *City of Chicago v. Morales*, 177 Ill. 2d 440, 448 (1997). The due process clauses state that no person shall be deprived of life, liberty, or property without due process of law. *Id*. An order is vague, and thus violates a probationer's due process rights, "if the requirements it imposes are not 'set forth in terms definite enough to serve as a guide to those who must comply with it.' " *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39 (quoting *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 291 (2003)). To pass constitutional muster, the terms must be (1) clear enough so that an individual of ordinary intelligence knows what is prohibited and may act accordingly without having to guess at its meaning, and (2) sufficiently definite to prevent arbitrary or discriminatory enforcement. *Id*; *K.M.*, 2018 IL App (1st) 172349, ¶¶ 46-47. The constitutionality of a probation condition is a question of law that we review *de novo*. *K.M.*, 2018 IL App (1st) 172349, ¶ 22.

¶ 38 Respondent first argues the condition prohibiting his association with known gang members is unconstitutionally vague because the order fails to explain what "type of association or contact" would violate the condition, leaving respondent prone to inadvertent violations. In response, the State argues the condition is not vague because respondent never complained of requiring association with a gang member for a legitimate purpose and there are no indications respondent will face inadvertent violations. The State further contends the trial court would not penalize respondent for innocuous conduct such as having dinner with a family member who is a

member of a gang.

¶ 39 Initially, we observe the court in *K.M.* rejected the State's argument that respondent was required to articulate a specific gang member he needs or wants to contact for some legitimate purpose in order to challenge the probation condition. *K.M.*, 2018 IL App (1st) 172349, ¶ 29. In striking down a "no-gang-contact" condition in *K.M.*, albeit based on *overbreadth*, the court observed that the probation order, as written, with no exceptions, left respondent "perpetually walking on eggshells." *Id*. The court observed that the respondent could unknowingly violate his probation simply for doing what he is supposed to be doing—attending school or performing community service. *Id*. The condition here similarly fails to provide respondent with any guidance as to what conduct is prohibited and what conduct is not. Our constitutional safeguards require that respondent must not be left to guess whether innocuous conduct such as incidentally working with a gang member at his place of employment or sitting next to a gang member at school will violate his probation. See *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39.

¶ 40 We further find the condition here invites arbitrary enforcement. Respondent is prohibited from associating with individuals he "know[s] are in gangs." There is simply no way for respondent's probation officer, or for the trial court, to determine whether respondent is aware an individual with whom he is associating is a member of a gang. As we alluded to above, respondent may unknowingly work with a classmate or coworker who is in a gang. Respondent's probation officer will be left to arbitrarily determine whether respondent has violated his probation. Such arbitrary enforcement renders the condition unconstitutionally vague. See *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39.

¶ 41 Moreover, the court in *K.M.* rejected the State's argument that respondent will not violate his probation for innocuous associations that, on their face, violate the condition as written. *K.M.*,

2018 IL App (1st) 172349, ¶ 38. Without providing exceptions, however, such innocuous conduct is precisely what the condition here prohibits. As the court recognized in *K.M.*, "[a]n unconstitutional[] [ ] provision cannot be upheld based on the prosecution's assurances that it will be applied with circumspection, so that the constitutional violations it authorizes will never, as practical matter, come to pass. *** The constitution *** requires more than this bare promise of '*noblesse oblige*' by government officials." *Id.*

¶ 42 Finally, we observe the written probation order, which simply states "no gangs," is even more vague than the trial court's oral pronouncement. We vacate both the oral and written order and remand to the trial court for entry of a revised written probation order in accordance with the United States and Illinois Constitutions and the Act. See 705 ILCS 405/5-715(4) (West 2016) ("A minor on probation or conditional discharge shall be given a certificate setting forth the conditions upon which he or she is being released."); *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39.

¶ 43 Respondent next argues the probation condition prohibiting him from wearing gang colors is unconstitutionally vague because it fails to specify what color combinations respondent can or cannot wear, thus failing to give him sufficient notice of what conduct is prohibited. Respondent further maintains the probation condition invites arbitrary enforcement. In response, the State argues that limiting the probation order to prohibit specific colors would be impractical because the prohibition would become stale the moment a gang decided to change its colors.

¶ 44 The State relies primarily on *R.H.*, 2017 IL App (1st) 171332, ¶¶ 31-34. The probation order in *R.H.*, however, required the respondent to "delete from his social media accounts 'all references to gangs, guns, or drugs' " and did not prohibit the respondent from wearing gang colors. *Id.* ¶ 8. Moreover, the court's finding in *R.H.*—that listing specific colors in the probation order would be impractical—was included in the court's first amendment "narrowly tailored"

analysis, the same analysis required for an *overbreadth* challenge, not a *vagueness* challenge. See *J.W.*, 204 Ill. 2d at 78; *K.M.*, 2018 IL App (1st) 172349, ¶ 22. The fact that a probation order need not list every color represented by every gang in respondent's neighborhood and the surrounding area is not responsive to the question of whether the condition is so vague as to fail to give respondent notice of what conduct is prohibited. The State's reliance on *R.H.* is therefore misplaced.

¶ 45 We observe that although Illinois courts have not addressed whether a probation condition prohibiting a probationer from wearing any gang colors passes constitutional muster, courts outside of Illinois have readily found similar conditions unconstitutionally vague. See *U.S. v. Green*, 618 F.3d 120, 124 (2nd Cir. 2010); *State v. Weatherwax*, 193 Wash. App. 667, ¶¶ 25, 33 (2016) (remanded for resentencing in *State v. Weatherwax*, 188 Wash. 2d 139 (2017)); *State v. Villano*, 166 Wash. App. 142, 143-44 (2012); *People v. Leon*, 181 Cal. App. 4th 943, 950-51 (2010); *People v. Lopez*, 66 Cal. App. 4th 615, 634 (1998). While these cases are not binding, we find them to be instructive. In *Green*, the probationer was prohibited from "wearing [ ] colors, insignia, or obtaining tattoos or burn marks (including branding or scars) relative to [criminal street] gangs." *Green*, 618 F.3d at 122. The Second Circuit Court of Appeals, noting that the range of possible gang colors was vast and indeterminate, found this condition was unconstitutionally vague because it failed to provide the defendant with sufficient notice of the prohibited conduct. *Id*. at 124. The condition failed to contain a limiting list of the colors or insignia that were typically associated with any particular gangs to guide the defendant in his clothing choice. *Id*. The court observed that "[e]liminating such a broad swath of clothing would make [the defendant's] daily choice of dress fraught with potential illegality. People of ordinary intelligence would be unable to confidently comply with this condition." *Id*.

¶ 46 The California Appellate Court in *Lopez* struck down a similar condition prohibiting the probationer from "wear[ing] or possess[ing][] any item of identified gang clothing ***." *Lopez*, 66 Cal. App. 4th at 622. The court held that the condition was not sufficiently precise for the probationer to know what was required of him, and without a knowledge requirement, it subjected the probationer to being charged with unwitting violations. *Id*. at 634. In other cases, similar conditions have been upheld only where the condition referenced the specific gang to which the probationer belonged because he was presumed to be familiar with the gang's paraphernalia. *U.S. v. Soltero*, 510 F.3d 858, 866 (9th Cir. 2007); *U.S. v. Ross*, 476 F.3d 719, 721-23 (9th Cir. 2007).

¶ 47 Here, as in *Green* and *Lopez*, the condition fails to provide respondent with sufficient notice of the prohibited conduct and invites inadvertent violations where nearly any color can be affiliated with a gang. See *Green*, 618 F.3d at 124; *Lopez*, 66 Cal. App. 4th at 634. The condition does not contain a knowledge requirement or limiting list of colors typically associated with any particular gang, nor is it limited to a specific gang with which respondent is affiliated. See *Soltero*, 510 F.3d at 866; *Ross*, 476 F.3d at 721-23; *Green*, 618 F.3d at 124; *Lopez*, 66 Cal. App. 4th at 634. Because the condition is not clear enough for respondent to know what is prohibited, it is unconstitutionally vague. *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39.

¶ 48 Finally, we observe the trial court failed to include any part of this condition in the written probation order as required by the Act. 705 ILCS 405/5-715(4) (West 2016). We vacate this condition and remand to the trial court for entry of a revised probation order in accordance with the United States and Illinois Constitutions and the Act. See *id*.; *Jawan S.*, 2018 IL App (1st) 172955, ¶ 39.

¶ 49 3. Overbreadth of the Gang-Related Probation Conditions

¶ 50 Although we have already vacated the probation conditions at issue, respondent raises additional arguments that we think are appropriate to address. First, respondent contends the condition prohibiting him from associating with individuals he knows are in a gang violates his due process rights and his first amendment right to associate with others because it offers no means by which he may obtain exemptions for legitimate purposes and is not narrowly drawn. In response, the State argues respondent provides no examples of legitimate gang associations. The State further contends the court's holdings in *K.M.*, *In re J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 15, and *In re Omar F.*, 2017 IL App (1st) 171073, ¶ 63, striking down as overbroad similar "no-gang-contact" conditions, were in error because the courts relied on hypothetical examples of legitimate gang contact that were not borne out by the record. *K.M.*, 2018 IL App (1st) 172349, ¶¶ 24-27.

¶ 51 As we noted previously, the trial court has wide latitude in imposing probation conditions. *Id*. at 77. Indeed, the restrictions imposed by the trial court "are often a critical tool for 'protecting a juvenile *** from the downward spiral of criminal activity into which peer pressure may lead the child.' " *K.M.*, 2018 IL App (1st) 172349, ¶ 20 (quoting *Schall v. Martin*, 467 U.S. 253, 266 (1984)). The trial court's discretion, however, is "limited by constitutional safeguards and must be exercised in a reasonable manner." *J.W.*, 204 Ill. 2d at 77. A probation condition that burdens the exercise of fundamental constitutional rights, as almost all of them do, must be narrowly drawn and must reasonably relate to the compelling State interest in reformation and rehabilitation. *Id*. at 78. A condition is overbroad and thus not narrowly drawn if it burdens a probationer's exercise of his or her constitutional rights substantially more than is necessary to achieve its rehabilitative goal. *K.M.*, 2018 IL App (1st) 172349, ¶ 22. We find the

condition here prohibiting respondent from associating with known gang members was not narrowly drawn and substantially burdens respondent's constitutional rights.

¶ 52 Initially, we observe that we previously addressed and rejected the State's contention that respondent was required to articulate which specific gang members he needed to contact for a legitimate purpose. *K.M.*, 2018 IL App (1st) 172349, ¶ 29. We further reject the State's contention that the courts' analysis was flawed in *K.M.*, *J'Lavon T.*, and *Omar F*. See *K.M.*, 2018 IL App (1st) 172349; *J'Lavon T.*, 2018 IL App (1st) 180228; *Omar F.*, 2017 IL App (1st) 171073. Relying on *U.S. v. Williams*, 553 U.S. 285, 303 (2008), the State contends "[t]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." (Internal quotation marks omitted.) In *Williams*, however, the court determined that the vast majority of the applications of the statute at issue in that case raised "no constitutional problems whatever." *Id*. The State's reliance on *Williams* is misplaced where the courts in *K.M.*, *J'Lavon T.*, and *Omar F.*, determined the probation condition would prohibit a considerable amount of unavoidable innocuous conduct. See *K.M.*, 2018 IL App (1st) 172349, ¶¶ 24-27; *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 15; *Omar F.*, 2017 IL App (1st) 171073, ¶¶ 63, 68.

¶ 53 In *Omar F.*, for example, the respondent was ordered to " 'stay away' " from and have " 'no contact' " with gangs. *Id*. ¶ 63. Although the court in *Omar F.* did not invalidate no-gang-contact restrictions in general, it found that the condition imposed on the respondent in that case was overbroad and not narrowly tailored. *Id*. ¶¶ 61, 63. The blanket no-contact restriction in that case failed to differentiate between lawful and unlawful contact with gang members. *Id*. ¶ 63. As a result, it prohibited even "innocuous" or incidental contact that the respondent would have been hard-pressed to avoid in a gang-infested neighborhood. *Id*. ¶¶ 63, 68. Moreover, the

probation condition failed to provide exceptions allowing the respondent to have contact with individuals for legitimate purposes, including contact with family members, classmates, and coworkers. *Id.* ¶ 63. The court was particularly troubled by the fact that the probation condition prevented the respondent from having any contact with his own brother, a former gang member who had turned his life around and now served as a role model for the respondent. *Id.*

¶ 54 The court came to the same conclusion regarding an identical probation condition in *K.M.* and *J'Lavon T. K.M.*, 2018 IL App (1st) 172349, ¶¶ 25-27; *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 15. We acknowledge the probation condition here prohibits "association" rather than "contact." Nonetheless, as in *K.M.*, *J'Lavon T.*, and *Omar F.*, the prohibition on respondent associating with known gang members fails to differentiate between lawful and unlawful conduct. *Id.*; *Omar F.*, 2017 IL App (1st) 171073, ¶¶ 63, 68. As a result, it prohibits innocuous or innocent associations that respondent may engage in on a daily basis, such as at school or work. See *id.* Accordingly, the probation condition imposed here, like the condition in *K.M.*, *J'Lavon T.*, and *Omar F.*, burdens respondent's constitutional rights substantially more than is necessary and is unconstitutionally overbroad. See *id.*

¶ 55 Respondent next argues the probation condition prohibiting him from wearing gang colors is an unconstitutionally overbroad limitation on his first amendment rights. We agree.

¶ 56 Respondent relies primarily on *City of Harvard v. Gaut*, 277 Ill. App. 3d 1 (1996), which struck down as overbroad a city ordinance which prohibited any person within the city from wearing known gang colors, emblems, or other insignia. The court noted that gang colors and gang clothing "are often worn by nongang members as a form of symbolic speech intended to convey a message unrelated to the promotion of gangs." *Id.* at 7. The ordinance was therefore unconstitutionally overbroad because it prohibited a substantial amount of constitutionally

protected speech. *Id*. at 5. Although the ordinance in *City of Harvard* applied to everyone within the city, the probation condition here similarly prohibits substantially more speech than is necessary to achieve its rehabilitative goal, including colors not known to respondent to be gang related, and is therefore unconstitutionally broad. See *id*.; *K.M.*, 2018 IL App (1st) 172349, ¶ 22; *Lopez*, 66 Cal. App. 4th at 629.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated above, we affirm the judgment of the circuit court of Cook County, vacate the probation conditions prohibiting respondent from associating with individuals he knows are in gangs and from wearing gang colors, and remand to the juvenile court for entry of a revised probation order.[4]

¶ 59 Affirmed in part, vacated in part, and remanded with directions.

¶ 60 JUSTICE GORDON, concurring in part and dissenting in part:

¶ 61 I concur with the majority's findings: (1) that the State established respondent's minority beyond a reasonable doubt when he stipulated to juvenile jurisdiction at his arraignment; and (2) that the trial court's imposition of gang-related conditions was not an abuse of discretion. For the following reasons, I dissent from the majority's finding that the trial court's gang prohibition was unconstitutional.

¶ 62 Turning to the constitutional issues, I observe that the probation order entered in this case stated simply: "no gangs." At sentencing, the trial court sentenced respondent to 18 months of probation, and then stated in relevant part:

"THE COURT: Mandatory school attendance; that means everyday, every class

[4] Illinois Supreme Court Rule 660A(f) (eff. July 1, 2013) mandates that this court file its decision within 150 days after the filing of the notice of appeal from a juvenile delinquency proceeding "[e]xcept for good cause shown." Accordingly, the decision in this case was due on July 16, 2018. Both parties, however, requested extensions of time to file their briefs, which were granted and which extended the briefing schedule beyond July 16. For this reason, there is good cause to issue this decision after the 150-day deadline.

unless you're sick. No gang membership. Cooperate with TASC and follow their recommendations. So you can't be in a gang; you can't [a]ssociate with people you know are in gangs; you can't represent a gang or wear gang colors. Do you understand that?

THE MINOR: Yes, your honor."

¶ 63 Neither the minor nor the minor's mother who was with him in court posed any questions. The minor's counsel, who was also present in court, also had no questions. The probation officer objected to the TASC condition because there was "no reason to believe that he [was] using anything." As a result of the objection, the trial court immediately struck the TASC requirement.

¶ 64 The trial court and the probation officer scheduled a progress report for May 22, 2018. The minor was not required to come to court on May 22, 2018, although he had the opportunity to do so.

¶ 65 The appellate record ends with the January 23, 2018, sentencing. Thus, we have no idea what happened on May 22, 2018. We do not know if the minor or his mother or the probation officer asked for a modification of his probation conditions. (We observe that the trial court was receptive to modification at sentencing, when asked.) We do not know whether the trial court reconsidered on May 22, 2018, and ordered time served, as the probation officer initially recommended and respondent initially sought. Thus, we have no idea, with our out-of-date record, whether the issues presented on this appeal have already become completely moot.

¶ 66 There is a process, set in place by our legislature, that the majority ignores. A juvenile defendant is expected to work with his or her probation officer and the juvenile court. The appellate court was not designed to be the place of first resort, if the juvenile does not understand a probation condition or finds a condition too cumbersome to work in practice.

¶ 67 In the case at bar, the record does not show that the juvenile defendant ever registered a

word of complaint about the probation condition until this appeal. The minor, his counsel and his mother voiced no complaint to the juvenile court about this recommendation.

¶ 68 The Juvenile Court Act (the Act) contemplates that a juvenile defendant will be regularly monitored. At least every six months the probation officer sends a report to the juvenile court. 705 ILCS 405/5-744(2) (West 2016).[5] In addition, anyone interested in the minor, including the minor himself, can request a change in condition. 705 ILCS 405/5-743(3) (West 2016) ("[t]he minor or any person interested in the minor may apply to the [juvenile] court for a change").

¶ 69 In addition, the juvenile court may terminate probation satisfactorily at any time. 705 ILCS 405/5-715 (West 2016) (the juvenile court may terminate probation "at any time if warranted by the conduct of the minor and the ends of justice"). For all this court knows, the juvenile defendant's probation may have already terminated satisfactorily and we may be issuing a moot opinion.

¶ 70 Just as Dorothy in the *Wizard of Oz* always had the power to return to Kansas by clicking her heels, the juvenile defendant always had, and still has, the ability to ask his probation officer and the juvenile court for a change in condition. He did not need us or this opinion to do that. He always had that ability and—as far as we know—he chose not to exercise it.

¶ 71 The last thing that a reviewing court, with a frozen and out-of-date record, should want to do is to encourage a juvenile to rush to appeal, bypassing the mechanisms set in place by our legislature, which decided that a juvenile's probation conditions should be considered, first and foremost, by the people with their feet on the ground—the probation officer and the juvenile court. 705 ILCS 405/5-743(3), 744(2) (West 2016). See also 705 ILCS 405/5-740 (West 2016).

¶ 72 If the probation condition stated anything more specific, such as precise symbols or signs,

[5] The Act requires the juvenile defendant's guardian or legal custodian, who may be his probation officer, to "file updated case plans with the court every six months." 705 ILCS 405/5-744(2) (West 2016); 705 ILCS 405/5-740 (West 2016) (permitting placement "under the guardianship of a probation officer").

the condition would become outdated before the ink was dry. *In re R.H.*, 2017 IL App (1st) 171332, ¶¶ 31-33. It is the juvenile's probation officer who is tasked with the job of keeping up with the ever-changing, minute-to-minute, world of gangs, members, signs and symbols; and the juvenile court's condition gives the probation officer the tools and flexibility to attempt to keep the juvenile out of trouble. *In re R.H.*, 2017 IL App (1st) 171332, ¶ 33 (any "prohibition would become stale the moment the members of that gang decided to change their shirts, move their activities, or splintered to form new, separate gangs"). The goal is to help this minor finish school, live with his parents and stay away from gangs.

¶ 73 Minors have some, but not all, of the same constitutional protections afforded to adults, because of the particular vulnerability of children and their inability to make mature, nuanced decisions. *In re R.H.*, 2017 IL App (1st) 171332, ¶¶ 20, 27. Our Illinois Juvenile Court Act provides: "This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court." 705 ILCS 405/1-2 (West 2016). See also *In re R.H.*, 2017 IL App (1st) 171332, ¶ 15 (discussing the "*parens patria*" concerns expressed in both the Act and Illinois case law).

¶ 74 If the juvenile had objected—at any time—to the court below and if the court had flat-out refused his request, then this case would be in a different posture. But that is not the case before us.

¶ 75 The trial court, as well as defendant, are well aware of the gangs and their colors that control the turf in the community in which defendant resides. If defendant had any questions about what the trial court meant when it stated that defendant cannot wear gang colors, he and his mother had the opportunity to object in court, or could have asked the court for a clarification. Their silence tells us that they knew exactly what the court meant. If this becomes

a problem, defendant and his mother can contact the probation officer to obtain a clarification. In the future, the trial court should explain what it means when it rules that a defendant cannot wear gang colors because people who are not familiar with living in areas infested with gangs may believe restricting a defendant from wearing gang colors is too vague.

¶ 76 I cannot join in an opinion that undercuts the process set forth by our legislature and undermines the authority of the juvenile court and its officers. Thus, I must respectfully dissent from the majority's finding that respondent's probation condition was unconstitutional. See *In re E.H.*, 224 Ill. 2d 172, 178 (2006) ("cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort").