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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re ERIK A., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIK A.,

Defendant and Appellant.

F037575

(Super. Ct. No. 13749)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Roger L. Wayne, Judge.

Susan C. Diamond, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

*Before Levy, Acting P.J., Cornell, J., and Polley, J.†

†Judge of the Tuolumne Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

-ooOoo-

On October 30, 2000, the juvenile court found true allegations in a petition filed pursuant to Welfare and Institutions Code section 602 that Erik A. fought in public (Pen. Code, § 415.1) in order to further a criminal street gang (Pen. Code, § 186.22, subd. (d)). The juvenile court found the offense to be a misdemeanor. Erik was placed on probation upon various terms and conditions, including that he not obtain any tattoos, burns, or voluntary scarring.

On appeal, Erik contends the juvenile court erred in using Penal Code section 186.22, subdivision (b) because it only applies to felony or wobbler offenses, not to simple misdemeanor offenses. Erik also contends the probation condition that he not obtain any tattoos, burns, or voluntary scarring is overbroad and violates his constitutional right to free speech.

FACTS

Eddie Murphy, a safety officer with Madera Unified School District, was patrolling the hallway of the English building at Madera High School at 9:00 a.m. on August 28, 2000. Murphy saw Erik and Miguel I. fighting in the hallway. Murphy separated the two. Miguel told Murphy that Erik threw the first punch. Murphy took Erik and Miguel to Officer Anderson who read Erik his *Miranda* rights.¹ Anderson explained that Erik was wearing a red belt and had his hair in a ponytail. Miguel was wearing a blue belt. Anderson thought Erik and Miguel were associated with gangs. Miguel had called Erik “a fuckin’ scrap and a sur rat” prior to the fight. Anderson believed the blue belt, which was actually a handkerchief, found on Miguel also indicated gang affiliation.

Damon Wasson, a police officer with the Madera Police Department, testified as an expert on gang association. Wasson knew Erik and had reviewed Erik’s school

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

records and police reports. Wasson opined Erik was a member of the Norteno gang and found significance in the red belt he was wearing because Norteno gang members wear red clothing. Nortenos fight Surreno gang members, who wear blue clothing. Wasson explained that when Miguel called Erik a “fuckin’ scrap, a sur rat,” Miguel was inviting Erik to fight. Wasson further opined that the fight was a gang-related fight.

GANG AFFILIATION ENHANCEMENT

Erik contends the finding that he violated Penal Code section 186.22, subdivision (d) must be reversed as a matter of law.² Erik argues this Penal Code section requires the underlying offense to be a so-called wobbler offense which can be either a felony or a misdemeanor. Erik asserts that his conviction for fighting in public is only a misdemeanor and, therefore, Penal Code section 186.22, subdivision (d) does not apply to his offense.

This issue was recently addressed in *Robert L. v. Superior Court* (2001) 90 Cal.App.4th 1414, 1417-1423. The *Robert L.* court found Penal Code section 186.22, subdivision (d) applies to felonies, wobbler offenses, and misdemeanors. (*Id.* at pp. 1422-1423.) We concur with the reasoning of *Robert L.* and apply its holding to the instant action.

² Penal Code section 186.22, subdivision (d) states: “*Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in county jail.*” (Italics added.)

TATTOO PROHIBITION

Erik further contends the juvenile court imposed an overbroad probation condition when it stated he could not obtain any new tattoos, brands, burns, or voluntary scarring. Erik argues the prohibition violates his First Amendment right to free speech. Erik also asserts this condition of probation is invalid because it is not limited to gang-related tattoos or marking. Our court recently examined and rejected all of these arguments. (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1034-1035.) We find *Antonio C.* well reasoned and will not deviate from it.

DISPOSITION

The judgment of the juvenile court is affirmed.