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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re O. M., A Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

H023435

Plaintiff and Respondent,

(Monterey County
Superior Court
No. J35296)

v.

O. M.,

Defendant and Appellant.

_____ /

A petition filed in juvenile court alleged that O. M., a minor, came within the provisions of section 602 of the Welfare and Institutions Code. The petition alleged the following three misdemeanor violations: possession of burglar's tools (Pen. Code, § 466)¹; entry/occupation of a structure without the owner's consent (§ 602, subd. (l)); and possession of not more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b)). It further alleged that the dispositions of two prior delinquency petitions were ineffective in rehabilitating O. M. and that the sustained petitions could serve to aggregate the total time O. M. should be removed from parental custody (Welf. & Inst. Code, §§ 777, 726). The probation department filed a notice that alleged O. M. had violated his probation under the previous petitions based upon the first two misdemeanors

¹ All further statutory references are to the Penal Code unless otherwise specified.

alleged in the present petition and on two alleged gang-related violations of his probation conditions. The juvenile court found all allegations in the petitions to be true and found some of the probation violations true. The juvenile court continued O. M. on open wardship. In addition to the original conditions, it ordered, inter alia, that O. M. serve 69 days in juvenile hall. At a subsequent review hearing, the court ordered O. M. to participate in the Youth Complex Program. On appeal O. M. contends the finding that he violated section 466 should be stricken because (1) nondescript fragments of spark plug insulation are not included among the burglary implements proscribed by the statute and (2) the evidence in the record is constitutionally insufficient to sustain the juvenile court's finding that O. M. had the necessary intent.

I. Facts²

On the evening of April 10, 2000, King City Police Officer Ricardo Robles was dispatched to King Del Rey School to investigate a report of trespassers at the school's greenhouse. When Robles arrived with another officer, they found seven male juveniles in the greenhouse. There were no school functions at the time.

When the officers tried to open the door, they learned that the greenhouse door was locked from the inside. They ordered the juveniles to open the door and come out with their hands raised. The seven did so, and O. M. was one of the seven.

While conducting a pat-down search for weapons, Robles felt hard, lumpy objects in O. M.'s front pocket. Robles asked for consent to search the pocket, and O. M. agreed. Robles conducted that search and removed five pieces of spark plug porcelain. The officers also located two pieces of porcelain spark plug in the pockets of one of the other six juveniles. Robles knew from his training and experience that burglars use the small porcelain pieces from spark plugs to break automobile windows without making any "sound at all" and that they then steal anything of value from inside the vehicles.

² Since O. M. only contests the juvenile court's finding that he possessed burglar's tools in violation of section 466, our factual summary relates solely to that one finding.

Asked what he was doing in the greenhouse, O. M. said he was seeking shelter from the cold. Asked if he knew what the pieces of spark plugs are used for, O. M. said that they were used “to break windows and break inside vehicles.” Asked if he knew it was against the law to possess such items, O. M. said he knew “it was against the law to possess them.” O. M. also told the officer that he found a spark plug while walking through an alleyway. He said he decided to pick it up and break it into pieces and that he was carrying the porcelain pieces “for fun.”

II. Discussion

O. M. contends the finding that he violated section 466 must be stricken because the small pieces of spark plug porcelain in question are not burglar’s tools within the meaning of section 466. We agree.

In pertinent part, section 466 provides that “[e]very person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code . . . is guilty of a misdemeanor.”

In *People v. Gordon* (2001) 90 Cal.App.4th 1409 (*Gordon*), Division One of the Fourth District Court of Appeal concluded that possession of ceramic spark plug pieces does not violate section 466. Review was denied in that case on October 31, 2001. In their respondent’s brief, the People argued that the reasoning *Gordon* “is flawed” and should not be followed. In so arguing, the People relied upon the analysis set forth in an opinion filed after *Gordon* by a different division of the Fourth District Court of Appeal. Since the People filed their brief, the California Supreme Court has granted review in the Fourth District’s case that criticized the reasoning in *Gordon*. (*In re Robert B.*, rev. granted February 13, 2002 (S103022).) Although the appellate decision in *Robert B.* is superseded and no longer citable authority (Cal. Rules of Court, rules 976(d), 977 (a)),

we have considered the legal analysis set forth in the People's brief before reaching our determination that porcelain pieces of a spark plug do not qualify as burglar's tools under section 466.

In reaching our conclusion that the spark plug pieces in question cannot support the finding that minor O. M. possessed burglar's tools within the meaning of section 466, we adopt the following reasoning in *Gordon* as our own.

“Ceramic pieces from a spark plug are not specifically listed in section 466; thus, the issue is whether they come under the meaning of ‘other instrument or tool’ as used in the section. In making this determination we are guided by the rule of construction known as *ejusdem generis*-- which applies when general terms follow a list of specific items or categories, or vice versa. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.) Under this rule, application of the general term is “restricted to those things that are similar to those which are enumerated specifically.” (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160, fn. 7, quoting *Martin v. Holiday Inns, Inc.* (1988) 199 Cal.App.3d 1434, 1437; see also *Kraus v. Trinity Management Services, Inc.*, *supra*, 23 Cal.4th at p. 141.) Moreover, ‘[i]n construing criminal statutes, the *ejusdem generis* rule of construction is applied with stringency. [Citation.]’ (*People v. Thomas* (1945) 25 Cal.2d 880, 899.) Thus, the meaning of the words ‘or other instrument or tool’ in section 466 is restricted to a form of device similar to those expressly set forth in the statute. (*Cook v. Superior Court* (1970) 4 Cal.App.3d 822, 828.)

“The items specifically listed as burglar's tools in section 466 are keys or key replacements, or tools that can be used to pry open doors, pick locks, or pull locks up or out. None of the devices enumerated are those whose function would be to break or cut glass -- e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be thrown at a car window to break it. Nevertheless, the People liken a ceramic spark plug piece to a ‘shaved’ key because both

provide for quiet breaking and entering, and argue that a spark plug piece is an ‘other instrument or tool’ which satisfies the statutory definition in section 466 because ‘it operates as effectively in breaking into a vehicle as unlocking the vehicle door with a metal tool’ However, the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be *similar* to those specifically mentioned. Here, a ceramic piece of a spark plug that can be thrown at a car window is not similar to the burglar’s tools listed in the statute. (See *Cook v. Superior Court, supra*, 4 Cal.App.3d at pp. 828-829 [where the statute prohibited possession of a revolver, pistol, fountain pen gun, billy, riot gun or ““other form of device . . . intended for the projection or release of tear gas,”” it did not apply to a mace/tear gas canister because this device was not similar to the enumerated items].)” (*People v. Gordon, supra*, 90 Cal.App.4th at pp. 1412-1413.) Accordingly, we conclude the trial court’s finding that minor O. M. possessed burglar’s tools under section 466 cannot stand. (*Ibid.*) In so holding, we reject the People’s claim that application of the rule of *ejusdem generis* does not effectuate the Legislature’s intent in this instance.

In light of the above conclusion, O. M.’s remaining contention that there was insufficient evidence to support the juvenile court’s finding that O. M. possessed burglar’s tools within the meaning of section 466 is moot.

III. Disposition

The juvenile court’s order is reversed. The matter is remanded to the juvenile court, and the court is directed to strike its finding that O. M. possessed burglar’s tools in violation of section 466. In addition, the juvenile court may make any modifications of O. M.’s probation grant it deems appropriate.

Mihara, J.

I CONCUR:
Rushing, J.

BAMATTRE-MANOUKIAN, Acting P.J., Dissenting.

I respectfully dissent. I believe the juvenile court properly found the minor violated section 466 when he possessed small pieces of spark plug porcelain, while trespassing in a school greenhouse with six other juveniles, and admitted that he knew that the items were used “to break windows and break inside vehicles” and that “he knew it was against the law to possess them.” Because the minor clearly had the intent to use the pieces of spark plug porcelain as burglary tools, I would uphold the juvenile court’s finding that the minor had “in his possession a[n] . . . instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle” (§ 466.)¹

In determining whether section 466 prohibits the possession of small pieces of spark plug porcelain with the intent to use them as burglary tools, I would apply the ordinary rules of statutory construction. “The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Ordinarily, the words of the statute provide the most reliable indication of legislative intent. [Citation.] When the statutory language is ambiguous, the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. [Citations.]’ [Citation.] ‘“When the language is susceptible of

¹ Section 466 provides: “Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe door puller, master key, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument named above so that the same will fit or open the lock of a building, railroad car, aircraft, vessel, trailer coach, or vehicle as defined in the Vehicle Code, without being requested to do so by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.”

more than one reasonable interpretation . . . , we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” ’ [Citation.]” (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

I do not find section 466 ambiguous. It clearly prohibits the possession of any “*other instrument or tool with intent*” to use that instrument or tool to break into a building or vehicle. (§ 466, italics added.) It also clearly prohibits a person from making “any key or other instrument” in order to open a locked building or vehicle without permission – in other words, with the intent to commit burglary. (*Ibid.*) Thus, it appears that the essence of the offense is possession of one or more of the named items or any other implement suitable for breaking into structures or vehicles *with the requisite burglarous intent*.

The majority follows *People v. Gordon* (2001) 90 Cal.App.4th 1409 (*Gordon*), where the court applied the rule of *ejusdem generis* to restrict the meaning of “other instrument or tool” to things similar to the enumerated instruments and tools. The *Gordon* court noted that none of the enumerated instruments and tools were *designed* to break or cut glass, but rather were *designed* to pick locks or pry open doors.

The *Gordon* court cited *Cook v. Superior Court* (1970) 4 Cal.App.3d 822 (*Cook*) in support of its analysis. The statute considered in *Cook* was former section 12420, which prohibited possession of any “form of shell, cartridge, or bomb containing or capable of emitting tear gas, or any weapon designed for the use of such shell, cartridge or bomb.” Unlike section 466, former section 12420 made no reference to the intent of the person possessing the enumerated items.

The statute considered in *Cook* is distinguishable from section 466, because it focused on whether the weapon was *designed* for a particular use, whereas section 466 focuses on how the possessor *intends to use* the “instrument or tool.”

Because section 466 focuses on the person’s intent, each case will be decided on its own facts. Thus, in some cases, the circumstances will indicate that a person has “in

his or her possession . . . a screwdriver . . . with intent feloniously to break or enter” a vehicle (§ 466); such a person would be subject to prosecution under section 466. In other cases, the circumstances will indicate that a person is carrying a screwdriver for an innocent purpose; lacking the requisite intent to use the screwdriver as a burglary tool, the person would not be subject to prosecution under section 466. Likewise, there may be cases where a person is carrying pieces of spark plug porcelain without the intent to use them as burglary tools. This, however, is not such a case.

The evidence in this case indicates that pieces of spark plug porcelain are commonly used as burglary tools. The arresting officer explained that pieces of spark plug porcelain are used by “[g]ang members . . . to break the windows to the vehicles” in order to steal items like car stereos. The minor himself admitted that the pieces of spark plug porcelain were used “to break windows and break inside vehicles” and that “he knew it was against the law to possess them.” In the *Gordon* case, an officer provided similar testimony, explaining that “pieces of ceramic spark plugs are used by thieves to throw at car windows and shatter them, because the spark plug pieces make very little sound in doing so.” (*Gordon, supra*, 90 Cal.App.4th at p. 1411.)

Here, the circumstances indicate that the minor did possess the pieces of spark plug porcelain with the intent to use them as burglary tools: he was trespassing in a school greenhouse during the evening with six other juveniles, one of whom also possessed pieces of spark plug porcelain. The minor’s assertion that he was carrying the pieces of spark plug porcelain “for fun” is contradicted not only by these circumstances but also by his own admissions regarding the common use of the items and the fact that it was illegal to possess them.

I would conclude that in this case, the minor’s possession of pieces of spark plug porcelain with the intent to use them as burglary tools violated section 466. Therefore, I would affirm the juvenile court’s finding.

BAMATTRE-MANOUKIAN, ACTING P.J.