

## Restricting the Freedom of Social Media Speech?

BY RAHUL GUPTA

**K**ids say the darndest things,” is an old phrase that captured the endearing nature of children saying what they are really thinking. An updated version of that phrase could be, “Kids post the dumbest things on social media!” As prosecutors, we typically welcome a defendant making a statement, almost any statement. Our cases usually get better when defendants exercise their constitutional right to freedom of speech, especially on social media. It is almost hard to imagine a situation where a prosecutor would not want the defendant to speak. However, *In re A.A.* gives a unique example from juvenile court of when and how it may occur.<sup>1</sup>

In 2017, the juvenile court sustained a petition against a minor for felony battery with serious bodily injury.<sup>2</sup> The facts were not in dispute. The victim was coaching a youth basketball team at the local YMCA. Instead of using the adjacent open courts, the minor insisted on using the court already occupied by the victim and his team. The victim asked the minor to leave multiple times to no avail. Finally, the victim simply reached for the minor’s basketball to end the disruption. The minor responded with unprovoked violence and “sucker punched” the victim. The minor’s attack was so vicious that it left the victim unconscious in front of the very children he was coaching. The victim required stitches to his mouth and forehead and two surgeries resulted in permanent scarring.

While out of custody and awaiting his hearing in juvenile court, the minor uploaded a photo of his court subpoena with the post: “[N]ew Ne[t]flix series coming. I’m a 16-year-old felon.”<sup>3</sup>

Obviously, the juvenile court judge was not happy and admonished the minor to refrain from any further social media postings. Just as obvious, the minor blatantly ignored the judge’s order. During the jurisdictional hearing, the minor posted a video to his Instagram account of himself dancing to music in front of the juvenile court. When the judge became aware of the video and inquired, the minor stated: “[P]eople knew I was in court; so I shot a video because I do have a lot of Instagram followers, and they do tend to like care in a sense of what I’m doing.”<sup>4</sup>

This time, the judge admonished the minor’s counsel to restrain the minor’s online behavior. Although any

testimony related to the social media posts was excluded at the juvenile court hearing, the judge noted the online behavior “could be relevant at a later stage in the proceedings.”<sup>5</sup> Sure enough, after the petition against the minor was sustained, the judge imposed as a condition of probation an order preventing the minor from posting anything related to the case on social media and to delete anything the minor had already posted. The minor agreed to the probation condition.

The juvenile court noted, “a juvenile court has broad discretion in imposing probation conditions it determines are ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the [minor] enhanced.’”<sup>6</sup>

The main issue on appeal was whether the probation condition restricting the minor’s ability to post on social media was overbroad and violated his First Amendment rights. Given the wide latitude a juvenile court has to modify a minor’s behavior, the appellate court noted the minor’s online behavior had exhibited a pattern of defiance to the court and disrespect to the victim. Since the minor was motivated to please his Instagram followers, the court found it was reasonable to believe “some of the Instagram followers knew the victim and that appellant’s postings about the case ... would embarrass the victim who was undergoing therapy.”<sup>7</sup> The minor had already accepted a probation condition that prevented him from contacting any victim or witness in the case and this was just being extended online. Therefore, the appellate court easily found a nexus between the minor’s “compulsion to discuss the case in social media posts” and the need to rehabilitate such conduct.

To establish the probation condition was overbroad under the First Amendment, the minor’s appellate attorney made the incredible argument that the restraint on free speech prevented the minor from “using social media ... to express remorse, to praise the efficacy of the juvenile justice system, or to inform his friends and family about the progress of the case.”<sup>8</sup>

The appellate court was in no mood to “like, follow, or subscribe,” to the minor’s argument. The minor was free to

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## The Misnomer of the Vehicle Inventory Search: *United States v. Garay*

BY SHARON LIZARDO

There are some defense arguments that advocate a vehicle inventory search by law enforcement officers is a ruse for an investigation, which may get some credence by the courts. To resolve the inventorying issue, prosecutors can derail the contention with some relevant and effective constitutional justifications.

In Fourth Amendment jurisprudence, it is a misnomer to consider a vehicle inventory search as a search. To thwart defense arguments that the vehicle inventory is a search, prosecutors need to convey to the court that an inventory is a cataloging process and not part of an investigation.

### Inventory Review

The aim behind the vehicle inventory search is that the seizure is for a valid “community caretaking” purpose.<sup>1</sup> The United States Supreme Court announced three justifications for sanctioning vehicle inventory searches by law enforcement:<sup>2</sup>

1. to protect the owner’s property while in law enforcement custody;
2. to protect law enforcement against claims or disputes over lost or stolen property; and
3. to protect law enforcement from potential dangers located in the property.

These justifications are administrative rather than investigative in nature. To be reasonable under the Fourth Amendment’s warrant exception, law enforcement actions should not be a ruse for general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory.<sup>3</sup>

The Supreme Court found that a routine inventory of a lawfully impounded vehicle is reasonable when performed pursuant to standard police procedure.<sup>4</sup>

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exercise his constitutional right of free speech through any other means, including “the telephone, in person or ... email.”<sup>9</sup> The court focused on the fact that the probation condition was narrowly drawn to restrict the use of a speech forum instead of the content of speech. In this case, the appellate court upheld restricting the minor from using social media as a speech forum because he abused it during the trial. It was clear that the minor’s previous online behavior would prevent his successful completion of probation. Therefore, the appellate court found the probation condition was precise, narrow, and reasonably tailored to address the minor’s prior conduct and directly related to his rehabilitation.

### Conclusion

As a general rule, it is rare for prosecutors to seek a probation condition that infringes on a defendant’s right to free speech. However, *In re A.A.* illustrates that in juvenile court you may be able to restrict an unruly minor’s online activity when the minor uses social media to brag about his or her offense to provoke or annoy a victim.

### ENDNOTES

1. *In re A.A.* (2018) 30 Cal.App.5th 596.
2. Pen. Code § 243(d).
3. *In re A.A.*, *supra*, at 598.
4. *Id.*
5. *Id.*
6. *Id.* at 600, quoting Welf. & Inst. Code § 730(b).
7. *In re A.A.*, *supra*, at 599.
8. *Id.*
9. *Id.*

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