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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EMERY CRAIG BARNES,

Defendant and Appellant.

A131369

(Contra Costa County  
Super. Ct. No. 05-091208-9)

**I.**

**INTRODUCTION**

Emery Craig Barnes (appellant) appeals following his conviction for one count of child abuse (Pen. Code, § 273a, subd. (a)).<sup>1</sup> The only issues raised by appellant on appeal concern two conditions imposed when sentencing was suspended and appellant was granted formal, felony<sup>2</sup> probation. He objects to a search and seizure condition (search condition), and to another condition that he not “own or possess or control any firearm or weapon.” His objection to the second condition of probation is that there is no requirement that he *knowingly* possess any firearm or weapon. Therefore, he claims this condition is unconstitutionally vague and overbroad. The Attorney General concedes this point, and we order this second condition modified to include an element of knowledge.

<sup>1</sup> All subsequent undesignated statutory references are to the Penal Code.

<sup>2</sup> The court denied appellant’s motion to reduce the felony to a misdemeanor. (§ 17). That order is not challenged on appeal.

We reject appellant's challenge to the search condition, and otherwise affirm the judgment.

## II.

### PROCEDURAL HISTORY

An information was filed by the Contra Costa County District Attorney charging appellant with one count of child abuse (§ 273a, subd. (a)). The information also alleged that appellant used an electric cord to commit the crime, which is a deadly and dangerous weapon, within the meaning of section 12022, subdivision (b)(1), and that the child abuse resulted in great bodily injury, within the meaning of section 12022.7, subdivision (a). Appellant denied the charge and special allegations, and the case ultimately proceeded to a jury trial commencing on January 12, 2011. The jury delivered its verdicts on January 24, 2011, finding appellant guilty of the child abuse charge, but also finding the special allegations not true.

A sentencing hearing was held on February 25, 2011. That day a report was submitted by the probation department recommending that appellant be admitted to formal probation subject to certain conditions. One of the conditions was that appellant's person, place of residence, storage locker, personal property and vehicles under his control be subject to search and seizure by any peace officer at any time. The trial court suspended sentencing and, following the recommendation of the probation department, granted appellant three years<sup>3</sup> formal probation. The terms of probation included a search clause and an additional condition that appellant not "own or possess or control" any firearm or weapon. Appellant also was ordered to "obey all laws" while on probation. Appellant's counsel objected to the inclusion of the search condition.

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<sup>3</sup> The probation department recommended a four-year formal probationary term.

**III.**  
**FACTUAL BACKGROUND**

Because appellant does not challenge the sufficiency of the evidence supporting his conviction of the underlying crime, in the interests of brevity, our factual summary is taken from the probation report.

The victim is the nine-year-old son of appellant and his former spouse. He had been living with appellant, the victim's stepmother, his two stepsisters, and his two-year-old brother. The victim's mother first noticed marks on his legs, which the victim initially stated resulted from a bicycle accident. Pressed for more information, the victim then admitted that he got into trouble at school and appellant physically punished him by hitting him with an extension cord.

During a subsequent interview by police, the victim stated that his father "whooped me with an extension cord" several times some weeks earlier. The "whooping" hurt a good deal, and caused the victim's leg to bleed. This report was also made by the victim to his teacher. The victim stated further that his father usually hit him with a belt when he got into trouble. Police observed six separate welts on the victim's right thigh in the shape of a backwards "C," which was consistent with the shape of a folded cord.

When appellant was contacted by police, he admitted that he had "spanked" the victim with an electric cord, and that he might have gotten "carried away" with the "discipline." Appellant claimed this was the first time he hit the victim, and that for "discipline" he usually had the victim do pushups or walk up and down stairs carrying books.

**IV.**  
**DISCUSSION**

Appellant's challenge to the search condition is based primarily on the argument that this condition must be stricken because it bears no relationship to the crime for which he was convicted, nor is it reasonably related to reduce future criminality.

A trial court's power to impose probation conditions has been well-settled since our Supreme Court decided *People v. Lent* (1975) 15 Cal.3d 481, 486, where the court stated: "A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (Fn. omitted.) "Insofar as a probation condition serves the statutory purpose of 'reformation and rehabilitation of the probationer' [§ 1203.1,] it necessarily follows that such a condition is 'reasonably related to future criminality' and thus may not be held invalid whether or not it has any 'relationship to the crime of which the offender was convicted.'" (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65.)

More recently, in *People v. Reyes* (1998) 19 Cal.4th 743, the high court has approved the inclusion of a search condition as a condition of probation, making clear that a warrantless search condition is intended to ensure that the probationer is obeying the fundamental condition of all grants of probation, that is, the requirement (as here) that the probationer "obey all laws." The court reasoned, "The threat of a suspicionless search is fully consistent with the deterrent purposes of the search condition. ' "The purpose of an unexpected, unprovoked search of defendant is to ascertain whether [the probationer] is complying with the terms of [probation]; to determine not only whether he disobeys the law, but also whether he obeys the law. Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant . . . ." ' [Citations.]" (*Id.* at p. 752; *People v. Adams* (1990) 224 Cal.App.3d 705, 712.)

It has been repeated innumerable times by appellate courts reviewing challenges to the conditions of a grant of probation that " "[t]he granting of probation is not a right but a privilege, and if the defendant feels that the terms of probation are harsher than the sentence for the substantive offense[,] he is free to refuse probation." [Citations.] Because a defendant has no right to probation, the trial court can impose probation conditions that it could not otherwise impose, so long as the conditions are not invalid

under the three *Lent* criteria.’ (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459-460 . . . .)’ (*People v. Giordano* (2007) 42 Cal.4th 644, 663, fn. 7.)

Appellant’s reliance on *In re Martinez* (1978) 86 Cal.App.3d 577, is unhelpful. Firstly, the defendant in that case pleaded guilty to a misdemeanor and was sentenced as such, not for a felony conviction as is involved here. More importantly, there is no indication that a condition of misdemeanor probation was that the defendant “obey all laws.” Therefore, the need for law enforcement to have the tool of warrantless searches in order to test the probationer’s compliance with this related condition of probation was not present.

A warrantless search condition serves a valid rehabilitative purpose, and because it does, it matters not whether the underlying offense is reasonably related to the specific conduct involved in the crime for which he was committed. Therefore, we reject appellant’s challenge to this condition of probation.

Turning to the condition of probation that appellant not “own or possess or control any firearm or weapon,” he argues that this condition must be modified because the condition, as imposed, does not include any express scienter, or knowledge, requirement. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752.) The point is conceded by the Attorney General, who suggests that we follow the example of our Third District colleagues in *People v. Patel* (2011) 196 Cal.App.4th 956, who proclaimed:

“[T]here is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter. . . . We also do not discern how addressing this specific issue on a repetitive case-by-case basis is likely to dissuade a probation officer inclined to act in bad faith from finding some other basis for harassing an innocent probationer. As a result, we . . . now give notice of our intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. We construe every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly

include such a scienter requirement.” (*People v. Patel, supra*, 196 Cal.App.4th at p. 960, italics omitted.)

We respectfully decline to adopt such a procedure because, unlike the Third District, the First District operates in five discrete, differentiated divisions, and we do not presume to speak for our colleagues who are not involved in the disposition of this case. Instead, we modify this term of appellant’s probation to read as follows: “Appellant shall not knowingly own, possess, or control any firearm or weapon.”

**V.**

**DISPOSITION**

The probation condition prohibiting appellant from “own[ing] or possess[ing] or controlling any firearm or weapon” is ordered to be modified as follows: “Appellant shall not knowingly own, possess, or control any firearm or weapon.”

As modified, the judgment is affirmed. Upon remand, the trial court shall correct its records.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.\*

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\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.