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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

**CARIN LOUISE PAGUIO
ANDERSON,**

Defendant and Appellant.

A134876

**(Napa County
Super. Ct. No. CR159560)**

In Napa County Superior Court, Carin Louise Paguio Anderson pleaded no contest to charges of second degree burglary and contributing to the delinquency of her minor daughter. When she was arrested for those offenses, the Solano County juvenile court removed Anderson's daughter from her custody, and Anderson was ordered to participate in reunification services in the Solano County juvenile dependency case. In the Napa County criminal case, Anderson was granted probation. Over defense counsel's objection, the trial court included a condition of Anderson's probation requiring her to follow all orders entered in the Solano County juvenile dependency case. The trial court also imposed certain fees on Anderson, although it waived the imposition of other fees.

On appeal, Anderson does not contest the validity of her no contest plea. Instead, she argues the condition of her probation requiring her to follow all orders in the Solano County juvenile dependency proceeding is legally unauthorized and overbroad. She also

contends the issue of fees must be remanded for reconsideration. The Attorney General concedes the fee issue must be remanded.

We will accept the Attorney General's concession and remand the matter to the trial court for reconsideration of the fee issue. Because we can find no evidence that the orders of the Solano County juvenile court were presented to the court below at sentencing, we will also direct the trial court to reconsider that condition on remand.

FACTUAL AND PROCEDURAL BACKGROUND

The factual basis for Anderson's no contest plea was that at around 3:00 p.m. on November 12, 2011, she entered a Kohl's store on First Street in Napa with her eight-year-old daughter. Anderson and her daughter both selected items from the store and placed them in empty Kohl's bags. They then left the store without paying. Anderson had done this four times before without being caught.

On January 24, 2012, the Napa County District Attorney filed an information accusing Anderson of five counts of second degree commercial burglary (Pen. Code, § 459), five counts of petty theft (Pen. Code, § 484, subd. (a)), and one count of contributing to the delinquency of a minor. (Pen. Code, § 272, subd. (a)(1).)

On February 6, 2012, Anderson pleaded no contest to two counts of second degree burglary and one count of contributing to the delinquency of a minor. The District Attorney dismissed the remaining counts with a *Harvey* waiver. (See *People v. Harvey* (1979) 25 Cal.3d 754.)

According to the probation officer's presentence report, at the time of Anderson's arrest, her daughter was removed from her care, placed first in a foster home, and then placed in the custody of her father. The report stated Anderson was subject to a reunification plan entered in a Welfare and Institutions Code section 300 juvenile dependency proceeding pending in Solano County. The probation officer's report recommended that probation be granted with a number of conditions. The 20th

recommended probation condition (Condition No. 20) required that Anderson “[f]ollow all court orders presently in effect in Solano County Child Protective Services Case.”¹

At the March 6, 2012 sentencing hearing, defense counsel told the court Anderson planned to comply with the terms of her reunification plan in the Solano County juvenile dependency case, explaining, “That’s her main priority.” Nevertheless, defense counsel objected to Condition No. 20 because the Solano County dependency orders were not before the sentencing court.² Consequently, counsel argued the court could not determine whether the terms of the Solano County orders were reasonably related to Anderson’s offenses. In addition, counsel contended Anderson would not have notice of the conditions of her probation. Finally, defense counsel cited *In re Nolan W.* (2009) 45 Cal.4th 1217 (*Nolan W.*) for the proposition that a juvenile court cannot hold a parent in contempt for failure to comply with a condition of a reunification case plan. While recognizing that *Nolan W.* was factually distinguishable, defense counsel argued that the same principle applied in this case and that if Anderson failed to comply with her reunification plan, the consequence of failing to reunify with her child would be punishment enough for that failure. The prosecutor responded by saying Anderson “already knows the terms and conditions that Solano County has provided her.”

The trial court expressed concern about whether Anderson would be in violation of probation if the Solano County juvenile court determined that termination of Anderson’s parental rights was in the best interests of her child, noting that in some cases parents agreed to termination of their rights. The prosecutor responded to the court’s concern by noting that if there were a change in the Solano County orders, the case

¹ Two final recommended conditions were handwritten at the end of the report. These were that Anderson pay a “\$210 fine (criminal conviction assessments and court security fee)” and a “\$240 restitution fine.” It is unclear if these handwritten recommendations were part of the original presentence report submitted to the court or if they were added later. At sentencing, the trial court noted that the probation report did not include these fines. This factual discrepancy does not affect our disposition of this case.

² The orders of the Solano County juvenile court are not part of the record on appeal, and it does not appear that those orders were presented to the trial court.

“could be put back on calendar to modify the terms of probation in this case to reflect that there has been a change in the status in that case.”

The court suspended imposition of sentence and granted probation. With regard to Condition No. 20, the trial court stated, “I’ll adopt it. I do have some concerns about it. I’ll read *In re Nolan* [W.] for the future, but I think at least at this point I think it’s appropriate to require her to [comply with the terms of the reunification plan]. They’re certainly reasonably related to the facts of this case and the issues in this case, and therefore I think appropriately can be imposed in this case.”

The trial court also imposed a \$70 per-count fine representing the mandatory court security fee of \$40 and the \$30 fee required by Government Code section 70373, subdivision (a), for a total fine of \$210. It also imposed a \$240 restitution fine. (See Pen. Code, § 1202.4, subd. (b)(1).) The court waived the pre-sentence report fee and attorney’s fee but imposed an annual probation supervision fee of \$240. An unsigned minute order for the sentencing hearing specifies a booking fee of \$71, a court security fee of \$120, and criminal conviction assessment fee of \$90.

Anderson filed an appeal from her sentence on March 7, 2012.³

On March 12, 2012, a clerk signed a form entitled “Napa County Superior Court Promise to Appear/CSB Referral,” which appears to impose a number of fines and fees on Anderson. The form listed an unexplained fine of \$330, a “Court Operations Assessment” fee of \$120, a probation supervision fee of \$720 (three years of supervision at \$240 per year), a booking fee of \$71, and an administrative fee of \$35. Anderson was not present when the fine and fees were imposed, and her signature does not appear on the form.

³ Because Anderson’s appeal addresses only sentencing issues and does not affect the validity of her plea, the order is appealable without a certificate of probable cause under Penal Code section 1237.5 and California Rules of Court, rule 8.304(b)(4)(B). (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, fn. 5)

DISCUSSION

Anderson raises two issues on appeal. She contends Condition No. 20, which requires her to obey the orders in the Solano County juvenile dependency proceeding, is both legally unauthorized and unconstitutionally vague. She also argues that the fines purportedly imposed by the clerk on March 12, 2012 must be stricken, since they were not imposed by the court and are not mandatory.

The Attorney General urges us to uphold Condition No. 20. With regard to the issue of fines and fees, however, she agrees that the matter should be remanded to clarify the discrepancies between the trial court's oral pronouncement, the unsigned minute order, and the March 12, 2012 "Promise to Appear/CSB Referral" document. The Attorney General also contends the matter must be remanded so that the booking fee mandated by Government Code section 29550 et seq. may be imposed.

Because the parties are in partial agreement on the fee issue, we will address it first.

I. *The Matter Must Be Remanded for Clarification of the Fees the Trial Court Intended to Impose.*

Anderson contends this matter should be remanded so that the trial court can clarify precisely which fees it intended to impose on her. The Attorney General concedes a remand is required "to clarify the discrepancies between the court's verbal pronouncement, the unsigned minute order, and the 'Promise to [Appear]' document." We will accept the Attorney General's concession and order the matter remanded for that purpose.⁴ (See *People v. Eddards* (2008) 162 Cal.App.4th 712, 717 [accepting Attorney General's concession regarding necessity of remand on issue of fines and fees].)

⁴ Regarding the March 12, 2012, "Promise to Appear/CSB Referral" form, the Attorney General admits the clerk has no power to impose fees the trial court did not order. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 386-389.) She questions whether this document has any legal effect, however, because it is unsigned and the record does not show that Anderson is required to pay amounts not imposed by the trial court itself. We trust the trial court will clarify this issue on remand as well.

Although the Attorney General agrees the matter must be remanded, she contends that the trial court's failure to impose the booking fee required by Government Code section 29550 makes Anderson's sentence illegal and that this fee must be imposed on remand. Anderson disagrees. She argues that the booking fee may only be imposed "based on . . . her ability to pay" (Gov. Code, § 29550, subd. (d)(2)) and that the trial court implicitly determined she was not able to pay it when it failed to include the booking fee in the list of fees it imposed. In support of this argument, she points out that the court waived imposition of \$600 in attorney fees and the \$560 fee for the pre-sentence report, presumably because it found Anderson could not afford to pay them. Furthermore, Anderson notes that the prosecutor did not object in the trial court to the failure to impose the booking fee. She therefore asserts that the issue has been forfeited.

We agree with Anderson that the prosecution's failure to object in the trial court has forfeited this issue on appeal. (See *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518-1519 [where prosecution did not object to trial court's failure to state reasons for not imposing drug program fee, the Attorney General could not raise issue on appeal].) Even if the issue has not been forfeited, it lacks merit. Anderson is correct that imposition of the booking fee requires "a finding, whether express or implied, of the defendant's ability to pay." (*People v. Pacheco, supra*, 187 Cal.App.4th at p. 1400.) Government Code section 29550 does not require the trial court to state this finding on the record, and the trial court in this case made no express finding. However, where the record is silent, we may assume the trial court exercised its discretion when it declined to impose the fee. (See *People v. Martinez, supra*, 65 Cal.App.4th at pp. 1517-1518, & fn. 2 [court's failure to impose mandatory drug program fee and other fees implied a determination that court found defendant unable to pay].) Thus, contrary to the Attorney General's contention, the failure to impose the fee does not render Anderson's sentence illegal. (See *id.* at p. 1518 [judgment failing to impose drug program fee "is not a legally unauthorized judgment"].)

II. *Because the Solano County Juvenile Court's Orders Were Not Before the Sentencing Court, We Must Remand Condition No. 20 for Reconsideration.*

Anderson challenges Condition No. 20, which requires her to “[f]ollow all court orders presently in effect in Solano County Child Protective Services Case.” She does so on two grounds. First, she contends the condition is legally unauthorized. Anderson argues that probation may not be conditioned upon her compliance with a reunification plan in a juvenile dependency proceeding, “because the child-focused and voluntary statutory scheme around reunification is incompatible with the defendant-focused and mandatory nature of probation conditions.” Second, she asserts that the condition is unconstitutionally vague, because it is unclear whether it requires her only to respect the custody decisions of the Solano County juvenile court or whether it purports to compel her compliance with the otherwise voluntary components of a reunification plan.

A. *Standard of Review*

“Generally, ‘[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.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

B. *The Parties' Contentions*

In support of her claim that the challenged condition is legally unauthorized, Anderson relies on *Nolan W.*, *supra*, 45 Cal.4th 1217. In that case, the California Supreme Court concluded that “the juvenile court may not use its contempt power to incarcerate a parent solely for the failure to satisfy aspects of a voluntary reunification case plan.” (*Id.* at p. 1224.) In reaching this conclusion, the Supreme Court explained that a parent’s participation in a reunification plan is voluntary. (*Id.* at pp. 1233-1234.)

The voluntary nature of reunification makes sense, the court explained, because “[w]hile reunification is the preferred outcome when it serves the interests of both parent and child, no interest is well served by compelling inadequate parents to shoulder responsibilities they are unwilling to accept or unable to discharge.” (*Id.* at p. 1234.) Under the statutory scheme governing juvenile dependency, “the Legislature envisions the punishment for noncompliance with reunification services to be loss of those services and, ultimately, loss of parental rights.” (*Id.* at p. 1235.) The court was unable to find any authority for “the notion that juvenile courts may force compliance with reunification orders by punishing parental lapses with contempt proceedings and incarceration.” (*Id.* at p. 1236.) It noted that reunification plans often require parents to adhere to a visitation schedule and that if juvenile courts could punish noncompliant parents with contempt, a parent could be fined or incarcerated for such a violation, a result “clearly inconsistent with the statutory scheme governing reunification.” (*Ibid.*, fn. omitted.)

Although she recognizes the factual and legal distinctions between her case and *Nolan W.*, Anderson nevertheless reasons that the trial court could not legitimately condition its grant of probation on compliance with a reunification plan. She correctly notes that the juvenile court has jurisdiction over her child, not her, and that her participation in reunification is entirely voluntary. (*Nolan W.*, *supra*, 45 Cal.4th at p. 1232 [“in dependency proceedings, the juvenile court’s jurisdiction is over the *minor*: It is the abused or neglected minor who becomes a ward of the court, not the deficient parent”]; see Welf. & Inst. Code, § 361.5, subd. (b)(14) [parent may advise court she is not interested in receiving reunification services].) Anderson asserts that the juvenile court could intervene to protect her daughter on grounds that would not appropriately support a violation of probation. In her reply brief, she points out the Attorney General’s failure to cite any authority for the proposition “that allows a criminal court to simply delegate its authority for setting the parameters of probation to a court that does not have jurisdiction over the probationer.”

The Attorney General emphasizes the distinctions between *Nolan W.* and this case. In particular, she observes that *Nolan W.* differentiated between probation violation

proceedings, in which the probationer is under the criminal court's jurisdiction, and summary contempt proceedings, in which the penalty for failure to comply is denial of reunification. The Attorney General appears to argue that any violation of probation in this case would stem not from the juvenile court's actions, but rather "from the actions of the court acting in appellant's criminal case." On the substance of Condition No. 20, the Attorney General contends the trial court could reasonably conclude that since Anderson involved her daughter in the offenses, there "would be a need to insure, as a condition of probation, that [Anderson] take steps that would present less risk of reoffending should she regain custody [of her daughter], and that complying with orders of the dependency court would lessen that risk." At oral argument, the deputy attorney general asserted Anderson had effectively volunteered to add the provisions of the reunification plan to her conditions of probation when her trial counsel told the court Anderson intended to comply with the terms of the Solano County juvenile court's orders.

C. *The Record Does Not Permit Informed Appellate Review.*

The parties have not cited to us any case in which a criminal court has conditioned probation upon the probationer's compliance with a reunification plan entered in a juvenile dependency proceeding to which the probationer is a party, and our own research has disclosed none. The only cases we have found in which probation has been revoked based on violation of an order in a separate proceeding are *People v. Hall* (1990) 218 Cal.App.3d 1102 (*Hall*) and *People v. Ayub* (1988) 202 Cal.App.3d 901 (*Ayub*). Neither of these cases offers much guidance.⁵ In light of the inadequacy of the record, however, we need not resolve the legal issues Anderson raises.

⁵ In *Hall, supra*, 218 Cal.App.3d 1102, a probationer was found to have violated a condition of his probation requiring that he obey all laws when he violated a stay-away order entered in a separate domestic violence case. (*Id.* at p. 1104, fn. 2.) In *Hall*, however, at the probation revocation hearing, the court found the probationer had committed violations of the Penal Code sections 594 and 602, prohibiting misdemeanor trespass and vandalism. (*Hall*, at p. 1104, fn. 2.) In *Ayub, supra*, 202 Cal.App.3d 901, a probationer who had been convicted of passing checks with insufficient funds committed a misdemeanor offense while on probation. (*Id.* at p. 903.) Her felony probation was

The parties agree that the juvenile court’s orders were not made part of the record. Indeed, insofar as we can discern, it does not appear that at the sentencing hearing, the trial court was presented with the orders entered in the Solano County juvenile dependency case. In fact, in the court below, Anderson’s counsel objected to inclusion of Condition No. 20 on the specific ground that the Solano County juvenile court’s orders were not before the sentencing court. Defense counsel explained that the reason for her objection was “that this court must determine that every term is reasonably related, and the court can’t determine that if the court doesn’t have those terms before the court.”

If, as it appears from the record, the trial court did not know the terms of Anderson’s reunification plan, it could not have determined whether those terms are reasonably related to future criminality. (Cf. *In re Gonzales* (1974) 43 Cal.App.3d 616, 620 [court’s exercise of discretion in probationary matters “is a judicial power manifested through the judge’s personal examination of the case before him”].) Likewise, because we do not know the content of the orders, it is impossible for *us* to make any judgment about them. Without knowing the terms of Anderson’s reunification plan, we cannot say whether those terms have any relationship to her offenses. (See *People v. Olguin*, *supra*, 45 Cal.4th at p. 379.) Nor can we determine whether they involve conduct which is not itself criminal, although we note it is common for reunification orders to govern conduct that is certainly not criminal, such as visitation with the minor and attendance at parenting classes. (See *Nolan W.*, *supra*, 45 Cal.4th at p. 1236 [visitation].) Finally, although probation conditions may be valid even if they have no relationship to the probationer’s crime and involve conduct that is not itself criminal, such conditions must still be “reasonably related to preventing future criminality.” (*People v. Olguin*, *supra*, 45 Cal.4th at p. 380.)

revoked and modified with a new condition that she pay restitution to the victims of the misdemeanor offense. (*Id.* at p. 906.) This condition was upheld in part because of the probationer’s felony conviction and the incidents for which she was required to pay restitution involved the same type of *criminal* conduct—writing bad checks. (*Ibid.*)

There is no evidence in the record that Anderson’s reunification plan was put before the trial court at sentencing. Because the reunification plan is not part of the record on appeal, the record does not permit informed appellate review. Since we must remand the matter for clarification of the fees the trial court intended to impose on Anderson, we will direct the trial court on remand to reconsider Condition No. 20 after it has had the opportunity to review the actual terms of the orders entered in the Solano County juvenile dependency case.

DISPOSITION

Probation Condition No. 20 is vacated and the matter is remanded for reconsideration of that condition, as well as for reconsideration of the fines and fees to be imposed on Anderson. In all other respects, the sentence is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.