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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.

MARK BRANDON ARROYO,

Defendant and Appellant.

A135799

(Humboldt County  
Super. Ct. No. CR1103904)

Defendant Mark Brandon Arroyo pleaded guilty to two counts in connection with a high-speed police chase on a rural road through Humboldt and Mendocino Counties. He argues on appeal that a fine imposed on one of the counts should have been stayed under Penal Code section 654<sup>1</sup> because it amounted to multiple punishment for an indivisible course of conduct. We remand to the trial court for further proceedings on this issue because the appellate record is unclear. We do not reach the merits of Arroyo's second argument, that the trial court impermissibly imposed a probation condition requiring him to obtain permission before leaving Humboldt County, because the issue was forfeited.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND<sup>2</sup>

Around 10 p.m. on September 13, 2011, a California Highway Patrol officer saw Arroyo cross a double yellow line as he drove a pickup truck westbound on Briceland Road in Humboldt County. The officer initiated a traffic stop for a violation of Vehicle Code section 21460, subdivision (a), which prohibits crossing double parallel solid lines. The officer pulled behind Arroyo's vehicle and turned on his patrol car's flashing red lights. Arroyo first pulled over but, instead of stopping, drove back onto the road and kept going, even after the officer turned on his siren, activated more flashing lights, and directed Arroyo on a public address speaker to pull over.

Arroyo led the officer, as well as an officer who was present in another car at the original traffic stop, and a third officer who later joined the pursuit, on a 23-minute chase, traveling 22 miles on a winding, rural mountain road. Arroyo traveled at different speeds during the chase, but was clocked at one point driving 60 miles per hour through a town with a speed limit of 30 miles per hour. The pursuit ultimately ended on an unpaved road in Mendocino County. A preliminary alcohol screening device measured Arroyo's blood alcohol level at 0.113 percent.

Arroyo was charged by information with a felony count of evading a peace officer with willful disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)—count 1) and a misdemeanor count of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)—count 2). The information included another count and a special allegation that were both dismissed under a negotiated disposition in which Arroyo pleaded guilty to count one (evading a peace officer) as well as one count of alcohol-related reckless driving (Veh. Code, §§ 23103, 23103.5), a lesser included offense of count two.

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<sup>2</sup> The facts are taken from the preliminary hearing transcript, which constitutes a factual basis for Arroyo's plea under the parties' stipulation.

The probation department recommended that Arroyo be granted three years' probation, subject to 24 conditions, two of which are challenged on appeal. The first of these challenged conditions recommended that Arroyo be ordered to pay a "[c]ourt fine" of \$600 under section 672, which authorizes the trial court to impose a fine on an offender convicted for any crime punishable by imprisonment, where no fine is otherwise prescribed by law. The second challenged condition recommended that Arroyo be ordered not to leave Humboldt County, the county in which he resided, without his probation officer's permission.

At the sentencing hearing, the judge stated that he had read and considered the probation officer's report, and intended to adopt the probation department's recommendation to place Arroyo on probation for three years and to impose the proposed terms and conditions *as to count one*. Defense counsel objected to some of the department's proposed conditions, but not the two at issue in this appeal. The trial court rejected counsel's arguments, placed Arroyo on three years' probation, and adopted all of the probation department's proposed conditions as to count one. Before imposing the conditions, the following exchange took place:

"[THE COURT]: Mr. Arroyo, have you read the proposed terms of probation?"

"THE DEFENDANT: Yes, I have.

"THE COURT: Do you understand them?"

"THE DEFENDANT: Yes, I do.

"THE COURT: Do you have any questions about any of them?"

"THE DEFENDANT: No, I don't.

"THE COURT: Do you accept those as the terms and conditions of your probation?"

"THE DEFENDANT: Yes, I do."

The trial court's one-page form minute order states, under a list titled "FINES/FEES," that a "[c]ourt fine" of \$600 was imposed as to count one. Presumably,

this was a reference to the \$600 proposed court fine listed in the probation report, as the fine was not specifically mentioned at the sentencing hearing.

As to count two, the court stated, without elaboration, at the beginning of the sentencing hearing that it intended to impose “a standard wet reckless sentence.” After the parties’ arguments regarding probation conditions and the trial court’s imposition of probation on count one, the trial court placed Arroyo on three years’ conditional, revocable release on count two. The court then stated: “Terms are you are to pay a fine in the amount of \$1,434. There will be a \$120 reduction if you complete the MADD Victims panel.” It is unclear how the court arrived at the figure of \$1,434, as this amount does not appear in the probation report and was not mentioned at the sentencing hearing before the fine was imposed.

The trial court’s minute order on count two appears on a two-page form that is different from the one-page form used for count one. A box is checked next to the following statement: “Court fine of \$[1,434<sup>00</sup> handwritten]; Suspend \$[left blank]. Fine includes Security Surcharge, Criminal Conv. Assessment, and all penalties, assessments and fees required except as stated below.” The minute order repeats the trial court’s comments at the hearing that compliance with the “MADD Program” would result in a \$120 reduction in the fine. Arroyo timely appealed.

## II. DISCUSSION

### *A. The Trial Court Did Not Clearly Violate Section 654.*

Arroyo first argues that the \$1,434 fine imposed on count two must be stayed under section 654. Section 654, subdivision (a) provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The statute “precludes multiple punishments not only for a single act, but also for an indivisible course of conduct. [Citation.] ‘The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more

than one statute and thus constitutes more than one crime.’ [Citation.]” (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626.) Fines that are punitive in nature are subject to section 654. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 865, 869 [criminal laboratory analysis fee punitive in nature and thus subject to § 654]; *Tarris, supra*, at p. 628 [Health & Saf. Code, § 25189.5, subd. (e) fine punitive in nature and thus subject to § 654, even if imposed as condition of probation].)

Section 654’s ban on multiple punishments does not apply, however, when the criminal acts committed during the single course of conduct serve separate criminal objectives. (*People v. Davey* (2005) 133 Cal.App.4th 384, 390.) “ ‘The question whether [Penal Code] section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.’ [Citation.] The court’s findings may be either express or implied from the court’s ruling. [Citation.] In the absence of any reference to Penal Code section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective. [Citations.]” (*People v. Tarris, supra*, 180 Cal.App.4th at pp. 626-627.)

If we knew that the trial court here imposed punitive fines on the same grounds for both counts one and two, we would conclude that the fines were subject to section 654, because Arroyo’s acts were committed during a single course of conduct. (*People v. Tarris, supra*, 180 Cal.App.4th at p. 628.) The preliminary hearing transcript reveals that Arroyo’s convictions for evading a peace officer and alcohol-related reckless driving both arose out of his single course of conduct in leading police on a chase while intoxicated, and the crimes he committed did not serve separate criminal objectives. (*People v. Davey, supra*, 133 Cal.App.4th at p. 390.) We disagree with respondent’s argument that Arroyo’s reckless driving conviction arose out of the “distinct act” of crossing the double yellow line. When the officer first saw Arroyo, he did not observe Arroyo speeding or doing anything wrong, other than crossing the yellow line. Arroyo pleaded guilty to a violation of Vehicle Code section 23103, which makes it unlawful to

drive on a highway in “willful or wanton disregard for the safety of persons or property.” (Veh. Code, § 23103, subd. (a).) In holding Arroyo to answer on the charges against him, the trial court specifically found that Arroyo’s actions in leading officers on a nearly 22-mile chase posed “wanton disregard for the safety of others, both person, property and the like,” with no suggestion that crossing a double line posed such serious safety concerns. It is clear that Arroyo’s convictions arose out of a single course of conduct.

But the record is ambiguous on whether the fines imposed for counts one and two were punitive and imposed on the same grounds. The \$600 “court fine” on count one was apparently imposed under section 672, as recommended by the probation department. But on count two, no statutory basis for the “court fine” imposed was specified, either at the sentencing hearing or on the form minute order. Arroyo simply asserts that the fine constituted punishment, without further analysis. Although fines arising from convictions generally are considered punitive in nature (*People v. Alford* (2007) 42 Cal.4th 749, 757), we note that the fine imposed on count two included a “*Security Surcharge*.” (Italics added.) The imposition of a court security fee serves a nonpunitive purpose, and therefore such a fee is not subject to section 654. (*Alford* at pp. 757-758.)

Even if the fine on count two was punitive, there are other differences between the two fines that call into question whether they were imposed on the same grounds. The fine imposed on count two included “Criminal Conv. Assessment, and all penalties, assessments and fees required by law,” while the fine imposed on count one did not. The fine imposed on count two would be reduced if Arroyo completed a Mothers Against Drunk Driving program, while the fine imposed on count one would not. Moreover, while Arroyo is technically correct that section 654 was not specifically mentioned at the sentencing hearing, the trial court was clearly aware of the prohibition against multiple punishment for a single act. When addressing count two, the court stated, “I am not imposing a restitution fine because *that was already imposed on Count One and there’s one per case.*” (Italics added.)

Under these particular circumstances, we find it appropriate to remand the matter to the trial court to clarify the grounds upon which it imposed the two court fines, and to stay one of the fines under section 654 if the trial court determines that the fines were punitive and based on the same grounds. (§ 1260 [appellate court may remand “for such further proceedings as may be just”]; see also *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1255 [trial court may, but is not required to, exercise its discretion to modify sentence after possible error identified on appeal].) We note that if the trial court concludes that error occurred, it is not required to stay the \$1,434 fine on count two, as Arroyo urges, but may instead stay the \$600 fine imposed on count one, if the court’s factual findings warrant such an approach. (§ 654, subd. (a) [act shall be punished under provision that provides for the *longest potential term*].)

*B. Arroyo Forfeited Objections to Travel Restriction.*

Arroyo also challenges the probation condition that he not leave Humboldt County without his probation officer’s permission, on both unreasonableness and constitutional grounds. Trial courts have broad discretion under section 1203.1 to impose conditions of probation to promote rehabilitation and to protect public safety. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Appellate courts generally review probation conditions for abuse of discretion. (*Ibid.*) We agree with respondent, however, that Arroyo forfeited his challenge by failing to object below.

In general, a condition of probation will be held invalid as unreasonable if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not in itself criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin, supra*, 45 Cal.4th at p. 379; *People v. Lent* (1975) 15 Cal.3d 481, 486.) Failure to timely challenge a probation condition on these grounds forfeits the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) “A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised

in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]” (*Id.* at p. 235.)

This forfeiture rule has particular force in this case because Arroyo not only failed to object to the condition that he obtain permission before leaving Humboldt County, but he also specifically told the trial court that he understood and accepted the probation terms. We therefore do not reach Arroyo’s argument that the probation condition barring him from leaving Humboldt County without permission is invalid under the factors set forth in *Olguin, supra*, 45 Cal.4th 375, and *Lent, supra*, 15 Cal.3d 481.

For similar reasons, we do not reach Arroyo’s alternative argument that the probation condition unreasonably infringes on his constitutional right to travel. (E.g., *In re White* (1979) 97 Cal.App.3d 141, 148 [probationer has constitutional right to intrastate travel].) “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “[G]enerally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction.” (*Id.* at p. 889.) Arroyo failed to object to the travel restriction even though he had notice of it before the sentencing hearing and had ample opportunity to challenge it during the hearing.

We recognize that in some circumstances a failure to object to a probation condition on constitutional grounds does not forfeit the issue for appellate review. “In common with a challenge to an unauthorized sentence that is not subject to the rule of forfeiture, a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court can be said to present a pure question of law. Correction on appeal of this type of facial constitutional defect in the relevant probation condition, similar to the correction of an unauthorized sentence on appeal, may ensue from a reviewing court’s unwillingness to ignore ‘correctable legal error.’ [Citation.]”

(*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887, italics omitted.) Still, such an exception is not necessarily applicable when there are “ ‘circumstances that do not present “pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.” [Citation.] In these circumstances, “[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court.” [Citation.]’ [Citation.]” (*Id.* at p. 889.)

We disagree with Arroyo’s contention, raised for the first time in his reply brief, that his constitutional challenge presents a pure question of law. In stark contrast with two similar cases that address restrictions on the right to travel, the record in this case lacks evidence of the specific hardships, if any, that will be imposed on Arroyo as a result of the condition. In *People v. Smith* (2007) 152 Cal.App.4th 1245, a probation condition barred the defendant from leaving Los Angeles County for any reason whatsoever. (*Id.* at p. 1248.) At the time, this condition was being imposed on all defendants convicted of a registerable sex offense. (*Ibid.*) The defendant filed a motion to modify the condition after his employer asked him to occasionally travel out of the county during the day. (*Id.* at pp. 1248-1249.) The trial court denied the modification request, but the appellate court reversed and concluded that the condition impermissibly infringed on the defendant’s constitutional right to intrastate travel. (*Id.* at pp. 1249-1251.) In doing so, the appellate court noted that the constitutional right to intrastate travel is not absolute. (*Id.* at p. 1250.) The condition was found to be “constitutionally infirm,” in part because it failed to take into consideration defendant’s *particular circumstances*. (*Ibid.*)

Here, the record is silent as to how Arroyo might be adversely affected by his travel restriction. The probation report stated that Arroyo had lived in Humboldt County since 1996 and that he planned to continue living there. He is a self-employed excavator, and there is no indication that he is required to travel outside the county for his work. Even if there was evidence that he was required to work outside the county, we would be reluctant to strike the travel restriction altogether. Unlike the defendant in *Smith*, *supra*, 152 Cal.App.4th 1245, Arroyo is able to ask for permission to leave the county under the express terms of his probation condition, and there is no reason on this record to believe

that permission would be unreasonably withheld. In remanding the matter to the trial court, the appellate court in *Smith* recognized that some travel restrictions may be proper. It remanded the case “to permit the trial court to fashion a less restrictive ban on out-of-county travel than that imposed by the probation department’s regulation but subject to whatever specific travel limitations the court finds are appropriate in this case or, in the alternative, to eliminate the travel restriction with regard to [defendant’s] work.” (*Id.* at p. 1252.)

Arroyo’s reliance on *In re White, supra*, 97 Cal.App.3d 141 is also unavailing.<sup>3</sup> In *White*, a defendant convicted of soliciting an act of prostitution was banned as a condition of probation from specified areas of Fresno known for prostitution activity. (*Id.* at pp. 143-144.) The defendant at first accepted the condition, but later filed a petition for a writ of habeas corpus to challenge it. (*Ibid.*) At the hearing on the defendant’s writ petition, the trial court considered statistics on prostitution in Fresno, the effect of the travel restriction on the defendant, and evidence showing that similar restrictions on other prostitutes simply caused prostitution activity to move to other areas. (*Id.* at pp. 144-145.)

The appellate court concluded both that the probation condition was unreasonable and that it impermissibly infringed on the defendant’s constitutional right to intrastate travel. (*In re White, supra*, 97 Cal.App.3d at p. 148.) But in doing so, and like the appellate court in *Smith*, it did not simply strike the condition. (*White* at p. 151.) Instead, it directed the trial court to either eliminate the condition or to modify it, such as by establishing reasonable hours when the defendant could enter the restricted area for specific and legitimate purposes. (*Id.* at p. 151.) In other words, the appellate court

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<sup>3</sup> Arroyo also relies on *People v. Bauer* (1989) 211 Cal.App.3d 937, which struck a condition that a defendant’s residence be subject to his probation officer’s approval, concluding that the condition impinged on the defendant’s constitutional right to travel and freedom of association. (*Id.* at pp. 943-945.) We note that the issue of whether a probation condition requiring a defendant to reside at a residence approved by the probation officer and not move without the officer’s approval is currently before the California Supreme Court. (*People v. Schaeffer* (2012) 208 Cal.App.4th 1, review granted Sept. 10, 2012, S205260.)

declined to strike or modify the condition without the development of a full record specific to the particular defendant (cf. *In re Sheena K.*, *supra*, 40 Cal.4th at p. 887), as Arroyo asks us to do. (*White* at pp. 151-152.)

Because the sentencing record in this case lacks any information on how the restriction affects Arroyo's need to travel out of the county, we conclude that it would be improvident to reach the merits of Arroyo's constitutional challenge. Arroyo nonetheless has a remedy. He may petition the trial court to modify the probation condition, provide evidence of his particular circumstances, and argue why the condition is unreasonable or impermissibly interferes with his constitutional rights. (§ 1203.3 [power to modify terms of probation]; *People v. Smith*, *supra*, 152 Cal.App.4th at p. 1249.)

III.  
DISPOSITION

The case is remanded to the trial court for further proceedings consistent with this opinion. The trial court is directed to clarify the basis (or bases) for the court fines imposed on counts one and two, and to stay one of the fines if appropriate under section 654. In all other respects, the trial court's order is affirmed.

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Humes, J.

We concur:

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Ruvolo, P. J.

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Rivera, J.