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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS MONTANO-TOPETE,

Defendant and Appellant.

A139882

(San Mateo County
Super. Ct. No. SC076493)

The People prosecuted Marcos Montano-Topete for killing his neighbor’s dog. He was charged with two felony counts, one under Penal Code¹ section 597, subdivision (a), and the other under subdivision (b). A jury convicted him on both counts. On appeal, Montano-Topete contends that a single act cannot constitute a violation of both subdivisions (a) and (b) of section 597. We agree and reverse his conviction under subdivision (b).

Montano-Topete was sentenced to a term of probation and challenges three of his conditions of probation on appeal. We agree with Montano-Topete that, in his case, a requirement that he abstain from the use of alcohol is unreasonable. We also agree that a requirement that he “stay away” from animals is unconstitutionally vague. However, we conclude that Montano-Topete forfeited his challenge to a search condition because he failed to object to the condition in trial court.

¹ Unless otherwise indicated, further statutory citations are to the Penal Code.

BACKGROUND

I. *Factual Background*

Montano-Topete lives in Redwood City with his wife and three children. The family owns a small dog named Cosita. Martha Barragan lives next door with her son and her daughter, Nataly Salazar. The Barragan family had an unneutered male dog named Globsis. Globsis had mated with Cosita, resulting in three separate pregnancies.

On March 26, 2012, Globsis escaped the Barragan home when Salazar took some trash outside. Cosita was tied to the Montano-Topeteses' kitchen door handle. Montano-Topete's wife called to him that the dogs were copulating. He went outside, observed the dogs mating, picked up a brick, and threw it at Globsis from about five feet away, hitting him.²

Globsis fell to the sidewalk. Montano-Topete saw that Globsis was hurt and he told Salazar so that she could get the dog to the veterinarian. Salazar testified that he told her, "I hit your dog upon the head," and pointed in Globsis's location. Salazar told Montano-Topete that if something bad happened to Globsis, she would call the police. Montano-Topete replied, "Go ahead. They're not going to do anything to me."

Salazar found Globsis on the ground with his legs up, shaking, and bleeding about the nose and eyes. She called 911. The police officer who arrived told Montano-Topete's wife to take Salazar, her brother, and Globsis to the veterinarian. Later that day the animal hospital called and told Salazar that Globsis's "cranium was broken into a lot of little pieces and part of his back." Salazar gave permission for the hospital to euthanize Globsis. A veterinarian testified that Globsis would not have survived his injuries.

² A veterinarian testified that he did not believe that Globsis's injuries could be caused by simply throwing the brick. He believed that "you would have to almost be hol[d]ing the dog or very close to the dog and make a very forceful blow. . . . I think the only way something like this would fracture the skull is if . . . the dog was standing still, one was holding the dog and it had to be very forceful."

II. Procedural Background

On September 18, 2012, the People filed an information charging Montano-Topete with the malicious and intentional killing of Globsis, in violation of section 597, subdivision (a) (count 1) and with cruelly killing Globsis, in violation of section 597, subdivision (b) (count 2). Both counts were charged as felonies.

On February 8, 2013, a jury found Montano-Topete guilty on both counts. On August 1, 2013, the court sentenced Montano-Topete to three years of probation, conditioned on serving one year in county jail, with total credits of 352 days. The sentence on count 2 was stayed, pursuant to section 654.

Montano-Topete timely filed a notice of appeal on September 27, 2013.

DISCUSSION

I. Conviction under Section 597, Subdivision (b)

Montano-Topete contends that he was wrongfully convicted on two counts, for violating both subdivisions (a) and (b) of section 597, arguing that the conviction on one of the two counts must be reversed. He presents three alternative arguments in support of this contention: (1) section 597, subdivision (b) applies only in cases that are not provided for under subdivision (a);³ (2) section 597, subdivision (b) applies only to animals under a defendant's care and control; and (3) the violation of section 597, subdivision (a) was a lesser included offense of the violation under subdivision (b). We agree with Montano-Topete's first argument and do not reach the others.

³ We note that Montano-Topete's first argument was made under the heading that applies to the second argument, thus violating California Rules of Court, rule 8.204(a)(1)(B), requiring that each point be made under a separate heading or subheading summarizing that point. This noncompliance with the rule is undoubtedly the reason that the People have failed to address the first argument. We exercise our discretion to disregard the noncompliance, because the issue is clear and additional briefing is not necessary. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

Section 597, subdivisions (a) and (b) provide, in relevant part: “(a) Except as provided in subdivision (c)^[4] of this section or Section 599c,^[5] every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of a crime punishable pursuant to subdivision (d). [¶] (b) Except as otherwise provided in subdivision (a) or (c), every person who . . . cruelly beats, mutilates, or cruelly kills any animal . . . is . . . guilty of a crime punishable pursuant to subdivision (d).” Section 597, subdivision (d), provides that a violation of subdivision (a), (b), or (c) may be charged as either a felony or a misdemeanor.

The question whether a single act may support convictions under both section 597, subdivision (a) and subdivision (b) is one of first impression. We find no prior cases involving convictions under both subdivisions for a single act.

When interpreting statutory language, “[w]e begin with the fundamental rule that our primary task is to determine the lawmakers’ intent.” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) “Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction.” (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340.) Here, there is no need for judicial construction.

Because section 597, subdivision (b) begins with the words “[e]xcept as otherwise provided in subdivision (a) or (c),” the statute clearly and unambiguously expresses a legislative intent that, whatever the definitional overlap between subdivisions (a), (b), and (c), a single act cannot simultaneously be a crime pursuant to more than one of the three

⁴ Section 597, subdivision (c) applies to the maiming, mutilation, or torture of endangered species and other protected animals.

⁵ Section 599c provides: “No part of this title shall be construed as interfering with any of the laws of this state known as the ‘game laws,’ or any laws for or against the destruction of certain birds, nor must this title be construed as interfering with the right to destroy any venomous reptile, or any animal known as dangerous to life, limb, or property, or to interfere with the right to kill all animals used for food, or with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state.”

subdivisions. If the act is a crime pursuant to subdivision (a), then it cannot also be a crime pursuant to subdivision (b), which applies only in cases not covered by subdivision (a) or (c). Accordingly, we reverse Montano-Topete's conviction on count 2.⁶ Because the sentence on count 2 was stayed, pursuant to section 654, the reversal of Montano-Topete's conviction on count 2 does not affect his term or conditions of probation.

II. *Conditions of Probation*

Montano-Topete challenges three of the conditions of probation imposed by the trial court. As stated in the clerk's minutes of the sentencing hearing, these three conditions are (1) "Defendant shall abstain from use and possession of intoxicating beverages and controlled substances" (the alcohol condition); (2) "Defendant shall submit to search and seizure of his/her person, place of residence or area under his/her control, or vehicle, by any probation officer or peace officer, during the day or night, with or without his/her consent, with or without a search warrant, and without regard to probable cause" (the search condition); and (3) "Defendant is to stay away from, not harass, or stalk animals" (the animal condition). Montano-Topete challenges the first condition only as it relates to alcohol use and the third condition only with regard to the requirement that he "stay away from" animals.

At the sentencing hearing, the court did not orally deliver the alcohol condition.⁷ The animal condition, as actually delivered by the court, was "to stay away from and not take, transfer, conceal, molest, attack, strike, threaten, harm or otherwise dispose of an

⁶ It was not error to charge Montano-Topete with violations under both subdivisions of section 597, but the court should have instructed the jury that it could find Montano-Topete guilty on count 2 only if it found him not guilty, or was unable to reach a verdict, on count 1.

⁷ Neither party has noted in their briefing that the probation conditions as delivered orally differ from the probation conditions listed in the clerk's minutes. Thus, Montano-Topete fails to raise the question, as he might have, whether he is actually subject to the alcohol condition. Because Montano-Topete does not raise the issue, we do not address it, but we do consider the fact that the alcohol condition was not delivered orally when dealing with the question of whether the reasonability of the alcohol condition is an issue preserved for appeal.

animal.” The search condition, as orally delivered by the court, did not differ materially from the condition as stated in the clerk’s minutes. Montano-Topete did not object to the probation conditions as delivered orally by the trial court and personally affirmed that he understood and accepted those conditions.

A. Legal Standard and Principles

A trial court has the discretion, in granting probation, to impose “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.” (§ 1203.1, subd. (j).)

The trial court’s discretion in setting conditions of probation is not without limit. Under the void for vagueness doctrine, based on the due process concept of fair warning, a condition “ ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.’ ” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)). The vagueness doctrine invalidates a condition of probation that is “ ‘ “ ‘so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” [Citations.]’ ” (*Ibid.*) “By failing to clearly define the prohibited conduct, a vague condition of probation allows law enforcement and the courts to apply the restriction on an ‘ “ ‘*ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ ” ’ ” (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

A probation condition must also avoid being unconstitutional because it is overbroad. “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.” (*Sheena K., supra*, 40 Cal.4th at p. 890.)

The contest of a probation condition as unconstitutionally vague or overbroad presents a question of law, which we review *de novo*. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 765.) A probationer might also contest a probation condition as

unreasonable under the circumstances. In that case we review for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*)). When reviewing for abuse of discretion we will not generally hold the condition 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.]’ ” (*Ibid.*)

When a probation condition is contested as unreasonable, the forfeiture rule applies—the issue is not preserved for appeal unless the probationer objects to the condition in the trial court. (*Sheena K., supra*, 40 Cal.4th at p. 885; *People v. Welch* (1993) 5 Cal.4th 228, 234-235.) This is because “the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case.” (*Sheena K.*, at p. 885.) On the other hand, failure to object on the ground that a condition is vague or overbroad does not forfeit the issue: “[A]n appellate claim—amounting to a ‘facial challenge’—that phrasing or language of a probation condition is unconstitutionally vague and overbroad . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court.” (*Ibid.*)

B. *The Alcohol Condition*

Montano-Topete maintains that the trial court abused its discretion by requiring him to abstain from the use of alcohol because such a condition is unreasonable in his case. We agree.

The People first argue that Montano-Topete has failed to preserve this issue for appeal by failing to object to the alcohol condition in the trial court. However, as we have noted, the alcohol condition was not delivered orally and appears only in the clerk’s minutes of the sentencing hearing. Moreover, an alcohol condition was not among the probation conditions recommended by the probation department in Montano-Topete’s

case. Because the record presents no reason to believe that Montano-Topete had notice of an alcohol condition or an opportunity to object to it, the issue is not waived on appeal.

To determine whether the court abused its discretion, we consider whether the alcohol condition has no relationship to Montano-Topete's crime, whether it relates to conduct which is not in itself criminal, and whether it requires or forbids conduct that is not reasonably related to future criminality.

Alcohol use by an adult is not in itself criminal and there was no evidence that Montano-Topete killed Globsis while under the influence of alcohol or another drug.⁸ Nor did any other evidence relate the use of alcohol to Montano-Topete's crime. The People do not dispute this.

Where Montano-Topete and the People differ is whether the alcohol condition forbids conduct that is not reasonably related to future criminality. The People argue: "It is clear from the evidence that, in committing the offense, [Montano-Topete] lacked any self control, restraint, or discretion. Indeed, the offense was marked by rash conduct and a complete lack of self-discipline. Even if appellant was not intoxicated, the trial court could certainly conclude that consumption of alcohol could lead to another loss of self-control."

The People's argument goes too far. Almost any knowing violation of the law could be characterized as demonstrating a lack of self-control or restraint. Many offenses, without any relationship to drug or alcohol use, are marked by rash conduct and demonstrate a lack of self-discipline. Under the People's argument, the alcohol condition would almost always be reasonable and would seem to obviate the rule that "[w]hether an alcohol-use condition of probation is an abuse of the trial court's discretion is determined by the particular facts of each case." (*People v. Lindsay, supra*, 10 Cal.App.4th at p. 1644.)

⁸ A condition restricting the use of alcohol has been found reasonable when use of another drug is related to the defendant's crime. (See, e.g., *People v. Smith* (1983) 145 Cal.App.3d 1032, 1035; *People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644-1645.)

Here, the probation report states that Montano-Topete has no prior criminal record. Montano-Topete reported to the probation officer that “he never had a need to experiment with any drugs, has never tried it and has not been pressured into using. In terms of alcohol, he reports limited use, at most, one beer per month.” The record provides no reasonable cause to believe that Montano-Topete’s modest use of alcohol, which was unrelated to the killing of Globsis, would be related to future criminality. Accordingly, we conclude that the alcohol condition was not reasonable in Montano-Topete’s case.

We strike the words “intoxicating beverages and” from the probation condition “Defendant shall abstain from use and possession of intoxicating beverages and controlled substances.”⁹

C. The Search Condition

Montano-Topete maintains that the search condition is unreasonable and violates his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

We reject Montano-Topete’s constitutional challenge to the search condition. “[W]e have observed that probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions.” (*Olguin, supra*, 45 Cal.4th 375, 384.)

We also reject Montano-Topete’s reasonability challenge, because he failed to object to the search condition as unreasonable in the trial court, forfeiting the issue on appeal. Anticipating this conclusion, Montano-Topete urges that his counsel’s failure to make the objection constitutes ineffective assistance of counsel.

“If . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate court must reject the claim of ineffective assistance

⁹ Even though we amend this probation condition, we reiterate that we have not reached a determination whether the amended condition was actually imposed on Montano-Topete because that issue is not before us.

unless there can be no satisfactory explanation for counsel's conduct.” (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 778, fn. omitted.) Here, the search condition was a condition recommended in the probation report and we assume that Montano-Topete and his counsel discussed the recommended probation conditions before his sentencing hearing. If during this discussion Montano-Topete expressed his understanding and acceptance of the search condition, then it would be reasonable for counsel not to object to the condition. Because Montano-Topete affirmed his understanding and acceptance of the probation conditions, including the search condition, after the court recited them orally, it is not unreasonable to believe that Montano-Topete expressed that understanding and acceptance to his counsel beforehand.

D. *The Animal Condition*

Montano-Topete contends that the requirement that he “stay away from” animals is vague, and would be impossible to comply with because “[a]nimals are all around us in our everyday life, seen and unseen.” We agree.

In arguing that the animal condition is valid, the People confuse the test of whether a condition is unconstitutionally vague with the three-factor test for reasonability. They argue that the condition is “directly related to [Montano-Topete’s] offense of animal cruelty and forbids conduct which is reasonably related to future criminality.” This is beside the point. The question that must be answered is whether the condition is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

The People argue that “a probation condition should be given ‘the meaning that would appear to a reasonable objective reader’ ” (citing *People v. Bravo*, 43 Cal.3d 600, 606). This simply begs the question, and the People nowhere suggest a meaning that would appear to a reasonable objective reader.

We have no idea how the animal condition would be applied. If Montano-Topete were to visit the residence of a friend, would he be required to leave if he discovers that the friend has a cat or a dog (or a goldfish, for that matter)? If he is visiting the park with

his children, must he leave or change location if someone is walking a dog nearby? How is Montano-Topete to “stay away from” animals that may be nearby in the streets? Does “staying away” imply a particular distance? May he visit the residence of a friend who has a dog if the dog is 20 feet away in another room, or must the dog be 50 feet away in the back yard? None of these questions of application are answered by the condition. It is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.¹⁰

Being near animals is unavoidable in our society. It is impossible to stay away from them. Montano-Topete does not challenge the conditions that he not “harass, or stalk animals” (as stated in the clerk’s minutes) or not “take, transfer, conceal, molest, attack, strike, threaten, harm or otherwise dispose of an animal” (as stated by the trial court at the sentencing hearing). Other probation conditions, which Montano-Topete does not challenge, require him not to possess or own animals, reside in a home in which there are pets, or work in any business relating to the handling or care of animals. The conditions related to animals that Montano-Topete does not challenge are clear, reasonably related to his crime, and seem sufficient. The condition that he “stay away” from animals is, however, unconstitutionally vague, and we strike that language from the animal condition.

DISPOSITION

Montano-Topete’s conviction on count 2, for violating section 597, subdivision (b) is reversed.

The words “intoxicating beverages and” are stricken from the probation condition “Defendant shall abstain from use and possession of intoxicating beverages and controlled substances.”

¹⁰ The People suggest that “if the stay away from animals is unconstitutionally vague, then it should simply be modified to order [Montano-Topete] to ‘knowingly’ stay away from animals.” This is singularly unhelpful. It is true that Montano-Topete can only “stay away” from animals that he knows to exist, but the element of knowledge does not resolve the questions of application.

The words “stay away from” are stricken from the probation condition “Defendant is to stay away from, not harass, or stalk animals.”

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.