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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES WAYNE KRIEBEL,

Defendant and Appellant.

C067976

(Super. Ct. No.
CM032803)

Defendant James Wayne Kriebel entered a negotiated plea of no contest to possession of ammunition by a felon. The court placed him on three years formal probation. On appeal, defendant contends the imposition of a probation condition prohibiting him from using medical marijuana was an abuse of discretion and a violation of his state and federal privacy rights. We affirm the judgment.

FACTS AND PROCEEDINGS

Because defendant pleaded no contest, we set forth the following facts as stated in the probation report:

During a routine traffic stop of a truck driven by defendant, a felon, police found a marijuana pipe with residue on it, a glass methamphetamine pipe with residue on it, a shotgun beanbag round, two live shotgun rounds, a bandolier with nine more live shotgun rounds, and two bottles of prescription pills (including Hydrocodone), neither bearing defendant's name.

Defendant told police he had been convicted of a felony, but claimed he did not know it was illegal for him to possess ammunition. He also told police that one of the bottles of pills belonged to his wife and the other to him, although he no longer had a prescription for it.

Charged with possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)--count 1) and possession of Hydrocodone, a controlled substance (Health & Saf. Code, § 11350, subd. (a)--count 2), defendant pleaded no contest to count 1 and admitted a prior felony conviction in Nevada for possession of methamphetamine, in exchange for dismissal of count 2 subject to a waiver pursuant *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

The court suspended imposition of sentence and placed defendant on three years formal probation. Over a defense objection, the court ordered defendant to comply with special condition No. 4, which states as follows: "Totally refrain from

the use, control, or possession of any controlled substance unless with a current prescription from a licensed physician.

. . . No Prop 215 marijuana recommendations allowed."

Defendant timely appealed.

DISCUSSION

I

Remand for Resentencing

We turn first to defendant's contention this matter must be remanded for resentencing because the trial court failed to state reasons on the record or in the related minute order for its refusal to allow him to use medical marijuana while on probation in violation of Health and Safety Code section 11362.795, subdivision (a)(2). This argument has been forfeited because defendant did not object at the time of sentencing to the trial court's failure to state reasons when it refused defendant's request. (See *People v. Moret* (2009) 180 Cal.App.4th 839, 854 (*Moret*).)

II

Abuse of Discretion

Defendant contends the trial court abused its discretion by imposing a probation condition prohibiting him from using medical marijuana. We disagree.

At sentencing, the court indicated it had read and considered the probation report and intended to "grant probation on all the terms and conditions recommended." The court continued, "In this case the defendant was found in possession

of ammunition as a felon. He is eligible for probation, and it is the recommendation. He had two shotgun shells in the car. He had a pipe, shotgun beanbag round, nine additional shotgun rounds, and a bandolier, two types of narcotics, one prior felony, which is possession of methamphetamine, and six misdemeanors, all drug-related." Defense counsel asked the court "not to impose under special condition number four the no Prop 215 recommendation," and added, "I think the report touches on the fact that [defendant] has a 215 recommendation and it appears for a physical condition. And this case doesn't have any facts that indicate that the use of marijuana in any way contributed to it." Counsel later argued, "I don't think the 215 prohibition or the alcohol prohibition are related in any way, and I'd ask the Court not to impose those."

The court, having found a factual basis for the plea, found defendant guilty of count 1 and ruled as follows: "The defendant is eligible for probation, and the Court will grant probation suspending imposition of sentence for a term of 36 months. During that time the defendant is ordered to comply with general conditions one through fifteen; special condition number 1, 90 days Butte County Jail. . . . [¶] . . . [¶] I am ordering number three. I am ordering number four. I am prohibiting 215 recommendation. I am going to order that you refrain from use or possession of alcohol. You have a history of alcoholic abuse, and I think that is the standard requirement of probation." The court also ordered that defendant participate in outpatient substance abuse treatment services.

Trial courts possess broad discretion to devise reasonable conditions of probation in order to foster the reformation and rehabilitation of the probationer and to protect public safety. (Pen. Code, § 1203.1, subd. (j); *In re Luis F.* (2009) 177 Cal.App.4th 176, 188; *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.)

"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 the condition is reasonably related to preventing future criminality." (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*)).

Health and Safety Code section 11362.5 (statutory citations that follow are to the Health and Safety Code unless otherwise noted), the Compassionate Use Act (CUA), is an initiative measure adopted by the voters in 1996 as Proposition 215. (*People v. Kelly* (2010) 47 Cal.4th 1008, 1012.) The CUA exempts eligible patients from "prosecution or sanction" for the possession and cultivation of marijuana. (§ 11362.5, subd. (b)(1)(B); see also *People v. Mower* (2002) 28 Cal.4th 457, 482.)

Although the CUA allows for limited possession and use of marijuana upon the recommendation of a doctor, the Act does not restrict a court from prohibiting marijuana use during a term of probation. (*Moret, supra*, 180 Cal.App.4th at p. 853.) This is because "a probation condition can prohibit otherwise lawful conduct that is reasonably related to the defendant's criminal offense." (*People v. Brooks* (2010) 182 Cal.App.4th 1348, 1351.) Consequently, "a trial court has discretion to impose a no-marijuana-use probation condition on the holder of a medical marijuana card." (*Moret*, at p. 853.)

Here, the trial court did not abuse its discretion by prohibiting defendant from using medical marijuana with or without a doctor's recommendation.

First, defendant never produced an actual medical marijuana recommendation from a doctor. He argues that he "sufficiently established his eligibility to use marijuana under the CUA" and "[n]o one disputed" that he "had obtained a physician's recommendation" for that purpose. However, he concedes, as he must, that in order to be eligible to use marijuana under the CUA in the future, it is his burden to show "that he is a 'patient,' that he seeks to 'possess[]' the 'marijuana' in question 'for [his] personal medical purposes,' and that he has the 'recommendation or approval of a physician' to do so." (See § 11362.5, subd. (d); *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441.) He failed to do so. Defense counsel implored the court not to impose the disputed condition, arguing "I think the [probation] report touches on the fact that [defendant] has a

215 recommendation and it appears for a physical condition," but provided no oral or documentary evidence to support that statement. The probation report contains nothing more than defendant's own statement that he "uses marijuana per his Proposition 215 PC recommendation." The record is similarly devoid of evidence to support defendant's assertions that he does in fact have a valid physician's recommendation. As such, defendant has failed to make a proper showing under section 11362.5, subdivision (d).

Next, while the challenged condition is not related to the offense of conviction for possession of ammunition, it is related to the charge of possession of a controlled substance (Hydrocodone) which was dismissed subject to a *Harvey* waiver, and to the admitted prior conviction for possession of methamphetamine.

Likewise, the challenged condition is reasonably related to the goal of precluding future criminality. Defendant reported to probation that (1) he uses marijuana because he suffers from carpal tunnel syndrome and knee pain and does not like to take prescription medications, but he has not seen a doctor regarding those ailments in over a year and a half; (2) he knew it was illegal to share prescriptions, but on occasion would take his wife's medication or pills given to him by "friends"; and (3) he believes it would be "kind of hard" to stop smoking marijuana; and he has been smoking marijuana daily since he was 17 years old; he was approximately 30 at the time of the offense. He does not say that all of his prior use was for medical reasons.

Defendant also reported that (1) he "was addicted to methamphetamine and alcohol" in the past; (2) he participated in a 30-day drug treatment program in 2001 that he did not take seriously and participated in only to "get out of trouble"; and (3) after completing a 90-day treatment program and a year of after-care in 2004-2005, relapsed and used methamphetamine in January 2010.

Under these circumstances, we conclude the probation condition, although not directly related to the offense for which defendant was convicted, is reasonably related to the goal of precluding future criminality. (*Olguin, supra*, 45 Cal.4th at pp. 379-380; *People v. Bianco* (2001) 93 Cal.App.4th 748, 754 (*Bianco*).)

The trial court did not abuse its discretion in prohibiting defendant from using marijuana during his term of probation.

III

Privacy Rights

Defendant contends the prohibition against using medical marijuana violated his right to privacy under the state and federal constitutions. Assuming for the sake of argument that a constitutional right of privacy is implicated by the probation condition, we reject the contention.

"The trial courts may impose conditions of probation that impinge on a defendant's constitutional rights if they are 'narrowly drawn' and '"reasonably related to a compelling state interest in reformation and rehabilitation.'" (*Bianco, supra*, 93 Cal.App.4th at pp. 754-755.) "'To the extent [a probation

condition] is overbroad it is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.'" (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058.)

The challenged condition is narrowly drawn to prohibit only the "use, control or possession of controlled substances" including medical marijuana and, as discussed above, is reasonably related to the interest of reformation and rehabilitation by preventing future criminal conduct and nonmedical use or possession of marijuana.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

RAYE, P. J.

DUARTE, J.