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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

(Sutter)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTONIO RODRIGUEZ,

Defendant and Appellant.

C069311

(Super. Ct. No. CRF081350)

Defendant Jose Antonio Rodriguez entered a negotiated plea of no contest to actively participating in a criminal street gang (Pen. Code, § 186.22, subd. (a)) and possessing a concealed and loaded firearm in a vehicle (Pen. Code, former § 12025, subd. (a)(1), (b)(6)(A)-(B) [now § 25400, subd. (a)(1), (c)(6)(A)-(B)]) in exchange for dismissal of the remaining count, discharging a firearm at an inhabited dwelling (Pen. Code, § 246), with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, and no

state prison at the outset.<sup>1</sup> The gang enhancement attached to the remaining count was stricken.

On December 8, 2008, the court granted defendant formal probation for a period of five years subject to certain terms and conditions, including that defendant serve a one-year term in the county jail term and that defendant “not . . . use or possess marijuana with or without a prescription, without prior written permission of the court.”

On July 15, 2011, defendant sought modification of probation, requesting permission to possess and use marijuana in accordance with his medical recommendation. The People opposed modification of probation. After a hearing, the court denied defendant’s request.

Defendant contends that the trial court abused its discretion in denying his request for modification of probation to allow him to use medical marijuana. We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

About 12:45 a.m. on May 16, 2008, police officers responded to a report of shots fired at a residence in Yuba City. The resident showed the officers several bullet holes in her window. Two bullets had gone through the front door. Bullet slugs were found in the kitchen and bedroom. The apartment was inhabited by the resident and her three children at the time of the shooting. No one was wounded.

Witnesses described a white car, which the officers located and attempted to pull over. The car failed to stop and a high speed chase ensued for seven miles. When the car

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<sup>1</sup> Codefendant Angelino Ray Rasul entered a plea of guilty to felony evading and participating in a criminal street gang and was sentenced to state prison for an aggregate term of three years. Codefendant Dominick Aleman Aguilera entered a plea of no contest to discharging a firearm at an inhabited dwelling and admitted the act was committed to benefit a criminal street gang and was sentenced to state prison for an aggregate term of six years.

stopped, Dominick Aleman Aguilera jumped out and fled but was apprehended. Angelino Ray Rasul was the driver. Defendant was also found in the car.

When interviewed by the police, defendant claimed he had been sleeping, received a call that a friend had been injured, and was on his way to the hospital. He claimed he was asleep in the car and did not know there had been a shooting. He finally stated he knew a gun was involved but did not know where it was.

In support of defendant's request to modify probation to allow him to use medical marijuana, defendant submitted a written doctor's recommendation dated March 2011 for one year<sup>2</sup> that stated defendant qualified under Health and Safety Code section 11362.5 for the use of marijuana for medical purposes.<sup>3</sup> Defendant argued that there was no nexus between his crimes and the use of marijuana and that his use of marijuana for medical purposes would not impede his rehabilitation or his ability to successfully complete probation.

Citing Health and Safety Code section 11362.795, the court stated that it would consider all relevant factors. Referring to the probation report, the court recited the facts underlying defendant's offenses to show he had committed dangerous offenses and needed rehabilitation. Defendant had been declared a ward of the court and placed on probation in 2004 with standard gang, alcohol, and drug conditions. The trial court noted two violations of probation, one in 2004 involving possession of marijuana and another in

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<sup>2</sup> The recommendation submitted to the court expired March 3, 2012, well before appellate briefing on this appeal was completed.

<sup>3</sup> The prosecutor noted that a recommendation usually states that the patient has a serious medical condition and would benefit from the use of medical marijuana. This one does not. It merely states that "the above mentioned patient qualifies under California Health and Safety Code Section §[sic] 11362.5 for the use of cannibas for medical purposes."

2005 involving a positive drug test.<sup>4</sup> Defendant reported that he first consumed alcohol and marijuana when he was 12 years old and experimented once with methamphetamine when he was 14 years old. Defendant stated that he had used marijuana from age 12 until about seven months before the interview with the probation officer.<sup>5</sup> At the time of the plea, defendant was 20 years old. Defendant had expressed an interest in a substance abuse program to stop using marijuana. The probation officer opined that defendant's ability to comply with the reasonable terms of probation conditions would be limited given his substance abuse history, his gang associations, and his lack of employment. The probation officer recommended standard controlled substance conditions "as he admitted ingesting marijuana within the last year."

At the modification hearing, the court cited the fact that defendant did not explain why he changed the desire he expressed at the time the probation report was prepared, to stop using marijuana, and there was no evidence he had completed a substance abuse program. In denying defendant's request, the court stated that a primary objective of probation is rehabilitation and that defendant's continued success on probation warranted maintaining the prohibition against the use of marijuana.

### **DISCUSSION**

Defendant contends the trial court abused its discretion in denying his request to use medical marijuana while on probation, arguing that the probation condition is invalid because the use of medical marijuana has no relationship to his crimes, such use is not

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<sup>4</sup> We note that the probation report actually shows two probation violations in 2005 for positive drug tests, the last of which resulted in defendant's termination from probation. Defendant's adjustment under probation supervision was deemed unsatisfactory.

<sup>5</sup> The offense of which defendant was convicted was committed on May 16, 2008. He was arrested on that same date. Defendant was interviewed by the probation officer on November 14, 2008, nearly six months after the arrest date. Defendant had been in custody during that time period.

itself criminal, and such use is not reasonably related to future criminality. We conclude the trial court did not abuse its discretion.

A trial court has broad discretion to impose reasonable conditions of probation in order to promote the rehabilitation of the probationer. (Pen. Code, § 1203.1, subd. (j); *People v. Urke* (2011) 197 Cal.App.4th 766, 774; *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.)

“ ‘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.]” (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1479 (*Hughes*)). “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.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*)). We review the imposition of probation conditions for abuse of discretion, and “[a] trial court does not abuse its discretion unless its determination is arbitrary or capricious or ‘ ‘ ‘ exceeds the bounds of reason, all of the circumstances being considered.’ ” ’ ” (*Hughes, supra*, 202 Cal.App.4th at p. 1479.)

Health and Safety Code section 11362.5, the Compassionate Use Act of 1996 (CUA), exempts qualified patients and primary caregivers from “criminal prosecution or sanction” for the possession and cultivation of marijuana (Health & Saf. Code, § 11362.5, subd. (b)(1)(B); see *id.*, subd. (d); *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, it does not prohibit a court from imposing a condition of probation which bans marijuana use even by a holder of a medical marijuana card.

(Health & Saf. Code, § 11362.795, subd. (a); *People v. Moret* (2009) 180 Cal.App.4th 839, 853 (*Moret*).)

Health and Safety Code section 11362.795 provides, in relevant part, as follows:

“(a)(1) Any criminal defendant who is eligible to use marijuana pursuant to Section 11362.5 may request that the court confirm that he or she is allowed to use medical marijuana while he or she is on probation or released on bail.

“(2) The court’s decision and the reasons for the decision shall be stated on the record and an entry stating those reasons shall be made in the minutes of the court.

“(3) During the period of probation or release on bail, if a physician recommends that the probationer or defendant use medical marijuana, the probationer or defendant may request a modification of the conditions of probation or bail to authorize the use of medical marijuana.

“(4) The court’s consideration of the modification request authorized by this subdivision shall comply with the requirements of this section.”

Here, the trial court did not abuse its discretion in denying defendant’s request for modification of his probation condition banning use of marijuana. Although the condition is not related to defendant’s convictions for actively participating in a criminal street gang and possession of a concealed and loaded firearm in a vehicle, the condition is reasonably related to the goal of preventing future criminality. Defendant reported to probation that he has been smoking marijuana since he was 12 years old. He was 20 years old at the time of the offense. His prior use was not for medical reasons, and defendant’s lengthy history of recreational use is strong evidence he may again use the drug for nonmedical purposes. Defendant reported that he wanted to stop smoking marijuana and was interested in a substance abuse program. The trial court noted at the modification hearing that defendant had not explained why he no longer desired to stop smoking marijuana, and there was no evidence he had attempted a substance abuse program in the two-plus years he had completed of the five-year term of probation.

Under these circumstances, we conclude the probation condition is reasonably related to the goal of preventing future criminality. (*Hughes, supra*, 202 Cal.App.4th at p. 1479; *Olguin, supra*, 45 Cal.4th at p. 380.) The condition assists defendant in his expressed desire to stop his addiction to marijuana and to prevent him from hiding that addiction behind the CUA. (See *Moret, supra*, 180 Cal.App.4th at pp. 842-843, 847-848, 850-851.)

Defendant contends that while he had been on probation, he had been drug testing, had not smoked marijuana or used any other illicit drug, and had had no violations of probation. Defendant argues that the probation officer's prediction that he would have limited success complying with probation was wrong. Based on defendant's success heretofore, he suggests that his use of medical marijuana would not jeopardize his rehabilitation. Defendant proves too much. He proves he can be successful on probation when he is not using marijuana -- exactly what the trial court sought to achieve by imposing the condition of probation. Defendant's success on probation does not refute the trial court's determination that maintaining the prohibition against defendant's use of medical marijuana remains necessary for his rehabilitation.

The trial court did not abuse its discretion in denying defendant's request to use medical marijuana during the remaining period of his probation term.

**DISPOSITION**

The order denying modification is affirmed.

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MURRAY, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.