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

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LEE WRIGHT,

Defendant and Appellant.

C081242

(Super. Ct. No. CM043204)

Defendant Joseph Lee Wright pleaded no contest to receiving stolen property. The trial court placed him on formal probation for three years with various terms and conditions. Defendant did not object to the terms and conditions of probation.

Defendant now contends (1) certain probation conditions regarding alcohol and drugs and the search of electronic devices are invalid; (2) his trial counsel was ineffective in failing to object to probation supervision fees and a presentence investigation report fee ordered by the trial court; and (3) he is entitled to six more days of presentence credit.

We conclude (1) defendant's challenges to the probation conditions are forfeited; (2) he has not shown that counsel was deficient in failing to object to the fees; and (3) we will modify the judgment to award defendant six days of conduct credit.

We will affirm the judgment as modified.

BACKGROUND

According to the original probation report, which the parties stipulated provided the factual basis for defendant's plea, on June 26, 2015, Butte County Sheriff's Office deputies responded to a report of a possible residential burglary in progress. The reporting party said there had been suspicious activity and prior thefts at the residence. While the deputies were en route they were informed that another officer had arrived at scene. The officer said a suspect was attempting to drive away through a rice field. When the deputies arrived they observed a green Dodge Durango in a rice field. The deputies contacted two individuals, a male (defendant) and a female (who became a codefendant); both were covered in mud and were walking away from the vehicle. The deputies learned defendant had an outstanding warrant for his arrest and detained him.

The female's purse contained methamphetamine, concentrated cannabis, marijuana, and drug paraphernalia. She was arrested. A search of her vehicle found a large amount of property belonging to the victim, who had been in the hospital for several weeks and told law enforcement no one should be in his residence.

Defendant pleaded no contest to receiving stolen property. (Pen. Code, § 496, subd. (a) -- count 2.)¹ The trial court referred the matter to probation.

Defendant told probation he had been drinking over a 12-pack of beer and a pint of hard liquor per day, but he was free of alcohol for 23 days and did not want to drink any more. He had been smoking three or four joints of marijuana and a "pipe load" of methamphetamine per day, still smoked marijuana, and had last used methamphetamine six months prior. He did not think he was an alcoholic and did not want to attend substance abuse treatment, Alcoholics Anonymous, or Narcotics Anonymous; he did not

¹ Undesignated statutory references are to the Penal Code.

believe in it and thought he could stop drinking on his own. He had a medical marijuana recommendation due to recurring back pain and “eating issues,” so he did not know if he could stop smoking; he tested positive for marijuana on the day of his interview with probation.

Defendant had 13 prior misdemeanor convictions, including numerous convictions for driving under the influence (DUI) and possession of narcotics. He was on probation in case No. SCR-83299 after pleading no contest in 2012 to DUI with two prior convictions and driving with a blood-alcohol content of 0.08 percent or higher.

A first supplemental probation report said that in case No. SCR-83299, defendant had been found in violation of probation based on his plea in the present case. Defendant said he was willing to comply with the terms and conditions of probation. He claimed he was cutting down his marijuana use, was no longer using alcohol, and would complete outpatient treatment, but could not do inpatient treatment because he had sole custody of his sons (who had written support letters for him).

A second supplemental probation report recommended terms and conditions of probation along with fines and fees. The recommended special conditions of probation relevant to this appeal were as follows:

“4. Totally refrain from the use, control, or possession of any controlled substance unless with a current prescription from a licensed physician. Do not possess any narcotic paraphernalia nor knowingly associate with anyone who has ever been convicted of any criminal offense involving these substances, nor anyone unlawfully using or selling controlled substances, without permission of the probation officer. No [Proposition] 215 marijuana recommendations allowed.

“5. Totally refrain from the use or possession of any alcoholic beverages and not knowingly enter any place or business or location where alcohol is the primary item for sale or use. Do not ingest or use any item containing alcohol.

[No. 6 omitted in the original text of the supplemental probation report.]

“7. Submit to any testing, treatment, or program designed to detect the presence of alcohol or controlled substance. Do not ingest any poppy seeds or supplements containing creatinine. You may not use or possess any devices designed to alter, mask or negate drug testing results. You may not falsify any drug test. Said testing to be at probationer’s expense, per . . . § 1203.1ab.

“8. Enroll in, pay for and successfully complete a 12 Step or other approved self-help program as directed, and not terminate participation in said program without the permission of the Court or your probation officer.”

Additional recommended special conditions of probation relevant to this appeal were as follows:

“20. You are to enter and complete a residential substance abuse treatment program as specifically approved by your probation officer. Do not leave the program or otherwise terminate your participation in the program without the permission of the program staff and your probation officer. While in the program, you are subject to warrantless search and drug/alcohol testing by program staff. You must follow all program rules as a condition of probation. Upon graduating from the program, you are to participate in any ‘aftercare’ program recommended by program staff. Report in person to the Butte County Probation office in Oroville at 1:00 p.m. on the first Tuesday after you leave the program for any reason.

[Nos. 21 through 31 omitted in the original text of the supplemental probation report.]

“32. Attend a minimum of six (6) meetings per week of 12 Step or other approved self-help programs and maintain a log of your attendance. Bring logs to all court, probation and treatment appointments. Obtain sponsor and work the steps.”

Another relevant recommended special condition of probation stated:

“65. The defendant shall be required to make available for inspection, including providing passwords or unlock codes, any data storage device, including cellular

telephones and computers, and any network applications associated with those devices, including social media and remote storage services. All said devices are subject to search by any peace officer upon request.”

In addition, the second supplemental probation report recommended the following fees: probation supervision fees pursuant to section 1203.1, subdivision (b) in the amount of “36 months x \$164.00”; a presentence investigation report fee in the amount of \$736; and public defender fees pursuant to section 987.8 in the amount of \$420.

At sentencing, the trial court stated: “If the defendant is willing to accept the proposed terms and conditions -- and I know that has been our issue in the past -- including the residential treatment program, I am inclined to give him this one opportunity on probation. If he is not, then we might as well just cut to the chase and sentence him to the upper term county prison sentence.”

After defendant said he was willing to accept the proposed terms and conditions, the trial court said: “All right. Then with that understanding, that is what I am inclined to do, but I will certainly hear from Counsel.” Defense counsel said he was prepared to submit the matter.

The trial court granted defendant probation, explaining it was his first felony conviction and defendant appeared willing and able to comply with the terms and conditions of probation. The trial court reinstated defendant’s probation in case No. SCR-83299 on the same terms and conditions previously imposed, suspended imposition of sentence in the present case, placed defendant on formal probation for 36 months (including 90 days in jail) and imposed, among other things, the special conditions described above. The trial court also imposed the probation supervision fees in the amount of “36 months times 164” and the presentence investigation report fee in the amount of \$736, but found that defendant had no ability to pay the public defender fees and did not impose those fees.

DISCUSSION

I

Defendant contends the special probation conditions regarding alcohol and drugs and the search of electronic devices are invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). He claims the alcohol and drug conditions are not related to his present crime, they describe conduct which is not criminal, and they require or forbid conduct not reasonably related to future criminality. (*Id.* at p. 486.) In addition, he argues the electronics search condition is unconstitutionally overbroad in violation of due process.

Defendant acknowledges that a challenge to a probation condition is generally forfeited if not raised at sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) He claims, however, that objection in the trial court would have been futile because “the trial court coerced [defendant] into accepting the conditions by giving him the choice of probation with the conditions or the upper term sentence if he refused.”

We disagree with defendant’s characterization of the record. Defendant had a history of significant alcohol and drug use and a series of criminal offenses including numerous DUIs, and seemed to be in some denial about his circumstances. He committed one DUI while on probation. Based on that prior record and the threat defendant’s DUIs posed to the public, it was not unreasonable for the trial court to consider county prison time unless defendant was willing to commit to the proposed terms and conditions of probation, which included treatment. The record does not evidence coercion, it evidences an inquiry as to whether defendant would commit to turning his life around. In any event, the trial court expressly invited comment from counsel before making its sentencing decisions, indicating that argument and objection would not be futile. Defense counsel said he was prepared to submit.

Because the record does not establish that an objection in the trial court would have been futile, defendant’s challenges to the probation conditions are forfeited.

Defendant adds an additional argument opposing forfeiture of the challenge to the electronics search condition. He argues the search condition is invalid under *Lent*, but it is also unconstitutionally overbroad in violation of due process, and a constitutional challenge to a probation condition presenting a pure question of law may be asserted for the first time on appeal. (Cf. *In re Sheena K.* (2007) 40 Cal.4th 875, 888 (*Sheena K.*))

Here, however, defendant's challenge to the electronics search condition does not present a pure question of law that can be resolved without reference to a broader record. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889.) As the court explained in *In re JB* (2015) 242 Cal.App.4th 749, 758, it might be appropriate for a court to strike certain overbroad phrases from a probation condition "while authorizing the trial court 'to impose a probation condition permitting searches of a narrower range of electronic information related to the court's supervisory concerns.'" (*Ibid.*, quoting *In re Ricardo P.* (2015) 241 Cal.App.4th 676, 692.) But the record provided to us in this appeal is not sufficient to determine whether there is a narrower range of electronic information related to the court's supervisory concerns. Perhaps this is because defendant did not object to the condition below; there was no need to create a broader record. Under the circumstances, the challenge to the electronic search condition is forfeited.

II

Defendant next contends his trial counsel was ineffective in failing to object to the probation supervision fees and the presentence investigation report fee. Defendant notes the trial court declined to impose the public defender fees based on defendant's inability to pay, and it is reasonably likely the trial court would have declined to impose the other fees based on inability to pay if defendant's counsel had raised the issue.

A reviewing court will not find ineffective assistance of counsel on direct appeal where the record does not disclose the reason for counsel's conduct, unless counsel was asked for an explanation and failed to give one, or there could have been no good reason. (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.) Here, counsel did not explain, and

was not asked to explain, his failure to raise inability to pay as to the probation supervision fees and the presentence investigation report fee. But it is possible to imagine a sufficient reason why he did not do so.

The original probation report said defendant was able-bodied and therefore could pay any assessed fees and fines in the case. No evidence in the record rebuts that premise and nothing in the record indicates counsel could have successfully argued defendant was unable to pay the assessed fees, with the exception of the public defender fees.

The public defender fee statute (§ 987.8), unlike other fee statutes, presumes that those subject to it do not have the ability to pay; the trial court must therefore find unusual circumstances, based on both the defendant's income and assets, before ordering the defendant to reimburse the public defender. (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1421.) Counsel might reasonably have concluded that a finding of inability to pay under this provision did not indicate any chance of obtaining a similar finding as to fees where the presumption of inability to pay does not apply. Counsel could have also thought that defendant had the ability to pay some, but not all of the monetary obligations.

Defendant has not shown that his counsel was deficient.

III

Defendant further contends he is entitled to six more days of presentence credit. The trial court awarded defendant seven days of actual custody credit but did not award any days of conduct credit. Defendant claims he is entitled to six days of conduct credit under section 4019, as recommended in the probation reports.

Defendant's appellate counsel says she asked the trial court to correct defendant's credit, but the trial court responded that conduct credit does not apply when a defendant receives probation. Counsel said she informed the trial court that defendant is still entitled to the credit, which could be applied in the event of a probation violation, but the trial court had not responded when appellant's opening brief was due in this court. We

