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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GERMANG PALAFOX, Defendant and Appellant.	D059735 (Super. Ct. No. SCN286142)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed as modified with directions.

Germang Palafox entered a guilty plea to one count of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)), as part of a plea agreement. As part of that agreement the prosecution dismissed the remaining counts and allegations and agreed to a grant of probation subject to a stipulated 365 days in jail.

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1 All further statutory references are to the Penal Code unless otherwise specified.

Pursuant to the plea agreement the court granted Palafox probation subject to various conditions, including so-called "gang conditions."

Palafox appeals from the probation order, challenging only the gang conditions. We agree with Palafox there is no basis in this record to support the trial court's imposition of "gang conditions" as there is no nexus with the current offense or the need for rehabilitation of the defendant which would justify the imposition of such conditions. Accordingly, we will direct the trial court to strike the gang conditions and otherwise affirm the probation order.

STATEMENT OF FACTS

Although this is an appeal after a guilty plea, we will set forth a brief summary of the facts presented at the preliminary hearing in order to provide context for the discussion which follows.

For convenience, we adopt the brief summary of the evidence from the preliminary hearing contained in the respondent's brief at pages 1 and 2:

"On December 24, 2010, Carlos Jimenez, took his wife, two boys and his nephew, Gary M., to Balderama Park in Oceanside, California. While at the park, Jimenez encountered appellant, whom he had previously met through his niece. Appellant asked Jimenez for money and a ride to an apartment building because he had been kicked out of his house. Jimenez said that he did not have any money but would give appellant a ride to his apartment building. Jimenez drove the car while appellant sat in the front passenger seat. Jimenez's wife, kids and nephew were sitting in the back seat. When

they arrived at the apartment, appellant asked if Jimenez would wait for him. After waiting for a bit, Jimenez drove the car to a nearby store. At the store, Jimenez's wife discovered that money from her purse was missing. Her purse had been left on the floorboard of the front seat passenger area, where appellant had been sitting. Jimenez drove back to appellant's apartment building. When they arrived at appellant's home, Jimenez's wife stepped out of the car to speak to appellant's mother. Jimenez and his wife stepped past the gate and Jimenez saw appellant on his left hand side with an aluminum baseball bat. Appellant yelled at them to leave. Appellant swung the bat and made contact with Jimenez's left elbow. Jimenez tried to take the bat away from appellant but appellant was still swinging the bat and made contact with Gary M.'s left leg. As a result of appellant's attack, Jimenez had surgery on his elbow, where doctors inserted screws and steel plates into his elbow. Appellant then called for his other family members so Jimenez and his family got back into their car. Appellant came to the car with a stick, the size of a baseball bat and struck Jimenez's vehicle in the front, causing a dent."

DISCUSSION

At the time of sentencing the court was presented with a number of proposed conditions of probation to consider. The conditions in section 12 of that material contain what the parties refer to as "gang conditions" in that they are used in cases of gang-involved defendants who need to be deterred from further gang-related activities. Palafox objected to the conditions in section 12 as being inappropriate since there is no

evidence in this case of gang involvement either in the offenses or in Palafox's criminal history.

The probation officer's report contained a single reference to gang membership. It noted that in 2010 the San Diego Police Department had documented Palafox as a member of the Posole Locos gang. The report also noted that Palafox denied membership in any gang.

The trial court overruled the defense objection to the gang conditions and stated: "As to conditions 12 et seq., I'm going to impose them. I think there's a sufficient nexus to gang involvement and the defendant's own statements to probation." The court's reference to the defendant's statements to probation is at best unclear. Palafox did not submit to an interview, and the only statement by him referenced in the report is that he denied gang membership.

Palafox challenges the imposition of gang conditions contending there is no substantial evidence in this record to support an inference that Palafox has been involved in gang activity or that his rehabilitation requires the imposition of gang conditions. He also contends two of the conditions are unconstitutionally vague and overbroad. We agree there is no substantial basis in this record to support imposition of gang conditions as part of the probation order. Because we find that the gang conditions were generally inappropriate, we need not discuss the merits of the individually challenged conditions.

Trial courts have broad discretion in selecting appropriate terms for grants of probation. We review trial court decisions under the abuse of discretion standard, taking

into account the facts of the underlying offense and the defendant's background. (*People v. Olguin* (2008) 45 Cal.4th 375, 379; *People v. Patillo* (1992) 4 Cal.App.4th 1576, 1579, overruled on another point in *People v. Welch* (1993) 5 Cal.4th 223, 237.) However, a court abuses its discretion when the factual findings in support of its decision find no support in the evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998, 1004.)

In order for a probation condition to forbid conduct that is otherwise legal, the conduct must be "reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.)

As we have noted, the only item in the probation report relating to possible gang activity is the assertion that Palafox was "documented" as a gang member, a fact which Palafox denies. The report does not provide any information as to how he was "documented" nor was any such information provided by the prosecution. Certainly the trial court did not articulate any basis for his finding of "nexus" of gang conditions to the defendant or any future criminality.

We look next to the crime. There is nothing in the record to even hint at gang involvement or motivation for this crime. The crime is irrational given that Palafox knew the victim. The crime may be somewhat more understandable given the undisputed fact that Palafox suffers from a diagnosed mental disorder.

If we look next at the defendant's background we again find nothing to support "gang conditions." Palafox was 27 years old at the time of sentencing. He had no prior

adult criminal record. He did have a juvenile record for burglaries committed in 1996 and 1999. Even those offenses have no identified connection with any gang or group. The probation report shows Palafox does have three tattoos. One of the tattoos says "Oceanside," the city in which he lives. The others represent the San Diego Padres baseball team and the San Diego Chargers football team.

In short, there is nothing in the record regarding the offense, the defendant's criminal history or his background that even remotely indicates gang involvement. The only item in the entire record that would be relevant is the unsubstantiated statement in the probation officer's report that the then 25-year-old Palafox was "documented" as a gang member, a fact which he denied. While hearsay information is useable in probation reports, in the face of a challenge to its accuracy and where there is absolutely nothing to substantiate the bald assertion, such information will not support the imposition of conditions that would prohibit otherwise lawful conduct by the probationer. Accordingly, we conclude the trial court abused its discretion in imposing the so-called gang conditions.

DISPOSITION

The trial court is directed to modify the probation order in this case to strike the "gang conditions" set forth under section 12 of the probation order. In all other respects the conviction and the probation order are affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.