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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ESQUIVEL,

Defendant and Appellant.

D060513

(Super. Ct. No. SCD235280)

APPEAL from a judgment of the Superior Court of San Diego County, Eugenia A. Eyherabide, Judge. Affirmed as modified.

William Esquivel pleaded guilty to possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and driving under the influence of methamphetamine (Veh. Code, § 23152, subd. (a)). The court granted Esquivel probation requiring, among other things, that Esquivel's probation officer approve Esquivel's place of residence and employment and that Esquivel not maintain a checking or charge account or be in possession of checks or credit or access cards in any other person's name. Esquivel objected to these two probation conditions at the time of sentencing.

Esquivel appeals, contending: (1) the court abused its discretion by requiring him to obtain prior permission from his probation officer before changing his residence or employment; and (2) the court abused its discretion by prohibiting him from maintaining a checking or credit account or being in possession of checks or credit cards in any other person's name. We conclude there is an insufficient nexus between the appealed probation requirements and Esquivel's crimes and accordingly, we strike those conditions on that ground. We affirm the judgment in all other respects.

FACTS

On July 11, 2011, a police officer stopped Esquivel after observing him driving erratically. The officer noticed that Esquivel was sweating profusely and appeared to be under the influence of a controlled substance. The officer had Esquivel perform a field coordination test, which Esquivel performed poorly. The officer then searched Esquivel and his car, finding a glass pipe in Esquivel's pocket and a bag containing .65 grams of methamphetamine on the front passenger floorboard. Esquivel told the officer he had used methamphetamine about an hour earlier. Esquivel tested positive for methamphetamine.

After Esquivel pleaded guilty, the court placed him on three-years formal probation, which included a six-month residential treatment program and various fines, fees, and conditions related to the charges. Esquivel appeals only condition 10g, requiring him to "[o]btain P.O. approval as to . . . residence [and] employment," and condition 6o, stating that Esquivel may not "maintain a checking/charge account or be in

possession of checks/credit/access cards unless issued per employment," modified as limited to those "in any other person's name." Esquivel appeals the conditions as being constitutionally overbroad.

DISCUSSION

Sentencing courts have broad discretion in imposing conditions of probation meant to protect the public and rehabilitate the defendant. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) A defendant may refuse probation if he believes the conditions are too harsh. (*In re Bushman* (1970) 1 Cal.3d 767, 776, overruled on another ground in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) Accepting probation, however, does not prevent a defendant from then challenging conditions of that probation on appeal. (*Ibid.*)

We review probation conditions for abuse of discretion. (*People v. Carbajal, supra*, 10 Cal.4th at p. 1121.) A probation condition is invalid if 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 . . ." (*People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *People v. Lent, supra*, 15 Cal.3d 481, 486.) All three parts of this test must be satisfied before a reviewing court will invalidate a condition of probation. (*Olguin, supra*, at p. 379.)

A. Requirement to Obtain Permission Before Changing Residence or Employment

In *People v. Bauer* (1989) 211 Cal.App.3d 937, the defendant was convicted of false imprisonment and assault and was placed on probation. One probation condition

was that he "obtain his probation officer's approval of his residence" (*Id.* at p. 940.) The defendant argued that the condition was not related to his crime or his rehabilitation and unreasonably infringed on his constitutional rights. (*Ibid.*) The *Bauer* court agreed, holding that nothing in the record indicated the defendant's home life contributed to his crimes or was reasonably related to his future criminality, and his residence was not in itself criminal. (*Id.* at p. 944.) The court noted that the condition was especially disturbing because it infringed on the defendant's constitutional rights of travel and freedom of association and gave the probation officer too much discretionary power over the defendant's living situation. (*Ibid.*)

In *People v. Burden* (1988) 205 Cal.App.3d 1277, the defendant pleaded guilty to writing checks with insufficient funds and was placed on probation with several conditions, including prohibiting him from working in a sales position. (*Id.* at p. 1279.) The *Burden* court noted that a sales position might give the defendant the opportunity to misrepresent his financial status or write checks while claiming that he would soon receive a large commission. (*Id.* at p. 1280.) However, because there was nothing in the record to indicate the defendant had used those tactics in the past, the court held the restriction to the defendant's constitutional right to employment was overbroad and should be stricken. (*Id.* at pp. 1280-1281.)

Similarly here, there is nothing in the record referring to Esquivel's living situation or indicating that it contributed to his possession of methamphetamine or his driving under the influence of the drug. Nor does the record show Esquivel intended to change

his residence, thus providing no indication of an intention to move to a location which would contribute to his future criminality. Likewise, nothing in the record links Esquivel's employment to his drug habit, nor is there an indication he intends to find employment somewhere that could facilitate his possession or use of methamphetamine.

The People argue that the residence and employment approval conditions are reasonably linked to Esquivel's rehabilitation because Esquivel could potentially choose to move to a residence or find employment where he would have increased access to methamphetamine. They claim the conditions would make it easier for the probation officer to keep Esquivel away from drug sources and people or conditions that could influence him to use methamphetamine. As the People admit, however, this argument is speculative and there is no basis in the record to infer that Esquivel has the intention of living or working in a location that would encourage him to use methamphetamine. Although there is no reason to believe the probation officer would abuse the authority to deny Esquivel permission to move or change employment, that alone does not permit the court to unnecessarily limit Esquivel's rights. (*People v. Bauer, supra*, 211 Cal.App.3d at p. 944.)

While Esquivel's probation officer has an interest in knowing the location of Esquivel's residence and place of employment, the unchallenged requirement that Esquivel notify his probation officer within 72 hours of any change of address or employment satisfies that interest. Therefore, the requirement that Esquivel obtain probation officer approval before changing his residence or employment is, in this case,

overbroad. The requirement improperly impedes Esquivel's right to travel, his freedom of association and his right to employment. It also gives too much discretionary control to the probation officer. For these reasons, and because the restriction applies to conduct that is not criminal, we strike the probation condition requiring Esquivel to obtain approval from his probation officer before changing his residence or employment.

B. Restriction on Esquivel's Use and Possession of Financial Instruments

The parties agree, as do we, that the restriction stating Esquivel may not "maintain a checking/charge account or be in possession of checks/credit/access cards unless issued per employment" is unreasonable, even as modified to apply to those "in any other person's name." There is nothing in the record indicating how Esquivel obtained the methamphetamine. Because the acts prohibited are legal and have no apparent nexus to Esquivel's criminality, we strike the probation condition limiting Esquivel's access to financial instruments.

DISPOSITION

Probation conditions 10g and 6o are stricken. In all other respects, the judgment is affirmed. The superior court is directed to amend the probation order in accordance with the views expressed in this opinion.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.