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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LOIS W. YOUSIF,

Defendant and Appellant.

D061605

(Super. Ct. No. SCE316894)

APPEAL from an order of the Superior Court of San Diego County, William J. McGrath, Judge. Affirmed in part, reversed in part.

A court convicted Lois W. Yousif of one count of felony resisting arrest (Pen. Code,<sup>1</sup> § 69) and one count of attempting to remove and take an officer's weapon while resisting arrest (§§ 664 & 148, subd. (b)). At sentencing, the court granted Yousif formal probation with certain terms and conditions.

Yousif appeals, contending the court abused its discretion in imposing the following probation conditions: (1) prohibiting him from knowingly using or possessing

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

alcohol if so directed by the probation officer; (2) requiring him to attend self help meetings if so directed by the probation officer; (3) prohibiting him from being in places, except in the course of employment, where Yousif knows, or is informed by a probation officer or other law enforcement officer, that alcohol is the main item for sale; and (4) requiring Yousif to obtain the probation officer's approval as to where he lives. Yousif also contends the last two probation conditions are unconstitutionally vague and overbroad.

We disagree with Yousif's contentions that the alcohol conditions are unreasonable and that he did not forfeit the constitutional challenge to not being in places where alcohol is the main item for sale. However, we agree the condition requiring probation officer approval of Yousif's residence is both unreasonable and overbroad. Accordingly, we affirm each alcohol probation condition but modify the probation order by striking the residence approval condition.

## FACTS

Because Yousif does not challenge the admissibility or sufficiency of the evidence to support his convictions, we will omit the traditional statement of facts. To the extent any factual background is relevant to the analysis of the contentions in this appeal, we will discuss such facts in the discussion section of this opinion.

## DISCUSSION

### I

#### *REASONABLENESS CHALLENGES*

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 (*Carbajal*)). We review probation conditions for abuse of discretion. (*Id.* at 1121.) A trial court abuses its discretion in imposing probation conditions if its decision is arbitrary, capricious or irrational. (*Ibid.*) 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 (*Olguin*), quoting *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*)). 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. Alcohol Conditions

Yousif contends the court abused its discretion in mandating the probation conditions pertaining to alcohol because there is no nexus to the crimes he committed in this case or to his future criminality. We disagree.

A probation condition forbidding conduct, which is " 'not itself criminal,' " like being within the vicinity of a public location or a business that predominantly sells alcohol, is valid if that conduct is " 'reasonably related to the crime of which the

defendant was convicted or to future criminality.' " (*Carbajal, supra*, 10 Cal.4th at p. 1121; *Lent, supra*, 15 Cal.3d at p. 486.) In determining whether a condition would be appropriate on these grounds, a court is permitted to view the totality of circumstances, including the defendant's entire criminal background. (See *Carbajal, supra*, at p. 1121.) "Insofar as a probation condition serves the statutory purpose of 'reformation and rehabilitation of the probationer,' (§ 1203.1) it necessarily follows that such a condition is 'reasonably related to future criminality' and thus may not be held invalid whether or not it has any 'relationship to the crime of which the offender was convicted.' [Citation.]" (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65.)

Here, the record indicates Yousif has two convictions for driving under the influence of alcohol (DUI). Yousif contends the DUI offenses occurred several years ago, and thus, are too remote and attenuated from this case. However, a trial court may consider a defendant's entire criminal background when determining probation conditions with no temporal restrictions. The court here acted reasonably in reviewing Yousif's past convictions in determining the alcohol conditions would benefit his rehabilitation and increase the likelihood he would successfully complete probation. Therefore, the court did not act in an arbitrary or capricious manner in imposing the alcohol conditions.

#### B. Residence Approval Condition

Yousif contends the probation condition requiring him to obtain his probation officer's approval of his residence is unreasonable because the condition is not related to his offenses and gives too much discretion to the probation officer. We agree.

To support his contention, Yousif relies on *People v. Bauer* (1989) 211 Cal.App.3d 937. In *Bauer*, the defendant was convicted of false imprisonment and assault. The court placed the defendant on probation. (*Id.* at p. 940.) The probation conditions included that he "obtain his probation officer's approval of his residence. . . ." (*Ibid.*) The defendant argued the condition did not relate 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 reasonably related to his future criminality. (*Id.* at p. 944.) Additionally, the court noted that while there was no reason to believe the probation officer would abuse his or her authority in approving the defendant's residence, that fact alone does not permit the court to unnecessarily limit the defendant's rights. (*Ibid.*)

Similarly here, nothing in the record indicates that Yousif's current residence contributed to his crimes or future criminality. Nor does the record show that Yousif intended to change his residence or that his current residence presented a concern for his rehabilitation to justify imposing such a restrictive probation condition. To the contrary, the probation officer's report states Yousif has lived at the same address with three roommates for more than five years and plans to return to the same apartment upon his release from custody.

The People contend this condition is reasonably linked to Yousif's rehabilitation and preventing future criminality because the condition supports probation officer safety

and supervision of the probationer. To support this contention, the People rely on *Olguin, supra*, 45 Cal.4th 375, 381. However, *Olguin* is not analogous here.

In *Olguin*, the probation condition imposed by the trial court required the defendant to *notify* his probation officer of his " 'place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes.' " (*Olguin, supra*, 45 Cal.4th at p. 380, italics omitted.) Here, in contrast, the probation condition gives Yousif's probation officer absolute authority to *approve* Yousif's residence. Although there is no reason to believe the probation officer would abuse the authority to deny Yousif permission to move, that alone does not permit the court to unnecessarily limit Yousif's rights. Moreover, there is nothing in the record to show that Yousif, who had previously completed probation successfully, had a history of violence or aggression towards his probation officers. Because the court abused its discretion in imposing the residence approval condition, that probation condition must be stricken.

## II

### *CONSTITUTIONAL CHALLENGES*

In addition to reasonableness challenges, Yousif also contends the probation condition prohibiting him from being in places where he knows, or is informed, that alcohol is the main item for sale, is constitutionally infirm for vagueness and overbreadth. Yousif also contends the probation condition requiring him to obtain his probation officer's approval as to his residence, is unconstitutional for vagueness and overbreadth.

Since Yousif's contentions present constitutional issues, we apply a de novo standard of review. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

#### A. Residence Approval Condition

Yousif also contends the probation condition to obtain his probation officer's approval of his residence is constitutionally infirm because the language is overbroad.

We agree.

A probation condition that imposes limitations "on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) A court may "leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation. However, the court's order cannot be entirely open-ended." (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1358-1359, [the court struck down a condition forbidding the defendant from associating with all persons designated by his probation officer because the condition was "overbroad and permit[ted] an unconstitutional infringement on defendant's right of association."].) In *Bauer*, the court held the condition requiring prior approval of residence by a probation officer invalid 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. (*Bauer, supra*, 211 Cal.App.3d at p. 944.)

The requirement that Yousif obtain probation officer approval before changing his residence is, in this case, overbroad. The requirement improperly impedes Yousif's right to travel and his freedom of association. It also gives too much discretionary control to the probation officer as a direct result of the overly broad language. The condition is not sufficiently narrowly tailored to the state interests of rehabilitation and reformation because it does not provide a standard to which the probation officer must adhere. For these reasons, we strike the probation condition requiring Yousif to obtain approval from his probation officer before changing his residence.

**B. Condition Prohibiting Being Present Where Alcohol is Main Item for Sale**

Even though Yousif did not object to this condition on constitutional grounds at sentencing, he contends his vagueness and overbreadth arguments present a facial constitutional challenge with pure questions of law based on undisputed facts and, thus, can be properly raised on appeal for the first time. We disagree.

The doctrine of forfeiture on appeal does not apply to challenges to probation conditions based on "facial constitutional defects" that do "not require scrutiny of individual facts and circumstances." (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 885, 886.) However, the forfeiture doctrine does apply if the objection involves a discretionary sentencing choice or unreasonable probation conditions "premised upon the facts and circumstances of the individual case." (*Id.* at pp. 885, 888.)

Here, Yousif's constitutional challenges are premised upon the facts and circumstances of his case because he claims the condition is unrelated to his present case

and is not adequately tailored to the purposes of probation. Yousif argues because the scope of this condition "extends far beyond any rational or rehabilitative purpose and encompasses conduct that is clearly innocent, it is overbroad." Yousif's sparse and conclusory analysis requires us to consider the facts and circumstances surrounding his crimes contained in the sentencing record to determine whether the condition is overbroad. We decline to do so because this constitutes an "as-applied" constitutional challenge that must first be preserved in the superior court to be considered on appeal. Thus, Yousif has forfeited the constitutional issue on appeal.

#### DISPOSITION

The probation condition requiring probation approval of Yousif's residence is stricken. In all other respects, the judgment is affirmed. The superior court is directed to amend the probation order accordingly.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.