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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO ALMODOVAR,

Defendant and Appellant.

D069567

(Super. Ct. No. JCF35313)

APPEAL from a judgment of the Superior Court of Imperial County, Diane B. Altamirano, Judge. Affirmed as modified with directions.

Patrick Dudley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Pedro Almodovar entered a no contest plea to one count of driving with a .08 percent blood alcohol causing injury (Veh. Code,<sup>1</sup> § 23153, subd. (b)). Appellant admitted an allegation that this offense occurred within 10 years of a prior "DUI" offense. (§ 23560.)

Appellant was granted formal probation on various conditions. Appellant did not object to any of the conditions of probation.

Appellant appeals challenging two specific conditions of probation. One condition requires regular attendance at Alcoholics Anonymous (AA) meetings. The other condition prohibits entry into businesses where the main product being sold is alcoholic beverages. Appellant challenges the latter condition on the basis that it is vague because it does not contain a knowledge requirement. The People concede error as to this condition and suggest we remand the case so the trial court can modify the condition.

With regard to the requirement that appellant attend AA meetings, appellate counsel now contends, for the first time on appeal, that AA is a religion based program and thus requiring mandatory attendance violates the establishment clause of the First Amendment and the California Constitution. The People contend the establishment clause issue has been forfeited by failure to raise it in the trial court. If we reach the merits of the issue, the People suggest we remand for trial court modification to permit appellant to attend a secular based program approved by the probation officer. We are satisfied the establishment clause issue has been forfeited. However, since there is a

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<sup>1</sup> All further statutory references are to the Vehicle Code unless otherwise specified.

potential constitutional issue in the condition that can be avoided by simple modification, we will exercise our discretion and remand the case to the trial court to provide an option for a nonreligion based program for appellant to address his alcohol problems.<sup>2</sup>

## DISCUSSION

At the sentencing hearing defense counsel asked the trial court to omit alcohol conditions because appellant should not be required to abstain from alcohol and that he already had to attend a mandatory drunk driving program. The court rejected those arguments and imposed the conditions we have discussed above. None of the issues raised on this appeal were ever presented to the trial court. However, given the People's responses, it appears the two challenged conditions can easily be modified to obviate any perceived constitutional issues.

### A. Legal Principles

As a general proposition failure to timely object to a probation condition in the trial court will result in forfeiture of the issue on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 234.) An exception to the forfeiture principle was acknowledged in *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*), in which the court found the challenge to constitutional vagueness was not lost by failure to object. A probation condition " 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.' " (*Ibid.*) Probation conditions require no more than reasonable certainty of what is being prohibited. The

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<sup>2</sup> The facts of the underlying offense are not relevant to the issues raised on this appeal, thus we will omit the traditional statement of facts.

principal issue is whether there is adequate notice of the requirements or prohibitions placed on the probationer. (*People ex rel Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117; *People v. Lopez* (1998) 66 Cal.App.4th 615, 630.)

#### B. AA Meetings

The trial court ordered appellant to attend at least two AA meetings weekly as a condition of probation. Appellant now contends AA is a religion based organization and an order compelling him to attend its meetings violates the establishment clause of the First Amendment. Recognizing the issue was not raised in the trial court appellant argues he is not barred from raising it on appeal because it is an unconstitutional condition which is never waived. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) We disagree with appellant's contention.

The court in *Sheena K.* *supra*, 40 Cal.4th 875 based its analysis on the fact the infirmity of the condition could be discerned without reference to the facts of the sentencing hearing. Such is not the case involving the AA condition. Nothing on the face of the record demonstrates AA is a religion based treatment program. Further, while we recognize some courts have held that forcing a parolee to attend a religion based program, over objection, violates the establishment clause (*Inouye v. Kemna* (9th Cir. 2007) 504 F.3d 705, 714), this record does not establish the selection of the AA program was over appellant's objection. Indeed, we cannot determine that appellant now personally objects to AA for that reason, we simply know he has belatedly challenged the condition on possible constitutional grounds. Of course, that is the detriment of failure to raise an issue in the trial court, only to have appellate counsel scour the record for

possible error to raise on appeal. Without the benefit of a full record we find the issue of violation of the establishment clause to be forfeited.

On this unusual record, the People have suggested, as an alternate ground for resolution of this issue, that we remand to have the trial court amend the condition to allow use of a secular agency, approved by the probation officer. As we will discuss, the case must be remanded to allow amendment of the prohibition on entering places where the main product for sale is alcohol. In such circumstance we think it makes sense to direct the trial court to address the establishment clause issue and to offer a secular based program, if appellant actually has a First Amendment objection to AA.

### C. Entering Establishments that Sell Alcohol

The second challenged condition prohibits appellant from entering any business in which the main product for sale is alcohol. Appellant contends, and the People agree, the condition as phrased is constitutionally vague. The infirmity of the condition is that it does not contain a knowledge element. As the parties agree, such condition may only prevent entry into the described places if the probationer has knowledge that its principal product is alcohol. The condition, as phrased is subject to the "void for vagueness doctrine." (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324.)

Given the parties correctly agree the condition should be modified, we will remand the case to the trial court to revisit the language of this condition of probation.

DISPOSITION

The case is remanded to the superior court with directions to modify the two challenged conditions of probation consistent with this court's opinion. In all other respects the judgment, as modified, is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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AARON, J.

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IRION, J.