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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ODU,

Defendant and Appellant.

E052347

(Super.Ct.No. RIF149493)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. Reversed in part; affirmed in part.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Andrew Mestman, Steve Oetting, and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of 13 charges stemming from thefts he committed from two homes, an attempt to cash a \$3,000 check at a bank, and failure to appear in

court during these criminal proceedings. The trial court imposed a suspended sentence and placed defendant on three years' probation. Defendant challenges the conviction for failure to appear as being supported by insufficient evidence. He also challenges the probation condition that he "[r]eside at a residence approved by the Probation Officer and not move without prior consent of the Probation officer." As discussed below, we reverse the failure to appear conviction and strike the associated enhancement, but otherwise affirm the judgment.

FACTS AND PROCEDURE

In November 2008, defendant stayed two nights at the home of his neighbors after he told their son he had been kicked out of his house and was sleeping in the park. The neighbors noticed a few items were missing from their home at that time, including money, DVD's and an antique jar. Not long after defendant had stayed with his neighbors, they found him inside their home without their permission. Defendant said he had gotten in through the sliding glass door. The neighbors later found out that someone had stolen one of their checks and cashed it for \$300. Defendant was shown cashing the stolen check on still photographs from a bank surveillance video.

In September 2009, defendant rented a room in the home of Sarah Munoz. Munoz noticed about two weeks later that her laptop was missing from her room. She confronted defendant and he told her that he had taken it to be repaired. He eventually returned the laptop after Munoz kept asking him about it. Munoz also noticed she was missing two camcorders. Again, she confronted defendant and he admitted to having stolen and pawned them. Finally, Munoz discovered that someone had made \$700 in

unauthorized charges on her credit card. Defendant eventually admitted to the police that he had made the unauthorized charges and had stolen Munoz's laptop and camcorders.

On January 4, 2010, the trial court ordered defendant to appear in court on January 21, 2010, as part of the criminal proceedings. On January 21, 2010, defendant failed to appear, so the trial court issued a bench warrant and set bail. On February 1, 2010, defendant appeared in custody.

On September 14, 2010, the People filed a 13-count amended felony information charging defendant with six counts of burglary (Pen. Code, § 459);¹ two counts of identity theft (§530.5, subd. (a)); one count of passing a fraudulent check (§ 476); one count of grand theft (§ 487, subd. (a)); one count of fraudulent use of a credit card (§ 484g, subd. (a)); one count of possessing a forged check (§ 475, subd. (c)); and one count of failure to appear in court (§ 1320, subd. (b)). The People also alleged three separate enhancements charging defendant with committing these felonies while released from custody pursuant to section 12022.1. Prior to trial, defendant admitted two of these enhancements and the trial court struck the third.

On September 21, 2010, a jury convicted defendant of all 13 counts.

On November 5, 2010, the trial court suspended imposition of sentence and placed defendant on three years' probation on conditions that included serving one year in county jail and upon release residing "at a residence approved by the Probation Officer and not mov[ing] without prior consent of the Probation Officer." This appeal followed.

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

DISCUSSION

1. *Failure to Appear and Accompanying Enhancement Are Dismissed*

Defendant argues the conviction for failing to appear in court must be reversed because insufficient evidence was presented to show that he had been released on his own recognizance, as required by sections 1320² and 1318.³ The People agree, in that no evidence was presented that defendant ever signed a written release agreement as required by section 1318 and such an agreement is necessary to support a charge under section 1320. (See *People v. Mohammed* (2008) 162 Cal.App.4th 920, 927-931; *People v. Jenkins* (1983) 146 Cal.App.3d 22, 27.) For this reason, the failure to appear count is reversed and, as the parties also agree, the second section 12022.1 enhancement based on that conviction is dismissed.

2. *Probation Condition on Residence Approval by Probation Officer*

Defendant argues the condition of probation requiring him to “[r]eside at a residence approved by the probation Officer and not move without prior consent of the Probation Officer” should be stricken because it is both unconstitutionally overbroad and unrelated to his crimes. The People respond: (1) defendant forfeited his right to challenge this condition on appeal because he did not object at trial; and (2) the condition

² “(a) Every person who is charged with or convicted of the commission of a misdemeanor who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a misdemeanor.”

³ “(a) The defendant shall not be released from custody under an own recognizance until the defendant files with the clerk of the court or other person authorized to accept bail a signed release agreement”

is related to the crimes of which he was convicted because he victimized both his landlord and some neighbors who allowed him to stay in their home. We conclude, regardless of the waiver issue, the probation condition was valid because it was both narrowly tailored and directly related to his past crimes and future criminality.

It is debatable whether defendant waived this issue by failing to object in the trial court because he challenges both the facial constitutionality of the probation condition, which withstands a waiver challenge, and the application of the condition to the facts underlying his conviction, which does not. (*People v. Welch* (1993) 5 Cal.4th 228, 232, 237; *In re Sheena K.* (2007) 40 Cal.4th 875, 878.) In any case, we will address the merits of this issue.

Courts have broad discretion to impose conditions of probation that foster rehabilitation or protect public safety. (§ 1203.1; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) The California Supreme Court has clarified the review of probation conditions on appeal. It held, “We review conditions of probation for abuse of discretion. [Citations.] Generally ‘[a] condition of probation will not be held invalid unless 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” [Citation.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) In other words, “even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as

the condition is reasonably related to preventing future criminality. [Citation.]” (*Id.* at p. 380.)

In *People v. Bauer* (1989) 211 Cal.App.3d 937, the defendant was found guilty of false imprisonment and assault. He was placed on probation with a condition that he “obtain his probation officer’s approval of his residence” (*Id.* at p. 940.) *Bauer* held this condition failed the requirements for probation conditions, as it was not related to the defendant’s crime and was not related to future criminality. (*Id.* at p. 944.) The *Bauer* court went on to hold that the probation condition was “all the more disturbing” because it impermissibly impinged on the defendant’s constitutional rights to travel and of freedom of association. (*Ibid.*) The condition was not narrowly tailored to interfere as little as possible with these important rights, but rather gave the probation officer broad power over the defendant’s living situation. (*Id.* at pp. 944-945.)

Here, unlike in *Bauer*, the two theft incidents that caused the majority of the convictions were directly related to the defendant’s living situation. In 2008, defendant stole from his neighbors both while he briefly lived with them and afterward. In 2009, defendant stole from the woman in whose house he rented a room, while he was living there. In both circumstances, defendant’s opportunity to steal sprang directly from his living situation. His living situation contributed directly to the crimes. Thus, the probation condition was both narrowly tailored to interfere with defendant’s rights only as much as necessary, and was related to both the crimes he committed and his future criminality. For these reasons, the probation condition requiring the probation officer to approve of defendant’s residence is not invalid.

DISPOSITION

The conviction for failure to appear is reversed and the second enhancement under section 12022.1, which was based on that conviction, is stricken. In all other respects the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.