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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.

DARCY LYNN MATTHEWS,

Defendant and Appellant.

E052977

(Super.Ct.No. RIF145675)

OPINION

APPEAL from the Superior Court of Riverside County. Janice M. McIntyre and Helios J. Hernandez, Judges. Affirmed with directions.

Cynthia A. Grimm, 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, Melissa Mandel, James D. Dutton, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Darcy Lynn Matthews (defendant) seeks relief from probation conditions which require that her place of residence and any plans to change it be approved by her probation officer. Defendant argues the conclusions are overbroad, vague and infringe upon her constitutional rights to travel and freedom of association. We do not find the conditions unconstitutional and will affirm the judgment of the trial court on this point. Defendant also claims that the conversion of the restitution order against her to a civil judgment is unauthorized. We agree and vacate the order of conversion.

FACTS AND PROCEDURAL HISTORY¹

John David Alber, a former U.S. naval officer, became acquainted with defendant, an ex-marine whose online user name was “imacowgirlbabay,” on “match.com” in March 2006. The two first met in person at defendant’s residence in Menifee, and thereafter began “dating.” Defendant held herself out to Alber as a licensed horse appraiser and the owner of “Phoenix Rising Equine, Inc.” In subsequent weeks, Alber “invested” in race horses with defendant to the tune of \$406,000.00. Alber received nothing—no horses and no money—in exchange for his investment.

Riverside County Sheriff’s Peter Detective Wittenberg investigated the matter. Wittenberg discovered that defendant is also known as Darcie McGowan, Darcy Lynn

¹ There is no probation report. The facts are taken from an August 27, 2008, “declaration in support of arrest warrant” by Riverside County Sheriff’s Deputy Peter Wittenberg and from the Reporter’s Transcript of the preliminary hearing of November 12, 2008. The declaration was filed with the Riverside County Superior Court on September 11, 2008.

McGowan, D.L. McGowan, Darcie Ziegler, Darci Lynn Hatcher, and Darcy Lynn McNeil, and that she has a history of felony convictions in other states. At the time of the current offense, she was on probation for a check fraud conviction in Texas. One of the conditions of probation imposed by Texas was that she not have access to a bank account, so defendant had had Alber's money deposited into the account of her mother, Donna Ziegler. Ziegler knew that her daughter was on probation and was not supposed to have a bank account, but rationalized that she "had to make a living," and so allowed her to sign her (Ziegler's) name to checks and to access the account via an ATM card.

On November 25, 2008, defendant was charged by information with grand theft (Pen. Code, § 487, subd. (a), count 1),² and with obtaining money by false pretenses (§ 532, subd. (a), count 2). As to count 2, the information alleged that the value of the property taken exceeded \$150,000 (§ 12022.6, subd. (a)(2)).³

On March 4, 2010, via a direct agreement with the court, and over the people's objection, defendant pled guilty to both counts and admitted the allegation.⁴ In exchange, the court sentenced her to a total of three years four months in state prison, instead of the five years and eight months to which she was subject. The court then suspended the

² All further statutory references are to the Penal Code unless otherwise indicated.

³ The referenced subsection pertains to the taking of property valued at over \$200,000, but defendant in fact took over \$400,000.

⁴ In all, four different judges presided over segments of defendant's case.

sentence and granted defendant probation for 36 months, with terms and conditions, to allow her the opportunity to participate in mental health services.

In taking the plea, the court asked defendant, “Did you look over and sign the terms of the probation?” and “Do you understand and accept the terms of the probation on all three pages?” To both questions she replied, “Yes, Your Honor.” Defendant also signed the sentencing memorandum and initialed each line of the felony plea form, including statements that she had had adequate time to discuss her plea and constitutional rights with her attorney. Among others, the conditions included requirements that she was to reside at a residence approved by the probation officer and not move without the probation officer’s prior permission, and that she was not to leave the State of California without first obtaining written permission of the probation department. Neither defendant nor her attorney questioned or objected to any of the conditions.

On May 25, 2010, the probation department filed an “allegation of violation of probation” report stating that defendant had not kept her probation appointment or called to cancel or reschedule, had not enrolled in the mental health treatment program, had not left a telephone number with the probation department, and was not living at the address she had given as her place of residence. By June 10, 2010, however, she had reestablished connection with the department, and the court quashed the bench warrant. On October 26, 2010, seven months after she was placed on probation, she provided the probation officer with proof that she had moved to Corona del Mar in Orange County and said she had transferred her medical and psychiatric care to Long Beach Veterans’ Hospital.

In a progress hearing on November 12, 2010, the court found defendant in compliance with the terms of her probation. In a restitution hearing on the same day, the court found that the victim's loss was \$406,000 and referred the matter to "Enhanced Collections" for a determination of defendant's ability to pay.

After the "ability to pay" hearing on January 28, 2011, the court ordered that the restitution order be converted to a civil judgment for collection. The court also extended defendant's probation two more years, for a total of five years from the date of her plea, and added a condition that she cooperate with the enhanced collection division, leaving it up to that division to determine what she might be able to pay toward the amount.

Defense counsel emphasized that her client had no money to pay anything and objected to the extension of probation, but not to any of the terms or conditions. Counsel told the court that defendant had married three weeks earlier, that her husband had been transferred to a base outside California, and that she was in the process of obtaining an "emergency transfer" of her probation.

In a progress hearing on February 24, 2011, the court again found defendant in compliance with the terms of probation. A report filed on the same date indicated that defendant was now living in Texas with her new husband. Defense counsel informed the court that defendant's probation had been transferred to that state.

DISCUSSION

I. Probation Conditions

Defendant's principal argument is that the terms requiring a probation officer's approval of her choice of residence and changes thereto interfere with her rights to travel

and to free association and must be stricken in their entirety as unconstitutionally vague and overbroad. We disagree.

Probation is a suspension of a sentence and a revocable grant of release conditioned upon supervision by a probation officer. (§ 1203, subd. (a).) “Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety.” (*People v. Welch* (1993) 5 Cal.4th 228, 233.) “Persons placed on probation by a court shall be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation.” (§ 1202.8, subd. (a).) ““Probation is not a right but a privilege.”” (*In re York* (1995) 9 Cal.4th 1133, 1150, quoting *People v. Bravo* (1987) 43 Cal.3d 600, 608.) “[If] the defendant feels that the terms of probation are harsher than the sentence for the substantive offense[,] he is free to refuse probation.” (*People v. Rubics* (2006) 136 Cal.App.4th 452, 459 (*Rubics*) quoting *People v. Miller* (1967) 256 Cal.App.2d 348, 356.)

Standard of Review:

“In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*)). We review their decisions for abuse of discretion. A trial court abuses its discretion when the probation conditions imposed are arbitrary, capricious, or exceed the bounds of reason. A condition will not be invalidated as unreasonable unless it satisfies each of the following criteria: (1) it has no relationship to the crime of which the offender was convicted; (2) it relates to conduct which is not itself criminal; and (3) it

requires or forbids conduct which is not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*); *Carbajal, supra*, at p. 1121.) The test is conjunctive. All three prongs must be satisfied before an appellate court will find it invalid. (*Lent, supra*, at p. 486.) “[E]ven 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.” (*People v. Olguin* (2008) 45 Cal.4th 375, 380 (*Olguin*)). A condition of probation that enables a probation officer to effectively supervise a probationer is reasonably related to future criminality. (*People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240-1241.)

Where there is a constitutional challenge based on vagueness and overbreadth, and the matter presents a pure question of law that can be resolved without resort to the record, the standard of appellate review is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) However, not every term which requires a defendant to give up a constitutional right is per se unconstitutional. (*People v. Mason* (1971) 5 Cal.3d 759, 764-765, overruled on a different point as stated in *Lent, supra*, 15 Cal.3d at p. 486, fn.1.) Probation conditions may place limits on constitutional rights if they are reasonably necessary to meet the twin goals of rehabilitation of the defendant and protection of the public. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-941.)

Appellate courts have sometimes modified or stricken conditions that restrict a probationer’s constitutional rights when the conditions are not narrowly drawn to serve the goals of rehabilitation and protection of the public. (See, e.g. *In re Bushman* (1970) 1

Cal.3d 767, 777 [condition requiring petitioner to seek psychiatric treatment at his own expense was beyond the court's jurisdiction where there was no evidence that he needed psychiatric care], disapproved on another ground in *Lent, supra*, 15 Cal.3d 481, 486, fn. 1); *People v. Keller* (1978) 76 Cal.App.3d 827, 839 [narcotics search condition not narrowly drawn where defendant's conviction was for theft of a \$0.49 ballpoint pen], overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Bauer, supra*, 211 Cal.App.3d at pp. 940-941 [condition requiring probation officer's approval of defendant's residence stricken where defendant had lived with his parents all his life and neither they nor their home had been involved in any way in his crime].)

Analysis:

In our view, the residence-approval conditions imposed on defendant were not unreasonable or arbitrary. And they were as precise and as narrowly drawn as were appropriate for her situation.

Much of defendant's opening brief is devoted to establishing that rights to travel and to free association are constitutional rights, and to claiming that the probation conditions in question "violate[]" those rights. We agree that these rights are constitutional and fundamental, and that the conditions curtail them. However, we do not agree that the conditions "violate" the rights in the sense that the restrictions imposed are unreasonable or otherwise constitutionally impermissible. Insofar as probation is a grant of supervised release in lieu of confinement, virtually *all* probation conditions restrict these rights. "Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" [Citation.] Just as other

punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.' [Citation.]" (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753.) Since it is impossible to travel or to associate freely with persons of one's choice from inside a prison cell, probation is generally a great deal for the grantee. If defendant felt otherwise, she was free to refuse probation, and instead serve her sentence. (*Rubics, supra*, 136 Cal.App.4th at p. 459.)

Moreover, "In evaluating the validity of a condition of probation, the issue is not the impact of the condition on the defendant's constitutional rights but its ability to meet the standard set forth in [*Lent*]." (*Gilliam v. Municipal Court* (1979) 97 Cal.App.3d 704, 708.) The conditions requiring defendant to obtain her probation officer's approval of her residence and plans to change it, meet the *Lent* standard. Choosing or changing a place of residence is not itself criminal conduct, but there are many instances where, as here, the choice is related to both the current offense and to the risk of future criminality. A residence may have been used to promote the criminal venture; it may be in a place or with people involved in concealing or facilitating the crime; and it may make a future crime of the same sort likely. On probation for check fraud in Texas, defendant took up residence in California where she used her home and the internet to meet and establish a relationship with a new victim. To circumvent the conditions imposed by Texas, she deposited the victim's money into an account shared and managed by her mother, who, in turn, repeatedly allowed her access to that money in violation of the state's probation condition.

Forfeiture

The people's first response to defendant's constitutional claims is that all but the claim of overbreadth were forfeited by her failure to object below. Anticipating this argument, defendant cites *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*) for the proposition that objection is not necessary for preservation of constitutional claims, so long as they involve pure questions of law made on grounds of overbreadth and vagueness and that can be resolved without reference to the underlying facts. (*Id.* at p. 887.) The people do not dispute defendant's understanding of the *Sheena K.* rule, but insist that the probation conditions at issue here do not fall into the relevant category. Not all constitutional defects in conditions of probation, they point out, may be presented for the first time on appeal "since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.]" (*Sheena K., supra*, 40 Cal.4th at pp. 875, 889.) We agree with the people.

Firstly, the residence-approval conditions are not facially unconstitutional, as defendant suggests. "“To support a determination of facial unconstitutionality . . . [a defendant] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.” [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) This defendant cannot do. There are many situations where offenders have used their homes in a criminal enterprise, and where the probation officer's approval of the probationer's choice of residence is necessary to protect the public and deter future criminality. (See, e.g., *People v. Stein* (1942) 55

Cal.App.2d 417, 420 [“house of ill repute” used for prostitution]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 315 [“drug house” used for illegal drug transactions]; *People v. \$497,590 United States Currency* (1997) 58 Cal.App.4th 145, 155 [“safe house” used to launder (literally) proceeds from illegal drug transactions].) As in these cases, defendant used her home (and arguably an internet chat room as an extension of her home), not to mention family relationships, to facilitate her criminal activity. Accordingly, her grant of probation could legitimately be conditioned on her probation officer’s approval of the probationer’s choice of residence and roommates, and on any plan she might develop to change her place and conditions of residence.

Secondly, the conditions were not unconstitutional as applied to defendant. There is no evidence that the probation department arbitrarily or capriciously disapproved any of her choices of a home; this despite the fact that she had not, initially, bothered to keep them informed of its whereabouts or of her move out of the area.

Because the conditions were not unreasonable and did not violate the *Lent* criteria, defendant should have taken at least one of the two meaningful opportunities she had to object to them.⁵ She did not, and so, except for overbreadth, her claim is not properly before us. Nonetheless, in the interests of justice and judicial economy, we will consider it more specifically.

⁵ Defendant’s missed opportunities to object occurred on March 4, 2010, when the conditions were first imposed, and on January 28, 2011, when the court extended her period of probation.

Vagueness

Although the concepts of vagueness and overbreadth are related, they are not identical. The basis of a vagueness challenge is the due process concept of fair warning. (*People v. Castenada* (2000) 23 Cal.4th 743, 751.) “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,’ if it is to withstand a [constitutional] challenge on the ground of vagueness.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890, quoting *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) Precision is necessary so that both the probationer and the person charged with enforcing the term, as people of common intelligence, can understand what is required. (*People ex rel Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.) “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.’ [Citation.]” (*Castenada*, *supra*, at p. 751.) Despite defendant’s arguments to the contrary, the conditions at issue here do neither.

Although stated at a high level of generality, the conditions are precise. So long as she is on probation, defendant must obtain her probation officer’s approval of her choice of residence and of any plan to change her place of residence or to move out of California. That is what is required. The conditions can prevent her from taking up residence, for instance, with a family member or other persons who might have helped

her violate probation in the past, or within or near a particularly vulnerable population, like elderly or mentally disabled persons.

Moreover, the conditions do not encourage arbitrary or discriminatory enforcement. They do not authorize the probation officer to irrationally withhold approval of defendant's choice of a home or to deny her any home at all. Since the court itself has no power to impose unreasonable conditions, it cannot endow the probation officer with power to do so. (*People v. Kwizera, supra*, 78 Cal.App.4th at pp. 1240-1241.) The court gave the probation department authority to approve defendant's residence, which basically means to closely supervise her and to evaluate whether the home is likely to be used in future criminality. (*Olguin, supra*, 45 Cal.4th at p. 379.)

Nor, as we have discussed, is there evidence that the probation department has acted in an unreasonable, capricious, or arbitrary manner. Defendant moved to Orange County without first informing or obtaining permission from her probation officer, but the move was apparently later approved. Similarly, her transfer out of state was approved. In light of the way the probation department has exercised its discretion to this point, there is no reason to believe that it will abuse its authority in the future.

Overbreadth

“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.” (*Sheena K., supra*, 40 Cal.4th at p. 890.) Here, in our view, because of the expansive nature of defendant's crime and history, the condition in question is so tailored.

Defendant insists that “This condition has nothing to do with [her] theft.” She is wrong. The record shows that defendant is an exceedingly mobile person who changes her location, her name, and her relationships with regularity, and who uses all three to promote and conceal her criminal activities. For the current crime, she used her home to meet and form a “dating” relationship with her victim before swindling him, just as she had done in the past with other victims.⁶ She has used at least five different last names, along with three variations on her first.⁷ She also used her relationship with her mother to facilitate the crime and avoid the probation restriction placed on her financial activities by the state of Texas. Her crimes have involved people in several cities within California and people in a number of other states, demonstrating her ability to pursue an expansive criminal agenda in a variety of locations.⁸ Defendant is also adept at disappearing. She was granted probation on March 4, 2010. Initially at least, she failed to give the department her telephone number and correct address and the probation officer could not find her. She apparently did not surface until after an allegation of violation of probation was filed on May 25, 2010.

⁶ Defendant formed a personal relationship with another man, Gaylord Hatcher, and, through him, with his sister, Gayle Bruckner. She then defrauded the two of significant sums of money.

⁷ Recently married, defendant presumably now has access to still another last name.

⁸ Defendant appears to have engaged in horse trading in California, Washington, Michigan, Colorado, Indiana, Iowa, Illinois, Ohio, and Vermont.

Defendant seeks support in *People v. Bauer, supra*, 211 Cal.App.3d 937, a case in which the appellate court found that a probation condition requiring probation officer approval of the defendant's place of residence did not meet the *Lent* criteria and was therefore unconstitutionally overbroad. (*Bauer* at p. 942.) Applying "a second level of scrutiny"⁹ the court determined that the condition was not narrowly tailored to further "a compelling state interest in reformation and rehabilitation." [Citations.] (*Ibid.*) *Bauer* is not apt here. That case concerned a 26-year-old man who had lived with his parents all his life. There was no evidence that his "exemplary" home life, or his parents, had contributed to his crime in any way. (*Id.* at p. 944.) Residing with one's parents, the court noted, is conduct not in itself criminal, and the probation department could not use the condition to "banish" the defendant from his parents. (*Id.* at pp. 943-944.) The situation here, where defendant used her home and her familial and romantic relationships to further crime, is different. Banishment is not an issue.

In sum, although they may restrict her movements and her choice of places to live, requirements that defendant obtain her probation officer's approval of her residence or plans to change it or to move out of state, are neither unreasonable nor unconstitutionally vague nor overbroad. In view of defendant's peripatetic pattern of criminal behavior, restriction on her rights to travel and to live just any place she might choose is critical to

⁹ The court did not otherwise specifically identify the standard of review it was applying as the "strict scrutiny" traditionally used for review of claims that a provision unconstitutionally restricts fundamental rights or discriminates against members of a suspect class of law abiding citizens. (See, e.g. *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42.)

the goals of protecting the public and rehabilitating defendant. The conditions will enable her probation officer to effectively supervise her and will make it much more difficult for her to vanish into still another location, name, and identity and to continue preying upon unsuspecting and vulnerable victims.

II. Restitution Order

Defendant's second argument is that the order converting the restitution order to a civil judgment is unauthorized and should be vacated. The People agree. The parties are correct. A restitution order is enforceable as a civil judgment (§ 1214, subd. (b)(2)), but an order "converting" a restitution order to a civil judgment is unnecessary and unauthorized. (*People v. Hart* (1998) 65 Cal.App.4th 902, 906.) We will vacate the order, but will not otherwise disturb the judgment.

DISPOSITION

The trial court's order converting the restitution order to a civil judgment is vacated. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
ACTING P.J.

KING
J.