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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.

JAROLD ROBERT CLOVIS,

Defendant and Appellant.

E053509

(Super.Ct.No. FSB1100856)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M.

Dest, Judge. Affirmed as modified.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jarold Robert Clovis was charged by felony complaint with sexual battery while restraining the victim (Pen. Code, § 243.4, subd. (a),

count 1),¹ sexual battery (§ 243.4, subd. (e)(1), count 2), and child molesting (§ 647.6, subd. (a)(1), count 3). Pursuant to a plea agreement, he pled guilty to count 1, and the trial court dismissed the other counts. The court placed him on probation for three years, under certain terms.

On appeal, defendant contends: 1) the condition requiring him to submit to polygraph testing is overbroad; 2) the condition prohibiting him from using or possessing any computer or internet device, except in the course of employment, is overbroad, unrelated to his crime, and unrelated to future criminality; and 3) the court erred in requiring him to pay the cost of probation supervision and other costs associated with his probation conditions, without first making a finding on his ability to pay; the court also erred in conditioning his probation on the payment of certain costs. The People concede, and we agree, that the probation condition regarding use of the internet should be modified. The condition regarding the polygraph testing should also be modified. Furthermore, we remand the matter for the trial court to eliminate the requirement that defendant pay the costs associated with specified conditions, as a condition of probation, and to issue a separate order for the payment of such costs.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

FACTUAL BACKGROUND²

On February 22, 2011, a 16-year-old girl was walking down the street when defendant approached her from behind on his bicycle. Defendant pushed her down and forcefully rubbed her vaginal area outside her clothing. She kicked him, and he stopped. Defendant then got on his bicycle and rode away. The victim observed defendant again that same evening in front of a grocery store and called the police.

When the police interviewed defendant, he denied his actions. However, he talked about his past issues with touching females and stated that he “had a thing with breasts,” and that was why he, his father, and his stepbrother were all section 290 registrants.

ANALYSIS

I. The Polygraph Testing Probation Condition Should Be Modified

The probation conditions imposed by the court included a requirement that defendant submit to random polygraph testing at the direction of the probation officer, as part of the sex offender surveillance program.³ Defendant contends that this probation condition is unconstitutionally overbroad, since it does not limit the questions he must answer to questions relevant to sexual relations with underage girls

² This statement of facts was taken from the probation report, since defendant pled guilty pursuant to a plea agreement.

³ The polygraph condition was referred to as condition No. 26 during oral proceedings, in accordance with the probation report. However, the minute order indicated the condition was No. 23. We will refer to it in this opinion as condition No. 23.

or completion of his court-ordered sex offender surveillance program. We agree that the term should be modified.

“Trial courts have broad discretion to set conditions of probation in order to ‘foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.’ [Citations.] . . . [¶] However, the trial court’s discretion in setting the conditions of probation is not unbounded.” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) A term of probation 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. Lent* (1975) 15 Cal.3d 481, 486.)

In *Brown v. Superior Court* (2002) 101 Cal.App.4th 313 (*Brown*), the defendant pled guilty to stalking his former girlfriend while a domestic violence temporary restraining order was in effect. (*Id.* at p. 317.) He was placed on probation, and one of his conditions required him to successfully complete a stalking treatment program. (*Ibid.*) In pleading guilty, the defendant stipulated to the facts contained in the police report and preliminary hearing transcript but denied he had engaged in the behavior. He also told the psychologist in charge of the treatment program that he did not belong in the program because he was not a stalker. (*Id.* at p. 318.) The psychologist recommended that the defendant’s probation include a polygraph testing condition for purposes of treatment, noting that the defendant had attempted to falsify a drug test, denied the major facts of the case, had a psychopathic personality, and had several ““stalking recidivism predictors’”” (*Ibid.*) The trial court then imposed the

condition that the defendant ““undergo periodic polygraph examinations at [his] expense, at the direction of the probation officer”” to further the defendant’s successful completion of the stalking therapy program. (*Id.* at p. 321.) The trial court declined to place any restrictions on the questions that could be asked during the testing. (*Ibid.*) The Court of Appeal found the polygraph testing to be a valid condition, since it was reasonably related to the defendant’s crime and to possible future criminality. (*Ibid.*) However, the court found the condition to be “broadly worded.” (*Ibid.*) It held that the condition “must limit the questions allowed to those relating to the successful completion of the stalking therapy program and the crime of which [the defendant] was convicted.” (*Ibid.*)

In the instant case, condition No. 23, the polygraph testing condition, read as follows: “You shall submit to random polygraph testing by a Probation department approved polygraph examiner at the direction of the Probation officer, as part of the sex offender surveillance program, and be responsible for all costs associated with examinations.” Defendant objected to the condition, but the court refused to strike it, finding that it was “a very useful tool for probation to supervise and to determine if there’s compliance.” The text of this condition is similar to the one in *Brown*, except that defendant is ordered to complete a sex offender surveillance program rather than a stalking therapy program. Like the condition in *Brown*, this probation condition is overbroad. It should be rewritten to limit the questions allowed to those relating to the successful completion of the court-mandated sex offender surveillance program and the crime of which defendant was convicted.

II. The Probation Condition Restricting Defendant's Use and Possession of a
Computer or Internet Device Should Be Modified

The trial court imposed a probation condition which read as follows: “Neither use nor possess any computer or internet device except in the course of employment with the employer’s knowledge of the nature of the offense and with the approval of the Probation Officer.”⁴ Defense counsel objected to the condition as overbroad and unrelated to the current offense. On appeal, defendant makes the same arguments and points out that his crime did not involve the use of a computer, but rather arose from his approaching a female randomly in public and grabbing her inappropriately. The People concede, and we agree, that the term should be modified.

We note that “[s]ome child molesters reach their victims through the Internet.” (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1236.) Moreover, as acknowledged by the People, “restrictions upon access to the Internet necessarily curtail First Amendment rights.” (*Id.* at p. 1235.) Therefore, a court “must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

Here, the probation condition at issue prohibits defendant from using or possessing a computer or internet device, except in the course of his employment and

⁴ The internet access condition was referred to as condition No. 27 during oral proceedings, in accordance with the probation report. However, the minute order indicated the condition was No. 24. We will refer to it as condition No. 24.

with the probation officer's approval. It is not tailored to defendant's conviction for sexual battery or the court's goal of public safety and rehabilitation. While defendant owned a computer at the time of his offense, he did not use it or the internet to perpetrate the crime. Thus, the broad restriction on defendant's use of the computer and internet bears no relation to his conviction.

The People propose a modified probation condition to read as follows: "Defendant is prohibited from accessing or subscribing to any computer internet service or local bulletin board service which provides access to or markets pornographic imaging unless approved in writing by [his] therapist and/or [his] probation officer. Defendant is also subject to unannounced inspections of material stored on [his] hard drive and removable disks, [and] search logs, and probation may install monitoring software on [his] computer or any other known computer defendant uses." Defendant urges this court to adopt the proposed modification, should we decline to strike the condition.

We agree with the modification, with one addition. Because the purpose of this condition is to limit defendant's use of the internet to access sexually explicit material, the condition should expressly articulate this purpose. Thus, in addition to the proposed modification by the People, the condition should read: "You are prohibited from accessing any sexually explicit material on the internet."

III. The Probation Conditions Mandating Payment of Certain Costs Should Be Modified

Defendant next contends that the court erred in finding he had the ability to pay for probation supervision, and in implicitly finding that he had the ability to pay the costs associated with implementing certain probation conditions, without inquiring into his ability to pay as required by section 1203.1b. He further argues that the court erred in conditioning probation on him paying the costs associated with implementing certain conditions. We conclude that defendant waived the claim regarding his ability to pay under section 1203.1b. However, we agree that the court erred in conditioning his probation on the payment of certain costs and that those specified conditions should be modified.

A. *Relevant Background*

In her report, the probation officer recommended that defendant not be put on probation because he had demonstrated predatory behavior and was a danger to society. Defendant said he was homeless, had never been employed, and had various mental disorders. Since defendant was homeless, the probation officer concluded that he did “not have th[e] resources and family support to assist in monitoring him in the community and ensuring that he addresses his emotional and mental issues.” Thus, the probation officer recommended that defendant be incarcerated. In light of his homeless status, the probation officer also recommended that he pay minimal fees and fines. Specifically, she found that defendant did not have the ability to pay for appointed counsel or the cost of conducting the presentence investigation and

preparation of the probation report. However, she found that he had the ability to pay \$15 per month for probation supervision fees, pursuant to section 1203.1b. The officer further recommended that the court order him to pay a court security fee of \$70 and that the total monthly payment for all ordered amounts be set at \$25 per month.

At the sentencing hearing, defense counsel noted that the probation department had exempted some of the fines and then asked the court to set payment “at the lowest possible rate, \$30 a month.” The court informed her that that amount was more than what the probation department was recommending. Defense counsel asked what the probation department’s recommendation was, and the court stated it was \$25 a month, starting 30 days from that date. Defense counsel replied, “That’s great. I’ll take that.” Defense counsel then objected to certain terms of probation and, after some discussion, submitted. Having considered the probation report and comments of counsel, the court ordered a court security fee of \$70, found that defendant had the ability to pay probation supervision fees of \$15 per month, and stated that the total monthly payments for all ordered amounts would be \$25 per month. Neither defendant nor his trial counsel objected to the finding of his ability to pay or to any of the fees.

B. Defendant Has Forfeited Any Claims Regarding His Ability to Pay

Defendant specifically complains that the court erred in finding he had the ability to pay, that the evidence did not support the probation officer’s determination that he had the ability to pay, and that he does not have the ability to pay and that there is no indication he waived his right to have the court make the determination of his

ability to pay. Defendant relies on the statutory requirements in section 1203.1b to support his arguments.

Section 1203.1b “authorizes the recoupment of certain costs incurred for probation and the preparation of preplea or presentence investigations and reports on the defendant’s amenability to probation.” (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070 (*Valtakis*)). The section “requires determinations of amount and ability to pay, first by the probation officer, and, unless the defendant makes ‘a knowing and intelligent waiver’ after notice of the right from the probation officer, a separate evidentiary hearing and determination of those questions by the court.” (*Ibid.*, fn. omitted.)⁵

In *Valtakis*, *supra*, 105 Cal.App.4th 1066, the defendant entered a negotiated plea. The probation report recommended that he pay a probation fee under section 1203.1 of \$250, as well as other fees and fines. The report contained no determination of ability to pay and no advisement of a right to a separate hearing on that issue.

⁵ Section 1203.1b, subdivision (a), provides in relevant part, that in any case in which a defendant is granted probation, “the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision” The statute further provides: “The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

(*Valtakis*, at pp. 1068-1069.) The court placed him on three years' probation, and ordered him to pay certain fees, the costs of any drug or alcohol testing, and a probation service fee of \$250. (*Id.* at p. 1069.) Neither he nor his counsel objected to any of the fees. (*Ibid.*) On appeal, the defendant "relie[d] solely on the statutory requirements" in arguing that the probation fee of \$250 was imposed without compliance with section 1203.1b. (*Valtakis*, at p. 1071.) The reviewing court held that the statutory claim was waived on appeal for failure to object anytime below. (*Id.* at pp. 1071-1072.) The court stated, "Did the Legislature intend . . . that a defendant and his counsel may stand silent as the court imposes a fee—even a nominal one like the \$ 250 here—and then complain for the first time on appeal that some aspect of the statutory procedure was not followed? We say no." (*Id.* at p. 1075.)

Here, as in *Valtakis*, defendant failed to object below to the court's finding of his ability to pay or the imposition of the probation supervision costs and other costs related to his probation conditions. Not only did he fail to object, he actually offered to pay *more* than the monthly amount recommended by the probation officer. He then *submitted* on the lower amount recommended by probation. Defendant has forfeited his claims.

Defendant argues that his claim regarding payment of the fees and costs is not forfeited by failing to raise it below "because imposition of fees as probation conditions was unauthorized, since it could not have been lawfully imposed under any circumstances and it is clear and correctable on review." He cites to *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402, in support of his argument. However,

his reliance on *Pacheco* is misplaced. The trial court in that case improperly imposed a court security fee as a condition of probation. (*Id.* at p. 1402.) The reviewing court held that the defendant had not forfeited his claim since “[t]he imposition of the court security fee *as a probation condition* was unauthorized because . . . this fee [was] collateral to [his] crimes and punishment and as such, its payment [could] not be made a condition of probation.” (*Ibid.*, italics added.)

We further note that if defendant’s situation has changed *since* the probation supervision fee and other costs were imposed, “his remedy is not through this appeal but through the statute itself” (*Valtakis, supra*, 105 Cal.App.4th at p. 1076.) Section 1203.1b allows for ““additional hearings”” on a defendant’s ability to pay any time during the probationary period, and for the modification of a judgment upon a showing of a change of circumstances. (*Valtakis*, at p. 1076; § 1203.1b, subds. (c), (f).)

C. The Court Erred in Conditioning Defendant’s Probation on the Payment of Costs Associated With Certain Probation Conditions

Defendant argues that certain terms of probation were improperly conditioned upon his payment of the costs of implementing those terms. Specifically, he objects to term No. 11, which requires him to participate in counseling and “be responsible for payment of all program fee(s)”; term No. 22, which requires him to participate in a sex offender treatment program and “be responsible for all program fees”; term No. 23, which requires him to “be responsible for all costs associated with [polygraph] examinations”; and term No. 41, which requires him to submit to continuous global

positioning system (GPS) monitoring and “pay [for] all associated equipment and/or monitoring.” He contends that the matter should be remanded to modify these conditions to make it clear that his payment of the costs associated with these conditions is not part of the conditions themselves. We agree.

In *Brown, supra*, 101 Cal.App.4th 313, the defendant objected to the polygraph condition imposed by the trial court mandating that the testing be at his own expense. (*Id.* at p. 321.) The reviewing court stated the following: “[A] trial court may order a defendant to pay for reasonable costs of probation; however, such costs *are collateral and their payment cannot be made a condition of probation.* [Citations.] Moreover, before ordering a defendant to pay costs of probation, the court must make an inquiry and determination of the defendant’s ability to pay and the amount of payment. [Citation.] Here, however, the requirement that the defendant pay for periodic polygraph testing is an integral part of polygraph condition 10(o) which require[s] the defendant to ‘undergo periodic polygraph examinations at defendant’s expense’ As such, payment of the costs of the polygraph testing is not collateral, but a condition of probation. [Citations.] . . . Pursuant to section 1203.1b, however, before requiring [the defendant] to pay all or a portion of the reasonable costs associated with periodic polygraph testing, the court must make an inquiry and determination regarding his ability to pay, and issue a separate order for the payment of such costs. [Citations.] This order can be enforced through a civil action—not through contempt proceedings, or the threat, express or implied, of revocation of probation. [Citations.]” (*Brown, supra*, 101 Cal.App.4th at pp. 321-322, italics added.)

Similarly, in the case before us, the requirement that defendant pay for the costs of participating in counseling, participating in the sex offender treatment program, polygraph testing, and GPS equipment and/or monitoring is an integral part of the probation conditions. As such, payment of those costs is a condition of his probation. Payment of such collateral costs is not enforceable as a condition of probation. (*Brown, supra*, 101 Cal.App.4th at p. 321.) Instead, the court must issue a separate order for payment of such costs. This order can only be enforced as a separate money judgment in a civil action. (*Id.* at p. 322.) As defendant suggests, the order granting probation should be modified to clarify that payment of the costs associated with condition Nos. 11, 22, 23, and 41 is not a condition of probation, but rather an order of the court entered at judgment. (See *People v. Flores* (2008) 169 Cal.App.4th 568, 578.)

DISPOSITION

Condition No. 23 is modified to read as follows: “You shall submit to random polygraph testing by a Probation Department approved polygraph examiner at the direction of the Probation Officer, as part of the court-mandated sex offender surveillance program. The questions shall be limited to those relating to the successful completion of the sex offender surveillance program and the crime of which you were convicted.”

Condition No. 24 is modified to read as follows: “You are prohibited from accessing or subscribing to any computer internet service or local bulletin board service, which provides access to or markets pornographic imaging unless approved in

writing by your therapist and/or your probation officer. You are prohibited from accessing any sexually explicit material on the internet. You are also subject to unannounced inspections of material stored on your hard drive and removable disks, and search logs, and probation may install monitoring software on your computer or any other known computer you use.”

The trial court is directed to modify its probation order to eliminate the portions of condition Nos. 11, 22, 23, and 41 that required that defendant pay the costs associated with those conditions. The trial court is directed to issue a separate order for the payment of such costs, enforceable as a money judgment in a civil action. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.