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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.

ALLIX ANASTASSIA HURTADO,

Defendant and Appellant.

E054226

(Super.Ct.No. BLF10000144)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Esther K. Hong, 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, Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On June 8, 2011, a jury found defendant and appellant Allix Anastassia Hurtado guilty of burglary under Penal Code¹ section 459 (count 1), and fraudulent use of an access card under section 484g, subdivision (a) (count 2), with a true finding that the value of the property taken was more than \$400.

At the sentencing hearing on August 5, 2011, the trial court reduced defendant's felony conviction in count 2 to a misdemeanor because the threshold amount required for a felony charge, due to a change in the law, had increased from \$400 to \$950. The court sentenced defendant to state prison for two years on the burglary conviction, but ordered execution of the sentence suspended and placed defendant on probation for 36 months. One of the probation conditions required that defendant inform the probation officer of her place of residence and reside at a residence approved by the probation officer.

On appeal, defendant contends that the probation condition requiring her to reside at a residence "approved" by the probation officer is unconstitutional. We agree and modify this probation condition. In all other respects, we affirm the judgment.

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

II

STATEMENT OF FACTS²

On three separate dates, March 1, 2, and 4, 2010, defendant entered Dobbs TV and Appliance in Blythe, California. She purchased three television sets, a rug, and a TV mount with a credit card not belonging to her. The total amount of her purchases were: (1) March 1 - \$1,169; (2) March 2 - \$717.74; and (3) March 4 - \$853.71. Defendant charged all her purchases to a credit card issued to “Maria Flores.”

Defendant signed the purchase receipts on each occasion with the name “Flores.” Ms. Flores did not know defendant, and she did not give defendant permission to use her credit card.

III

ANALYSIS

As a condition of probation, the trial court ordered defendant to “[i]nform the probation officer of [her] place of residence and reside at a residence approved by the probation officer.” Defense counsel did not object.

Defendant’s sole contention on appeal is that the probation condition requiring her to obtain her probation officer’s approval of her choice of residence violates her constitutional rights to travel, freedom of association, and is “impermissibly overbroad” and “vague,” and hence, should be stricken. The People respond that defendant forfeited

² Defendant’s sole issue on appeal is whether her constitutional rights were violated by the terms of her probation. We, therefore, will only provide a brief summary of the facts.

this issue on appeal by failing to object in the court below; and, in the alternative, argue that defendant's contention lacks merit.

Generally, challenges to the reasonableness of probation terms require an objection. (*People v. Welch* (1993) 5 Cal.4th 228 (*Welch*)). Here, defendant's claim is that the probation condition violates her constitutional rights. Courts have held that the waiver rule announced in *Welch* applies even when a defendant contends a probation condition is "constitutionally flawed." (*People v. Gardineer* (2000) 79 Cal.App.4th 148, 151; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on another ground as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962 [Fourth Dist., Div. Two]; *In re Justin S.* (2001) 93 Cal.App.4th 811, 814.) But *Welch*'s waiver doctrine is subject to an exception for sentences that are unauthorized or in excess of the trial court's jurisdiction. (*Welch*, at p. 235.) The exception "involve[s] pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court. [Citations.]" (*Ibid.*; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 889.) In other words, an exception to the forfeiture rule may be found when the appeal presents an important issue of law and the error is easily remediable on appeal by modification of the probation condition. (*In re S.B.*, at pp. 1293-1294.)

In *People v. Smith* (2001) 24 Cal.4th 849, the Supreme Court explained this exception as follows: "Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.'

[Citation.] We deemed appellate intervention appropriate in these cases because the errors presented ‘pure questions of law’ [citation], and were “‘clear and correctable” independent of any factual issues presented by the record at sentencing.’ [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.” (*Id.* at p. 852; see also *In re Sheena K.*, *supra*, 40 Cal.4th at p. 887 [“An obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture.”].)

Here, contrary to the People’s claim, we find defendant’s constitutional claim cognizable on appeal, as it presents “a pure question of law” turning on undisputed facts. (*Welch*, *supra*, 5 Cal.4th at p. 235.) Defendant’s challenged probation condition can easily be remedied on appeal by modification of the condition. (See, e.g., *In re Sheena K.*, *supra*, 40 Cal.4th at p. 888.) Therefore, her constitutional challenge to the residence probation condition has not been forfeited.

Probation conditions impinging on “constitutional rights ‘must be narrowly drawn’” so that they are reasonably related to the state’s interest in reformation and rehabilitation. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 627; see also *People v. Garcia* (1993) 19 Cal.App.4th 97, 101-102.) In *People v. Bauer* (1989) 211 Cal.App.3d 937, cited by both the People and defendant, the reviewing court struck a nearly identical residence approval probation condition, stating: “The condition is all the more disturbing because it impinges on constitutional entitlements—the right to travel and freedom of

association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power, for example, to forbid appellant from living with or near his parents—that is, the power to banish him. It has frequently been held that a sentencing court does not have this power. [Citations.]” (*Id.* at pp. 944-945.)

In view of the foregoing, we conclude that the challenged condition should be modified. We do see the benefit of the probation officer being informed if defendant’s residence has changed. We have the power to modify a probation condition on appeal. (See *In re Sheena K.*, *supra*, 40 Cal.4th at p. 892; *In re Justin S.*, *supra*, 93 Cal.App.4th at p. 816.) The condition should be modified to read as follows: “Defendant shall keep the probation officer informed of her place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence.”

IV

DISPOSITION

The challenged probation condition is modified to read: “Defendant shall keep the probation officer informed of her place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence.”

In all other respects, the judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.