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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.

JAIME MOJICA, JR.,

Defendant and Appellant.

E054767

(Super.Ct.No. RIF1101218)

OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields,
Judge. Affirmed.

Janice R. Mazur, 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, Barry Carlton, and Scott C.
Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea bargain, defendant and appellant Jaime Mojica, Jr., pleaded guilty to one count of interfering with a police investigation (Pen. Code, § 148; count 1, a misdemeanor) and one count of sale or transportation of methamphetamine (Health & Saf. Code, § 11379; count 2, a felony), with an enhancement for a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (a)). As a result of the plea bargain, defendant was sentenced to five years in the county jail, consisting of three years in actual custody, plus two years under supervised release. Defendant has filed an appeal challenging one of the conditions of his future supervised release as unconstitutionally vague and overbroad. Defendant has also filed a petition for writ of habeas corpus asserting that the trial court miscalculated his custody conduct credits. Defendant has requested immediate consideration of his habeas corpus petition, because, if he is granted the relief requested, he would be entitled to release on December 30, 2012. This court has issued an order for expedited consideration of the habeas corpus petition, together with the appeal. Assignment of both for consideration by the same panel ensures consistent decisionmaking and promotes judicial efficiency; expedited treatment should permit time for a decision before defendant's hoped-for release date.¹

As to the issue raised on appeal, we conclude, by analogy to conditions of probation, that the challenged condition of supervised release is not unconstitutionally

¹ The petition for writ of habeas corpus (case No. E056175) will be resolved by separate order.

vague or overbroad. We thus affirm the judgment, albeit with directions to correct a clerical error in the court's minutes.

FACTS AND PROCEDURAL HISTORY

The matter arises on a plea of guilty, pursuant to a plea bargain reached before a preliminary hearing. There was also no probation sentencing report. The facts of the underlying offense are, therefore, taken from the declaration in support of an arrest warrant, and treated briefly, for purposes of background only.

In February 2011, at approximately 8:30 p.m., two Riverside County sheriff's deputies were on patrol in an unincorporated area of the county. The officers saw a vehicle with a burned out headlamp and effected a traffic stop. One of the deputies met with the driver of the vehicle, while the other met with defendant, the passenger. Defendant told the deputy that he was on probation for a drug-related offense. The deputy asked to conduct a search of defendant's person, to determine his compliance with the terms of probation. Among other things, the deputy asked defendant to take off his shoes and socks. Defendant appeared to catch something in his hand as he balled up one of his socks. The deputy commanded defendant to show his hands, but defendant put something into his mouth and ran away. The deputy caught defendant when defendant tripped and fell; while the deputy attempted to detain defendant, defendant tried to break the deputy's grasp on him, punching with his elbows and biting the deputy's hand. On the ground near defendant's head, the deputies found two clear plastic baggies containing a white powdery substance. Field tests indicated the substance was methamphetamine.

Defendant also had “multiple denominations of U.S. currency with him consistent with the sale of narcotics.”

As a result, defendant was charged in an amended complaint with one felony count of forcibly resisting arrest (Pen. Code, § 69; count 1), one felony count of selling or transporting methamphetamine (Health & Saf. Code, § 11379; count 2), and one misdemeanor count of attempted destruction of evidence (Pen. Code, §§ 135/664; count 3). Count 2, sale or transportation of methamphetamine, also alleged that defendant had previously been convicted of a prior drug offense, within the meaning of Health and Safety Code section 11370.2, subdivision (a).

Before the preliminary hearing, however, defendant agreed to a plea bargain: Count 1 was amended to allege a misdemeanor offense of interfering with a police investigation (Pen. Code, § 148, subd. (a)). Defendant agreed to plead guilty to count 1 as amended, and to count 2, as well as admitting the prior drug conviction enhancement. Count 3 would be dismissed. The maximum custody commitment on the pleaded offenses was seven years, but the agreement would give defendant a total of five years, part to be served in the county jail, and part to be served on supervised release.

Accordingly, the court denied probation and sentenced defendant to a five-year principal term on count 2, consisting of the low term of two years for the offense, plus three years for the enhancement. The court ordered three years to be served in the county jail, and two years on supervised release. The court proceeded to set the terms of defendant’s prospective supervised release, including setting various fines and fees,

ordering drug testing, and calculating defendant's credits for time served. Among other terms and conditions of release, the court included the following requirements: "Inform the probation officer of your place of residence and reside at a residence approved by the probation officer. [¶] Give written notice to the probation officer 24 hours before changing your residence and do not move without the approval of the probation officer."

It is these conditions which defendant has challenged on appeal, alleging that the conditions are unconstitutionally vague and overbroad.

ANALYSIS

I. The Constitutionality of Conditions of Supervised Release Should Be Evaluated in the Same Manner as Conditions of Probation

As an initial matter, defendant argues that the validity and constitutionality of a condition of supervised release should be evaluated in the same manner as the validity and constitutionality of conditions of probation. Under the terms of the recent realignment legislation, the courts are permitted to sentence certain nonviolent felons to county jail, rather than state prison. The courts also have discretion to have the convicted person serve part of the sentence under supervised release. (See Pen. Code, § 1170, subd. (h)(5)(B).) Such supervised release is to be monitored by county probation officers "in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation" (*Ibid.*) The purposes and goals of both probation and supervised release are comparable: to provide an opportunity for successful reentry into the community. (Pen. Code, § 1170, subd. (a)(2); see *People v. Hackler* (1993) 13

Cal.App.4th 1049, 1058 [“The purpose of probation is rehabilitation.”].) We thus agree with defendant that the constitutional validity of the terms of supervised release should be analyzed under standards analogous or parallel to those applied to terms of probation.

II. Standard of Review

In general, the courts are given broad discretion in fashioning terms of probation or supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; *People v. Urke* (2011) 197 Cal.App.4th 766, 774.) Thus, the imposition of a particular condition of probation is subject to review for abuse of that discretion. “As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances.

[Citation.]” (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702.) However, constitutional challenges are reviewed under a different standard. Whether a term of probation or supervised release is unconstitutionally vague or overbroad presents a question of law which we review de novo. (*In re J.H.* (2007) 158 Cal.App.4th 174, 183; *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) We also agree with defendant’s contention that the failure to object below that a condition of supervised release is unconstitutionally overbroad does not forfeit review of the issue on appeal, as it is a pure issue of law. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889; *People v. Welch* (1993) 5 Cal.4th 228, 235.)

III. The Court Properly Imposed the Conditions

Defendant argues that the prospective conditions of his supervised release—that he obtain approval of the probation officer for his residence, and to change addresses—are unconstitutionally vague and overbroad. We turn to an examination of these issues.

A condition of probation or supervised release is unconstitutionally vague when it provides insufficient notice of the prohibited conduct. “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’” (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 890, citing *People v. Castenada* (2000) 23 Cal.4th 743, 751.) “A probation [or supervised release] condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. (*People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.)” (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 890.)

Defendant contends that the residence approval conditions imposed here are unconstitutionally vague because they provide insufficient notice to defendant as to what potential residences are prohibited. He claims that, while the probation conditions require him to “inform his probation officer of his place of residence and give 24 hours notice before changing his address, and not move without permission, the condition gives no notice whatsoever as to what parameters or conditions or locations might be acceptable to the probation officer. As written, if [defendant] desired to change his residence, he would have to search out a new prospective residence, determine whether it

was available/affordable, etc., and then seek approval from his probation officer who could, in his discretion, reject the proposed residence. [¶] This is analogous to a probation requirement which, for example, precludes a probationer from associating with ‘anyone disapproved by probation,’ a condition which has been held to be unconstitutionally vague (In re Sheena K., (2007) 40 Cal.4th 875, 889-890.) In that situation, the probationer cannot know in advance whether he can or cannot associate with any particular person. . . . Requiring [defendant] to obtain permission 24 hours before he moves to any location is akin to requiring the appellant in Sheena K. to run to [her] probation officer before [she] talks to anyone to find out if [she] has permission to associate with that particular person. The vagueness of the condition renders it unduly burdensome.”

The hyperbole of defendant’s comparison of the condition in *In re Sheena K.* to the condition here undercuts his argument. A probationer or a person under supervised release has multiple opportunities to “associate” with other persons every day. The fear is that the probationer may potentially violate the condition without realizing it. However, a probationer is not required to obtain multiple approvals every day, merely to alleviate the perils of “associat[ion]” with all manner of “persons” one might casually encounter, such as “grocery clerks, mailcarriers, and health care providers.” (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 891, citing *In re Kacy S.* (1998) 68 Cal.App.4th 704, 712-713.) Rather, the “association” condition is to be modified to require the

probationer's knowledge whether a person is disapproved by the probation officer. (*In re Sheena K.*, *supra*, 40 Cal.4th 875, 891-892.)

With respect to the conditions at issue here, defendant has identified these potential effects associated with a vague provision: the potential to violate the condition without knowing it, arbitrary enforcement, or chilling defendant's exercise of his constitutional rights.

As defendant himself notes, the process of changing addresses is far less frequent, and generally requires much greater planning than the happenstance of meeting (potentially "associating with") multiple other persons each day. Most people who change addresses will know well more than 24 hours in advance that a change will be made. That provides plenty of time for a defendant under supervised release to notify the probation officer of an impending move.

Defendant acknowledges that a person on supervised release would "have to search out a new prospective residence, [and] determine whether it was available/affordable, etc." This is by no means an instantaneous process. The inclusion of the probation officer early in the evaluation of the proposed prospective residences is not particularly burdensome. A defendant is not required to complete the process of selecting a new residence before notifying the probation officer, and thus risk rejection of the proposed new residence only after considerable investment of time and resources has been made. In any case, the language of the conditions is fully sufficient to properly apprise defendant in advance of what he must do to avoid violating them. He must

simply inform the probation officer of his address and obtain approval to live there. If defendant wants or needs to move, he must give 24 hours written notice before he does so, and not move without the probation officer's approval.

Defendant is not put at his peril to violate the conditions unknowingly, in contrast to the "association" condition in *In re Sheena K.* Nor do we interpret the conditions to permit the probation officer to arbitrarily or irrationally withhold approval.² Because the terms of these probation conditions are clear and understandable, and subject to the presumption that approval will not be unreasonably denied, the conditions do not unduly restrict defendant's constitutional rights in ensuring compliance.

² We recently so held in *People v. Schaeffer* (2012) 208 Cal.App.4th 1 (Fourth Dist., Div. Two): "Defendant relies upon [*People v.*] *Bauer* [(1989)] 211 Cal.App.3d 937, in which the reviewing court struck a residence approval condition, which seemed designed to prevent the defendant from living with his parents because they were overprotective. Nothing in the record suggested that the defendant's home[]life contributed to the crimes of which he was convicted (false imprisonment and simple assault), or that his home[]life was reasonably related to future criminality. (*Id.* at p. 944.) The court concluded that the residence approval condition impinged on the right to travel and freedom of association, and was extremely broad since it gave the probation officer the power to forbid the defendant from living with or near his parents. (*Ibid.*)

"The present case is distinguishable. Defendant here pled guilty to possessing methamphetamine and being under the influence of a controlled substance. Where she lives will directly affect her rehabilitation (e.g., without any limitations, defendant could choose to live in a residence where drugs are used or sold). Under these circumstances, the state's interest in defendant's rehabilitation is properly served by the residence approval condition.

"Furthermore, the legal landscape has changed since [*People v.*] *Bauer, supra*, 211 Cal.App.3d 937. The Supreme Court stated in *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*), that "[a] probation condition should be given "the meaning that would appear to a reasonable, objective reader." [Citation.]" (*Id.* at p. 382.) We view the residence approval condition here in light of *Olguin* and presume a probation officer will not withhold approval for irrational or capricious reasons. (*Id.* at p. 383.)" (*Schaeffer*, at p. 5.)

Defendant also contends that the supervised release conditions are unconstitutionally overbroad, as restricting his right to travel and to freely associate with others. “A restriction is unconstitutionally overbroad . . . if it (1) ‘impinge[s] on constitutional rights,’ and (2) is not ‘tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.’ [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights--bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The conditions here are sufficiently narrowly tailored to serve the state’s compelling interest in defendant’s rehabilitation. Here, defendant’s convicted conduct revolved around drug abuse. As in *People v. Schaeffer*, “Where [defendant] lives will directly affect [his] rehabilitation (e.g., without any limitations, defendant could choose to live in a residence where drugs are used or sold). Under these circumstances, the state’s interest in defendant’s rehabilitation is properly served by the residence approval condition.” (*People v. Schaeffer, supra*, 208 Cal.App.4th 1, 5.) As the People point out, the residence-approval conditions are the narrowest means of ensuring that defendant’s residence does not undermine his rehabilitation. Supervised release cannot take place at all unless the probation officer is kept informed of defendant’s current residence address. It is not feasible to specify in advance every characteristic of a particular living situation

which would compromise defendant's successful avoidance of criminal behavior and reintegration into society. An implied reasonableness requirement, such that approval cannot be arbitrarily or capriciously denied, restricts the probation officer's discretion so that it does not impinge upon defendant's freedom to travel or to associate with others, within a range that meets the requirements of effective supervision.

The residence approval conditions of defendant's prospective supervised release were not unconstitutionally vague or overbroad. The trial court properly imposed these conditions.

IV. Correction of Minute Order

As a final point, defendant urges that the trial court's minutes of October 6, 2011, should be corrected to reflect that defendant will be placed on supervised release for a period of 24 months, not 36 months. The People concede that the minute order should be so corrected. Indeed, the trial court announced orally more than once that the period of supervised release would be two years. Accordingly, we order the minute order of October 6, 2011, corrected to show that the period of supervised release is 24 months.

DISPOSITION

The residence address conditions of supervised release are constitutional. However, the trial court is also directed to correct its minute order of October 6, 2011, to conform to the court's oral pronouncement in court, and to reflect a supervised release period of 24 months, rather than 36 months. The judgment is otherwise affirmed.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.