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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.

KENNETH CHRISTOPHER MONROE,

Defendant and Appellant.

E061051

(Super.Ct.Nos. INF1101794 &
INF1202121)

OPINION

APPEAL from the Superior Court of Riverside County. William S. Lebov, Judge.
(Retired Judge of the Yolo Super. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed as modified.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Charles C. Ragland, Supervising Deputy Attorney General, and Scott C. Taylor, Deputy
Attorney General, for Plaintiff and Respondent.

In January 2013, in case No. INF1101794, defendant and appellant Kenneth Christopher Monroe pled guilty to unlawfully passing a check with the intent to defraud (Pen. Code, § 476),¹ and admitted that he had suffered 10 prior prison terms (§ 667.5, subd. (b)). In return, the remaining charges were dismissed and defendant was sentenced to six years in county jail, four years of which were suspended, with a credit of 416 days for time served. He was placed on mandatory supervision pursuant to section 1170, subdivision (h), for those four suspended years on various terms and conditions. At that same time, in case No. INF1202121, defendant pled guilty to unlawfully passing a check with the intent to defraud (§ 476). In return, the remaining charges and allegations were dismissed, and defendant was sentenced to a term of two years in county jail to be served concurrently with the sentence in case No. INF1101794.

Due to defendant's medical condition, defendant's surrender date was continued multiple times. Ultimately, the parties agreed to resentence defendant to require community service in lieu of the balance of his jail time. As such, in April 2014, defendant was resentedenced to the six-year term; however, the court suspended the balance of his county jail time and ordered defendant to complete 2,000 hours of community service.

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

Defendant's sole contention on appeal is that the mandatory supervision condition requiring him to have his residence approved by his probation officer is unconstitutionally vague and/or overbroad and impinges on his rights to travel and freedom of association. We agree and modify the challenged condition.

I

FACTUAL BACKGROUND²

On July 13, 2011, defendant entered JW's Auto World (JW's) to purchase a car, and gave a check in the amount of \$1,000 as deposit on the car. Two days later, defendant gave another check for \$1,000 as a deposit on a second car.

The manager of JW's soon discovered that there were insufficient funds in the account to support the checks and contacted defendant. Defendant stated that his bank accounts were being audited so his assets were frozen, and assured the manager that he would go to JW's on August 3, 2011, to purchase the vehicles. Defendant did not go to JW's on August 3.

After the manager contacted defendant again, defendant eventually went to JW's with a check in the amount of \$20,039.69, which was the full purchase price for the first vehicle, a 2004 Lexus. The check had a Citibank logo, the name TNA Associates Group, and an address from Long Beach, California. The manager informed defendant that he would have to wait until the check was cleared before he could give him the vehicle.

² The factual background is taken from the February 28, 2012 preliminary hearing.

Defendant agreed to come back in a few days, and began filling out all the purchase paperwork and gave his driver's license to the manager. When the manager suspected the check might be fraudulent, he called the police and spoke with Officer Kevin Foderaro.

In order to find defendant, Officer Foderaro first checked the address on defendant's driver's license. The officer then searched for any other addresses in police contacts and obtained the address defendant gave to JW's.

As Officer Foderaro was waiting near the address on defendant's driver's license, he saw a vehicle drive by that resembled the car he saw previously at defendant's house. The officer followed the car to a market, which was directly across the street from JW's, and contacted defendant. The officer asked defendant for his identification and asked defendant if he was willing to talk to him. Defendant stated "[t]hat he would," and the officer asked defendant about the check. Defendant stated that he had received the check from his business associate, a man named Ray Allan, who lived in Long Beach. Defendant further stated that he thought the check was fake but decided to buy a car with it anyway.

II

DISCUSSION

Defendant argues the residence approval condition of his mandatory supervision should be struck because it is unconstitutionally vague and overbroad and violates his constitutional rights to travel and association. The People argue defendant forfeited his

challenge to the residency condition because he failed to object at the resentencing hearing and his claim does not fall under the narrow exception to the forfeiture rule. In the alternative, the People assert the residency restrictions on defendant's constitutional rights to travel and association are reasonably related to his future criminality.

Among other terms and conditions of mandatory supervision, 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." Defendant did not object to this supervision condition, and indicated that he did not have any questions about the terms and conditions of his supervision and that he had reviewed them with his attorney.

As an initial matter, we assess the validity and reasonableness of conditions of mandatory supervision using the same standard applied to conditions associated with other forms of supervised release, including probation or parole. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 762-764 [Fourth Dist. Div. Two].) The purposes and goals of both probation and supervised release are comparable: to provide an opportunity for successful reentry into the community. (§ 1170, subd. (a)(2); see *People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058 ["The purpose of probation is rehabilitation"].) In general, trial 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 or supervised release 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 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.)

Where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law which is not forfeited by failure to raise it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889 (*Sheena K.*); *People v. Welch* (1993) 5 Cal.4th 228, 235.) As the court in *Sheena K.* explained, the doctrine of forfeiture on appeal does not apply to challenges to probation conditions based on “facial constitutional defects” that do “not require scrutiny of individual facts and circumstances.” (*Sheena K.*, at pp. 885-886.) However, the forfeiture doctrine does apply if the objection involves a discretionary sentencing choice or unreasonable probation conditions “premised upon the facts and circumstances of the individual case.” (*Id.* at pp. 885, 888.)

Here, defendant claims that even though he did not object to this condition on constitutional grounds at sentencing, his vagueness and overbreadth arguments present a facial constitutional challenge with pure questions of law based on undisputed facts and, thus, can be properly raised on appeal for the first time. Defendant notes that the challenged condition was part of a preprinted form that the trial court simply checked off and that the court did not give reasons to impose the condition or even mentioned the specific condition at sentencing, such as would require this court to second-guess the trial court's decision. We are inclined to agree with defendant and reject the People's forfeiture argument.³

Defendant contends that the portions of the supervisory condition requiring him to “reside at a residence approved by the probation officer” and “not move without the approval of the probation officer” are vague or overbroad, as it restricts his right to travel and to freely move and live with friends or family, and gives the probation officer unfettered discretion. He believes that the residency condition must be stricken since it permits arbitrary enforcement. He primarily relies on *People v. Bauer* (1989) 211 Cal.App.3d 937 (*Bauer*).

³ We focus only on the constitutionality of the condition, not whether it is reasonable as applied to defendant. (See *People v. Lent* (1975) 15 Cal.3d 481, 486 [test for reasonableness of probation conditions].) By failing to object below, defendant has forfeited all claims except a challenge “based on the ground the condition is vague or overbroad and thus facially unconstitutional.” (*Sheena K., supra*, 40 Cal.4th at p. 878.)

To be valid, a supervisory condition “must (1) . . . relate[] to the crime of which the defendant was convicted, *or* (2) relate to conduct that is criminal, *or* (3) require or forbid conduct that is reasonably related to future criminality.” (*Bauer, supra*, 211 Cal.App.3d at p. 942, italics in original.) “If a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is “not entitled to the same degree of constitutional protection as other citizens.” ’ ” (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O’Neil*), quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) But an otherwise valid condition that impinges upon constitutional rights “must be carefully tailored, ‘ “reasonably related to the compelling state interest in reformation and rehabilitation” ’ ” (*Bauer, supra*, 211 Cal.App.3d at p. 942, quoting *In re White* (1979) 97 Cal.App.3d 141, 146 (*White*).

A supervisory condition cannot be overbroad or vague; it “ “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” ’ ” (*People v. Barajas* (2011) 198 Cal.App.4th 748, 753, quoting *Sheena K., supra*, 40 Cal.4th at p. 890.) “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.)

However, even a facial challenge to constitutionality requires more than a one-size-fits-all approach. Our inquiry does not take into account the individual facts pertaining to this particular probationer—as would an “as applied” challenge—but it must take into account the nature of the case and the goals and needs of probation in general. For example, what is constitutional in a case involving drug usage is not necessarily the same as what is constitutional in a theft-related case. The difficulties of the probation department and the probationer will be quite different in cases where the probationer may be fighting addiction than they will be in other cases. This broad consideration of the nature of the case must inform all decisions about whether the condition has been “narrowly tailored,” even where, as here, we do not reach the personal circumstances of the probationer.

Here, the offenses are theft-related. The appropriate inquiry therefore, is whether the supervisory condition use is reasonably related to supervision of a thief. In that regard, we find *Bauer* instructive. In *Bauer*, the defendant was convicted of false imprisonment and assault. As a probation condition, the trial court required the defendant to “obtain his probation officer’s approval of his residence” (*Bauer, supra*, 211 Cal.App.3d at p. 940.) The *Bauer* court 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 further concluded

the restriction was unconstitutionally overbroad, explaining “[t]he 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,” and gave the probation officer broad power over the defendant’s living situation. (*Id.* at pp. 944-945.)

Bauer has been accepted since it was decided nearly 25 years ago, and has been applied in analyzing other probation conditions. For example, in *O’Neil, supra*, 165 Cal.App.4th 1351 (a case involving drug sales but not usage), the appellate court found a probation condition prohibiting the probationer from associating with persons not approved by his probation officer to be unconstitutionally overbroad. (*Id.* at p. 1357-1358.) Relying on *Bauer*, the court explained the probation condition placed no limits or guidelines on the probation officer’s discretion. Thus, “[w]ithout a meaningful standard, the order is too broad and it is not saved by permitting the probation department to provide the necessary specificity.” (*Ibid.*)

The probation condition here suffers from the same infirmity as the one in *Bauer*. It puts no limits on the probation officer’s discretion. Probationer’s residence could be disapproved for any reason, including inconvenience. Nothing about the nature of the charges suggests a need for such unfettered oversight, so we cannot approve this broad restriction. Further, there is nothing in the record referring to defendant’s living situation. Defendant was convicted of two counts of unlawfully passing a check with the intent to defraud. There is no indication that his home life contributed to these offenses. In fact,

the People do not claim that defendant's residence was related to his crime, nor would the record support such a contention. We can see a situation where the probation condition might be necessary because the defendant's residence was somehow involved in the crime or due to the nature of the crime, e.g., a sex offender who is mandated to live in certain areas, but in this case, the condition was not in any way related to defendant's offenses. Like the court in *Bauer*, we do not find that the condition itself is inappropriate in all circumstances (see *Bauer, supra*, 211 Cal.App.3d at p. 944 [finding residence approval condition not related to the defendant and his crimes in the case, but not invalidating the condition in every case]), but that such approval was not related to defendant's crimes and living situation in this case.

Furthermore, the condition is not reasonably related to defendant's future criminality. There is no indication that he was living with or planned to live with individuals that might impede his rehabilitation. It is mere speculation to believe he might move to an undesirable location or live in a residence or community which "might be 'a source of temptation to continue to pursue a criminal lifestyle,' " as the People assert. Imposing the residence approval portion of the condition was unreasonable.

The People contend that *Bauer* does not control here because that case is distinguishable and the legal landscape regarding the constitutionality of probation conditions has changed since *Bauer* with the Supreme's Court's decision in *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*). The People essentially believe *Olguin* expanded

future criminality to include the ability of the probation officer to supervise the probationer in order to facilitate rehabilitation.

In *Olguin*, the Supreme Court reviewed a condition of probation that required the probationer to inform the probation officer of any pets owned by the probationer and to inform the probation officer within 24 hours of any changes. (*Olguin, supra*, 45 Cal.4th at p. 380.) The Supreme Court found that although the condition was not related to the crime the defendant committed, it was reasonably related to the supervision of defendant and, therefore, to his rehabilitation and future criminality. The court held, “[T]he condition requiring notification of the presence of pets is reasonably related to future criminality because it serves to inform and protect a probation officer charged with supervising a probationer’s compliance with specific conditions of probation. . . . [T]o ensure that a probationer complies with the terms of his or her probation and does not reoffend, a probation officer must be able to properly supervise that probationer. Proper supervision includes the ability to make unscheduled visits and to conduct unannounced searches of the probationer’s residence. . . . Therefore, the protection of the probation officer while performing supervisory duties is reasonably related to the rehabilitation of a probationer for the purpose of deterring future criminality.” (*Id.* at p. 381.)

The People now seem to equate the notification by a probationer to his probation officer when he brings a pet into his home to the approval of defendant’s residence by the probation officer. They insist that such approval of the residence assists in the supervision of the probationer and reasonably relates to future criminality.

This condition is unlike that in *Olguin*, where the probationer only needed to notify the probation officer of a pet in the home and did not need approval to have a pet in his home. Several times the *Olguin* court distinguished the condition from one that would require approval of a pet by the probation officer. (See *Olguin, supra*, 45 Cal.4th at pp. 383, 385.) On these grounds alone, we find *Olguin* inapplicable, as it did not even consider a situation where the probation officer must approve a pet, much less a residence. Here, in contrast to the pet condition challenged in *Olguin*, the supervisory condition gives defendant's probation officer absolute authority to approve defendant's residence. Although there is no reason to believe the probation officer would abuse the authority to deny defendant permission to move, that alone does not permit the court to unnecessarily limit defendant's rights.

Further, the People claim the condition assists in a probation officer's supervision of a probationer, because "the probation officer can steer [defendant] away from places where he is likely to relapse into criminal behavior." The probation officer, however, can assist defendant in his rehabilitation without the approval requirement. The People also claim that a less burdensome residence condition "would be incapable of preventing [defendant] from living in a home or community that is likely to undermine his rehabilitation." This is pure speculation. Nothing in the record suggests that defendant lived with the man whom he obtained the fraudulent check from or that his residence contributed to his offenses. The instant probation condition was not reasonably related to defendant's future criminality.

As the parties correctly observe, the constitutionality of probation conditions requiring residence approval is presently before our Supreme Court in *People v. Schaeffer* (2012) 208 Cal.App.4th 1 (Fourth Dist., Div. Two), review granted October 31, 2012, S205260. We distinguish this case from *Schaeffer*. In that case, we allowed a similar supervisory condition to stand based on the defendant's convictions for possessing methamphetamine and being under the influence of a controlled substance. This is because the defendant's residence could negatively impact her rehabilitation should she choose to live in a residence where drugs are used or sold. Here, defendant's residence would have no such foreseeable effect on his rehabilitation unlawfully passing a check with the intent to defraud.

Because defendant's living situation has not been shown to be reasonably related to future criminality and because there is no nexus between these circumstances and the instant offenses, 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 *Sheena K.*, *supra*, 40 Cal.4th at p. 892.) Thus, the challenged supervisory condition should be modified to read as follows: "Defendant shall keep the probation officer informed of his place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence."

III

DISPOSITION

We modify the residence restriction condition of defendant's mandatory supervision to read as follows: "Defendant shall keep the probation officer informed of his place of residence and give written notice to the probation officer twenty-four (24) hours prior to a change in residence."

The judgment is affirmed as modified.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

CODRINGTON

J.