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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.

GEORGE DENNIS VICKERY,

Defendant and Appellant.

E064183

(Super.Ct.No. FSB1500133)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed as modified.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant George Dennis Vickery guilty of receiving stolen property. (Pen. Code, § 496a, subd. (b).) A trial court placed him on formal probation for a period of three years, on specified terms and conditions.

On appeal, defendant argues that three of his probation conditions should either be stricken or modified. We agree that two of the terms should be modified. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

John Krueger had a white Honda Arrow motorcycle with a “tow pack conversion kit” on it. In October 2014, his motorcycle was stolen from outside the garage door of his home. He still had the keys. He reported it stolen to the police.

Defendant lived two doors down from Krueger. Krueger had known defendant for about 18 years and had shown defendant the motorcycle many times.

In December 2014, John Blackburn, defendant’s stepfather, bought a motorcycle from defendant. Defendant initially offered to sell it to him for \$6,000; however, Blackburn said he was not interested because the price was too high. Defendant said he would lower the price, so Blackburn said he would consider it. Blackburn went to defendant’s place to see the motorcycle and take a test drive. The motorcycle was red, and defendant used a screwdriver to start the ignition. Defendant told Blackburn that the key had broken off in the lock, and that he had another key or lock for it. Blackburn negotiated the price down to \$2,000 and purchased the motorcycle in December 2014. At that time, defendant said a new key was on order. Blackburn asked for the paperwork (e.g., pink slip and registration), but

defendant said he had lost it, and new papers were coming in the mail. A few weeks later, Blackburn had his suspicions about the motorcycle, so he asked the police department to check the vehicle identification number (VIN). The VIN and license plate number matched that of Krueger's stolen motorcycle. When Krueger recovered the motorcycle, he observed that it had been repainted, the gas cap and ignition cap had been replaced, and the logos were missing. The tow pack and other various parts to the motorcycle were recovered in defendant's yard. When the police questioned defendant, he said the motorcycle was not stolen. He said he had obtained it from a man named David Pierce by trading 100 marijuana seeds for it.

ANALYSIS

I. The Condition Requiring Defendant to Obtain the Probation Officer's Written Permission to Leave the State Should Be Modified

Defendant contends condition No. 5, which provides that he “[n]ot leave the State of California without first obtaining written permission of the probation officer” is unconstitutionally broad, since it infringes upon his rights to travel and associate. He asserts the term should be stricken.¹ We conclude 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’ [¶] However, the trial court’s discretion in setting the conditions of probation is not unbounded.” (*People v. Lopez* (1998) 66

¹ The People acknowledge that, even though defendant failed to object to the probation condition below, he has not forfeited his constitutional challenge. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.)

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 (*Lent*).)

“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.) “[W]here an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, “‘reasonably related to the compelling state interest in reformation and rehabilitation’”” (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*).)

In *Bauer, supra*, 211 Cal.App.3d 937, cited by defendant, the reviewing court struck a similar 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.” (*Id.* at pp. 944-945.)

In the instant case, condition No. 5 is not narrowly tailored to be reasonably related to the state’s interest in defendant’s reformation and rehabilitation. Similar to the condition

in *Bauer*, the condition here impinges on the right to travel and freedom of association, and it is very broad. It gives defendant's probation officer the unfettered power to prevent him from traveling outside of California. The potentially arbitrary nature of such a condition is not justified under the circumstances of this case. Nothing about defendant's current offense of receiving the stolen property of his neighbor raises any particular concerns with him being outside of California. Moreover, neither the trial court nor the probation officer expressed any concerns regarding defendant traveling out of state.

In arguing that the condition should be upheld, the People suggest that the condition is necessary and that "no narrower condition would allow for the effective supervision of [defendant] to ensure his whereabouts do not undermine his rehabilitation process." The argument has no merit. Other conditions of defendant's supervised release, which he has not challenged on appeal, require that he report to the probation officer every 14 days or as directed, cooperate with the probation officer in a plan of rehabilitation, keep the probation officer informed on his place of residence, not associate with known felons, and stay away from the victim and his wife and property. The People have articulated no reason why the probation officer's prior permission to leave California might be necessary to aid defendant's rehabilitation, in light of these other conditions of his supervision.

The People also cite to *People v. Olguin* (2008) 45 Cal.4th 375, 383 (*Olguin*) for the proposition that we should presume the probation officer will not withhold permission for irrational reasons. In *Olguin*, the Supreme Court upheld a probation condition requiring the defendant to inform the probation officer of the presence of any pets in his residence. (*Ibid.*)

It did so in part, however, because the condition did not require the defendant to obtain permission from his probation officer to obtain or keep any pet, but only to inform the probation officer of the pet's presence at his place of residence and to give timely notice prior to any changes in that situation. (*Id.* at pp. 383, 385.) Analogously, here, condition No. 5 could have been more narrowly tailored to the state's interests by requiring defendant to give his probation officer notice of him leaving the state, rather than requiring prior approval.

Therefore, we do not simply strike condition No. 5, as defendant has requested. Instead, condition No. 5 should be modified to read as follows: Not leave the State of California without giving written notice to the probation officer 24 hours prior to departure.

II. The Court Properly Imposed the No-Alcohol Probation Condition

Condition No. 9 states: "Neither possess nor consume any alcoholic beverages nor enter places where such beverages are the chief item of sale." Defendant argues that this probation condition (the no-alcohol condition) was not reasonably related to his offense or his rehabilitation. Thus, it should be stricken, or at least modified to include a knowledge requirement. The People concede, and we agree, that the condition should be modified.

At the outset, defendant recognizes that he failed to object to the alcohol condition below, but argues that the failure to object was the result of ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that that he suffered prejudice as a result. (*People v. Weaver* (2001) 26 Cal.4th 876, 961 (*Weaver*).)

Here, there was no indication that defendant's current offense involved alcohol. However, contrary to his claim that he had "no alcohol-related history," defendant had a prior conviction in 1999/2000 for driving under the influence. He also had a prior conviction for misdemeanor possession of marijuana. Furthermore, defendant testified that he had a physical disability and was prescribed medical marijuana and hydrocodone for pain relief. He also was taking medication for his bipolar disorder. Defense counsel could have failed to object because the no-alcohol condition was reasonable in light of defendant's prior convictions and his current mental state and prescription drugs. Thus, defendant has not shown that his counsel's representation fell below an objective standard of reasonableness. (*Weaver, supra*, 26 Cal.4th at p. 961.)

Notwithstanding the failure to object, we conclude that the court properly imposed the no-alcohol condition, as it was reasonably related to future criminality. (*Lent, supra*, 15 Cal.3d at p. 486.) Even though his current offense did not involve alcohol, defendant's criminal history shows problems with alcohol and drugs. As stated above, he had prior convictions for driving under the influence and possession of marijuana. Although defendant asserts that he has committed no alcohol-related convictions in the past 15 years, we note that he is also taking medical marijuana and other prescription drugs for his bipolar disorder and pain. "The use of alcohol produces many effects similar to the effects produced by marijuana, barbiturate and other sedative hypnotics. Sensorial impairment is present, there is a lessening of internalized self-control, and euphoria, accompanied by a reduction of anxiety, is experienced. Alcoholic euphoria is accompanied by activity and

aggressive behavior, . . . The bottom line, however, is the undisputed fact that the physical effects of alcohol are not conducive to controlled behavior.” (*People v. Smith* (1983) 145 Cal.App.3d 1032, 1034-1035, fns. omitted (*Smith*)). It is reasonable to conclude that the use of alcohol could impact defendant by inhibiting his senses, making him susceptible to abusing drugs or alcohol, and preventing him from taking his prescribed medication. It is also a reasonable conclusion that mixing alcohol and psychotropic medication could have a detrimental effect on a person. Moreover, we are dealing with an individual who appears to be emotionally unstable, as he was on medication for his bipolar disorder.

Giving “proper deference to a trial court’s broad discretion in imposing terms of probation, particularly where those terms are intended to aid the probation officer in ensuring the probationer is complying with the fundamental probation condition, to obey all laws” (*People v. Balestra* (1999) 76 Cal.App.4th 57, 69), we cannot say that the no-alcohol condition was unreasonable in the circumstances presented. We therefore conclude that the court properly imposed the no-alcohol condition.

Defendant further contends that the condition should contain an express knowledge requirement. He asserts that the term should be modified to state that he cannot enter a place where he knows alcoholic beverages are the “chief item for sale.” The People concede, and we agree. Thus, condition No. 9 should be modified to read: Neither possess nor consume any alcoholic beverages nor enter places where defendant knows such beverages are the chief item of sale.

III. The Probation Condition Regarding Employment Should

Be Corrected in the Minute Order

Defendant testified that he was mentally and physically disabled. At the sentencing hearing, the court imposed, as one of the probation conditions, the following: “[T]he Court will request that you seek and maintain gainful employment if you can, given your disability.” Defendant later stated that he was limited in the amount of time he could work, since he was on social security and disability. The court clarified that he was required to find “gainful employment within [his] limited disability.” The minute order stated the condition (No. 4) as follows: “Seek and maintain gainful employment, or attend school, and keep the probation officer informed of status of employment, or school.” Defendant now requests the minute order to be corrected to reflect the oral pronouncement. The People concede, and we agree.

“Entering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error.” (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) “The record of the oral pronouncement of the court controls over the clerk’s minute order.” (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn 2.) Therefore, the minute order should be corrected to reflect the following as condition No. 4: Seek and maintain gainful employment, or attend school, within the limits of your disability, and keep the probation officer informed of status of employment, or school.

DISPOSITION

Condition No. 4 should be modified to read: Seek and maintain gainful employment, or attend school, within the limits of your disability, and keep the probation officer informed of status of employment, or school.

Condition No. 5 should be modified to read as follows: Not leave the State of California without giving written notice to the probation officer 24 hours prior to departure.

Condition No. 9 should be modified to read: Neither possess nor consume any alcoholic beverages nor enter places where defendant knows such beverages are the chief item of sale.

In all other respects, the judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MILLER
J.