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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JAMES ROBERTS,

Defendant and Appellant.

G045188

(Super. Ct. No. 09CF2308)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard Toohey, Judge. Affirmed as modified.

Johanna R. Pirko, 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, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Anthony James Roberts guilty of assault with a deadly weapon. The court granted Roberts three years' probation on various terms and conditions. On appeal, Roberts challenges the following three conditions requiring that he: (1) consume no alcoholic beverages and not be present in any place where the primary items for sale are alcoholic beverages; (2) maintain a residence subject to his probation officer's approval; and (3) refrain from associating with persons disapproved of by his probation officer. The Attorney General concedes the alcohol and association conditions should be modified to include a knowledge requirement, but it maintains Roberts forfeited his challenge to the residence condition. Alternatively, the Attorney General argues the residence condition was appropriate.

We conclude the court did not abuse its discretion with respect to the residency condition because it is reasonably related to the circumstances of Roberts's crime. However, we agree the alcohol and association conditions are unconstitutionally overbroad and vague because they fail to adequately inform Roberts whether his conduct will comply with the probation conditions. We direct the trial court to modify those probation conditions to include a knowledge requirement.

We note that last September a different panel of this court in *People v. Moses* (2011) 199 Cal.App.4th 374, 376 directed the trial court to modify its preprinted form of probation conditions to comply with constitutional mandates and to avoid further repetitive, successful challenges to its probation conditions. The trial court in this case did not have the benefit of the *Moses* opinion. We are hopeful the necessary modifications have been made and these issues can be finally laid to rest.

## I

Due to the limited nature of the issues raised on appeal, the underlying facts of this case need not be discussed in great detail. Suffice it to say, Roberts, a 21-year-old, nearly six-foot tall, 170-pound self-described alcoholic, attacked his five-foot, three-inch tall, 120-pound mother with a knife in their home while he was intoxicated. Roberts's

mother had asked Roberts to move out of the apartment two months before the attack. She asked him again to leave the day before the attack. Robert described his mother as an “abusive bitch,” and they often argued about his laziness. In the probation report, Roberts stated he planned to return home to live with his mother and get a job to help with the household bills.

After the incident, Roberts’s mother attempted to minimize her son’s actions. At trial, her description of the altercation changed from the way she originally reported it to the police. In the probation report, Roberts’s mother reported she is a single parent, and Roberts was an asset to the family. She reported they were attending family counseling and Roberts “brings happiness” to their home. She added Roberts is a caring person who helps with his younger brothers.

In February 2011, a jury found Roberts guilty of assault with a deadly weapon. In April 2011, the court suspended imposition of the sentence and ordered Roberts to serve three years of formal probation, subject to various terms and conditions. In addition, the court ordered Roberts to serve 180 days in jail, for which he was awarded 122 days of credit. Finally, the court ordered Roberts to pay various fines and fees.

## II

“A sentencing court has ‘broad discretion’ to determine what conditions should be imposed in granting probation. [Citation.] Even conditions which regulate conduct not in itself criminal are valid as long as they are “‘reasonably related to the crime of which the defendant was convicted or to future criminality.’” [Citation.]” (*People v. Peck* (1996) 52 Cal.App.4th 351, 362; see also Pen. Code, § 1203.1.)

“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.”’ [Citation.] [¶] The court’s discretion, however, is not unlimited. A probation condition is unreasonable 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.’ [Citation.] But ‘a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.’ [Citation.] ‘As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or “exceeds the bounds of reason, all of the circumstances being considered.”’ [Citation.]” (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1355-1356 (*O’Neil*).

“Judicial discretion to set conditions of probation is further circumscribed by constitutional considerations. [Citation.] ‘The *Dominguez/Lent* test of the validity of a condition of probation may be supplemented by a second level of scrutiny: where 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 . . . .”’ [Citation.]” (*O’Neil, supra*, 165 Cal.App.4th at p. 1356.)

#### A. *Probation Condition Nos. 24 and 36*

Probation condition No. 24 provides: “Consume no alcoholic beverages and do not be present in any establishment where the primary items for sale are alcoholic beverages.” Probation condition No. 36 provides: “Do not associate with any persons disapproved of by the [p]robation [o]fficer.”

The Attorney General concedes these two conditions are constitutionally overbroad/vague because they lack a knowledge requirement and therefore fail to provide Roberts with adequate notice of what conduct they prohibit. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 878-891 (*Sheena K.*) [condition prohibiting association with “anyone disapproved by probation” was unconstitutionally vague and failed to provide fair warning]; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1434.)

We agree with the parties' suggestion the alcohol condition must be modified to require Roberts to not *knowingly consume* any alcoholic beverage and to not be present in any establishment where *he knows* the primary items for sale are alcoholic beverages. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [making similar modifications].) Similarly, the association condition can be modified to require Roberts not associate with any persons *known to be* disapproved of by the probation officer. (*Sheena K., supra*, 40 Cal.4th at p. 892 [making similar modification].)

*B. Residence Probation Condition*

The trial court ordered Roberts to “maintain a residence subject to approval of his probation officer.” He argues the condition impinges on his constitutional rights to travel and associate and is unrelated to his conviction. The Attorney General argues Roberts’s challenge is forfeited by his failure to object, and alternatively, it fails on the merits. We agree the claim is meritless.

In arguing that the probation condition in question is overbroad, Roberts relies on *People v. Bauer* (1989) 211 Cal.App.3d 937 (*Bauer*). In that case, the trial court required defendant to obtain his probation officer’s approval of his residence as a condition of probation. (*Id.* at p. 940.) The condition was not proposed by the probation department, however the probation report disclosed defendant had lived with his parents all his life and was the only one of six siblings to still live with his parents. The report also stated defendant was very close to his parents and he had no plans to leave their home because he wanted to help them as they grew older. (*Id.* at p. 944.)

The appellate court held the condition could not stand. It reasoned, “The trial court’s interest in appellant’s residence seems to have resulted from defense counsel’s suggestion that appellant’s ‘immaturity’ may have resulted from his protective parents.” (*Bauer, supra*, 211 Cal.App.3d at p. 944.) The appellate court explained defendant’s close relationship with his parents did not justify disruption of that relationship by a probation officer. (*Ibid.*) There was nothing in the probation report or

the record as a whole that suggested appellant's home life contributed to the crimes of which he was convicted (false imprisonment and simple assault), or that it was reasonably related to future criminality. (*Ibid.*) The court concluded the condition was unreasonable.

In addition, the *Bauer* court determined the condition impinged on constitutional entitlements of the right to travel and freedom of association. (*Bauer, supra*, 211 Cal.App.3d at p. 944.) The condition was not narrowly tailored to interfere as little as possible with these rights and, in effect, gave the probation officer the power to banish the defendant from his home. (*Ibid.*)

Our case is factually distinguishable. Unlike the *Bauer* case, the probation report refers to Roberts's living situation and the probation department proposed the residence condition. The report specifically refers to the fact the victim was Roberts's mother (who was smaller and 70 pounds lighter than him), and the assault was committed with a knife in their home. They had a history of conflict and she had asked him to move out several times. In short, the residence condition was not arbitrary and was justified under the circumstances of this case. The condition is directly and reasonably related to the state's interest in Roberts's reformation and rehabilitation.

Knowing where Roberts resides is clearly necessary to properly supervise and aid in his rehabilitation. The condition addresses the obvious concern regarding his future contact with the victim and Roberts's younger siblings. The probation report noted that after the attack, Roberts and his mother appeared to have benefitted from family counseling. They both indicated Roberts should remain living at home and help care for his two younger siblings. The condition properly gave the probation officer discretionary power to preclude Roberts from living with his mother if circumstances should change. The trial court properly exercised its discretion in imposing the residence condition.

### III

We direct the trial court to modify its minute order and defendant's probation conditions as follows: (1) Probation condition No. 24 is modified to read: "Do not knowingly consume any alcoholic beverages and do not be present in any establishment where you know the primary items for sale are alcoholic beverages." (2) Probation condition No. 36 is modified to read: "Do not associate with any persons known to be disapproved of by the probation officer." All other probation conditions shall remain. As so modified, the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.