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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.

RICARDO ARANA,

Defendant and Appellant.

G049609

(Super. Ct. No. P00761)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Craig E. Robison, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Stephanie M. Adraktas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Lynne G. McGinnis and Eric A. Swenson, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court found defendant Ricardo Arana violated a term of his parole that prohibited him from “entering any private property or motel/hotel” without preapproval from his parole officer. Arana contends the parole condition is unconstitutionally overbroad, and infringes on his constitutional rights to travel, free association, and a liberty interest in shelter under the First and Fourteenth Amendments. For the reasons expressed below, we affirm the trial court’s revocation and reinstatement of Arana’s parole, but direct modification of the condition.

I

FACTUAL AND PROCEDURAL BACKGROUND

In December 2013, Arana’s parole agent petitioned to revoke Arana’s parole (Pen. Code, § 3000.08; all further statutory references are to this code) within 10 days of his release from prison. Arana’s parole term followed his 2006 conviction for forcible rape of a 16-year-old girl, for which he received an 11-year prison sentence. Arana’s prior criminal history included a conviction in 2000 for lewd acts on a child under age 14. Arana’s parole release terms included global positioning system (GPS) monitoring. Upon his release and in the presence of his mother and stepbrother-in-law, Arana’s parole agent explained to Arana his parole conditions. Condition 107 specified in relevant part: “You must have prior approval from DAPO [Division of Adult Parole Operations] or your parole agent before entering any private property or motel/hotel. You shall not enter any private property of any residence or motel/hotel without the occupants[’] prior knowledge of your criminal history.”

On November 28, five days after his release, Arana entered a private residence in La Puente without his agent’s approval. On December 2, he entered a Stanton motel without approval. The parole agent and Garden Grove police officers arrested Arana on December 3. He denied entering the La Puente residence. According to Arana’s mother, she drove Arana and her daughter to the residence to visit a family

member, but Arana did not go inside. Arana acknowledged visiting a friend at the motel, but claimed he went inside only to use the restroom. The parole agent recommended continuing Arana on parole with remedial sanctions, including 135 days in custody.

In early January 2014, Arana responded to the revocation petition by requesting that the trial court modify condition 107 and other parole conditions. At the hearing on the petition, readouts from the GPS device showed Arana entered the La Puente residence and that he remained inside the motel for 90 minutes, despite his claim he only used the restroom there while visiting his friend. Arana's parole officer, Reynaldo Garcia, had not authorized either entry. Garcia explained the purpose for requiring prior approval "is to make sure that the people that live in the residence [knew Arana's] current or prior commitment offenses and to make sure there isn't anything in the residence that could cause him to violate his conditions of parole." The prosecutor explained at the revocation hearing that the condition was necessary given Arana's history of serious offenses in which he "met [young girls] through acquaintances at various homes," where he "lured them into his confidence" before sexually assaulting them.

Arana's other parole release conditions similarly reinforced a general bar against contact with minors ("No contact" means no contact in any form"). For example, Arana was not to enter or loiter within 250 feet of "places where children congregate," including daycare centers, schools, playgrounds, video arcades, and fairgrounds, nor was he to enter any park where children regularly gathered without prior *written* approval from his parole officer, and he was required to inform the officer "regarding any contact with a minor," including "'accidental' or 'incidental' contact."

Arana's parole conditions also required parole department preapproval of his residence, a curfew from 11:00 p.m. to 5:00 p.m., and preapproval from his parole officer before "spend[ing] the night away from [his] residence of record." At Arana's parole indoctrination, Garcia gave Arana a contact number for assistance in locating a

residence complying with his parole conditions and legal restrictions for sex offenders, but he concluded Arana likely would be homeless. Because Arana functioned at a low first grade level in educational testing, Garcia explained to Arana that condition 107's prohibition against entering "private property" meant "apartment complexes; and that some of these apartment complexes do have a kid area. So I explained to him that the private property was exactly that, entering any private residence or private property in reference to apartment complexes that have a play area for kids."

Garcia specifically advised Arana and his mother that Arana could not enter the mother's residence because a child under age 18 resided in the home where she rented a room. Garcia advised Arana he could enter a Walmart, Target, neighborhood market, or fast food restaurants without a children's play area, but he could not enter a mall. He told Arana and his mother Arana could shower at a place such as Mary's Kitchen, a homeless services provider in Orange. The parole agent repeatedly emphasized Arana could not associate with persons under age 18.

The court found Arana violated his parole by entering the motel without his parole officer's approval and ordered him to serve 120 days in custody with credit for 104 days. The court modified condition 107 to read as follows (modification italicized): "You must have prior approval from [the parole agent or other authorized person] before entering any private *residential* property . . . or Motel/Hotel. You shall not enter any private property of any residence or motel/hotel without the occupants['] prior knowledge of your criminal history." The court declined to modify the condition to specify Arana could enter and remain in a motel parking lot or other similar "public" areas of private property without prior approval.

II

DISCUSSION

Arana contends condition 107's prohibition against entry without preapproval into motels and private residences violates his constitutional rights to travel

and free association, and unduly infringes his liberty interest in shelter. He argues the condition is not narrowly tailored to accomplish the state’s legitimate goals in supervising him on parole and protecting the public, nor is it reasonably related to his rehabilitation. He seeks reversal of the trial court’s order finding he violated parole and an order striking condition 107.¹

A. *Legal Principles Governing Parole Conditions and Revocation*

“The fundamental goal of parole ‘is to help individuals reintegrate into society as constructive individuals’ [citation], “to end criminal careers through the rehabilitation of those convicted of crime” [citation] and to become self-supporting.” (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1233 (*Stevens*)). Toward that end, the Legislature has vested with parole departments “expansive authority to establish and enforce rules and regulations governing parole, and to impose any parole conditions deemed proper” (*In re E.J.* (2010) 47 Cal.4th 1258, 1282, fn. 10), which includes any condition reasonably related to parole supervision (§ 3053, subd. (a)). Legitimate parole conditions are designed to deter future criminality (cf. *People v. Harrison* (2005) 134 Cal.App.4th 637, 641 (*Harrison*) [probation conditions]), aid the parolee in

¹ Effective July 1, 2013, the court in the county responsible for supervising the parolee determines whether the parolee has violated parole. (§ 3000.08, subd. (f); see *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 643 [parolee entitled to arraignment within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final hearing within 45 days of the arrest]; see also § 1203.2 [governing procedure for revocation of supervision including parole, postrelease community supervision, probation, and mandatory county supervision].) Before the statutory change, the Board of Prison Terms conducted these hearings. Under the prior statutory regime, a parolee could challenge the propriety of parole revocations by filing a petition for writ of habeas corpus. (*In re Powell* (1988) 45 Cal.3d 894, 903; *In re Tucker* (1971) 5 Cal.3d 171, 176 [challenge to parole revocation may only be made on habeas corpus to “discourage needless judicial review”].) Although no published opinion since the statutory and jurisdictional change has held an order revoking parole is appealable, we assume these determinations are appealable. (*People v. Totari* (2002) 28 Cal.4th 876, 882 [“[S]ection 1237, subdivision (b), literally permits an appeal from any postjudgment order that affects the ‘substantial rights’ of the defendant”].)

avoiding criminal temptation and triggers (*People v. Denne* (1956) 141 Cal.App.2d 499, 508), and foster a law-abiding lifestyle (*In re Hudson* (2006) 143 Cal.App.4th 1, 9).

While a parolee gains release based on “‘reasonable promise of being able to return to society and function as a responsible, self-reliant person’” (*In re Corona* (2008) 160 Cal.App.4th 315, 320), “the parolee’s commission of a crime ‘justifies imposing extensive restrictions on the individual’s liberty.’ [Citation.]” (*Ibid.*) Though no longer confined in prison, a parolee remains “‘constructively a prisoner in the legal custody of state prison authorities’” (*In re Taylor* (2015) 60 Cal.4th 10, 1037 (*Taylor*)), and “his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally.” (*People v. Burgener* (1986) 41 Cal.3d 505, 531 (*Burgener*), disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 754, 756.) To ensure public safety, the parolee’s liberty and privacy interests are not the same as other citizens, but rather “‘partial and restricted.’” (*Taylor*, at p. 1037.) Consequently, the state may impose parole conditions governing a parolee’s residence and living companions, and may restrict the parolee’s associations, right to travel, and other aspects of the parolee’s life. (*In re E.J.*, *supra*, 47 Cal.4th at p. 1282, fn. 10.)

There are, however, limits to the state’s parole authority because the parolee retains “‘certain basic rights and liberty interests.’” (*In re Taylor*, *supra*, 60 Cal.4th at pp. 1037, 1042; see *Morrissey v. Brewer* (1972) 408 U.S. 471, 482 [“the liberty of a parolee . . . includes many of the core values of unqualified liberty” because his or her “condition is very different from that of confinement in a prison”].) Parole conditions therefore “‘must be reasonable since parolees retain ‘constitutional protection against arbitrary [and] oppressive official action.’” (*Stevens*, *supra*, 119 Cal.App.4th at p. 1234.)

We review parole conditions with the same broad latitude as probation conditions. (*Burgener*, *supra*, 41 Cal.3d at p. 531.) Specifically, a parole condition

“will not be held invalid unless 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.]’ [Citation.] This test is conjunctive — all three prongs must be satisfied before a reviewing court will invalidate” the condition. (*People v. Olguin* (2008) 45 Cal.4th 375, 379, (*Olguin*) italics added.) Given Arana’s constitutional claims, the foregoing test “may be supplemented by a second level of scrutiny: where an otherwise valid condition . . . 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*); see *Harrison, supra*, 134 Cal.App.4th at p. 641 “[i]t is not enough to show the government’s ends are compelling; the means must be carefully tailored to achieve those ends”].)

In a parole revocation hearing, the prosecution must prove a parole violation by a preponderance of the evidence. (See § 3044, subd. (a)(5).) We review the trial court’s revocation of parole for abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Galvan* (2007) 155 Cal.App.4th 978, 983.)

B. *Condition 107*

Arana argues condition 107 is similar to a probation condition requiring preapproval of a residence, which the court in *Bauer* found invalid. (*Bauer, supra*, 211 Cal.App.3d at p. 944.) The condition in *Bauer*, however, had no relation to the defendant’s false imprisonment and simple assault offenses. (*Ibid.*) In contrast, the restriction here fell under well-established authority providing for close regulation of the housing and living circumstances of sex offenders. (*In re E.J., supra*, 47 Cal.4th at pp. 1282-1283, fn. 10.) The sex offenses Arana committed typically are committed in the privacy of a home or residence. Indeed, Arana does not challenge the identical provision as in *Bauer* requiring preapproval of his residence.

Condition 107 is not per se unreasonable because Arana met his victims “through acquaintances at various other homes” and committed his offenses in a residential setting where he could isolate his victims to commit his offenses without interference. The restriction therefore has some relationship to Arana’s offenses and is broadly related to preventing him from reoffending. (*Olguin, supra*, 45 Cal.4th at p. 379.)

Similarly, the preapproval requirement is not unfounded where Arana in committing his offenses lacked the foresight to recognize the risk of offending when young girls were present, and similarly lacked the self-control to depart the residence when they arrived. His decision not to attempt to contact his parole officer for permission to enter the motel violated his parole terms both by entry *and* by failing to seek preapproval. Seeking preapproval is not an empty requirement; it demonstrates whether Arana has gained self-discipline to follow society’s rules and whether he has gained insight to consider not only whether children are present, but also whether they likely might arrive on a particular occasion. The seriousness of Arana’s repeat offenses justifies the utmost caution of requiring preapproval.

Arana argues condition 107’s blanket restriction should be more narrowly tailored because it prohibits him from entering any residence without prior approval even when there are no children present. Arana suggests revising the parole condition to eliminate the preapproval requirement and permit him to enter residences if children are not present. Arana’s suggested modification, however, would undermine the state’s legitimate interest in preventing him from having contact with minors. For instance, Arana’s modification would not account for the likelihood a potential victim might arrive after Arana entered the residence. A preapproval requirement would allow the parole agent to assess the likelihood children may later arrive at the residence and question Arana about the purpose of his visit.

Nevertheless, we agree with Arana that we must ensure through close scrutiny that parole conditions impinging on constitutional rights are “carefully” tailored. (*Bauer, supra*, 211 Cal.App.3d at p. 942). Arana does *not* challenge his parole release condition requiring preapproval before he stays the night at a motel or in someone’s home, away from his own residence. His right to travel, association, and shelter are thus substantially circumscribed.

But as he explains, other circumstances may arise in which the need for preapproval for *temporary* entry into a residence or motel may become oppressive because it cannot be given quickly. For example, “If [he] either has an immediate need to enter a building, such as to use the restroom, or is offered shelter [in inclement conditions] on an evening or weekend, it is probable that he would not be able to reach his parole officer immediately or after office hours. Moreover, given that parole officer Garcia is undoubtedly very busy, it is unlikely that [Arana] would be able to obtain advance permission quickly even during business hours.” He notes other basic instances of liberty, association, shelter, and dignity in which, under the parole condition, he “is not able to enter his mother or sister’s home to shower and eat without advance permission from his parole officer, even if minors are not present. The parole officer’s suggestion that [he] could shower and eat at a charity called ‘Mary’s Kitchen’ demonstrates the extent to which the parole condition interferes with [his] legitimate family and community ties and renders him dependant on public charity,” rather than fostering “a successful transition to the community.”

We may not find a condition invalid on the mere possibility it could be applied in an arbitrary manner, but instead presume the opposite. (See *Olguin, supra*, 45 Cal.4th at p. 383 [presumption that probation officer will not act irrationally or capriciously with authority to disapprove a wide range of pets]; see also *In re Hudson* (2006) 143 Cal.App.4th 1, 11 [appellate court will not assume parole officer will unreasonably withhold permission].) Here, the trial court observed that Garcia seemed

reasonable and likely would not “violate [Arana]” “willy nilly” or refuse legitimate entry requests when contacted for preapproval.

But as Arana’s examples illustrate, the issue is not so much arbitrary or capricious official conduct, but simply succeeding in making contact when approval is needed. We therefore will direct the trial court to modify the relevant portion of condition 107 as follows: “You must notify DAPO or your parole agent before entering any private residence or motel/hotel and obtain the agent’s authorization. *If the parole agent is unavailable to authorize entry, you may enter the residence or motel/hotel if you have left a message for the agent explaining the reason for the visit and no minors are present.* You shall not enter any private residence or motel/hotel without the occupants’ prior knowledge of your criminal history.” (Substantive modification in italics.)

Arana therefore must continue to seek his parole officer’s permission before entry into a private residence or motel by notifying the parole officer of his interest in entering the property, either directly or by leaving a message. Allowing Arana to make the decision to enter wholly unguided by his parole officer either in advance or by followup at the parole officer’s discretion is insufficient for the reasons discussed. The notice requirement serves as a reasonable means to supervise Arana’s gradual reintegration into society, without unduly burdening his constitutional interests. Here, even under the condition as now modified, Arana violated the terms of his parole release by failing to seek authorization for entry from his parole agent. Consequently, the court did not err in finding him in violation of his parole. There is no basis to reverse the order.

III

DISPOSITION

The order finding Arana in violation of parole is affirmed. The trial court is directed to modify the relevant portion of condition 107 as follows: “You must notify DAPO or your parole agent before entering any private residence or motel/hotel and obtain the agent’s authorization. *If the parole agent is unavailable to authorize entry, you*

may enter the residence or motel/hotel if you have left a message for the agent explaining the reason for the visit and no minors are present. You shall not enter any private residence or motel/hotel without the occupants' prior knowledge of your criminal history."

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.