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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.

MATTHEW TYE,

Defendant and Appellant.

G051627

(Super. Ct. No. 10HF2304)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Edward Hall, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded with directions.

Matthew Tye, in pro. per., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Matthew Tye appeals from an order denying his motion to strike or modify a probation condition which required him to maintain a residence as approved by his probation officer. He contends the condition is constitutionally infirm because the language is overbroad. We agree. Therefore, the order will be reversed and the matter will be remanded with directions to impose a more narrowly drawn substitute condition.

### **FACTS AND PROCEDURAL HISTORY**

In 2013 defendant pleaded guilty to five counts of oral copulation with a minor and three counts of sexual intercourse with a minor, all pursuant to a disposition negotiated with the prosecutor. As provided in the guilty plea form signed by defendant, the court suspended imposition of sentence and placed defendant on supervised probation for five years.

The terms and conditions of probation were set out on pages six and seven of the guilty plea form and separately initialed by defendant. Item No. 18 on page seven of the guilty plea form (Residence Condition) required defendant to, “maintain residence as approved by your probation . . . officer.”

Item No. 31 on the same page stated: “I understand that the Court ultimately determines the conditions of probation . . . , and I have the right to request the Court modify or eliminate any condition imposed by the Probation Department that I believe is unreasonable.”

Defendant did not appeal from the judgment.

In October 2014, defendant told his probation officer he wanted to move out of Orange County because he could not find work here. His probation officer said moving out of county without prior approval would violate the Residence Condition.

In December, 2014, defendant filed a motion (Motion) to “Modify Supervision.” Defendant argued the Residence Condition was unconstitutional, and should be stricken or modified, “consistent with well settled appellate case law.”

On February 18, 2015, the court heard and denied the Motion without prejudice. The court found the Residence Condition was reasonably related to the compelling government interests in reforming and rehabilitating defendant, was not unduly burdensome on defendant's constitutional rights, was not unconstitutional on its face, and was not unconstitutional as applied "to this point in time."

Defendant filed a timely notice of appeal from the order.

## DISCUSSION

### *1. The Residence Condition Is Unconstitutional On Its Face.*

Defendant claims the court erred because the Residence Condition is unconstitutionally overbroad, both on its face and as applied. The Attorney General contends it is sufficiently narrow to pass constitutional muster.<sup>1</sup> We agree the Residence Condition is unconstitutionally overbroad on its face.

As a preliminary matter, we note defendant did not object to the Residence Condition (or any other) at the sentencing in 2013. As a result, he has forfeited any claim the Residence Condition does not bear a reasonable relationship to the underlying offenses and future criminality. (*People v. Welch* (1993) 5 Cal.4th 228, 234-238; see *In re Sheena K.* (2007) 40 Cal.4th 875, 881.) Even so, defendant may advance an appellate claim amounting to a facial challenge based on a constitutional defect that does not require scrutiny of individual facts and circumstances, but instead requires the review of abstract and generalized legal concepts. (*In re Sheena K.*, at p. 885.)

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<sup>1</sup> The Attorney General also urges us to dismiss this appeal or affirm the order on the grounds that: defendant expressly waived his right to appeal as part of the guilty plea agreement; defendant was required to obtain a certificate of probable cause (Pen. Code, § 1275) but failed to do so; defendant cannot challenge a condition of the guilty plea agreement which he agreed to; this appeal is an untimely challenge to a condition imposed at the time of judgment in 2013; and defendant waived or forfeited his right to challenge the Residence Condition because he did not object to it at the time it was imposed. We express no opinion on these procedural issues and instead exercise our discretion to decide this appeal on the merits.

Probation conditions may be overbroad if they unduly restrict the exercise of constitutional rights. (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1016.) Then again, probation conditions may be valid, even though they restrict the exercise of constitutional rights, if they are narrowly drawn to serve the important interests of public safety and rehabilitation and are specifically tailored. (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084; see *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1356, quoting *People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*).

The constitutionality of conditions restricting a probationer's residence to one approved by a probation officer is being considered by our Supreme Court in *People v. Schaeffer* (2012) 208 Cal.App.4th 1, review granted October 31, 2012, S205260 (*Schaeffer*).<sup>2</sup> Meanwhile, no reported decision has found the broad residence restrictions imposed here to be constitutional. In fact, *Bauer* found a nearly identical provision to be unconstitutionally overbroad. (*Bauer, supra*, 211 Cal.App.3d at pp. 943-945.)

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 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." (*Id.* at p. 944; see *People v. Burden* (1988) 205 Cal.App.3d 1277, 1280 [restriction on defendant's constitutional right to employment overbroad].)

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<sup>2</sup> *Schaeffer* actually concerned two probation conditions. The first required the defendant to reside at a residence approved by the probation officer, and the second prohibited her from moving without her probation officer's permission. The defendant asserted both conditions unconstitutionally infringed on her rights to travel and freedom of association. (*Schaeffer, supra*, 208 Cal.App.4th at p. 4.) In this case, defendant's probation conditions do not include the second *Schaeffer* condition.

The Residence Condition here suffers from the same infirmities as the one in *Bauer*. Rather than being narrowly tailored to interfere as little as possible with defendant's rights to travel and freely associate, it gives the probation officer absolute discretion to prohibit defendant from living anywhere, with any person, including an elderly parent or future spouse who has no association with the offenses committed and no criminal record. A residence could be disapproved for any reason or no reason at all.

Further, we note other probation conditions also address the public safety and rehabilitation interests without unduly burdening defendant's constitutional rights. He cannot be in the presence of children under the age of 18, unless accompanied by a responsible adult. He must submit himself, his residence, and his property to search and seizure at any time without warrant, probable cause or reasonable suspicion. And he is barred from contacting E.L. and K.T.

In sum, there is no need for unfettered oversight under the Residence Condition, and it must be more narrowly drawn. Therefore, the order denying the Motion will be reversed, and the matter will be remanded to the trial court with directions to grant the Motion and impose a more narrowly drawn substitute condition.

*2. The Reversal and Disposition Above Moots All of Defendant's Other Contentions.*

The reversal and disposition set out above moots the following contentions by defendant:

- The Residence Condition is unconstitutional as applied.
- The court mistakenly said K.T. was 15 years old.
- The court erroneously took judicial notice of some facts.
- The court refused to recognize his "right" to relocate.
- The court initially refused his request to represent himself.
- The hearing on the Motion was substantially delayed.
- The court improperly questioned him.
- The court viewed the Residence Condition as punishment.

**DISPOSITION**

The February 18, 2015 order denying the Motion is reversed. The matter is remanded to the trial court with directions to grant the Motion and impose a more narrowly drawn residence condition.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.