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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

IRENA MARIA GONZALEZ,

Defendant and Appellant.

H037268

(Santa Clara County

Super. Ct. No. C1079947)

Defendant Irena Maria Gonzalez entered a negotiated plea of guilty to solicitation of murder. The trial court placed defendant on probation for three years on various conditions. On defendant's subsequent motion to modify the probation conditions to allow the use of medical marijuana, the trial court ordered a modification of probation by imposing certain gang conditions. On appeal, defendant contends that the trial court erred by modifying her probation conditions without evidence of a change in circumstances. The People concede the issue. And we agree that the concession is appropriate. We therefore reverse the order modifying probation.

BACKGROUND

At defendant's change of plea hearing, the trial court inquired, "Is there going to be any proposal for any kind of gang conditions or anything like that in this case?" The prosecutor replied, "No, Your Honor." The trial court sentenced defendant at a later date. Thereafter, the trial court held a hearing on defendant's request to modify the probation conditions to allow consumption of medical marijuana. The People opposed the request

on the basis that the physician's recommendation that defendant submitted in support of her request was not a recommendation from defendant's primary doctor. The trial court denied the request and entertained "a request for probation to impose the gang conditions which are appropriate in this case based on the photos in the police report."<sup>1</sup> It then imposed certain gang-related conditions over defendant's objection.

### DISCUSSION

In the event of a violation of probation, "the court may modify, revoke, or terminate the probation of the probationer." (Pen. Code, § 1203.2, subd. (b); see also *id.* § 1203.1, subd. (j).) "[T]he court has jurisdiction, upon revocation of probation, to place the defendant upon a new probation, with new conditions." (*In re Bine* (1957) 47 Cal.2d 814, 817.) "Probation is an act of clemency and may be withdrawn if the privilege is abused. . . . In such case the court is specifically authorized to modify and change any and all of the terms and conditions of probation." (*Ibid.*) However, a change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation, and an order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of jurisdiction of the court, for the reason that there is no factual basis for it. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; *In re Clark* (1959) 51 Cal.2d 838, 840; *In re Bine, supra*, at p. 818.) A change in circumstance equates to a "fact" " 'not available at the time of the original order.' " (*People v. Cookson, supra*, at p. 1095.)

Here, as the People concede, no evidence supports a change in circumstances that would support a modification of defendant's probation. There is no petition and, to the extent that any photographs support a modification, any photographs were necessarily available at the time of the original order.

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<sup>1</sup> There is no petition to modify defendant's probation to impose gang conditions. And there are no photographs in the record.

DISPOSITION

The order modifying defendant's probation is reversed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.