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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON ALAPISCO,

Defendant and Appellant.

H037397

(Monterey County

Super. Ct. No. SS102026)

Defendant Aaron Alapisco challenges the trial court's imposition of a probation condition barring him from using medical marijuana while on probation for firearm and gang offenses. He claims that the imposition of this probation condition was an abuse of discretion and a violation of his fundamental rights. We reject his contentions and affirm the order.

I. Background

Defendant was seen brandishing a firearm. A week later, the police saw defendant riding his skateboard and approached him. Defendant reached for a gun in his waistband. The officers drew their weapons and ordered him to put up his hands. Instead, he ran away with the officers in pursuit. While in flight from the police through an apartment complex where young children were present, defendant threw down his loaded handgun and hopped over a fence.

Defendant was eventually taken into custody. He told the police that he had obtained the gun to protect himself from Sureno gang members. Although he was not an “official member” of the Norteno gang, he “associates” with Nortenos.

Defendant pleaded no contest to carrying a loaded firearm (Pen. Code, former¹ § 12031, subd. (a)(1))² and misdemeanor active participation in a criminal street gang (§ 186.22, subd. (a)) and admitted that he was not the registered owner of the firearm (former § 12031, subd. (a)(2)(F)). His pleas and admission were entered on condition that he receive felony probation and that other counts and allegations be dismissed. When he waived his rights, defendant acknowledged his understanding that he could be subjected to “any other conditions of probation deemed reasonable by the Court.”

The probation report recounted that defendant denied current use of “any illegal narcotics” or alcohol. However, “[defendant] stated that he previously used marijuana approximately three times a week for one year prior to the instant offense. After he was released from Monterey County Jail, he decide[d] that continued use of marijuana would not help him in making the positive steps he wanted to take to avoid further criminal behavior.”

The court suspended imposition of sentence and placed defendant on probation with numerous conditions including “[o]bey all laws,” but no conditions concerning drugs or alcohol. Defendant accepted probation on these terms.

Seven months later, the probation department filed a petition seeking to modify his probation. The petition alleged that defendant had been found in possession of a marijuana smoking pipe, that he had admitted smoking marijuana, and that he had provided a “medicinal marijuana card” indicating that the marijuana was used pursuant to a doctor’s recommendation “to treat his migraines and anxiety.” The probation

¹ Former Penal Code section 12031 is now Penal Code section 25850.

² Subsequent statutory references are to the Penal Code unless otherwise specified.

department sought to modify defendant's probation to add conditions requiring him to refrain from using alcohol or drugs "without the prescription of a physician" and to submit to alcohol and drug testing.

At the hearing on the petition, the trial court noted that "I can think of so many different medications that can deal with anxiety that are prescribed by physicians," and the written recommendation submitted by the defense "does not suggest for one second any personalized evaluation of the defendant that relates to anxiety." The defense offered to produce the doctor who had issued the recommendation, and the trial court continued the hearing for more than a month to permit such testimony.

At the continued hearing, the defense was unable to produce the doctor or any medical records to support the recommendation. The defense sought a further continuance to obtain medical records. The prosecutor suggested that the court modify probation "and if the Defense wants to put it back on calendar for a modification of probation at a later date when they can make a doctor available, that that's how we proceed." The probation department noted: "There's no medical diagnosis. There's no information as to what his specific ailment is or to what treatment regimen he's followed previously or other medications he's explored prior to obtaining the medicinal marijuana."

The court noted the absence of any medical justification for defendant's use of marijuana. "[M]y first question [for the doctor] is why don't you -- why don't you prescribe Xanax or something, you know? Why don't you do something that is conventional, instead of this other thing?" The probation department directed the court's attention to defendant's statement to the probation officer concerning his prior use of marijuana, and the court said: "Wow, that was insight." "Kind of hard to ignore that comment . . . isn't it?" "I have one concrete thing in front of me and that's that statement, and I'm going to go with that statement."

The trial court modified the probation conditions as requested and ordered that defendant “can’t smoke marijuana unless and until the Court modifies that order otherwise.” Defendant timely filed a notice of appeal from the court’s order modifying his probation.

II. Discussion

Defendant challenges the probation condition prohibiting him from “smok[ing] marijuana” on two grounds. First, he claims that this condition was not related to his crimes or to his future criminality. Second, he maintains that this condition improperly interferes with his fundamental right to autonomy in medical decision making and is not narrowly tailored.

A trial court’s decision to impose a probation condition is generally reviewed under the highly deferential abuse of discretion standard and will be upheld unless it fails all three factors of the traditional test. “A trial court has broad, but not unlimited, discretion in setting the terms and conditions of probation. [Citations.] On appeal, we review the trial court’s exercise of that discretion under the abuse of discretion standard. ‘A condition of probation 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.]’ [Citations.] All three factors must be present for a condition of probation to be invalid. [Citation.] Furthermore, “[i]nsofar as a probation condition serves the statutory purpose of “reformation and rehabilitation of the probationer,” [citation] it necessarily follows that such a condition is “reasonably related to future criminality” and thus may not be held invalid whether or not it has any “relationship to the crime of which the offender was convicted.”’ [Citation.] A trial court does not abuse its discretion unless its determination is arbitrary or capricious or

“‘exceeds the bounds of reason, all of the circumstances being considered.’”” (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1479 (*Hughes*).

Every appellate court to consider this issue has held that a trial court has discretion to impose a probation condition barring the use of medical marijuana.

In *People v. Bianco* (2001) 93 Cal.App.4th 748, the Third District Court of Appeal upheld a no-medical-marijuana condition where the defendant had been convicted of cultivating marijuana. (*Bianco*, at pp. 753-754.) In *Bianco*, the defendant claimed that the condition was invalid because it “implicates his right to privacy by impeding his right to select an appropriate medical treatment.” (*Bianco*, at p. 754.) The Third District questioned whether any fundamental right was involved, but it concluded that, in any event, the condition was sufficiently tailored to withstand such scrutiny. (*Bianco*, at pp. 754-755.)

In *People v. Moret* (2009) 180 Cal.App.4th 839 (*Moret*), the defendant was convicted of possessing a concealed firearm after he was found carrying a loaded firearm, which he said he had obtained for protective purposes. (*Moret*, at p. 846.) He told the probation officer that he used marijuana for his migraine headaches. (*Moret*, at p. 847.) The First District Court of Appeal upheld the trial court’s discretionary decision to impose a no-medical-marijuana probation condition. (*Moret*, at pp. 845-847.)

People v. Brooks (2010) 182 Cal.App.4th 1348 (*Brooks*) concerned a defendant who, after having been found in possession of methamphetamine and marijuana, pleaded guilty to possession of methamphetamine and was granted probation. While on probation, he was found in possession of two pounds of marijuana. (*Brooks*, at p. 1350.) A probation violation was alleged, and the prosecution sought revocation of his probation. Brooks claimed that the marijuana was for personal use and that he used it pursuant to a physician’s recommendation. (*Ibid.*) The recommending doctor testified at the probation hearing that he had recommended that Brooks use marijuana for asthma, irritable bowel syndrome, and shoulder pain. (*Ibid.*) The trial court found that Brooks

had possessed the marijuana for sale, not personal use, found him in violation of probation, and reinstated probation with the condition that he not use any controlled substances. (*Ibid.*) On appeal, Brooks claimed that the trial court was prohibited, as a matter of law, from imposing “a probation condition barring the use of doctor-recommended medical marijuana.” (*Ibid.*) The Second District Court of Appeal held that a trial court’s discretion to impose probation conditions includes the power to impose a no-medical-marijuana condition. (*Brooks*, at p. 1352.) Brooks also claimed that the trial court had abused its discretion under the traditional three-factor test. The Second District found no abuse of discretion. (*Brooks*, at pp. 1352-1353.)

The most recent case addressing this issue was the Fourth District Court of Appeal’s decision in *Hughes*, which neither party cites.³ The Fourth District held that the trial court had not abused its discretion under the traditional three-factor test in imposing a no-medical-marijuana condition. (*Hughes*, *supra*, 202 Cal.App.4th at pp. 1480-1481.) This was a simple issue in *Hughes* because the defendant had been convicted of cultivating, transporting, and possessing marijuana for sale. (*Hughes*, at p. 1481.) Nevertheless, in dicta, the *Hughes* court disapproved of the trial court’s focus on other factors. “[T]he trial court incorrectly focused on whether defendant had a need to use medical marijuana, as suggested by the trial court’s skepticism about the thoroughness of the medical exam conducted by the doctor who authorized defendant’s use of marijuana. The trial court also apparently questioned the palliative efficacy of marijuana and apparently believed that marijuana is not the only medication that could resolve defendant’s ailments and pain. In addition, the trial court was concerned that because defendant’s medical authorization does not limit the amount of marijuana defendant can

³ The *Hughes* opinion came out the day after appellant filed his opening brief; the California Supreme Court denied review in *Hughes* a month and a half before appellant filed his reply brief.

use he might become addicted. The trial court's concerns effectively question the wisdom of allowing marijuana to be used for medicinal purposes. That issue was resolved in 1996 when voters of this state passed the CUA." (*Hughes*, at p. 1481.)

Defendant implicitly concedes that a trial court has the discretion to impose a no-medical-marijuana probation condition under appropriate circumstances. As the Fourth District pointed out in *Hughes*, the Legislature has statutorily authorized trial courts "to impose a condition of probation that prohibits a defendant from the use of medical marijuana." (*Hughes, supra*, 202 Cal.App.4th at p. 1480; see Health & Saf. Code, § 11362.795 [court may decide if probationer for whom medical marijuana is recommended may use medical marijuana while on probation].) Defendant's claim is that the particular circumstances here did not support the court's decision. He maintains that the no-medical-marijuana probation condition was invalid because his use of medical marijuana was (1) lawful, (2) unrelated to his offenses, and (3) unrelated to his future criminality.

Assuming *arguendo* that defendant's use of medical marijuana was lawful and unrelated to his current offenses, there was nevertheless a substantial basis in the record for the trial court's conclusion that defendant's use of medical marijuana was related to his future criminality. Defendant told the probation officer "he [had] decide[d] that continued use of marijuana would not help him in making the positive steps he wanted to take to avoid further criminal behavior." Defendant thereby *admitted* that his marijuana use hindered his ability to "avoid further criminal behavior." This was *the* basis for the trial court's decision, and we can see no abuse of discretion in the trial court's reliance on it. Defendant, who told the probation officer that he had used marijuana three times a week during the year preceding the current offenses, was fully aware of his own weaknesses. The trial court could reasonably credit defendant's own belief that using marijuana might lead him to further criminal behavior.

Defendant argues that using medical marijuana was likely to help him avoid future crimes because it would relieve his anxiety, which, he argues, led to his current offenses. To the extent that there is any evidentiary support for this argument in the record, it is immaterial. The decision as to whether a particular probation condition will assist the probationer in avoiding future criminality is committed to the trial court's discretion. Where the record could support either of two conclusions, the trial court's discretionary decision must be upheld. The trial court was entitled to credit the evidence that use of medical marijuana would hinder rather than assist defendant's efforts to avoid future criminality. Consequently, we must uphold the trial court's imposition of the no-medical-marijuana probation condition under the traditional three-factor test.

The only remaining issue before us is whether this probation condition violated defendant's fundamental rights. Defendant contends that the condition violated his fundamental right to make medical decisions for himself. "Because probation is a privilege and not a right [citation], a probationer is not entitled to the same degree of constitutional protection as other citizens. Accordingly, even a probation condition which infringes a constitutional right is permissible where it is "necessary to serve the dual purpose of rehabilitation and public safety."'" (*People v. Peck* (1996) 52 Cal.App.4th 351, 362.) The trial court's decision was explicitly based on defendant's own assessment that his use of marijuana would hinder his ability to avoid future criminality. And the trial court left open to defendant the opportunity to have the condition modified if he could establish an evidentiary basis for doing so. Under these circumstances, the trial court could reasonably conclude that the condition's temporary and limited infringement on defendant's medical decision making rights was sufficiently tailored to and justified by the need to enhance defendant's ability to avoid future criminality.

The trial court did not abuse its discretion or violate defendant's fundamental rights in imposing the no-medical-marijuana probation condition.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Marquez, J.