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

THE PEOPLE,

Plaintiff and Respondent,

v.

RHUBEN DREW HOLLINS,

Defendant and Appellant.

H037521

(Santa Clara County

Super. Ct. No. C1198450)

Defendant Rhuben Drew Hollins pled guilty to a charge of falsely impersonating another, thereby exposing the victim to liability, in violation of Penal Code section 529. The trial court placed him on probation on the condition, among others, that he refrain from using alcohol and avoid places where alcohol is sold. On appeal he objects to this condition on the ground that there was no evidence that consumption of alcohol has played any role in past misconduct by him and no reason to believe it has any bearing on the risk of future criminality. We find this objection sound. In imposing the condition the trial court was apparently laboring under the false impression that defendant had sustained a prior conviction for public drunkenness. In fact there is no evidence in this record that defendant has ever abused alcohol or any other drug; the only evidence of any use of intoxicants is two prior convictions based upon the possession of marijuana. We do not find in this history a reasonable basis to conclude that the inhibition-lowering

effects of alcohol would significantly affect the risk of future criminal conduct by defendant. Accordingly, we will strike the alcohol prohibition and affirm the judgment as modified.

### **BACKGROUND**

According to police reports, defendant was involved in a traffic accident on June 28, 2009.<sup>1</sup> He identified himself to officers as Edward Casey Hollins, which is actually the name of his brother. A citation for the incident was issued to the latter, eventually leading to the suspension of his driver's license. He reported to police that he had been the victim of identity theft. The fingerprint on the citation led officers to defendant.

On January 10, 2011, a felony complaint was filed charging defendant with false personation exposing the victim to liability (Pen. Code, § 529). On September 6, 2011, he pled guilty to the charge, on the understanding that he would receive a sentence of “90 days on the weekend-work program” and that after he paid “full restitution” he could “get a section 17,” i.e., the offense would be designated as a misdemeanor. (See Pen. Code, § 17.)

Prior to sentencing the probation department filed a “[w]aived [r]eferral” report stating that defendant had been convicted of three other offenses on July 15, 2011: two

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<sup>1</sup> The complaint referred to and expressly incorporated by reference certain attachments described as “official reports and documents of a law enforcement agency which the complainant believes establish probable cause for [defendant’s] arrest.” These attachments should have been, but were not, included in the copy of the complaint in the clerk’s transcript, because their incorporation by reference made them part of the pleading. (See *Pine Terrace Apartments, L.P. v. Windscape, LLC* (2009) 170 Cal.App.4th 1, 16, quoting *Republic Bank v. Marine Nat. Bank* (1996) 45 Cal.App.4th 919, 922 [matter incorporated by reference “ ‘becomes as much a *part* of the document as if it had been typed in directly’ ”]; Cal. Rules of Court, rule 8.320(b)(1) [clerk’s transcript must include “[t]he accusatory pleading and any amendment”].) Instead appellate counsel has had to bring them before us by motion to augment the record. We note that in addition to being part of the complaint, these reports were cited by the trial court as furnishing a factual basis for defendant’s guilty plea.

counts of driving with a suspended license, a misdemeanor (Veh. Code, § 14601.1, subd. (a)), and one count of possession of less than an ounce of marijuana, an infraction (Health & Saf. Code, § 11357, subd. (b)).

At the commencement of the sentencing hearing on October 14, 2011, a representative of the probation department proposed to add six conditions of probation not included in its written report. Among these were that defendant would “submit to chemical test as directed by the probation officer,” that he was “not to possess or consume alcohol or illegal controlled substances,” and that he would “enter and complete a substance treatment program.” Defense counsel expressed the belief that the “tests and alcohol conditions” were based on “a 647(f) conviction” sustained by defendant in 2010. The probation department representative, however, added, “He does have an 11357(b) misdemeanor in July as well,” whereupon the court remarked, “So he’s had alcohol and drugs in the last year.” The court proceeded to place defendant on three years’ probation subject to conditions including one transcribed as follows: “Cannot possess, consume alcohol or illegal drugs or go to places where alcohol is the primary item of sale or that illegal drugs, that he knows are being used or sold.”

Defendant brought this timely appeal.

### **DISCUSSION**

Defendant contends that the trial court’s injunction against using alcohol possesses all three of the characteristics that will render a probation condition invalid, i.e., it lacks any relationship to the crime of which defendant was convicted, it regulates conduct that is not itself criminal, and it “requires or forbids conduct which is not reasonably related to future criminality . . .” (*People v. Lent* (1975) 15 Cal.3d 481, 486.) Respondent does not seriously contest the presence of the first two characteristics, and we are unable to see how they could be contested. The record contains no evidence that defendant was using alcohol at the time of the underlying traffic collision, and the use of alcohol by an adult

“is not in itself criminal.” The only real question is whether the trial court could find that a prohibition on using alcohol, or being in places where it is “the primary item of sale,” was “reasonably related to future criminality.”

“The primary goal of probation is to ensure ‘[t]he safety of the public . . . through the enforcement of court-ordered conditions of probation.’ (Pen. Code, § 1202.7.)” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) “In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety . . . .” (*Id.* at p. 1120.) “The trial court’s discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute.” (*Id.* at p. 1121.) “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.’ ” [Citations.]” (*Id.* at p. 1121, quoting *People v. Welch* (1993) 5 Cal.4th 228, 233; see *People v. Olguin* (2008) 45 Cal.4th 375, 379 [“We review conditions of probation for abuse of discretion.”].)

Probation conditions restricting alcohol use are inevitably troublesome because of the paradoxical role alcohol plays in our culture. It is on the one hand a common, if not ubiquitous, feature of American social and recreational life. At the same time, it plays a prominent role in many social ills, including traffic accidents, child abuse and neglect, domestic violence, and various other forms of antisocial conduct. Given alcohol’s Jekyll-and-Hyde character, it is not surprising that probation conditions restricting its use have received diverse appellate treatments. Defendant relies primarily on *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*) (disapproved on other grounds in *People v. Welch, supra*, 5 Cal.4th 228, 236-237), where the court invalidated a condition closely resembling the one before us. The defendant there had been convicted of possessing methamphetamine for sale. The probation report indicated that he had used various intoxicants, including alcohol, “since he was 14,” but that he “ ‘had no problem’ ” and

was a “social drinker.” (*Id.* at p. 927.) Nothing in the record indicated that alcohol “was related to the crime for which defendant was convicted.” (*Ibid.*) Since alcohol use itself was not criminal, the validity of the condition turned on whether the condition was “reasonably related to future criminal activity.” (*Id.* at pp. 927-928.) The court found no “indication . . . that the proscribed behavior, in defendant’s case, is reasonably related to future criminal behavior.” (*Id.* at p. 928.) The condition was therefore invalid. (*Ibid.*)

Numerous cases have distinguished or criticized *Kiddoo*. In *People v. Beal* (1997) 60 Cal.App.4th 84 (*Beal*), the defendant challenged a prohibition on alcohol use in her appeal from a conviction for possession and sale of methamphetamine. The court observed that *Kiddoo* might be distinguished on the ground that the defendant there professed to have “ ‘no problem’ ” with alcohol and to use other substances only “ ‘sporadically,’ ” whereas the defendant in *Beal* admitted she “suffered from ‘chemical dependency.’ ” (*Id.* at p. 86, fn. 1, quoting *Kiddoo, supra*, 225 Cal.App.3d at p. 927.) However the court expressed “disagree[ment] with the fundamental assumptions in *Kiddoo* that alcohol and drug use are not reasonably related and that alcohol use is unrelated to future criminality where the defendant has a history of substance abuse.” (*Id.* at p. 87.) Rather, the court stated, “empirical evidence shows . . . a nexus between drug use and alcohol consumption.” (*Ibid.*) Citing a 1992 case, which in turn cited a 1967 study, the court continued, “It is well-documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs.” (*Ibid.*, citing *People v. Smith* (1983) 145 Cal.App.3d 1032, 1034, citing Pollack, *Drug Use and Narcotic Addiction* (1967) University of Southern California Institute of Psychiatry and Law for the Judiciary, pp. 1-2, 4-5.) Thus, the court concluded, “substance abuse is reasonably related to the underlying crime and that alcohol use may lead to future criminality where the defendant has a history of substance abuse and is convicted of a drug-related offense.” (*Ibid.*)

In *People v. Balestra* (1999) 76 Cal.App.4th 57, the defendant pleaded guilty to elder abuse based on evidence that upon coming home one evening smelling of alcohol, she “terrorized” her mother for two hours. (*Id.* at p. 61.) The probation officer recommended that probation be conditioned on drug and alcohol testing; the defendant’s attorney objected only insofar as the condition referred to drugs. The court relied on *Beal* to find *Kiddoo* “simply inconsistent with a proper deference to a trial court’s broad discretion in imposing terms of probation, particularly where those terms are intended to aid the probation officer in ensuring the probationer is complying with the fundamental probation condition, to obey all laws.” (*Id.* at p. 69.)

In *People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644-1645 (*Lindsay*), the court found no abuse of discretion in imposing a prohibition on alcohol use following a conviction for sale of cocaine—an offense the defendant conceded committing to support his own cocaine habit. It also appeared that the defendant had used alcohol since the age of 10; he acknowledged having “ ‘an addictive personality’ ” and that he had been “battling an alcohol problem” for the preceding five years. (*Id.* at p. 1645.) The court observed that alcohol use could interfere with his abstention from cocaine since it could impair the willpower needed “[a]s an addict” to refrain from drug use. (*Ibid.*)

In *People v. Smith* (1983) 145 Cal.App.3d 1032, 1034-1035, the defendant was convicted of possessing PCP and was under its influence at the time of his arrest. The court held that he could properly be subjected to a no-alcohol condition despite the absence of any indication that he used alcohol. The court wrote, that “[d]rinking . . . , even for the social, controlled drinker . . . , can lead to a temporary relaxation of judgment, discretion, and control. . . . [T]he physical effects of alcohol are not conducive to controlled behavior. [¶] . . . Given the nexus between drug use and alcohol consumption, we find no abuse of discretion in the imposition of the condition of probation relating to alcohol usage.”

Here there is no evidence that defendant has ever had an alcohol problem, or indeed that he has ever used alcohol. Nor was the offense on which he was sentenced shown to have any relation to the use of alcohol or any other intoxicating substance. It is also questionable whether the record can be said to demonstrate “substance abuse.” The only suggestion of a history involving intoxicants is an allusion at sentencing to two prior convictions, one described by defense counsel as “a 647(f) conviction in the year of 2010,” and the other by the prosecutor as “an 11357(b) misdemeanor in July,” apparently meaning July of 2011. The record of this matter contains no reference to the 2010 conviction and no information regarding the 2011 conviction beyond a statement in the probation department’s “[w]aived [r]eferral” report that “[o]n July 15, 2011, under case #C1081088, the defendant was convicted of a violation of Section 11357(b) of the Health and Safety Code, a misdemeanor at which time the sentence was suspended.” Nonetheless the trial court somehow formed the impression that, as it said at sentencing “[H]e’s had alcohol and drugs in the last year.”

At defendant’s request, we have taken judicial notice of records from the superior court files in the cases alluded to at sentencing. The files include police reports containing the only available accounts of the underlying facts. According to those, the earlier offense occurred on January 17, 2010, when an officer observed defendant driving a car with no front license plate and with a rear plate that was, according to dispatch, unassociated with any motor vehicle on file. The officer stopped the car and, upon speaking to defendant, noticed the scent of marijuana coming from inside the vehicle. Defendant told the officer he had smoked marijuana earlier but it was all gone. A consensual search yielded three pieces of crumpled paper containing marijuana buds. Upon their discovery defendant volunteered, “ ‘Look man I’m not a crook, I just smoke weed. I take care of my kid. I work at Toys R Us.’ ” Asked how much marijuana he thought there was, he said “ ‘about an eighth’ ” and that he had paid \$40 for it. The

officer issued a citation, apparently for possession of marijuana in violation of Health and Safety Code section 11357, subdivision (b). Defendant signed it but then asked for his marijuana back, saying it represented “ ‘half [his] paycheck.’ ” Spurning this entreaty, the officer booked the marijuana into evidence. The marijuana and the “evidence package” in which it was booked had a combined weight of 28.3 grams. On June 4, 2010, defendant pled guilty to a violation of Penal Code section 647, subdivision (f) (§ 647(f)), which makes it a form of disorderly conduct—a misdemeanor—to be “found in any public place under the influence of intoxicating liquor . . . [or] drug . . . , in [such] a condition that [the defendant] is unable to exercise care for his or her own safety or the safety of others . . . .”

The second offense alluded to at sentencing occurred on June 10, 2011, when, according to the police report, an officer stopped defendant for driving without a seat belt. Upon learning of an outstanding warrant, the officer arrested defendant. In a subsequent search of his car, the officer found a baggie containing marijuana under the driver’s seat. The combined weight of the marijuana, packaging, and evidence envelope was 23 grams. Defendant pled guilty to a violation of Health and Safety Code section 11357, subdivision (b), on July 15, 2011.

It thus appears that the two prior convictions rest on nothing more than defendant’s having possessed marijuana. Because there is no full probation report, there was no occasion to assess the extent of defendant’s use of marijuana or any other intoxicant. The trial court’s apparent rationale for restricting defendant’s access to alcohol was not that he was a substance abuser in general but that “he’s had alcohol . . . in the last year.” There is no evidentiary basis for this statement. The court was apparently under the mistaken impression that defendant’s 2010 conviction of violating section 647(f) was based on public drunkenness. But as the police report clearly indicates, it was based entirely on his possession of marijuana. Nor does the record of

that conviction suggest a degree of intoxication that might warrant an inference of a “drug problem.” Although section 647(f) predicates guilt on a level of intoxication interfering with the ability to exercise care for one’s own or others’ safety, nothing in the police report so much as hints that defendant was found in such a state. At most the record shows that he had been smoking marijuana in his car shortly before he was stopped. Had he been noticeably intoxicated—let alone intoxicated to the point of inability to care for his own or others’ safety—the officer might have been expected to arrest him for something more serious than possession of marijuana. (See Veh. Code, § 23152, subd. (a) [unlawful to drive a vehicle “under the influence of any alcoholic beverage” or drug]; *People v. Miller* (2012) 202 Cal.App.4th 1450, 1453 [driving under influence of Valium, Vicodin, and possibly marijuana].) Indeed, the officer might have been under a duty to do so. (*People v. Lamb* (1964) 230 Cal.App.2d 65, 68 [under prior statute making it unlawful to drive while addicted to drugs, officer was under duty to arrest driver given knowledge of driver’s prior narcotics use and observation of fresh injection marks on driver’s arms].) The officer’s failure to arrest defendant thus supports a *presumption* that defendant was not, or did not appear, intoxicated; for otherwise the officer would presumptively have performed his duty and taken defendant into custody. (See Evid. Code, § 664 [presumption that “official duty has been regularly performed”].) Instead, as the officer reported, he “issued the suspect a criminal citation and released him at the scene.”

In any event, this incident provided no support for the supposition, on which the trial court apparently based the challenged condition, that alcohol was involved. Nor is there any connection between the present offense and alcohol use. The record contains no evidence of an “addictive personality” (*Lindsay, supra*, 10 Cal.App.4th at p. 1645) or “ ‘chemical dependency’ ” (*Beal, supra*, 60 Cal.App.4th at p. 86, fn. 1), as have been held to justify alcohol restrictions in the cases cited by respondent. We are not prepared to

hold that the mere use of marijuana, in and of itself, can sustain a prohibition on drinking alcohol, let alone on being in places where alcohol is sold. On this record, no reasonable connection appears between such a prohibition and the risk of future criminal conduct by defendant. We will therefore modify the judgment by striking the offending condition.

**DISPOSITION**

The challenged condition is modified by striking the references to alcohol and to places where alcohol is sold, so as to provide as follows: “Defendant is prohibited from possessing or consuming illegal drugs or going to places where he knows illegal drugs are being used or sold.” As so modified, the judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.