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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JENNIFER MARIE DORECK, Defendant and Appellant.	H037594 (Monterey County Super. Ct. No. SS110959)

Defendant Jennifer Marie Doreck pleaded guilty to two felonies, theft of over $950 from an elder adult and obtaining a controlled substance by fraud. The victims of the crimes were defendant's grandparents. The court suspended imposition of sentence and placed defendant on probation.

Defendant claims that the court erred in imposing certain probationary conditions, namely, orders that she (1) enroll in and complete a 52-week batterer's treatment program, (2) pay $300 to a women's shelter program, and (3) pay a domestic violence fee of $400. She contends that the statute under which these probation conditions were imposed, Penal Code section 1203.097, is unconstitutional both on its face and as applied to her individual case.[1]

[1] All further statutory references are to the Penal Code unless otherwise stated.

We address an issue not initially raised by the parties in this appeal: Whether the mandatory probation conditions of section 1203.097 apply to this particular case. After requesting and receiving supplemental briefing from the parties, we conclude that this statute is inapplicable here and that the court's imposition of probation conditions under the statute was an unauthorized sentence. We will therefore strike the three probation conditions imposed under section 1203.097 challenged by defendant and will affirm the probation order as modified.

FACTS[2]

On January 18, 2011, Patricia Reisig,[3] defendant's grandmother, reported a theft to a King City Police Officer. Patricia reported that defendant in 2010 had taken her Capital One credit card without her permission and had used it to charge a number of purchases, including those to fast food restaurants, for a motel room in King City, and for Disneyland tickets. On January 16, 2011, defendant's family confronted her about the unauthorized credit card purchases, and she responded that John Reisig, Patricia's husband, had given her the credit card in December 2010. Patricia told the police that her husband had been hospitalized at the time defendant had indicated that he had given defendant the Capital One credit card. Patricia stated further that her husband had never accessed her purse and had always provided cash if he needed someone to buy something at the store for him.

On January 25, 2011, Karen Reisig, defendant's mother met with an officer with the King City Police Department. Karen told the officer she had become suspicious when, in reviewing her parents' bank statement, she had seen a charge for over $400 to Safeway in Carmel, dated December 31, 2010. She said that her parents did not shop at

[2] Our summary of the facts is taken from the probation report.

[3] In order to avoid confusion and while intending no disrespect, we will refer to the victims and family by their first names.

that store. She also related to the officer that her son, Jonathan, had called her on December 31, 2010, and had told her about defendant's purchases at Safeway; Karen had thought it strange because her daughter was unemployed at the time.

In addition, Karen reported to the officer that she was aware that defendant had picked up several prescriptions for hydrocodone, and that she suspected that her daughter was either selling or was addicted to the drug. "[Karen] handed the officer a copy from Bertelli's Pharmacy['s] electronic signature log. The log had [defendant's] signature for three prescriptions under Patricia's name. Under John's file, [defendant] signed for two prescriptions under John's name."

At the end of May 2011, a police officer was able to make contact with defendant at her residence. She admitted to having made charges on her grandmother's credit card but said the purchases were for her grandparents and were made with their consent. Defendant told the officer "that there were a few credit card purchase[s] that she knew she should not have made. But for the most part, 70-80% of the time[] she used the credit card, she bought merchandise for her grandparents['] use." She also admitted that she had picked up "dozens" of prescriptions for her grandparents.

PROCEDURAL BACKGROUND

Defendant was charged by a complaint filed in May 2011 with eight felonies, namely, two counts of theft from an elder or dependent adult of more than $950 (§ 368, subd. (d); counts 1 and 3); two counts of fraudulent use of an access card (§ 484g, subd. (a); counts 2 and 4); two counts of obtaining a controlled substance by fraud (Health & Saf. Code, § 11173, subd. (a); counts 5 and 7); and two counts of second-degree burglary (§ 459; counts 6 and 8). On August 3, 2011, defendant entered a conditional plea of guilty to one count of theft from an elder or dependent adult of more than $950 (count 1), and one count of obtaining a controlled substance by fraud

(count 5).[4] The parties stipulated that there was a factual basis for the plea and the court made such a finding. The plea was entered with the understanding that the remaining counts would be dismissed, charges filed in another proceeding would also be dismissed, and that defendant would receive felony probation.

On September 14, 2011, the court suspended imposition of the sentence and placed defendant on three-year felony probation on the condition that she serve 200 days in county jail. The court ordered victim restitution to Patricia Reisig in the amount of $7,122.83. Among other probation conditions, the court also ordered the payment of the fines and attendance at a treatment program pursuant to section 1203.097 that are the subject of this appeal. The court granted the prosecution's request to dismiss the remaining counts alleged in the complaint and the charges alleged in another proceeding, Monterey Superior Court case number SS111328. Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea.

DISCUSSION

Probation Conditions Pursuant to Section 1203.097

A. *Background and Contentions*

At sentencing, the court ordered as additional terms of probation that defendant, inter alia, pay $300 to a Women's Shelter Program in lieu of a fine, pay a domestic violence fee of $400, and enroll in and complete a minimum of 52 weeks of batterer's treatment in an approved program; these conditions (hereafter, collectively the domestic violence prevention conditions) were imposed pursuant to section 1203.097.[5] No

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[4] The reporter's transcript reflects that defendant pleaded guilty to counts 1 and 5. The clerk's minutes reflect that defendant pleaded no contest to the two counts. Where there is a conflict between the clerk's minutes and the oral pronouncement of the court, the latter controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

[5] There are other mandatory probation conditions specified in subdivision (a) of section 1203.097 besides these three conditions addressed by defendant. Because her (continued)

objection was asserted on behalf of defendant to these or to any other probation conditions imposed by the court.

Defendant contends that the court erred in its imposition of the domestic violence prevention conditions. She contends that section 1203.097 "is constitutionally overbroad on its face" because it impermissibly requires the sentencing court to impose domestic violence prevention conditions on defendants convicted of nonviolent crimes, notwithstanding the fact that the statute targets crimes of domestic violence. Defendant asserts further that the statute is overly broad as applied to her particular case and is therefore unconstitutional because she was convicted of no acts involving domestic violence; rather her conviction was for theft. She argues that we should consider this "as-applied" constitutional challenge notwithstanding her trial counsel's failure to raise it below. In the event the claim is forfeited, defendant asserts that we should nonetheless consider it because the failure to make the constitutional argument below constituted ineffective assistance of counsel.

The Attorney General responds that section 1203.097 is not overly broad. She asserts that the statute is reasonably certain and defendant "has not shown, and cannot show, the statute is impermissibly vague in all of its applications [citation]." The Attorney General argues further that defendant's "as-applied" constitutional challenge has been forfeited because defendant's trial counsel failed to assert the objection below. Lastly, she asserts that defendant has failed to establish an ineffective assistance claim.

B. *Issues Raised By This Court*

On September 6, 2012, this court asked the parties to submit supplemental letter briefs on two issues not addressed in the appellate briefs. We asked the parties whether

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challenge is limited to these three probation conditions, we do not address the propriety of any other conditions which the court may have imposed under section 1203.097. (See *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1163, fn. 5.)

the provisions of section 1203.097 were applicable to the facts of this case. Secondly, we requested that the parties address whether the imposition of the domestic violence prevention conditions under that statute in this case constituted an unauthorized sentence.

C. *Whether Court Erred in Imposing Probation Conditions*

1. *Applicability of Section 1203.097*

Under section 1203.097, if the court grants probation in certain instances, it is required to impose specified probation conditions. These mandatory probation conditions include the issuance of a criminal court protective order relative to the victim(s) (§ 1203.097, subd. (a)(2)); defendant's payment of a minimum fee of $400, the proceeds of which are to be used for specific purposes related to domestic violence programs (§ 1203.097, subd. (a)(5)); the defendant's successful completion of a batterer's program, as defined by statute, of at least one year in duration and with weekly class sessions of at least two hours (§ 1203.097, subd. (a)(6)); and defendant's completion of a specified amount of community service (§ 1203.097, subd. (a)(8).[6]

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[6] "If a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code, the terms of probation shall include all of the following: [¶] (1) A minimum period of probation of 36 months, which may include a period of summary probation as appropriate. [¶] (2) A criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions. [¶] (3) Notice to the victim of the disposition of the case. [¶] (4) Booking the defendant within one week of sentencing if the defendant has not already been booked. [¶] (5) A minimum payment by the defendant of four hundred dollars ($400) to be disbursed as specified in this paragraph. If, after a hearing in court on the record, the court finds that the defendant does not have the ability to pay, the court may reduce or waive this fee. [¶] Two-thirds of the moneys deposited with the county treasurer pursuant to this section shall be retained by counties and deposited in the domestic violence programs special fund created pursuant to Section 18305 of the Welfare and Institutions Code, . . . The remainder shall be transferred, once a month, to the Controller for deposit in equal amounts in the Domestic Violence Restraining Order Reimbursement Fund and in the Domestic Violence Training and Education Fund, . . . [¶] . . . [¶] (6) Successful completion of a batterer's program, as defined in subdivision (c), or if none is available, (continued)

another appropriate counseling program designated by the court, for a period not less than one year with periodic progress reports by the program to the court every three months or less and weekly sessions of a minimum of two hours class time duration. . . . [¶] (7)(A)(i) The court shall order the defendant to comply with all probation requirements, including the requirements to attend counseling, keep all program appointments, and pay program fees based upon the ability to pay. [¶] (ii) The terms of probation for offenders shall not be lifted until all reasonable fees due to the counseling program have been paid in full, but in no case shall probation be extended beyond the term provided in subdivision (a) of Section 1203.1. If the court finds that the defendant does not have the ability to pay the fees based on the defendant's changed circumstances, the court may reduce or waive the fees. [¶] (B) Upon request by the batterer's program, the court shall provide the defendant's arrest report, prior incidents of violence, and treatment history to the program. [¶] (8) The court also shall order the defendant to perform a specified amount of appropriate community service, as designated by the court. . . . [¶] (9) If the program finds that the defendant is unsuitable, the program shall immediately contact the probation department or the court. The probation department or court shall either recalendar the case for hearing or refer the defendant to an appropriate alternative batterer's program. [¶] (10)(A) Upon recommendation of the program, a court shall require a defendant to participate in additional sessions throughout the probationary period, unless it finds that it is not in the interests of justice to do so, states its reasons on the record, and enters them into the minutes. In deciding whether the defendant would benefit from more sessions, the court shall consider whether any of the following conditions exists: [¶] (i) The defendant has been violence free for a minimum of six months. [¶] (ii) The defendant has cooperated and participated in the batterer's program. [¶] (iii) The defendant demonstrates an understanding of and practices positive conflict resolution skills. [¶] (iv) The defendant blames, degrades, or has committed acts that dehumanize the victim or puts at risk the victim's safety, including, but not limited to, molesting, stalking, striking, attacking, threatening, sexually assaulting, or battering the victim. [¶] (v) The defendant demonstrates an understanding that the use of coercion or violent behavior to maintain dominance is unacceptable in an intimate relationship. [¶] (vi) The defendant has made threats to harm anyone in any manner. [¶] (vii) The defendant has complied with applicable requirements under paragraph (6) of subdivision (c) or subparagraph (C) to receive alcohol counseling, drug counseling, or both. [¶] (viii) The defendant demonstrates acceptance of responsibility for the abusive behavior perpetrated against the victim. [¶] (B) The program shall immediately report any violation of the terms of the protective order, including any new acts of violence or failure to comply with the program requirements, to the court, the prosecutor, and, if formal probation has been ordered, to the probation department. The probationer shall file proof of enrollment in a batterer's program with the court within 30 days of conviction. [¶] (C) Concurrent with other requirements under this section, in addition to, (continued)

Section 1203.097 applies where the defendant "is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code . . ." (§ 1203.097, subd. (a).) Under Family Code section 6211—part of the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.; DVPA)—domestic violence is defined as "abuse perpetrated against . . . [¶] . . . [¶] (f) Any other person related by consanguinity or affinity within the second degree." "Abuse" is defined under Family Code section 6203 as "(a) Intentionally or recklessly to cause or attempt to cause bodily injury. [¶] (b) Sexual assault. [¶] (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (d) To engage in any behavior that has been or could be enjoined pursuant to [Family Code] Section 6320." Lastly, under Family Code section 6320, the behavior for which injunctive relief relating to domestic violence may be sought consists of "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal

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and not in lieu of, the batterer's program, and unless prohibited by the referring court, the probation department or the court may make provisions for a defendant to use his or her resources to enroll in a chemical dependency program or to enter voluntarily a licensed chemical dependency recovery hospital or residential treatment program that has a valid license issued by the state to provide alcohol or drug services to receive program participation credit, as determined by the court. The probation department shall document evidence of this hospital or residential treatment participation in the defendant's program file. [¶] (11) The conditions of probation may include, in lieu of a fine, but not in lieu of the fund payment required under paragraph (5), one or more of the following requirements: [¶] (A) That the defendant make payments to a battered women's shelter, up to a maximum of five thousand dollars ($5,000). [¶] (B) That the defendant reimburse the victim for reasonable expenses that the court finds are the direct result of the defendant's offense. [¶] . . . [¶] (12) If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, is not benefiting from counseling, or has engaged in criminal conduct, upon request of the probation officer, the prosecuting attorney, or on its own motion, the court, as a priority calendar item, shall hold a hearing to determine whether further sentencing should proceed. . . ." (§ 1203.097, subd. (a).)

Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party . . ." Thus, "section 1203.097 is directed at the protection of victims of domestic violence . . ." (*People v. Selga* (2008) 162 Cal.App.4th 113, 119 [invalidating stay-away order protecting boyfriend of victim, the defendant's ex-girlfriend and mother of his child, because boyfriend did not qualify under statute as person for whose protection order could issue].) And the mandatory probation conditions of section 1202.097 "appl[y] to any person placed on probation for a crime if the underlying facts of the case involve domestic violence, even if the statute defining the crime does not specifically refer to domestic violence." (*People v. Cates* (2009) 170 Cal.App.4th 545, 548 (*Cates*) [affirming probation conditions where underlying facts of aggravated assault conviction involved defendant's battery of his former girlfriend].)

Here, the victims, as the grandparents of defendant, clearly meet the relationship test of the Family Code section 6211, subdivision (f). But the "abuse" standard of that statute does not apply in this instance. Under the DVPA, forms of "abuse" include intentional or reckless conduct causing or attempting to cause bodily injury (Fam. Code, § 6203, subd. (a)), a sexual assault (Fam. Code, § 6203, subd. (b)), and actions causing a person to reasonably apprehend that he or she or another person is in danger of imminent physical injury (Fam. Code, § 6203, subd. (c)). The underlying facts of the crime here obviously do not fall within any of these three categories of abuse. (Cf. § 13700, subd. (a) [defining " '[a]buse' " as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another"].)

Furthermore, this case does not fall within the fourth category of abuse listed in Family Code section 6203—engaging "in any behavior that has been or could be enjoined pursuant to [Family Code] section 6320" (Fam. Code, § 6203, subd. (d).) Although the "abuse" in this statutory context need not involve the actual infliction of

physical injury or an assault (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1496), an element of harassment, stalking, or infliction of emotional injury is required. Here, on the facts of this case, the suffering the grandparents justifiably sustain as a result of being victims of theft by a relative is insufficient to satisfy this "abuse" standard. Contrary to the Attorney General's assertions, there is nothing in the record suggesting menacing conduct, repeated phone calls, the making of threats, or similar harassing conduct by defendant toward her grandparents which could warrant a conclusion that the underlying crime involved "abuse" in the sense that defendant "engag[ed] in any behavior that has been or could be enjoined pursuant to [Family Code] Section 6320" (Fam. Code, § 6203, subd. (d)). And we do not believe the "destroying personal property" aspect of Family Code section 6320 embraces the kind of crime here—theft through the unauthorized use of the victim's credit card. (Cf. *People v. Brown* (2001) 96 Cal.App.4th Supp.1, 39-40 [imposition of domestic violence probation conditions under § 1203.097 upheld where husband had smashed most of wife's car windows immediately after domestic argument].)

In short, the underlying facts of the conviction here do not constitute a case of domestic violence governed by section 1203.097. Therefore, the domestic violence prevention conditions which are mandatory under that statute should not have been imposed here.

2. *Potential Forfeiture of Appellate Claim*

We address whether defendant's claim of error based upon the inapplicability of section 1203.097—one which she asserted in her supplemental letter brief solicited by the

court—was forfeited because no objection to the domestic violence prevention conditions was lodged below.[7]

Defendant did not raise any challenge below to the imposition of the domestic violence prevention conditions. In fact, she indicated that she understood and accepted each of the conditions imposed by the court, including those challenged here.

It is indisputably true that an appellate challenge to a discretionary decision regarding the imposition of probation conditions is generally forfeited if it is not preserved in the trial court. (See *People v. Welch* (1993) 5 Cal.4th 228, 235.) The defendant there, who was convicted of welfare fraud, argued that eight probation conditions were overly broad and unreasonable, objections not raised by her trial counsel. (*Id.* at p. 232.) The Supreme Court held that these challenges were forfeited, explaining: "[The] failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.] No different rule should generally apply to probation conditions under consideration at the same time. A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]" (*Id.* at pp. 234-235, fn. omitted; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 885 (*Sheena K.*).)

An exception to this forfeiture rule is recognized for categories of cases in which the sentence itself is unauthorized. "[T]he 'unauthorized sentence' concept constitutes a

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[7] The Attorney General asserted in her respondent's brief that defendant's constitutional challenges were forfeited. We therefore address whether the challenge to the applicability of section 1203.097, also not raised below, is forfeited.

narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) Where an unauthorized sentence exists, the appellate court may take action on its own motion to correct it, even where the parties have failed to raise the issue. (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*); *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) And in the context of probation conditions, a defendant may challenge for the first time on appeal a probation condition, such as imposition of a fee purportedly authorized by statute, when the claim is that the condition is unauthorized as a matter of law and correctable without reference to factual findings. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402; see also *People v. Anderson* (2010) 50 Cal.4th 19, 26; *Sheena K.*, *supra*, 40 Cal.4th at p. 887.)

We have concluded here that section 1203.097 has no application to this case and that it was therefore improper for the court to impose the three mandatory probation conditions dictated by that statute which were challenged by defendant. Because this is indeed an instance in which the probation conditions " 'could not lawfully be imposed under any circumstance in the particular case' [citation], [the claim of error is] reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.]" (*Smith*, *supra*, 24 Cal.4th at p. 852.) We thus conclude that the case falls within the narrow exception to the forfeiture rule for cases involving unauthorized sentences. (See *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382 [challenge to three-year protective order as being not authorized by section 136.2 not forfeited, where "case involves the jurisdictional validity of the trial court's decision"]; *Cates*, *supra*, 170 Cal.App.4th at p. 552 [court's failure to impose mandatory probation terms constituted unauthorized sentence].)

The Attorney General, however, argues that even if section 1203.097 is inapplicable to this case, the imposition of the domestic violence prevention conditions did not constitute an unauthorized sentence, because it was within the court's discretion to impose the conditions irrespective of whether section 1203.097 applied. We disagree. The court here did not impose the domestic violence prevention conditions as an exercise of its discretion generally in the imposition of probation conditions. The probation order specifically referred to section 1203.097 in connection with the imposition of each of the three conditions. Thus, the record demonstrates clearly that the court imposed the challenged conditions based upon the erroneous conclusion that section 1203.097 applied to this case and that it was therefore required to impose them.

Accordingly, because section 1203.097 was inapplicable to this case and the imposition of the challenged domestic violence prevention conditions was an unauthorized sentence, we will order that they be stricken.

DISPOSITION

The conditions of probation requiring defendant to (1) pay $300 to a Women's Shelter Program in lieu of a fine, (2) pay a domestic violence fee of $400, and (3) enroll

in and complete a minimum of 52 weeks of batterer's treatment in an approved program, are ordered stricken. As modified, the order of probation is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.