

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD MICHAEL DOMINGUEZ,

Defendant and Appellant.

H037601

(Santa Clara County

Super. Ct. No. C1114537)

In this appeal, appellant Richard Dominguez challenges the imposition of a probation condition that was imposed after he pleaded no contest to one count of resisting an officer in the performance of his/her duty (Pen. Code, § 69, count one), one misdemeanor count of battery on a peace officer (§§ 242, 243, subd. (b))<sup>1</sup> and one count of resisting arrest (§ 148, subd. (a)(1)).

For reasons that follow, we strike the probation condition and remand to the trial court for further proceedings.

*Facts and Proceedings Below*<sup>2</sup>

<sup>1</sup> All unspecified statutory references are to the Penal Code.

<sup>2</sup> Since there was no preliminary hearing in this case and the probation report contains no description of the facts of the underlying crimes, we take the facts from the police officers' reports. Counsel stipulated that there was a factual basis for appellant's plea based on the police reports.

On September 1, 2011, Marlo Cortese, the manager of the Country Club Villa Apartments on Cortese Circle saw appellant pushing a shopping cart through the parking lot of the apartment complex. Ms. Cortese told appellant that he could not push the cart through the property. Thereupon, appellant stuck his middle finger on her eye and shouted at her. Then, he punched her in the side of her face; he walked away toward Toyon Avenue.

When Officers Baza and Elischer located appellant on Toyon Avenue appellant became agitated and his body movements became exaggerated. Appellant began to push the shopping cart into Officer Baza. Officer Elischer grabbed appellant's arm; appellant turned and punched the officer in the head with a closed fist. Officer Elischer reciprocated by punching appellant in the right side of his face in an effort to overcome his resistance.

Eventually, Officer Baza was able subdue appellant and Officer Elischer was able to handcuff him. The officers took appellant to a patrol car and Officer Elischer attempted to photograph appellant's injuries. As he did so, appellant stepped toward Officer Elischer and kicked him in the groin area.

According to the probation officer, he spoke with Ms. Cortese. Ms. Cortese told him that she is the property manager for both the Country Club Villa Shopping Center and the Country Club Villa Apartment complex. The two properties are adjacent to each other. Ms. Cortese requested that appellant be ordered to stay away from both the shopping center and the apartment complex.

The Santa Clara County District Attorney filed a complaint in which it was alleged that appellant committed one count of resisting an officer (Officer Elischer) (§ 69), one count of battery on a police officer (Officer Elischer) and one count of resisting arrest (§ 142, subd. (a)(1)).

Pursuant to a negotiated disposition, appellant pleaded no contest as charged in exchange for a grant of probation, which included a six month county jail sentence, and

the promise that there would be no additional consequences that would result from a probation violation in another case (number C108952).

On October 4, 2011, after the court explained all the consequences of appellant's intended plea and appellant waived all his constitutional rights, appellant pleaded no contest as charged.

At sentencing, among other things, the court ordered that appellant "stay off the premise of, the entire parking lot and all the structures of Country Club Villa Shopping Center located at 3487 McKee Road San Jose. Don't go on the premises in any way." Defense counsel asked for clarification of condition 11. The court told her that he had changed the condition, we presume from as written in the probation officer's report, to prevent appellant from going on to the premises of the shopping center. Condition 11 as written in the probation officer's report is that the "defendant shall remain 300 yards from the Country Club Villa Shopping Center at 3487 McKee Road, San Jose." The court explained that the condition was being limited because the court did not want a 300 yard restriction. Defense counsel felt that to ban appellant from the entire shopping center was "a bit much." Later, defense counsel objected again saying that she thought the condition was "overbroad." The court explained, "What [we're] trying to do is keep them from encountering the person so that lady has to park her car maybe or something like that. If you've got an idea, I'll be glad to limit it differently if you have an idea. [¶] I don't have any sense. If it was Oakridge Mall, I could tell you exactly where you could go and you can't go and I wouldn't ban him from the whole mall. [¶] I'm not familiar with this shopping strip so I can't make orders unless I get more information."

Defense counsel stated that she did not object to a 300 yard stay away order as to Ms. Cortese. To which to court suggested "[h]ow about a hundred yards from her and her store." The prosecutor asked for more than that. Defense counsel, while accepting that Ms. Cortese was the manager of the shopping center, reiterated that the point was that appellant stay away from Ms. Cortese. The court stated, "If she is the manager of the

whole shopping center which is not uncommon as you know in businesses, they do hire managers for shopping centers. I'm going to ban him from the shopping center, but I'm not going to do 300 yards away because he can't travel down the street in front of it." Defense counsel stated, "That's over my objection."

#### *Discussion*

Appellant argues that the condition of probation forbidding him from an otherwise lawful visit to the Country Club Villa Shopping Center is an unconstitutional restriction of the right to travel. Specifically, appellant contends that the condition is overbroad. Alternatively, appellant contends that condition is not reasonably related to the offenses of which he was convicted or to his rehabilitation.

"In granting probation, courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121. See also, *People v. Welch* (1993) 5 Cal.4th 228, 233 (*Welch*).)

Nevertheless, the court's discretion is not unbounded. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-941; *People v. Cervantes* (1984) 154 Cal.App.3d 353, 358.) A court's "discretion must be exercised in a reasonable manner and is limited by certain constitutional safeguards. [Citations.]" (*People v. Beach* (1983) 147 Cal.App.3d 612, 620.) Thus, probation conditions must be both reasonable and constitutional. In some cases, "the matter of reasonableness is intertwined with constitutional issues." (*In re White* (1979) 97 Cal.App.3d 141, 148 (*White*).)

The right to travel "is simply elementary in a free society. Freedom of movement is basic in our scheme of values [citation]." (*White, supra*, 97 Cal.App.3d at p. 149.) "The right of intrastate travel has been recognized as a basic human right" of constitutional dimension. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100.) Furthermore, "other fundamental rights such as free speech, free assembly, and free association are often tied in with the right to travel." (*White, supra*, 97 Cal.App.3d at p.

149.) A plurality of the United States Supreme Court has recognized that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 53, fn. omitted (plur. opn. of Stevens, J.).)

A claim that a probation condition is unconstitutionally overbroad may be reviewed on appeal without an objection in the trial court if it is capable of correction without reference to the particular sentencing record in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 878–879, 888–889 (*Sheena K.*.) Moreover, defense counsel's argument that the condition banning appellant from the entire shopping center was "a bit much" appears to this court to be an objection as to the reasonableness of the condition and has preserved for review the condition on *Bushman/Lent* reasonableness grounds.

Our high court has articulated a three-part test for evaluating whether a probation condition is reasonable. (See *In re Bushman* (1970) 1 Cal.3d 767, 777 (*Bushman*), disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1 (*Lent*). As established by *Bushman* and *Lent*, a probation condition is unreasonable only "if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, [and] (3) requires or forbids conduct that is not reasonably related to future criminality. [Citation.]" (*Bushman, supra*, 1 Cal.3d at p. 777, as clarified in *Lent, supra*, 15 Cal.3d at p. 486, fn. 1.) "The test is clearly in the conjunctive, that is, the three factors must all be found to be present in order to invalidate a condition of probation." (*People v. Balestra* (1999) 76 Cal.App.4th 57, 65, fn. 3. See *Lent, supra*, 15 Cal.3d at p. 486, fn. 1.)

Moreover, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra*, 40 Cal.4th at p. 890.) To put it another way, "where an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored,

' "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." [Citations.]" (*People v. Bauer, supra*, 211 Cal.App.3d at p. 942.)

"Under the overbreadth doctrine, ' "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." ' [Citations.] 'A law's overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.' [Citation.]" (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497 [discussing challenges to a preliminary injunction].)

It is quite apparent that the purpose of the probation condition at issue here is to prevent appellant from encountering Ms. Cortese at one of the places at which she is employed. "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction [preventing appellant from encountering Ms. Cortese at her place of employment] and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The defendant in *White, supra*, 97 Cal.App.3d 141, was convicted of soliciting an act of prostitution. She challenged a probation condition that banned her from certain areas of "prostitution activity," claiming it was unreasonably harsh and restrictive because she was unable to use a bus depot and other services in that area. (*Id.* at p. 144.) The Court of Appeal found the blanket prohibition unreasonable, noting that there was no direct relationship between the commission of prostitution and the exercise of the right to travel. The *White* court explained: "While White's reasonable expectations regarding association and travel have necessarily been reduced, the restriction should be regarded with skepticism. If available alternative means exist which are less violative of the

constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used . . . . No case has been called to our attention upholding such a broad condition which completely prohibits mere presence in a geographical area *at all times* as contrasted with the prohibition of entry into selected and particularized places (such as bars, pool rooms and the like) with reasonable restrictions as to time. [¶] Limitations as to times in which a defendant has legitimate business or legitimate reason to be in a particular area or a prohibition as to working therein have been upheld [citations]; on the other hand a condition that a defendant not enter a county without authorization in advance was condemned as unduly harsh [in an out-of-state case]." (*Id.* at p. 150.)

The *White* court did not strike the condition but remanded with directions to the trial court to either modify the condition (with suggestions about how that might be done) or eliminate it. The *White* court explained that the "manifest goals of probation and the need for individualistic treatment compels the imposition of special probation conditions framed to meet the particular needs of each individual case. Particularized conditions of probation should be directed toward rehabilitation rather than reliance upon some general condition which utilizes a mechanized mass treatment approach." (*White, supra*, 97 Cal.App.3d at pp. 150–151.)

The fundamental concepts expressed in *White* must be applied here. When they are, it becomes apparent that the trial court's order is constitutionally infirm. This is one of those cases where the "the matter of reasonableness is intertwined with constitutional issues." (*White, supra* at p. 148.)

The probation condition at issue here has no relationship to the crimes of which appellant was convicted. All the crimes of which appellant was convicted involved Officer Elischer. Furthermore, entering a shopping complex to conduct business at one of the stores or to just walk across the parking lot from one side to the other is in no way criminal. Simply put there are innumerable situations where appellant could be in the

shopping complex that have no relationship to the crimes of which he was convicted. As noted, it appears that the purpose of the condition is to prevent appellant encountering Ms. Cortese, but the encounter between appellant and Ms. Cortese that precipitated appellant's arrest took place in an entirely different complex from the shopping center and in an area that was arguably not open to the public, which presumably is why Ms. Cortese confronted appellant. There is simply no factual nexus between the prohibited activity (entering the shopping center) and future criminality. Appellant is no longer permitted to enter the apartment complex and there is nothing to support a conclusion that appellant has ever caused trouble of any kind at the shopping center.

Further, the condition at issue is so broad that it is completely unrelated to appellant's rehabilitation. There is absolutely nothing in the record to suggest that appellant will commit crimes in the shopping center or even that he is likely to encounter Ms. Cortese there. Presumably Ms. Cortese keeps normal business hours as manager of the shopping center and so is unlikely to be there at other times—times when appellant could enter the shopping center on legitimate business. In short, the condition is excessive and unduly burdensome in relation to its purpose; simply put, it far exceeds the scope of its stated purpose.

"[E]ven where probation access restrictions are appropriate, 'provision should be made to allow for lawful travel through the area of restriction *and for access to the area for legitimate purposes . . .*' (*Oyoghok v. Municipality of Anchorage* (1982) 641 P.2d 1267, 1270, fn. 4, italics added; *White, supra*, 97 Cal.App.3d at p. 150 . . . ; *In re J.W.* (2003) 204 Ill.2d 50, 272 Ill.Dec. 561, 787 N.E.2d 747, 765; see also *State v. Churchill* (N.C.App.1983) 62 N.C.App. 81, 302 S.E.2d 290, 293 [probation provision restricting defendant's access to a transportation facility was valid because '[t]he court allowed

defendant access to the terminal premises for the legitimate business purpose of traveling by bus'.]" (*People v. Perez* (2009) 176 Cal.App.4th 380, 386.)<sup>3</sup>

We strike the probation condition requiring appellant to stay off the premises and the entire parking lot and all the structures of Country Club Villa Shopping Center located at 3487 McKee Road, San Jose. The court may impose a narrower condition if it deems such a condition to be necessary. In all other respects, we affirm the judgment (order of probation).

---

<sup>3</sup> Although *Perez* concerned the constitutional right to access the courts (*Perez, supra*, 176 Cal.App.4th at p. 385), the constitutional right to travel is no less important. In fact, the "right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.' [Citation.]" (*Saenz v. Roe* (1999) 526 U.S. 489, 498.)

*Disposition*

The case is remanded to the lower court for further proceedings.

---

ELIA, J.

WE CONCUR:

---

RUSHING, P. J.

---

PREMO, J.