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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID VASCONCELOS GOMEZ,

Defendant and Appellant.

H040082

(Santa Clara County

Super. Ct. No. C1358977)

Defendant David Vasconcelos Gomez pleaded nolo contendere to a count of inflicting corporal injury on the mother of his child within seven years of a prior conviction of battery (Pen. Code, § 273.5, former subd. (e)(2), now (f)(2))¹ and a count of drawing and exhibiting a deadly weapon other than a firearm (§ 417, subd. (a)(1)). The trial court suspended imposition of sentence and placed him on probation for a period of three years, subject to various terms and conditions.

On appeal, defendant argues that the conditions of probation related to alcohol and substance abuse are not related to his offenses and are therefore invalid. In the alternative, he asserts that the conditions are unconstitutionally vague and must be modified to include a knowledge requirement. We modify the probation conditions to strike the conditions related to alcohol, the condition requiring defendant submit to chemical testing, and the condition requiring defendant complete a substance abuse treatment program. As modified, the judgment is affirmed.

¹ Further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

The Underlying Offense

Since defendant pleaded nolo contendere, our summary of his offenses are taken from the probation officer's report. On June 11, 2013, officers responded to a domestic violence call. Upon their arrival, the victim stepped outside and told officers that defendant was inside the home. The officers could hear defendant yelling at the victim. The officers instructed defendant to step outside and show his hands. Defendant threw a knife onto a table located inside the front door and showed his hands to the officers. He was pushed to the ground, handcuffed, and arrested.

Defendant had been dating the victim for approximately four and a half years, and they had a child together. The victim said that earlier that day, she had been sitting inside the room she shared with defendant while he played video games. Their roommate knocked on the door and gave the victim a calculator. Defendant grabbed the calculator from her, threw it against the door, and yelled at her. The victim told defendant to leave, and he left the room. She picked up her phone. Shortly after, defendant reentered the room, took the victim's phone from her, and began shouting at her again. Defendant told the victim that he was going to "beat her up" and threw her phone against the wall. The victim screamed, and defendant grabbed her by the throat, pushing her toward a couch. Defendant began choking her with both his hands while she shouted for help. In the midst of this assault, their baby woke up. Defendant stopped choking the victim, picked the baby up, and threatened to hurt the baby. The victim pleaded for defendant not to harm the baby. Defendant put the baby down and attacked the victim again.

At some point during the attack, the victim began crying. Defendant asked her if she was okay, and she pleaded for him to leave. He left the room and returned with a baseball bat. Defendant told her that he was "tired of [her] shit" and held the bat as if he was going to strike her. He then dragged her outside by the neck. The victim pleaded with neighbors to call 911. Defendant let her go, and the victim used their roommate's

phone to call the police. She had no visible injuries when the police arrived but complained of pain in her neck and shoulder.

Procedural History

On June 14, 2013, the district attorney filed a complaint charging defendant with a count of inflicting corporal injury on the mother of his child within seven years of a prior conviction for battery (§ 273.5, former subd. (e)(2), now (f)(2); count 1), assault with a deadly weapon (§ 245, subd. (a)(1); count 2), threatening to commit a crime resulting in death or great bodily injury (§ 422; count 3), and unlawful and malicious removal, injury, destruction and damage to or obstructing the use of a wireless communication device (§ 591.5; count 4).

On July 25, 2013, defendant pleaded nolo contendere to count 1 and an added count 5, a misdemeanor of drawing or exhibiting a weapon other than a firearm (§ 417, subd. (a)(1)). During the change of plea hearing, it was understood that defendant would be sentenced to nine months in county jail and would be allowed to finish the balance of his sentence by participating in a Salvation Army program. The court noted that it did not appear that a “JAC assessment or any other referral” had been internally made for defendant to participate in a program.² Defendant’s attorney acknowledged that defendant had to contact the Salvation Army himself, after which the program would determine if he qualified for the program and if space was available. The court asked defendant if he understood he would be placed on probation, subject to “full domestic violence conditions.” Defendant acknowledged he understood the requirements. The court referred the matter to the probation department for a “full report.”

According to the probation report prepared by the department, defendant declined to provide a statement regarding his substance abuse history. The probation officer determined that defendant presented “11 out of 21 believed risk factors for

² There is nothing in the record defining a “JAC” assessment.

dangerousness, future violence or lethality,” including, but not limited to, a “history of drug use.” Defendant had a prior criminal history of two felony convictions for theft and use of an unauthorized vehicle and driving in willful disregard of safety or avoiding a police officer. Defendant also had nine prior misdemeanor convictions, none of which appeared to be related to drugs or alcohol. The probation officer noted that “*although the defendant’s substance abuse is unknown*, to assist with supervision and to support a successful completion of the defendant’s 9 months at Salvation Army, substance abuse conditions will be recommended.” (Italics added.)

During the sentencing hearing on August 23, 2013, the trial court indicated its intent to impose drug and alcohol-related probation conditions. Defendant’s attorney objected, reasoning that there was no evidence in the record that showed defendant suffered from drug or alcohol abuse and no evidence that demonstrated drugs or alcohol played a part in the offenses of which he was convicted. The prosecutor argued that there was “some mention at the time of the disposition from [defendant’s prior attorney] that the defendant appeared to have an issue with substance abuse and the [Alternate Defender’s Office] had a statement from the victim regarding the same.” The prosecutor claimed that “it was anticipated that he would clearly be doing some kind of substance abuse program in [the] Salvation Army [program].” The prosecutor also added that in his experience, cases that involved Salvation Army programs also always involved substance abuse.

Defendant’s attorney countered that he did not have any notes indicating the victim had given a statement about defendant’s substance abuse issues. He also added that while he was not “intimately familiar with all the ins and[] outs of the Salvation Army program,” he was “not aware of any requirement that a person have a substance abuse problem to go there, or that [having a substance abuse problem] be a necessary and sufficient reason for going there.”

Thereafter, the trial court concluded that “JAC assessments are only discussed in the courtroom when there is a substance abuse issue. Salvation Army is only considered by this Court when there’s a substance abuse issue. I think it was crystal clear when we were discussing disposition in this case.” The trial court then suspended imposition of sentence and placed defendant on three years probation, subject to various terms and conditions, including that he serve nine months in county jail, with the condition that he would be allowed to complete his jail term at the Salvation Army residential program should space become available. The trial court imposed several conditions of probation related to alcohol and drug use, including: “You shall submit to chemical tests as directed by the probation officer. You shall not possess or consume alcohol or illegal controlled substances or go to places where alcohol is the primary item for sale. You shall enter and complete a substance abuse treatment program as directed by the probation officer.” The People dismissed the remaining counts. Defendant appealed.

DISCUSSION

1. Validity of the Alcohol and Substance Abuse Probation Conditions

On appeal, defendant argues that the probation conditions related to drugs and alcohol are unreasonable because they are unrelated to his crime, and he has no history of substance or alcohol abuse.

Standard of Review

Where, as here, a trial court imposes a probation condition based on its determination of historical or situational facts regarding the defendant or the defendant’s crimes, a reviewing court is confined to determining whether the condition amounted to an abuse of discretion. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.) In particular, the trial court may “impose conditions to foster rehabilitation and to protect public safety.” (*Id.* at p. 1120.) “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.’ ” (*People v. Lent* (1975) 15 Cal.3d 481, 486, superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) The touchstone is whether the condition is reasonable under all of the circumstances. (*People v. Welch* (1993) 5 Cal.4th 228, 234.)

The Challenged Conditions

First, we address the probation conditions related to alcohol that were imposed on defendant. The no-alcohol condition is unrelated to the crimes of which defendant was convicted and alcohol possession and consumption are legal for a person of defendant’s age. Therefore, the sole issue is whether the condition forbids conduct that is not reasonably related to future criminality, an analysis that is highly fact-specific. (*People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644 (*Lindsay*).

Several courts have found probation conditions prohibiting the use of alcohol to be reasonable where there is some factual basis for concluding that the defendant abused alcohol. In *Lindsay*, because the defendant had an “ ‘alcohol problem’ ” and an “ ‘addictive personality’ ” and the crime was related to his drug addiction (the defendant admitted he sold cocaine to support his addiction), the appellate court found that an alcohol prohibition was appropriate. (*Lindsay, supra*, 10 Cal.App.4th at p. 1645.) *People v. Balestra* (1999) 76 Cal.App.4th 57 (*Balestra*), upheld a no-alcohol condition where the defendant smelled of alcohol at the time of the elder abuse of which she was convicted and where the trial court stated that everyone appeared to agree that the defendant had an alcohol problem. (*Id.* at pp. 61-62.) In the present case, defendant does not concede he has a problem with drugs or alcohol, and alcohol and drugs were not a part of the crimes in which he was convicted. Therefore, the foregoing cases do not apply.

Defendant relies on *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*) (disapproved on other grounds in *People v. Welch, supra*, 5 Cal.4th at pp. 236-237), in which the appellate court found a no-alcohol condition to be unreasonable because there was no evidence the defendant had an alcohol problem. The defendant had been

convicted of possessing methamphetamine and admitted he sold the drugs to support a gambling habit. He also admitted having used marijuana, methamphetamine, amphetamine, cocaine, and alcohol since he was 14, that he drank socially and that he used methamphetamine sporadically but had had “ ‘no prior problem.’ ” (*Kiddoo, supra*, at p. 927.) On these facts, the appellate court concluded that the no-alcohol probation condition was not reasonably related to future criminal behavior and was therefore invalid. (*Id.* at p. 928.)

The People point to *People v. Beal* (1997) 60 Cal.App.4th 84 (*Beal*), which disagreed with *Kiddoo*, concluding that there is a connection between substance abuse and alcohol use so that even where the defendant does not have a demonstrated problem with alcohol, a no-alcohol condition is reasonably related to future criminality. In *Beal*, the defendant, who admitted she had a “drug habit,” had been convicted of possession for sale and simple possession of methamphetamine and granted probation with a no-alcohol condition. (*Id.* at pp. 86, 87, fn. 1.) The appellate court rejected the defendant’s challenge to the condition, disagreeing with the underlying assumption in *Kiddoo*, which was that alcohol use and drug abuse are not reasonably related. (*Id.* at p. 87.) *Beal* reasoned that “empirical evidence shows that there is a nexus between drug use and alcohol consumption. 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. [Citations.] Presumably for this very reason, the vast majority of drug treatment programs, including the one *Beal* participates in as a condition of her probation, require abstinence from alcohol use.” (*Ibid.*) The court concluded that the alcohol prohibition was within the trial court’s discretion because “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.*; see also, *People v. Smith* (1983) 145 Cal.App.3d 1032, 1033-1035.)

The People contend that as a general matter, a loss of willpower can accompany the use of alcohol; therefore, the condition that defendant refrain from using alcohol is

reasonable because it makes defendant's successful compliance with the terms of probation more likely. But this is a generality that would make the no-alcohol condition appropriate in the case of every probationer and is the kind of arbitrariness *Lent* precludes. There must be some facts to show the condition is reasonable under the circumstances of the particular case. It is not justifiable simply because alcohol is generally known to impair judgment.

The theory behind the holding in *Beal* and similar cases is that the defendant's behavior, whether in connection with the crime or otherwise, was affected by his or her inability to resist intoxicating substances. Since alcohol is just another intoxicating substance, an across-the-board prohibition on the use of both drugs and alcohol could make it more likely that such defendants would comply with the other terms of probation.

Here, the People assert the record clearly establishes that defendant had substance abuse issues, noting that the probation report indicated a history of drug use as one of defendant's risk factors. Generally, probation reports are "a proper source of information upon which judicial discretion may be exercised when a defendant is arraigned for sentencing." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725.) However, as defendant pointed out during sentencing, the probation report also expressly stated that the alcohol and drug-related probation conditions were recommended despite his substance abuse history being unknown. In a separate section, the probation report asserted that defendant refused to discuss his substance abuse issues, so his drug and alcohol use were unknown. In sum, the probation report reiterated twice in the same document that defendant's substance abuse history was unknown, yet listed a history of drug use as one of defendant's risk factors. Given these plainly contradictory statements, it would be unreasonable to conclude that defendant had a substance abuse problem based on the probation report alone.

Nonetheless, the trial court did not state it was relying on the probation report when it sentenced defendant and imposed the probation conditions. During sentencing,

the trial court merely stated that it was “clear” defendant had substance abuse issues based on the court’s own recollection of the proceedings and defendant’s referral to the Salvation Army program. However, the trial court’s conclusion in this regard is devoid of support in the record. The fact that as part of his negotiated plea defendant would be allowed to serve part of his county jail sentence at the Salvation Army is not by itself evidence of a drug or alcohol problem. It is unclear from the record whether the Salvation Army program is indeed solely reserved for individuals with substance abuse issues. Defendant’s trial attorney had argued that he was unaware of any requirement that an individual have a substance abuse problem to enroll in the Salvation Army program. The prosecutor refuted this argument and maintained that the Salvation Army program, in his experience, was only brought up in cases that involved substance abuse issues. The trial court apparently agreed with this assertion, but there is no evidence or factual basis in the record to support this conclusion.

The People also argue that the prosecutor indicated during the sentencing hearing that there were notes from the plea negotiations that defendant had substance abuse issues, a claim allegedly bolstered by a statement from the victim given to the Alternate Defender’s Office. However, the alleged statements made by the victim are essentially unsubstantiated hearsay; the statements are not in the record, and no mention of it was made in the probation report. Defendant’s attorney also refuted the existence of such a statement, asserting that he did not have any notes or statements from the victim about defendant’s substance abuse issues in his file.

Given the lack of factual support that defendant abused drugs or alcohol, it is questionable whether the record can be said to demonstrate “substance abuse.” Moreover, the record contains no evidence of an “ ‘addictive personality’ ” (*Lindsay, supra*, 10 Cal.App.4th at p. 1645) or a “ ‘chemical dependency’ ” (*Beal, supra*, 60 Cal.App.4th at p. 86, fn. 1). Based on the record, there was no rational basis for the trial court to conclude that the probation conditions relating to alcohol were reasonably related

to his future criminality. There must be some sort of factual basis to support the court's exercise of discretion; thus, the conditions prohibiting defendant from possessing and consuming alcohol and from going to places where alcohol is the primary item of sale are invalid under *Lent* and must be stricken. (*People v. Lent, supra*, 15 Cal.3d 481.)

Defendant also contests the validity of the probation conditions restricting him from possessing or using illegal drugs, requiring him to submit to chemical tests, and requiring him to complete a substance abuse program. There is no evidence in the record that illegal drugs were related to his offenses. Additionally, as we previously discussed, there is no factual basis to conclude defendant had a history of substance or drug abuse. However, using illegal drugs is generally against the law. (See, e.g., Health & Saf. Code, § 11550.) Furthermore, one must typically possess a drug in order to use it. (See *People v. Cuevas* (1955) 131 Cal.App.2d 393.) Therefore, the probation conditions prohibiting him from possessing or consuming illegal controlled substances is patently reasonable as it forbids unlawful conduct, and defendant is required to obey all laws as a fundamental condition of his grant of probation. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380; *Balestra, supra*, 76 Cal.App.4th at p. 69.)

However, the same cannot be said of the probation conditions requiring defendant submit to chemical testing and complete a substance abuse program. There is no support for the conclusion that defendant suffers from drug or alcohol abuse issues. Accordingly, there is no reason to believe that subjecting him to chemical testing and requiring him to complete a substance abuse program would somehow be related to defendant's future criminality, and the conditions are not a reasonable way to ensure his compliance with the law. Therefore, we strike these conditions because they are arbitrary and unreasonable under *Lent*. (*People v. Lent, supra*, 15 Cal.3d 481.)

2. Modification of Probation Conditions

Next, defendant contends that the probation condition prohibiting him from possessing or consuming alcohol and illegal controlled substances is unconstitutionally vague because it lacks a knowledge requirement.

Standard of Review

A court of appeal may review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.) Our review of such a question is de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

Knowledge Requirement is Implied

Since we find the alcohol-related probation conditions unreasonable in the first part of this opinion, we need only consider whether the condition prohibiting defendant from possessing or consuming illegal controlled substances should be modified to include an express knowledge requirement.

This court recently considered a similar probation condition in *People v. Rodriguez* (2013) 222 Cal.App.4th 578 (*Rodriguez*). The condition contemplated in *Rodriguez* required that the defendant “ ‘[n]ot use or possess alcohol, intoxicants, narcotics, or other controlled substances without the prescription of a physician’ ” (*Id.* at p. 592.) The *Rodriguez* defendant asserted the condition must be modified to include an express knowledge requirement. We disagreed, concluding that a knowledge requirement was “reasonably implicit” in the probation condition. (*Id.* at p. 593.) “Division 10 of the Health and Safety Code is the California Uniform Controlled Substances Act. (Health & Saf. Code, § 11000 et seq.) Case law has construed these statutes as including implicit knowledge elements. ‘[A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled

substance at issue ([Health & Saf. Code,] §§ 11350-11352, 11357-11360, 11377-11379), such a requirement has been implied by the courts.’ ” (*Ibid.*)

Following the reasoning set forth in *Rodriguez*, we conclude that with respect to the condition prohibiting defendant from using or possessing illegal controlled substances, what “is implicit is that possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance.” (*Rodriguez, supra*, 222 Cal.App.4th at p. 593.) Therefore, no modification is necessary.

DISPOSITION

The judgment is modified by striking the probation conditions requiring defendant to stay out of places where alcohol is the primary item of sale, to submit to chemical testing and to complete a substance abuse program. The probation condition prohibiting defendant from consuming and possessing alcohol and illegal controlled

substances is modified to read: “You shall not possess or consume illegal controlled substances.” As modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Márquez, J.