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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MONICO GONZALEZ,

Defendant and Appellant.

H040699

(Monterey County

Super. Ct. No. SS130175)

Pursuant to a negotiated agreement, defendant Monico Gonzalez pleaded no contest to welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2)) and perjury (Pen. Code, § 118, subd. (a)). The trial court suspended imposition of sentence and placed defendant on probation for three years. Defendant contends that the trial court abused its discretion when it imposed probation conditions related to alcohol and substance abuse. We agree and modify the order. As modified, the order is affirmed.

**I. Statement of Facts**

Defendant received public assistance in the form of cash and food stamps for his family. In July 2010, defendant began working. However, he did not report this change of circumstances to the Monterey County Department of Social Services. He also failed

to report his income in quarterly eligibility/status reports. He signed a statement under penalty of perjury in which he denied that he was working.

## II. Discussion

Defendant contends that the trial court abused its discretion by prohibiting the possession or consumption of alcohol and ordering substance abuse testing and treatment as conditions of probation.

The probation officer recommended that the trial court impose 20 probation conditions, including: “8. Not knowingly use or possess intoxicants, or other controlled substances without the prescription of a physician. . . . [¶] 9. Submit to and complete any field sobriety test or alcohol/narcotics testing of your blood, breath, or urine at the request of any probation officer or law enforcement officer. [¶] . . . [¶] 15. Participate in any counseling or substance abuse program the probation officer deems necessary, including approved residential treatment. . . .”

As the trial court was stating the conditions of probation during the sentencing hearing, defense counsel stated: “If I could briefly interrupt on eight, nine, and 15. I don’t think there is any alcohol or drug issues. I ask the Court not to impose that.” The trial court imposed the conditions.

A trial court has broad discretion when it determines which probation conditions should be imposed. (*People v. Welch* (1993) 5 Cal.4th 228, 233.) Thus, we review the trial court’s imposition of probation conditions for abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) “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.] [Fn. omitted.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant

was convicted or to future criminality.” (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*), superseded on another ground as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290-292.) “The [*Lent*] 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.)

Here, defendant has satisfied the first factor, since there was no evidence that alcohol or controlled substances was a contributing factor in defendant’s crimes of welfare fraud or perjury. As to the second factor, defendant was 41 years old at the time of sentencing, and thus his possession and use of alcohol is legal. (See *People v. Burton* (1981) 117 Cal.App.3d 382, 390.)<sup>1</sup> Similarly, submitting to alcohol/narcotics testing and participation in substance abuse counseling and treatment requires conduct which is not criminal. Turning to the third factor, we note that defendant has never been convicted of any offenses related to alcohol or controlled substances. Moreover, defendant has no history of alcohol or substance abuse. Defendant, who was 41 years old at the time of sentencing, first tried alcohol when he was 21 years old, and since the age of 30, has consumed alcohol twice a year. Defendant experimented with marijuana when he was 15 years old, has never tried any other illicit drugs, and has never been in an alcohol or drug treatment program. Thus, probation condition No. 8’s prohibition of alcohol use and possession is not reasonably related to future criminality. Similarly, the requirements of alcohol/narcotics testing in probation condition No. 9 and participation in substance abuse counseling and treatment in condition No. 15 are not reasonably related to future criminality.

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<sup>1</sup> Defendant does not challenge probation condition No. 8 to the extent that it prohibits his use or possession of any controlled substances without a prescription by a physician, since it would be unlawful for him to do so regardless of whether it was prohibited by a probation condition. (Health & Saf. Code, § 11350 et seq.)

The Attorney General concedes that probation condition Nos. 8 and 9 should be modified to the extent that they impermissibly prohibit defendant from using or possessing alcohol and that probation condition No. 15 should be stricken. She argues, however, that probation condition No. 9 is not entirely invalid. Relying on *In re Kacy S.* (1998) 68 Cal.App.4th 704, 710 (*Kacy S.*), she asserts that the requirement that defendant undergo testing for illicit substances relates to conduct that is criminal and is reasonably related to the prevention of defendant's future criminality. However, *Kacy S.* is distinguishable from the present case. In that case, the juvenile court imposed narcotics testing conditions, though neither the minors' offenses nor their social histories indicated substance abuse. (*Id.* at pp. 707-708.) *Kacy S.* held that Welfare and Institutions Code section 729.3 specifically authorizes urine testing as a condition of probation in juvenile cases. (*Kacy S.*, at pp. 708-709.)<sup>2</sup> No such statute authorizes narcotics testing for an adult. Moreover, the scope of the court's discretion in juvenile probation cases is broader than that in adult probation cases. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

### **III. Disposition**

The order is modified by striking probation condition Nos. 9 and 15. Probation condition No. 8 is modified to read: "Not knowingly use or possess controlled substances without the prescription of a physician." As modified, the order is affirmed.

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<sup>2</sup> Welfare and Institutions Code section 729.3 provides: "If a minor is found to be a person described in Section 601 or 602 and the court does not remove the minor from the physical custody of his or her parent or guardian, the court, as a condition of probation, may require the minor to submit to urine testing upon the request of a peace officer or probation officer for the purpose of determining the presence of alcohol or drugs."

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Márquez, J.