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

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS GOMEZ ROBLEDO,

Defendant and Appellant.

H039772

(Santa Clara County
Super. Ct. No. C1238176)

Defendant Luis Gomez Robledo was placed on probation for three years after he pleaded no contest to lewd act on a child under 14 (Pen. Code, § 288, subd. (a))¹ and annoying or molesting a minor (§ 647.6, subd. (a)(1)).² The probation department recommended that the trial court impose the probation conditions mandated by section 1203.067, subdivisions (b)(3) and (b)(4). These probation conditions require a probationer to “waive any privilege against self-incrimination and participate in polygraph examinations” (the subdivision (b)(3) condition) and “waive any psychotherapist-patient privilege to enable communication between the sex offender

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

² Defendant was originally charged by felony complaint with three counts of lewd act on a child under 14. Two of those counts were dismissed as part of his plea agreement, and the complaint was amended to add the annoying or molesting count. His probation was also conditioned on a seven-month jail term, which was deemed served.

management professional and the Probation Officer” (the subdivision (b)(4) condition). Defendant objected to these two probation conditions on constitutional and reasonableness grounds.³ The court overruled his objections and imposed these two conditions, but it expressly “construe[d]” the two conditions in a written order to be “strictly limited, and narrowly tailored, to effectuating the ‘sex offender management program.’”

On appeal, defendant renews his challenges to these two conditions. He claims that the subdivision (b)(3) condition is unconstitutionally overbroad because it requires him to “waive his Fifth Amendment privilege against self-incrimination.” He further contends that the trial court’s written construction of the limited scope of the waivers, while correct in his view, was inadequate because the court did not incorporate its construction of the waivers into the text of the conditions. We reject his contentions.

I. Analysis

Section 1203.067 subdivision (b) provides: “On or after July 1, 2012, the terms of probation for persons placed on formal probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive⁴, shall include all of the following: [¶] . . . [¶] (2) Persons placed on formal probation on or after July 1, 2012, shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length

³ The California Supreme Court is currently reviewing the constitutionality of these two probation conditions in *People v. Garcia* (2014) 224 Cal.App.4th 1283, review granted July 16, 2014, S218197, *People v. Friday* (2014) 225 Cal.App.4th 8, review granted July 16, 2014, S218288, and *People v. Klatt* (2014) 225 Cal.App.4th 906, review granted July 16, 2014, S218755.

⁴ Section 290, subdivision (c) requires registration for a violation of section 288. (§ 290, subd. (c).)

of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court. . . . ¶ (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. ¶ (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09.”⁵ (§ 1203.067, subd. (b).)

The Fifth Amendment provides that no person “shall be compelled *in any criminal case* to be a witness against himself.” (Italics added.) The subdivision (b)(3) condition does not force defendant to choose between forfeiting his Fifth Amendment privilege, on the one hand, or asserting it and suffering the revocation of his probation. This condition *does* prohibit defendant from *invoking* any right against self-incrimination and thereby sets the price of invocation at the revocation of probation. By doing so, the condition creates the “classic” situation where the penalty exception applies. If the State “asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer’s answers would be deemed compelled and *inadmissible* in a criminal prosecution.” (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, italics added.) Because the penalty exception will necessarily apply to any statements that defendant makes under the compulsion of the subdivision (b)(3) condition, these statements cannot be used

⁵ These provisions of section 1203.067 were added to the statute in 2010 and took effect in September 2010. (Stats. 2010, ch. 219.) Section 1203.067 was amended in 2011 to replace “formal supervised probation” with “formal probation.” (Stats. 2011, ch. 357.) Since the language of the statute is otherwise unchanged, we refer to the current version of the statute.

against defendant in a criminal proceeding. Hence, the condition cannot result in any Fifth Amendment violation.

Defendant claims that the subdivision (b)(3) condition is unconstitutionally overbroad because it restricts his Fifth Amendment privilege. “[A]dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights” (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) “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.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Under this 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.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘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.]” (*Ibid.*)

The subdivision (b)(3) condition requires defendant to waive his self-incrimination privilege and undergo polygraph examinations in connection with the sex offender management program. It bars him from exercising any privilege against self-incrimination to avoid answering the polygraph examiner’s questions. However, the Fifth Amendment does not prohibit the State from compelling statements. It prohibits the State from using a person’s compelled statements against that person in a criminal proceeding. Any statements that defendant makes under the compulsion of this condition will be subject to the penalty exception. As a result, these statements will *not* be permitted to be used against defendant in a criminal proceeding. Consequently, this condition will never result in a violation of defendant’s Fifth Amendment privilege.

To the extent that this condition results in any restriction on defendant's Fifth Amendment privilege, it *is* closely tailored to the purpose of the condition. The Legislature's enactment of section 1203.067 recognized that a grant of probation to a sex offender is a very risky proposition that is appropriate only where those risks can be managed. One of the risks is that the sex offender's full history of sex offenses may not be known when he or she is granted probation. The Legislature could reasonably conclude that a sex offender who has committed additional unreported sex offenses generally poses a significantly greater risk to the public if he or she is not incarcerated. Similarly, the State has a compelling interest in discovering whether the sex offender is committing additional offenses while on probation. By requiring every sex offender granted probation to make full disclosures and to give up any right to refuse to answer the polygraph examiner's questions, the State greatly enhances its ability to manage the serious risks posed by sex offenders who remain free in the community. This condition permits the State to discover the full extent of the risks created by the sex offender's freedom so that the State can respond with additional treatment, closer monitoring, and other measures necessary to protect the community. Allowing sex offenders on probation to refuse to answer questions posed as part of their sex offender management program would create an unacceptable danger to the community.

Defendant also claims that the trial court's narrow construction of the scope of the two waivers was inadequate because it was not incorporated into the conditions themselves. We see no inadequacy. The only logical reading of the text of section 1203.067, subdivision (b)(3)'s self-incrimination waiver is that it is intended to apply only in the context of the sex offender management program. Nowhere in the text of this statutorily mandated probation condition does it purport to prohibit a probationer from exercising his or her privilege against self-incrimination outside of his or her participation in the sex offender management program. The same is true of the subdivision (b)(4) condition. Its waiver requirement is explicitly limited to "enabl[ing] communication

between the sex offender management professional and supervising probation officer” while defendant is participating in the sex offender management program. (§ 1203.067, subd. (b)(4).) The trial court’s written opinion clearly construing the narrow scope of these probation conditions was fully adequate to preclude a broader application of these conditions.

II. Disposition

The order of probation is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.