Filed 3/27/18 P. v. Paet CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. COURTNEY CHRISTINE PAET, Defendant and Appellant.	H043983 (Santa Clara County Super. Ct. No. C1515557)

Defendant Courtney Christine Paet pleaded no contest pursuant to a plea agreement to felony possession of heroin for sale (Health & Saf. Code, § 11351),[1] misdemeanor possession of clonazepam for sale (§ 11375, subd. (b)(1)), and misdemeanor possession of alprazolam without a prescription (§ 11375, subd. (b)(2)). The court suspended imposition of sentence and placed her on probation with numerous conditions.

On appeal, she challenges the court's imposition of a search condition requiring her to submit to a warrantless search of "all cellular telephones in your possession or under your control, . . . any text messages, voice messages, call logs or [associated] photographs . . . ." Defendant contends that this condition was unconstitutionally

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[1] Subsequent statutory references are to the Health and Safety Code.

overbroad because it impinged on her privacy. We conclude that the narrowly tailored cell phone search condition imposed by the trial court was not unconstitutionally overbroad, and we affirm the trial court's probation order.

I. Background

In June 2015, defendant was seen exiting a residence, talking and texting on her cell phone, and then engaging in a hand-to-hand drug transaction. Less than an hour later, she was again seen leaving the residence and engaging in a hand-to-hand drug transaction. She was detained and found in possession of heroin packaged for sale, a digital scale, illegal prescription pills, and drug paraphernalia. Defendant agreed to let law enforcement look at her cell phone. It was unlocked, and there were multiple "open text messages" on her cell phone indicating that defendant was selling narcotics.

In July 2015, defendant was charged by felony complaint with possession of heroin for sale, possession of clonazepam for sale, possession of methadone (§ 11350, subd. (a)), possession of hydrocodone (§ 11350, subd. (a)), and possession of alprazolam without a prescription.

While these charges were pending, defendant was separately charged with being under the influence of a controlled substance and three counts of aggravated trespass arising out of defendant's August 2015 entries into multiple homes. After the August 2015 charges were brought, defendant was charged in a third case with possession of stolen property, possession of a controlled substance without a prescription, and possession of controlled substance paraphernalia.

In February 2016, defendant entered into a plea agreement to resolve the June and August 2015 cases. She pleaded no contest to the heroin, clonazepam, and alprazolam counts in exchange for dismissal of the other June 2015 counts and a grant of probation conditioned on a county jail term of six to eight months. She also pleaded no contest to the August 2015 charges.

The probation department recommended an electronics search probation condition because defendant had been using her cell phone to sell narcotics. The proposed condition would have applied to "all electronic devices (including but not limited to cellular telephones, computers or notepads) in his/her possession or under his/her control to a search of any text messages, voicemail messages, call logs, photographs, e-mail accounts, social media accounts (including but not limited to Facebook, Instagram, Twitter, Snapchat or any other site which the Probation Officer informs him/her of), and/or applications ('apps') pertaining to said accounts at any time with or without a warrant." The probation department also recommended a probation condition requiring defendant to provide passwords for her electronic devices and accounts.

At the September 2016 sentencing hearing, the trial court suspended imposition of sentence and placed defendant on probation for three years conditioned on a six-month jail term, which was deemed served. Defendant objected to the proposed electronics search condition on the grounds that it was "overbroad" and "overinclusive." Her trial counsel argued: "The cellphone, I do understand there may be a nexus. There is no nexus to anything other, including any social media accounts or any other applications." The prosecutor argued that the proposed condition was justified because "defendant was in possession of a cellphone with text messages indicating she was involved in transportation, sales of narcotics." He also argued that "it's well-known that Facebook and other methods of social media are often used for drug transactions."

The trial court responded by modifying the proposed electronics search condition and eliminating the passwords condition. It limited the electronics search condition to "all cellular telephones in your possession or under your control, . . . any text messages, voice messages, call logs or [associated] photographs . . . ." Defendant timely filed a notice of appeal.

II. Analysis

Defendant's sole contention on appeal is that the cell phone search condition imposed by the trial court is unconstitutionally overbroad because it impinges on her right to privacy. She insists that it is not possible to narrowly tailor a cell phone search condition so as to render the condition constitutional.

"[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.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction 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.) "[T]he right to privacy is not absolute, but may yield in the furtherance of compelling state interests." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.)

The question before us is whether the narrow cell phone search condition crafted by the trial court was sufficiently closely tailored to its purpose to justify the limited invasion of defendant's right to privacy that it authorized. In this case, the state had a compelling interest in ensuring that defendant did not revert to criminality during her probation. The narrowly tailored cell phone search condition imposed by the trial court was carefully designed to enable the probation department to monitor whether defendant is complying with the conditions of her probation by avoiding narcotics. The compelling need for such a probation condition was amply demonstrated by the fact that defendant used her cell phone to commit the crimes for which she was being granted probation. The trial court's restriction of the devices to which the condition would apply to only cell

phones and further narrowing of the condition to only the types of information most closely associated with narcotics sales greatly limited the condition's infringement upon defendant's privacy interests.

This court has upheld electronics search conditions against constitutional overbreadth challenges where those conditions were justified by the circumstances of the case. In *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), this court upheld much broader electronics conditions against an overbreadth challenge because the conditions were justified by the need to minimize the risk that the defendant posed to the community. "Access to all of defendant's devices and social media accounts is the only way to see if defendant is ridding himself of his gang associations and activities, as required by the terms of his probation, or is continuing those associations and activities, in violation of his probation." (*Ebertowski*, at p. 1175.) "The minimal invasion of his privacy that is involved in the probation officer monitoring defendant's use of his devices and his social media accounts while defendant is on probation is outweighed by the state's interest in protecting the public from a dangerous criminal who has been granted the privilege of probation." (*Ebertowski*, at p. 1176.)

Unlike *Ebertowski*, this case does not involve a "dangerous criminal," but it does involve a defendant who used her cell phone to commit the crimes for which she is being placed on probation. When a cell phone has been used as an instrumentality of the crime, the need for cell phone monitoring by the probation officer is acute. The limited abridgement of defendant's privacy interests resulting from this condition is fully justified by this need.

Defendant's reliance on *Riley v. California* (2014) 134 S.Ct. 2473 (*Riley*) is misplaced. *Riley* concerned the validity of a warrantless search of the contents of a cell phone under the exception to the warrant requirement for a search incident to an arrest. (*Riley*, at pp. 2493-2495.) The court held that a warrant was required because searches of cell phones "implicate privacy concerns far beyond those implicated by the search of a

cigarette pack, a wallet, or a purse." (*Riley*, at pp. 2488-2489.) Probation conditions do not implicate the warrant requirement because a probationer consents to a warrantless search.

Defendant also relies on this court's decision in *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*). In *Appleton*, a different panel of this court distinguished *Ebertowski* and found unconstitutionally overbroad a probation condition requiring the defendant's devices to be "'subject to forensic analysis search.'" (*Appleton*, at p. 721.) That panel held that "the state's interest here . . . could be served through narrower means. For example, the trial court could impose the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring." (*Appleton*, at p. 727.)

Appleton is readily distinguishable. Unlike the broad condition in *Appleton*, the probation condition imposed by the trial court in this case was limited to defendant's cell phone, further limited to "text messages, voice messages, call logs or [associated] photographs," and did not require defendant to submit her cell phone to "'forensic analysis search.'" Thus, the probation condition here was narrowly drawn to permit the probation officer access to only a very limited portion of the information on defendant's cell phone that was most likely to reflect her resumption of narcotics activity. Furthermore, the decision in *Appleton* plainly did not find all electronics search conditions to be unconstitutionally overbroad because it suggested that it would be appropriate for the trial court to impose the "narrower condition approved in *Ebertowski*," which was considerably broader than the one imposed here.

The cell phone search condition imposed by the trial court in this case was not unconstitutionally overbroad.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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