



IN THE SUPREME COURT OF THE STATE OF CALIFORNIA MAY 26 2016

Frank A. McGuire Clerk

Deputy

In re Ricardo P.

A minor.

No. S230923

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

Ricardo P.,

Defendant and Appellant.

First Appellate District No. A144149
Alameda County Superior Court No. SJ14023676
Hon. Leopoldo E. Dorado, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the trial court err by imposing an “electronics search condition” on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375, because it would facilitate the juvenile’s supervision?

STATEMENT OF THE CASE AND FACTS

On September 18, 2014, a Santa Clara County Welfare and Institutions Code section 602 petition was filed alleging two felony violations of Penal Code section 459/460(a) (First Degree Burglary). (CT

18, 20.)¹ The charges stemmed from two incidents that occurred between 10:00 am and noon on a single day.² In the first incident, three people were seen entering a home through a sliding glass door. A resident of the home then came through the front door, and all three people left through the back door without taking anything. (CT 14, 122-124.) In the second incident, a neighbor saw two people break a sliding glass door to enter a house; a video recording also captured them breaking the door. (CT 12-13, 61, 68.) Several items of costume jewelry worth a total value of \$200 were taken. (CT 13, 58, 70.) Ricardo and two of his adult cousins were arrested soon afterwards. (CT 41, 52, 63.) Ricardo was positively identified by a witness to one of the break-ins. (CT 77.) Ricardo's two adult co-defendants were charged, pleaded guilty, and were sentenced to state prison for two and three years. (CT 140.)

On October 9, 2014, Ricardo admitted both counts. (CT 5, 8.) On November 4, 2014, the petition was transferred to Alameda County, Ricardo's county of residence. (11/4/2014 RT 2.) On December 15, 2014, Ricardo was made a ward of the court and placed on probation. (12/15/2014 RT 3.) Over defense objection, the probation conditions imposed included a requirement that Ricardo submit to a search of

¹ "CT" refers to the Clerk's Transcript on Appeal and "RT" to the Reporter's Transcript of Proceedings.

² These facts were taken from the probation reports and San Jose Police Department reports.

“electronics including passwords.” (12/15/2014 RT 4; CT 148.)

On appeal, Ricardo challenged the imposition of this condition as unconstitutional and unreasonable under the test set forth in *People v. Lent* (1975) 15 Cal.3d 481. On October 22, 2015, the Court of Appeal, in a published opinion, held the condition valid under the *Dominguez/Lent* test as reasonably related to future criminality (Opin., at pp. 17-18.) To conform to constitutional requirements, the Court of Appeal ordered the juvenile court to modify the probation condition and suggested wording that would limit searches to “text and voicemail messages, photographs, e-mails, and social-media accounts,” sources the court said were “reasonably likely to reveal” Ricardo’s involvement in drugs. (Opin., at p. 15.)

SUMMARY OF ARGUMENT

The electronics search condition does not pass muster under the *Dominguez/Lent* test because it does not relate to Ricardo’s underlying offense or to his prior offenses and is thus unrelated to future criminality. Under the *Dominguez/Lent* test, a probation condition is invalid if 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, supra*, 15 Cal.3d at p. 486.) California courts have consistently interpreted the *Dominguez/Lent* test to require a nexus between the

probation condition and the underlying offense or probationer's prior offenses for the condition to be valid as reasonably related to future criminality. This case represents the first time a California court has upheld under *Lent* an electronics search condition that has no relationship with the defendant's underlying offense or prior offenses and serves only to increase surveillance of the probationer.

The Court of Appeal erroneously expanded language in *People v. Olguin* (2008) 45 Cal.4th 375, which concerned a narrow issue of officer safety, to broadly validate any probation condition that could arguably facilitate supervision of the probationer even if the condition is unconnected to the probationer's underlying offense or prior offenses. The Court of Appeal's decision threatens to eviscerate the *Dominguez/Lent* test by expanding the third prong (reasonably related to future criminality) so broadly as to allow any probation condition that facilitates supervision of the probationer, no matter how intrusive or unconnected to the defendant's offense or to prior offenses.

The Court of Appeal also incorrectly invoked this Court's decision in *People v. Olguin, supra*, 45 Cal.4th 375, which involved a probation condition that did not impinge on the probationer's constitutional rights, to validate the highly intrusive electronics search condition. The Court of Appeal failed to subject the electronic search condition, which impinges on Ricardo's "precious constitutional rights," to the heightened scrutiny

required by *Lent* jurisprudence. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) The Court of Appeal erred in equating searches of electronic devices and digital data with physical property searches and disregarded the United States Supreme Court's decision in *Riley v. California* (2014) 134 S.Ct. 2473, 2488-2489, which made clear the substantial difference between searches of physical property and searches of digital data and electronic devices and held that the privacy concerns implicated by a search of electronic devices necessitate greater protections for users of those devices beyond those required for a search of physical property.

Furthermore, the Court of Appeal's incorrect interpretation of *Olguin* – allowing any probation condition that can be said to facilitate supervision of a probationer – would inevitably result in unconstitutional probation conditions. Any probation condition that increases government surveillance of a probationer could be justified on the basis that it facilitates supervision of the probationer. However, many hypothetical probation conditions that would increase surveillance of the probationer also unduly burden the probationer's constitutional rights and would not survive the heightened scrutiny required when a probation condition impinges on constitutional rights. The Court of Appeal's reasoning would render the *Dominguez/Lent* test not only meaningless, but also unconstitutional.

ARGUMENT

I. THE COURT OF APPEAL ERRED IN FINDING THE ELECTRONICS SEARCH CONDITION VALID UNDER *PEOPLE V. LENT*.

The Court of Appeal erred in holding that, under *People v. Olguin*, *supra*, 45 Cal.4th 375, any probation condition that can possibly be said to facilitate supervision of the probationer is reasonably related to future criminality and thus valid under the *Dominguez/Lent* test. The court below ignored the fundamental principle of the *Dominguez/Lent* test – the existence of a nexus between the probation condition and the defendant’s underlying offense or prior offenses—and departed from over forty years of *Lent* jurisprudence. Such reasoning eviscerates the *Dominguez/Lent* test by broadening the third prong (reasonably related to future criminality) so as to allow any probation condition that increases surveillance of a probationer, no matter how disconnected from the probationer’s offense or background.

The Court of Appeal also erred by failing to subject the condition, which impinges on Ricardo’s constitutional rights, to the heightened level of scrutiny required when constitutional rights are at issue. Thus, the Court of Appeal disregarded the United States Supreme Court’s decision in *Riley v. California*, *supra*, 134 S.Ct. 2473, which articulated the need for heightened protections for searches of digital data and electronic devices.

The condition would allow law enforcement and the probation department unfettered access to intimate details of Ricardo's life and would, in effect, allow law enforcement to continually monitor his communications, locations, and associations. The Court of Appeal's decision, if allowed to stand, would open the door to the imposition of similar probation conditions in every criminal and juvenile case.

A. Factual and Procedural Background.

Ricardo's two felony violations of first-degree burglary were not drug-related, but in his conversations with the probation department, Ricardo admitted occasional marijuana use. (12/15/2014 RT 6; CT 15, 140.) The record contains no mention of any prior offenses by Ricardo, drug-related or not. However, because of his prior marijuana use, the court imposed probation conditions that included drug testing, the warrantless search of Ricardo's person and property, and an order that he stay away from known drug users. (CT 148.) The court also imposed a condition requiring him to submit to search of his electronic devices and to provide his electronics passwords to the probation department. (12/15/2014 RT 5.) Defense counsel objected to the condition, stating "the cell phone and electronics search term . . . is not reasonably related to the crime or preventing future crime." (12/15/2014 RT 5, 6.)

The juvenile court justified the electronic search condition on the

basis that some teenagers boast about their drug use on social media, and thus monitoring Ricardo's communications on social media would assist the probation department in ensuring Ricardo was not using drugs. (12/15/2014 RT 5; Opin., at pp. 3-4.) The court explained that "[T]his is appropriate for individuals who – particularly minors or people that are [appellant's] age. I find that minors typically will brag about their marijuana usage or drug usage, particularly their marijuana usage, by posting on the Internet, showing pictures of themselves with paraphernalia, or smoking marijuana. It's a very important part of being able to monitor drug usage and particularly marijuana usage." (12/15/2014 RT 6.) Because Ricardo had no prior offenses, no attempt was made to justify the electronics search condition as related to a prior offense.

On appeal, Ricardo challenged the electronics search condition as unreasonable under *Lent*, unconstitutionally overbroad, and permitting illegal eavesdropping in violation of Penal Code section 632. The Court of Appeal agreed the condition as written was unconstitutionally overbroad and struck the phrase "electronics including passwords" from the warrantless search condition. (Opin., at p. 17.) The Court of Appeal indicated that, on remand, the juvenile court could validly impose a condition requiring searches of a "narrower range of electronic information" that would be "reasonably likely to reveal whether Ricardo is boasting about his drug use . . . such as text and voicemail messages,

photographs, e-mails, and social-media accounts.” (Opin., at pp. 17-18.)

Thus, while holding the condition as written overbroad, the Court of Appeal, at the same time, found the probation condition reasonable under the third prong of the *Lent* test because “the electronics search condition is reasonably related to enabling the effective supervision of Ricardo’s compliance with” other probation conditions. (Opin., at p. 10.) Even though the Court of Appeal agreed with Ricardo that the condition was not related to the underlying offense, the court reasoned that “[u]nless our state Supreme Court departs from its holding in *Olguin*, we are bound to accept the principle that conditions reasonably related to enhancing the effective supervision of a probationer are valid under *Lent*.” (Opin., at pp. 8, 10.) The Court of Appeal also expressed some “skepticism about” the juvenile court’s remarks concerning the “prevalence of minors’ boasting on the Internet about marijuana use,” but found that that juvenile court’s reliance on its belief that teenagers tend to brag about marijuana use on social media was not “outside the bounds of reason” and thus a valid basis for imposing the condition. (Opin., at p. 10.)

B. The Court of Appeal's Decision Departs From a Fundamental Principle of the *Dominguez/Lent* Test Requiring a Nexus Between the Probation Condition and the Underlying Offense or Probationer's Prior Offenses.

The Court of Appeal's reasoning in this case relies on a fundamental misunderstanding of the nature of the *Dominguez/Lent* test, developed almost fifty years ago and adopted by this Court in 1975. (*People v. Lent* (1975) 15 Cal.3d 481.) Contrary to the Court of Appeal's interpretation of *People v. Olguin*, the origins of the test and subsequent jurisprudence demonstrate the essential nature of a nexus between the probation condition and the underlying offense or probationer's prior offenses.

People v. Dominguez (1967) 256 Cal.App.2d 623, in which the Court of Appeal first articulated the three-prong test adopted by this Court in *People v. Lent, supra*, 15 Cal.3d 481, emphasized the requirement of a nexus between the probation condition and the probationer's underlying offense. *Dominguez* involved a challenge to a probation condition prohibiting the probationer, who had been convicted of second-degree robbery, from becoming pregnant while unmarried. In determining whether the probation condition was valid, the Court of Appeal first looked to the statutory requirement that probation conditions be "reasonable" that further "the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person

resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer.” (*Id.* at p. 627, citing Cal. Pen. Code § 1203.1, subd. (j).)³ To determine the limits of the trial court’s statutory authority to impose conditions of probation, the *Dominguez* court looked to several prior cases in which the courts’ analysis centered on whether the disputed condition was related to the underlying offense. (*Dominguez, supra*, 256 Cal.App.2d at p. 628; see *People v. Osslo* (1958) 50 Cal.2d 75 (condition prohibiting probationer from holding a position with a union upheld where the underlying offense involved crimes stemming from union activity); *People v. Stanley* (1958) 162 Cal.App.2d 416 (condition of probation requiring defendant to refrain from having a telephone in his home or on property under his control upheld where the crime of which he was convicted was bookmaking by telephone).)

The *Dominguez* court then articulated a three-prong test: “A condition of probation which (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 does not serve the statutory ends of probation and is invalid.” (*People v. Dominguez, supra*, 256 Cal.App.2d at p. 627.) The

³ The *Dominguez/Lent* test is applicable to juveniles as well as adults. (*In re D.G.* (2010) 187 Cal.App.4th 47; Wel. & Inst. Code § 730, subd. (b) (authorizing the juvenile court to “make any and all reasonable orders for the conduct of the ward”).)

court emphasized the requirement that the likelihood of future criminality must be connected to the underlying offense. “Appellant's future pregnancy was unrelated to robbery. . . . Appellant's future pregnancy had no reasonable relationship to future criminality.” (*Id* at p. 627.) Because the probation condition was unrelated to the defendant’s underlying offense or prior offenses, it could not be reasonably related to the risk of her future criminality and was thus invalid. (*Id.* at pp. 627-628.)

Shortly after *Dominguez* was decided, this Court applied the three-prong *Dominguez* test in *People v. Bushman* (1970) 1 Cal.3d 767, and *People v. Mason* (1971) 5 Cal.3d 759, and in both cases emphasized the requirement of a nexus between the condition and the underlying offense.⁴ In *Bushman*, this Court invalidated a probation condition that required the defendant to seek psychiatric treatment. (*Bushman, supra*, 1 Cal.3d at p. 777.) In concluding that the probation condition was not reasonably related to future criminality, the Court emphasized the lack of a nexus between the condition and the underlying offense: “without any showing that mental instability contributed to that offense, psychiatric care cannot reasonably be related to future criminality.” (*Bushman, supra*, 1 Cal.3d at p. 777.) In *Mason, supra*, 5 Cal.3d at p. 764, this Court upheld a warrantless property search condition for a narcotics offender as reasonably related to prior

⁴ In *Bushman* and *Mason*, the Court inadvertently misstated the test as disjunctive rather than conjunctive but applied the test correctly. (See *Lent, supra*, 15 Cal.3d at p. 487, fn. 1.)

criminal conduct and thus future criminality.

This Court clarified the wording of the *Dominguez* test in *Lent*, which upheld a probation condition requiring a probationer to pay restitution related to a theft charge of which he had been acquitted. The probationer had been convicted of a separate theft charge against the same victim, and the Court reasoned that the evidence developed at the probation revocation hearing and trial supported the imposition of the condition as both related to the underlying offense of which he was convicted and, given that relationship, as a deterrent to future criminality. (*People v. Lent, supra*, 15 Cal.3d at pp. 486-487.)

Consistently over the past forty years, as this Court and the Courts of Appeal have applied the *Dominguez/Lent* test to a variety of probation conditions for both adults and juveniles, they have continued to require a nexus between the probation condition and the circumstances of the underlying offense or prior offenses in order for the probation condition to be justified as reasonably related to future criminality. In *People v. Carbajal* (1995) 10 Cal.4th 1114, this Court, applying the *Dominguez/Lent* test, found valid a probation condition requiring the probationer to pay restitution following his conviction for hit-and-run. This Court held that the condition was related to the underlying offense, even though there was no showing that the damage to the victim's parked car was caused by the defendant's criminal actions in leaving the scene of the accident. (*Id.* at p.

1119, 1124.) The Court made clear that the restitution was related to future criminality because it was related to the underlying offense. Because it forced “the defendant to accept the responsibility he attempted to evade by leaving the scene of the accident without identifying himself, the restitution condition acts both as a deterrent to future attempts to evade his legal and financial duties as a motorist and as a rehabilitative measure tailored to correct the behavior leading to his conviction.” (*Id.* at p. 1124.)

Conversely, the Courts of Appeal have consistently invalidated probation conditions as not reasonably related to future criminality where the nexus between the condition and the offense or defendant’s prior offenses was lacking. For example, in *People v. Burton* (1981) 117 Cal.App.3d 382, the court struck a probation condition that defendant refrain from consuming alcohol as not reasonably related to future criminality because the “record is completely devoid of any evidence that [defendant] had consumed alcoholic beverage[s] prior to, during, or after the assault for which he was convicted,” and “the record fails to establish the requisite factual nexus between the crime, [defendant’s] manifested propensities and the probation condition.” (*Id.* at p. 390; see also *People v. Petty* (2013) 213 Cal.App.4th 1410, 1417 (probation condition requiring defendant to take antipsychotic medication invalid where his “long mental health history” was not reasonably related to underlying offense); *In re Erica R.* (2015) 240 Cal.App.4th 907, 913 (electronics search condition

invalid where underlying offense of drug possession unrelated to electronics or social media usage).)

The relationship of the probation condition to future criminality required by the *Dominguez/Lent* test must be specific to the individual defendant in order to be deemed reasonable and valid under *Lent*. Thus, in *People v. Brandão* (2012) 210 Cal.App.4th 568, the Court of Appeal found invalid a probation condition prohibiting the probationer from associating with known gang members because there was no evidence that the defendant was involved in a gang and because the underlying offense was not gang-related. (*Id.* at 576-577.) The court explained that the condition could only be reasonably related to future criminality if it was “reasonably related to a risk *that* defendant will reoffend.” (*Id.* at p. 574 (emphasis added).) The court noted that “a remote, attenuated, tangential, or diaphanous connection to future criminal conduct” does not provide the requisite nexus and does not pass *Lent* muster. (*Ibid.*)

Though the court in *Brandão* agreed that association with gang members is “less than ideal,” it rejected the Attorney General’s argument that a probation condition unrelated to the defendant’s prior offenses or underlying offense would be valid if it could be possibly related to future criminality in a general sense. (*Id.* at p. 577; see also *In re D.G.* (2010) 187 Cal.App.4th 47, 53 (probation condition prohibiting the minor from coming within 150 feet of a school that he was not attending invalid where his past

or current offenses did not demonstrate “a predisposition to commit crimes near school grounds or upon students,” so his background could not lead to a “specific expectation he might commit such crimes”); *In re Martinez* (1978) 86 Cal.App.3d 577, 581-582 (probation condition cannot be imposed simply based on the “speculati[on]” that such a condition might prevent future crime).) Thus, when deciding whether a probation condition is reasonably related to future criminality, a court must consider whether the condition is reasonably related to that specific defendant’s risk of re-offending. Speculation that the condition could be related to criminality, as the juvenile court engaged in here when it discussed the possibility that minors may brag about marijuana usage on the internet (Opin., at p. 10), is not adequate under *Lent* jurisprudence.

An additional consideration in juvenile cases is this Court’s requirement that juvenile probation conditions be “tailored specifically to meet the needs of the juvenile.” (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82; see also *In re D.G.*, *supra*, 187 Cal.App.4th at p. 56 (A “probation condition that can be justified only on grounds that can be applied equally to every juvenile probationer is hardly tailored to the needs” of the minor).) The logic of the Court of Appeal in this case would allow expansive electronics surveillance conditions in every case, and the probation condition thus cannot be said to be tailored to the needs of the particular juvenile.

Here, the Court of Appeal held that the probation condition passed

the test set forth in *People v. Lent* because “the third prong required to invalidate a probation condition – that the condition forbids conduct unrelated to future criminality – is *not* satisfied.” (Opin., at p. 9 (emphasis in original).) The Court of Appeal agreed with Ricardo that nothing in the record permitted “an inference that electronics [including cell phones] played a role” in his offense (Opin., at p. 8), but found persuasive the Attorney General’s contention that the electronics search condition would enable the probation department to “monitor and enforce compliance” with other conditions designed to address Ricardo’s marijuana use and potential contact with his two adult co-defendants. (Opin., at p. 10.) The Court of Appeal suggested that “allowing text messages or Internet activity to be reviewed” would allow the probation department to “assess whether Ricardo is communicating about drugs or with people associated with drugs.” (Opin., at p. 10.)

The Court of Appeal’s decision in this case radically departs from settled case law that requires a probation condition have more than a “remote” or “attenuated” connection with the defendant’s underlying offense or prior offenses to pass the third prong of *Lent*. (See *Brandão*, *supra*, 210 Cal.App.4th at p. 574.) There was no evidence that electronics usage played a role in the underlying offense or that Ricardo had ever used electronics to purchase drugs or engage in any illegal activity. The contention that a probation condition unconnected to the defendant’s crimes

is valid if it could possibly be connected to future criminality was exactly the argument contemplated and rejected in *Brandão*, *supra*, 210 Cal.App.4th at p. 577, and *In re D.G.*, *supra*, 187 Cal.App.4th at p. 53, as prohibited by *Lent* and subsequent case law. (See also *In re Erica R.*, *supra*, 240 Cal.App.4th at p. 913; *In re J.B.* (2015) 242 Cal.App.4th 749, 756.) Because no nexus exists between electronics usage and the underlying offense of burglary, there is no connection between electronics usage and the risk that Ricardo will engage in criminal activity in the future, and thus the probation condition fails the third prong of *Lent*.

The Court of Appeal also erred by relieving the state of its burden to prove that the probation condition is reasonably related to the risk the specific defendant will engage in criminal activity and replacing it with a universal assumption that all defendants will use electronic devices in future criminal activity: “Given the ubiquity of electronic devices, particularly cell phones, we cannot say that an electronics search condition is unreasonable simply because the record does not show that the probationer necessarily has access to such devices or has used them to engage in illegal activity.” (Opin., at p. 11.) Under the Court of Appeal’s reasoning, the evidence in the record is irrelevant – if a hypothetical electronic device could possibly be used in criminal activity, then it is open to warrantless search by the probation officer or police. Neither *Lent* nor *Olguin* (see Section C, *post*) support this sweeping conclusion or broad

expansion of a warrantless search clause.⁵

Ricardo does not claim that a probation condition authorizing warrantless searches of electronic devices is never permissible under *Lent*. If a nexus exists between electronics or social media usage and the underlying offense or probationer's prior offenses, such a condition might be valid as reasonably related to future criminality. For example, in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, which involved imposition of a probation condition similar to the one at issue here, the record contained evidence that the defendant had used social media sites to promote a criminal street gang. (See also *In re Malik J.* (2015) 240 Cal.App.4th 896, 903-904 (court upheld a restricted electronics search condition to allow search of cell phones in juvenile's possession to determine whether they were stolen where juvenile had previously stolen cell phones).)

Though an electronics search condition may be valid under *Lent* where the defendant's underlying offense or prior offenses involve electronics or social media, such a condition should not be allowed in this case. Ricardo's offense did not involve electronics or social media, there is no record of any prior offenses on his part, and thus, there is no basis to conclude that electronics and social media are related to his particular risk

⁵ Nor does such a condition pass constitutional muster, given the heightened privacy concerns implicated in searches of digital data and electronic devices. (See *Riley v. California*, *supra*, 134 S.Ct. 2473, as discussed in Section D, *post*.)

of future criminality. Because no nexus exists between the condition and the underlying or prior offenses, the condition does not pass *Lent* scrutiny.

C. The Court of Appeal’s Overly Expansive Interpretation of *Olguin* to Permit Probation Conditions That Serve Only To Facilitate Supervision of the Probationer Renders the *Dominguez/Lent* Test Meaningless.

In deciding that the electronics search condition here was justified under *Lent*’s third prong as reasonably related to future criminality, the Court of Appeal relied primarily on language in this Court’s decision in *People v. Olguin* (2008) 45 Cal. 4th 375. (Opin., at pp. 9-10.) The Court of Appeal erred by erroneously expanding language in *People v. Olguin*, which concerned only officer safety, to broadly validate any probation condition that could arguably facilitate supervision of the probationer.

People v. Olguin concerned a narrow issue of officer safety and did not discuss the type of intrusive search condition at issue in this case. In *Olguin*, this Court upheld under *Lent* a probation condition requiring the probationer to inform the probation department of all pets living at his residence in order to protect the safety of the probation officer when making unscheduled visits to the probationer’s home. (*Olguin, supra*, 45 Cal. 4th at pp. 380-381.) The Court in *Olguin* explained “the protection of the probation officer while performing supervisory duties is reasonably