SUPREME COURT NO. S149303

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ALEJANDRO OLGUIN, Defendant and Appellant.	Court of Appeal No. E039342 Superior Court No. FSB051372

APPEAL FROM THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY

Honorable Michael M. Dest, Judge

APPELLANT'S REPLY BRIEF

on the Merits

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By Appointment of the
California Supreme Court

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Plaintiff and Respondent,	)	Court of Appeal No.
	)	E039342
v.	)	
	)	Superior Court No.
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	)	
Defendant and Appellant.	)	
	)	
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I.

THE PROBATION CONDITION REQUIRING APPELLANT TO KEEP HIS PROBATION OFFICER INFORMED OF ALL PETS IN HIS RESIDENCE AND NOTIFY THE OFFICER TWENTY-FOUR HOURS PRIOR TO ANY CHANGES IS AN INVALID CONDITION BECAUSE IT WAS NOT REASONABLY RELATED TO APPELLANT'S PRESENT CRIME OR FUTURE CRIMINALITY AND BECAUSE IT WAS OVERBROAD IN VIOLATION OF DUE PROCESS.

Respondent argues the probation condition requiring appellant to inform his probation officer of any pets is valid because: (1) it was reasonably related to appellant's

future criminality; and (2) it did not deprive appellant of any constitutional rights. Appellant disagrees.

Under *People v. Lent* (1975) 15 Cal.3d 481, 486, a condition of probation is invalid if it has no relationship to the crime of which the offender was convicted, relates to conduct that is not criminal, and forbids conduct that is not reasonably related to future criminality. Respondent concedes the requirement for appellant to notify his probation officer that he owns a pet has no relationship to the crime of which appellant was convicted and does not relate to criminal conduct. Hence, the only issue is whether the requirement appellant notify his probation officer that he owns a pet is reasonably related to future criminality.

Respondent initially contends that the issue of prohibition of an animal is not ripe because appellant has not been prohibited from owning any animal. (Respondent's Brief p. 7.) The issue before this court is not whether appellant has been prohibited from possessing any pet. The issue is whether the probation condition as worded is valid. The probation condition went into effect when appellant was sentenced. Because appellant is currently required to comply with the condition, the validity of the condition is ripe for this court to decide.

The two cases cited by respondent do not support the conclusion the issue before this Court is not ripe for resolution. In *Hunt v. Superior Court* (1999) 21 Cal.4th 984, low income residents filed a class action lawsuit challenging the county's modification of its standards for providing medical care to indigent residents. The trial court entered a preliminary injunction forbidding the county from implementing the new standards. This Court granted review to determine whether the trial court had properly issued the

preliminary injunction and properly denied a motion to dissolve it. The county argued the trial court erred by granting the preliminary injunction because the issue was not ripe for review. The county argued the issue was not ripe because it had not implemented the new standards and the new standards would become effective only upon entry of a final adverse judgment. This Court concluded the issue was ripe for resolution because the preliminary injunction precluded the county from denying medical services to certain individuals. The Court also stated, "the ripeness requirement does not prevent us from resolving a concrete dispute if the consequence of a deferred decision will be lingering uncertainty in the law." (*Hunt v. Superior Court, supra*, 21 Cal.4th at p. 998.) In the instant case, this Court's failure to resolve the issue before it on the merits would leave appellant uncertain about the validity of the condition he notify his probation officer that he owns a pet. The validity of the condition appellant notify his probation officer that he owns a pet is a concrete dispute. The fact appellant has not yet attempted to acquire a pet and been denied permission from the probation officer does not mean the validity of the condition is not ripe for resolution. It simply means one hypothetical dispute in the future has not yet arisen. The trial court's requirement appellant notify his probation officer he owns a pet presently impacts appellant.

In *People v. Johnson* (2006) 142 Cal.App.4th 776, the court reversed the defendant's murder conviction because the prosecutor violated the discovery rules. The defendant argued a number of issues in support of reversal of the conviction. The Court declined to discuss the other issues raised by the defendant in support of reversal of the conviction because those issues were no longer ripe for resolution. The Court concluded resolving those issues would constitute issuing an advisory opinion. (*People v. Johnson, supra*, 142

Cal.App.4th at p. 789, fn. 4.) Appellant is not seeking an advisory opinion. He is subject to a concrete and specific condition of probation which impacts his conduct while on probation.

The contested probation term required appellant to, "[k]eep the probation officer informed of his place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes." (CT p. 18.) The Court of Appeal interpreted this condition as impliedly granting the probation officer the authority to exclude appellant from owning certain pets. (Opn. pp. 7-8.) Respondent, however, concedes that a probation officer does not have the authority under this condition to exclude certain pets without first petitioning the superior court to modify the probation condition. (Respondent's Brief pp. 4, 8.) To the extent the condition is upheld, appellant agrees. Absent a court-ordered modification of the condition, a probation officer does not have the authority to prohibit appellant from owning any type of animal.

Respondent further contends the probation condition is reasonably related to preventing future criminality because it serves important state goals of rehabilitating appellant and promoting public safety. (Respondent's Brief p. 9.) Respondent's entire argument focuses not on whether ownership of pets would lead appellant to engage in future criminal behavior, but on the ability of the probation officer to properly supervise appellant. Respondent claims a probation officer's ability to perform unannounced searches of a probationer's residence would be inhibited without the probation condition for two reasons. First, a dangerous animal at the probationer's residence, of which the probation officer was unaware, could endanger the safety of the probation officer during an unannounced search;

and second, a pet may act as a warning system, alerting the probationer of the arrival of the probation officer, thus allowing the probationer to dispose of evidence of criminal activity. (Respondent's Brief pp. 10-11.)

Both of the points made by respondent demonstrate the overbreadth of the probation condition. The condition requires appellant to notify his probation officer of any pets at appellant's residence. However, both concerns raised by respondent address specific types of animals. The concern over officer safety during an unannounced search would be more properly addressed if the condition forbade appellant from possessing a dangerous animal. The concern that a pet would act as a warning system also refers to a specific type of animal: one that would forewarn the probationer of the arrival of the probation officer. Animals such as cats, rabbits, fish and hamsters would not forewarn of an individual's arrival. Thus, the probation condition as worded is overbroad because it includes pets that would neither harm the probation officer, nor forewarn appellant of the probation officer's arrival for an unannounced search. As worded, appellant could be found in violation of his probation for failing to notify his probation officer that he or one of his roommates acquired a harmless animal such as a hamster or a cat. Such a condition punishes behavior that is not criminal and does not address the state interest in rehabilitating the probationer or protecting officer safety.

The Court of Appeal believed it would be unreasonable to require a trial court to fashion a probation condition outlining the type, nature, and temperament of a pet that could properly be forbidden as a condition of probation because many animals are unpredictable and may attack a stranger even if not considered dangerous or vicious. (Opn. p. 6.)

However, the solution was not to provide a blanket condition that was so overbroad as to subject appellant to a probation violation for failing to notify his probation officer of the presence of a completely harmless animal twenty-four hours prior to its arrival. A more narrowly worded probation condition could have been imposed that properly addressed the state interest in rehabilitating the probationer and protecting officer safety without subjecting appellant to a probation violation for failing to report a harmless animal. Requiring a probationer to secure any animal on the premises when the probation officer arrives to conduct a search is an example. The probationer would have the choice of providing a cage or crate in which to restrain the pet during a search, or not owning a pet.

Appellant does not quarrel with the proposition that supervision is necessary for the effective rehabilitation of an individual on probation. However, effective supervision can be accomplished requiring appellant to have an ongoing duty to notify his probation officer that he has acquired ownership of a pet. There are any number of less restrictive ways a probation officer can determine whether a probationer owns a dangerous animal. The probation officer might ask appellant at the first probation interview whether he or she owns a pet. Generally, probation is not granted without a probation report. (§ Pen. Code, § 1203.10.) During the initial interview, if the probation officer determines a probationer owns a pet, the probation officer could request that a condition of probation be included for that particular probationer narrowly tailored to consider both officer safety and at the same time not unduly restrict pet ownership. After probation is granted, the probation officer might discover on her or his first unannounced probation visit that appellant owns a pet. In those cases, the probation officer could request modification of the probation terms to

include a narrowly tailored restriction of the type of pet the probationer owns. (§ 1203.3, subd. (a); 1203.1, subd. (j); 5-90 California Criminal Defense Practice § 90.06(1)(b) [Modification proceedings may be instituted on court's own motion, or by petition of the defendant, probation officer, or district attorney. The court may modify probation if there has been a change in circumstances regardless of whether there has been a violation of probation].)

A probation condition must be "reasonable" and must be imposed with *this* probationer in mind to prevent his or her future criminality. It is the duty of the probation officer to provide a report to the court as to the probationer's "character, history, family environment, and offense of such person." (§ 1203.10.) Thus, the burden is rightly placed on the probation officer to inquire as to any pets the probationer may have and to include that information in the probation report for the court's use in imposing probation conditions. Here, the probation condition is neither reasonable, nor was it imposed with *this* probationer in mind, nor does it serve the purpose of deterring future criminality. This probationer drove a vehicle under the influence of alcohol. There was no factual relationship between probationer's crime and the pet ownership restriction. There was no indication appellant owned a pet. The pet ownership restriction was not imposed with *this* probationer in mind, and therefore was not reasonable.

Moreover, the condition requiring appellant to notify his probation officer that he owned a pet was not reasonable because it was condition imposed on all, or most probationers, regardless of the crime committed, whether the probationer had any pets, or whether ownership of pets had any factual nexus to the crime committed. It was nothing

more than a "blanket, all encompassing" condition applied to probationers who are convicted in the Central District of San Bernardino County.[1] Other counties and other districts in San Bernardino County have not found it necessary to impose such an all encompassing restriction as a probation condition. Thus, it was not a reasonable condition of probation and is not specifically tailored to the reformation and rehabilitation of *this* appellant.

The Probation Department of the Central District of San Bernardino County has unilaterally decided to restrict pet ownership on probationers to enhance its supervisory duty without consideration of the particular circumstances of each probationer. Probation is governed by statute. (Pen. Code, §1203.1.) When a court orders a grant of probation, it may impose reasonable conditions specifically "for the reformation and rehabilitation *of the probationer*. (§ 1203.1, subd. (j), emphasis added.) The statute does not authorize imposition of a blanket, all-encompassing probation condition regulating pet ownership on all probationers who happen to be convicted in the Central District of San Bernardino County. As such, it was not a reasonable probation condition related to future criminality of *this* probationer and did not meet the third requirement of the *Lent* test.

For the reasons above and in the Opening Brief, the requirement appellant notify his

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[1]Other counties and other districts in San Bernardino County do not appear to be imposing such a "blanket" probation condition on probationers. (See cases which have been granted review on a grant and hold basis all emanating from the Central District of San Bernardino County: *People v. Lawyer* (S151518); *People v. Mendez* (S151595); *People v. Navarrette* (S151897); *People v. Diaz* (S151984); *People v. Salas* (S152525); *People v. Gamboa* (S152803); *People v. Wornstaff* (S153158); *People v. Shelton* (S153186); *People v. Young* (S153517); *People v. Vences* (S153537); *People v. King* (S154604); *People v. Sepulveda* (S154693); *People v. Heyden* (S155465).

probation officer that he owns a pet was invalid. The condition must be stricken.

Dated: 10/25/07

John L. Staley

I declare under penalty of perjury this Reply Brief contains 2,327 words.

John L. Staley

PROOF OF SERVICE
(People v. Olguin, appeal No. S149303)

I reside in the county of SAN DIEGO, State of California

I am over the age of 18 and not a party to the within action; My business address is 11770 Bernardo Plaza Court, Suite 305, San Diego, CA 92128. On October 26, 2007, I served the foregoing document described as:

APPELLANT'S REPLY BRIEF

on all parties to this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States Mail at San Diego, California. Executed on October 26, 2007, in San Diego, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

John L. Staley