Filed 12/15/06 P. v. Olguin CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO OLGUIN, Defendant and Appellant.	E039342 (Super.Ct.No. FSB051372) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Stephanie H. Chow and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alejandro Olguin pled guilty to two counts of driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)) and was sentenced to three years eight months in state prison. The sentence was suspended for a grant of probation. During the sentencing hearing, defendant objected to probation terms 8, 10, and 12, but was overruled. Defendant raises the same objections on appeal. As the trial court set legitimate probation terms in order to rehabilitate defendant and promote public safety, we affirm.

I. FACTS

On August 6, 2005, officers conducted an enforcement stop of defendant for making a nonemergency stop on the freeway. Officers noticed a strong smell of alcohol emanating from inside the vehicle, and observed an open can of beer near defendant. Officers also noted that defendant's eyes were bloodshot and watery, and that his speech was slow and slurred. Defendant admitted to drinking earlier in the day, and could not produce a driver's license, registration, or proof of insurance. Defendant failed the field sobriety test and was then arrested.

Defendant was charged with four counts: Counts 1 and 3 alleged violation of Vehicle Code[1] section 23152, subdivision (a), driving under the influence of alcohol, and counts 2 and 4[2] alleged violation of section 23152, subdivision (b), driving with a blood

---

[1] All future statutory references are to the Vehicle Code unless otherwise specified.

[2] Count 4 is based on an incident that occurred on July 30, 2004; however, the record contains no facts pertaining to that incident.

[footnote continued on next page]

alcohol level in excess of .08 percent by weight. All four counts alleged that defendant had suffered four prior convictions within the meaning of sections 23550 and 23550.5.

On September 29, 2005, defendant pled guilty to counts 2 and 4, and on October 31, 2005, defendant was sentenced to three years eight months in state prison. The execution of the sentence was suspended, however, and defendant was granted three years of supervised probation with one year in county jail. During sentencing, defendant requested the trial court to modify probation terms 8 and 12 by striking the terms "pets" and "controlled substances," respectively, and to strike term 10 as having no relation to the offense.[3] Defense counsel stated the terms were "unconstitutional and overbroad" or had "no nexus to [defendant's] offense." The trial court denied each request, and defendant appeals.[4]

II. STANDARD OF REVIEW

"'[T]he trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be

---

[footnote continued from previous page]

[3] Probation term 8 reads, "Keep the probation officer informed of place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes."

Term 10 reads, "Submit to a search and seizure of your person, residence and/or property under your control at any time of the day or night by any law-enforcement officer, with or without a search warrant, and with or without cause [(*People v. Bravo* (1987) 43 Cal.3d 600)]."

Term 12 reads, "Submit to a controlled substance test at direction of probation officer."

[4] The defendant preserved the issue for appeal by objecting to the probation terms during sentencing. (*People v. Welch* (1993) 5 Cal.4th 228, 232-233 (*Welch*).)

set aside on review'" without a showing that the sentence was arbitrary or capricious. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 (*Alvarez*).) The trial court also has broad discretion when determining whether probation is appropriate, and if so, has the discretion to impose terms necessary to promote justice, or to reform and rehabilitate a defendant. (Pen. Code, § 1203 et seq.; *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*); see *People v. Wardlow* (1991) 227 Cal.App.3d 360, 365 (*Wardlow*).) The defendant has the burden of proving that the trial court abused its discretion. (*Alvarez, supra,* 14 Cal.4th at pp. 977-978.)

III. DISCUSSION

Defendant argues that the trial court abused its discretion by failing to strike or modify probation terms 8, 10, and 12 in order to comport with the standards set forth in *Lent*, which we discuss below. (*Lent, supra,* 15 Cal.3d at. p. 486.)

The goals of probation are that 1) justice be done, 2) amends be made to society, and 3) the probationer be rehabilitated and reformed. (Pen. Code, § 1203.1, subd. (j).) Any condition of probation "that restrict[s] constitutional rights must be carefully tailored and 'reasonably related to the compelling state interest' in reforming and rehabilitating the defendant. [Citations.]" (*People v. Jungers* (2005) 127 Cal.App.4th 698, 704.) If the defendant believes the conditions of probation are harsher than the potential sentence, he may refuse probation and choose to undergo the sentence. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 68-69 (*Balestra*).)

In addition, a term of probation may be considered invalid if it 1) has no relationship to the crime, 2) involves conduct that itself is not criminal, and 3) forbids

conduct that is not reasonably related to future criminality. (*Lent, supra*, 15 Cal.3d at p. 486.) All three conditions must be present to invalidate a probation term. (*Balestra, supra*, 76 Cal.App.4th at p. 65, fn. 3.)

A. Probation Term 8 Is Reasonably Related to Future Criminality

Defendant claims that the requirement to report ownership of pets as required in probation term 8 should be stricken because it has no relationship to DUI charges, and owning a pet is not criminal and does not relate to future criminality.

Although ownership of a pet does not relate to DUI charges and is not criminal, a probation term that regulates conduct that is not itself criminal is still valid as long as it is reasonably related to defendant's crime or to future criminality. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Probation is geared toward preventing future criminality, which requires careful supervision by a probation officer. In *United States v. Knights* (2001) 534 U.S. 112, 120 (*Knights*), the Supreme Court stated that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation . . . ." (Accord, *People v. Reyes* (1998) 19 Cal.4th 743, 753) [holding that probation search conditions prevent future criminal activities by probationers].)

A pet can enable defendant to conceal alcohol or drugs by either distracting or preventing a probation officer from entering or searching defendant's residence. Also, without prior knowledge of a pet, a probation officer may endanger his own life or the life of the pet by visiting defendant's residence unannounced. While certain pets are not

dangerous and would not inhibit the duties of a probation officer, to require a trial court to outline the type, nature, temperament, and treatment of a pet that would fall within the probation term is unreasonable and impractical. Many animals are unpredictable and may attack a stranger who attempts to enter a defendant's residence; thus, it is inadequate to limit the term only to dangerous or vicious animals.[5]

Further, a probation term should be given "the meaning that would appear to a reasonable, objective reader." (*People v. Bravo* (1987) 43 Cal.3d 600, 606-607.) Under probation term 8, defendant simply has to notify his probation officer of a pet 24 hours in advance. This does not prevent defendant from owning a pet or authorize a probation officer to irrationally or capriciously exclude a pet. (See *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240-1241 [holding that a trial court empowering a probation department with the authority to supervise probation conditions does not conflict with the standards set in *Lent*, *supra*, 15 Cal.3d at p. 486, and does not authorize irrational directives by the probation officer].)

---

[5] For example, reports by the Center for Disease Control state that, while certain breeds of dogs are responsible for more fatalities, all breeds of dogs can cause injury. In addition, the main factor affecting the behavior of a dog is the owner. Therefore, it would be more effective to target dog owners than specific breeds in order to promote public safety. (Sacks et. al., *Breeds of Dogs Involved in Fatal Human Attacks in the United States Between 1979 and 1998* (Sept. 2000), 217 J. Amer. Veterinary Medicine Assn. 817, 839-840; Center for Disease Control and Prevention, U. S. Dept. of Health and Human Services / Public Health Service, *Dog-Bite-Related Fatalities – United States, 1995-1996* (May 1997) 46 Morbidity and Mortality Weekly Rep. 463-467.) Following this line of reasoning, probation term 8 focuses on the probationer to keep the probation officer safe.

If there *is* any ambiguity about a probation term, "[o]ral advice at the time of sentencing . . . afford[s] defendants the opportunity to clarify any conditions they may not understand and intelligently to exercise the right to reject probation granted on conditions deemed too onerous." (*Bravo*, *supra*, 43 Cal.3d at p. 610, fn. 7.) Here, defendant did not request clarification of term 8, even though he did feel free to question the trial court about a term that imposed a mandatory interlock device on any of his vehicles.

The interpretation of "pets" is a case of first impression, but should be analyzed using the same standards as that used to approve notification of "cohabitants," which is also included in probation term 8. Notification of "cohabitants" is imposed in order to ascertain whether the probationer is associating with people who would negatively affect his rehabilitation. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 622-625 [holding that a condition forbidding contact with gang members was necessary to rehabilitation and future criminality].) For example, a defendant convicted of drug possession should not live with drug users or dealers. The purpose of notification about pets is similar: 1) assure proper rehabilitation of defendant, 2) protect the probation officer. We believe knowledge of pets is a prerequisite to the search condition, which makes sure that defendant is complying with his sentence and is not reoffending. (See *Bravo*, *supra*, 43 Cal.3d at p. 610 [holding that probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers].) The implied power of the probation officer regarding both cohabitants and pets is also the same: notification of pets implies a probation officer's authorization to exclude certain pets or direct the care of the pet (i.e. keeping them contained) in order

to allow searches. Again, this does not authorize capricious exclusions, but allows directives that further the rehabilitation of defendant.

Thus, probation term 8 is valid, as it protects the probation officer and allows him to oversee the defendant for future criminality.

B. Probation Term 10 Relates to Defendant's Crime and Future Criminality

Defendant contends that the waiver of his Fourth Amendment right to freedom from unreasonable search and seizure under probation term 10 is excessive, and therefore, the condition should be stricken or modified to limit searches to areas likely to contain alcohol.

The search term is related to defendant's crime and to future criminality, and concerns criminal conduct because defendant drives after drinking alcohol. Defendant has shown his proclivity numerous times to drive under the influence, and a search term for defendant's residence is necessary to combat recidivism. (*Knights, supra*, 534 U.S. at pp. 119-121.) Further, warrantless and suspicionless probation searches do not violate a defendant's Fourth Amendment rights, and are necessary to determine if defendant is complying with his sentence. (*Bravo, supra*, 43 Cal.3d at p.608; *Samson v. California* (Feb. 22, 2006, No. 04-9728) __U.S.__, [126 S.Ct. 2193, 2202, 2006 U.S. Lexis 4885] (*Samsun*), [holding that suspicionless searches do not violate a parolee's Fourth Amendment rights];[6] see *Knights, supra,* at pp. 119-120.) Even if, as defendant argues, a

[6] *Bravo* held that probationers have less of a right to privacy than parolees, and *Samson* held that parolees do not have a Fourth Amendment right of protection against suspicionless searches. (*Samson, supra*, 126 S.Ct. at p. 2205; *Bravo, supra*, 43 Cal.3d at

[footnote continued on next page]

full waiver of defendant's Fourth Amendment rights is excessive, alcohol is an item that can be concealed anywhere. Thus, the search term would not be effective if it were limited.

Therefore, term 10 is valid.

C. Probation Term 12 Is Related to the Crime and Involves Criminal Conduct

Defendant states that he should not be subjected to drug testing as required in probation term 12 because he has not used drugs for 15 years and the testing requirement is excessive in relation to his crime. In support of this argument, defendant cites *People v. Kiddoo* (1990) 225 Cal.App.3d 922 (*Kiddoo*), disapproved on other grounds in *Welch*, *supra*, 5 Cal.4th at p. 236. The defendant in *Kiddoo* pled guilty to methamphetamine possession and was ordered to refrain from alcohol as a condition of probation. The appellate court held that the term was invalid because alcohol consumption was not related to defendant's crime, was not illegal, and did not reasonably relate to future criminality. (*Kiddoo, supra,* 225 Cal.App.3d at pp. 927-928.)

Here, drug testing applies to defendant because it involves conduct that is criminal. Moreover, defendant had a prior conviction for violating Health and Safety Code section 11378 (possession for sale). Drug use is also reasonably related to future criminality, as highlighted by the empirical evidence establishing a nexus between alcohol and drug use: "It is well documented that the use of alcohol lessens self-control

---

[footnote continued from previous page]
pp. 607-608.) Therefore, if a suspicionless search does not violate a parolee's Fourth Amendment rights, then, a fortiori, a suspicionless search does not violate a probationer's Fourth Amendment rights. (*Samson*, *supra*, 126 S.Ct. at. pp. 2204-2205.)

and thus may create a situation where the user has reduced ability to stay away from drugs. [Citations]" (*People v. Beal* (1997) 60 Cal.App.4th 84, 87.)

Therefore, drug testing is reasonably required for defendant's rehabilitation.

IV. CONCLUSION

Defendant's challenges to probation terms 8, 10, and 12 have no merit, and the trial court did not abuse its discretion in overruling defendant's objections to those terms.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

I concur:

RICHLI
J.

KING, J., Concurring and dissenting.

I concur with the majority, save and except as it relates to probation term 8. I would strike the requirement that defendant be required to notify a probation officer with 24-hour written notice relative to defendant informing a probation officer of pets.

While the court maintains broad discretion to impose conditions of probation, the discretion "nevertheless is not without limits . . . . As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or '"'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]'" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120-1121.)

In *People v. Lent* (1975) 15 Cal.3d 481, the California Supreme Court stated, "A condition of probation will not be 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 . . . .'" (*Id.* at p. 486.) For a condition of probation to be invalid, it must satisfy all three of the above requirements. Clearly, the ownership of pets is not criminal. Nor does it have a relationship to driving under the influence of alcohol or driving with a blood alcohol level in excess of .08 percent by weight. Lastly, the ownership of a pet is not reasonably related to future criminality. There is nothing to warrant an expectation that defendant, who pled guilty to felony driving under the influence, would commit a future crime involving the ownership of or access to an animal. Thus, I would remand for the purpose of striking the pet portion of term 8.

To the extent that one accepts the argument that pet ownership is reasonably related to future criminality, the provision is overbroad. Here, there are a number of conditions of probation which relate to the prohibition of future criminal conduct. One such condition is term 3 which indicates that the probationer shall "violate no law." As the majority states, probation requires careful supervision by a probation officer. Thus, it is arguably within the contemplation of all, that a probation search may occur at defendant's premises. With this in mind, the term and condition of probation relative to the ownership of pets and the notification of the existence of such pets should be limited to dogs and/or pets which pose a risk of injury to individuals entering the premises. In that the condition is not so limited, it is overbroad.

/s/ King
J.