Filed 8/17/07 P. v. Ashton 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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. CHRISTINA KIMBERLY ASHTON, Defendant and Appellant.	E041793 (Super.Ct.No. FSB057558) OPINION

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

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Jeffrey J. Koch, Supervising Deputy Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

Appellant and defendant Christina Kimberly Ashton pled guilty to one count of transportation of a controlled substance. (Health & Saf. Code, § 11379, subd. (a).)[1] The court granted probation for a period of three years, subject to certain terms and conditions. On appeal, defendant argues that two of the probation conditions are invalid and unconstitutional as applied to her. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On January 24, 2006, a police officer noticed defendant's car because it had a large air freshener hanging from the rearview mirror, obstructing the driver's view. The officer pulled defendant's car over. Defendant said she did not have any identification with her. She consented to a search of the car. The officer found a baggie containing methamphetamine in defendant's purse. She admitted the methamphetamine was hers and said she was going to sell it to get money to have her child's picture taken at the mall.

Defendant was charged with transportation of a controlled substance (§ 11379, subd. (a), count 1) and possession for sale of a controlled substance. (§ 11378, count 2.) Defendant entered a plea agreement and agreed to plead guilty to count 1 in exchange for a grant of probation for three years under certain conditions and the dismissal of count 2. At the sentencing hearing, defense counsel objected to some of the probation conditions recommended in the probation report. Probation condition No. 7 (the pet probation

---

[1] All further statutory references are to the Health and Safety Code, unless otherwise indicated.

[2] The facts are taken from the probation report.

condition) required defendant to "[k]eep 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." Defense counsel objected to this condition. The court explained that the condition did not restrict defendant from having pets, and then substituted the word "dogs" for "pets," in order to make the condition specific.

Defense counsel also objected to condition No. 20 (the field interrogation condition), which required defendant to "[s]ubmit to and cooperate in, a field interrogation by any peace officer at any time of the day or night." Defendant claimed the condition was unconstitutional, overbroad, and in violation of the Fifth Amendment. Defendant requested the court to modify the condition, but the court denied the request.

ANALYSIS

I. The Court Properly Imposed the Pet Probation Condition

Defendant argues that the court abused its discretion in imposing the pet probation condition because it was overbroad and invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).[3] We conclude that the pet probation condition is valid.

Trial courts have broad discretion to set conditions of probation in order to "foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see Pen. Code, § 1203.1, subd. (j).)

[3] We note that the issue of the validity of the standard pet probation condition is currently pending before the Supreme Court. (*People v. Olguin* (Dec. 15, 2006, E039342) review granted Mar. 21, 2007, S149303; *People v. Lopez* (Nov. 30, 2006, E039251) review granted Mar. 21, 2007, S149364.)

"If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) However, the trial court's discretion in setting the conditions of probation is not unbounded. "A condition of probation will not be held 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 . . . .' [Citation.]" (*Lent, supra,* 15 Cal.3d at p. 486.) A probation condition may be deemed reasonable if it "enable[s] the [probation] department to supervise compliance with the specific conditions of probation." (*People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240.) 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.)

In *People v. Balestra*, *supra,* 76 Cal.App.4th 57, the defendant pled guilty to elder abuse and was granted probation on certain conditions, including that she submit her person and property to search with or without probable cause, and that she undergo drug and alcohol testing if so directed. (*Id*. at pp. 60-61.) The court rejected the defendant's claim that the trial court abused its discretion in imposing the search condition and the drug and alcohol testing condition. (*Id*. at p. 69.) The court stated that a probation condition which serves the statutory purpose of reformation and rehabilitation of the probationer is necessarily "'reasonably related to future criminality.'" (*Id*. at p. 65.)

Further, the court stated that a warrantless search condition serves the valid rehabilitative purpose of ensuring that the probationer is obeying all laws. (*Id*. at p. 67.)

We initially note that the challenged condition does not prohibit ownership of a dog, as claimed by defendant. 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.) Under the pet probation condition, defendant simply has to notify her probation officer of what pets may be present.

In any event, the People concede that the pet probation condition does not meet the first two *Lent* criteria, but argue that the condition is valid because it is reasonably related to future criminality. We agree.

One of defendant's probation conditions required her to "[s]ubmit to a search . . . of [her] . . . residence . . . at any time of the day or night . . . ." The pet probation condition, along with the search condition, is intended to facilitate the supervision of defendant and to help ascertain whether she is complying with her other probation conditions. A dog can enable defendant to conceal drugs by either distracting or preventing a probation officer from entering or searching defendant's residence. Moreover, without prior knowledge of a dog, a probation officer may endanger his own life or the dog's life by visiting defendant's residence unannounced. Many dogs are unpredictable and may attack a stranger who attempts to enter a probationer's residence. The knowledge of any dogs defendant possesses is essential to ensuring probation officer safety, and thereby facilitates the supervision of defendant. Thus, it is reasonable to

require a probationer to notify the probation department of any changes with regard to pet dogs.

Defendant concedes that the ownership of vicious dogs could pose a hazard for probation officers supervising her, but asserts that there was no indication that she owned a vicious dog. Thus, she argues that the "general prohibition imposed herein is . . . overbroad." We reiterate that the condition at issue does not prohibit dog ownership. In any event, a dog would not necessarily have to be vicious to be distracting to a probation officer.

In sum, the court properly imposed the pet probation condition, as it protects the probation officer and is reasonably related to defendant's future criminality.

II. The Field Interrogation Condition Is Valid

Defendant contends that the field interrogation condition, which requires her to "[s]ubmit to and cooperate in, a field interrogation by any peace officer at any time of the day or night," is unconstitutional as written because it implicates her constitutional right against self-incrimination. We disagree.

While probationers have long been required to cooperate with their probation officers, a probationer is not foreclosed from asserting his or her Fifth Amendment privilege, and it would not be inherently uncooperative for him or her to assert the Fifth Amendment. (See *United States v. Davis* (1st Cir. 2001) 242 F.3d 49, 52 [finding no realistic threat in a requirement to "cooperate" with the probation officer].) Therefore, although defendant must cooperate with the police, she retains the right to assert the Fifth Amendment, and her probation cannot be revoked based on a valid exercise of that right.

(*Minnesota v. Murphy* (1984) 465 U.S. 420, 434 (*Murphy*).) In *Murphy*, the Supreme Court explained that if a state attaches "the threat of punishment for reliance on the privilege" against self-incrimination by asserting either "expressly or by implication . . . that invocation of the privilege would lead to revocation of probation . . . the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." (*Id*. at p. 435.) However, defendant's probation condition contains no such threat. It would not be inherently uncooperative for defendant to assert the Fifth Amendment; defendant could still follow instructions and answer nonincriminating questions. (See *United States v. Davis*, *supra*, 242 F.3d at p. 52.)

Like the standard probation search condition, a field interrogation condition is a correctional tool that can be used to determine whether the defendant is complying with the terms of his or her probation or disobeying the law. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752 [the purpose of an unexpected search is to determine not only whether parolee disobeys the law, but also whether he or she obeys the law; the condition helps measure the effectiveness of parole supervision]; *In re Anthony S*. (1992) 4 Cal.App.4th 1000, 1006 [probation is an alternative form of punishment, and with the benefit of probation comes the burden of a search term, which can be used as a correctional tool].) The threat of an unexpected interrogation is fully consistent with the deterrent purposes of the field interrogation condition. (*People v. Reyes*, *supra*, 19 Cal.4th at p. 752.)

Here, defendant's field interrogation probation condition will provide practical, on-the-street supervision of her. A field interrogation will be useful to monitor defendant's compliance with her other probation conditions. Also, information obtained

from field interrogations will provide a valuable measure of her amenability to rehabilitation, which is related to her future criminality. In other words, the condition provides officers with a means of assessing defendant's progress toward rehabilitation, it assists them in enforcing other terms of her probation, and it deters further criminal activity. Thus, the field interrogation condition serves the purposes of probation and is valid under the *Lent* criteria. (*Lent, supra*, 15 Cal.3d at p. 486.)

To the extent defendant relies on *United States v. Saechao* (9th Cir. 2005) 418 F.3d 1073 (*Saechao*) in support of her argument, that reliance is misplaced. In *Murphy, supra*, 465 U.S. 420, the United States Supreme Court held that the probation condition that a defendant "be truthful with his [or her] probation officer in all matters" was constitutional because it only proscribed false statements. (*Id.* at p. 436.) There was nothing in the probation condition that compelled the defendant to answer all questions; the defendant was only required to be truthful if she chose to answer her probation officer's questions. (*Ibid*.) In contrast, the probation condition in *Saechao* explicitly stated that the defendant must "'promptly and truthfully answer all reasonable inquiries'" during a field interrogation. (*Saechao, supra*, 418 F.3d at p. 1075.) The Ninth Circuit held that this probation condition was unconstitutional because, "[n]ot only was [the defendant] required to be truthful to his probation officers, but he was expressly required, under penalty of revocation, to 'promptly . . . *answer all* reasonable inquiries.'" (*Id*. at p. 1078.) The court held that this condition violated the Fifth Amendment because, unlike the condition in *Murphy*, the probationer was not permitted to invoke the privilege

against self-incrimination without jeopardizing his supervised release. (*Saechao*, *supra*, 418 F.3d at p. 1081.)

Here, defendant is not subject to a condition like the one found impermissible in *Saechao* requiring her to answer all reasonable inquiries. She is subject to a condition like the one found permissible in *Murphy*, *supra*, 465 U.S. 420, bearing the implied general obligation to be truthful in her answers. If asked a question, the answer to which is likely to incriminate her, she is free to invoke her Fifth Amendment privilege and refuse to respond.

Defendant argues that the probation condition should at least be modified because it appears to permit harassing, arbitrary, and capricious interrogations. However, law enforcement officers may not ask harassing questions that have no relation to the crime for which defendant is under supervision. If the officer inquires into improper matters or otherwise acts improperly, defendant may present evidence at the probation violation hearing to show that the interrogation or conduct was arbitrary, capricious, harassing, or otherwise not reasonably related to the purposes for which she is on probation. (See *In re Tyrell J.* (1994) 8 Cal.4th 68, 87, fn. 5, overruled on other grounds by *In re Jaime P.* (2006) 40 Cal.4th 128, 140.) In any event, as discussed above, defendant is not required to forgo her right to decline to answer particular questions. (*Murphy*, *supra*, 465 U.S. at p. 434.)

Defendant finally contends that police officers must issue *Miranda*[4] warnings prior to each field interrogation. We disagree. An individual who is subjected to a custodial police interrogation must be informed of his right to be silent and right to counsel. (See *Miranda*, *supra*, 384 U.S. 436, 444.) An interrogation is custodial when the individual has been taken into custody or is otherwise deprived of his freedom of movement. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) In making this determination, we apply an objective test, namely, whether there was a formal arrest or a restraint on the individual's freedom to the degree associated with a formal arrest. (*Ibid*.) "Absent 'custodial interrogation,' *Miranda* simply does not come into play." (*People v. Mickey* (1991) 54 Cal.3d 612, 648.)

A field interrogation of a probationer is not a custodial interrogation, for purposes of *Miranda*. A field interrogation, as evident from the title, occurs anywhere "in the field" (i.e., not in a police station). It does not occur upon a formal arrest, and there are no attendant restraints on the probationer's freedom to the degree associated with a formal arrest during a field interrogation. Moreover, as discussed *ante*, a peace officer is allowed to ask questions to monitor defendant's compliance with her other probation conditions, but a probationer can decline to answer particular questions. Thus, there is nothing coercive about a field interrogation. *Miranda* simply does not come into play.

---

[4] *Miranda v. Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ HOLLENHORST
Acting P.J.

I concur:

/s/ MILLER
J.

KING, J. Dissenting.

Trial courts have broad discretion to set conditions of probation in order to "foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see Pen. Code, § 1203.1, subd. (j).) "If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

However, the trial court's discretion in setting the conditions of probation is not unbounded. "A condition of probation will not be held 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 . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486.) A condition of probation must satisfy all three requirements before it may be declared invalid. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365-366.)

The pet probation condition here violates all three criteria set forth in *Lent*.

First, defendant's ownership or contact with a pet of any kind has nothing to do with the crime of which he was convicted. Here, defendant pled guilty to assault with a deadly weapon. There is no indication in the record that a pet was present at the time of the crime or had anything to do with defendant's actions.

Second, having a pet is not in itself criminal.

Third, pet ownership, of itself, is not indicative of or related to future criminality. Defendant did not commit any crime relating to ownership of or access to any animals and there is no basis upon which to anticipate that defendant would commit such a crime in the future.

The People contend the condition is valid because it is reasonably related to future criminality. The argument on the point is that the probation condition at issue helps insure that a probation officer can safely conduct his supervisory visits at defendant's residence. As a pet itself can be a weapon, knowledge of any pets in defendant's residence can be crucial to insuring a probation officer's safety in supervising defendant's compliance with the other conditions of probation.

The concern, it appears, is whether defendant might have a dangerous animal at his residence. Knowing whether a defendant keeps dangerous animals as pets would assist an officer when conducting a search of a probationer's residence for probation violations such as being in the possession of weapons or drugs.

The purpose of officer safety, to permit the probation officer to reasonably supervise defendant so as to prevent future criminality by conducting visits to the residence or probation searches without interference from dangerous animals, is not met by the condition imposed. Stated another way, the pet probation condition here is overbroad and not reasonably tailored to meet the objective for which it has been imposed.

To the extent there exists a legitimate and justifiable concern as to the safety of individuals conducting a probation search, the condition must be narrowed to deal with

dogs and/or animals which pose a foreseeable risk of injury to persons entering the premises.

Two cases mention a condition of parole (not probation) involving pets, where the condition is related to officer safety. *United States v. Crew* (D.Utah 2004) 345 F.Supp.2d 1264 refers to a defendant's release on parole, including as a parole condition: "4. HOME VISITS: I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with [this] requirement, *i.e.* having vicious dogs, perimeter security doors, refusing to open the door, etc." *United States v. Pyeatt* (D.Utah, June 15, 2006, 2:05-CR-890 TC) 2006 U.S.Dist. Lexis 40337 referred to an identical parole condition.

The genuine concern to be addressed by the probation condition, as suggested by the parole conditions in *Crew* and *Pyeatt*, is whether a probation officer making a home visit or conducting a probation search will be able to do so without being at risk from a dangerous animal, such as a vicious dog. The probation condition here is not tailored to meet that objective, or the objective of allowing the officer to approach the residence unannounced. "A probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition." (*People v. Harrisson* (2005) 134 Cal.App.4th 637, 641, citing *In re White* (1979) 97 Cal.App.3d 141, 146 ["'. . . The Constitution, the statute, all case law, demand and authorize only "reasonable" conditions, not just conditions "reasonably related" to the crime committed.' [Citation.] [¶] Careful scrutiny of an unusual and severe

probation condition is appropriate [citation].”].) “[C]onditions of probation that impinge on constitutional rights must be tailored carefully and ‘reasonably related to the compelling state interest in reformation and rehabilitation . . . .’ [Citation.]” (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.) To the extent that the generic “pets” condition here is not tailored to meet that legitimate objective, it is not related to defendant’s offense or to his future criminality. It therefore fails to meet the test of reasonableness under *Lent* and is invalid.

The present condition relating to all pets without limitation is overbroad.

I would therefore remand the case to modify probation condition No. 7 to strike the reference to pets in general but to add a new condition narrowed to deal with dogs and/or animals which pose a foreseeable risk of injury to persons entering the premises.

I also do not agree with the majority as it relates to the term and condition of probation dealing with field interrogation. I believe it is overbroad.

The term of probation should be limited to allowing field interrogation of the probationer only as it relates to the probationer’s criminality and compliance with the other terms and conditions of probation.

The condition presently provides: “Submit to and cooperate in a field interrogation by any peace officer at any time of the day or night.”

The general propriety of such a term has been recognized. (See *Minnesota v. Murphy* (1984) 465 U.S. 420 [104 S.Ct. 1136, 79 L.Ed.2d 409].) It must nonetheless be tailored, so that it is reasonably related to the crime of which defendant was convicted, or

to defendant's future criminality. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.)

By its provision, that term allows for the probationer to be interrogated as to any subject matter, whether related or unrelated to the conduct of the probationer.

/s/ King
J.