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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ABRAHAM GOMEZ, Defendant and Appellant.	E040515 (Super.Ct.No. FSB053761) 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.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Marissa A. Bejarano, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Abraham Gomez pled guilty to possession of a stolen vehicle (Pen. Code § 496d, subd. (a)) and was later sentenced to three years of probation on the condition that he serve 180 days in jail. During the sentencing hearing, defendant objected to two probation terms, namely, that he notify his probation officer in writing 24 hours in advance of any change in pets, and that he submit to, and cooperate in, field interrogations at any time. The trial court overruled these objections and defendant raises them on appeal. As the trial court set legitimate probation terms in order to rehabilitate defendant and promote public safety, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On November 17, 2005, a police officer found defendant sleeping in a stolen vehicle. Defendant told the officer the car belonged to a friend. Defendant was in possession of four cellular phones and two shaved keys. He was charged with unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)) and possessing a stolen vehicle. He pled guilty to possessing a stolen vehicle, and on May 15, 2006, the trial court sentenced him to three years probation on the condition that he serve 180 days in jail. At the sentencing hearing, defense counsel objected to term No. 8, that he keep his probation officer informed of any pets he owned ("pet condition"), and term No. 19, that he submit to a field interrogation at any time of the day or night ("field interrogation condition"), as unconstitutional and overbroad. The trial court overruled both objections, and defendant appeals.

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 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.) 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 faults the trial court for failing to strike or modify probation term Nos. 8 and 19 in order to comport with the standards set forth in *Lent*, which we discuss below. (*Lent*, *supra*, 15 Cal.3d at p. 486.)[1]

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[1] Defendant argues the condition is invalid in light of this court's ruling in *People v. Quintero* (Sept. 27, 2006, E039290 [nonpub. opn.]). However, subsequent to the filing of defendant's opening brief, that case was modified to vacate the publication order and cannot be cited as authority for defendant's position. (Cal. Rules of Court, rule 8.1115(a).)

We note that this issue is currently pending before the Supreme Court. (*People v. Olguin* (Dec. 15, 2006, E039342 [nonpub. opn.]) review granted Mar. 21, 2007, S149303; *People v. Lopez* (Nov. 30, 2006, E039251 [nonpub opn.]) review granted Mar. 21, 2007, S149364.)

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 No. 8 – Pet Condition

Defendant challenges the imposition of probation term No. 8 that states that he is to "[k]eep the probation officer informed of . . . cohabitants and pets, and give written notice . . . twenty-four (24) hours prior to any changes."

Although ownership of a pet is not in itself 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 [151 L.Ed.2d 497]), 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 in his commission of future crimes by 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.[2]

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[2] 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 No. 8 focuses on the probationer to keep the probation officer safe.

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 (*Bravo*).) Under probation term No. 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].)

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 probation term No. 8, even though he did feel free to request a modification of term No. 20, which requires him to carry a valid Department of Motor Vehicles driver's license or identification card.

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 No. 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].) The purpose of notification about pets is similar: (1) assure proper rehabilitation of defendant, and (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 No. 8 is valid, as it protects the probation officer and allows him or her to oversee the defendant for future criminality.

B. Probation Term No. 19 - Field Interrogation Condition

Probation term No. 19 requires that defendant "[s]ubmit to and cooperate in a field interrogation by any peace officer at any time of the day or night." Defendant contends that this condition is not related to the crime of possessing a stolen vehicle. He also contends that it violates his Fifth Amendment right against self-incrimination because it can be interpreted to mean that he cannot refuse to answer a question posed during a field interrogation, even when he believes the answer will be incriminating.

While not related to the crime of which defendant was convicted, the field interrogation condition is related to future criminality. In *People v. Adams* (1990) 224

Cal.App.3d 705 (*Adams*), we observed that "a warrantless search condition is intended and does enable a probation officer '"to ascertain whether [the defendant] is complying with the terms of probation; to determine not only whether [the defendant] disobeys the law, but also whether he obeys the law. Information obtained . . . would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation."' [Citations.]" (*Id*. at p. 712.)

In *Balestra, supra,* 76 Cal.App.4th 57, the court upheld a search condition of probation where the defendant was convicted of physically abusing her elderly mother. The court found that the condition was related to future criminality because, as in *Adams*, *supra*, 224 Cal.App.3d 705, it assisted authorities in determining whether the defendant was complying with the terms of her probation.

The fact that defendant was convicted of possessing a stolen vehicle does not reduce the benefit of this search condition in measuring the effectiveness of his supervision and determining his amenability to rehabilitation. Thus, the condition is related to defendant's future criminality and was properly imposed.

We also disagree with defendant's contention that the condition violates his Fifth Amendment right to refuse to answer an incriminating question. While probationers have long been required to "cooperate" with their probation officers, a probationer is not foreclosed from asserting his Fifth Amendment privilege and it would not be inherently uncooperative for him to assert that privilege. (See *United States v. Davis* (1st Cir. 2001) 242 F.3d 49, 52 (*Davis*) [finding no realistic threat in a requirement to "cooperate" with the probation officer].) Therefore, although defendant must cooperate with the police, he

retains the right to assert the Fifth Amendment and his probation cannot be revoked based on a valid exercise of that right. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 427, 434 [79 L.Ed.2d 409] (*Murphy*).)

In *Murphy*, the Supreme Court explained that if a state attaches "[t]he 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." (*Murphy*, *supra*, 465 U.S. at p. 435, fn. omitted.) 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 *Davis*, *supra*, 242 F.3d at p. 52.)

Also, defendant may, when questioned, give a truthful answer, and his answer may be used at trial without offending the Fifth Amendment. His obligation to answer questions truthfully is the same obligation borne by any witness at a trial or before a grand jury. (*Murphy*, *supra*, 465 U.S. at p. 427.) It is not too onerous to require him, for purposes of rehabilitation and reform, to speak truthfully to an officer. Because he has a duty to answer an officer's questions truthfully, unless he asserts the privilege, it does not violate his right not to incriminate himself. The purpose of probation is, of course, defendant's reformation and rehabilitation, and speaking truthfully to a peace officer is arguably an implied condition of probation. (See *People v. Cortez* (1962) 199 Cal.App. 2d 839, 844.)

Nevertheless, defendant is not required to give up his freedom to decline to answer particular questions. (*Murphy*, *supra*, 465 U.S. at p. 429.) The Constitution does not forbid the asking of incriminating questions (*Murphy, supra,* at p. 428), and the state in this case has neither expressly nor by implication threatened that invocation of the Fifth Amendment privilege would lead to revocation of probation. Thus, we reject defendant's challenge to probation term No. 19, the field interrogation condition of his probation.

IV. CONCLUSION

Defendant's challenges to probation term Nos. 8 and 19 have no merit, and the trial court did not abuse its discretion in overruling defendant's objections to them.

V. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.