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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SUSAN ANN SCHAEFFER, Defendant and Appellant.	E053499 (Super.Ct.No. RIF1102208) OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Johnson, Judge. Affirmed as modified with directions.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez, Anthony Da Silva and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of part II.

Defendant and appellant Susan Ann Schaeffer was charged by felony complaint with possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count 2), and possessing a hypodermic syringe (Bus. & Prof. Code, § 4140, count 3). The complaint also alleged that defendant was in violation of her probation. Pursuant to a plea agreement, she pled guilty to counts 1 and 2 and admitted that she was in violation of her probation. The trial court placed her on probation for three years, under certain terms and conditions, including that she participate in a drug treatment program. (Pen. Code, § 1210.1.)[1]

On appeal, defendant contends: (1) the probation condition limiting her to a residence approved by the probation officer violates her constitutional right to travel and freedom of association; and (2) the court erred in imposing a drug program fee and reimbursement for probation costs, since it failed to make a finding on her ability to pay. We remand the matter for the trial court to make a finding on defendant's ability to pay. Otherwise, we affirm the judgment.

FACTUAL BACKGROUND

The facts of the case are not relevant to the issues on appeal. According to the complaint, on April 23, 2011, defendant possessed methamphetamine (count 1) and was under the influence of a controlled substance (count 2).

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

ANALYSIS

I. The Court Properly Imposed the Residence Approval Probation Condition

The probation conditions imposed by the court included a requirement that defendant "[r]eside at a residence approved by the Probation Officer and not move without his/her prior approval."[2] Defendant contends that this probation condition is unconstitutionally broad, since it infringes upon her right to travel and freedom of association. We conclude that the condition is narrowly tailored to further the state's interest in defendant's rehabilitation. Therefore, the court properly imposed it.[3]

"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.' [Citations.] . . . [¶] However, the trial court's discretion in setting the conditions of probation is not unbounded." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) A term

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[2] As noted by the People, the minute order reflects that the condition requires defendant to "[i]nform the probation officer of [her] place of residence and reside at a residence approved by the probation officer." However, the sentencing memorandum form reflects that the condition requires defendant to "[r]eside at a residence approved by the Probation Officer and not move without his/her approval." Thus, there is a discrepancy between the clerk's minute order and the sentencing memorandum form. The reporter's transcript reflects that the court asked defendant if she went over all of the probation terms checked off on the sentencing memorandum form, and if she agreed to follow them. Defendant said yes and waived the court's reading of all the conditions. The court then placed defendant on formal probation. The record of oral pronouncement controls over the minute order. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn 2.)

[3] Although defendant did not object to this condition in the trial court, the parties agree that she has not waived this claim. The claim is cognizable on appeal, as it presents a "pure question[] of law" turning on undisputed facts. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) Defendant's challenged probation condition can easily be remedied on appeal by modification of the condition. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.)

of probation 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* (1975) 15 Cal.3d 481, 486.)

"If a probation condition serves to rehabilitate and protect public safety, the 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. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.) "[W]here an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, '"reasonably related to the compelling state interest in reformation and rehabilitation . . . ."' [Citations.]" (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*).)

Defendant relies upon *Bauer*, *supra*, 211 Cal.App.3d 937, in which the reviewing court struck a residence approval condition, which seemed designed to prevent the defendant from living with his parents because they were overprotective. Nothing in the record suggested that the defendant's homelife contributed to the crimes of which he was convicted (false imprisonment and simple assault), or that his home life was reasonably related to future criminality. (*Id*. at p. 944.) The court concluded that the residence approval condition impinged on the right to travel and freedom of association, and was extremely broad since it gave the probation officer the power to forbid defendant from living with or near his parents. (*Ibid*.)

The present case is distinguishable. Defendant here pled guilty to possessing methamphetamine and being under the influence of a controlled substance. Where she lives will directly affect her rehabilitation (e.g., without any limitations, defendant could choose to live in a residence where drugs are used or sold). Under these circumstances, the state's interest in defendant's rehabilitation is properly served by the residence approval condition.

Furthermore, the legal landscape has changed since *Bauer*, *supra*, 211 Cal.App.3d 937. The Supreme Court stated in *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*), that "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*Id.* at p. 382.) We view the residence approval condition here in light of *Olguin* and presume a probation officer will not withhold approval for irrational or capricious reasons. (*Id.* at p. 383.)

Moreover, we observe that "probation is a privilege and not a right, and that adult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions. [Citations.]" (*Olguin*, *supra*, 45 cal.4th at p. 384.) "If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citation.]" (*Id.* at p. 379.)

We conclude that the trial court did not abuse its discretion in imposing the condition that defendant, as a term of her probation, reside at a residence approved by the probation officer and not move without the officer's prior approval.

II. The Matter Should Be Remanded for a Hearing on Defendant's Ability to Pay

Defendant next contends that the court erred in imposing a drug program fee and reimbursement for probation costs, since it failed to make a finding of her ability to pay, and because there was insufficient evidence to support a finding that she had the ability to pay. The People assert that the court made an implicit finding of her ability to pay, and that there was sufficient evidence to support that finding. We conclude that the matter should be remanded for a hearing on defendant's ability to pay.

A. *Relevant Background*

At sentencing, defense counsel objected to the imposition of the booking fee (Govt. Code, § 29550.2, subd. (a)), the drug program fees (Health & Saf. Code, § 11372.7), and the reimbursement costs of probation (Pen. Code, § 1203.1, subd. (b)), on the ground that defendant had no ability to pay, and that the fees could not be ordered without her ability to pay being considered by the court. Defense counsel explained that defendant had been homeless for approximately three years, and that she collected "recyclables" for money. The court asked defendant how old she was and when she was last employed. Defendant replied that she was 43 years old and was employed three years ago as a legal assistant. When the court asked if she planned on seeking employment, she said she did, but not in the legal field. Defendant said she collected "recyclables" now and made jewelry to sell on occasion. The court agreed to waive the booking fee, and stated: "The other fees will be subject to your ability to pay, but I'll go into that a little bit more." The court then asked if defendant was admitting or denying that she violated her probation. She admitted it. The court accepted her admission and

reinstated her on probation. It confirmed that defendant understood all of her probation conditions and agreed to follow them. The court informed defendant that she would be released that day, and she was required to report to probation within two days. The court added, "Also, within two business days of your release you must go to Enhanced Collections, they are on the first floor, to first be assessed for your ability to pay these fines and fees and to set up a payment plan. [¶] If they find that you do not have the ability to pay these fines and fees, simply add yourself back on calendar and we can have a hearing about that. Okay?" Defendant agreed.

B. *The Court Did Not Make an Ability to Pay Finding, but Also Did Not Impose Any Fees or Fines*

Section 1203.1b, subdivision (a), provides in relevant part, that in any case in which a defendant is granted probation, "the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision . . . ." The statute further provides: "The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, which includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right

to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

Section 1203.1b, subdivision (b), further provides that when the defendant fails to waive the right to a court determination of his ability to pay, the probation officer "shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made." Thus, section 1203.1b "requires determinations of amount and ability to pay, *first by the probation officer*, and, unless the defendant makes 'a knowing and intelligent waiver' after notice of the right from the probation officer, a separate evidentiary hearing and determination of those questions by the court." (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070, italics added.)

Similarly, Health and Safety Code section 11372.7, subdivision (b), provides that the court shall determine whether or not the defendant has the ability to pay a drug program fee.

The People claim that the court made an implicit finding of defendant's ability to pay. However, there is no evidence in the record that anyone, whether the probation officer or the court, made any such determination. Nor is there any evidence that the probation officer advised defendant of her right to have the court make this determination, or that she waived this right. After defendant objected to paying certain fees, the court agreed to waive the booking fee, and then stated: "The other fees *will be subject to your ability to pay* . . . ." (Italics added.) The court then informed defendant that within two days of her release, she had to "go to Enhanced Collections . . . to first be

assessed for [her] ability to pay these fines and fees and to set up a payment plan." The court stated that if the Enhanced Collections Division found she did not have the ability to pay, she could "have a hearing about that" with the court. It appears that the statutory procedure provided at section 1203.1b for a determination of defendant's ability to pay probation related costs was not followed. According to defendant, there has still been no finding on her ability to pay.

We note defendant's claim that "the court's failure to make a finding on [her] ability to pay before *imposing the fees* violated both [of] the applicable statutes." (Italics added.) However, the record demonstrates that the court did not actually impose the drug program fee or probation fees defendant now contests.

Accordingly, we will remand the matter to the trial court to conduct a hearing on whether defendant has the financial ability to pay the challenged fees.[4]

[4] Although section 1203.1b states that the probation officer should first assess a defendant's ability to pay, we remand the matter to the trial court to make the assessment, since it must do so with regard to the drug program fee. (Health & Saf. Code, § 11372.7, subd. (b).)

DISPOSITION

The matter is remanded to the trial court for the purpose of conducting a hearing on whether defendant has the financial ability to pay the challenged fines and fees. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.