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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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. FELICIA MARIE WORNSTAFF, Defendant and Appellant.	E040528 (Super.Ct.No. FSB055492) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert D. Macomber, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

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

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

Appellant and defendant Felicia Marie Wornstaff pled guilty to one count of receiving stolen property. (Pen. Code, § 496d, 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.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A police officer conducted a traffic stop on the vehicle that defendant was driving. The officer checked the registration and determined that the vehicle was stolen. Defendant was charged with unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a); count 1) and receiving stolen property (a motor vehicle). (§ 496d, subd. (a); count 2.) She entered a plea agreement and agreed to plead guilty to count 2 in exchange for a grant of probation for three years under certain conditions. 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 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 the term "pets" as unconstitutional, overbroad, and vague. The court imposed the condition unmodified.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

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

Defense counsel also asked the court to strike condition No. 17 (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." The court denied the request, stating that the condition was standard.

FACTUAL AND PROCEDURAL HISTORY

A. The Probation Condition Concerning Pets Must Be Modified

"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 . . . conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted (*Lent*).)

Here, probation condition No. 7 states that defendant must keep her probation officer informed of ownership of pets. That portion of the probation condition violates all three criteria set forth in *Lent*. Defendant's ownership or contact with a pet of any kind had nothing to do with the crime of which she was convicted. Having a pet is not in itself criminal. Pet ownership is not indicative of or related to future criminality.

The People argue that the probation condition is related to the third *Lent* standard, future criminality. The concern apparently addressed is whether defendant might have a dangerous animal, such as a vicious attack dog, at her residence. However, it is already unlawful to keep vicious or dangerous animals, and defendant's probation conditions already require her to violate no law. (See Food & Agr. Code, § 31601 et seq.; § 399.)

As noted, the offense of which defendant was convicted had nothing to do with any pets. Her conviction involved possession of stolen property. The ownership of pets is a lawful activity; indeed, "the harboring of pets" has been recognized as "an important part of our way of life." (Cf. *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163.)

We have conducted a thorough search of hundreds of cases concerning probation conditions related to pets. Virtually all the cases of pet probation conditions involve convictions of animal cruelty, harboring a vicious pet, or some other offense in which an animal was actually involved. (See, e.g., *Stephens v. State* (2001) 247 Ga.App. 719 [545 S.E. 2d 325] [conviction of cruelty to animals (pit bull dogs used for fighting, kept in unsafe and unhealthy conditions), probation condition forbade the defendant from owning any dogs or to live at a residence where dogs were present]; *State v. Choate* (Mo.App. 1998) 976 S.W.2d 45 [one count of animal neglect, the defendant was ordered as conditions of probation to pay for care of the dog while it was in protective custody and not to return the dog to the county]; *State v. Sheets* (1996) 112 Ohio App.3d 1 [677 N.E.2d 818] and *State v. Barker* (1998) 128 Ohio App.3d 233 [714 N.E.2d 447] [animal owner convicted of animal cruelty may be required as condition of probation to forfeit all the animals (horses), even those not specifically the subject of the charges]; *State v. Bodoh* (1999) 226 Wis.2d 718 [595 N.W.2d 330] [defendant convicted of injury by negligent handling of dangerous weapons (rottweiler dogs attacking cyclist) and ordered as a condition of probation not to have any dogs at his residence unless approved by the probation officer]; *Scott v. Jackson County* (D.Or. 2005) 403 F.Supp.2d 999 [defendant

guilty of animal neglect (rabbits), ordered as a condition of probation not to possess any animals]; *Mahan v. State* (Alaska App. 2002) 51 P.3d 962 [defendant convicted of animal neglect for multiple kinds of animals, ordered as a condition of probation not to own or be the primary caretaker of more than one animal, and not to own or care for any horse]; *Hurst v. State* (Ind.App. 1999) 717 N.E.2d 883 [probation condition of suspension of hunting license for violation of fish and game and wild animal laws]; cf. *People v. Torres* (1997) 52 Cal.App.4th 771, 778 [commenting in passing that "[p]ersons convicted of cruelty to animals could be ordered not to own or possess pets"].)

We have found two cases that 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. "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"].) "[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 "pet" condition here is not tailored to meet that legitimate objective, it is not related to defendant's offense or to her future criminality. It therefore fails to meet the test of reasonableness under *Lent* and is invalid.

Whether defendant owns a pet is not reasonably related to her future criminality. No one had any reason to think that defendant owned a pet that could endanger a probation officer's life. If facts could have been brought to bear to show that a defendant is likely to have, or to live on premises that have, a dangerous animal, then there might be some justification for a probation condition narrowly tailored to avoid the anticipated danger. But the portion of the condition imposed which related to all pets, without limitation, is overbroad.[3]

[3] See concurring and dissenting opinion of King, J., *post*, supporting the finding that probation condition No. 7 is overbroad.

B. The Field Interrogation Condition Is Valid

Defendant's contends that probation condition No. 17, 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 and is overbroad. 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 "its misleading language appears to permit harassing, arbitrary, and capricious

interrogations that evoke incriminating statements." 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* warnings prior to each field interrogation. We disagree. An individual who is subjected to a custodial police interrogation must be informed of his or her right to be silent and right to counsel. (See *Miranda v. State of Arizona* (1966) 384 U.S. 436, 444 (*Miranda*).) An interrogation is custodial when the individual has been taken into custody or is otherwise deprived of his of her 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]

DISPOSITION

The trial court is directed to strike the reference to "pets" in probation term No. 7. The trial court may, however, modify the terms of probation to include a condition narrowly tailored to address legitimate concerns about dogs and/or animals which pose a foreseeable risk of injury to probation officers when they conduct home visits. In all other respects, the judgment is affirmed.

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/s/ MILLER
J.

[4] See concurring and dissenting opinion of Hollenhorst, Acting P.J., *post*, supporting the finding that probation condition No. 17 is a valid probation condition.

HOLLENHORST, J., Concurring and Dissenting.

I concur with section B of the opinion concerning the validity of the field interrogation condition.

I dissent from Section A of the opinion and the holding that the probation condition concerning pets was invalid. I would uphold the probation condition as written.

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).) A defendant who believes the conditions of probation are harsher than the potential sentence may refuse probation and choose to undergo the sentence. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 68-69 (*Balestra*).)

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.) 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. (*People v. Lent* (1975) 15 Cal.3d 481, 486.) All three conditions must be present to invalidate a probation term. (*Balestra, supra*, 76 Cal.App.4th at p. 65, fn. 3.)

Defendant claims that the requirement to report ownership of pets should be stricken because it has no relationship to her conviction of possession of stolen property, and owning a pet is not criminal and does not relate to future criminality. Although

ownership of a pet does not relate to possession of stolen property 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 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 could enable defendant to conceal stolen property 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 might endanger his or her own life or safety or the life or safety of the pet when visiting defendant's residence unannounced. Although some 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 would be unreasonable and impractical. Because many animals are unpredictable and may threaten or attack a stranger who attempts to enter a defendant's residence, it would inadequate to limit the

term only to animals known to be dangerous or vicious.[1] Thus, I would conclude that the probation condition as written complied with the requirements of *Lent, supra*, 15 Cal.3d 481, in that it was reasonably related to defendant's future criminality.

Defendant further argues that the probation condition, as written, was invalid because it is overbroad. 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 challenged probation condition, defendant merely has to notify her 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*

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[1] For example, reports by the Center for Disease Control state that, although 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-

[footnote continued on next page]

v. Kwizera (2000) 78 Cal.App.4th 1238, 1240-1241 [holding that a trial court's empowering a probation department 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].)

I would uphold the validity of the pet probation condition.

/s/ HOLLENHORST
Acting P. J.

[footnote continued from previous page]
467.) Following this line of reasoning, the challenged probation term focuses on the probationer to keep the probation officer safe.

KING, J., Concurring and dissenting.

I concur with Justice Miller's opinion and his disposition relative to probation condition No. 7 (the pet probation condition).

I further concur that probation condition No. 17, relative to the probationer submitting and cooperating in a field interrogation, does not violate the probationer's Fifth Amendment privilege. I dissent, however, in that I believe the probation condition dealing with field interrogation is overbroad. 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, term 17 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.