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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. HOWARD WILLIAM NEEL, Defendant and Appellant.	C080559 (Super. Ct. No. CM040257)

Defendant Howard William Neel was found guilty by jury of six counts of insurance fraud. (Ins. Code, § 1871.4, subd. (a)(1).) The trial court suspended imposition of sentence and placed him on a three-year term of formal probation.

Among the terms and conditions, defendant was required to maintain his residence as approved by the probation officer and not to change his residence without prior written approval of the probation officer; defendant was also prohibited from leaving California without written permission from the probation officer. The trial court also ordered defendant to cooperate with any psychological or psychiatric testing or counseling

suggested by the probation officer, and to authorize the release of any records from a psychologist, psychiatrist, counselor, or physician.

On appeal, defendant asserts these conditions are unconstitutionally overbroad. We agree only as to the change of residence condition, and remand with directions to modify. We otherwise affirm.

BACKGROUND

Defendant was a mobile driver for Elite Security. His car was hit while he was pumping gas on December 12, 2009. He made numerous false statements regarding his injuries and what caused them to several doctors. Based on the false representations, defendant submitted and received workers' compensation benefits for his injuries.

Probation Conditions

Among the various general conditions of probation imposed by the trial court were the following:

"4. You must maintain your residence as approved by the probation officer and not change your residence without prior written approval of the probation officer."

"6. You must not leave the State of California without having first received written permission from the probation officer. By accepting probation herein you agree to waive extradition to the State of California from any jurisdiction in or outside the United States where you may be found, and also agree that you will not contest any effort by any jurisdiction to return you to the State of California."

"9. You must cooperate in any psychiatric or psychological testing or counseling which may be suggested by the probation officer and authorize the release of any reports or records (written or oral) from any psychiatrist, physician, psychologist, or counselor to the Court, Probation Department, and/or District Attorney."

Defendant did not object to any of the conditions at issue on this appeal at the time of their imposition.

DISCUSSION

I

Forfeiture and Standard of Review

Failure to make a timely objection to a probation condition generally forfeits the claim of error on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881.) A claim that a probation condition is facially overbroad and violates fundamental constitutional rights that is based on undisputed facts may be treated as a question of law which is not forfeited by failure to raise it in the trial court. (*Id.* at pp. 888-889 [probation condition prohibiting the defendant from associating with " 'anyone disapproved of by probation' " was vague and overbroad despite lack of objection in the trial court].)

The Attorney General claims defendant's challenges to the probation conditions are forfeited because resolving them "requires reference to the trial record." Defendant maintains his contentions are facial challenges to the conditions.

We will review the challenges considering only arguments that do not require we look to the record to resolve. Our review for facial overbreadth is de novo. (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 993 (*Stapleton*).)

II

Overbreadth

" '[A] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citations.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 384 (*Olguin*).) "A restriction is unconstitutionally overbroad . . . if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.]" (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) " 'A statute or regulation is overbroad if it "does not aim specifically at evils within the allowable area of [governmental] control, but . . . sweeps within its ambit other activities that in the ordinary circumstances

constitute an exercise" of protected expression and conduct.' [Citation.]" (*People v. Leon* (2010) 181 Cal.App.4th 943, 951.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights--bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, at p. 1153.)

A. *Residency Restriction*

Defendant contends general condition No. 4's requirement to "maintain [his] residence as approved by the probation officer and not change [his] residence without written approval of the probation officer" is unconstitutionally overbroad and impermissibly restricts his right to travel. He relies in large part on *People v. Bauer* (1989) 211 Cal.App.3d 937, where the First Appellate District, Division Two, found unconstitutional a probation condition that required the defendant to obtain the probation officer's approval of his residence. (*Id.* at pp. 943-945.) The condition was evidently intended to prevent the defendant from residing with his overprotective parents. (*Id.* at p. 944.) The court explained: "The condition is all the more disturbing because it impinges on constitutional entitlements -- the right to travel and freedom of association. Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power . . . to banish [the defendant]. It has frequently been held that a sentencing court does not have this power. [Citations.]" (*Ibid.*)

The Attorney General claims *Bauer* was limited by our Supreme Court's opinion in *Olguin*. *Olguin* addressed a probation condition requiring the "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.' " (*Olguin, supra*, 45 Cal.4th at p. 380.) The defendant argued the limitation on pets was not related to his future criminality, was a violation of his fundamental rights, and was

unconstitutionally overbroad. (*Id*. at p. 378.) The Supreme Court noted that "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]" (*Id*. at p. 380.) In upholding the condition, it found, "[a] condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' [Citations.]" (*Id.* at pp. 380-381.) From this, the Attorney General concludes general condition No. 4 is narrowly tailored to the compelling state interest in facilitating supervision and rehabilitation.

The probation condition at issue in *Olguin* was different in key respects from that presented here. First and foremost, the condition in *Olguin* required the probationer to *notify and inform* the probation officer, not to obtain *prior permission and approval*. Second, the dispute in *Olguin* centered on pets, not residences. In finding that the condition did not authorize the probation officer to arbitrarily prevent the defendant from having a particular pet, our high court noted: "[O]n its face the condition simply requires notification that reasonably provides the probation officer with information designed to assist in the supervision of defendant while he is on probation." (*Olguin*, *supra*, 45 Cal.4th at p. 383.) The court "observe[d] that defendant has raised a facial challenge to a probation condition that merely requires notification of the presence of pets, and that *does not provide for the probation department's approval* or removal of any pet in his home." (*Id*. at p. 385, italics added.)

Here, in sharp contrast, condition No. 4 confers open-ended authority to the probation officer to prevent defendant from changing his residence.

The Attorney General echoes *Stapleton*, *supra*, 9 Cal.App.5th at page 996, where the Fourth Appellate District, Division Two examined *Bauer* and concluded that *Olguin* "changed" "the legal landscape" since *Bauer* was issued. Stapleton was convicted of petty theft with a prior and placed on probation subject to conditions wherein he was

"required to inform his probation officer of his place of residence, reside in a residence approved by his probation officer, give written notice to his probation officer 24 hours before changing his residence, and not to move without approval from his probation officer." (*Id.* at p. 992.) Citing *Bauer*, the defendant argued the condition violated his rights to travel and freedom of association. (*Id.* at p. 995.) The *Stapleton* court first classified the contention as a pure question of law and found that it was not forfeited despite the defendant's failure to object below. (*Id*. at p. 994.) The court then distinguished *Bauer* on its facts, finding, "[u]nlike the condition in *Bauer*, the residence condition imposed here is not a wolf in sheep's clothing; it is not designed to banish defendant or to prevent him from living where he pleases." (*Id.* at p. 995.) Further, Stapleton had a history of substance abuse and mental illness, which meant his place of residence may directly affect his rehabilitation. (*Ibid*.) "Without a limitation placed by the residence conditions or without supervision, for example, defendant could opt to live in a residence where drugs are used or sold. A probation officer supervising a person like defendant must reasonably know where he resides and with whom he is associating in deterring future criminality." (*Id*. at pp. 995-996.)

The *Stapleton* court then cited *Olguin* to note that, " '[a] probation condition should be given "the meaning that would appear to a reasonable, objective reader." ' [Citation.]" (*Stapleton, supra*, 9 Cal.App.5th at p. 996, citing *Olguin, supra*, 45 Cal.4th at p. 382.) From this, the *Stapleton* court concluded: "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. [Citation.] A probation officer cannot issue directives that are not reasonable in light of the authority granted to the officer by the court. Thus, a probation officer cannot use the residence condition to arbitrarily disapprove a defendant's place of residence. The condition does not grant a probation officer the power to issue arbitrary or capricious directives that the court itself could not

order. [Citation.]" (*Stapleton*, at pp. 996-997.) Division Three of the Fourth Appellate District followed *Stapleton* in *People v. Arevalo* (2018) 19 Cal.App.5th 652, 657-658.

We need not decide here whether we agree with the *Stapleton* court's reading of *Olguin* to narrow what otherwise would be an overbroad condition by assuming the probation officer will exercise unlimited authority to deny a constitutional right in a reasonable manner. *Stapleton* (and *Arevalo*) are readily distinguishable from the instant case because despite their self-characterization as reviews for facial overbreadth, they each rely heavily on the particular facts of the case to support the constitutionality of the conditions.[1] (See *Stapleton, supra,* 9 Cal.App.5th at pp. 995-996 [keeping the defendant from living near where drugs sold important due to his history of substance abuse and mental illness]; *People v. Arevalo, supra*, 19 Cal.App.5th at pp. 654-655, 658 [emphasizing the importance of keeping a defendant convicted of drug possession from living in close proximity to drug dealers].)

Further, the analysis from *Olguin* on which the Attorney General, *Stapleton*, and *Arevalo* rely addresses Olguin's claim that the challenged condition was *unreasonable* under *People v. Lent* (1975) 15 Cal.3d 481, not that it was unconstitutional on its face (see *Olguin, supra*, 45 Cal.4th at pp. 379-380, 384-385). The reasonableness of a condition given the facts of the case is relevant under *Lent* and to "as applied" challenges, but not to facial challenges. Likewise, the presumption of reasonable application utilized in assessing the reasonableness of a probation condition does not exempt a trial court from having to provide sufficiently definite standards to govern the application of probation conditions that infringe on fundamental rights. (See, e.g., *People v. Leon,*

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[1] Although it purported to consider the challenge at issue as facial (*Stapleton, supra,* 9 Cal.App.5th at p. 994), in upholding the challenged probation condition the *Stapleton* court found no abuse of discretion (*id.* at p. 997), a standard of review not applicable to claims of facial overbreadth, as we have discussed.

supra, 181 Cal.App.4th at pp. 946, 952-953, 954; *People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1358-1359 [a trial court "may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation" but "the court's order cannot be entirely open-ended"].)[2]

In our view, *Bauer* is not diminished by *Olguin*. Like the probation conditions in *Bauer*, *O'Neil*, and *Leon*, the condition at issue here is unlimited. Rather than requiring *notification* of residence changes to the probation officer, which would be analogous to the condition upheld in *Olguin*, the condition requires the probation officer's *prior approval* of residence changes, with no guidance as to unacceptable locations. Although it is true that a probation officer is not permitted to act arbitrarily, this legal limit does not permit imposition of open-ended orders. On remand, general condition No. 4 must be stricken or modified to delimit the probation officer's authority to veto defendant's proposed changes of residence or to require prior notice rather than prior approval.

B. *Travel Out of State*

Defendant also contends general condition No. 6, which requires the probation officer to approve travel out of state, is an overbroad restriction on his right to travel. We upheld a similar condition in *People v. Relkin* (2016) 6 Cal.App.5th 1188, noting that, "[w]hile all citizens enjoy a federal constitutional right to travel from state to state

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[2] Even were we to consider the facts of this case, no undisputed facts even suggest that *where* defendant resides is important to his rehabilitation or future criminality such that *open-ended prior approval*, rather than merely prior notification or approval under certain circumstances, would be sufficiently narrowly-tailored to pass constitutional muster. Defendant's crimes and criminality have no nexus to controlled substances as was the case in *Stapleton* and *Arevalo*. There is no reason apparent in this record to assume that rehabilitation or future criminality of a person convicted of defendant's crimes--insurance fraud--would hinge on his or her place of residence and thereby justify conferring open-ended authority to the probation officer to permit or prevent defendant from changing his residence.

[citation], that right is not absolute and may be reasonably restricted in the public interest. [Citation.]" (*Id*. at p. 1195.)

Such a condition is in the public interest, as it assists the probation department in determining "defendant meets the standards of the Uniform Act for Out-of-State Probationer and Parolee Supervisions before he is allowed to go to another state. [Citation.] Also it minimizes extradition problems." (*People v. Thrash* (1978) 80 Cal.App.3d 898, 902.) Distinguishing *Bauer*, we held that "the condition's limitation on interstate travel is closely tailored to the purpose of monitoring defendant's travel to and from California not by barring his ability to travel altogether but by requiring that he first obtain written permission before doing so." (*People v. Relkin, supra,* 6 Cal.App.5th at p. 1195.) Condition No. 6 is not unconstitutionally overbroad.

C. *Mental Health Testing, Treatment, and Records*

Defendant's final challenge is to general condition No. 9, which requires that he undergo any psychological or psychiatric testing or counseling suggested by the probation officer and authorize release of his mental health records. He claims this requirement infringes on his rights to privacy and due process.

Defendant relies primarily on *People v. Petty* (2013) 213 Cal.App.4th 1410. *Petty* addressed a challenge under *Lent* to a probation condition requiring the defendant to take antipsychotic medications at the direction of his mental health worker. (*Id.* at pp. 1412, 1414.) The First Appellate District, Division Two struck the condition "due to lack of a medically informed showing that the condition is reasonably related to defendant's crime or future criminality." (*Id*. at p. 1412.) "Indeed, the court's probation order is so broad that it could cover any form of medication, whether or not related to defendant's mental health or his criminality. [Citation.] Even if we could assume the 'mental health worker' would insist only on his taking mental health medications, we remain concerned that the decision whether defendant must take a particular drug has been delegated to 'the mental health worker' whose exact relationship with defendant is not clear from the record and

whose qualification to make medical decisions on defendant's behalf is not established. [Citations.]" (*Id*. at p. 1420.)

Invoking the right of a competent individual to refuse medical treatment (see, e.g., *In re Qawi* (2004) 32 Cal.4th 1, 14; *Thor v. Superior Court* (1993) 5 Cal.4th 725, 735) and the privacy interest in records regarding psychological or psychiatric treatment or therapy (see *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 753), defendant asserts the condition is an overbroad infringement on his rights.

"The right of privacy guaranteed by the California Constitution, article I, section 1 'guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity.' [Citation.]" (*In re Qawi, supra,* 32 Cal.4th at p. 14.) Counseling and similar forms of mental health treatment are not "intrusions" of "bodily integrity." They are appropriate conditions of probation, serving to facilitate rehabilitation and prevent future criminality. (See, e.g., Pen. Code, § 1210.1, subd. (a) [family counseling and drug treatment program as conditions of probation for nonviolent drug offenses]; *People v. Petty, supra,* 213 Cal.App.4th at p. 1417 [participation in drug treatment program appropriate probation condition where the defendant committed the crime to pay off a drug debt]; *In re Todd L*. (1980) 113 Cal.App.3d 14, 20-21 [psychological counseling and treatment appropriate where social history suggests it may deter future criminality].)[3]

Mental health testing and counseling do not implicate the right to privacy found in the right to refuse medical treatment, and therefore are not subject to defendant's overbreadth claim. While permitting access to defendant's mental health records does

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[3] Conditions requiring mental health treatment, therapy, or counseling may be stricken as unreasonable where there is no evidence to indicate a probationer had or may have any mental health issues. (See *People v. Acosta* (2018) 20 Cal.App.5th 225, 236-237.) Defendant cannot raise this contention because it relies on the particular facts of this case and is therefore forfeited due to his lack of objection below.

implicate his right to privacy, access to his mental health history is a necessary part of determining whether mental health treatment is appropriate, and if so, what type of treatment is required. Access to these records is a practical necessity. "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights--bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O., supra,* 188 Cal.App.4th at p. 1153.) Defendant has not shown that the disclosure condition "is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citation.]" (*Ibid.*)

DISPOSITION

The matter is remanded to the trial court with directions to either strike general condition No. 4 or to revise it in a manner consistent with this opinion. In all other respects, the judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Murray, J.