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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KASSANDRA LOPEZ,

Defendant and Appellant.

B290417

(Los Angeles County  
Super. Ct. No. PA090967)

APPEAL from an order of the Superior Court of  
Los Angeles County, Hayden A. Zacky, Judge. Reversed with  
directions.

Melissa J. Kim, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Steven D. Matthews and J. Michael Lehmann,  
Deputy Attorneys General, for Plaintiff and Respondent.

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After Kassandra Lopez pleaded no contest to identity theft, the trial court imposed an electronic search condition of probation. She contends that the condition is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. We conclude that although the search condition is valid under *Lent*, it is overbroad in the present circumstances. Therefore, we reverse so that the trial court can narrow the search condition.

## BACKGROUND

On May 2, 2018, Lopez went to a check cashing store and cashed a forged check purportedly issued from Hollywood at Home Inc. A week later, she tried to cash a similar check at the same store. A store employee called the police, who discovered that the checks had been stolen from the car of Hollywood at Home Inc.'s owner. Officers found additional checks, a bolt cutter, shaved keys, and a slim jim in Lopez's car.

Lopez was charged with two counts of identity theft (Pen. Code, § 530.5, subd. (a);<sup>1</sup> counts 1 & 2), forgery relating to identity theft (§§ 475, subd. (c), 473, subd. (a); count 3), and possessing burglar's tools (§ 466; count 5). On May 23, 2018, per a plea agreement, Lopez pleaded no contest to the two counts of identity theft. That same day, the trial court suspended imposition of sentence and placed her on three years' formal felony probation on various terms and conditions, including that she serve 365 days in jail.

Another condition required Lopez to submit her person and property to search and seizure at any time, "including but not

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<sup>1</sup> All further statutory references are to the Penal Code.

limited to your person, property, vehicle, electronic information and personal belongings.” Lopez objected to the search condition, arguing it was not part of the plea agreement and bore no rational relationship to her underlying conduct, as there was no indication that she had used the internet, a cell phone or electronic device in her crimes. The trial court found that the condition was reasonably related to the offense because people who commit identity theft often use the internet to find victims, to gain identities and to obtain social security numbers. Lopez now appeals, contending that the search condition is invalid.

## DISCUSSION

### I. Validity of the search condition

When a sentencing court chooses to grant probation, it has broad discretion to impose conditions to foster rehabilitation and to protect public safety. (§ 1203.1.) A condition of probation must serve a purpose specified in the statute, and conditions regulating noncriminal conduct must be reasonably related to the crime of which the defendant was convicted or to future criminality. (*People v. Moran* (2016) 1 Cal.5th 398, 403.) Generally, a probation condition will not be invalidated 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. (*Lent, supra*, 15 Cal.3d at p. 486.) All three prongs must be satisfied before we will invalidate a probation term. (*People v. Olguin* (2008) 45 Cal.4th 375, 379–380.) We review the imposition of a probation condition for abuse of discretion. (*Moran*, at p. 403.) Therefore, we will not invalidate a probation condition unless the trial court’s decision

to impose it was arbitrary and exceed the bounds of reason.

(*Ibid.*)

As to electronic search conditions specifically, our Supreme Court recently held such a condition invalid under *Lent*. (*In re Ricardo P.* (Aug. 15, 2019, S230923) \_\_\_ Cal.5th \_\_\_ [2019 D.A.R. 7716.]) The juvenile in *Ricardo P.* committed felony burglary. The juvenile court required him to submit to warrantless searches of his electronic devices. Even though there was no indication the juvenile had used an electronic device in connection with his crimes, the juvenile court reasoned that the condition was reasonably related to preventing future criminality because it furthered monitoring of the juvenile. The *Ricardo P.* majority, however, disagreed, finding that the electronic search condition did not satisfy *Lent*'s third prong because, on the record before it, the burden it imposed on the juvenile's privacy was substantially disproportionate to the countervailing interests of furthering his rehabilitation and protecting society. (*Id.* at p. \_\_\_ [2019 D.A.R. at p. 7718].) Therefore, the condition was not reasonably related to future criminality.<sup>2</sup> (*Id.* at p. \_\_\_ [2019 D.A.R. at p. 7720].) Although the court found the electronic search condition invalid, it noted that its holding did not categorically invalidate electronic search conditions.

*In re Ricardo P.* does not assist Lopez because the electronic search condition at issue is related to the crime of identity theft. Lopez pleaded no contest to identity theft under section 530.5, subdivision (a). The Legislature added that section to the Penal Code to provide a remedy for victims whose

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<sup>2</sup> The dissenters would have found that the search condition was valid under *Lent* but constitutionally overbroad.

identities had been misused and in recognition that identity theft victims suffer a unique harm because personal identifying information cannot be easily changed. (*People v. Weir* (2019) 33 Cal.App.5th 868, 874–875.) That crime, which is becoming ever more ubiquitous, can be accomplished in a variety of ways. It can be committed, as Lopez says, the “traditional” way, by stealing checks physically from a car and forging the owner’s signature. But it can also be committed in modern ways, by using electronics to misappropriate personal identifying information and to manufacture forged items using that information. In whichever manner the crime is accomplished, it is still identity theft, and that is the crime for which Lopez has exhibited a propensity. Therefore, because identity theft can be accomplished in different ways and because Lopez has exhibited a propensity to commit identity theft, we cannot find that the trial court abused its discretion by imposing an electronic search condition.

## II. Overbreadth

Having found that an electronic search condition is valid under *Lent*, we next consider whether it is unconstitutionally overbroad. As we now explain, we conclude it is overbroad in this case.

As an initial matter, Lopez has not forfeited her constitutional challenge. A challenge to a condition of probation on the grounds it is vague and overbroad is a question of law that we can review notwithstanding any failure to object in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) We review a constitutional challenge to a probation condition de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

In determining whether an electronic search condition is unconstitutionally overbroad, courts have applied the test articulated in *In re Sheena K.*, *supra*, 40 Cal.4th at page 890: a probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the condition's purpose to avoid being invalidated as unconstitutionally overbroad. However, at least one court of appeal has questioned the applicability of the "closely tailored" test to an electronic search condition of probation. (*People v. Wright* (2019) 37 Cal.App.5th 120.) *Wright* applied the more deferential standard of review for infringements of Fourth Amendment privacy rights. That test weighs the defendant's interest in privacy against the state's interests in support of the search condition.

We need not decide which test applies, because the electronic search condition here fails under both. Electronic search conditions authorize a potentially greater intrusion than mere search of a residence. (*People v. Wright*, *supra*, 37 Cal.App.5th at pp. 156–158 (conc. & dis. opn. of Mauro, J.); see *Riley v. California* (2014) 573 U.S. 373, 394.) Here, the trial court subjected all of Lopez's "electronic information" to search. This imprecise and limitless language could require Lopez to give law enforcement access to all devices and, even if she has no devices, access to anything pertaining to herself that is "electronic," for example, electronic medical records, social media accounts, digitally stored photographs and videos, her GPS location, and private communications including personal emails. Lopez, even with her lessened expectation of privacy as a probationer, retains some residual expectation of privacy. (*In re Jaime P.* (2006) 40 Cal.4th 128, 136–137.) The state, however,

has no interest in *all* of her electronic information. Thus, whether framed as a failure to closely tailor the condition to the limitations on Lopez's constitutional rights or as Lopez's interest in privacy outweighing the state's interest in accessing all of her electronic information, the search condition is overbroad.

### **DISPOSITION**

The order is reversed. The trial court is directed to narrow the scope of the electronic search condition.

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DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.