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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TITO ACE THOMAS,

Defendant and Appellant.

B283735

(Los Angeles County  
Super. Ct. No. YA094365)

APPEAL from an order of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed as modified.

Edward Mahler, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Tito Ace Thomas appeals from an order placing him on probation following his pleading nolo contendere to robbery (Pen. Code § 211)<sup>1</sup> and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). He argues the trial court erred in imposing certain fines and assessments as terms of his probation. We agree and modify the court's order to separately impose those fines and assessments.

Appellant also argues the trial court violated his constitutional right to due process when it made support of his dependents "as directed by [his] probation officer" a condition of his probation. He argues this condition is unconstitutionally vague and improperly delegates judicial authority. We agree in part and modify the court's order accordingly. In all other respects, we affirm the trial court's order.

### **FACTUAL AND PROCEDURAL SUMMARY**

On December 13, 2016, appellant pleaded nolo contendere to robbery and assault by means of force likely to produce great bodily harm. At his probation and sentencing hearing on December 19, 2016, the trial court suspended the imposition of appellant's sentence and placed him on formal probation for five years. The terms of probation included, among other things, that appellant pay an \$80 court operations assessment under section 1465.8, subdivision (a)(1), a \$60 criminal conviction assessment fine under Government Code section 70373, and a \$41 crime prevention fine under section 1202.5 (including a \$10 base fine, a \$29 penalty assessment, and \$2 surcharge). The court also ordered appellant to "support dependents as directed by the

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

probation officer” as a condition of his probation. Appellant did not object to these probation conditions.

Appellant did not file a timely appeal. In an order dated August 9, 2017, this court granted appellant relief from default for failure to timely file a notice of appeal and directed the Los Angeles Superior Court to accept for filing as timely appellant’s notice of appeal.

## DISCUSSION

### I

Appellant argues, and respondent agrees, that the trial court lacked authority to impose certain fines and assessments as conditions of probation. We agree and modify the order to reflect that these fines and assessments are separately ordered and not imposed as conditions of probation.

Appellant challenges the validity of the following fines and assessments as conditions of probation: the court operations assessment under section 1465.8, subdivision (a)(1), the crime prevention fine under section 1202.5, and the criminal conviction assessment fine under Government Code section 70373. Although he did not object to the imposition of these fines as probation conditions, the argument is not forfeited because the conditions are unauthorized as a matter of law and correctable without reference to the factual findings. (*People v. Kim* (2011) 193 Cal.App.4th 836, 842 (*Kim*).) The issue raised presents a pure question of law, which we review de novo. (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1140.)

As respondent recognizes, fines and assessments cannot be imposed as probation conditions because they are collateral to a defendant’s crime and punishment and are not oriented towards

a defendant's rehabilitation. (*Kim, supra*, 193 Cal.App.4th at p. 842.) Instead, such fines and assessments should be separately imposed. (*Id.* at pp. 842-843.) Consequently, we modify the court's order to separately impose the challenged fines and assessments.

## II

Appellant argues the trial court's order that he "support dependents as directed by the probation officer" is unconstitutionally vague. We agree and modify the court's order to clarify that the condition includes a scienter requirement. Appellant also argues the court violated his right to due process by improperly delegating authority to a nonjudicial officer. Because we disagree with this contention, we affirm the order in all other respects.

Although appellant did not raise any objection to the contested probation condition below, his challenge is not forfeited because it presents a pure question of constitutional law which may be resolved without reference to the particular sentencing record developed by the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*)) We review challenges to the constitutionality of probation conditions de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

A probation condition is unconstitutionally vague if it "fails to provide adequate notice to those who must observe its strictures" and "'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" (*Sheena K., supra*, 40 Cal.4th at p. 890, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th

1090, 1116.) A probation condition will not be invalidated as unconstitutionally vague if any reasonable and practical construction can be given to its language. (See *People v. Hall* (2017) 2 Cal.5th 494, 500-501.)

Appellant argues the probation condition at issue lacks specificity, so that he cannot understand how to conform his conduct to the requirement. Specifically, he argues the court erred in omitting the level of support he would be required to provide dependents (or guidelines for determining that level of support) and a list of identified dependents to whom the support would be paid. A similar argument was addressed in *Sheena K.*, in which the defendant challenged a probation condition that she “not associate with anyone disapproved of by probation.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 878.) The court in that case found the condition unconstitutionally vague because it failed to provide notice to the defendant of the particular persons with whom she was forbidden to associate. (*Id.* at pp. 891-892.) Yet it upheld the condition as modified by the Court of Appeal to specify that the defendant must know the persons of whom probation disapproved in order to have violated the condition. (*Ibid.*) The probation condition in this case can be similarly modified to avoid vagueness by adding language specifying that appellant must know the level of support and the persons to whom he must pay it before he can be said to have violated the condition. (*People v. Moses* (2011) 199 Cal.App.4th 374, 381; but see *People v. Patel* (2011) 196 Cal.App.4th 956, 960-961.)

Appellant also contends the court improperly delegated its authority to a nonjudicial officer by granting the probation officer the discretion to determine the manner in which he would support his dependents. He argues this delegation placed him in

danger of subjection to “arbitrary and discriminatory application” of the condition. We disagree, principally because the court is statutorily required to delegate authority over probationers to probation officers by section 1203.1, subdivision (j), which provides that “the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation.” Further, probation conditions giving discretion to probation officers cannot be read to authorize them to act irrationally or capriciously. (*People v. Stapleton* (2017) 9 Cal.App.5th 989, 996; see also *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1241 [probation conditions will not be construed to allow probation officers to act irrationally].) Therefore, appellant’s concern that he will be subject to the whim of the probation officer with respect to his support obligation is unfounded. For these reasons, we affirm the condition as modified.

### **DISPOSITION**

The trial court’s minute order dated December 19, 2016 is modified to reflect that the court operations assessment imposed under section 1465.8, subdivision (a)(1), the criminal assessment fine imposed under Government Code section 70373 and the crime prevention fine under section 1202.5 are separate orders and not conditions of probation. The order requiring appellant to support his dependents in the discretion of the probation officer is modified to specify that appellant must know the level of support he is required to pay and the persons to whom he must pay it

before he can be said to have violated the condition. The order is affirmed as modified.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.