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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.

ANDRE COSTA SOARES,

Defendant and Appellant.

B269934

(Los Angeles County
Super. Ct. No. BA440274)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed in part, modified in part, and remanded with directions.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brennan and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Andre Costa Soares pleaded no contest to two counts of forgery and was placed on formal probation for a period of five years. One of the terms of probation imposed was that Soares stay 100 yards away from his spouse, John Ramirez. Soares contends the probation condition is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). Because the probation condition is reasonably related to future criminality and the crime, but is overbroad, we strike it and remand to allow the trial court to craft a more narrowly drawn condition.

FACTUAL AND PROCEDURAL BACKGROUND

Soares was charged in two separate cases with felony forgery relating to an item exceeding \$950 in value. (Pen. Code, §§ 470(d), 473(a).)¹ According to the probation report, on August 31, 2015 Soares moved into an apartment complex using an “altered” or “fraudulent” check in the amount of \$6,424. On September 2, 2015 the apartment manager confirmed that the “check was bad” and complained to the police department. Soares’s contract was cancelled and he moved out on October 2, 2015. According to the probation report, the second matter involved the “same type of crime.” Based on the parties’ statements at the plea hearing, in the second case Soares allegedly entered a bank and tried to cash a forged check for approximately \$1,900. The bank did not cash the check, and there was no actual monetary loss to the victim.

Pursuant to a negotiated disposition of both matters, Soares pleaded no contest to two counts of forgery. In accordance with the terms of the plea agreement, the court imposed a

¹ All further undesignated statutory references are to the Penal Code.

suspended sentence of three years eight months and placed Soares on formal probation for five years, on condition he serve 180 days in jail. The court awarded 158 days of credit and imposed a restitution fine, a suspended probation restitution fine, a court operations assessment, and a criminal conviction assessment.

During the plea and sentencing proceeding, the trial court expressed concern that Soares had stated in “numerous” conversations with the court that Soares’s spouse, Ramirez, had “set [Soares] up.” The court stated it did not want to “release [Soares] and have him rush out and confront” Ramirez. The prosecutor concurred, explaining that Soares had stated “it was the other person who committed all of these thefts and set up and framed Mr. Soares for all of these crimes, to take the fall for all of these crimes. And he’s responsible for actually all of these thefts.” The court observed that Ramirez was not a victim, but was a related party, and confirmed that Ramirez had been listed as a witness in one of the police reports.

Defense counsel represented that Soares would “be seeking his own protective order” against Ramirez. The court stated, “If that’s the case, let’s make sure it’s reciprocal here. Because I have heard some very hostile things being uttered . . . with respect to this individual and how he’s responsible for everything that’s happened to” Soares. The court explained that Soares “thinks that [Ramirez] turned him in or is somehow responsible for this whole case happening for him to have been in custody.” Soares had acted “incredibly emotionally violent and aggressive to the point that we’ve had to call in on several occasions numerous extra security. He’s banged his head against the table.

He's refused to leave the courtroom. And I am concerned for the safety of' Ramirez.

Defense counsel objected that a probation condition requiring Soares to keep away from Ramirez was invalid because it was insufficiently related to the case. Counsel argued that Ramirez was not a victim, and any protective order should be a civil matter. Although one of the police reports listed Ramirez as a witness, in fact Ramirez only provided police with information that was not reasonably subject to dispute, and he was not a material witness.

The court nonetheless ordered as a condition of probation that Soares stay 100 yards away from, and have no contact with, Ramirez. The court explained to Soares: "Don't contact him through a third party. Don't call him on the phone. Don't text him. Don't email him. Don't have any contact at all through a friend or anybody." Soares stated that he did not want to "see him or be in touch with him." However, Soares averred that Ramirez had taken all of Soares's property while Soares was in jail, and he needed to get it back. The trial court suggested Soares could speak with his counsel about ways he could retrieve the property, or could arrange with the local police department to retrieve it; however, Soares could not directly contact Ramirez. Soares confirmed that "the police station [would] be the first place I go" because he had a "huge report against [Ramirez] with the fraud investigation." In light of the foregoing, the court's minute order stated that "Defendant may go through an attorney or police department (only) to retrieve property from John Ramirez."

Soares appeals.

DISCUSSION

1. *Applicable legal principles and standard of review*

“When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are ‘fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.’ (§ 1203.1, subd. (j).) Accordingly . . . a sentencing court has ‘broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.’ [Citation.] But such discretion is not unlimited: ‘[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.”’ [Citation.]” (*People v. Moran* (2016) 1 Cal.5th 398, 402-403; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) Generally, a probation condition 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 or forbids conduct which is not reasonably related to future criminality” [Citation.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, 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.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380; *People v.*

Moran, supra, at p. 403; *Lent, supra*, 15 Cal.3d at p. 486.) A court “enjoys wide discretion under section 1203.1 to impose a stay-away order as a condition of probation” (*People v. Selga* (2008) 162 Cal.App.4th 113, 118.)

We review a probation condition for abuse of discretion. (*People v. Moran, supra*, 1 Cal.5th at p. 403; *People v. Olguin, supra*, 45 Cal.4th at p. 379.) “That is, a reviewing court will disturb the trial court’s decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable.” (*People v. Moran, supra*, at p. 403; *People v. Carbajal, supra*, 10 Cal.4th at p. 1121.) However, 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. (*People v. Olguin, supra*, at p. 384; *People v. Brandão* (2012) 210 Cal.App.4th 568, 573.)

2. *Imposition of a probation condition limiting contact between Soares and his spouse was permissible, but the condition imposed is overbroad*

Soares insists that the probation condition was not reasonably related to the criminal offense of forgery, had no reasonable nexus to present or future criminality, and did not serve the rehabilitative function of deterring him from committing forgery in the future. He argues that his convictions did not involve domestic violence, Ramirez was not a victim, and there was an insufficient showing he intended to harm Ramirez. Therefore, he argues, the condition is invalid under *Lent* and must be stricken.

We conclude the trial court could impose a properly circumscribed probation condition restricting Soares's contacts with Ramirez.² The first *Lent* factor is met here. The probation condition is related to the offenses because Soares, correctly or not, blamed Ramirez for the fact Soares was charged with the crimes. Soares had repeatedly expressed to the trial court the opinion that Ramirez "set him up" and "turned him in." Indeed, Soares insisted he was not guilty and had stated to the court that Ramirez was the actual perpetrator. "As the test is one of reasonableness and deference to the trial court's exercise of discretion," we "uphold the trial court's choice." (*People v. Moran, supra*, 1 Cal.5th at p. 404 [upholding probation condition prohibiting defendant from entering the premises or adjacent parking lots of all Home Depot stores in California].) It is true that the no contact condition does not relate to the offense of forgery in the abstract; it is not, for example, akin to a condition requiring a person convicted of a drug or gang offense to stay away from drug users or gang members. Nonetheless, the condition is directly related to the offenses in the sense that Soares's hostility toward Ramirez was a direct outgrowth of the fact Soares was charged with and jailed for the offenses.

Moreover, as noted, even where a condition of probation has no relationship to the crime and involves conduct that is not itself criminal, it is valid as long as the condition is reasonably related to preventing future criminality. (*People v. Olguin, supra*, 45 Cal.4th at pp. 379-380.) The standard for preventing

² Although Soares accepted the probation condition, that does not preclude him from challenging it on appeal. (*People v. Moran, supra*, 1 Cal.5th at p. 403, fn. 5; *People v. Brandão, supra*, 210 Cal.App.4th at p. 572.)

future criminality is fairly broad and need not necessarily relate to the particular type of offense at issue. (See *id.* at p. 378 [probation condition requiring defendant convicted of driving under the influence to notify probation officer of any pets at his residence facilitated the effective supervision of probationers and was therefore reasonably related to deterring future criminality].) Here, the primary impetus for imposition of the condition was the trial court's concern that Soares was angry, violent, and emotionally out of control, and was liable to violently confront Ramirez. The court had personally observed "incredibly emotionally violent and aggressive" behavior from Soares, requiring extra security. Under these circumstances, it was not arbitrary or capricious for the court to be concerned that Soares might, in his angry and emotional state, attack or commit offenses against Ramirez. Such an attack would, of course, amount to future criminal conduct. The condition was therefore "reasonably directed at curbing [defendant's] future criminality." (See *People v. Moran*, *supra*, 1 Cal.5th at p. 404.)

The condition also served the interest in protecting public safety, i.e., protecting Ramirez. (See *People v. Olguin*, *supra*, 45 Cal.4th at p. 379 [the primary goal of probation is to ensure public safety through the enforcement of court ordered conditions of probation].) As our Supreme Court has recently noted, "Sentencing courts often condition a grant of probation on the offender's agreement to avoid future contact with his or her victim." (*People v. Moran*, *supra*, 1 Cal.5th at p. 404, citing *People v. Armas* (2011) 191 Cal.App.4th 1173, 1176, fn. 2 [defendant was ordered to stay away from his victim]; *People v. Hall* (1990) 218 Cal.App.3d 1102, 1104, fn. 2 [defendant was ordered to stay 100 yards from victim's residence].) "[S]uch so-

called stay-away orders are common in domestic violence cases.” (*Moran, supra*, at p. 404.) We recognize that Soares had not committed domestic violence -- or any other violent conduct -- against Ramirez, or in the underlying offenses. But the probation condition was aimed at forestalling exactly such conduct. Given the court’s observations of Soares’s in-court conduct and statements, we cannot say the order was an abuse of discretion on the unusual facts presented here.

Soares relies on *People v. Brandão, supra*, 210 Cal.App.4th 568, in support of his argument. There, defendant pleaded no contest to possessing methamphetamine. Nothing in the record indicated he had any gang affiliation or gang-related history, nor did the underlying offense have “anything to do with a gang.” (*Id.* at pp. 570, 576.) Nonetheless, the trial court imposed a no-gang-contact probation condition because it felt that this would help forestall the risk of future criminal behavior. (*Id.* at p. 574.) The appellate court concluded the condition was not reasonably related to future criminality. (*Id.* at pp. 574-576.) The court reasoned that “[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.” (*Id.* at p. 574.) It was impermissible to forbid probationers from having contact with “any person or entity that could conceivably tempt an individual to stray from the path of the straight and narrow” (*Id.* at p. 577.) Thus, the court held a no-gang-contact probation condition cannot be imposed if the record divulges “(1) no ties between defendant and any criminal street gang, (2) no such ties involving any member of defendant’s family, and (3) no criminal history showing or strongly suggesting a gang tie.” (*Id.* at p. 576.) Under these circumstances, the condition was not

related to the offense or to future criminality and was unauthorized under section 1203.1. (*Brandão*, at p. 577.)

The same is not true here. The probation condition was neither attenuated nor tangential: it was imposed due entirely to Soares's in-court comments and behavior that, in the trial court's view, demonstrated Ramirez might be in danger upon Soares's release. The facts stand in contrast to those in *Brandão*, where the probation condition had "no connection to either the crime or the probationer." (*People v. Brandão*, *supra*, 210 Cal.App.4th at p. 575.)

People v. Petty (2013) 213 Cal.App.4th 1410 is instructive. There, the defendant stole valuable jewelry from the mother of a friend during a party the friend gave while her parents were away. The defendant returned to the property several times: to return the jewelry by slipping it under a fence, to check on it afterwards, and to apologize to the victim. (*Id.* at p. 1421.) He also claimed the friend had stolen money from him the previous year. (*Id.* at p. 1422.) As a condition of probation, the court ordered him to stay 50 yards away from the victim's home and 100 yards away from the victim and her daughter. (*Id.* at pp. 1413, 1424.) The appellate court found the conditions reasonable. The defendant had "attempted to make himself welcome where he [was] not." (*Id.* at p. 1421.) Further, the court reasoned: "Unlike many property crimes perpetrated against strangers, defendant's family and the victim's family had known each other for many years. By stealing the victim's valuable jewelry (some of which were family heirlooms) while he was a guest in her home defendant violated a long-standing family friendship and committed a serious breach of trust. When asked to provide a statement to the probation department, defendant

expressed his suspicion that the victim's daughter stole \$500 from his home a year earlier. Such an accusation suggests there may have been more personal hostilities influencing the crime than are involved in a typical theft." (*Id.* at p. 1422.) "[W]hether an emotional violation and breach of trust are grounds for issuing a protective order appears to be subject to the court's discretion. (§ 1203.1, subd. (j).) While it may be unusual to impose such an order for a property offense alone, defendant has directed us to no case holding such an order cannot be issued in such circumstances." (*Id.* at p. 1423.)

As in *Petty*, this case may be unusual in that no-contact orders are not typically imposed on family members in property crime cases. But each case must turn on its own facts. Here, similar to *Petty*, whether Soares's "incredibly emotionally violent and aggressive" behavior in the courtroom, stemming from his view that his spouse had framed him, was cause for the condition was a matter within the court's discretion.³

³ Soares further argues that the no contact condition could not have been imposed as a criminal protective order under section 136.2, because Ramirez was neither a witness nor a victim and the order was not temporally limited to the duration of trial proceedings. Under section 136.2, "during the pendency of a criminal proceeding when the court has a 'good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,' the court is authorized to issue a restraining order." (*People v. Selga, supra*, 162 Cal.App.4th at p. 118.) However, a section 136.2 order is limited to the pendency of a criminal action. (*People v. Selga*, at pp. 118-119 [protective order issued under § 136.2 is operative only during pendency of the criminal proceedings and as prejudgment orders]; *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 951 [§ 136.2 protective order improper

Although a probation condition limiting Soares's contact with his spouse was reasonable under *Lent*, in this case it was not sufficiently narrowly drawn.⁴ Marriage is a fundamental right. (See *Obergefell v. Hodges* (2015) __ U.S. __, __ [135 S.Ct. 2584, 2598] [the United States Supreme Court "has long held the right to marry is protected by the Constitution"]; *Roberts v.*

where the case did not involve domestic violence and there was no evidence the defendant attempted to intimidate or dissuade victims from reporting the crime]; *People v. Ponce* (2009) 173 Cal.App.4th 378, 380-383; *People v. Stone* (2004) 123 Cal.App.4th 153, 159-160.)

However, this circumstance does not assist Soares, because the trial court did not impose the no contact condition as a section 136.2 protective order, but as a condition of probation pursuant to section 1203.1, subdivision (j). The trial court did not expressly reference section 1203.1, but it stated it was imposing the no contact order *as a condition of probation*. When defense counsel stated that Soares would seek a protective order against Ramirez, the trial court suggested, "let's make sure it's reciprocal here." When defense counsel stated he believed a protective order would not be "legal under [section] 136.1," the trial court reconsidered and stated, "Well, if we're not going to have a protective order that is issued, I'm still going to order as a condition of probation that he stay 100 yards away from and have no contact with" Ramirez.

⁴ Soares did not object in the trial court on constitutional grounds, and he does not argue on appeal that the probation condition violates his constitutional rights or that the condition is overbroad. Nonetheless, we exercise our discretion to reach this issue because it is integral to our consideration of the legality of the condition. (See generally *People v. Moran, supra*, 1 Cal.5th at p. 403, fn. 5; *In re P.O.* (2016) 246 Cal.App.4th 288, 297-298.)

United States Jaycees (1984) 468 U.S. 609, 618-620 [marriage, cohabitation, and family relationships are constitutionally protected]; *In re Peeler* (1968) 266 Cal.App.2d 483, 491 [“ ‘Marriage is one of the “basic civil rights of man.” ’ ”].) A no-contact order between spouses obviously infringes on the marital relationship. This does not mean probation conditions limiting contact between spouses are constitutionally barred. Probation is a privilege, and adult probationers may validly consent to limitations upon their constitutional rights. (*People v. Olguin, supra*, 45 Cal.4th at p. 384; *People v. Jungers* (2005) 127 Cal.App.4th 698, 703 [because probation conditions foster rehabilitation and protect the public safety they may infringe the defendant’s constitutional rights; defendant “is ‘not entitled to the same degree of constitutional protection as other citizens’ ”].) Thus, for example, the right to associate may be restricted by a probation condition if the condition is primarily designed to meet the ends of rehabilitation and protection of the public and is reasonably related to such ends. (*People v. O’Neil* (2008) 165 Cal.App.4th 1351, 1356; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) A probation condition prohibiting the defendant from associating with reputed drug users has been upheld even where the defendant’s husband was a presumed drug user. (*In re Peeler, supra*, at pp. 491-493.) Probation conditions limiting defendants’ contact with their spouses are not uncommon in domestic violence cases. (See, e.g., *People v. Jungers, supra*, at p. 704 [defendant’s reasonable expectations of free association and marital privacy were necessarily reduced by his conviction of a domestic violence crime].) Indeed, when a defendant convicted of domestic violence is granted probation, the terms of probation must include a protective order protecting the

victim, which may include residence exclusion or stay-away conditions. (*Ibid.*; § 1203.097, subd. (a)(2).)

In this case, Soares's convictions were *not* for domestic violence, or even for violent crimes, and Soares apparently has no prior record. Nonetheless, as we have explained, the trial court was concerned with forestalling future domestic violence between Soares and his husband in light of Soares's statements and behavior. "The elimination of domestic violence is a compelling state interest." (*People v. Jungers*, *supra*, 127 Cal.App.4th at p. 704.) It is also noteworthy that Soares told the court below that he did not want contact with Ramirez and would be seeking his own protective order.

Nonetheless, as noted, a probation condition that imposes limitations on a person's constitutional rights must be closely tailored to avoid being invalidated as unconstitutionally overbroad. (See, e.g., *People v. Olguin*, *supra*, 45 Cal.4th at p. 384; *In re Sheena K.* (2007) 40 Cal.4th 875, 890; *People v. Appleton* (2016) 245 Cal.App.4th 717, 723.) Here, the probation condition is for a five-year period. It prohibits all contact between Soares and his spouse, whether initiated by Soares or by Ramirez, and regardless of the circumstances. Such a condition effectively prevents the couple from reconciling for a five-year period. If Soares and Ramirez do not intend to reconcile, the condition could hamper efforts at dissolving their union. Given the absence of evidence Soares has ever physically injured Ramirez or anyone else and lacks a criminal record, the condition as structured sweeps too broadly. Accordingly, we order the condition stricken. However, because the trial court can no doubt craft a condition to protect Ramirez that is narrowly tailored, we

remand to the trial court to allow it to consider fashioning such a condition. (See *People v. Appleton, supra*, at p. 727.)

DISPOSITION

The probation condition prohibiting Soares from having contact with John Ramirez is stricken. The matter is remanded for further proceedings consistent with the opinions expressed herein. In all other respects the judgment is affirmed.

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ALDRICH, Acting P. J.

We concur:

LAVIN, J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.