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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WUENDY M. MAGANA et al., Defendants and Appellants.	B280357 (Los Angeles County Super. Ct. No. PA083962)

APPEALS from judgments of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Affirmed.

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

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant, Maria Clemencia Estrada.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Acting Supervising Deputy

Attorney General, and Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

Wuendy M. Magana and Maria Clemencia Estrada each pleaded no contest to one count of transporting more than four kilograms of a controlled substance in violation of Health and Safety Code sections 11352, subdivision (a), and 11370.4, subdivision (a)(2), and were sentenced to a split term of three years in county jail and five years of mandatory supervision. On appeal Magana and Estrada contend the condition of mandatory supervision authorizing unlimited searches of their electronic devices, including smart phones, is unconstitutionally overbroad. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Los Angeles County Sheriff's Deputy John Leitelt conducted a traffic stop of an SUV in the area of Interstate 5 north of Castaic on the afternoon of July 22, 2015. Magana was in the driver's seat; Estrada in the front passenger seat. After receiving permission to search the vehicle, Leitelt opened a black suitcase in the rear storage area of the SUV and found five wrapped packages that contained a total of 4.992 kilograms of cocaine. Leitelt also found four cell phones in the SUV.

Magana and Estrada were charged with the sale or transport of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), with a special allegation that the weight of the controlled substance exceeded four kilograms (Health & Saf. Code, § 11370.4, subd. (a)(2)). After initially pleading not guilty and prior to a hearing on a motion to suppress evidence (Pen. Code, § 1538.5), Magana and Estrada each pleaded no contest to

the charge of transporting a controlled substance and admitted the special allegation that the controlled substance exceeded four kilograms by weight.

At the sentencing hearing on October 4, 2016 the court denied probation and sentenced both Magana and Estrada to eight-year terms in county jail (the lower term of three years for the substantive offense plus five years for the weight enhancement), but suspended execution of five years on each sentence, placing them instead on mandatory supervision for five years pursuant to Penal Code section 1170, subdivision (h)(5).[1] One of the conditions of mandatory supervision imposed by the court is that Magana and Estrada "submit their person and property to search and seizure at any time of the day or night by any probation officer or other peace officer, with or without a warrant, probable cause, or reasonable suspicion. And this search and seizure condition involves their person, residence, vehicles, electronic information, and personal belongings. And [as to the] property subject to search and seizure, which includes any electronic devices owned or possessed by the defendants, they are consenting to provide passwords and any access to those phones or other electronic devices as a condition of this search and seizure. And that's pursuant to California Electronics Communication Privacy Act."[2]

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[1] Magana and Estrada were each awarded eight days of presentence custody credit.

[2] The search condition as recorded in the court's minute orders is slightly different: "[S]ubmit your person and property to search and seizure at any time of the day or night, by any probation officer or other peace officer, with or without a warrant, probable cause or reasonable suspicion. [¶] As part of your

Neither Magana nor Estrada objected to any of the conditions imposed by the court for the five-year period of mandatory supervision.

DISCUSSION

1. *Magana and Estrada Have Not Forfeited Their Facial Overbreadth Challenge to the Electronics Search Condition*

In most cases the failure to object to a condition of probation or mandatory supervision forfeits the issue for appellate review. (See *People v. Welch* (1993) 5 Cal.4th 228, 234-235 [failure to object to the reasonableness of a probation condition precludes the defendant from raising the challenge on appeal]; accord, *People v. Moran* (2016) 1 Cal.5th 398, 404, fn. 7.)[3]

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supervision, whether probation, mandatory supervision, community supervision or parole, you will be required to submit your person, residence, vehicle, electronic information, and personal belongings to search or seizure, at any time of the day or night, with or without probable cause by any law enforcement officer. You will also be waiving all rights under the Electronic Communications Privacy Act specified in Penal Code section 1546 through 1546.4 for the duration of your supervision period." The court's oral pronouncement of the condition, which included the requirement that Magana and Estrada provide passwords for their electronic devices, controls over the clerk's minute order. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mullins* (2018) 19 Cal.App.5th 594, 612.)

[3] Mandatory supervision following a county jail commitment, imposed under Penal Code section 1170, subdivision (h), "is akin to a state prison commitment; it is not a grant of probation or a conditional sentence." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422; see *id.* at p. 1423 ["mandatory supervision is more similar to parole than probation"]; see also

This forfeiture rule applies to constitutional challenges to probation conditions if the constitutional question cannot be resolved without reference to the sentencing record developed by the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).) However, in *Sheena K.* the Supreme Court held a constitutional challenge to a probation condition based on vagueness or overbreadth may be reviewed on appeal if it presents an error that is "a pure question of law, easily remediable on appeal by modification of the condition." (*Id.* at pp. 888-889.)

As discussed, Magana and Estrada did not object to the electronics search condition in the trial court. To the extent they raise a facial challenge to the constitutional validity of that condition, their claim has not been forfeited. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889.) However, we address only the constitutionality of the challenged condition, not whether it is reasonable as applied to Magana or Estrada. (See generally *People v. Olguin* (2008) 45 Cal.4th 375, 380 ["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. Lent* (1975) 15 Cal.3d 481, 486 ["[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the

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People v. Martinez (2014) 226 Cal.App.4th 759, 763.) Nonetheless, it is similar to probation in the sense that the terms and conditions of the defendants' release are ordered by the court at the sentencing hearing. Thus, the rationale for the rule of forfeiture applies equally to the trial court's order imposing conditions for mandatory supervision.

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"]; see also *People v. Moran*, *supra*, 1 Cal.5th at p. 403.)

2. *The Electronics Search Condition Is Not Unconstitutionally Overbroad*

"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." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Magana and Estrada acknowledge that cell phones are frequently used in connection with the transportation and sale of cocaine[4] and concede that requiring a defendant convicted of violating Health and Safety Code section 11352, subdivision (a), to permit law enforcement officers to search his or her cell phone as a condition of mandatory supervision serves a legitimate state interest. However, emphasizing the nature of today's smartphone as a powerful computer containing for many "the privacies of life," as recognized by the United States Supreme Court in *Riley v. California* (2014) 573 U.S. 373, 393, 403 [134 S.Ct. 2473, 189 L.Ed.2d 430] (*Riley*),[5] Magana and Estrada

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[4] As discussed, in addition to nearly five kilograms of cocaine, Deputy Leitelt recovered four cell phones from the SUV being driven by Magana.

[5] Explaining that most cell phones are now "minicomputers that also happen to have the capacity to be used as a telephone" that "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person" (*Riley*, *supra*, 573 U.S. at p. 393), the United States Supreme Court in *Riley* held the search-incident-to-arrest exception to the general

contend by authorizing unlimited searches of their smartphones and other personal electronic devices, rather than restricting permissible searches to data that may be reasonably likely to contain indicia of illegal conduct, the condition imposed by the trial court is unconstitutionally overbroad, violating their Fourth Amendment right to be free from unreasonable searches and seizures and their right to privacy.[6]

An identical constitutional challenge to a similar electronics search condition imposed as a condition of probation following the defendant's conviction for possessing methamphetamine for sale was upheld in *People v. Maldonado* (2018) 22 Cal.App.5th 138, review granted June 20, 2018, S248800 (*Maldonado*). The court explained its holding, "The California Supreme Court has determined that 'probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] As a probationer, defendant's diminished expectation of privacy is 'markedly different from the broader privacy guaranteed under the Fourth Amendment to individuals who are not serving sentences or on grants of probation.' [Citation.] 'It is that preconviction expectation of privacy that was at issue in *Riley* . . . .' [¶] The purpose of the challenged conditions is to prevent defendant from using

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prohibition of warrantless searches does not apply to cell phones. (*Id*. at pp. 401-402.)

[6] We review de novo a constitutional challenge to a condition of mandatory supervision. (See *People v. Appleton* (2016) 245 Cal.App.4th 717, 723; *In re Malik J.* (2015) 240 Cal.App.4th 896, 901.)

electronic devices in the future to facilitate the sale of controlled substances. . . . [A]ccess to defendant's electronic devices is appropriate to ensure that he does not reoffend while on probation. [¶] . . . Defendant argues that the challenged conditions would allow a search of his electronic devices for 'medical records, financial records, personal diaries, and intimate correspondence with family and friends.' But we are not persuaded of the need to narrow the conditions, because defendant is protected by the principle that warrantless probation searches must not be conducted in an arbitrary, capricious, or harassing manner." (*Id.* at pp. 144-145; see also *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted April 12, 2017, S240222 [electronics search condition as applied to minor who used an electronic device to commit the crimes he admitted is not constitutionally overbroad; *Riley* involved a person's "preconviction expectation of privacy"].)

Pending the Supreme Court's decision in *In re Ricardo P.*, S230923, review granted February 17, 2016, which involves a related issue of the constitutionality of an electronics search condition imposed as a condition of probation in a delinquency proceeding,[7] we adopt as our own the analysis of the court of

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[7] The issue before the Supreme Court in *In re Ricardo P.* is whether an electronics search condition, imposed in delinquency proceedings as a condition of probation on a juvenile who had committed first degree burglary, unduly infringed the juvenile's rights to privacy and expression and was unconstitutionally overbroad because it was not related to the crime he had committed and was not limited to the types of data that might indicate his future involvement with illegal drugs.

appeal in *Maldonado*, *supra*, 22 Cal.App.5th 138. Indeed, because we properly review the validity of terms of supervised release under standards comparable to those applied to terms of parole, rather than conditions of probation (see *People v. Martinez* (2014) 226 Cal.App.4th 759, 763), and because parolees have an even more limited expectation of privacy than do probationers (see *Samson v. California* (2006) 547 U.S. 843, 850 [126 S.Ct. 2193, 165 L.Ed.2d 250] ["parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment"]; *People v. Schmitz* (2012) 55 Cal.4th 909, 921 [same]), the balance favoring the state's interest in reducing recidivism over Magana's and Estrada's limited privacy interests is even greater here than it was in *Maldonado*. (See *Schmitz*, at p. 923 ["[T]he state's

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Pursuant to California Rules of Court, rule 8.512(d)(2), the Supreme Court has granted a petition for review and deferred further action "pending consideration and disposition of a related issue in *In re Ricardo P.*, S230923 . . . or pending further order of the court" in more than 70 cases involving the validity of electronics search conditions similar to the condition imposed in this case. The courts of appeal have been divided in ruling whether those search condition are constitutional. (Compare, e.g., *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650 [electronics search condition not unconstitutionally overbroad] with, e.g., *People v. Valdiva* (2017) 16 Cal.App.5th 1130, review granted Feb. 14, 2018, S245893 [electronics search condition is unconstitutionally overbroad].)

Briefing in *In re Ricardo P.* was completed by the parties on September 28, 2016. Oral argument has now been scheduled for May 30, 2019.

interest in supervising parolees is substantial. [Citation.] Parolees "'are more likely to commit future criminal offenses'" [citation] and pose 'grave safety concerns that attend recidivism' [citation]. Additionally, because of their conditional release into society, parolees have an even greater 'incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal'"]; compare *United States v. Johnson* (9th Cir. 2017) 875 F.3d 1265, 1273 [permitting the warrantless search of a parolee's cell phone] with *United States v. Lara* (9th Cir. 2016) 815 F.3d 605, 612 [applying *Riley* to the warrantless search of a probationer's cell phone].)

To be sure, the probation condition at issue in *Maldonado*, *supra*, 22 Cal.App.5th 138 allowed a search of electronic devices only for specific categories of information—"'text messages, voicemail messages, call logs, photographs, email accounts, [and] social media accounts'" (*id.* at p. 142)—while the condition imposed on Magana's and Estrada's mandatory supervision contained no such limitation. But Magana and Estrada, like the defendant in *Maldonado*, are protected by the principle that a probation search "will not be conducted in an arbitrary, capricious, or harassing manner." (*People v. Schmitz*, *supra*, 55 Cal.4th at p. 923; see *People v. Woods* (1999) 21 Cal.4th 668, 682 [probation search may not be "undertaken in a harassing or unreasonable manner"].) Moreover, because Magana and Estrada did not object in the trial court and, as a consequence, we are considering only a facial challenge to the search condition at issue in the case, we have no basis to conclude the broader language of their search condition threatens to intrude into information on their electronic devices such as past or present medical records that might invoke stronger privacy protections.

DISPOSITION

The judgments are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.