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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS JOSEPH OCHOA,

Defendant and Appellant.

C102751

(Super. Ct. No. 62-190319)

Defendant Carlos Joseph Ochoa pled no contest to burglary and cruelty to a child by abuse or neglect. Defendant also admitted an allegation the burglary was committed while a nonparticipant was present. Defendant was sentenced to one year in custody followed by five years of formal probation. (See Pen. Code,<sup>1</sup> § 1203.097, subd. (a).) Defendant understood and accepted the probation terms.

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<sup>1</sup> Further undesignated section references are to the Penal Code.

On appeal, defendant asserts, for the first time, a probation condition (condition No. 5) is unconstitutional because it is vague, overbroad, and an improper delegation of judicial authority to the probation officer. In addition to disagreeing with defendant's arguments, the People also assert the doctrine of forfeiture disposes of defendant's issues on appeal. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The trial court imposed probation condition No. 5, which provided: "After completion of his/her jail commitment, the defendant shall enter into and continue such education, psychological, psychiatric, drug, alcohol, or other rehabilitation programs as directed by the probation officer or as specifically ordered as a term of probation, and shall not leave or terminate such programs without the permission of the probation officer." The trial court ordered defendant to complete a substance abuse assessment as probation condition No. 4. The trial court also ordered defendant to complete a "52-week batterers' treatment program under section 1203.097." The trial court specified defendant "need[ed] to complete the program within 18 months of enrollment." Defendant was also ordered to complete a child abuser's treatment program, pursuant to section 273c.

In explaining some probation conditions, the trial court noted: "You're to do a [substance abuse] assessment. [¶] You are to complete [condition] N[o.] 5, which is a term of probation. You may have to do some sort of continuing education or rehabilitation efforts." While defendant objected to some probation conditions, he neither objected to nor asked for clarification of condition No. 5.

Defendant appeals.

#### DISCUSSION

Defendant contends probation condition No. 5 is unconstitutionally vague and overbroad, as well as constitutes an impermissible delegation of judicial authority to the probation officer. The People disagree on every point. The People contend defendant's

failure to object to condition No. 5 during sentencing renders the issue forfeited. We conclude there is no forfeiture but otherwise agree with the People.

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited [the] right to raise the claim on appeal.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) Nevertheless, a facial constitutional challenge to a probation condition may be considered for the first time on appeal if it presents a pure question of law that does not depend on the underlying factual record. (*Id.* at p. 889.) Questions of law are reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

The People contend, “[Defendant’s] constitutional challenge is susceptible to forfeiture because evaluating it requires examining the record.” We disagree. Defendant’s constitutional challenges do not rely on any facts of his crime, but merely whether the plain language of probation condition No. 5 passes constitutional muster. Thus, defendant’s constitutional challenges are facial and properly before us. (See *In re Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

As to the merits, defendant asserts probation condition No. 5 is “entirely open-ended” as “[i]t permits the probation office to determine [defendant’s] rehabilitative needs without any guidance from the court.” Defendant further asserts this authority “permits the probation office to develop a plan for [defendant’s] mandatory participation in undetermined activities.” We disagree.

“Under the separation of powers doctrine (Cal. Const. art. III, § 3), judicial powers may not be delegated to nonjudicial officers. [Citation.] While the probation officer may properly specify the details necessary to effectuate the court’s probation conditions, it is the court’s duty to determine the nature of the requirements imposed on the probationer.” (*People v. Smith* (2022) 79 Cal.App.5th 897, 902 (*Smith*).) “The trial court has broad discretion to fashion conditions of probation.” (*People v. Bryant* (2021) 11 Cal.5th 976, 984; see § 1203.1, subd. (j).) “The 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. However, the court's order cannot be entirely open-ended." (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1358-1359.) "To survive a vagueness challenge, a probation condition must be precise enough to provide the probationer with notice of what is required or prohibited and allow the court to ascertain whether the probationer has violated its terms." (*Smith*, at pp. 901-902.) "When a probation condition impinges on a person's constitutional rights, the condition is overbroad if its restrictions are not closely tailored to the purpose served by the condition." (*Id.* at p. 902.)

The language of probation condition No. 5 is not open-ended when read in context with the other imposed conditions. (See *Smith*, *supra*, 79 Cal.App.5th at p. 902 [appellate courts can consider oral and written comments for clarification of a probation condition].) Although the trial court did not expressly link a treatment purpose to condition No. 5, the court imposed a substance abuse assessment as condition No. 4—immediately before condition No. 5's treatment requirements. Read in context, the sequence in which the conditions appear in the order granting probation, in addition to the trial court's comments regarding the order, reflects a link between condition Nos. 4 and 5, such that condition No. 4 operates as the "standard by which the probation department is to be guided" when enforcing condition No. 5. (*People v. O'Neil*, *supra*, 165 Cal.App.4th at p. 1359.) Thus, condition No. 5 passes constitutional muster "when considered in light of the assessment condition and the [trial] court's comments." (*Smith*, at p. 903; see *People v. Penoli* (1996) 46 Cal.App.4th 298, 307-308 [after the trial court identifies a specific rehabilitative purpose, the probation department can generally impose a particular rehabilitative program given the probation department's ability to remain apprised of the availability of various programs].)

Defendant relies on *Smith* to argue probation condition No. 5 impermissibly gives the probation department the discretion to impose a residential treatment program. Not

so. The defendant in *Smith* appealed the constitutionality of a probation condition that required her to “participate in any treatment program, including residential treatment, as directed by her probation officer.” (*Smith, supra*, 79 Cal.App.5th at p. 899.) The appellate court concluded the treatment condition improperly delegated to probation the decision whether the defendant needed to attend residential treatment as opposed to outpatient treatment. (*Id.* at pp. 903, 905.) The court remanded for the trial court to either “strike the words ‘including residential’ ” or specify that the court was requiring residential treatment. (*Id.* at p. 905.) Here, condition No. 5 does not expressly identify residential treatment as a possibility, so we elect to construe the condition to eliminate the possibility of residential treatment. (See *People v. Hall* (2017) 2 Cal.5th 494, 501 [reviewing court will not invalidate a probation condition as unconstitutional if a “ ‘ ‘ ‘reasonable and practical construction can be given to [the] language’ ” ’ ’’].)

Further, during review of the record, we discovered a clerical error in the order granting probation, which requires correction. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-187.) Probation condition No. 43 provides defendant shall enroll and complete a child abuser’s treatment program pursuant to section 273c, subdivision (c)(3)(A). This is clearly a clerical error because section 273c, subdivision (c)(3)(A) does not exist and section 273c instead pertains to the collection of fines. The order is corrected to reflect the child abuser’s treatment program is ordered pursuant to section 273a, subdivision (c)(3)(A), as this section mandates treatment requirements.

## DISPOSITION

The order granting probation is affirmed. The trial court shall prepare a corrected order of probation and forward a certified copy to the probation department.

/s/  
ROBIE, Acting P. J.

We concur:

/s/  
RENNER, J.

/s/  
WISEMAN, J.\*

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\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.