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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. REYES DAVID QUINTERO, Defendant and Appellant.	E039290 (Super. Ct. No. FSB052151) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest, Judge. Affirmed with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and James D. Dutton and Scott C. Taylor, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Reyes David Quintero pleaded guilty to one felony count of possession of methamphetamine. The court granted probation; defendant argues on appeal that one of

the terms of probation was invalid. We agree and we order that probation term stricken. This is without prejudice, however, to modification of the terms of probation to include a term narrowly tailored to address the appropriate concern.

2. Factual and Procedural Background

On September 20, 2005, defendant was working on the engine of a car when he was approached by sheriff's deputies. The deputies suspected defendant was under the influence of drugs; he admitted to the deputies that he was on probation. The deputies conducted a probation search of the vehicle and found methamphetamine inside. Defendant admitted the drugs were his.

Defendant pleaded guilty to one felony charge of possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a).

After defendant pleaded guilty, the trial court granted probation. One of the terms of probation was that defendant should "[k]eep the probation officer informed of place of residence, cohabitants and pets, and give written notice to the probation officer twenty-four (24) hours prior to any changes." Defense counsel specifically objected to the condition concerning pets, arguing that it was overbroad. The trial court overruled the objection.

3. Analysis

A. The Probation Condition Concerning Pets Must Be Stricken as Overbroad

Probation is an act of clemency (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337), allowing an eligible convicted person limited freedom in lieu of incarceration. (*People v. Guzman* (2005) 35 Cal.4th 577, 590-591.) The purpose of probation is

rehabilitation of the offender. (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1058.) "In granting probation, the primary considerations are: 'the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant.' ([Pen. Code,] § 1202.7.)" (*People v. Orabuena* (2004) 116 Cal.App.4th 84, 100.)

"The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. (Pen. Code, § 1203.1, subd. (b); Cal. Rules of Court, rule 414; *People v. Warner* (1978) 20 Cal.3d 678, 682-683 [143 Cal.Rptr. 885, 574 P.2d 1237].)" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).) The courts "have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1." (*Ibid*.) That broad discretion "nevertheless is not without limits." (*Id*. at p. 1121.) "As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ' " 'exceeds the bounds of reason, all of the circumstances being considered.' " [Citations.]' [Citation.]" (*Ibid*.)

"[A] condition of probation must serve a purpose specified in the statute [Penal Code section 1203.1]." (*Carbajal, supra,* 10 Cal.4th 1114, 1121.) Numerous possible

conditions of probation are enumerated in Penal Code section 1203.1,[1] such as requiring a period of imprisonment, imposing a fine, requiring restitution, requiring a performance bond, and other conditions. (§ 1203.1, subd. (a).) There is also a catchall provision, which may require either an affirmative act or which may require abstaining from certain acts. Section 1203.1, subdivision (j) provides in part: "The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine 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 generally and specifically for the reformation and rehabilitation of the probationer . . . ." Reasonable conditions under the catchall provision (depending on the circumstances) may include, for example, requiring a probationer to submit to a search of his person or residence without a warrant – an example of affirmatively required conduct (see *People v. Mason* (1971) 5 Cal.3d 759, 765) – or refraining from the use of drugs or alcohol – an example of abstention (see *People v. Smith* (1983) 145 Cal.App.3d 1032, 1035).

The reasonableness of a particular condition depends, as noted, upon "all of the circumstances being considered." (*Carbajal*, *supra*, 10 Cal.4th 1114, 1121.) "In addition, [the California Supreme Court has] interpreted Penal Code section 1203.1 to require that probation conditions which regulate conduct 'not itself criminal' be

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[1] All further statutory references will be to the Penal Code unless otherwise

[footnote continued on next page]

'reasonably related to the crime of which the defendant was convicted or to future criminality.' " (*Ibid*.) Here, the condition in question relates to ownership of pets, a matter which is in itself not criminal. Thus, such a condition must satisfy the requirement that it be "reasonably related to the crime of which the defendant was convicted or to future criminality."

The seminal case on invalid probation conditions is *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent).* There, the California Supreme Court stated:

"A condition of probation 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 related to future criminality . . . .' [Citation.]" (*Lent, supra,* 15 Cal.3d 481, 486.)

A condition of probation must satisfy all three requirements before it may be declared invalid. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365-366.) The probation condition here does violate all three criteria set forth in *Lent*.

First, defendant's ownership or contact with a pet of any kind had nothing to do with the crime of which he was convicted. He had some drugs in his car. No animal was present and there was no reason to think that any animal had anything to do with defendant's possession of the drugs.

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indicated.

Second, having a pet is not in itself criminal. Indeed, "the harboring of pets" has been recognized as "an important part of our way of life." (Cf. *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 514; see also *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163.)

Third, pet ownership, of itself, is not indicative of or related to future criminality. There was no reason to think that defendant had committed, would commit, or was likely to commit any crime relating to ownership of or access to any animals whatsoever.

The People argue that the condition related to future criminality in the sense that preventing defendant's future criminal behavior was dependent upon the probation officer's "ability to effectively and safely supervise" defendant. The sole amplification of this argument is that, "[k]nowledge of [defendant's] residence, of others living in the residence and of any pets in the residence, *can be* crucial to a probation officer in supervising [defendant], as such knowledge is particularly important in maintaining the safety of the probation officer during any unscheduled visits to [defendant's] residence." (Italics added.)

The People never explain, however, how knowledge about defendant's pets, if any, could improve the probation officer's ability to supervise defendant.

Knowing where defendant resides is, obviously, a prerequisite to proper supervision and thus to future criminality. The probationer is subject to visits and to searches, not only to determine whether he or she disobeys the law, but also whether he or she obeys the law. The residence condition is prerequisite to the search condition, which is itself a vital tool of probation supervision. (Cf. *People v. Reyes* (1998) 19

Cal.4th 743, 752 [parole].) We note, however, that a probation condition making an adult probationer's place of residence *subject to approval* of the probation officer may be overbroad where nothing about the nature of the defendant's crime or the likelihood of his future criminality was implicated in the defendant's place of residence. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944 [condition requiring probationer to obtain approval of probation officer for his residence impinged on right of travel and freedom of association, and was not narrowly tailored; and where the probationer's crime involved false imprisonment and assault, which had nothing to do with his crime or his future criminality].)

Requiring defendant to inform the probation officer of other people who live where he resides is also plainly related to future criminality. The associational rights of a probationer may be restricted if reasonably required to ensure his or her rehabilitation and to reduce the likelihood that he or she will reoffend. A probation condition that a defendant convicted of drug offenses not associate with other drug users is valid and reasonable. (*People v. Peck* (1996) 52 Cal.App.4th 351, 363.) A probation officer supervising someone like defendant, who was convicted of a drug offense, must reasonably know who the people are with whom defendant is associating and with whom he is residing. It is proper to restrict a probationer from contact with persons who might be "a source of temptation to continue to pursue a criminal lifestyle." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 626 (*Lopez*).)

Thus, a probation condition restricting an adult offender from associating with gang members serves a valid rehabilitative purpose, whether or not the probationer's

crime was itself gang related. "Because '[a]ssociation with gang members is the first step to involvement in gang activity,' such conditions have been found to be 'reasonably designed to prevent future criminal behavior' " with respect to juveniles. (*Lopez, supra*, 66 Cal.App.4th 615, 624.) "Whether the minor was currently connected with a gang has not been critical. Thus, probation terms have been approved which bar minors from being present at gang gathering areas, associating with gang members, and wearing gang clothing. [Citation.] [¶] [P]robationary proscriptions against gang-related conduct are equally proper when imposed upon adult offenders such as Lopez. The path from gang associations to criminal gang activity is open to adults as well as to minors." (*Id.* at pp. 624-625.)

For similar reasons, a probationer whose offenses involved alcohol abuse may be restricted from association with known users or sellers of narcotics, or felons or ex-felons. (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

The requirement to inform the probation officer of any persons residing with the defendant serves the same salutary, rehabilitative purpose, preventing the defendant from associating with those who might lead him or her into criminal behavior.

The probation condition as to pets is not of the same ilk, however. There is no logical connection between the probationer's, or a coresident's, possession or ownership of a pet which could lead to future criminality in the same way that human interpersonal relationships (e.g., gang member, drug users, known felons) might.

We can only infer, from the reference to officer safety, that the concern apparently addressed is whether there might be a dangerous animal, such as a vicious attack dog, at defendant's residence.

The purpose of officer safety, to permit the probation officer to reasonably supervise defendant so as to prevent future criminality, as by conducting visits to the residence or probation searches without interference from dangerous animals, is not met by the condition imposed. Stated another way, the pet probation condition here is not reasonably tailored to meet the objective for which it has been imposed.

First, whether defendant or any other person living at his residence had unquestionably harmless animals, such as a goldfish or a hamster, has nothing to do with officer safety. Second, as written, the probation condition impinges on defendant's liberty, privacy, and associational interests. He could be imprisoned for violation of his probation if he fails to inform the probation officer of the presence of *any* pet, including, again, such innocuous animals as a goldfish or a hamster. Defendant's probation could be violated if he fails to give written notice 24 hours in advance of "any changes." Defendant could thus be subjected to violation proceedings for such conduct as failing to predict a pet's death. His probation could be violated if he were unaware that a resident had a pet. Third, assuming that a dangerous animal was present in the residence, the probation condition requiring defendant to *inform* the officer of pets and to give 24 hours *written notice* of any changes regarding pets would not do anything to enhance officer safety. Rather, something further is implied: i.e., the probation officer's ability to order

defendant to confine the animal, or the ability to direct him not to possess, or not to live with anyone who possesses, such a dangerous animal.

We have conducted a thorough search of hundreds of cases concerning probation conditions related to pets. Virtually all the cases of pet probation conditions involve convictions of animal cruelty, harboring a vicious pet, or some other offense in which an animal was actually involved. (See, e.g., *Stephens v. State* (2001) 247 Ga.App. 719 [545 S.E.2d 325] [conviction of cruelty to animals (pit bull dogs used for fighting, kept in unsafe and unhealthy conditions), probation condition forbade the defendant from owning any dogs or to live at a residence where dogs were present]; *State v. Choate* (Mo.App. 1998) 976 S.W.2d 45 [one count of animal neglect, the defendant was ordered as conditions of probation to pay for care of the dog while it was in protective custody and not to return the dog to the county]; *State v. Sheets* (1996) 112 Ohio App.3d 1 [677 N.E.2d 818] and *State v. Barker* (1998) 128 Ohio App.3d 233 [714 N.E.2d 447] [animal owner convicted of animal cruelty may be required as condition of probation to forfeit all the animals (horses), even those not specifically the subject of the charges]; *State v. Bodoh* (1999) 226 Wis.2d 718 [595 N.W.2d 330] [defendant convicted of injury by negligent handling of dangerous weapons (rottweiler dogs attacking cyclist) and ordered as a condition of probation not to have any dogs at his residence unless approved by the probation officer]; *Scott v. Jackson County* (D.Or. 2005) 403 F.Supp.2d 999 [defendant guilty of animal neglect (rabbits), ordered as a condition of probation not to possess any animals]; *Mahan v. State* (Alaska App. 2002) 51 P.3d 962 [defendant convicted of animal neglect for multiple kinds of animals, ordered as a condition of probation not to own or

be the primary caretaker of more than one animal, and not to own or care for any horse]; *Hurst v. State* (Ind.App. 1999) 717 N.E.2d 883 [probation condition of suspension of hunting license for violation of fish and game and wild animal laws]; cf. *People v. Torres* (1997) 52 Cal.App.4th 771, 778 [commenting in passing that "[p]ersons convicted of cruelty to animals could be ordered not to own or possess pets"].)

We have found two cases that mention a condition of parole (not probation) involving pets, where the condition is related to officer safety. *United States v. Crew* (D.Utah 2004) 345 F.Supp.2d 1264 refers to a defendant's release on parole, including as a parole condition: "4. HOME VISITS: I will permit visits to my place of residence by agents of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with [this] requirement, *i.e.* having vicious dogs, perimeter security doors, refusing to open the door, etc." *United States v. Pyeatt* (D.Utah, June 15, 2006, 2:05-CR-890 TC) 2006 U.S.Dist. Lexis 40337 referred to an identical parole condition.

The genuine concern to be addressed by the probation condition, as suggested by the parole conditions in *Crew* and *Pyeatt*, is whether a probation officer making a home visit or conducting a probation search will be able to do so without being at risk from a dangerous animal, such as a vicious dog. The probation condition here is not tailored to meet that objective. "A probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition." (*People v. Harrisson* (2005) 134 Cal.App.4th 637, 641, citing *In re White* (1979) 97 Cal.App.3d 141, 146 [" '. . . The Constitution, the statute, all case

law, demand and authorize only "reasonable" conditions, not just conditions "reasonably related" to the crime committed.' [Citation.] [¶] Careful scrutiny of an unusual and severe probation condition is appropriate"].) "[C]onditions of probation that impinge on constitutional rights must be tailored carefully and 'reasonably related to the compelling state interest in reformation and rehabilitation . . . .' [Citation.]" (*People v. Delvalle* (1994) 26 Cal.App.4th 869, 879.) To the extent that the generic "pet" condition here is not tailored to meet that legitimate objective, it is not related to defendant's offense or to his future criminality. It therefore fails to meet the test of reasonableness under *Lent* and is invalid.

That is not to say that a valid probation condition could not be imposed to meet the concern – officer safety – which we have here identified. As already observed, a similar parole condition has been imposed in Utah.

Here, however, no one had any reason to think that defendant here owned a pit bull or a tiger, or for that matter a goldfish, a golden retriever, a tadpole, or a tabby cat. If facts could have been brought to show that a defendant is likely to have, or to live on premises that have, a dangerous animal, then there might be some justification for a probation condition narrowly tailored to avoiding the anticipated danger. But the condition imposed, which related to all pets without limitation, was overbroad and unreasonable.

4. Disposition

The trial court is directed to strike the reference to "pets" in probation condition No. 8A. The trial court may, however, modify the terms of probation to include a

condition narrowly tailored to address concerns about dangerous animals when probation officers conduct home visits. In all other respects, the judgment is affirmed.

GAUT
J.

I concur:

MILLER
J.

Richli, J.

I must respectfully dissent. While pet ownership is not, in itself, criminal, nor particularly related to possession of methamphetamine, it *is* reasonably related to the supervision of a probationer, and hence to his or her future criminality.

"'[C]onditions of probation that impinge on constitutional rights must be tailored carefully and "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." [Citation.]' [Citation.]" (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1016 [Fourth Dist., Div. Two], quoting *People v. Delvalle* (1994) 26 Cal.App.4th 869, 879, quoting *People v. Mason* (1971) 5 Cal.3d 759, 768 (dis. opn. of Peters, J.).) However, there is no constitutional right to keep a pet. (See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 388.) A fortiori, there is no constitutional right to keep a pet without telling your probation officer.[1]

Absent any such constitutional concerns, "[a]n adult probation condition is unreasonable if '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.]" (*In re Byron B., supra,* 119 Cal.App.4th at p. 1016, quoting *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. omitted, quoting *People v. Dominguez* (1967) 256

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[1] Arguably, if keeping the pet was, in itself, a crime, such a requirement might violate the right against self-incrimination. This, however, is not the thrust of either defendant's argument or the majority's opinion.

Cal.App.2d 623, 627.) "As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or '"'exceeds the bounds of reason, all of the circumstances being considered.'" [Citations.]' [Citation.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121, quoting *People v. Welch* (1993) 5 Cal.4th 228, 234, quoting *People v. Warner* (1978) 20 Cal.3d 678, 683, quoting *People v. Giminez* (1975) 14 Cal.3d 68, 72.)

"[Probation conditions] are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. [Citation.] These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism, [citation], and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes, [citation]." (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 875 [97 L.Ed.2d 709, 107 S.Ct. 3164].) A probation condition therefore may be deemed reasonable if it "enable[s] the [probation] department to supervise compliance with the specific conditions of probation." (*People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240.)

A probation officer may need to visit a probationer's home unannounced. Here, for example, defendant's probation conditions required him to "[s]ubmit to a search . . . of your . . . residence . . . at any time of the day or night . . . ." Knowing, in advance, what animals are in the probationer's home is reasonably related to the safety of the probation officer. The majority even concedes that a "genuine concern" that a probation

condition may properly "address[]" is "whether a probation officer making a home visit or conducting a probation search will be able to do so without being at risk from a dangerous animal . . . ." (Maj. opn., *ante*, at p. 11.) Thus, the majority also concedes that defendant could be forbidden to keep a vicious dog. (*Id*. at pp. 11-12.)

However, while some pets are so innocuous that they could not possibly interfere with a probation officer's performance of his or her duties (see, e.g., <http://www.cuteoverload.com>, as of September 12, 2006), it is perfectly reasonable for the trial court not to be more specific as to species, breed, or temperament. Animals can be unpredictable, particularly when confronted by a stranger in what they consider to be their own territory. Ask any letter carrier. Or ask any professional animal trainer -- they have a saying: "[A]nything with a mouth bites." (Sutherland, Kicked, Bitten and Scratched (2006) p. 63.)

Moreover, a probation officer is entitled to some protection against undue surprise. A trial court drafting probation conditions in the abstract might not think to include a parrot among the pets that must be disclosed; presumably, however, a probation officer would appreciate being warned that that voice in another room may just be a bird. Likewise, any probation officer who has to open a closet or reach under a bed during a search would no doubt like to know ahead of time whether the probationer keeps snakes -- regardless of whether the snakes are venomous.

But even assuming the challenged condition could have been more narrowly tailored, that does not render it invalid; rather, it simply must not exceed the bounds of reason. It not unreasonable to put the burden on the probationer to tell the probation

officer what animals may be present. The probation officer can then decide what precautions to take. The challenged condition does not prevent the probationer from owning a pet of any kind. It does not even require approval of the pet! It simply requires notice to the probation officer. This is amply within the bounds of reason.

Significantly, defendant does not challenge the probation condition that required him to keep the probation officer informed of his cohabitants. The majority opines that this condition "serves the . . . salutary, rehabilitative purpose [of] preventing the defendant from associating with those who might lead him into criminal behavior." (Maj. opn., *ante,* at p. 8.) They do not seem to think this condition had to be more narrowly drawn so as to require defendant to report only cohabitants who are "gang member[s], drug users [or] known felons . . . ." (*Ibid*.) It is just as reasonable to require defendant to report all of his pets as it is to require him to report all of his cohabitants.

The majority claims to have "conducted a thorough search of hundreds of cases concerning probation conditions related to pets." (Maj. opn., *ante,* at p. 10.) Nevertheless, they evidently have not found any case holding such a condition invalid. They merely assert that in "[v]irtually all" such cases, the probationer's underlying offense involved an animal. (*Ibid*.) This shows that an offense involving an animal is *sufficient* to support such a condition, but not that it is *necessary*. All that is necessary is that the condition be reasonable under all the circumstances. This condition here meets this requirement.

"[A] probation condition also may be challenged as excessively vague." (*In re Byron B., supra,* 119 Cal.App.4th at p. 1018.) Although defendant has not argued that

the pet condition is vague, the majority thoughtfully supply this omission. Thus, they suggest that defendant could be found to have violated his parole by failing to give written notice 24 hours before the death of a pet! (Maj. opn., *ante*, at p. 9.) I refuse to believe that any court of this state would interpret the condition so as to require the impossible.

In any event, any ambiguity in a probation condition can be dispelled when, at the time probation is granted, the defendant is advised of the condition. (*People v. Bravo* (1987) 43 Cal.3d 600, 610, fn. 7.) "Oral advice at the time of sentencing . . . afford[s] defendants the opportunity to clarify any conditions they may not understand and intelligently to exercise the right to reject probation granted on conditions deemed too onerous." (*Ibid*.) Here, at sentencing, defense counsel objected that the challenged condition was "overbroad." He did not object that it was vague; he did not request any clarification. Thus, he waived any objection that it was vague or ambiguous.

RICHLI
Acting P.J.