Filed 8/17/10 P. v. Realmuto CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PETER R. REALMUTO, Defendant and Appellant.	D055436 (Super. Ct. No. SCD213658)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

Peter Realmuto pleaded guilty to stalking and driving under the influence. He was placed on five years' probation. He contends the trial court erred in (1) denying his motion to withdraw his guilty plea, and (2) imposing a probation condition allowing searches of his computer and recordable media without a warrant and without reasonable cause. We reject his assertions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

After meeting in December 2004, Realmuto and the victim (Robyn Higginson) were in a romantic relationship for about two years. During the relationship, Realmuto was at times hostile, argumentative, and violent. He owned various weapons, including firearms, nunchucks, swords, and knives. In about January 2007, Higginson started trying to distance herself from Realmuto because of his negative behavior, such as using foul language and throwing things against the wall when he became angry. Higginson told Realmuto that if he continued being negative around her, she could not handle it anymore. Realmuto repeatedly told Higginson that she was "bound to him" and if could not have her, no one else could. He also threatened to send her employer videotapes depicting her sexual activity and drug use when they were together. They saw each other off and on during 2007, and in October 2007 Higginson ended the relationship entirely.

Realmuto would not accept the end of their relationship. In October 2007, he continually called Higginson (sometimes multiple times during one day) and showed up at her house. She stopped answering his phone calls and would pretend she was not at home when he was at her door. He left her angry, threatening phone messages; for example, saying she had better "get [her] ass out here or else." He told her that "he would never stop." On one occasion in October 2007 he arrived, unannounced, at her home at 11:15 p.m. to retrieve a television set that he had loaned her. He loudly yelled profanity outside her front door. Higginson opened the door (apparently leaving a latch attached)

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1 Because the judgment arose from a guilty plea, our summary of the facts is based on the preliminary hearing and the probation report.

and told him she would not let him in, but would place the television on the front porch for him to pick up the next day. Realmuto responded, "You think this door's going to stop me?"

In April 2008, Higginson found items (such as roses and chocolate) left on the windshield of her car parked in the driveway of her residence. Higginson suspected Realmuto was leaving the items on her car in the early morning hours. Her fears were confirmed when she spotted his car in the neighborhood at 4:45 a.m. while she was running with a friend, and then found roses on her car when she returned home. On another occasion she heard his motorcycle and saw him from her kitchen window; after he left she went outside and found a rose on her car's windshield. Higginson's neighbors (who were aware of the problem with Realmuto) also heard his loud-sounding motorcycle and saw him on this latter occasion.

Upset by Realmuto's conduct, on April 30, 2008, Higginson reported the incidents to the police. She started parking her car elsewhere. At about midnight on May 1, 2008, she heard a motorcycle in the neighborhood. Looking out a window, she saw Realmuto standing in her side yard. He appeared agitated. She saw him go towards her backyard, and then heard him smashing her bedroom's sliding glass door. Terrified, she hid in the house and called 911. While on the phone with the 911 operator, she heard Realmuto's motorcycle driving away. The police apprehended Realmuto while he was leaving the neighborhood. His blood alcohol level measured .17 percent.

Guilty Plea

Realmuto was charged with stalking, vandalism, and two misdemeanor counts for drunk driving (driving under the influence (DUI), and driving with a blood alcohol level of .08 percent or more). In February 2009, while represented by counsel, he pleaded guilty to the stalking and DUI counts. In the plea agreement, the prosecutor agreed to dismiss the balance of the complaint, that Realmuto could receive probation, and that the stalking conviction could be reduced to a misdemeanor after 18 months if he successfully completed a stalking program and was otherwise successfully performing on probation.

On the guilty plea form signed by Realmuto, Realmuto placed his initials by the statements that he was entering his plea freely and voluntarily; that he was sober, his judgment was not impaired, and he had not consumed any drug, alcohol, or narcotic within the past 24 hours; and that he had read, understood, and initialed each item on the form.

At the change of plea hearing, the trial court recited the terms of the plea, and told Realmuto that at sentencing the court would give him probation and release him from custody so he could start the stalking program. The court asked Realmuto if this was what he had been told, and Realmuto responded, "Yes, your honor." When asked if anyone had promised him anything else, Realmuto responded, "No, sir." The court then asked Realmuto a detailed series of questions, including if he had read and understood all the paperwork; if he had initialed and signed the paperwork; if he had understood and waived each of the listed constitutional rights; if he understood that his maximum punishments were three years for stalking and 180 days for DUI; if he was aware that he

could go to prison if he failed on probation and that his convictions could be used against him to increase his punishment in any future cases; if he understood that as long as he had a felony conviction he could not possess firearms and that he could lose his driving privileges. Realmuto answered each question asked by the court affirmatively, stating, for example, "Yes, Your Honor, I did"; "Yes, sir, I do"; "Yes, Your Honor"; "Yes, sir."

After receiving these assurances from Realmuto that he understood the plea and its consequences, the trial court asked what his plea was to each of the two charges and recited the facts underlying those charges. Realmuto responded "Guilty" for each charge, and answered "Yes, sir" as to the facts recited by the court. The trial court then accepted the plea, finding that Realmuto had knowingly and voluntarily waived his constitutional rights and had understood the nature of the charges and the consequences of the plea.

Plea Withdrawal Motion

In March 2009 Realmuto moved to represent himself, and the trial court granted the motion. In April 2009 Realmuto filed a pro. per. motion to withdraw his guilty plea. He set forth the basis for his request as "disruption of my effective reasoning ability due to the influence of [a]nti depressant drugs, [and] sleep depr[i]vation," and attorney negligence or fraud. At the hearing on the plea withdrawal motion, Realmuto testified that at the time of his guilty plea he was in a "very confused condition"; he was "operating in a condition that was far under what [his] normal mental capacity would have been"; the plea bargain was "constantly fluctuating"; he was given little or no time to try to understand anything; and he had lost all confidence in his counsel. He stated that under the conditions of his incarceration, he got very little or no sleep at night, which

affected his cognitive abilities. He was also experiencing constant pain because he was denied his medication. He was given an antidepressant that had side effects affecting his cognitive ability.[2]

On cross-examination, Realmuto acknowledged that he initialed the change of plea form setting forth the plea agreement and stating that his judgment was not impaired; that at the change of plea hearing he told the court that he understood the plea and its consequences; and that at no time during the change of plea hearing did he say anything about being confused or under the influence of any medication. Called to testify by the prosecution, the attorney who represented Realmuto at the change of plea hearing (Charles Luckman) testified that he would not proffer a change of plea form in court unless he "was sure the person understood exactly what they were agreeing to."[3]

The trial court denied the plea withdrawal motion, finding he had not shown that his plea was anything other than knowing, voluntary, and intelligent.

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[2] When filing his plea withdrawal motion, Realmuto included a written statement and other documents providing more details concerning his claims of pain, sleep deprivation, and medicinal side effects. The prosecutor objected to these documents as inadmissible hearsay, and the trial court sustained the objection to the extent the documents contained "out of court statements." Realmuto has not challenged this ruling on appeal; however, he cites to these documents in his appellate briefing. In any event, the testimony at the plea withdrawal hearing covered the essential facts of Realmuto's claims, and thus we need not delve into this issue.

[3] On grounds of attorney/client confidentiality, Luckman declined to answer questions concerning his actual discussions with Realmuto during the change of plea proceedings, and the trial court ruled he had a right not to answer.

Sentencing

At sentencing, the trial court granted Realmuto probation in accordance with the plea agreement and ordered his release from custody that day. The court placed him on five years' probation and ordered various conditions of probation, including that he not "contact, annoy, or molest" Higginson, and that he submit his "person, vehicle, residence, property, personal effects, computers and recordable media . . . to search at any time with or without a warrant, and with or without reasonable cause . . . ." The court also imposed a 10-year criminal protective order, stating that Realmuto must not come within 100 yards of Higginson and must have "no personal, electronic, telephonic, or written contact" with her.

DISCUSSION

I. *Denial of Plea Withdrawal Motion*

Realmuto asserts the trial court abused its discretion in denying his plea withdrawal motion because he was under duress at the time of the plea, as reflected in his statements that he was in pain, denied needed pain medication, suffering from side effects of antidepressant medication, and was sleep-deprived. He asserts he presented clear and convincing evidence that his reasoning and decisionmaking abilities were affected so that he did not have a clear understanding of the plea agreement.

The defendant has the burden to show good cause for withdrawal of a guilty plea by clear and convincing evidence. (Pen. Code, § 1018;[4] *People v. Huricks* (1995) 32

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4 Subsequent unspecified statutory references are to the Penal Code.

Cal.App.4th 1201, 1207.) Good cause exists if the defendant was operating under mistake, ignorance, inadvertence, fraud, duress, or any other factor overcoming the exercise of free judgment. (*People v. Huricks, supra,* at p. 1208.) A trial court's ruling on a plea withdrawal motion will not be disturbed on appeal unless the defendant shows a clear abuse of discretion. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) We defer to the trial court's factual findings if they are supported by substantial evidence. (*Ibid.*)

The record supports the trial court's rejection of Realmuto's claim that his plea was not knowing and voluntary. Before entering the plea, he initialed the statements on the guilty plea form indicating that the plea was free and voluntary, his judgment was not impaired, and he understood each item on the guilty plea form. At the change of plea hearing, the trial court conducted a careful inquiry to confirm that Realmuto understood the plea agreement and wanted to plead guilty as set forth in the agreement. Realmuto answered all of the court's inquiries affirmatively. Realmuto never made any statement suggesting that he was in pain or confused.

At the plea withdrawal hearing, Realmuto acknowledged that he initialed the guilty plea form, that he told the court at the change of plea hearing that he understood the plea and its consequences, and that he never told the court he was confused or under the influence of medication. Further, at the plea withdrawal hearing, the attorney who had represented Realmuto at the change of plea hearing testified he would not submit a guilty plea to the court for approval if he thought his client had not understood the agreement.

Realmuto also asserts that his decisionmaking abilities were impacted because he had difficulty communicating with his newly-retained attorney (Luckman) who represented him during the change of plea proceedings.[5] Realmuto did not make these complaints at the change of plea hearing, but rather indicated to the trial court that he understood the plea and its consequences.

The same trial judge observed Realmuto's demeanor at both the change of plea hearing and the plea withdrawal hearing. Absent any contrary showing in the record, we defer to the trial court's assessment that Realmuto was fully cognizant at the change of plea hearing, and we likewise defer to the court's credibility assessment rejecting Realmuto's contrary claims at the plea withdrawal hearing. (*People v. Ravaux, supra*, 142 Cal.App.4th at p. 918.)

The trial court did not abuse its discretion in denying the plea withdrawal motion.

II. *The Probation Condition*

Realmuto argues that the probation condition requiring him to submit to searches of his computers and recordable media without a warrant or reasonable cause is unconstitutionally overbroad because it is not narrowly tailored to him or his offense. He contends the probation condition should be modified to permit searches only "in those areas where drugs, alcohol, or weapons could reasonably be found."

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[5] Prior to his retention of Luckman, Realmuto had been represented by a series of different attorneys, including appointed counsel and other retained counsel.

Although Realmuto did not make this objection at sentencing, we consider the issue to the extent it raises a facial unconstitutional overbreadth claim involving a pure question of law. (*In re Sheena K*. (2007) 40 Cal.4th 875, 887, & fn. 7.)

A trial court has broad discretion to select probation conditions. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Generally, a probation condition is not an abuse of discretion if it is reasonably related either to the crime of which the defendant was convicted or to the goal of preventing future criminality. (*Id.* at pp. 379-380.) However, to avoid unconstitutional overbreadth, a "probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition . . . ." (*In re Sheena K., supra*, 40 Cal.4th at p. 890; *People v. Harrisson* (2005) 134 Cal.App.4th 637, 641.) A probation condition that infringes on a constitutional right is permissible if it is closely tailored to achieve the legitimate purpose of rehabilitating the defendant. (See *People v. Olguin, supra*, 45 Cal.4th at p. 384.)

It is well established that a probation condition requiring a blanket search waiver of a probationer's person and property is permissible for purposes of deterring future criminality. (See *People v. Ramos* (2004) 34 Cal.4th 494, 504-506; *People v. Balestra* (1999) 76 Cal.App.4th 57, 67.) A probation condition broadly permitting a search of the defendant's person and property without a warrant or reasonable cause is constitutionally permissible because the defendant "consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege." (*People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Balestra, supra*, 76 Cal.App.4th at p. 65; see *People v. Reyes* (1998) 19 Cal.4th 743, 752-

754 [parolee's search waiver permits warrantless, suspicionless search because parolee has diminished expectation of privacy].) Further, a broad search waiver permitting unannounced, random inspections to ensure the probationer is complying with the probation terms and the law serves a valid rehabilitative purpose regardless of the nature of the underlying offense. (*People v. Balestra, supra,* 76 Cal.App.4th. at p. 67.)

A probationer's waiver of Fourth Amendment rights is, nevertheless, subject to the same reasonableness requirement imposed on all probation conditions. (§ 1203.1, subd. (j); *People v. Bravo, supra,* 43 Cal.3d at p. 610; see *In re York* (1995) 9 Cal.4th 1133, 1150; *People v. Reyes, supra,* 19 Cal.4th at pp. 753-754.) Here, in addition to a general search waiver for Realmuto's person and property, the search waiver specifies computers and recordable media. Assuming that this specific search waiver does not automatically fall within the blanket search waiver that may permissibly be imposed on probationers, there is a reasonable nexus between Realmuto's stalking conviction and the use of electronic media to bring this aspect of the waiver within constitutional parameters.

The stalking offense is committed when the defendant repeatedly follows or harasses the victim and makes a credible threat with the intent to cause fear. (§ 646.9, subd. (a).) The offense encompasses threats "performed through the use of an electronic communication device." (§ 646.9, subd. (g).) Because a defendant can stalk a victim through the use of a computer or other recordable media (e.g., by sending emails or other computer generated communications, leaving recorded phone messages, or filming the victim), a probation condition permitting the authorities to search the defendant's computer or other recordable media is reasonably related to the goal of ensuring that the

defendant is not trying to communicate with or otherwise harass the victim. In light of the stalking conviction, there is no facial unconstitutional overbreadth to the condition permitting a search of Realmuto's computers and recordable media without a warrant or reasonable cause.

Additionally, even if we were to exercise our discretion to examine the probation condition in light of the particular facts of this case, there is no unconstitutional overbreadth. Realmuto stalked Higginson by repeatedly calling her, leaving her threatening phone messages, arriving uninvited at her home, leaving unwelcome gifts at her home, and damaging her home. The harassment included the use of recordable media; i.e., calling and leaving phone messages. Realmuto also had a history of using recordable media in a threatening manner; i.e., threatening (apparently during the waning stages of the relationship) that he would send private videotapes of the victim to her employer. Realmuto is subject to a 10-year criminal protective order that prohibits him from having any contact with the victim, including contact through electronic media. Given that electronic media can be used for stalking purposes, that Realmuto has harassed the victim in a variety of ways, and that he is prohibited from contacting the victim in any manner (including through electronic media), there is a reasonable relationship between Realmuto's actual and potential future criminal conduct and the probation condition permitting the search of his computers and recordable media.

To support his challenge to the probation condition, Realmuto notes there is no evidence that he sent threatening or harassing email messages to the victim or that he monitored her movements through a computer. Realmuto did, however, use electronic

media (i.e., a phone) to harass the victim. Moreover, because stalking can readily be committed through computer use, it is reasonable to extend the search waiver to computers in a case where the probationer has been convicted of stalking.

To the extent Realmuto asserts that the probation condition could lead to a search of his bank records and other personal financial accounts, he does not cite to anything in the record suggesting the warrantless search condition encompasses these matters. "A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.'" (*People v. Olguin, supra*, 45 Cal.4th at p. 382.) The warrantless search condition specifies his "person, vehicle, residence, property, personal effects, computers and recordable media." On its face, this condition does not refer to financial information. Absent a showing the authorities have interpreted the condition to include review of financial information, Realmuto has not shown possible unconstitutional overbreadth on this basis.

To support his argument, Realmuto cites *In re Stevens* (2004) 119 Cal.App.4th 1228. In *Stevens*, the court held that a parole condition prohibiting the defendant, a convicted child molester, from *using* his computer was overbroad because a computer was not involved in the commission of the crime. (*Id.* at p. 1239.) The *Stevens* court noted the importance of computer use in today's society, and that there were other ways to ensure the defendant did not use a computer for illegitimate use, including unannounced inspections of his computer. (*Id*. at pp. 1234, 1239.) Unlike the condition in *Stevens*, Realmuto is not prohibited from using a computer. Rather, his computer is subject to inspections without a warrant or reasonable cause, a procedure the *Stevens*

court referenced with approval to monitor compliance with conditions of probation. There is no unconstitutional overbreadth.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.