

No. H024071

In the Court of Appeal  
Of the State of California  
Sixth Appellate District

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

SEAN FRANCIS HENDERSON,

Defendant and Appellant.

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APPELLANT'S OPENING BRIEF

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Appeal from Santa Clara County  
Superior Court Case No. 206975  
The Honorable Leon P. Fox

SIXTH DISTRICT APPELLATE PROGRAM  
In association with

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## **STATEMENT OF APPEALABILITY**

This appeal is taken from a final judgment including sentencing of the defendant, which is appealable pursuant to Penal Code section 1237.

## **STATEMENT OF THE CASE**

On July 27, 1998, the District Attorney filed a complaint charging appellant Sean Francis Henderson with inflicting corporal injury on a cohabitant in violation of Penal Code section 273.5, subdivision (a), and assault with intent to commit the felony of sodomy in violation of Penal Code section 220. (Clerk s Transcript ( CT ) 2-3.)

After Mr. Henderson pled guilty to the section 273.5 violation on June 15, 1999, the court suspended imposition of sentence and imposed 3 years of formal probation on condition Mr. Henderson serve 7 months in county jail. (CT 1, 28-40; 6/15/99 Reporter s Transcript ( RT ) 6-7.)

On September 18, 2001, the District Attorney petitioned for modification of the terms of probation on the grounds that Mr. Henderson had refused to verify his employment/income. (CT 47-49.) The court summarily revoked Mr. Henderson s probation on October 11, 2001, remanding him

to custody. (CT 46.)

On December 17, 2001, the court found that Mr. Henderson had violated probation, sentencing him to 270 days in county jail, with 68 days actual credit for time served and 34 days pursuant to Penal Code section 4019, for total credit of 102 days. (CT 77; 12/17/01 RT 210-13.)

Mr. Henderson timely appealed on January 22, 2002. (CT 78.)

## STATEMENT OF FACTS

On June 15, 1999, the trial court advised Mr. Henderson that he would be on formal probation for 3 years upon the usual and customary terms as printed in the probation report. (6/15/99 RT 6; 12/17/01 RT 143-44, 167, Exhibit B.) The court reviewed the recommended conditions set forth in the Report of Probation Officer ( Report ) on the record, striking two of them at the request of the prosecution. (CT 36-37; 6/15/99 RT 6-8; 12/17/01 RT, Exhibit B.)

The Report, pages 9-10, listed 20 recommendations for conditions on parole, including the completion of a certified domestic violence program, no contact with the victim, and the payment of various fines and fees. (CT 36-37.) There was no reference to employment in the Report, the court minutes, the court order imposing probation, or in the reporter s transcript of the sentencing hearing. (CT 1, 36-37, 40; 6/15/99 RT 3-8; 12/17/01 RT 141-42, 144, Exhibit B.)

Mr. Henderson s performance on probation was generally satisfactory for the first two years, and he not only completed the ordered domestic violence counseling, but also paid the fines imposed at the time of his sentencing. (CT

56; 12/17/01 RT 109-110, 155, 160.) His probation officer during that time, Paul Machado, testified that during the course of the probation he never heard that Mr. Henderson was failing to meet his financial obligations. (12/17/01 RT 109-10, 160.)

Mr. Machado did advise Mr. Henderson that he needed to verify his employment, ostensibly based on a document entitled Probation Standard Terms and Conditions, which Mr. Henderson first saw on February 4, 2000. (12/17/01 RT 111-13, 176, Exhibit 1.) That document contained a number of conditions that were not ordered by the court, but were instead required by the probation department. (12/17/01 RT 137-38, 140, Exhibit 1.)

Condition Number 5 of the Probation Standard Terms and Conditions stated that the probationer must:

Remain employed or engaged in a useful activity.  
If unemployed, you must diligently seek employment.

(12/17/01 RT 114-25, Exhibit 1.)

Mr. Henderson complied with Mr. Machado's requests for documentation of employment, though he considered them to be an invasion of his privacy. (12/17/01 RT 110-11, 175.) On August 24, 2000, Mr. Machado advised Mr. Henderson that he had to verify work and provide time sheets at the next

meeting, after Mr. Henderson stated that he was unemployed but hoping to secure a new position. (12/17/01 RT 115-17.)

At the next meeting, September 27, 2000, Mr. Henderson stated that he had secured a temporary job, and hoped to be offered permanent employment. (12/17/01 RT 117-18.) Mr. Henderson said essentially the same thing at the next meeting on October 18, 2000, and also said he had a pay stub at home which he had not produced. (12/17/01 RT 118.) On December 11, 2000, Mr. Henderson indicated the job was permanent, but again did not verify employment by producing a pay stub or some other document. (12/17/01 RT 118-19.)

On January 23, 2001, Mr. Machado contacted Mr. Henderson's grandmother after receiving a report from Mountain View police that Mr. Henderson had become upset over something the grandmother said and trashed her kitchen. (12/17/01 RT 120-23.) Mr. Henderson hit no one during the incident, which involved a broken refrigerator retaining bar, broken dishes, and ketchup on a counter. (12/17/01 RT 158, 190-91.)

The grandmother indicated she was not frightened of Mr. Henderson, but stated that he had received psychiatric care

for years regarding his temper. (12/17/01 RT 123-24.) Mr. Henderson had previously discussed his psychiatric problems with Mr. Machado, (12/17/01 RT 158-59.)<sup>1</sup>

During a meeting on January 24, 2001, Mr. Henderson stated that he was going to a psychiatrist and would advise Mr. Machado if the doctor prescribed medication. (12/17/01 RT 124-25.) Mr. Machado strongly suggested Mr. Henderson seek help, without making it a condition of probation. (12/17/01 RT 159, 195.) Mr. Henderson also indicated he was being evicted from the grandmother's residence, and Mr. Machado said he had to verify employment. (12/17/01 RT 124-25.)

At the next meeting on February 7, 2001, Mr. Henderson produced no documents and had not yet seen a counselor, but on March 5, 2001 he verified 2 jobs and had a new address. (12/17/01 RT 125-27.) By May 15, 2001, he had quit one job and been fired from the other. (12/17/01 RT 127-28.) Mr.

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<sup>1</sup> Mr. Henderson had been receiving psychiatric care since he was five and had spent more than a year in a psychiatric hospital during his teenage years. (12/17/01 RT 169.) He had been diagnosed as bipolar at 16, but was receiving no medication for that condition from January through October of 2001, and so was very wound up. (12/17/01 RT 168-70, 194.) When in that condition, he felt that he could control everything, and acted in a very grandiose manner. (12/17/01 RT 170-71.)

On November 28, 2001, Mr. Henderson was finally prescribed deprecote to calm him down. (12/17/01 RT 168-69.)

Machado advised him to seek work. (12/17/01 RT 128-29.)

On June 6, 2001 Mr. Henderson indicated that he was going to be starting his own business, and cash flow would be slow. (12/17/01 RT 128-29.) Mr. Henderson was selling orchids, and indicated that one had sold for \$7,000, but provided no proof. (12/17/01 RT 129.)

By August 10, 2001, Mr. Henderson reported that he had a new business address and was continuing to grow flowers and pay bills, but did not provide any written evidence of the business. (12/17/01 RT 130-31.) He provided a flyer advertising property which he was renting for the business, but could not provide a lease, because he had not yet received the signed copy back from the landowner, and the unsigned copy had been misplaced. (12/17/01 RT 134-35, 148-49, 182-83, 185, 198.)

At a September 13, 2001 meeting, Mr. Henderson discussed his business, which involved selling, maintaining and renting plants, as well as film/music production, a business in which he had previously engaged. (12/17/01 RT 131-35, 149-52.) Mr. Henderson said that he ran both businesses, and while there was no discussion as to how he was paid, Mr. Machado understood that the pay was based on a percentage of

the profits. (12/17/01 RT 150-52.) Mr. Henderson indicated the business would not generate significant income for some time. (12/17/01 RT 154.) Mr. Henderson also indicated that he was \$50,000 in debt, most of which was owed to his grandmother. (12/17/01 RT 131-33.)

According to Mr. Machado, at that meeting he demanded verification regarding the business but Mr. Henderson refused, stating that an attorney had advised him that the information was confidential. (12/17/01 RT 151-53.) Mr. Machado contended that he asked for a source of income, rather than financial records. (12/17/01 RT 163.)

According to Mr. Machado, Mr. Henderson stated that he had partners, and that Mr. Machado would have to take his word for it regarding the business, based on advice of counsel that the records were confidential and the investors private. (12/17/01 RT 131-32, 135, 150, 163.)

Mr. Machado then read Condition Five on Exhibit 1 aloud to Mr. Henderson, and indicated they would go back to court if Mr. Henderson did not comply. (12/17/01 RT 135-36.) According to Mr. Machado, Mr. Henderson responded that the judge would laugh the case out of court. (12/17/01 RT 136, 197.) At the same meeting, Mr. Machado gave two Vickers

letters to Mr. Henderson, the second advising him to appear on October 11, 2001 for arraignment for probation violation, which Mr. Henderson signed. (12/17/01 RT 136-37.)

Mr. Henderson testified that at the September 13, 2001 meeting he asked Mr. Machado to visit his 5,600 square foot studio at 1031 Cotton Street in Oakland, (12/17/01 RT 193-94, 197), and that he did not provide documents requested of him in part because he did not know what was wanted by Mr. Machado, who simply said he wanted something. (12/17/01 RT 181-82, 185, 196.)

New Harvest Productions, of which he was CEO, was leasing property from a family corporation, (12/17/01 RT 171-72), but Mr. Henderson had no ownership interest in the corporations, which were separate entities. (12/17/01 RT 171-72.) Mr. Henderson's grandmother, girlfriend and two others were investors in New Harvest. (12/17/01 RT 172.) His girlfriend was also involved in bookkeeping for the business. (12/17/01 RT 134, 148.)

According to Mr. Henderson, Mr. Machado demanded that he produce the corporate books, which were kept by his girlfriend, and he refused because the books belonged to the corporation, not to him. (12/17/01 RT 172-73.) He could

not bring in pay stubs because he was at the time a voluntary employee who was hoping to be compensated for taking a leadership role. (12/17/01 RT 173-74.) There was no written documentation because the corporation was in a start-up mode and was being formed among friends who did not know what paperwork was necessary. (12/17/01 RT 174, 180-81, 185-87.)

## ARGUMENT

### I. EMPLOYMENT CONDITION WAS ARBITRARY WHERE IT WAS NOT REASONABLY RELATED TO CRIME COMMITTED OR TO GOAL OF DETERRING FUTURE CRIMINALITY

California courts enjoy broad discretion in determining whether to grant probation and, if so, under what conditions. *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Although broad, the trial court's discretion is not without limits, and its authority is wholly statutory pursuant to Penal Code section 1203.1. (*People v. Hodgkin* (1987) 194 Cal.App.3d 795, 802. That authority cannot be exercised in either an arbitrary or capricious manner. (*Carbajal*, 10 Cal.4th at 1120.)

The court's power to condition probation is not boundless.... Human liberty is involved. A probationer has the right to enjoy a significant degree of privacy, or liberty, under the Fourth, Fifth and Fourteenth Amendments to the federal Constitution.

(*People v. Bauer* (1989) 211 Cal.App.3d 937, 940-41, quoting *People v. Keller* (1978) 76 Cal.App.3d 827, 832.)

Section 1203.1, subdivision (d) provides that the court may require as a condition of probation that the probationer go to work and earn money for the support of his or her dependents or to pay any fine imposed or reparation condition. In addition, section 1203.1, subdivision (j)

provides that the court may impose any:

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,...

Probation conditions seeking to regulate conduct that is not in itself criminal must be reasonably related to the crime of which the defendant was convicted or to the goal of deterring future criminality. (*Carbajal*, 10 Cal.4th at 1123, citing *People v. Lent* (1975) 15 Cal.3d 481, 486.) Whether the condition reasonably relates to either factor depends on the facts of each case. (*People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1644.)

*Hodgkin*, 194 Cal.App.3d at 807-11, involved a challenge to a probation condition ordering defendant to seek and maintain employment, based on the Thirteenth Amendment's prohibition on involuntary servitude. The court found section 1203.1, subdivision (d) to be constitutional because the statute limited the circumstances under which a court could impose such a condition, but still determined that the trial court had erred by not making a particularized inquiry into the defendant's individual circumstances before

entering such an order. (*Hodgkin*, 194 Cal.App.3d at 808-11.)

Section 1203.1, subdivision (d) does not apply in this case, because Mr. Henderson has no dependents and did not need to obtain employment in order to pay the relatively modest fines and fees imposed. The employment condition has nothing whatsoever to do with the crime of which he was convicted, and since he has never been in any financial trouble, is not reasonably related to future criminality. (*Lent*, 15 Cal.3d at 486.)

The employment condition is therefore an abuse of discretion, and the court should reverse the judgment.

**II. EMPLOYMENT CONDITION MUST BE STRICKEN BECAUSE IT WAS IMPOSED BY PROBATION OFFICER, RATHER THAN TRIAL COURT, AND WITHOUT ANY INQUIRY INTO PROBATIONER S CONDITION**

This court would have to strike the employment condition as arbitrary if it had been imposed by the trial court. But there is an even more basic problem with this condition it was not imposed by the trial court, but by a probation officer.

*People v. Cervantes* (1984) 154 Cal.App.3d 353, set aside

a trial court order that defendant pay restitution in an amount determined by the probation officer because section 1203.1 granted the discretion to determine the terms and conditions of probation to the court, not the probation officer. (*Cervantes*, 154 Cal.App.3d at 457.) The order could not stand because it deprived the defendant of his right to present evidence to the court regarding the conditions imposed, and there was no statutory provision sanctioning a delegation of unlimited discretion to a probation officer. (*Cervantes*, 154 Cal.App.3d at 357-61.)

At the sentencing hearing in this case, there was never any mention of an employment condition. (6/15/99 RT 3-8; 12/17/01 RT, Defense Exhibit B.) The court referred to the Report of Probation Officer, which did not recommend such a condition. (CT 36-37; 6/15/99 RT 6; 12/17/01 RT, Defense Exhibit B.) Although the court considered and struck two of the conditions contained in the Report, it never exercised any discretion regarding an employment condition, because it never even considered imposing such a condition. (6/15/99 RT 6-8.)

This is not a case such as *People v. Welch* (1993) 5 Cal.4th 228, 230-31, where the prosecution could argue that

the defendant had waived an objection to a probation condition by not raising it at the sentencing hearing. As the *Welch* court reasoned, the statutory scheme obviously contemplates that all issues relevant to the probation determination will be litigated in the sentencing court. (*Welch*, 5 Cal.4th at 234.)

Mr. Henderson would have needed clairvoyance to litigate the employment condition at the time of the sentencing hearing. It was not until eight months later, when he met with Mr. Machado, that he received the Probation Standard Terms and Conditions, which contained the employment condition imposed by the probation department. (12/17/01 RT 111-13, 137-38, 140, 176; Exhibit 1.)

California probationers need not refuse probation and go to prison in order to contest invalid conditions they can accept probation and then seek review of those conditions on appeal. (*Welch*, 5 Cal.4th at 236-37; *Bauer*, 211 Cal.App.3d at 940.) Since the employment condition was not imposed at the time of sentencing, Mr. Henderson has not until this time had an opportunity to seek review of that condition. As in *Welch*, 5 Cal.4th at 237-38, which determined that it would be unfair to apply a newly announced rule so as to

effectively bar any review of defendant's claims, in this case it would be unfair to deprive Mr. Henderson of his right at this time to contest the imposition of this wholly improper condition.

The court should find that the condition was invalid because it was not imposed by the court after an individualized consideration of Mr. Henderson's condition, but was instead arbitrarily imposed by the probation officer in violation of California law.

**III. TRIAL COURT ABUSED DISCRETION IN FINDING VIOLATION OF PROBATION WHERE THERE WAS NO EVIDENCE THAT MR. HENDERSON HAD VIOLATED ANY PROBATION CONDITION IMPOSED BY THE COURT**

Even if this court does not agree that the employment condition was wholly invalid, it should reverse the decision of the trial court because there was no evidence that Mr. Henderson actually violated any term of his probation.

Section 1203.2, subdivision (a) allows a trial court to revoke probation if it has reason to believe ... that the person has violated any of the conditions of his or her probation, as established by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443-

47.)

The Probation Standard Terms and Conditions did not require Mr. Henderson to maintain employment or to provide verification of such employment. Instead, Condition Number 5 simply stated that he was to:

Remain employed or engaged in a useful activity.  
If unemployed, you must diligently seek employment.

(12/17/01 RT 114-25; Exhibit 1.)

The evidence produced at the revocation hearing did not demonstrate that Mr. Henderson was not engaged in a useful activity, but only that he did not produce documentation of actual employment that was satisfactory to Mr. Machado. Mr. Henderson testified at length about his activities in attempting to get a business off the ground, which was a useful activity.

Mr. Henderson paid the fines imposed at the time of his sentencing, and his probation officer admitted that he never learned that Mr. Henderson was failing to meet his financial obligations. (CT 56; 12/17/01 RT 109-110, 155, 160.) The prosecution did not meet its burden of proving that Mr. Henderson violated any condition actually imposed on him, and it was an abuse of discretion for the trial court to find him in violation and order him to serve 270 days in

jail. (*Rodriguez*, 51 Cal.3d at 443.)

**CONCLUSION**

For all the above reasons, the court should reverse the judgment of the trial court.

DATED: March 22, 2007

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In association with the  
Sixth District Appellate Program