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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ADRIAN FULLER,

Defendant and Appellant.

A130496

(Solano County Super. Ct.  
No. VCR196729)

This latest appeal by defendant Kenneth Adrian Fuller is from the denial of a petition for writ of error coram nobis. This appeal seeks *dual* credit for the 71 actual days (with corresponding conduct credits) for the period of time he served in Solano County Jail from September 3, 2008 until November 12, 2008 against a Sonoma County sentence. In this appeal, appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, but has not done so. Upon independent review of the record, we conclude that no arguable issues are presented for review. However, a clerical error was made, and we will remand for the trial court to modify the abstract of judgment. As modified, we will affirm the judgment.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1</sup>

### *Prior Appeals*

On March 17, 2008, Officer Robert Reynolds of the Vallejo Police Department arrested defendant following a burglary at the Cemmco Machine Shop at 1640 Marine World Parkway. Defendant was charged with one count of attempted second degree commercial burglary. (Pen. Code, §§ 664/459.) Prior to arraignment on April 7, 2008, defendant posted bail. When he failed to appear on May 20, 2008, a warrant issued.<sup>2</sup> The warrant was served on defendant in the Santa Rosa (Sonoma) County Jail on June 2, 2008.

On August 26, 2008, defendant's motion to act as his own counsel (*Faretta v. California* (1975) 422 U.S. 806) was denied without prejudice because he was not present in court in Solano County—he was still incarcerated in Sonoma County on another case.

On September 11, 2008, a Solano County judge ordered defendant's removal from the Sonoma County Jail to Solano County to appear in court on October 1, 2008, at which time defendant did appear.<sup>3</sup>

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<sup>1</sup> The historical and procedural facts summarized above are drawn from our opinion in defendant's prior appeal affirming the same Solano County judgment (VCR196729 [Pen. Code, §§ 664/459] in *People v. Fuller*, A123364, filed on July 14, 2009, and from our opinion in defendant's prior appeal affirming the Sonoma County judgment (SCR537091 [Pen. Code, § 496]) in *People v. Fuller*, A122700, filed on August 31, 2009. We take judicial notice of our records in defendant's prior appeals.

<sup>2</sup> On June 2, 2008, Sonoma County Sheriff's deputies arrested defendant on outstanding warrants in connection with a possible burglary of Pacheco's Auto Body. In a subsequent search of defendant's truck, deputies found property that had been stolen during a commercial burglary in Lake County. A felony complaint was filed in Sonoma County charging defendant with burglary and receiving stolen property.

<sup>3</sup> In Sonoma County, defendant pleaded no contest to a violation of Penal Code section 496 on June 16, 2008. On September 2, 2008, defendant was sentenced to a three-year state prison sentence; however, execution of that sentence was suspended and defendant was placed on probation for three years, on the condition, among others, that he serve 10 months in any penal institution, with 139 days actual and conduct credit for time served, prior to entry into a residential drug-treatment program. Defendant was

On November 3, 2008, following admonitions given by his counsel, defendant entered a negotiated plea of no contest to attempted second degree commercial burglary, in exchange for the promise of an eight-month sentence to be served concurrently with the sentence in Sonoma County Case No. SCR537091, with 231 actual and conduct credit for time served as of that date. He was also found in violation of probation in another Solano County case; his probation was revoked and reinstated.

At the sentencing hearing on November 12, 2008, defendant was denied probation, sentenced to the lower term of eight months, and granted sentence credits in the total amount of 242 days. According to the abstract of judgment, defendant was sentenced pursuant to Penal Code section “1170(a)(3). Pre-confinement credits equal or exceed time imposed. (Paper Commitment.)” Despite defendant’s plea bargain, the Solano County sentence was not made concurrent with any other sentence on the abstract of judgment. Defendant filed a timely notice of appeal on December 2, 2008. In that appeal, appellate counsel filed a *Wende* brief. Defendant did not file a supplemental brief. The court found no arguable issues and affirmed the judgment on July 14, 2009.

### ***Current Appeal***

On August 9, 2010, the Solano County Superior Court in Vallejo received a priority mail package sent by defendant from the Minimum Security Folsom Ranch in Folsom, California, containing a petition for writ of habeas corpus. It was filed on August 12, 2010. In it, defendant alleged that the terms of his plea bargain in Solano County Case No. VCR19629 [*sic*] were violated in that “there was a specific agreement between the Solano District Attorney Office, Superior Court Judge Bower, and Petitioner Fuller that in exchange for a plea of no contest to Solano [County] Case No. VCR-19629 [*sic*] that Petitioner Fuller would receive a concurrent sentence against his Sonoma County conviction, Case No. SCR-537091. Sonoma County has failed to abide by terms AGREED upon in the Solano County Case; Petitioner has not been credited for the 71

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advised by the court that if he were able to gain transportation to Solano County to resolve his matters there, “you’ll still be given credit for the time I’ve imposed here.”

days he spent on the Solano County [C]ase against the Sonoma County Case. Therefore the plea bargain on the Solano County [C]ase has been violated.” The matter was calendared for September 28, 2010. That same day the court transferred the petition for writ of habeas corpus to Sonoma County.

On September 2, 2010, the Solano County Superior Court received a petition for writ of error coram nobis from defendant, and a motion for appointment of counsel to represent petitioner on the writ. In his memorandum of law, defendant argued that “[a] petition for writ of error coram nobis is typically used to withdraw a guilty plea induced by official promises that were not kept,” citing *People v. Welsh* (1964) 61 Cal.2d 786 and *People v. Phillips* (1968) 263 Cal.App.2d 423 (*Phillips*). The gravamen of defendant’s coram nobis petition, like that of his habeas petition, is that his plea bargain in Solano County was violated, in that a material element of his plea was the promise of “a concurrent sentence on Solano County Case No. VCR-19629 [*sic*] against his Sonoma County sentence [C]ase [No.] SCR-537091 as agreed upon in Court by Petitioner Kenneth Fuller, the Solano County District Attorney and Superior Court Judge Bower” and that promise has not been kept. He alleged that the only benefit he received for his participation in the plea agreement “was to receive a concurrent sentence on [the] Solano County Case against his Sonoma County [C]ase; Petitioner was two weeks away from completing a consecutive sentence had he gone to trial and actually lost the trial; the only thing Petitioner gained in exchange for his plea of guilty to [the] Solano Charge, was instead of a consecutive sentence amounting to a possibility of 4 months with half time in state prison, he was offered a concurrent sentence against his Sonoma County sentence. [¶] Through no fault of his own, Petitioner has never received the 71 days of concurrent credit as agreed upon.” Defendant attached a copy of Penal Code section 2900.5, with the notation “Solano County Case No. SCR-19629 [*sic*] was supposed to be concurrent to Sonoma County Case No. SCR-537091 not consecutive. Concurrent sentence was the specific plea term in exchange for plea of no contest.” He requested “specific enforcement of plea agreement (concurrent time credits of 71 days earned in the custody

of the Solano County Jail between 09/03/08 and 11/12/08 [Case VCR-196729 against Sonoma County Case SCR 537091]” or, alternatively, plea withdrawal.

Attached to the petition are several lettered exhibits: (A) is the cover page and page 39 of the reporter’s transcript of the proceedings in Sonoma County on September 2, 2008; (B) is a Sonoma County probation report for an April 27, 2009 sentencing hearing on a violation of probation; (C) is a reporter’s transcript of the April 27, 2009 sentencing on the probation violation in Sonoma County; (D) is a Sonoma County probation report for a December 17, 2009 sentencing on a September 2, 2009 violation of probation for failure to successfully complete residential treatment.

On September 2, 2010, a removal order was executed by the Solano County District Attorney to secure defendant’s presence in Solano County Superior Court on September 27, 2010. The order was signed on September 7 and filed on September 8, 2010. On September 10, 2010, this court directed that defendant be sent a copy of the appellate record in the prior appeal No. A123364. Defendant timely filed a notice of appeal from the denial of his writ of error coram nobis on September 28, 2010.

### **DISCUSSION**

On October 3, 2011, appointed counsel filed a *Wende* brief in this court. Defendant has not filed a supplemental brief, but it is evident from his various pleadings in the trial court that he believes the court in Solano County violated his plea bargain. We have reviewed the entire record on appeal, including the transcripts for October 28, November 3, and November 12, 2008, of which we take judicial notice. We assume, for the purposes of this appeal, that “a petition for writ of error coram nobis is an appropriate means to raise the contention that defendant was induced to plead guilty in reliance on an unkept promise by a state official.” (*Phillips, supra*, 263 Cal.App.2d at p. 426. Cf. *In re Williams* (2000) 83 Cal.App.4th 936, 943 [habeas corpus will lie where presentence credit was material term of plea bargain, but CDC determined that defendant was ineligible to receive it].

On October 28, 2008, defendant appeared in Solano County Superior Court on his Penal Code section 1381 demand to be tried. Defendant had two cases pending before

that court, one in action No. 196729 (the attempted commercial burglary, a felony), and one in action No. 237162, a misdemeanor “DUI.” The court determined that on the felony charge defendant was facing “one-half of 16, two or three.” Defendant indicated that he “was just trying to get this thing expedited, get back to Sonoma County.” The matter was continued to the following Monday, since defendant had also indicated at some prior point that he wished to fire his attorney and represent himself. On Monday morning, November 3, 2008, he was offered an eight-month sentence (one-half the low term) “to run concurrent with any sentence he had . . . in Sonoma.” Defendant indicated he would agree to that, but the matter was put over to the afternoon for him to “think about it.”

In the afternoon, defendant’s attorney stated: “He’s going to take the eight months concurrent with Sonoma County.” Defendant was informed by the court that he had 231 credits to run concurrent with his Sonoma County case, which was nine days short of credit for the entire sentence. Defendant entered a no contest plea to second degree commercial burglary of Cemco Machine Shop “pursuant to *People versus West* [(1970) 3 Cal.3d 595].” Sentencing was continued to allow defendant to accrue the nine days of additional credit he needed to complete his sentence in county jail instead of prison. In the drunk driving case, the court found defendant in violation of probation, revoked it, and then reinstated probation. On November 12, 2008, defendant was sentenced, in part, in accordance with his bargain. He received a total of 242 days credit, his sentence was deemed served, and he was released subject to any other holds. The abstract of judgment shows his sentence was not made concurrent with the 10-month probationary sentence in Sonoma County Case No. SCR537091. Nothing in the record suggests the trial court intended to renege on its promise to make defendant’s Solano County case concurrent with his Sonoma County case. The error appears simply to be a clerical error. Therefore, we will remand defendant’s case to the Solano County Superior Court to amend the abstract of judgment to reflect that the eight-month sentence in No. VCR196729 is concurrent with the 10-month probationary sentence in No. SCR537091.

There were no other errors in the proceedings.

**DISPOSITION**

The Solano County Superior Court is directed to modify the abstract of judgment to reflect that the eight-month sentence in Solano County Case No. VCR196729 is concurrent with the 10-month probationary sentence in Sonoma County Case No. SCR537091. As modified, the judgment is affirmed.

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Marchiano, P.J.

We concur:

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Margulies, J.

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Banke, J.