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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.

A130787

(Sonoma County Super. Ct.  
No. SCR537091)

This latest appeal by defendant Kenneth Adrian Fuller is from the denial of a petition to correct custody credits after judgment. (Pen. Code, §§ 1237.1, 1237, subd. (b).) This appeal seeks *dual* credit for 71 actual days and 70 days of conduct credit for the period of time he served in Sonoma and Solano County Jails from September 3, 2008 until November 12, 2008. In this appeal, defendant contends he is entitled to those credits against his Sonoma County sentence because: (1) the Sonoma County Superior Court judge told him, at sentencing on a probation violation, that he would be given dual credit; (2) he did not waive those credits on April 27, 2009, and (3) the January 25, 2010 amendment to section 4019 applies to his case. We find that under the strict causation rule of *In re Joyner* (1989) 48 Cal.3d 487 (*Joyner*) and *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), defendant is not entitled to dual credits against both his Sonoma County sentence and his Solano County sentence. Since he received both actual and conduct credit for the time served in Solano County Jail against his eight-month sentence in the Solano County case, he was not entitled to also receive either actual or conduct credit for that time against his Sonoma County sentence, and we therefore affirm the judgment.

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

### *The Offenses*

On March 17, 2008, defendant was arrested by an officer of the Vallejo Police Department 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 in Solano County. (Pen. Code, §§ 664/459.) Defendant posted bail. When he failed to appear, a warrant issued. The warrant was served on defendant at the Santa Rosa Jail in Sonoma County on June 2, 2008.

On June 2, 2008, Sonoma County Sheriff Department 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.

### *Disposition of the Sonoma County Case*

On June 16, 2008, defendant pleaded no contest to the Sonoma County charge of receiving stolen property in exchange for the dismissal of the burglary charge and a misdemeanor charge in another Sonoma County case. No promises were made as to the sentence, but the court indicated a sentence of no initial state prison, subject to its consideration of the probation report. Neither the reporter's transcript of the change of

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<sup>1</sup> We draw our summary of the historical and procedural facts from the appellate records and opinions in defendant's four prior appeals: (1) *People v. Fuller*, A123364, opinion filed on July 14, 2009, affirming the judgment in Solano County action No. VCR196729 [Pen. Code, §§ 664/459]; (2) *People v. Fuller*, A122700, opinion filed on August 31, 2009, affirming the judgment in Sonoma County action No. SCR537091 [Pen. Code, § 496]; (3) *People v. Fuller*, A124762, opinion filed on September 30, 2009, affirming an order reinstating probation; and (4) *People v. Fuller*, A127226, filed August 9, 2010, modifying the judgment to award additional conduct credits and affirming as modified. We have previously granted defendant's request for judicial notice of various excerpts from the prior records on appeal. Because resolution of defendant's claim requires resort to additional documents from all four of defendant's prior appeals, we now take judicial notice of the entire record in all four appeals on our own motion. (Evid. Code, § 452, subd. (d).)

plea, nor the waiver of rights form signed by defendant, show any promise of concurrent sentencing with Solano County case No. VCR196729.<sup>2</sup>

On September 2, 2008, defendant was sentenced on the Sonoma County case. Execution of a three-year state prison sentence was suspended, and defendant was placed on probation for three years, on the conditions, among others, that he serve 10 months in the county jail (with 139 days of actual and conduct credit for time served), prior to entry into a residential drug-treatment program. “[T]he court stated that, if defendant were accepted into a residential drug treatment program, the court would entertain a motion to modify the incarceration condition of defendant’s probation so that defendant could begin the program immediately. The court also permitted defendant to serve his remaining jail time in Solano County so that he could attempt to resolve his outstanding warrants there.” The court advised defendant that if he could get himself to Solano County, “you’ll still be given credit for the time I’ve imposed here.” Defendant agreed “to waive any custody credits you might accrue while you’re actually in treatment,” should he be placed in a drug-treatment program.

Defendant timely filed a notice of appeal. This court affirmed the judgment on August 31, 2009.<sup>3</sup>

### ***Disposition of the Solano County Case***

Apparently, on September 11, 2008, defendant was transferred to Solano County pursuant to a removal order and, on October 15, 2008, a preliminary hearing was held there on the attempted burglary charge.

On November 3, 2008, defendant entered a negotiated plea of no contest to attempted second degree commercial burglary, in exchange for the promise of a sentence of eight months (one-half of the 16-month low term for an attempt) to be served

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<sup>2</sup> Meanwhile, in Solano County, 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 then incarcerated in Sonoma County on a misdemeanor drunk driving case.

<sup>3</sup> Defendant’s appeal raised claims of *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) and *Faretta* (*Faretta v. California* (1975) 422 U.S. 806) error only.

concurrently with the sentence in Sonoma County case No. SCR537091, with credit for 155 actual and 76 conduct credits, for a total of 231 days credit for time served as of that date. Because defendant was “nine days short of the actual eight months,” and he did not want to risk being sent to state prison before being returned to Sonoma County, he agreed to enter his plea on November 3, 2008, but to defer actual sentencing until November 12, 2008. The court reaffirmed that the agreement was for “the low term of eight months [i.e., 240 days], of which you have today 231 days. [¶] Against this, as I said, and it’s going to run concurrent with the Sonoma case.” Defendant was also found in violation of probation in another Solano County case (a “DUI” in action No. 237612); his probation in that case was revoked and reinstated.

At the sentencing hearing in Solano County on November 12, 2008, defendant was denied probation, sentenced to eight months, and granted sentence credits in the total amount of 242 days—162 actual plus 80 conduct credits (pursuant to § 4019)—a number in excess of the sentence.<sup>4</sup> Defendant filed a timely notice of appeal on December 2, 2008. In that appeal, appellate counsel filed a *Wende* brief. This court found no arguable issues and affirmed the judgment on July 14, 2009.

#### ***Probation Violations in the Sonoma County Case***

On March 18, 2009, defendant was arrested in Petaluma for being under the influence of a controlled substance after police were called in connection with a family disturbance. On March 27, 2009, defendant pleaded guilty to a violation of Health and Safety Code section 11550, subdivision (a), and was found to have thereby violated probation. Although the probation department recommended execution of the previously imposed but suspended three-year state prison sentence, the trial court offered to place

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<sup>4</sup> The abstract of judgment filed in Solano County case No. VCR196729 on November 18, 2008 does not show that the sentence was to be served concurrently with any other case. Instead, it shows that defendant was sentenced pursuant to “PC 1170(a)(3). Pre-confinement credits equal or exceed time imposed. (Paper Commitment. Deft. ordered to report to local Parole Office upon release.)” In defendant’s other pending appeal, A130496, we have ordered correction of the abstract of judgment to reflect concurrent sentences.

defendant in a drug-treatment program, provided he waived his accrued credits to “demonstrate [his] sincerity about following through with [the treatment].” The probation report stated that defendant was to receive no credit against his Sonoma County case for the 71 days between September 3, 2008 and November 12, 2008, because that time had been credited to his Solano County case No. VCR196729 pursuant to Penal Code section 2900.5, subdivision (b). Through counsel, defendant objected that “he was serving concurrent time and therefore he should receive credits for those times.” After conferring further with counsel, defendant agreed to waive 272 days of accrued custody credits, plus credit for any time to be spent in the drug program, in exchange for reinstatement on probation, with residential drug treatment. The credits were waived and probation was reinstated. In the misdemeanor matter, No. SCR558309, the court sentenced defendant to 90 days in county jail, to run concurrently “with the sentence just imposed,” and a total of 61 days credit for time served.

Defendant filed a timely notice of appeal. In that appeal, appellate counsel filed a *Wende* brief. Defendant filed a brief raising three issues, none of which concerned credit calculation. This court found no arguable issues and affirmed the judgment on September 30, 2009.

In October 2009, defendant was again found to have violated his probation and, in December 2009, the suspended three-year sentence was finally executed. Defendant received 193 days of presentence credit, consisting of 129 actual days and 64 days of conduct credits. This did not include the 71 days between September 3 and November 12, 2008, or the 272 days previously waived, or the days spent in a drug-treatment facility.

Defendant timely appealed, arguing that he was entitled to an additional 64 days of conduct credit under the amendments to section 4019 that took effect on January 25, 2010, while his appeal was pending. In an unpublished opinion filed on August 9, 2010, this court awarded him the additional conduct credits and amended the judgment to reflect that defendant had 128 days of conduct credit; as amended, the judgment was affirmed.

### *Current Appeal in Sonoma County Case*

Beginning in February 2010, defendant began filing variously titled motions and petitions to receive additional credits against his Sonoma County prison sentence. Specifically, on July 3, 2010, defendant filed a petition to correct the abstract of judgment to include conduct credits pursuant to Penal Code sections 2900.5 and 4019, subdivision (f), as amended January 25, 2010. In this petition, defendant alleged that (1) he had served a total of 241 days in custody prior to being sentenced to prison in No. SCR537091 on December 21, 2009,<sup>5</sup> (2) he appealed from that sentence on December 24, 2009; (3) he should have received 482 credits pursuant to the January 25, 2010 amendment to section 4019; (4) he had recently discovered that he had not been credited with 71 days from September 3, 2008 to November 12, 2008, against his 10-month probationary jail term; (5) that he should have been credited with that time against his Sonoma County case, even though he was in jail in Solano County during that time period, because both counties sentenced him to concurrent time against both cases; and (6) he should also have been credited for the 41 days he served from his arrest on a probation violation from March 18, 2009 to April 27, 2009, while he was serving a concurrent 90-day sentence on a misdemeanor charge in No. SCR558309.

On November 19, 2010, the Sonoma County Superior Court denied all of defendant's motions and petitions. On December 28, 2010, defendant filed an appeal from his postjudgment motions and petitions.

### **DISCUSSION**

On appeal, defendant abandons his claim for 41 days of credit for the period of incarceration from March 18, 2009 to April 27, 2009. He argues only that he is entitled to 71 days of actual credit against his Sonoma County prison sentence for the time spent in custody in Solano County from September 3, 2008 to November 12, 2008. He also

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<sup>5</sup> A minute order for November 17, 2010, included in the record on appeal, shows that per the remittitur, an abstract of judgment was to be prepared giving defendant 129 days of actual and 128 days of conduct credits, for a total credit of 257 days as of December 21, 2009.

contends he is due 70 days of conduct credit for that time period pursuant to the January 25, 2010 amendment to Penal Code section 4019. We disagree.

Section 2900.5, subdivision (b), (hereafter section 2900.5) provides that “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” In *Bruner, supra*, 9 Cal.4th 1178, our Supreme Court construed section 2900.5 as requiring a rule of strict causation to be applied in cases where the same conduct is implicated in multiple proceedings: “[W]e hold . . . that where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint.” (*Bruner, supra*, 9 Cal.4th at pp. 1193–1194.) Under *Bruner’s* “rule of strict causation: ‘[a] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the *sole reason* for his loss of liberty during the presentence period.’ ([*Bruner, supra*,] 9 Cal.4th [at p. 1191], italics added; [citations].)” (*People v. Callahan* (2006) 144 Cal.App.4th 678, 685. See also *Joyner, supra*, 48 Cal.3d 487, 489.)

*Bruner’s* strict causation rule precludes presentence credits against defendant’s Sonoma County case for the time he spent in county jail from September 3, 2008 to November 12, 2008, because the record shows that defendant’s loss of liberty was not solely attributable to proceedings related to the *same conduct* (i.e., receiving stolen property in Sonoma County) for which he was convicted and subsequently sentenced to state prison. From September 3, 2008 through November 12, 2008, defendant was serving a 10-month probationary sentence attributable to the conduct for which he had been convicted in Sonoma County. But he was also held on warrants out of Solano County attributable wholly to other conduct, namely attempted burglary and drunk driving charges. Pursuant to his plea and sentence bargain in Solano County, he was given credit for that time period against his Solano County case(s). Even if those sentences were concurrent, defendant was not entitled to dual credit against his Sonoma

County sentence as well, under *Joyner, supra*, 48 Cal.3d 487 and *Bruner, supra*, 9 Cal.4th 1178.

*In re Marquez* (2003) 30 Cal.4th 14 (*Marquez*), does not compel a different result. In that case, petitioner Marquez was arrested in Monterey County for first degree burglary in July 1991, and a few days later posted bail and was released from custody. (*Id.* at p. 17.) Later in that month, defendant was arrested in Santa Cruz County for burglary. He remained in continuous custody from that day forward. Monterey County placed a hold on him in August 1991. (*Ibid.*) Marquez was thereafter convicted of burglary in Santa Cruz County and sentenced to prison, with credit for time served from his arrest in the subject case to the date of sentencing in December 1991. (*Id.* at p. 18)

Subsequently, Marquez was rebooked into Monterey County Jail, convicted, and, in April 1992, sentenced to prison on the burglary he committed in that county, with 229 days of presentence credit, excluding the time spent in custody between the day he was sentenced in Santa Cruz County and the day he was sentenced in Monterey County. (*Marquez, supra*, 30 Cal.4th at p. 18.)

Marquez appealed both convictions. The Monterey County judgment was affirmed, while the Santa Cruz County judgment was reversed. The Santa Cruz County court subsequently vacated defendant's sentence and dismissed the charges in the interests of justice. Petitioner then sought to have his Santa Cruz County credits applied to his Monterey County sentence. (*Marquez, supra*, 30 Cal.4th at p. 18.) Our Supreme Court awarded the credits, reasoning: "To deny petitioner credit for his time spent in custody between December 11, 1991, and April 2, 1992, would render this period 'dead time,' that is, time spent in custody for which he receives no benefit. Sometimes this result is unavoidable. For example, had petitioner's Santa Cruz County *presentence* custody been attributable solely to the Santa Cruz County charges (that is, had Monterey County never placed a hold), dismissal of the Santa Cruz County charges would have left petitioner with no sentence against which credit for that period could be applied. But because his custody after placement of the Monterey County hold was attributable to both his Santa Cruz *and* Monterey County cases, dismissal of the Santa Cruz County charges

still left him with the Monterey County sentence against which credit for all of his custody from placement of the Monterey County hold until imposition of sentence could be applied.” (*Marquez, supra*, 30 Cal.4th at pp. 20–21, original italics.)

The Supreme Court explained that *Bruner’s* rule of strict causation did not apply in this situation. “The requirement of ‘strict causation,’ on which this court relied in *Bruner, supra*, 9 Cal.4th 1178, and *Joyner, supra*, 48 Cal.3d 487, is applicable in cases involving the possibility of *duplicate credit* that might create a windfall for the defendant. Here, because the Santa Cruz County charges have been dismissed, no possibility of a windfall (in the form of double credit) to petitioner exists. Unlike in *Bruner* and *Joyner*, the choice is not between awarding credit once or awarding it twice. The choice is instead between granting petitioner credit *once* for his time in custody between December 11, 1991, and April 2, 1992, or granting him *no credit at all* for this period of local custody.” (*Marquez, supra*, 30 Cal.4th at p. 23, original italics.)

In this case, defendant was given credit, against the Solano County sentence, for the period of custody between September 3, 2008 and November 12, 2008. Under the cases discussed above, he is not entitled to dual credit, against his Sonoma County sentence as well. The trial court did not err in denying defendant’s request for additional presentence custody credits. It follows that since defendant is not entitled to additional custody credits, he also is not entitled to additional conduct credits under section 4019, as amended January 25, 2010.

**CONCLUSION**

Defendant is not entitled to additional presentence custody or conduct credits.

**DISPOSITION**

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.