

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OSMAR ANAVISCA RODRIGUEZ,

Defendant and Appellant.

A131026

(Marin County

Super. Ct. No. SC146044; SC172035)

I. INTRODUCTION

Osmar Anavisca Rodriguez (Rodriguez) pleaded guilty to failing to appear for sentencing while on bail (Pen. Code, § 1320.5) pursuant to an agreement that he would be sentenced to an eight-month sentence for this offense and a consecutive four-year term for a prior conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11351), for a total sentence of four years and eight months in state prison. The plea agreement also contained a term pursuant to which Rodriguez waived his right to appeal on any basis except for sentencing error.

On appeal, Rodriguez seeks review of an order denying his motion to suppress evidence and an order denying his motion to withdraw his plea to the drug charge. We will dismiss this part of the appeal because Rodriguez waived his right to appeal these orders. Rodriguez also contends that he is entitled to additional pre-sentence credits. We will remand this case to the sentencing court to address that issue.

II. STATEMENT OF FACTS

A. *The Drug Offense [Case No. SC146044]*

On February 10, 2006, police executed a search warrant at a home where Rodriguez lived with several people.¹ Rodriguez, who was not home at the time, lived in one of the four upstairs bedrooms. Inside that room, the K-9 dog alerted officers to a safe box and a garbage can. The safe, which was inside a closet, contained “103.4 grams of cocaine inside a plastic bag, 11 grams of cocaine in a paper bag, 212.6 grams of cocaine inside a plastic bag, 3.7 grams of crystal methamphetamine, metal baking dish with white residue, spoon with residue, and six twenty dollar bills.” From the garbage can, police recovered an additional 32.3 grams of methamphetamine and a plastic bag with residue. Police seized several additional items from Rodriguez’s bedroom including a black binder with “pay-owe” sheets, a list of prices, a supply of bags, tape, cards and invoices with Rodriguez’s name, a knife, a razor blade with residue, a digital scale, a cell phone, pager, and numerous money order receipts. Under the bed, police found a box of rubber gloves and five one hundred dollar bills. After completing their search, officers located Rodriguez at his work and placed him under arrest. At the time, he was carrying \$4,839 in a paper bag. Initially Rodriguez told the officers that his friend had been using his room for the past two or three weeks. Subsequently, Rodriguez admitted that he had been selling cocaine for over three months and that the cocaine found in the safe belonged to him.

On March 26, 2008, after several proceedings not relevant to this appeal, Rodriguez was charged by information with possession for sale of cocaine (Health & Saf. Code, § 11351) and possession for sale of crystal methamphetamine (Health & Saf. Code, § 11378). The district attorney also alleged that Rodriguez was not eligible for probation because of the quantity of the drugs involved. (Pen. Code, § 1203.073, subd. (b)(1).)

¹ Because Rodriguez pleaded guilty to this offense, facts relating to the search are taken from the probation officer’s presentence report.

Rodriguez subsequently filed a motion to suppress evidence relating to the February 2006 search of his bedroom, which the trial court denied on November 21, 2008.

On March 3, 2009, Rodriguez pleaded guilty to possession of cocaine for sale pursuant to a plea agreement. The terms of that agreement were reflected in a written form titled “Plea of Guilty (Felony)” that Rodriguez signed that same day (the 2009 plea agreement). In exchange for his guilty plea, Rodriguez was promised that the enhancement and separate drug charge would be stricken with *Harvey*² waivers, and that he would be sentenced to probation. The 2009 plea agreement contained several additional terms to which Rodriguez expressly agreed, including the following waiver of his appeal rights: “I understand that I have a right to appeal from any judgment of this court. I waive my right of appeal and my right to attack the final judgment by any statutory or non-statutory means, except as to any sentencing error the court may make.”

On March 3, 2009, Rodriguez also executed a “Waiver of Right to Withdraw Plea of Guilty Pursuant to a Disposition Commitment (*Cruz/Vargas* Waiver).”³ Pursuant to that waiver, Rodriguez acknowledged and agreed that his 2009 plea agreement obligated him to appear for sentencing, and he further agreed that he would not violate any law prior to sentencing and that, if he violated these conditions, “the Court will no longer be bound by this disposition agreement and I would not have any right to withdraw my plea.” The *Cruz/Vargas* Waiver also contained the following term: “I FURTHER UNDERSTAND AND AGREE that if the Court finds any willful violation of these terms, the Court will be free to impose any greater sentence than expressly stated in this agreement, up to the maximum penalty for each offense . . . to which I am pleading guilty/no contest or admitting, and I will not have any right to withdraw my plea.” This waiver was signed by both Rodriguez and his trial counsel on March 3, 2009.

² See *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

³ See *People v. Cruz* (1974) 12 Cal.3d 562 (*Cruz*); *People v. Vargas* (2007) 148 Cal.App.4th 644 (*Vargas*).

On July 15, 2009, Rodriguez filed a motion to withdraw his plea. The basis for the motion was that Rodriguez was denied the effective assistance of counsel. Newly appointed defense counsel argued that the attorney who advised Rodriguez to enter his plea rendered ineffective assistance by failing to explore the possibility of pleading guilty to a charge that did not have a mandatory deportation consequence for Mr. Rodriguez. A hearing was conducted on November 16, 2009, after which the trial court denied the motion to withdraw Rodriguez's plea.

B. *The Failure to Appear [Case No. SC172035]*

On September 13, 2010, Rodriguez was charged with one count of felony failure to appear (Pen. Code, § 1320.5), with an enhancement for committing the offense while on bail (Pen. Code, § 12022.1). The charge was supported by allegations that Rodriguez willfully and unlawfully failed to appear at a February 3, 2010, hearing in order to evade the process of the court with respect to his March 2009 drug conviction.

On September 29, 2010, Rodriguez was the subject of a preliminary hearing in a separate case charging him with felony domestic violence. That proceeding was interrupted so that Rodriguez could change his plea in that case *and* in the case charging him with failure to appear. Although the pleas were entered separately, the record reflects there was a global agreement pursuant to which the prosecutor agreed that, in exchange for the guilty pleas, the domestic violence charge would be reduced to a misdemeanor, other unspecified charges would be dismissed, and Rodriguez would receive a total sentence of four years and eight months for the domestic violence case, the failure to appear case and the prior drug conviction.⁴

⁴ At the hearing, the court gave this summary of the global agreement: "The bottom line is that you'll be sentenced as follows: Four years in state prison in the old drug case, 146044, eight months additional consecutive prison for the failure to appear. For a total of four years, eight months in the state prison. All of the time that you've been in custody in all three of these cases will be credited towards that prison sentence. [¶] Then in the misdemeanor charge you won't be placed on probation. You'll be faced with that conviction, but there won't be any other sanction."

On September 29, 2010, Rodriguez also executed a document entitled “Plea of Guilty (Felony)” in connection with his plea to the failure to appear charge (the 2010 plea agreement). The 2010 plea agreement reflects that the following promises were made to Rodriguez in exchange for his guilty plea: (1) the enhancement for being on bail would be dismissed with a *Harvey* waiver; (2) he would receive a four-year sentence for the prior drug conviction; (3) he would receive a consecutive eight-month sentence for failure to appear, and thus (4) his total sentence for these two cases would be four years and eight months.

The 2010 plea agreement contained several additional terms to which Rodriguez expressly agreed, including the following waiver of his appeal rights: “I understand that I have a right to appeal from any judgment of this court. I waive my right of appeal and my right to attack the final judgment by any statutory or non-statutory means, except as to any sentencing error the court may make.”

C. *Sentencing and Appeal*

On December 8, 2010, a hearing was conducted for the purpose of sentencing Rodriguez in his three pending cases, the domestic violence case, the failure to appear case and the drug case. Consistent with the 2010 plea agreement, Rodriguez was given a total aggregate sentence of four years and eight months in state prison for his failure to appear conviction and his prior drug conviction. The sentencing court awarded Rodriguez a total of 360 credits toward his aggregate sentence which included 240 actual credits plus 120 goodtime/worktime credits.

On January 11, 2011, Rodriguez filed a notice of appeal, listing all three cases that were the subject of the December 2010 sentencing hearing. According to that notice, “This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.”

The court asked Rodriguez if this summary was consistent with his understanding of the situation, to which Rodriguez responded “Yes, sir.”

On February 1, 2011, Rodriguez filed a second notice of appeal in the superior court, purporting to appeal from the order denying his motion to suppress evidence seized during the 2006 search of his bedroom and the order denying his motion to withdraw his plea of guilty to the drug charge.⁵ Attached to this February 2011 notice of appeal is a certificate of probable cause relating only to the issue of the voluntariness of his plea.

III. DISCUSSION

A. *The Motion to Suppress*

Rodriguez's first claim of error pertains to the November 21, 2008, order denying his motion to suppress evidence in the drug case (Case No. SC146044). Rodriguez contends his suppression motion was erroneously denied because the police did not have probable cause to search his bedroom on February 2, 2006, and they exceeded the scope of their search warrant by breaking into his locked bedroom when he was not one of the people whose name appeared in the warrant.

We hold that this claim of error is not cognizable on appeal because, as reflected in our factual statement, both the 2009 and the 2010 plea agreements contain express terms pursuant to which Rodriguez waived his right to appeal on *any ground* other than sentencing error. Relevant authority holds that such a general waiver is enforceable when the record demonstrates that the "defendant freely, knowingly and intelligently waived his right of appeal" (*People v. Kelly* (1994) 22 Cal.App.4th 533, 536 (*Kelly*); see also *People v. Berkowitz* (1995) 34 Cal.App.4th 671.)

Rodriguez fails to address this issue in his opening brief. In his reply brief, Rodriguez acknowledges that he entered into a "*Cruz/Vargas* waiver . . . which provided that if he violated the law before he was sentenced the court could increase his sentence and he could not withdraw his plea and thus not appeal the increased sentence." However, Rodriguez contends that this waiver cannot be fairly or reasonably interpreted as a waiver of his right to appeal the denial of his suppression motion.

⁵ This February 2011 notice of appeal was never formally lodged in this court but it is included in the Clerk's Transcript pertaining to Case No. SC146044, i.e. the drug case.

First, we are not persuaded by Rodriguez's narrow interpretation of the *Cruz/Vargas* waiver that he signed in 2009. In making that waiver, Rodriguez not only agreed to waive his right to appeal an increased sentence, he expressly acknowledged that if he violated the law or failed to appear for sentencing then "I will not have any right to withdraw my plea." There is no dispute that Rodriguez subsequently violated the law and failed to appear for sentencing.

Second, and in any event, Rodriguez either overlooks or ignores the additional general waiver of his appeal rights, which is a term of both the 2009 plea agreement and the 2010 plea agreement. In *Kelly, supra*, 22 Cal.App.4th 533, the court found that a very similar general waiver included a waiver of the defendant's right to appeal an order denying his suppression motion. The court reasoned that the defendant had initialed key terms in his written plea form pursuant to which he acknowledged and agreed that he (1) waived his right of appeal except as to sentencing error, (2) read all of the terms in the plea agreement, (3) discussed those terms with his attorney who explained them to him, and (4) understood the terms of his plea agreement. Furthermore, at the hearing on his change of plea, the *Kelly* defendant confirmed he had signed the plea form and agreed he was entering his plea freely and voluntarily. Finally, the defendant was represented by counsel when he entered the plea. (*Id.* at p. 536.)

All of these circumstances were present here as well. In both the 2009 plea agreement and the 2010 plea agreement, Rodriguez initialed the term expressly waiving his appeal rights except for sentencing error, as well as all of the other key terms in each agreement. Furthermore, in both instances, the trial court ensured that Rodriguez had been properly advised and actually understood the terms of his plea bargain. At the March 2009 hearing, where Rodriguez entered his plea to the drug charge, the trial court conducted a probing inquiry pursuant to which it discussed the terms of the agreement with Rodriguez, confirmed that Rodriguez understood those terms and that he had received advice about them from his counsel, and then made an express finding that Rodriguez's plea and his waivers were "made knowingly, intelligently and voluntarily." Similarly, at the September 2010 hearing, where Rodriguez entered his plea to the failure

to appear charge in exchange for, among other things, an agreed sentence on the drug offense, the trial court also conducted a thorough inquiry to ensure that Rodriguez understood the terms of the 2010 plea agreement, that he had received the advice of counsel and that he wanted to enter his plea. Again, the court made an express finding that Rodriguez's plea and waivers were "made knowingly, intelligently and voluntarily."

The record on appeal establishes that Rodriguez executed two voluntary, knowing and intelligent waivers of his right to appeal the order denying his suppression motion in the drug case. Therefore, the appeal from that order will be dismissed.

B. *Denial of Motion to Withdraw Plea*

Rodriguez's second claim of error pertains to the November 16, 2009, order denying his motion to withdraw his plea in the drug case (case no. SC146044). Rodriguez contends that the trial court abused its discretion by denying his motion because he demonstrated that his trial counsel rendered ineffective assistance by failing to adequately advise him about the immigration consequences of his plea. Rodriguez does not dispute that he was advised that the drug conviction to which he pleaded guilty would have immigration consequences. Instead, he argues that trial counsel was nevertheless ineffective because she did not explore alternative pleas to related offenses which may not have resulted in automatic deportation.

In his reply Brief, Rodriguez argues that he did not waive his right to challenge the voluntariness of his plea to the drug offense. Again he acknowledges that he executed a *Cruz/Vargas* Waiver in his drug case. However, Rodriguez contends that a waiver in a plea agreement does not apply to alleged errors that occurred after the plea was entered (citing *People v. Mumm* (2002) 98 Cal.App.4th 812, 815), and that the order denying his motion to withdraw his plea was entered after he executed the *Cruz/Vargas* Waiver.

Rodriguez ignores the fact that he executed another broad waiver of his appeal rights when he entered into the 2010 plea agreement. That waiver was made *after* Rodriguez: (1) entered his guilty plea in the drug case, pursuant to a general waiver of his appeal rights and a separate *Cruz/Vargas* waiver; (2) filed an unsuccessful motion to withdraw his plea to the drug charge on the same ground he attempts to assert on appeal;

(3) failed to appear for sentencing on the drug conviction; and (4) committed a domestic violence offense. After all these events occurred, Rodriguez entered into another broad waiver of his right to appeal on any ground other than sentencing error. As we have already demonstrated, the trial court's express finding that Rodriguez's 2010 waiver was knowing, intelligent and voluntary is amply supported by the record.

In addition, we note that, before the trial court accepted Rodriguez's plea and waivers in September 2010, the following exchange occurred:

“THE COURT: . . . We've gone through significant litigation on immigration issues up to this point. It's a certainty that immigration consequences will stem. As I mentioned, you'll be deported, denied admission into the United States at some point in the future, denied application for naturalization as a U.S. citizen or application for amnesty. [¶] There were some questions about what charges have those consequences previously. Do you understand that those consequences will stem from all of these convictions here?

“THE DEFENDANT: I do.”

Thus, the trial court expressly confirmed that Rodriguez understood and agreed to the immigration consequences of his plea bargain before it accepted his plea and waivers, including his general waiver of his appeal rights.

Under all these circumstances, the record demonstrates that Rodriguez knowingly and intelligently and voluntarily waived his right to appeal the order denying his motion to withdraw his guilty plea to the drug offense. (*Kelly, supra*, 22 Cal.App.4th at p. 536.) Therefore, the appeal from the order denying that motion shall be dismissed.

C. *Sentence Credits*

As reflected in our factual summary, when Rodriguez was sentenced on December 8, 2010, he was granted a total of 360 credits toward his aggregate sentence which included 240 actual credits plus 120 “conduct” credits for work/good conduct. On appeal, Rodriguez contends that the court should have awarded him 240 conduct credits, i.e., one additional day of credit for every day served prior to his sentence.

With exceptions not relevant here, “[p]ersons who remain in custody prior to sentencing receive credit against their prison terms for all of those days spent in custody prior to sentencing, so long as the presentence custody is attributable to the conduct that led to the conviction. [Citation.] This form of credit ordinarily is referred to as credit for time served. [¶] Additional credit may be earned, based upon the defendant’s work and good conduct during presentence incarceration. [Citations.] Such presentence credit is referred to as conduct credit. [Citation.]” (*People v. Duff* (2010) 50 Cal.4th 787, 793 (*Duff*).

“The presentence credit scheme, [Penal Code] section 4019 [(section 4019)], focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) “ ‘[T]he court imposing a sentence’ has responsibility to calculate the exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable [conduct] credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. [Citations.]” (*Id.* at p. 30.)

Prior to 2010, section 4019 allowed prisoners to earn a total of “two days [of conduct credit] for every four days” that the defendant was in actual presentence custody. (*Duff, supra*, 50 Cal.4th at p. 793.) However, an amendment to section 4019, which became effective on January 25, 2010 [the January 2010 amendment], allowed eligible prisoners to earn conduct credits at a greater rate, such that two days of conduct credits could be earned for every two days of actual presentence custody. (Former Amended § 4019, subd. (f).)

A subsequent amendment to section 4019, which became effective on September 28, 2010 [the September 2010 amendment], eliminated these extra credit provisions and returned section 4019 verbatim to the way it was amended in 1982. (Compare Stats. 2010, ch. 426, § 2, p. 2088 with Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) However, this September 2010 amendment also added a new subdivision g, which states: “The changes in this section as enacted by the act that added this subdivision shall apply to

prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act.” (Former amended § 4019, subd. (g).⁶)

In the present case, we cannot determine what version of section 4019 the sentencing court employed or intended to employ. The award itself (i.e., 120 conduct credits for 240 days served) suggests that the court may have applied the version of section 4019 that was in effect when Rodriguez was sentenced in December 2010, i.e., the September 2010 amendment. If so, the trial court erred because the changes to credit calculations that were made by that amendment apply only to crimes committed after its effective date. (Former amended § 4019, subd. (g).)

Clearly the court did not apply the January 2010 amendment to section 4019 because it did not award Rodriguez two days of custody credit for every two days of actual confinement. This fact concerns us because the court had previously expressed its intention to award Rodriguez an equal number of conduct and actual time credits. Indeed, before Rodriguez entered his pleas at the September 2010 hearing, he expressly inquired about “how many months or days” of credit he would receive for time he had served in his various cases. Although the discussion of that issue was confusing, it appears that the court may have assured Rodriguez that he would receive “day-for-day” conduct credit.

On appeal, the parties do not address whether the method of calculating credits and/or the number of presentence credits was the subject of any of Rodriguez’s plea agreements in any of the three cases that were addressed at the December 2010 sentencing hearing. Instead, they debate whether the sentencing court should have applied Penal Code section 2933 (section 2933) to calculate Rodriguez’s presentence credits.

Rodriguez contends that a version of section 2933, subdivision (e), which was in effect when Rodriguez was sentenced (former section 2933(e)) required an award of one

⁶ Section 4019 was substantially amended again in 2011.

day of conduct credit for every day of actual confinement.⁷ The People counter that the sentencing court could not properly have applied section 2933 because that statute codifies a distinct and exclusive scheme for earning credits after sentencing which is administered solely by the Department of Corrections. (See generally, *People v. Buckhalter*, *supra*, 26 Cal.4th 20.)

This debate, which we decline to resolve, only reinforces our decision to remand this case. On the one hand, the discussion of Rodriguez's conduct credits at the September 29 hearing might support the notion that the court contemplated applying former section 2933(e). On the other hand, neither the court nor any party at the sentencing hearing made any reference to this statute; rather it appears that everyone contemplated applying some version of section 4019.

Several cases and plea agreements were relevant to this sentence and we cannot determine if the subject of conduct credits was covered by any of those agreements or what statute the trial court applied to calculate those credits. At least with respect to the 2010 plea agreement, there is some indication in this record that Rodriguez may have been promised one day of conduct credit for every day of actual confinement. Under these circumstances, we find it necessary to remand this case to the sentencing court so that it can reconsider the issue and create a record as to the basis for the calculation of Rodriguez's pre-sentence conduct credits.

⁷ On the same day that the September 2010 amendment to section 4019 went into effect, an amendment to section 2933 also became effective. Pursuant to that September 2010 amendment, section 2933, subdivision (e) stated: "Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail . . . from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." (Former § 2933, subd. (e)(1).) Section 2933 was substantially amended again in 2011.

IV. DISPOSITION

We dismiss the part of this appeal which purports to appeal from the order in case No. SC146044 denying Rodriguez's motion to suppress evidence and the order in case No. SC146044 denying Rodriguez's motion to withdraw his plea. The judgment is affirmed and this case is remanded to the superior court so that it can reconsider the award of pre-sentence conduct credits.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.