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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
DISHON EDWARD VALES,
Defendant and Appellant.

A131994
(Solano County
Super. Ct. No. FCR258310)

In 2008, defendant pleaded no contest to grand theft by use of an access card of money or goods that exceeded \$400 in violation of Penal Code section 484g, subdivision (a).¹ He also admitted a prior prison term enhancement (§ 667.5, subd. (b)). The plea agreement stated that defendant initially would receive no prison time and his maximum prison term was three years. Defendant received probation and, subsequently, he violated his probation and the court sentenced him to three years in state prison.

Between the time of defendant's conviction and the trial court's imposition of his three-year sentence, the Legislature amended section 484g, subdivision (a) to raise the threshold loss for felony grand theft from \$400 to \$950. Defendant contends that his conviction under section 484g, subdivision (a) should be

¹ All further unspecified code sections refer to the Penal Code.

reversed because the amendment should be applied retroactively and his theft was for less than \$950. He also claims that the lower court erred in denying him conduct credits based on amendments to sections 2933 and 4019 because the prosecutor failed to plead or prove his prior felony conviction.

We hold that defendant is estopped from challenging his three-year sentence because the sentence was consistent with a term of his plea agreement. We also conclude that the conduct credits were calculated correctly because the amended section 4019 does not require the prosecutor to plead and prove the prior conviction. Accordingly, we affirm the judgment.

BACKGROUND

The facts related to defendant's conviction are not relevant to the issues raised on appeal; thus, they are only briefly summarized as set forth in the probation report. While on parole for a prior residential burglary conviction, defendant took a woman's ATM card in June 2008 and used it without her permission to purchase about \$700 in clothing.

On October 6, 2008, defendant pleaded no contest to a felony complaint charging him with grand theft pursuant to section 484g, subdivision (a) and admitted a prior prison term enhancement (§ 667.5, subd. (b)) for a previous burglary conviction. The prosecutor stated that the amount stolen was \$700. Defendant signed a waiver of rights form stating the plea was in return for "no initial state prison," and that "[t]he maximum punishment which the court may impose based upon this plea is . . . [three years] state prison." Defendant stated in court that he understood the entire plea form before he signed it. Defense counsel explained: "We tried to indicate on the form that there was a three-year maximum sentence for the charge, a violation of 484g, and also a one-year sentence to state prison for the alleged prior conviction for a total of four years." The parties acknowledged there was a factual basis for the plea.

Defendant failed to appear for his sentencing hearing on November 17, 2008. On June 8, 2009, defendant appeared for sentencing and the court

suspended imposition of judgment and placed defendant on formal probation for three years.

Defendant appeared in court and admitted violating probation in January 2010, and again in November 2010. In both instances, probation was reinstated.

On December 3, 2010, defendant appeared in court and the court revoked his probation. On January 18, 2011, after a contested revocation hearing, the trial court found that defendant had violated his probation.

On March 10, 2011, the court sentenced defendant to a total of three years in state prison. This sentence was comprised of the two-year midterm for the felony violation of section 484g, subdivision (a), and a consecutive one-year term for the section 667.5, subdivision (b) enhancement. The court awarded defendant credit for 468 days served, which included 312 actual days plus 156 days pursuant to section 4019. On April 27, 2011, following a hearing, the court amended the abstract of judgment to award 771 days of credit, which included 515 days actual time and 256 conduct credit days.

Defendant filed a timely notice of appeal.

DISCUSSION

I. The Sentence of Three Years and the Plea Agreement

In 2008, defendant pleaded no contest to fraudulent use of a bank access card, a violation of section 484g, based upon his having used the victim's card to obtain \$700 in clothing. At the time of defendant's offense and conviction, a violation of section 484g was grand theft, a felony, if the amount of the money or goods fraudulently obtained exceeded \$400. Effective January 25, 2010, the Legislature enacted Senate Bill No. 18 (2009-2010 3d Ex. Sess.) (Sen. Bill No. 18), which raised the felony threshold amount from over \$400 to over \$950. (Sen. Bill No. 18, ch. 28, § 15.)

Defendant contends that he was not finally sentenced until March 10, 2010, when he appeared for "judgment and sentencing" and that he is entitled to the retroactive operation of the amendment to section 484g. He maintains that in 2008

the court suspended imposition of judgment and sentence and placed him on formal probation and therefore there was no final judgment in 2008.

Our Supreme Court in *In re Estrada* (1965) 63 Cal.2d 740, considered whether an amendment to a criminal statute that lessened the punishment applied retroactively when the defendant committed the crime prior to the amendment but final judgment was after the amendment. The court held that “where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed” if there is no final judgment. (*Id.* at p. 748.)

Defendant argues that he committed his crime prior to the amendment but judgment was suspended and not final until 2011, when the court revoked his probation, sentenced him, and imposed the judgment. “[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.) Furthermore, he stresses that the amendment did not include a saving clause and nothing in the legislative history indicates an intent to make the statute’s application prospective only.

The People mount several challenges to defendant’s argument, including that the amendment applies prospectively only. We need not address whether the amendment to section 484g applies retroactively. In the present case, defendant received probation pursuant to a plea agreement and we conclude that he is estopped from now challenging his three-year sentence. Indeed, if defendant had been sentenced to prison for three years in 2008, rather than receiving the benefit of probation, he would have already served his sentence and be unable to argue that the amendment to section 484g, subdivision (a) had any retroactive application to him.

On October 6, 2008, defendant signed a waiver of rights form that stated he was changing his plea to no contest to the charge of section 484g, subdivision (a).

The form indicated that there was a maximum punishment of three years in state prison. He indicated that he had been promised “no initial state prison.”

At the hearing on October 6, 2008, where defendant entered his plea, the court asked him whether he understood that there was a three-year maximum sentence for the charge and an additional year for the alleged prior conviction for a total of four years, and defendant responded that he understood. The court explained: “Do you understand the court has the authority to order a prison sentence of up to three years[?]” Defendant responded, “Yes, sir.” At the sentencing hearing, the prosecutor stated: “This is a case where the defendant did plea and admitted a prison proffer for no initial state prison. But at the time of the sentence, which was October 6th, he was given a cruise waiver, meaning while he was out pending judgment and sentence if he were not to obey all laws, that would become an open plea. [¶] He subsequently failed to appear on November 17th. A bench warrant was issued, and he was brought back to court on April 2nd. It’s my view that [his failure to appear] makes it an open plea. But having said that, I wouldn’t object to probation being granted”

Thus, it is clear that defendant agreed to plead no contest in exchange for probation and a maximum sentence of three years if the court subsequently found he violated his probation. “A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles.” (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, “[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” [Citations.] [Citation.] “The mutual intention to which the courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances

under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. . . . [Citations.]’ ” (*Ibid.*)

Applying the foregoing contract principles, the language of the plea agreement in the present case expressly stated that defendant would receive a maximum punishment of three years in state prison in exchange for “no initial state prison.” The agreement is clear and defendant received the benefit of the bargain.

Defendant has gained a substantial benefit from the plea agreement and he cannot now “come back and renege on his side of the bargain by challenging the very terms to which he agreed. [Citation.]” (*People v. Jones* (1989) 210 Cal.App.3d 124, 133.) When a defendant has pleaded guilty in return “for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction.” (*People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*)). “ ‘When a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.’ ” (*Ibid.*)

Here, there is no dispute that the trial court had fundamental jurisdiction over defendant. “Lack of fundamental jurisdiction means an entire absence of power to hear or determine the case, such as a lack of jurisdiction over the subject matter or the parties.” (*In re Wright* (2005) 128 Cal.App.4th 663, 673.) The court clearly had jurisdiction over both the subject matter and the parties, and defendant does not contend otherwise.

Defendant’s argument is that his sentence is too harsh under the amendment to section 484g, subdivision (a). He emphasizes that *Hester* involved a situation where the plea agreement contained a specific sentence, but in the

present case the agreement did not contain a specified sentence. He thus insists that the present case is distinguishable from *Hester, supra*, 22 Cal.4th 290 and estoppel should not apply.

Our Supreme Court in *People v. Shelton, supra*, 37 Cal.4th 759 makes it clear that we apply contract principles when interpreting a plea agreement. “Thus, the specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term.” (*Id.* at p. 768.) In the present case, it is not significant that the agreement specified a maximum sentence rather than a specific sentence, because the rationale underlying the decision in *Hester, supra*, 22 Cal.4th 290 applies with equal force here: “[D]efendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*Id.* at p. 295.)

Defendant is estopped from challenging his sentence because he admitted to the crime and enhancement and agreed to accept the lid of a three-year sentence in exchange for receiving probation. He received the benefit of his bargain, and cannot now challenge the sentence given to him pursuant to the terms of the agreement.

II. Ineffective Assistance of Trial Counsel

Defendant argues that his trial counsel’s failure to raise the issue of retroactivity at sentencing constituted ineffective assistance of counsel.

A reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) A defendant claiming ineffective assistance of counsel in violation of his or her Sixth Amendment right to counsel must first show that “ ‘counsel’s

representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ ” (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, quoting *Strickland*, at p. 688.) “Second, defendant must show that the inadequacy was prejudicial, that is, ‘ “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” ’ (*People v. Ledesma, supra*, at pp. 217-218, quoting *Strickland . . .*, at p. 694)” (*People v. Diaz* (1992) 3 Cal.4th 495, 557.)

Moreover, “[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions. [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) “When a claim of ineffective assistance [of counsel] is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Here, defendant cannot demonstrate that trial counsel’s actions were not reasonable or that the failure to argue the retroactive application of the statute prejudiced him. Trial counsel’s failure to argue retroactivity did not fall below an objective standard of reasonableness as defendant had agreed to a three-year term in his plea agreement. As already discussed, defendant was estopped from arguing that the sentence was unauthorized after he had accepted and received the benefit of the plea agreement.

III. Conduct Credits

A. Background

The trial court determined that defendant had 515 actual custody credits. Defendant contends that under amended sections 4019 and 2933, he is entitled to day-for-day credits in the amount of 515, for a total of 1,030 pre-sentence credits. Defendant maintains that the amended statutes apply retroactively to him. He

concedes that, under the amended statutes, those who were convicted of violent felonies or those previously convicted of serious or violent felonies are excluded from the award of increased credits, but he argues that exclusion does not apply to him because the prosecutor did not plead and prove that he had a prior serious or violent felony. The People respond that defendant has forfeited this issue and that the amended section 2933, subdivision (c) does not apply retroactively.

The complaint filed July 22, 2008, against defendant stated that defendant suffered a prior conviction for violating section 459 “and that a term was served as described in . . . section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term.” On October 6, 2008, defendant initialed and signed the waiver form and admitted the prior conviction, which included a maximum punishment of one year for the prior conviction under section 667.5, subdivision (b).

At the plea hearing on October 6, 2008, the prosecutor stated that defendant had a prior prison commitment and had received a four-year prison sentence. The court asked defendant if he admitted the prior prison conviction and prior prison term as alleged in the complaint and defendant expressly admitted it.

At the sentencing hearing on March 10, 2011, the court stated: “Against [the four-year] term of imprisonment, at this point in time, I’ll find that he has actual custody credits of 312 days. I’m not going to give him day-for-day credit. I know you haven’t made the argument, I know you’re about to, but I think he does have—it’s really not contested. And in some respects, the prior 459 was pled, although not as a first. The defendant admitted suffering that prior burglary conviction, albeit not as a first, and not with specific language disqualifying him from the January 25th, 2010, day-for-day enhanced 4019 credits I’ll call them. [¶] I do note that the complaint in this case to which the defendant pled was filed in July of ‘08, long before the 4019 credits were amended; and the plea was entered in June of ‘09 or shortly before that, before the amendment. I just don’t think

there was a pleading proof requirement for this, for that particular amendment. I understand that issue is currently under review.” The court awarded total credits of 468 days, and continued the matter for defense counsel to investigate whether defendant was owed credits for jail time on a parole violation.

On April 27, 2011, defense counsel advised the court that defendant was already in the Department of Corrections. The court awarded a total of 771 days credits, consisting of 515 actual days and 256 conduct days under section 4019. Defense counsel noted that the court had rejected his argument that defendant should get more than two-thirds credit, and the court replied that defendant had already served “more than two-thirds” of his prison term.

Defendant contends that that the prosecution did not plead or ever prove that defendant’s burglary conviction was a serious or violent felony, as there was no showing that it was a conviction for first degree burglary. Without such a showing, defendant maintains that the trial court erred when it did not give him day-for-day credits under amended section 2933, subdivision (e).

B. Forfeiture

The People assert that defendant has forfeited any argument that he is entitled to credits under amended section 2933, subdivision (e), because he failed to move for correction of the record to modify credits in the trial court. The People assert that credits are to be awarded under section 2933 by the California Department of Corrections and Rehabilitation (CDCR), and therefore the trial court is not responsible for calculating or granting credits pursuant to this provision. The People claim that these credits fall within the purview of the CDCR and therefore any objections to credits were waived by defendant’s failure to make them below.

The People, however, never allege on appeal that there was any error because the superior court, rather than the CDCR, made the award of credits. Additionally, the People do not seek to vacate the award of credits. We therefore reject the People’s argument that the trial court did not have the authority to

determine custody credits.

We also conclude that defendant did raise the issue of conduct credits sufficiently in the trial court to preserve the issue for appeal. As discussed above, the court anticipated defendant's argument regarding the prosecutor's failure to plead and prove the prior conviction at the sentencing hearing on March 10, 2011. The court stated that it did not believe that the prosecution pled or proved defendant's burglary conviction as a serious or violent felony but ruled that there was no pleading or proof requirement for this at the time the complaint was filed, because it was filed prior to the amendment to section 4019. The trial court therefore expressly rejected defendant's argument, and defendant did not forfeit raising this issue on appeal.

C. The Law on the Calculation of Conduct Credits

In 2008, as part of his plea agreement, defendant admitted that he had a prior conviction (§ 667.5, subd. (b)). This occurred well before the amended version of section 4019 was enacted. At that time, section 4019 conduct credits could be accrued at the rate of two days for every four days of actual time served under section 2900.5.

Defendant's probation was revoked in December 2010. In October 2009, the Legislature amended section 4019 to accelerate the pace for accruing custody credits. Effective January 25, 2010, certain defendants received two days of conduct credit for every two days of actual custody credit. (Stats. 2009 (3d Ex. Sess.) ch. 28, § 50.)² However, the enactment exempted every defendant who "was committed for a serious felony, as defined in Section 1192.7, or has a prior

² Senate Bill No. 18 amendments were revoked by another amendment to section 4019 enacted on September 28, 2010. By its express terms, however, this revocation does not apply to defendants who committed their crimes prior to September 28, 2010. (§ 4019, subd. (g).) Further changes were made to custody credit awards by Assembly Bill No. 109, enacted on April 4, 2011, with an operative date of October 1, 2011. By its express terms, however, these amendments do not apply to defendants who committed their crimes prior to October 1, 2011. (§ 4019, subd. (h).)

conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5” (Former § 4019, subs. (b)(2), (c)(2).) If a defendant had a prior serious felony conviction, he continued to earn conduct credit at the rate applicable before the amendments.

Effective September 28, 2010, the Legislature amended section 4019 and 2933. The current version of section 2933 awards earned conduct credits on a day-for-day basis to a prisoner who has been “sentenced to the state prison under Section 1170 for whom the sentence is executed” 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,” except that persons who have a prior serious felony conviction (among others) are not eligible for day-for-day credits under section 2933; instead, they earn six days credit for every four days served under former section 4019. (§§ 2933, subs. (e)(1), (3), 4019, subd. (g), (eff. 9/28/10), 4019, subd. (f) (eff. 1/25/10).)

1. *Retroactivity*

The People contend defendant is not entitled to additional credits and argues that the amendment to section 4019 is not retroactive to crimes committed before its enactment. The Courts of Appeal have decided the issue of retroactively differently and the Supreme Court has granted review to resolve the matter. (E.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.) We have concluded in an earlier decision that retroactive application of the amended version of section 4019 is proper. (*People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808.) For the same reasons already discussed in that decision, until the Supreme Court settles this issue, we conclude that the statute applies retroactively.

2. *Pleading and Proof Requirement*

Defendant does not dispute that the increased conduct rate under the amended section 4019 excludes from its application a defendant previously

convicted of a felony. He argues, however, this exemption applies only if the prosecution pleads or proves that the prior conviction was a serious or violent felony. Defendant acknowledges that he voluntarily pled no contest to a previous burglary conviction and prior prison term enhancement under section 667.5, subdivision (b) but asserts that this enhancement was neither plead nor proven. He maintains that without a showing that his prior robbery was a serious or violent felony pursuant to section 667.5 or 1192.7, it was error for the court to deprive him of the day-for-day credits.

The appellate courts are split on the question of whether a pleading and proof requirement should be read into the January 2010 version of section 4019, as well as the related question of whether a prior conviction allegation may be dismissed in order to permit a defendant to accrue conduct credits at the accelerated rate. Both questions are pending before the California Supreme Court. (See, e.g., *People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted August 31, 2011, S195672; *People v. James* (2011) 196 Cal.App.4th 1102, review granted Aug. 31, 2011, S195512; *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784; *People v. Koontz* (2011) 193 Cal.App.4th 151, review granted May 18, 2011, S192116; *People v. Jones* (2010) 188 Cal.App.4th 165, review granted Dec. 15, 2010, S187135.)

We agree with those courts that have concluded that section 4019 does not contain any requirement that a prior conviction be pled or proved.³ The statute

³ Cases rejecting a pleading and proof requirement include the following: *People v. Fuentes* (Nov. 16, 2010, H035286) (nonpub. opn.); *People v. Smith* (Jan. 14, 2011, E050923) (nonpub. opn.); *People v. Ortiz* (June 10, 2011, A129049) (nonpub. opn.); *People v. Millsap* (July 7, 2011, A130626) (nonpub. opn.); *People v. James, supra*, 196 Cal.App.4th 1102, review granted August 31, 2011, S195512; *People v. Voravongsa, supra*, 197 Cal.App.4th 657, review granted August 31, 2011, S195672; and *People v. D'Ascenzo* (Dec. 7, 2011, A129585) (nonpub. opn.).

Cases requiring pleading and proof include the following: *People v. Jones, supra*, 188 Cal.App.4th 165, review granted December 15, 2010, S187135; *People*

does not contain an express pleading and proof requirement. As the Supreme Court stated in *In re Varnell* (2003) 30 Cal.4th 1132, “ ‘[W]hen a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.’ ” (*Id.* at p. 1141.) Furthermore, it is settled that a sentencing judge can deny probation on the basis of an uncharged, prior serious felony conviction. (*People v. Wiley* (1995) 9 Cal.4th 580, 586-587.) It would be incongruous to permit the court to sentence a defendant to prison due to an uncharged prior conviction but prohibit the sentencing court from calculating custody credits as directed by the January 2010 version of section 4019, unless the prior has been pled and proven.

Accordingly, the prosecution did not need to plead or prove defendant’s prior robbery conviction and the trial court properly denied additional conduct credits.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.

v. Tolbert (Nov. 22, 2010, B221747) (nonpub. opn.); *People v. Koontz*, *supra*, 193 Cal.App.4th 151, review granted May 18, 2011, S192116; and *People v. Lara*, *supra*, 193 Cal.App.4th 1393, review granted May 18, 2011, S192784.