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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN GIDEON,

Defendant and Appellant.

A132690

(Contra Costa County  
Super. Ct. Nos. 032207934,  
050702274)

A jury convicted appellant Nathan Gideon of voluntary manslaughter enhanced by the use of a deadly weapon. He also pled no contest to one count of inflicting corporal injury on a cohabitant in a separate matter. (Former Pen. Code,<sup>1</sup> §§ 192, subd. (a) [as amended by Stats. 1998, ch. 278, § 1, pp. 1228-1229], 273.5, subd. (a) [Stats. 2003, ch. 262, § 1, pp. 2412-2414], 12022, subd. (b)(1) [Stats. 2004, ch. 494, § 3, pp. 4042-4043].) Sentenced to 13 years in state prison for these offenses, he appeals. Gideon contends that (1) he should have been allowed to set aside his no contest plea to the injuring a cohabitant charge when his no contest plea to voluntary manslaughter was set aside after a People’s appeal; and (2) he is entitled to additional credit against his sentence. We order the trial court to modify the abstract of judgment to reflect some additional presentence credit and otherwise affirm the judgment.

<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

## I. FACTS

In March 2006, appellant Nathan Gideon was charged by complaint with murdering his roommate, Stephen Hauser, enhanced by the use of a deadly weapon. (§ 187; former § 12022, subd. (b)(1).) Gideon pled not guilty.

Brandi Archimede was Gideon's sometime girlfriend. In February 2006, he had been violent toward her. In April 2006, a felony complaint charged Gideon with inflicting corporal injury on a cohabitant and dissuading a witness by force or threat. (§ 136.1, subd. (c)(1); former § 273.5, subd. (a).) In May 2006, Gideon pled not guilty to these charges and waived time for conducting a preliminary hearing in this matter.

In February 2007, after a preliminary hearing, Gideon was held to answer for the murder charge and the weapon use enhancement. The domestic violence case was ordered to trail. An information was filed later that month charging Gideon with murder, enhanced by use of a deadly weapon. (§ 187; former § 12022, subd. (b)(1).)

Investigations suggested that both Gideon and Hauser had well-documented mental health histories and that a struggle had occurred at the scene of the crime. In August 2007, plea negotiations began. Ultimately, the prosecution offered to amend the information to add a voluntary manslaughter count. If Gideon would plead guilty to that charge, would admit the deadly weapon use enhancement and would plead guilty to a charge of inflicting injury on a cohabitant, it would agree to a 13-year sentence—11 years for voluntary manslaughter, enhanced by one year for weapon use, and one year for domestic violence. (Former §§ 192, 273.5, 12022, subd. (b)(1).)

In September 2007, defense counsel indicated Gideon's intent to accept the plea offer. Initially, Judge Theresa J. Canepa seemed inclined to accept the plea agreement. However, in October 2007, after a hearing, Judge Canepa declined to approve the proposed plea agreement.

Gideon moved to compel the prosecution to abide by the terms of the plea agreement. In February 2009, Judge Mary Ann O'Malley granted his motion for specific performance. Gideon pled no contest to voluntary manslaughter enhanced by weapon use and to inflicting corporal injury on a cohabitant. (Former § 192.) Judgment was

entered imposing a 13-year sentence according to the terms of the plea agreement, prompting a People’s appeal. One part of this 13-year term was a one-year consecutive term imposed for inflicting corporal injury on a cohabitant. The dissuading charge in the domestic violence case was dismissed.

In January 2010, we concluded that Judge O’Malley had no power to override Judge Canepa’s rejection of the proposed plea agreement on the voluntary manslaughter case. We reversed the judgment, including the sentence, and remanded the matter to the trial court for further proceedings. (*People v. Gideon* (Jan. 29, 2010, mod. Feb.11, 2010, A124694) [nonpub. opn.].)<sup>2</sup> Our final remittitur issued in this matter on April 2, 2010. In response to our decision, the trial court set aside Gideon’s no contest plea to voluntary manslaughter and reinstated the murder charge. He pled not guilty to murder and voluntary manslaughter, and denied the enhancement allegation. No similar action was taken on his no contest plea to the domestic violence charge.

Later in April 2010, Gideon sought to vacate the sentence in the domestic violence case. In July 2010, he moved to withdraw his no contest plea in that matter. In December 2010, he filed a petition for writ of error *coram nobis*. Gideon argued that he entered his no contest plea under the mistaken belief that his plea would not be appealed; if he had known that his voluntary manslaughter plea would be vacated, he would not have pled no contest to the domestic violence charge in the unrelated case. He reasoned that our 2010 decision required the trial court to allow him to withdraw his no contest plea to the domestic violence charge as well as his no contest plea in the voluntary manslaughter case. The trial court issued an order to show cause on the petition, prompting a People’s return on Gideon’s reply.

In February 2011, the trial court—after a hearing—denied the petition for a writ of *coram nobis*. It ruled that the People had only appealed—and our decision had only reversed—the voluntary manslaughter conviction, not the conviction for inflicting injury on a cohabitant based on Gideon’s no contest plea to that unrelated, unconsolidated

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<sup>2</sup> We take judicial notice of the record of Gideon’s prior appeal. (See Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

charge. The trial court concluded that the domestic violence conviction remain final, even after our 2010 decision in the People’s appeal.

Gideon was tried on the Hauser murder charge and in April 2011, he was found guilty of the lesser included offense of voluntary manslaughter. The jury also found the deadly weapon enhancement allegation to be true.

In June 2011, the trial court set aside the sentence previously imposed in the domestic violence matter. Based on the April 2011 voluntary manslaughter verdict and Gideon’s February 2009 domestic violence plea, the trial court again sentenced him to 13 years in state prison—11 years for voluntary manslaughter, one year for the weapon enhancement and a consecutive one-year term for inflicting corporal injury. (Former §§ 192, subd. (a), 273.5, subd. (a), 12022, subd. (b)(1).) He was awarded 2,180 days of presentence credit against his prison term—1,896 days of custody credit and 284 days of conduct credit.

## II. WITHDRAWAL OF PLEA

Gideon contends that the trial court erred by failing to set aside his no contest plea on the domestic violence charge. His various arguments are based on a single premise—that his no contest plea was invalidated by our 2010 decision. He reasons that that decision compelled the trial court to permit him to withdraw his no contest pleas to both the voluntary manslaughter and domestic violence charges.

Gideon’s claim of error challenges the validity of his no contest plea to inflicting injury on a cohabitant. (See, e.g., *People v. Placencia* (2011) 194 Cal.App.4th 489, 494.) He failed to obtain the certificate of probable cause required to entitle him to raise such a challenge on appeal. A criminal defendant may not appeal from a judgment entered after a no contest plea unless he or she files a written statement showing reasonable constitutional, jurisdictional or other grounds going to the legality of the proceeding, and the trial court files a certificate of probable cause for the appeal. (§ 1237.5; see *People v. Hoffard* (1995) 10 Cal.4th 1170, 1176 [guilty plea].)

Gideon argues that this provision does not apply to his case because his issues pertain to events arising after his 2009 plea—our 2010 decision, his 2010 motion to

withdraw his plea, and his 2010 petition for writ of error *coram nobis*. We disagree. All issues challenging the validity of a plea require a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) The crucial issue is *what* the defendant challenges, not *when* the challenge arises. (*Ibid.*; *People v. Ribero* (1971) 4 Cal.3d 55, 63; *People v. Placencia, supra*, 194 Cal.App.4th at p. 494.)

For example, a certificate of probable cause is required when the defendant claims that the plea was induced by fundamental misrepresentations (*People v. Panizzon, supra*, 13 Cal.4th at p. 76); on appeal from the denial of a motion to withdraw a no contest plea, even though that motion involves a proceeding arising after entry of the plea (*People v. Johnson* (2009) 47 Cal.4th 668, 679 [guilty plea]); *People v. Ribero, supra*, 4 Cal.3d at p. 63); on appeal from the denial of a petition for writ of error *coram nobis* (*People v. Chew* (1971) 16 Cal.App.3d 254, 256-258); or when the appeal challenges a sentence imposed after a no contest plea (*People v. Panizzon, supra*, 13 Cal.4th at p. 76). The logic of these cases compels the conclusion that his challenge to the validity of the plea is barred because he failed to obtain a certificate of probable cause.<sup>3</sup>

### III. CREDITS

#### A. Conduct Credit

A defendant who serves time in prison for a nonviolent felony earns a day of conduct credit for every day of actual time served—in essence, 50 percent credit. (Former § 2933, subd. (b) [Stats. 2010, ch. 426, § 1].) By contrast, one convicted of a violent felony accrues conduct credit at a maximum rate of 15 percent of custody credit. (§ 2933.1, subd. (a); *People v. Baker* (2002) 144 Cal.App.4th 1320, 1325.) For purposes of determining whether the 15 or 50 percent rate applies, voluntary manslaughter is deemed to be a violent felony, but inflicting corporal injury on a cohabitant is not. (Former §§ 273.5, subd. (a), 667.5, subd. (c)(1) [Stats. 2002, ch. 606, § 2, pp. 3384-

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<sup>3</sup> If Gideon had obtained a certificate of probable cause and we addressed the merits of his claim of error, we would uphold the trial court's action. It properly determined that our 2010 decision allowing him to withdraw his guilty plea in the voluntary manslaughter case (case No. 050702274) did not undermine the validity of the no contest plea in the unrelated domestic violence matter (case No. 032207934).

3387]; § 2933.1, subd. (a).) In June 2011, Gideon sought an award of 50 percent credit against his term for inflicting injury on a cohabitant. Instead, the trial court awarded him conduct credit at a 15 percent rate against the 13-year sentence it imposed for voluntary manslaughter and inflicting injury on a cohabitant.<sup>4</sup> (See former § 273.5, subd. (a); § 2933.1.)

On appeal, Gideon argues that if we uphold his conviction for inflicting corporal injury on a cohabitant, he is entitled to day-for-day conduct credit for each day of custody served in prison for this conviction. He reasons that because he served prison time while the outcome of the murder charge was still pending, and because inflicting injury on a cohabitant offense is a nonviolent offense for purposes of calculating the rate of in-prison conduct credit, we must assume that the prison time he served before his June 2011 sentencing pertained to the conviction for inflicting corporal injury on a cohabitant.

Gideon was committed to state prison in February 2009 on his original sentence for voluntary manslaughter and inflicting corporal injury on a cohabitant. The People's appeal of his voluntary manslaughter conviction based on his no contest plea did not stay his sentence until the judgment was reversed. (§ 1242.) By the time our decision in that matter became final in April 2010, he had already served a year in state prison. In June 2011, the trial court set aside the sentence originally imposed in the domestic violence matter and sentenced Gideon anew to a total term of 13 years for both matters.

In essence, Gideon argues that service of the nonviolent inflicting injury conviction preceded the jury's voluntary manslaughter conviction, entitling him to conduct credit at the 50 percent rate—the rate for nonviolent felonies—against his overall term. We disagree. The 15 percent limit on conduct credits applies to the offender, not the offense. (*People v. Nunez* (2008) 167 Cal.App.4th 761, 765; *People v. Ramos* (1996)

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<sup>4</sup> If a certificate of probable cause is required as to some issues but not others, and the defendant has not obtained a certificate of probable cause, we may address the noncertificate issues. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1099-1100.) No certificate of probable cause is required to raise this credits issue because the alleged errors occurred at sentencing and assumes the validity of the no contest plea. (See *People v. Kaanehe* (1977) 19 Cal.3d 1, 8.)

50 Cal.App.4th 810, 817.) An “offender serving a sentence that combines *consecutive* terms for violent and nonviolent offenses is subject to the [15 percent] credit restriction” of section 2933.1, subdivision (a). (*In re Reeves* (2005) 35 Cal.4th 765, 772; *People v. Nunez, supra*, 167 Cal.App.4th at p. 765.) This is so because multiple determinate terms for multiple convictions *merge* into a *single, aggregate term* of imprisonment, whether or not the consecutive terms arose from the same or different proceedings. (Former § 1170.1, subd. (a) [Stats. 2002, ch. 126, § 1, pp. 690-692]; *In re Reeves, supra*, 35 Cal.4th at pp. 772-773; *People v. Nunez, supra*, 167 Cal.App.4th at pp. 765-766.) Thus, when an aggregate term includes time for a violent offense, the prisoner is deemed to be convicted of a violent felony and serving time for that violent felony “at any point during that term . . . .” (*In re Reeves, supra*, 35 Cal.4th at p. 773.)

Gideon’s June 2011 sentence for both a violent and nonviolent offense constituted a single, aggregate term. The fact that he spent some time in prison on this term before it was imposed does not alter the rate of conduct credits he is due. When an offender spends time in custody after his or her convictions have been reversed on appeal, the credit accrual is to be calculated according to the defendant’s ultimate postsentence status. (*In re Martinez* (2003) 30 Cal.4th 29, 31, 34-37.)

This does not create an unfair result. The jury’s ultimate voluntary manslaughter verdict confirms that Gideon’s initial conviction of that offense based on his no contest plea, “although procedurally invalid, was not without legal basis.” (*In re Martinez, supra*, 30 Cal.4th at p. 37.) The trial court properly applied the 15 percent statutory limit on conduct credits even though the nonviolent inflicting injury on a cohabitant conviction predated the voluntary manslaughter violent felony conviction. (See *People v. Baker, supra*, 144 Cal.App.4th at pp. 1327-1328.)

#### B. *Calculation of Credit*

Finally, Gideon contends that he must be credited with 2,201 days of presentence credit—1,914 days of custody credit and 287 days of conduct credit. The trial court awarded him only 2,180 days of credit—1,896 days of custody credit and 284 days of conduct credit. This calculation was calculated based on the time between Gideon’s

March 22, 2006 arrest and a May 27, 2011 anticipated sentencing date. In fact, he was sentenced in June 2011. At the time of the June 2011 sentencing, Gideon had served 1,914 days in custody, which he now claims entitles him to additional days of credit.<sup>5</sup>

The Attorney General concedes that the calculation reflected in the abstract of judgment was incorrect and we agree. Crediting Gideon with 1,914 days of custody credit and 287 days of conduct credits at a rate of 15 percent, we conclude that he is entitled to a total of 2,201 days of presentence credit against his prison term.

The matter is remanded to the trial court, which is ordered to amend the abstract of judgment to reflect the correct sentencing credits, consistent with this opinion. As so modified, the judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J,

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Sepulveda, J.\*

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<sup>5</sup> Gideon sought correction in the trial court. The People advise us that the trial court has not ruled on this matter. (See § 1237.1.)

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.