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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**THOMAS D. HAGBERG,**

**Defendant and Appellant.**

**A133725**

**(Sonoma County  
Super. Ct. No. SCR557712)**

Defendant Thomas D. Hagberg (appellant) appeals his conviction following a no contest plea to failing to file a change of residence address (Pen. Code, § 290.013, subd. (a))<sup>1</sup> and admission of a prior strike conviction (§ 1170.12). He was sentenced to four years in state prison. His counsel has advised that examination of the record reveals no arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant has filed a supplemental brief on appeal. We conclude the court's sentencing determination was erroneous. The judgment is otherwise affirmed.

**BACKGROUND**

In September 2002, appellant was convicted of assault with intent to commit rape (§ 220), an offense subjecting him to lifetime annual registration as a sex offender pursuant to section 290. His last annual registration occurred in May 2008.

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<sup>1</sup> All undesignated section references are to the Penal Code.

On March 9, 2009, appellant was arrested in Reno, Nevada and booked into the Washoe County jail for misdemeanor trespassing. During the booking, he gave a Reno address as his current address. As a result of appellant's failure to register the change of address, a felony complaint was filed on March 10, 2009. A second amended complaint (SAC) was filed on August 27, 2009, charging him with: failing to file a change of residence address (§ 290.13, subd. (a); count 1); failure to register at all addresses where he resides (§ 290.010; count 2); and failure to provide registration information following his release from confinement (§ 290.015, subd. (a); count 3). The SAC also alleged 11 prior strike convictions (§ 1170.12) and a prior prison term (§ 667.5, subd. (b)). Appellant pled not guilty and denied the enhancement allegations.

On May 12, 2009, proceedings were suspended after appellant was found mentally incompetent to stand trial and committed to Napa State Hospital (NSH). In August 2009, proceedings were reinstated after he was found competent to stand trial. On February 25, 2010, proceedings were again suspended after appellant was found incompetent to stand trial; he was thereafter committed to NSH. On May 21, he was found competent to stand trial and proceedings were reinstated. On October 19, 2010, proceedings were again suspended after he was found incompetent to stand trial; the court ordered the involuntary administration of antipsychotic medication. On November 16, 2010, appellant was again committed to NSH. On January 5, 2011, proceedings were reinstated after he was found competent to stand trial.

On February 22, 2011, pursuant to a negotiated disposition, appellant withdrew his not guilty plea and pled no contest to the count 1 violation of section 290.013, subdivision (a) and admitted one prior strike conviction for violation of section 422. In exchange, the remaining charges and enhancements were dismissed, probation was denied and he agreed to a four-year prison term. Appellant's change of plea form also stated that he understood that the following were consequences of his plea: "Mandatory prison" and "Reduced conduct credits [¶] ii. Prior Strike(s) (no credit to max. 20%)." At the change of plea hearing, defense counsel stated that the parties had stipulated to a four-year prison term.

On April 13, 2011, the court granted the motion of appellant's retained counsel, Kevin McConnell, to withdraw as attorney of record due to a conflict of interest between him and appellant. New counsel, C. Davis, was appointed for appellant on that date.

On May 2, 2011, appellant's *Marsden* motion<sup>2</sup> regarding Davis was denied.

On June 6, 2011, appellant's peremptory challenge of the court (Judge Robert M. Laforge; Code Civ. Proc., § 170.6) was denied as untimely.

On July 20, 2011, appellant substituted retained counsel Erik Bruce as his attorney of record.

On September 27, 2011, the probation department calculated appellant's presentence credits from March 12, 2009 to October 19, 2011 as follows: "Actual: 651 [¶] Conduct: 324 (per 2933(e)(3) PC, due to prior serious felony) [¶] Hospital: 189 [¶] Total: 1164 days."

On October 11, 2011, appellant wrote to the court: "[M]y plea deal sentence is 1168 days which is 80 [percent] of 4 years. On Wednesday the 19th my credit for time served . . . will be 1166 days so I will have only 2 days to go and will get out on Friday October 21st."

On October 19, 2011, appellant was sentenced to four years in state prison (the two-year midterm doubled pursuant to section 1170.12. The court imposed a \$200 restitution fine (§ 1202.4), a \$200 parole revocation fine, suspended unless parole is revoked (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)(1)), and ordered him to provide blood and saliva samples (§ 296.) The court stated appellant was entitled to 1,164 days of credit. Defense counsel noted he disagreed with appellant's credits calculation and asked the court to resolve the dispute. The court said appellant would be released on October 22 when he will have "served his entire sentence." The court granted the People's motion to dismiss a trailing matter due to appellant's having "fulfilled the maximum amount of time." As calculated by the probation department, appellant was awarded 651 days of actual credit, 324 days of conduct credit, and 189

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

days of hospital credit, for a total of 1,164 days of presentence custody credits. The October 20 abstract of judgment states that defendant was awarded 1164 days of credit for time spent in custody including 651 days of actual time credits and 324 days of local conduct credit. However, it does not mention the court's award of 189 days of hospital credit.

On October 24, 2011, appellant advised the court that he had not been released from jail and requested his release from custody.

On October 26, 2011, at a hearing to "clarify" appellant's credits, the court stated there were two options. Appellant's sentence could be deemed served based on the credits calculation and he could be released on parole or he could be required to serve 80 percent of his four-year stipulated term. The court also stated, "I know you've had conversations with your attorney about the credit situation. Your attorney is actually absolutely correct in his interpretation, and my understanding when I was looking at the credits last week of 80 percent, would have been 1,168 days. But that's actual time. The credits that were listed by probation in the credit report or the supplemental report listed conduct credits as well. Those conduct credits do not count toward[ ] that 80 percent actual time. So you are not in completion of your 4 year sentence at this point and actually there's a couple hundred days left to be served."

Appellant then stated he wished to withdraw his plea; the court did not address the request. The minute order from the October 26, 2011 hearing states "court addresses credits, credits to remain the same." No amended abstract of judgment was filed following the October 26 hearing and the record before us does not reveal the exact number of days the court concluded appellant had left to serve.

On November 7, 2011, appellant filed his notice of appeal and obtained a certificate of probable cause.

## DISCUSSION

Pursuant to section 2900.5, a defendant convicted of a felony is entitled to credit against a state prison term, or against any fine imposed, for actual time spent in custody before commencement of the prison sentence so long as the presentence custody is

attributable to the conduct that led to the conviction. (*People v. Duff* (2010) 50 Cal.4th 787, 793 (*Duff*); Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2011) § 37.55, pp. 1137-1138.) “In custody,” includes, but is not limited to “any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, *hospital*, prison, juvenile detention facility, or similar residential institution[.]” (§ 2900.5, subd. (a); italics added.) As in the case of appellant, pursuant to section 2900.5, a defendant who is found incompetent to stand trial, but recovers his competency and is convicted, is entitled to actual custody credit against his sentence for pretrial custody in a state hospital after the finding of incompetency. (*People v. Callahan* (2006) 144 Cal.App.4th 678, 684-685 (*Callahan*).

Additional credit may be earned, based upon the defendant’s work and good conduct during presentence incarceration. (§§ 2900.5, subd. (a), 4019.) This presentence credit is referred to as conduct credit. (*Duff, supra*, 50 Cal.4th at p. 793.) Such presentence work and conduct credit is not awarded for time spent in state hospitals. (*People v. Waterman* (1986) 42 Cal.3d 565, 571 (*Waterman*); *Callahan, supra*, 144 Cal.App.4th at p. 682.)

Once a person begins serving his sentence, he may earn worktime credit for participating in prison work and training programs during his postsentence incarceration. (§ 2933; *Duff, supra*, 50 Cal.4th at p. 794; *People v. Buckhalter* (2001) 26 Cal.4th 20, 31 (*Buckhalter*)). As relevant here, a person, such as appellant, serving a sentence under the Three Strikes law, cannot earn postsentence prison worktime credits under section 2933 exceeding 20 percent of his total sentence. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5); *Buckhalter*, at p. 32.) However, “restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing. . . . [W]hen limiting the credit rights of offenders sentenced thereunder, the Three Strikes law (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5)) expressly refers only to ‘postsentence . . . credits,’ . . . and ‘does not address *presentence* . . . credits’ for Three Strikes defendants [citation].” (*Buckhalter*, at p. 32.)

We informed the parties that the trial court's conclusion at the October 26, 2011 hearing that appellant had not completed his four-year stipulated sentence because he was required to serve 80 percent of his sentence and his presentence conduct credits "do not count towards that 80 percent actual time" presents an arguable sentencing issue and invited them to provide supplemental briefing thereon.

Defense counsel's supplemental brief contends there is no statutory or decisional authority for the court's conclusion that appellant's presentence conduct credits do not count toward his four-year stipulated sentence. Defense counsel correctly asserts that because of appellant's prior strike, his *postsentence* conduct credits could not exceed 20 percent of his total term of imprisonment, but this restriction on postsentence credit did not preclude his earning presentence conduct credit. (*Buckhalter, supra*, 26 Cal.4th at p. 32.) Defense counsel asserts that at the October 26, 2011 hearing to clarify appellant's credits the trial court "conflated appellant's entitlement to postsentence credits and the length of his sentence with the award of presentence credit and the reduction of his sentence without restriction to the extent of his presentence custody credit earned and awarded." Defense counsel argues that appellant was entitled to all of the presentence custody credit he earned and his sentence should have been reduced by the amount of presentence custody credit awarded. He contends that as a result of the court's erroneous failure to grant this credit, his release from custody may have been delayed and his motion to withdraw his plea was erroneously denied.

In a supplemental brief, the Attorney General contends the trial court's conclusion that appellant still had to serve "nearly 200 days" toward his four-year sentence was correct, but its reasoning was wrong. She argues the probation department's presentence credits calculation erroneously included the 189 days of hospital time during which defendant was confined at NSH after being found incompetent to stand trial. Although she correctly asserts hospital time cannot generate conduct credit, she argues, with no citation of authority, that time spent in hospital confinement cannot be applied to actual custody credit. Thus, she argues appellant was not entitled to actual custody credit or

conduct credit for the 189 days he spent at NSH, and appellant had to serve an additional 189 days before he could be released. The Attorney General's argument is misplaced.

The probation department's credits calculation stated that appellant was entitled to 1,164 days of presentence credit as follows: 651 actual days, 324 conduct days and 189 hospital days. It is clear from the credits calculation statement that the 189 hospital days were actual days of hospital time, counted in addition to the actual days of jail time. And, there is no indication that those 189 hospital days were included in the 324 conduct days enumerated in the calculation statement. As we noted previously, a defendant, such as appellant, who is found incompetent to stand trial, but recovers his competency and is convicted, is entitled to actual custody credit against his sentence for pretrial custody in a state hospital after the finding of incompetency. (*Callahan, supra*, 144 Cal.App.4th at p. 681.) Thus, appellant was entitled to the 189 days of actual presentence time spent in NSH.

The Attorney General does not otherwise object to the 1,164 days of presentence custody credits awarded up to the October 19, 2011 sentencing hearing. And the court's minute order from the October 26 hearing states "court addresses credits, credits to remain the same." Based on the record before us, it appears appellant was properly awarded 1,164 of presentence credit as of October 19, and was entitled to release from custody upon service of 1,168 days. Thus, the court's determination that appellant had to serve "nearly 200 [additional] days" was erroneous, and he is entitled to immediate release from custody.

#### *Appellant's Supplemental Brief*

In his supplemental brief, appellant makes three claims which he asserts should result in dismissal of his case. First, at his "first arraignment," no public defender was present in violation of his right to counsel and he was not arraigned within 48 hours. Second, at an "April 24" preliminary hearing, he was unrepresented by counsel in violation of his right to counsel and the district attorney requested him to submit to a competency examination for the purpose of delaying the preliminary hearing. Third, his

three competency examination interviews were each only 10 minutes long, instead of at least 30 minutes as required by law.

Because appellant's claims are neither supported by citation to the appellate record or by legal authority we will consider them waived. (Cal. Rules of Court, rules 8.204(a)(1)(B) & (C); 8.360(a); *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799-801; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.)

#### DISPOSITION

The sentencing court's October 26, 2011 determination that appellant was required to serve an additional "couple hundred days" is reversed and remanded to the court with directions to apply the 1,164 days of presentence credit previously awarded, order appellant's immediate release from custody due to his having served his four-year prison term, prepare an amended abstract of judgment properly reflecting the award of presentence credits and forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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SIMONS, Acting P.J.

We concur.

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NEEDHAM, J.

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BRUINIERS, J.