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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. VINCENT EDWARD CALLAHAN, Defendant and Appellant.	A135264 (Napa County Super. Ct. No. CR160511)

Vincent Edward Callahan appeals from the trial court's denial of presentence custody credits following his conviction. Defendant's appointed counsel raises no issues and asks this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Defendant was notified of his right to file a supplemental brief, but has not done so. We find no arguable issues and affirm the judgment.

BACKGROUND

In March 2012, defendant was charged by information filed by the Napa County District Attorney with exhibiting a deadly weapon to a police officer to resist arrest (Pen. Code, § 417.8[1]), which was accompanied by a special allegation that he had suffered a previous serious or violent felony conviction, or "strike." (§ 667, subds. (b)-(i)).

[1] Subsequent statutory citations herein are to the Penal Code unless indicated otherwise.

According to the probation department report contained in the record, defendant was involved in several criminal matters prior to the present case,[2] including the following:

In 1984, defendant was arrested while on probation for violations of sections 664 (punishment for unsuccessful attempt to commit crime) and 211 (robbery). Ultimately, he was convicted, his probation was revoked, and he was sentenced to 10 years in state prison. This was the basis for the prior strike charge in the present case.

In 1993, defendant was convicted of a felony violation of Health and Safety Code section 11350 (possession of a controlled substance). He received four years probation and a one-year jail term.

In 1995, defendant was arrested and charged with violating Health and Safety Code, section 11377 subdivision (a) (possession of a controlled substance). Defendant was admitted to a state mental facility in accordance with section 1370 until he was found competent to stand trial. He pleaded not guilty by reason of insanity, was detained pursuant to section 1026, and, in 1997, was transferred to Napa State Hospital (NSH).

In 2006, defendant was convicted of a felony violation of section 245, subdivision (a)(1) (assault with a deadly weapon or instrument other than a firearm or by any means of force likely produce great bodily injury) (former § 245, subd. (a)(1), Stats 2004, ch. 494, § 1), sentenced to three years' summary probation, and ordered detained at NSH pursuant to section 1026.

In the present case, defendant was arrested at NSH, then held in custody at the Napa County Department of Corrections. He pleaded not guilty and denied the special allegation. The court set bail at $150,000. It subsequently denied defendant's request to be housed at NSH pending trial based on its review of the probation department's bail report, and ordered bail remain as previously set.

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[2] As we will discuss, defendant was involved in a previous appellate case, *People v. Callahan* (2006) 144 Cal.App.4th 678 (*Callahan*). That case's recitation of defendant's criminal history is slightly different than what we recite herein from the probation department report, but not in any way material to the issues presented by his appeal.

At the preliminary hearing, the testimony of two NSH officers together indicated that on November 29, 2011, defendant, while committed to NSH, exhibited two sharpened pieces from a pair of eyeglasses at an officer in the course of the officer's arrest of another NSH patient. Based on that testimony, the court found there was sufficient evidence to hold defendant to answer the charge. At arraignment, defendant again pleaded not guilty and denied the prior strike allegation.

Defendant subsequently changed his plea to no contest and admitted the prior strike allegation was true. On his plea form, defendant indicated that he was promised a sentence of two years, doubled to four years based upon his admission that the prior strike allegation was true. He also indicated that he was promised he would receive 48 days of "actual days, day for day credit until sent to CDC."

Upon a finding that defendant's plea was freely and voluntarily entered, that there was a factual basis for the plea, and that he made an intelligent waiver of his trial rights, the court accepted defendant's change of plea. Defendant was convicted of violating section 417.8. subject to a sentence enhancement because of his prior strike.

The court referred the case to the probation department for a report pursuant to section 1203, subdivision (c). That report stated that defendant was not entitled to presentence custody credits because he was previously committed to NSH pursuant to section 1026. The court subsequently sentenced defendant to a four-year term. The record indicates the court did not award any presentence custody credits.[3]

Defendant filed a timely notice of appeal specifically challenging the court's denial of "time credits," an apparent reference to presentence custody credits.

DISCUSSION

Having independently reviewed the entire record, we find no arguable issues.

As we have mentioned, defendant has appealed from the trial court's denial of presentence custody credits. The award of such credits is governed by section 2900.5, which provides that in all felony and misdemeanor convictions, when the defendant is in

[3] The record does not include a transcript of the April 11, 2012 sentencing hearing, but does include a minute order from the hearing and an abstract of judgment.

custody, including in jail, all days of custody shall be credited to the defendant's term of imprisonment. (§ 2900.5, subd. (a).) However, a defendant is only credited for custody "attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).)

The California Supreme Court has recognized the purposes for awarding presentence custody credits include: "(1) eliminating the unequal treatment suffered by indigent defendants who, because of their inability to post bail, serve a longer overall confinement for a given offense than their wealthier counterparts [citation], and (2) equalizing the actual time served in custody by defendants convicted of the same offense . . . ." (*In re Joyner* (1989) 48 Cal.3d 487, 494.) Accordingly, " '[t]he crucial element of [section 2900.5] is not where or under what conditions the defendant has been deprived of his liberty,' " but whether the custody is attributable to proceedings related to the same conduct for which the defendant has been convicted. (*In re Rojas* (1979) 23 Cal.3d 152, 156 (*Rojas*) [regarding a previous version of section 2900.5, subdivision (b) of similar import].)

In other words, "a prisoner is not entitled to credit for his 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." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Thus, when a defendant is already incarcerated and serving a sentence for a prior offense and is charged with the second offense, "deprivation [of his liberty] cannot be attributed to the second offense" as required by section 2900.5. (*Rojas*, *supra*, 23 Cal.3d at p. 156.)

The same is true when the defendant is subject to an insanity commitment pursuant to section 1026, rather than incarcerated due to a prior offense, as Division One of this district determined regarding this defendant's circumstances in a previous case. (*Callahan*, *supra*, 144 Cal.App.4th at pp. 683-684, 686 [denying custody credits to defendant for, among other things, his time spent in jail pending the outcome of new charges, when he was already committed to NSH pursuant to section 1026].) The *Callahan* court rejected defendant's argument that the strict causation rule of *Bruner*,

Joyner, and *Rojas* did not apply because the prior deprivation of defendant's liberty was due to a civil sanity commitment, not a criminal sentence:

"This is a distinction without a difference. The question is not the *type* of liberty deprivation, but the *fact* of the liberty deprivation itself. Logically, the key question is whether defendant would have been free if he had sufficient funds to make bail on the new criminal charge. If he would have remained in custody in a case, *regardless of the characterization of that custody as criminal or civil*, he is simply not entitled to actual custody credit." (*Callahan*, *supra*, 144 Cal.App.4th at p. 686.)

At the time of his arrest on the charges brought in the current case, defendant was committed to NSH pursuant to section 1026 because of prior matters unrelated to the present case. Therefore, the presentence custody credits provided for in section 2900.5 were not available to him. (*Callahan*, *supra*, 144 Cal.App.4th at p. 686.)

DISPOSITION

Our independent review of the record reveals no arguable issues and, accordingly, we affirm the judgment.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.