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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.**

**RODGER KEVIN BLACK ,**

**Defendant and Appellant.**

**A135483**

**(Napa County  
Super. Ct. No. CR149537)**

Defendant Rodger Kevin Black appeals from an order sentencing him to prison following a violation of probation. He contends: (1) the court should have limited his prior waiver of presentence credits to a total of 180 days, the amount he agreed to; and (2) portions of his sentence must be stayed under Penal Code section 654.<sup>1</sup> We agree with the first contention and the Attorney General concedes the second.

**I. BACKGROUND**

Defendant took two containers of weed killer from a store without paying for them and attempted to punch the store's security officer when confronted. He pled no contest to second degree robbery, petty theft with a prior and second degree commercial burglary, in exchange for a dismissal of counts relating to a different incident and a prison prior term enhancement allegation. (§§ 211, 666, 459, 667.5, subd. (b).)

At the initial sentencing hearing held on February 16, 2010, the court placed defendant on three years formal probation subject to various terms and conditions,

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<sup>1</sup> Further statutory references are to the Penal Code.

including the completion of a residential treatment program and the service of 364 days in jail. The probation officer was given the authority to release defendant from jail for participation in a treatment program. Defendant had at that time served 44 actual days in local custody.

On January 5, 2011, defendant's probation was revoked and reinstated after he admitted a violation. He was ordered to serve 180 days in jail, and was given credit for 72 actual days in local custody plus 36 days in conduct credits.

On March 16, 2011, defendant admitted a second probation violation. Due to concerns about the time remaining to place defendant in a residential treatment program, defense counsel advised the court, "Your Honor, the status is that Mr. Black is prepared to admit the violation of probation with the understanding that probation will be simply revoked and reinstated. . . . [H]e would be waiving 180 days total worth of time credits so probation has enough time to place him in the program." The court inquired, "So he's waiving 180 days of prior credits?" and defense counsel responded affirmatively. In accepting defendant's admission to the probation violation, the following colloquy ensued, "THE COURT: Mr. Black, at this time, do you waive your right to credit, 180 days of jail you served so far? [¶] DEFENDANT: Yes, sir. [¶] THE COURT: You understand you can't get that back later on, that's going to be credit that you will not receive in the future? [¶] DEFENDANT: I understand."

On February 29, 2012, defendant's probation was revoked after he admitted a third violation with the understanding that he would be sentenced to prison, but for no more than two years. At sentencing, defense counsel expressed concern about the number of credits calculated by the probation officer. In addition to concerns about the accuracy of the dates that defendant had been in custody, counsel noted that the probation officer had applied the previous waiver of 180 days credit by deducting those days from the actual time served and then adding on to the remaining days the conduct credits to which the defendant was entitled. This meant that defendant was deprived of both 180 days actual time and the conduct credits he would otherwise have been entitled to for those 180 days. Counsel argued that the waiver should be construed to require a deduction of 180 days

from defendant's total presentence credits (actual and conduct credits combined), which would result in a greater number of total credits.

Although the court was initially sympathetic to this argument, it ultimately ruled that the probation officer's method of calculating the credits under the time waiver was correct. It noted that the minute order from the hearing at which the credits waiver was taken states, "Defendant waives 180 days of actual time." Based on the minute order, the court concluded that defendant had waived 180 days of actual time, plus any conduct credits that might otherwise have accrued during those 180 days: "You know the March 16th, 2011, Minute Order says that defendant waives one hundred eighty days of actual time credits. And I was the judge so my feeling is it was probably pretty clear we weren't talking about good time because the Minute Order reflects we were talking about actual time credits." When defense counsel indicated that defendant had advised him he was not aware he would be effectively forfeiting conduct credits, the court responded, "I can only go based upon what's in the Minute Order and the fact that it says actual time credits. I probably made a point of making sure the clerk put that in there which suggests to me that we covered that in court, and at a minimum that [former defense counsel] who represented him at the time covered that."

The court sentenced defendant to prison for the two-year lower term on the second degree robbery count, with concurrent two-year middle-term sentences for the petty theft and commercial burglary counts. It awarded him 135 days of presentence custody credits (315 days for time spent in actual custody, less the 180 days for the credits waived) plus an additional 20 days of conduct credit (15 percent of the custody credits awarded for time in actual custody, pursuant to section 2933.1, subdivision (c)), for a total award of 155 days.

## II. DISCUSSION

### *Credits Waiver*

Defendant argues that the court should have implemented his 180-day credits waiver by taking the 362 days in total credits to which he would have otherwise been entitled (315 days actual custody plus 47 days conduct credit under section 2933.1), and

then subtracting 180 days from this figure, for a total award of 182 days of credit. This would have netted him 27 more days of presentence credit than the 155 days he was actually awarded, which was calculated by taking the 315 days defendant had served in actual custody, subtracting 180 days, taking the resulting 135 days actual time, and adding 20 days of conduct credits based on the 135-day figure. We agree with defendant.

A criminal defendant is ordinarily entitled to credit for all days spent in local custody, including time spent in jail or a residential treatment program as a condition of probation. (§ 2900.5; *People v. Johnson* (2002) 28 Cal.4th 1050, 1053; *People v. Jeffrey* (2004) 33 Cal.4th 312, 315 (*Jeffrey*)). Presentence credits may be waived for the purpose of avoiding the one-year limitation on time that can be spent in local custody as a condition of probation. (See § 19.2; *People v. Johnson* (1978) 82 Cal.App.3d 183, 188–189.) Such a waiver allows the court to resolve a probation violation by imposing additional time in local custody rather than sending the defendant to prison. (See *People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1923–1924.)

A waiver of presentence credits must be “ ‘knowing and intelligent’ in the sense that it was made with awareness of its consequences.” (*People v. Thurman* (2005) 125 Cal.App.4th 1453, 1460 (*Thurman*)). “The gravaman of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled. . . .” (*People v. Arnold* (2004) 33 Cal.4th 294, 308–309 (*Arnold*); see also *People v. Urke* (2011) 197 Cal.App.4th 766, 777; *People v. Burks* (1998) 66 Cal.App.4th 232, 236, fn. 3.) A knowing and intelligent waiver of credits bars any future use of those credits to reduce a prison term in the event probation is terminated and a prison sentence imposed. (*Jeffrey, supra*, 33 Cal.4th at pp. 316–317.)

Defendant does not dispute that he entered a knowing and intelligent waiver of 180 days of credits when he admitted his second violation of probation on March 16, 2011. He argues, however, that his waiver was limited to a total of 180 days, and that he did not knowingly and intelligently waive any additional time that would otherwise have been awarded as conduct credits as a result of the 180 days being deducted solely from

his actual time served. The point is well taken. Defendant was told he was waiving 180 days of credit. Although judges and lawyers handling criminal cases are well versed in the complexities of credits calculations, a layperson who is advised that he is waiving 180 days of credit would understand that 180 days would be subtracted from whatever credits he would otherwise be entitled to receive, not that he would lose both 180 days actual time and some number of additional conduct credits that would otherwise have been awarded.

The People note that in taking the credits waiver, the trial court asked defendant, “[D]o you waive your right to credit, 180 days *of jail* you served so far?” They reason that a waiver of actual days in jail amounts to a waiver of corresponding conduct credits, because conduct credits must attach to the actual time served. We agree that conduct credits are calculated based on the amount of actual time in custody, but do not agree that the reference to jail time was sufficient to alert defendant that he was losing more than a total of 180 days in credits. The term “jail” could just as easily suggest to a layperson—even one who had prior experience with probation violations—that he was waiving a *total* of 180 days of the credits he would otherwise receive for the time spent in jail. Considering the totality of the circumstances (*Arnold, supra*, 33 Cal.4th at p. 306), defendant’s waiver cannot reasonably extend beyond a total of the 180 days specified.

The reference in the March 16, 2011 minute order to “actual time” credits does not alter our analysis. To the extent there is a conflict between that minute order and the oral proceedings, the oral proceedings control. (*In re Jerred H.* (2004) 121 Cal.App.4th 793, 798, fn. 3.) Although the trial court construed the clerk’s minute order to reflect a judicial determination that the defendant had waived 180 actual days *plus* any conduct credits to which he would be entitled, the comments at the hearing at which the waiver was taken do not reflect a conscious decision by the court in this respect. It does not appear from the reporter’s transcript of the credits waiver that the parties or the court considered the issue now at hand.

Because defendant’s credits waiver was limited to 180 days, he is entitled to an additional 27 days of presentence credits as outlined in the first paragraph of this section

of the Discussion. To maintain the statutory ratio of actual and conduct credits under section 2933.1, subdivision (c), the breakdown of these credits shall be 24 days actual custody credit and three days of conduct credit.

#### *Section 654*

Section 654<sup>2</sup> precludes multiple punishment where an act or course of conduct violates more than one criminal statute but a defendant has only a single intent and objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) In such circumstances, the court must impose but stay execution of sentence on all of the convictions arising out of the course of conduct except for the offense with the longest sentence. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.) Defendant argues that the sentences on his convictions for petty theft with a prior and commercial burglary should have been stayed rather than ordered to run concurrently, because they were committed as part of the same course of conduct and with the same objective as the robbery count. The Attorney General commendably concedes the issue, noting, “Courts have routinely held that a defendant cannot receive multiple prison terms for burglary, theft, and robbery in circumstances similar to the one at hand. (See *People v. Perry* (2007) 154 Cal.App.4th 1521, 1526; *People v. Le* (2006) 136 Cal.App.4th 925, [930-931]; *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.)” We will order the judgment modified accordingly.

### III. DISPOSITION

The judgment is modified to award defendant an additional 27 days of presentence credits, consisting of 24 days of custody credit and three days of conduct credit under section 2933.1, subdivision (c), for a total of 339 days actual custody credits, 23 days of conduct credits under section 2933.1, subdivision (c) and 362 days in total presentence credits. The judgment is further modified to stay the sentences for petty theft with a prior and commercial burglary (counts 2 and 3) pursuant to section 654. The clerk of the

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<sup>2</sup> Section 654, subdivision (a) provides in relevant part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

superior court shall prepare a modified abstract of judgment reflecting these modifications and shall forward a copy of the same to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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BRUINIERS, J.