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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.

CHILICO DAVID HART,

Defendant and Appellant.

A135870

(Sonoma County Super. Ct.  
Nos. SCR-599406; SCR-607909;  
SCR-611461)

Appellant Chilico David Hart is presently serving a five-year prison sentence. The originally suspended sentence, encompassing three separate felony informations, was executed following his admission that he had violated his probation in those matters.

Assigned counsel has submitted a *Wende*<sup>1</sup> brief, certifying that counsel has been unable to identify any issues for appellate review. Counsel also has submitted a declaration confirming that Hart has been advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court's attention. No supplemental brief has been submitted. As required, we have independently reviewed the record. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110.)

We find no arguable issues and therefore affirm.

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<sup>1</sup> *People v. Wende* (1979) 25 Cal.3d 436.

## BACKGROUND

Hart was charged by complaint in case No. SCR-599406 with second degree burglary (Pen. Code, § 459),<sup>2</sup> grand theft (§ 487, subd. (a)), receiving stolen property (§ 496, subd. (a)), and possession of child pornography (§ 311.4, subd. (d)). On June 8, 2011, he completed a written plea waiver form and entered no contest pleas to all counts, with the fourth count having been amended to charge a violation of section 311.11, subdivision (a). On September 29, 2011, imposition of sentence was suspended and he was placed on three-years probation, with conditions to include participation in the Redwood Gospel Mission treatment program. Hart walked away from the treatment program after two days.

On January 13, 2012, Hart completed a written plea waiver and entered no contest pleas in case No. SCR-607909 to one count each of second degree burglary (§ 459) and vandalism (§ 594, subd. (a)). The court found Hart in violation of his probation in case No. SCR-599406 based on this plea. On January 30, 2012, he entered a guilty plea in case No. SCR-611461 to one count of attempting to smuggle drug paraphernalia into the county jail.

On March 13, 2012, all three matters came on for sentencing. Hart asked the court to allow him to return on probation to the Redwood Gospel Mission treatment program and offered to waive custody credits if the court would permit him to do so. The court said that “the only way I would consider giving you, yet again, another chance, is to waive all those credits and additionally to waive all your credits while in treatment.” Hart agreed, saying that he understood the credits he was waiving, stating that “I think I am a little more motivated with the suspended prison sentence and waiving all my credits, leaving the entirety of the term hanging over my head.” The court specifically asked Hart, “do you waive all of the previous custody credits as I described on the record?” and “[d]o you waive all future custody credits while you’re attending the treatment program?” Hart said that he did. The court imposed the midterm of three years

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

on the possession of paraphernalia offense in case No. SCR-611461, with consecutive one-third the midterm sentences of eight months each on the second degree burglary charge in No. SCR-607909, and the second degree burglary and possession of pornography charges in No. SCR-599406, for a total of five years in state prison. Sentences on the grand theft and receiving stolen property charges in No. SCR-599406 were stayed pursuant to section 654. The court suspended execution of the prison sentence on condition that Hart participate in, and successfully complete, the Redwood Gospel Mission program. The court warned Hart that if he failed to complete the program he was “headed to prison” for the suspended term.

On April 7, 2012, Hart again walked away from Redwood Gospel Mission. He surrendered himself into custody on April 12, 2012. On April 25, 2012, Hart, represented by counsel, admitted that he had violated his probation by leaving the program, and by attempting to smuggle a cigarette lighter into the jail at the time of his self-surrender. The court continued the matter for receipt of a supplemental probation report and sentencing.

On May 29, 2012, the court denied Hart’s request for restoration to probation, stated that it had given Hart “every possible chance.” The court imposed the previously suspended five-year term prison term. It denied credits in case Nos. SCR-599406 and SCR- 607909 based on the previous credits waivers, but awarded Hart 48 actual and 48 conduct days in case No. SCR-611461, for a total of 96 days presentence custody credits.

A timely notice of appeal was filed on June 7, 2012. The notice of appeal stated that Hart challenged the validity of his plea, and under “other basis” for appeal Hart said that he was challenging the denial of the previously-waived presentence custody credits, and contending that a section 290 sex offender registration requirement imposed as a consequence of his child pornography plea in case No. SCR-599406 was an unconstitutional denial of equal protection. Hart sought a certificate of probable cause asserting that he should have been given an opportunity to withdraw his plea, and also raising the denial of the presentence custody credits, and contesting the section 290 registration requirement. The court denied the request.

## DISCUSSION

Under section 1237.5 and California Rules of Court, rule 8.304(b), a defendant seeking to appeal after entering a guilty or no contest plea generally must first obtain a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.) “[T]o appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal . . . the statement required by . . . section 1237.5 for issuance of a certificate of probable cause.” (Cal. Rules of Court, rule 8.304(b)(1).) Denial of a certificate of probable cause is reviewable only by timely petition for a writ of mandate. (*People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.) Since Hart did not obtain a certificate of probable cause, the scope of issues cognizable on appeal is narrow. There are no cognizable issues relating to his guilt, or to his plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097.)

A “defendant need not [obtain a certificate of probable cause] if the notice of appeal states that the appeal is based on . . . [¶] . . . [¶] [g]rounds that arose after entry of the plea and do not affect the plea’s validity.” (Cal. Rules of Court, rule 8.304(b)(4)(B); see also *People v. Panizzon, supra*, 13 Cal.4th at p. 74.) Assuming that Hart’s notice of appeal has preserved the issue of his waiver of custody credits, and that a certificate of probable cause is not required, his claim presents no arguable issue. Here, the waiver of presentence custody credits was a specific condition of the sentence imposed on March 13, 2012, restoring Hart to probation. Hart was represented by counsel and the record reflects a knowing and intelligent waiver of his rights to custody credits. In *People v. Arnold* (2004) 33 Cal.4th 294 (*Arnold*), our Supreme Court concluded “that when a defendant knowingly and intelligently waives jail time custody credits after violating probation in order to be reinstated on probation and thereby avoid a prison sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed.” (*Id.* at p. 298.) In a companion case,

*People v. Jeffrey* (2004) 33 Cal.4th 312 (*Jeffrey*), the court held that “a *Johnson*<sup>3</sup> waiver of *future* custody credits to be earned in a residential drug or alcohol treatment facility is a waiver of such credits for all purposes, including application of such credits to a subsequently imposed prison term in the event probation is revoked.” (*Jeffrey*, at p. 318.) While the “ ‘better practice is for sentencing courts to expressly admonish defendants who waive custody credits under *Johnson* . . . that such waivers will apply to any future prison term should probation ultimately be revoked and a state prison sentence imposed. [Citations.] A sentencing court’s failure to include such an explicit advisement will not, however, invalidate a *Johnson* waiver by which the defendant is otherwise found to have knowingly and intelligently relinquished his or her right to custody credits . . . .’ [Citation.]” (*Jeffrey*, *supra*, 33 Cal.4th at pp. 318–319.)

The sex offender registration requirement was not imposed as a condition of Hart’s sentence on June 7, 2012, or as a consequence of revocation of his probation. It was imposed at the time of his plea on September 29, 2011, in case No. SCR-599406. Hart was advised of his obligation of lifetime registration at the time of his plea, did not object, and he did not appeal. Even assuming that he has not forfeited any claim of error (see *People v. Scott* (1994) 9 Cal.4th 331, 353–354), and that he can raise this claim in this appeal, he raises no arguable issues.

Hart was convicted of a violation of section 311.11, subdivision (a) which provides: “Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct, as defined in

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<sup>3</sup> *People v. Johnson* (1978) 82 Cal.App.3d 183 (*Johnson*).

subdivision (d) of Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment.” Section 311.11 is an offense listed under section 290, subdivision (c), mandating registration as a sex offender. Because registration is mandatory for persons convicted of an offense listed in section 290, subdivision (c), the duty to register cannot be avoided through a plea bargain or through the exercise of judicial discretion. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196; *People v. McClellan* (1993) 6 Cal.4th 367, 380.)

In his request for a certificate of probable cause, Hart asserts that the registration requirement denies him equal protection because there is no similar requirement for a person convicted under section 311.7. That section provides: “Every person who, knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, requires that the purchaser or consignee receive any obscene matter or who denies or threatens to deny a franchise, revokes or threatens to revoke, or imposes any penalty, financial or otherwise, by reason of the failure of any person to accept obscene matter, or by reason of the return of such obscene matter, is guilty of a misdemeanor.”

The concept of equal protection is based on the principle that persons similarly situated with respect to the legitimate purpose of the law should receive like treatment. (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) The first prerequisite to a meritorious equal protection claim is “a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” (*Id.* at p. 530.) The use of the term “similarly situated” recognizes the fact that “ ‘the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’ [Citations.]” (*In re Roger S.* (1977) 19 Cal.3d 921, 934.) “The ‘similarly situated’ prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of

scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.)

Offenders under sections 311.7 and 311.11, subdivision (a) are not similarly situated. Section 311.7 does not specifically involve child pornography, and a violation of section 311.11 requires possession of pornography involving a real child having actually engaged in or simulated the sexual conduct depicted, and requires knowledge of the minority status by the perpetrator. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 846.) Lifetime sex offender registration for a violation of section 311.11 has been upheld against a claim that it constituted cruel and unusual punishment under the state and federal constitutions. (*In re Alva* (2004) 33 Cal.4th 254, 260.)

No arguable issues are presented.

**DISPOSITION**

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.