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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW JOSEPH LEVINE,

Defendant and Appellant.

A143736

(Lake County
Super. Ct. Nos. CR929639,
CR931759-A, CR933303, CR934965)

After defendant violated the terms of his probation for the second time, he entered a *Johnson*¹ waiver, whereby he agreed to waive his custody credits on the condition the trial court place him in a residential drug treatment program in lieu of imposing a jail sentence. Defendant failed to complete the program. Following another arrest and corresponding probation violation, the trial court invoked defendant's *Johnson* waiver and refused to apply credits for time served while in custody. Defendant now contends the waiver is invalid because he did not waive his credits knowingly and intelligently. We disagree and affirm.

I. BACKGROUND

On October 31, 2012, in case No. CR929639 (the 639 action), defendant was placed on probation for resisting arrest and possession of a controlled substance. Only a few months after being placed on probation, defendant was arrested again, and in case No. CR931759-A (the 59A action), defendant was charged with transportation of

¹ *People v. Johnson* (1978) 82 Cal.App.3d 183 (*Johnson*).

methamphetamine (Health & Saf. Code, § 11379, subd. (a); count I), possession of methamphetamine for sale (Health & Saf. Code, § 11378; count II), and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count III). Defendant was also charged with violating his probation in the 639 action. On March 11, 2013, defendant pleaded no contest to count II and admitted violating probation. In exchange, counts I and III were dismissed and defendant's probation was reinstated with a condition of a 300-day jail term.

In early September 2013, in case No. CR933303 (the 303 action), defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count I), resisting arrest (Pen. Code, § 148, subd. (a)(1); count II), and violating probation in the 639 and 59A actions. On November 4, 2013, defendant pleaded no contest to the methamphetamine charge and admitted violating his probation in the 639 and 59A actions, and in exchange, the remaining count was dismissed.

On December 2, 2013, defendant's probation was reinstated and extended with the condition he serve 365 days in a residential treatment program. The trial court allowed defendant to attend a residential treatment program in lieu of serving a jail sentence on entry of a *Johnson* waiver, that is a waiver of defendant's statutory right to credit for time served against a subsequent sentence pursuant to Penal Code section 2900.5. At the December 2 hearing, the court asked defendant, "Do you waive any credits you have in these cases?" Defendant replied, "Yes, I do, Your Honor." The court further clarified, "You understand that if you violate in the future, you start out with no credits?" Defendant again responded affirmatively. Following this colloquy, the court explicitly stated, "Okay. *Johnson* waiver, all credits, all cases." The court concluded the proceedings by explaining, "[I]n all three cases, I'm ordering you into [the residential treatment program] for a year. If you don't complete the program, you get no credits. If you walk out early on them, it's like you weren't there. You did nothing." Defendant answered, "I understand."

In early March 2014, defendant yet again failed to satisfy the conditions of his probation from the prior three cases. First, defendant violated the law. In case

No. CR934965 (the 965 action)—the fourth and final case—defendant was charged with possession of methamphetamine for sale (Health & Saf. Code, § 11378; count I), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count II), resisting arrest (Pen. Code, § 148, subd. (a)(1); count III), and possession of drug paraphernalia (Health & Saf. Code, § 11364.1, subd. (a)(1); count IV). Additionally, defendant failed to complete the residential treatment program as ordered by the trial judge.

On April 14, 2014, defendant pleaded no contest to counts II and III in the 965 action and to violating probation in the three prior cases in exchange for dismissal of count I. As a result, on May 27, defendant was sentenced to five years in jail. The trial court referred to the transcript from the December 2 hearing, confirmed defendant had entered a *Johnson* waiver, and thus declined to apply his custody credits in the 639, 59A, and 303 actions. Defendant did receive 156 days of sentencing credits in the 965 action, the only case not subject to defendant’s *Johnson* waiver.

At defendant’s resentencing hearing on November 17, 2014, defendant was sentenced to three years in jail in the 59A action, and three concurrent one-year jail terms in the 639, 303, and 965 actions.

II. DISCUSSION

Defendant contends, in light of the totality of the circumstances, he did not enter into the *Johnson* waiver knowingly and intelligently. Thus, the waiver is invalid, and he is entitled to 229 additional days of credit. We disagree.

A trial court’s sentencing decisions are reviewed for an abuse of discretion. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) “An abuse is found only where [the trial court’s] choice is ‘arbitrary or capricious or “ ‘exceeds the bounds of reason, all circumstances being considered.’ ” ” (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.) To properly uphold a waiver of a defendant’s entitlement to custody credits, the defendant’s choice must be knowing and intelligent. (*People v. Arnold* (2004) 33 Cal.4th 294, 308.) A waiver is knowing and intelligent when the defendant understands he is

relinquishing custody credits to which he was otherwise entitled under Penal Code section 2900.5. (*People v. Arnold*, at p. 308.)

Here, the colloquy between defendant and the trial court at the December 2 hearing clearly establishes defendant's understanding of the consequences of his *Johnson* waiver. Defendant does not assert he misunderstood the effects of a *Johnson* waiver—that he was waiving credits to which he would otherwise be entitled. Rather, defendant alleges the *Johnson* waiver only applied to one case, the 303 action.

This argument is unavailing. At the December 2 hearing, the trial court explicitly referred to the pertinent cases—the 639, 59A, and 303 actions—collectively. Although the hearing was in response to defendant's arrest in the 303 action, the court also discussed defendant's probation violations for the 639 and 59A actions. In fact, immediately after finding defendant guilty of the charge for possession of methamphetamine in the 303 action and in violation of probation in the 639 and 59A actions, the court asked defendant, "Do you waive any credits you have in these cases?" The court's use of the plural, "cases," unmistakably indicated defendant's waiver would apply to more than one case, at the very least. Moreover, after confirming defendant's consent and understanding, the court stated, "*Johnson* waiver, all credits, all cases." Finally, the trial court unambiguously ordered defendant to serve one year in the residential treatment program "in all three cases." And, the court reminded defendant, "If you don't complete the program, you get no credits." Nothing in the trial court's instructions suggested to defendant that the *Johnson* waiver applied to only the 303 action.

Defendant asserts the probation officer's report prepared for the December 2 hearing created confusion as to the scope of his waiver. Defendant is correct that portions of the report discussing the *Johnson* waiver may be reasonably construed as only referencing the 303 action. For example, the report states, "[defendant] reported he would enter a *Johnson* Waiver, waiving all his actual and behavioral credits up until sentencing [*sic*] in case number CR-933303." However, the report does not describe the waiver that took place at the December 2 hearing. Rather, the probation officer's report

is a collection of recommendations—not a summary of the proceedings. Consequently, any confusion that may have resulted from the probation officer’s report was clarified at the December 2 hearing.

III. DISPOSITION

We find no abuse of discretion and affirm the trial court’s application of defendant’s *Johnson* waiver.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.