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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY DONALD VERDUSCO,

Defendant and Appellant.

B231888

(Los Angeles County
Super. Ct. No. VA107852)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Margaret M. Bernal, Judge. Reversed and remanded, with directions.

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys
General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2009, appellant Tony Donald Verdusco entered a guilty plea to a charge of possession of a controlled substance for sale (Health & Saf. Code, § 11351).¹ He was sentenced to a term of three years, plus a concurrent term of six months for a related misdemeanor charge (possession of a hypodermic needle in violation of Bus. and Prof. Code, § 4140). The court awarded 15 days of pre-sentence credit.

In November 2010, appellant filed a petition seeking an additional 240 days of presentence credit pursuant to Penal Code section 2900.5.² In an attached letter, he stated that on October 2, 2008, his residence was “raided,” he was arrested, and his parole was revoked for possession of a controlled substance for sale. He further stated that on his release, he was charged with possession of a controlled substance for sale based on the same incident.³

On January 21, 2011, appellant’s petition was addressed by the court. No parties were present. The court ruled: “[Appellant’s] motion to correct credits is denied. [Appellant] is only entitled to one third credits as he had a strike prior, even though [the] court struck it.”

Appellant filed a notice of appeal. According to the request for certificate of probable cause prepared and signed by appellant: (1) on October 2, 2008,

¹ The abstract of judgment indicated the offense occurred in 2008.

² Appellant’s petition, which was self-prepared, actually stated that he sought 120 days of presentence custody credit under Penal Code section 2900.5 and 120 days of conduct credit under Penal Code section 4019, for a total of 240 days spent in presentence custody. However, on appeal the parties agree that the pertinent provision is section 2900.5.

³ Attached to the petition was a computer-generated document which indicated appellant had an “arrest/hold” date of October 2, 2008 and a revocation period of 240 days. A second document that appeared to be a summary of appellant’s 2009 conviction and incarceration indicated an “offense date” of October 2, 2008.

appellant's parole was revoked for possession for sale of a controlled substance; (2) he spent 120 days in jail; (3) on January 30, 2009, the charges for which he is currently incarcerated were filed against him; (4) on December 14, 2009, he was sentenced to three years; (5) at the time of the sentencing hearing, his attorney told him that the court would not give credit for the violation until the Department of Corrections and Rehabilitation (CDCR) provided documentation; (6) he made multiple requests for documentation to the CDCR; (7) after erroneously attempting to rectify the matter through an inmate appeal, he petitioned the superior court on advice of a CDCR appeals coordinator.

DISCUSSION

Penal Code section 2900.5, subdivisions (a) and (b) provide that a convicted person shall receive credit for all days spent in custody “where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” Thus a parolee whose parole is revoked for conduct that later becomes the subject of a criminal charge is entitled to credit for the period he or she was in custody for the parole revocation when sentenced on the criminal charge. (See *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485.) However, “[a] criminal sentence may not be credited with jail for prison time attributable to a parole or probation revocation that was based only in part upon the same criminal episode.” (*Ibid.*) Thus, a defendant is entitled to credit for presentence confinement only if he or she “shows that the conduct which led to his [or her] conviction was the sole reason for his [or her] loss of liberty during the presentence period” or “prove[s] that the conduct which led to the conviction was a ‘dispositive’ or “‘but for’” cause of the presentence custody.” (*Ibid.*, quoting *People v. Bruner* (1995) 9 Cal.4th 1178, 1180.)

Appellant contends that he presented sufficient evidence to demonstrate that both the parole revocation and the criminal charges in the underlying case resulted solely from the fact he was in possession of the controlled substance and paraphernalia found in the October 2, 2008 search of his residence. He points out that he so stated in the underlying petition and that the prosecution presented no countervailing evidence. Respondent concedes that “if the factual assertions appellant made in his pleading at the trial level, as well as here on appeal, are true, he would be entitled to the additional presentence credits he now seeks.”⁴ Respondent contends, however, that “this Court cannot make the determination on the issue appellant now raises because it does not have enough evidence before it to make a proper determination.” Respondent specifically asserts that “[n]o documentation within the appellate record expressly indicates that appellant had been incarcerated from October 2, 2008 through the date of his sentencing hearing, and no documentation indicates that any such incarceration was due to the conduct underlying his most recent offense.” According to respondent, “[t]he best course of action . . . is to remand the matter for the trial court to address the issue.”

We agree that the matter must be remanded to determine whether appellant is entitled to additional custody credits and if so, the proper number of days. The documentation on which appellant relies indicates that both the parole revocation and the 2009 guilty plea arose from conduct occurring on October 2, 2008. However, it is not entirely clear that the parole revocation was based solely on the

⁴ Respondent also concedes that “[i]n rejecting appellant’s claim below, the trial court apparently misunderstood the gist of appellant’s argument, focusing on whether a strike conviction limited him to conduct credit amounting to one-third of actual days served, but failing to address whether appellant’s incarceration as a result of his parole revocation could also serve as presentenc[e] custody credit for the most current sentence.” Moreover, there is no dispute that an incorrect award of presentence custody credit is a jurisdictional error that may be corrected at any time. (See *People v. Johnson*, *supra*, 150 Cal.App.4th at p. 1485.)

conduct that led to the 2009 criminal charges (possession of a controlled substance and/or possession of a hypodermic needle) or that the conduct was a “but for” cause of appellant’s presentence custody. Nor is the amount of time appellant spent in custody for the parole violation clear. The trial court is in the best position to access the necessary information and resolve these factual issues. (See *People v. Fares* (1993) 16 Cal.App.4th 954, 956-957 [interpreting documentation relevant to calculation of presentence custody credits “is the sort of determination trial courts are in the best position to make, aided by their administrative support including the probation department”]; *People v. Wischemann* (1979) 94 Cal.App.3d 162, 174-175 [where presentence custody credits are at issue and record on appeal does not contain competent evidence of duration of defendant’s presentence incarceration, appellate court must remand to trial court]; *People v. Hyde* (1975) 49 Cal.App.3d 97, 102 [“If the credit authorized by Penal Code section 2900.5 depends upon a disputed issue of fact we see no reason why that disputed question may not be presented, on motion and notice, for resolution to the court which imposed the sentence and which has ready access to the information necessary to resolve the dispute.”].)

DISPOSITION

The order of January 21, 2011 is reversed. The matter is remanded to the trial court for determination of appellant's entitlement to additional presentence custody credits based on the period he was in custody for the October 2008 parole violation.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.