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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LASARO COREAS,

Defendant and Appellant.

B235107

(Los Angeles County Super. Ct.
No. VA116753)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed in part and remanded with directions.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Ann Krausz, Attorney, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Lasaro Coreas was found guilty by jury of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)).¹ The jury found true allegations that defendant had served two prior prison terms (§ 667.5, subd. (b)) and had suffered a prior conviction under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The trial court sentenced defendant to five years in state prison, calculated as the midterm of two years, doubled under the three strikes law, plus one year for one of the prior prison terms.

Defendant raises the following issues on appeal: (1) the trial court failed to exercise sound discretion when it erroneously concluded that doubling the sentence for a robbery prior conviction and imposition of a one year enhancement for a prior prison term, based on the same conviction, constituted an impermissible dual use of facts; (2) trial counsel was constitutionally inadequate due to a failure to possess knowledge of elementary rules of sentencing; (3) defendant was entitled to 332 days of presentence credit and 332 days of conduct credit or, in the alternative, 166 days of conduct credit, rather than the 66 days awarded; and (4) this court should conduct an independent review of the in camera hearing on defendant's *Pitchess*² motion.

We resolve the first two issues by remanding the case to the trial court for resentencing defendant to a term of four years eight months, based on the sentence originally pronounced by the trial court. We conclude defendant is entitled to presentence credit of 332 days and conduct credit of 166 days in light of the holding of our Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). Finally, we hold the trial court did not abuse its discretion in ruling on defendant's motion under *Pitchess*.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

FACTS

Defendant, a convicted felon, was the passenger in a car that accelerated rapidly from sheriff's deputies on September 6, 2010. When the car stopped, defendant exited in possession of a semi-automatic handgun. A chase ensued, which eventually resulted in a police dog alerting to defendant's presence in the backyard of a residence. A loaded .45-caliber semi-automatic handgun fell from defendant's waistband when he was taken to the ground by a deputy.

DISCUSSION

I

The jury found defendant had served two prior prison terms as defined in section 667.5, subdivision (b). The trial court initially imposed a sentence of four years eight months in state prison, consisting of the low term of 16 months, doubled due to a robbery conviction under the three strikes law, and one year for each prior prison term, including the robbery conviction. Defense counsel then suggested it was improper to use defendant's 2008 robbery conviction to double the sentence under the three strikes law and as a one year prior prison term enhancement. The court reconsidered and sentenced defendant to five years in prison, consisting of the midterm of two years, doubled under the three strikes law, and only one prior prison term enhancement for the non-robbery offense.

Defendant argues that the original sentence of four years eight months was lawful and should not have been changed. Because the increased sentence was based on the trial court's erroneous interpretation of the law, defendant contends the increase of his sentence to five years was an abuse of discretion. Defendant further argues trial counsel was constitutionally deficient for suggesting an invalid interpretation of the law that led to imposition of an increased sentence.

The Attorney General responds that the case must be remanded for resentencing, because the five-year sentence ultimately imposed by the trial court did not take into account both of defendant's prior prison terms. The Attorney General reasons the five-year sentence was unauthorized as a matter of law, because the court failed to either impose or strike the robbery prior prison term.

A. *Standard of Review*

Section 1170 affords the trial court broad discretion in selecting a term of punishment within the statutory range. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) “Even with the broad discretion afforded a trial court under the amended sentencing scheme, its sentencing decision will be subject to review for abuse of discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976–977 [trial court’s decision whether to reduce a ‘wobbler’ offense to a misdemeanor under § 17, subd. (b) is reviewable for abuse of discretion]; *People v. Russel* (1968) 69 Cal.2d 187, 195 [‘all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue’].) The trial court’s sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the offender, and the public interest.’ (*Alvarez, supra*, 14 Cal.4th at p. 978.)” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

“If the trial court misunderstands or misapplies the applicable legal standard, it has not properly exercised its discretion. [Citations.]” (*People v. Millard* (2009) 175 Cal.App.4th 7, 31; see *People v. Marquez* (1983) 143 Cal.App.3d 797, 803-804.) Where the trial court has a misunderstanding concerning the scope of the discretion, remand for resentencing is not necessary, where to do so would be “an idle and unnecessary, if not pointless, judicial exercise.” (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

B. Analysis

We conclude defendant has the better of the argument under the unusual circumstances of this case. The sentence originally announced by the trial court—four years eight months—was a lawful sentence. That sentence properly took into account both of defendant’s prior prison terms, including the robbery that was used to also double the sentence under the three strikes law. The same conviction may be used under the three strikes sentencing scheme and as a prior prison term. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1518; *People v. Cressy* (1996) 47 Cal.App.4th 981, 989-993.)

The sentence of four years eight months would have been imposed had defense counsel not incorrectly questioned whether the trial court could use the robbery conviction to double defendant’s sentence under the three strikes law and as a one year prior prison term enhancement. Defendant’s valid sentence of four years eight months in state prison was increased to five years when the court mistakenly concluded, at the suggestion of defense counsel, that only one prior prison term enhancement could be imposed. Resentencing under the original terms of the four-year eight-month sentence is appropriate under these circumstances.

In view of our resolution of this issue under the abuse of discretion standard of review, we need not address defendant’s further contention that the increased sentence resulted from inadequate assistance of trial counsel.

II

We next address defendant’s various claims to additional credit against his state prison sentence. He first argues, and the Attorney General properly concedes, that defendant was entitled to 332 days of presentence custody credit, rather than the 331 days awarded by the trial court. Defendant next argues, based upon principles of equal protection of the law, he is entitled to one-for-one conduct credits in the amount of 332

days under the amendment to section 4019, applicable to crimes committed on or after October 1, 2011. At a minimum, defendant contends, he is entitled to 166 days of conduct credit, rather than the 66 days awarded by the trial court. The Attorney General agrees with this latter contention.

The parties are correct that defendant was entitled to 332 of presentence credit under section 2933. Upon resentencing, the judgment should reflect this correct calculation of custody credits.

Defendant is entitled to 166 days of conduct credit but not the 332 days he claims. Defendant's commitment offense and arrest occurred on September 6, 2010. He was sentenced on August 3, 2011. At the time of his offense and sentencing, defendant was entitled under former section 4019 to six days of credit for every four days served. Effective October 1, 2011, sections 4019 was amended to effectively provide one day of conduct credit for each day of custody credit. (§ 4019, subd. (f) ["a term of four days will be deemed to have been served for every two days spent in actual custody"].) The amendment providing for one-for-one credits applies only to crimes committed on or after October 1, 2011. (§ 4019, subd. (h).) As a matter of statutory construction, the amendment to section 4019 is expressly not retroactive, and defendant quite properly makes no contrary argument. (See *People v. Brown* (2012) 54 Cal.4th 314, 322, fn. 11.)

Defendant's equal protection argument, based largely on *In re Kapperman* (1974) 11 Cal.3d 542, is foreclosed by our Supreme Court's recent decision in *Brown, supra*, 54 Cal.4th 314. (*People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*.) "Defendant and amicus curiae also contend the present case is controlled by *In re Kapperman, supra*, 11 Cal.3d 542, in which this court concluded that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison. We disagree. Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and

after the effective date of a statute authorizing *conduct* credits are similarly situated.”
(*Brown, supra*, at p. 330; see *Ellis, supra*, at p. 1552.)

Accordingly, defendant is entitled to 166 days of conduct credit based on 332 days of custody credit.

III

Defendant requests this court to independently review the record of the in camera hearing held on his motion filed under *Pitchess v. Superior Court, supra*, 11 Cal.3d 531. In carrying out our duty to conduct an independent review (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1232), we issued a record correction order to have a complete record of proceedings. Having reviewed the corrected record and conducted an independent review of the proceedings, we hold the trial court did not abuse its discretion in ruling on the *Pitchess* motion.

DISPOSITION

The cause is remanded to the trial court with directions to vacate the five-year sentence imposed and to enter a sentence of four years eight months as originally contemplated by the trial court. The judgment shall include custody credit of 332 days and conduct credit of 166 days. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.