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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR GONZALEZ,

Defendant and Appellant.

2d Crim. No. B238480  
(Super. Ct. No. 2009038396)  
(Ventura County)

Edgar Gonzalez appeals the judgment entered after he pled guilty to first degree residential burglary (Pen. Code,<sup>1</sup> §§ 459, 460, subd. (a)). The trial court imposed a two-year state prison sentence and ordered it to run concurrent to the two-year sentence appellant was already serving for another residential burglary. Appellant was awarded 180 days of presentence custody credit, consisting of 120 days of actual custody credit and 60 days of conduct credit. He contends the court erred in denying his request for additional custody credits. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Because the facts underlying appellant's conviction are not relevant to the issue raised on appeal, we need not discuss them in detail. On June 29, 2009, an individual called the police and reported seeing appellant with two juveniles in a

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

neighbor's back yard. When the police arrived, appellant was found inside the residence while the juveniles were outside with property taken from the residence. Other evidence tied appellant and his accomplices to two other residential burglaries committed earlier that same day.

On July 1, 2009, appellant was charged by felony complaint with three counts of residential burglary and one count of misdemeanor resisting a peace officer (§ 148, subd. (a)(1)).<sup>2</sup> He remained in custody until October 27, 2009, when he was released on bail. While he was out on bail, he was charged with committing another residential burglary in Los Angeles County. He subsequently pled no contest to the charge and was sentenced to two years in state prison.

On June 23, 2011, appellant made a section 1381<sup>3</sup> demand for trial in the instant matter. Instead of sending the demand to the district attorney's office, however, he sent it to the Ventura County Sheriff. On July 25, 2011, appellant made another section 1381 demand and sent it to the district attorney. On July 27, the district attorney submitted a proposed order for appellant to be produced for trial. The court issued the order the following day. After appellant was not produced pursuant to that order, two additional orders were issued. Appellant was produced in the trial court on October 13, 2011.

On October 20, 2011, appellant moved to dismiss the action pursuant to section 1381. The court denied the motion. Appellant subsequently pled guilty to one of

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<sup>2</sup> Following several continuances, the case was dismissed and refiled under a different case number on October 20, 2009.

<sup>3</sup> Section 1381 provides in pertinent part: “Whenever a defendant has been convicted, in any court of this state, of the commission of a felony . . . and has been sentenced to and has entered upon a term of imprisonment in a state prison . . . , and at the time of the entry upon the term of imprisonment or commitment there is pending, in any court of this state, any other . . . criminal proceeding wherein the defendant remains to be sentenced, the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment or commitment and his or her desire to be brought to trial or for sentencing . . . . In the event that the defendant is not brought to trial or for sentencing within the 90 days the court in which the charge or sentencing is pending shall . . . dismiss the action.”

the burglary counts and was sentenced to a concurrent two-year state prison term. The remaining counts were dismissed. Appellant was awarded 120 days of actual custody credit (for the time from his arrest until his release on bail), plus 60 days of good conduct credit.

## DISCUSSION

Appellant's sole contention on appeal is that the court erred in denying his request for additional presentence custody credits. He contends the court should have either (1) awarded credits for the time he spent in custody from the date he made his demand for trial pursuant to section 1381 until the date he was sentenced; or (2) designated his sentencing date as the date he made his section 1381 demand. This claim is forfeited because it was not raised below.<sup>4</sup>

In any event, the claim lacks merit. Our colleagues in the Fourth District recently rejected the claim that defendants are entitled to presentence custody credits for the period after they have filed a section 1381 notice and demand for trial. (*People v. Gisbert* (2012) 205 Cal.App.4th 277, 282.) The court reasoned that such credits are barred by section 2900.5, subdivision (b), which provides that "credit shall be given 'only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. . . ." (*Id.* at p. 281.) In reaching its conclusion, the court followed well-established authority providing that "[a] defendant is not entitled to presentence custody credits when he is charged with a crime while already incarcerated and serving a sentence on a separate, earlier crime." (*Ibid.*, quoting *People*

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<sup>4</sup> In his written motion appellant claimed that (1) he is entitled to "day-for-day" conduct credits under the October 1, 2011, amendments to section 4019; and (2) he should be awarded 61 days of additional custody credit for delays that allegedly were beyond his control. He also orally argued that he should "be sentenced nunc pro tunc to either the date he was sentenced in Los Angeles, which was May 3rd[,] or July 28 when the Court . . . received a request from the district attorney for an order of production." On appeal, appellant asserts that he is entitled to credit for the period of time he was in custody after June 23, 2011, i.e., the date he sent his initial section 1381 demand to the Ventura County Sheriff. As the trial court correctly found, the initial demand was ineffective because it was not mailed to the district attorney as is required under the statute. (See *People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111 [section 1381 requires strict compliance].)

*v. Bruner* (1995) 9 Cal.4th 1178, 1180; *In re Joyner* (1989) 48 Cal.3d 487, 489; *In re Rojas* (1979) 23 Cal.3d 152, 155.)

Appellant acknowledges this authority, yet urges us to reject it. He claims an exception to section 2900.5 should be made because "[t]he principal purpose of Penal Code section 1381 is to allow a defendant who is serving a prison sentence to obtain the benefit of concurrent sentencing by accelerating the resolution of the pending charges." Although we do not disagree with this stated purpose of the statute, that purpose is met when the defendant is brought to trial within 90 days of serving his or her demand for trial. That is what happened here. Appellant's complaint to the contrary ignores the fact that his initial demand was ineffective and thus did not trigger the 90-day period.

Appellant also cites to section 1203.2a, which dictates the procedure to be followed when a defendant who is sentenced on a probation violation is already in state prison for an offense committed after the one in which probation was granted. The statute provides in pertinent part: "Upon imposition of sentence hereunder the commitment shall be dated as of the date upon which probation was granted. If the defendant is then in a state prison for an offense committed subsequent to the one upon which he or she has been on probation, the term of imprisonment of such defendant under a commitment issued hereunder shall commence upon the date upon which defendant was delivered to prison under commitment for his or her subsequent offense." According to appellant, defendants sentenced in this manner "receive true concurrency between their earlier and subsequently imposed sentences because the sentence in the latter case is deemed to have been imposed when the defendant first arrived in prison on the earlier case." He then argues that section 1381 "has an identical purpose."

We are not persuaded. To the extent appellant notes that section 1203.2a expressly provides "true concurrency" for state prisoners subsequently sentenced for a probation violation, this merely demonstrates that the lack of such an express statement in section 1381 evinces a contrary legislative intent.<sup>5</sup> Appellant offers no reason for us to

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<sup>5</sup> Appellant also fails to appreciate that the "true concurrency" provided under section 1203.2a does not benefit defendants. The sentence for a defendant who is not already in

diverge from the conclusion that he is not entitled to presentence custody credits for the period after he filed his section 1381 demand, because his custody was not solely attributable to the instant proceedings. (*People v. Gisbert, supra*, 205 Cal.App.4th at p. 282.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

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state prison for a *subsequent* offense is deemed to have commenced as of the date probation was granted. By contrast, the sentence for a defendant who is already in prison is deemed to begin on a later date, i.e., the date he or she began serving the sentence for the subsequent offense.

Bruce A. Young, Judge

Superior Court County of Ventura

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