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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.

KENNETH W. ROYSTER,

Defendant and Appellant.

B239050

(Los Angeles County  
Super. Ct. No. MA052331)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol Koppel, Judge. Affirmed in part, reversed in part, and remanded.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan M. Krauss, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Kenneth W. Royster (defendant) pleaded no contest to second degree commercial burglary (Pen. Code, § 459<sup>1</sup>). On appeal, appointed counsel for defendant filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 requesting that this court conduct an independent review of the record to determine if there are any issues which if resolved in defendant's favor would require reversal or modification of the judgment. On August 16, 2012, we gave notice to defendant that his counsel had failed to find any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wished this court to consider. Defendant did not file a response brief or letter.

After independently reviewing the record, we asked the parties to submit letter briefs addressing whether we should reverse the amount of custody credits awarded defendant, and remand this matter to the trial court for purposes of determining the proper number of custody credits to be awarded defendant, including finding the date on which defendant was arrested for the crime for which he was convicted in this matter, and whether defendant was in custody attributable to another offense during any portion of the time he was arrested to the time he was sentenced in this matter such that defendant's entitlement to presentence credits must be reduced. We reverse the amount of custody credits awarded defendant, and remand this matter to the trial court for purposes of determining the proper number of custody credits to be awarded defendant. We otherwise affirm the judgment.

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

## **BACKGROUND**

### **A. Factual Background**

According to the record,<sup>2</sup> on August 21, 2010, defendant and Amanda Maryrea Whaley<sup>3</sup> entered a Factory Brand Shoes in the City of Lancaster. They located items to purchase and Whaley filled out and tendered a check for \$226.59 in payment for the items. Whaley wrote her driver's license number on the check. Her check was denied. Defendant told the store clerk that they had been victims of identity theft, and wrote two more checks that were also denied.

The store clerk threatened to call the police and defendant and Whaley left the store. The clerk "documented the vehicle license number" and provided to the police the two checks left by defendant and Whaley and a surveillance video. A detective showed the store clerk and manager a photo lineup that included defendant's photograph, and the witnesses identified defendant as the person who attempted to provide them with forged checks. Thereafter, defendant was arrested.

### **B. Procedural Background**

The District Attorney of Los Angeles County filed a complaint, treated as an information, charging defendant with one count of second degree commercial burglary in violation of section 459 (count 1), three counts of forgery in violation of section 470, subdivision (d) (counts 2, 3, and 4), one count of counterfeit seal in violation of section 472 (count 5), and one count of forgery in violation of section 470, subdivision (a) (count 6). The District Attorney alleged as to all counts that defendant suffered prior convictions of a serious or violent felony or juvenile adjudication as defined by sections

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<sup>2</sup> Because defendant pleaded no contest, there is no testimony concerning the charges against him. The facts are taken from the probation report.

<sup>3</sup> Whaley is a codefendant, but she is not a party to this appeal.

1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), and suffered prior convictions as defined by section 667.5, subdivision (b).

Defendant pleaded no contest to count 1, and admitted he suffered convictions within the meaning of sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i), and section 667.5, subdivision (b). On December 14, 2011, the trial court sentenced defendant to state prison for a term of five years, consisting of a term of two years on count 1, doubled to four years on the allegation of defendant having suffered prior convictions of a serious or violent felony or juvenile adjudication as defined by sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), and one year for having suffered prior convictions as defined by section 667.5, subdivision (b). The trial court dismissed the remaining counts.

The trial court ordered defendant to pay restitution in an amount to be determined, a \$1,000 restitution fine, a \$1,000 parole revocation fine, a \$40 court security fee, and a \$30 criminal conviction fee. The trial court awarded defendant 272 days of custody credit consisting of 136 days of actual custody credit and 136 days of conduct credit.

## **DISCUSSION**

### **A. Sentencing**

The calculation of the amount of custody credits to which defendant was entitled is not accurate. Defendant's counsel stated at the December 14, 2011, sentencing hearing that, "As far as [defendant's] credits, I believe he has 136 actual days." Based on that, the trial court awarded defendant 272 days of custody credit consisting of 136 days of actual custody credit and 136 days of conduct credit. The probation report stated, however, that defendant was arrested on November 9, 2011, in connection with the crime for which he was convicted. Therefore, assuming that defendant was, in fact, arrested on November 9, 2011, because defendant was sentenced on December 14, 2011, defendant was in custody 35 days, not 136 days.

Also, according to the probation report, on December 12, 2011, defendant stated that “he is currently serving a five year sentence at Susanville State Prison for forgery.” The author of the probation report stated in the report that he “was unable to find a Kern County conviction in June, 2011 for 470(d) PC [forgery] . . . . Defendant stated he is currently serving a 5 year sentence for this crime.” “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. (*People v. Bruner* [(1995)] 9 Cal.4th [1178,] 1180; *In re Joyner* (1989) 48 Cal.3d 487, 489 [256 Cal.Rptr. 785, 769 P.2d 967]; *In re Rojas* (1979) 23 Cal.3d 152, 155 [151 Cal.Rptr. 649, 588 P.2d 789].)” (*People v. Gisbert* (2012) 205 Cal.App.4th 277, 281.) The record does not disclose whether defendant was, in fact, in prison during any portion of the period between his date of arrest and date of conviction, and if so, during what period of time.

The wrong formula was applied in calculating the number of days of custody credit to which defendant was entitled, if any. Prior to January 25, 2010, section 4019 provided that a defendant could earn two days of conduct credit for every four days the defendant served in actual custody. (Former § 4019, subds. (b) and (c), as amended by Stats. 1982, ch. 1234, §7.) Section 4019 was amended so that from January 25, 2010, through September 27, 2010, certain defendants accrued day-for-day conduct credit. (Former § 4019, subds. (b)(1) and (c)(1), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, §50.) This scheme, however, did not apply to defendants who, inter alia, had a prior conviction for a serious or violent felony; they continued to accrue conduct credit under the version of former section 4019 in effect prior to January 25, 2010, at a rate of two days of conduct credit for every four days the defendant served in actual custody. (Former § 4019, subds. (b)(2), (c)(2) and (f), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, §50.)

Defendant committed his count 1 offense on August 21, 2010, making him eligible for conduct credit under the version of section 4019 in effect between January 25, 2010, through September 27, 2010. (Former § 4019, subds. (b)(1) and (c)(1), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, §50.) Because defendant had a prior conviction

for a serious or violent felony, however, he was not entitled to the day-for-day conduct credit, but instead, should have been credited, if at all, with conduct credit under the version of former section 4019 in effect prior to January 25, 2010 at a rate of two days of conduct credit for every four days the defendant served in actual custody. (Former § 4019, subds. (b)(2), (c)(2) and (f), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, §50.)

We therefore reverse the amount of custody credits awarded defendant, and remand this matter for purposes of the trial court determining the proper number of custody credits to be awarded defendant consistent with this opinion. In doing so, the trial court is to, inter alia, determine the date on which defendant was arrested for the crime for which he was convicted in this matter, and whether defendant was in custody attributable to another offense during any portion of the time he was arrested to the time he was sentenced in this matter such that defendant's entitlement to presentence credits must be reduced.

## **B. Review**

In addition to reviewing and addressing the matters raised in the parties' letter briefs, we have made an independent examination of the entire record to determine if there are any other arguable issues on appeal. Based on that review, we have determined that there are no other arguable issues on appeal. We are therefore satisfied that defendant's counsel has fully complied with counsel's responsibilities under *People v. Wende, supra*, 25 Cal.3d 436.

**DISPOSITION**

We reverse the amount of custody credits awarded defendant, and remand this matter to the trial court for purposes of determining the proper number of custody credits to be awarded defendant consistent with this opinion. We otherwise affirm the judgment.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.