

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNARD WATKINS,

Defendant and Appellant.

B239277

(Los Angeles County
Super. Ct. No. TA087041)

APPEAL from an order of the Superior Court of the County of Los Angeles, Eleanor J. Hunter, Judge. Affirmed in part and remanded with instructions.

California Appellate Project, Jonathan B. Steiner, Executive Director, Richard B. Lennon, 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, Linda C. Johnson, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

On remand from an appeal to this court, the trial court resentenced defendant. In doing so, the trial court, inter alia, awarded defendant additional custody credits which it later deleted from an amended abstract of judgment. Defendant appeals from that amended abstract of judgment, arguing that it does not accurately reflect his base sentence and that he is entitled to an additional 706 days of custody credit. The Attorney General agrees with defendant.

We hold that the abstract of judgment does not accurately reflect defendant's base sentence and omits 706 days of actual custody credit to which defendant is entitled for time spent in a state institution. We therefore remand the matter to the trial court with instructions to amend the abstract to reflect accurately defendant's base sentence and by adding 706 days of actual custody credit for time spent in a state institution.

PROCEDURAL BACKGROUND

On May 16, 2008, we issued an unpublished opinion in case number B200861 conditionally reversing the judgment of conviction and directing the trial court to conduct *Pitchess*¹ proceedings to determine whether there was any discoverable information that defendant did not receive prior to trial and, if so, whether defendant was prejudiced by the failure to provide that information to him. We also instructed the trial court that, if it determined there was no discoverable information or that defendant had suffered no prejudice, it was to reinstate the conviction and resentence defendant.

On remand, the trial court conducted the *Pitchess* review, ordered that certain discovery be provided to defense counsel, and determined that defendant suffered no prejudice from the failure to provide the discovery to him prior to trial. The trial court therefore reinstated the judgment and resentenced defendant. According to a July 24,

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

2009, amended abstract of judgment, the trial court awarded defendant 706 days of actual custody credit for the time defendant spent in prison between the initial sentencing and the resentencing. The 706 days were added to the 256 days of presentence actual custody credit that defendant was awarded at the original sentencing, for a total of 962 days of actual custody credit. The trial court, however, also awarded defendant 352 days of *conduct* credit, in addition to the original sentencing award of 128 days, for a total of 480 days of conduct credit. On November 4, 2009, and February 1, 2010, the trial court issued amended abstracts of judgment that did not modify the custody credits shown in the July 24, 2009, amended abstract of judgment.

On February 1, 2012, the Department of Corrections sent a letter to the trial court advising that the amended abstract of judgment erroneously showed that defendant was entitled to additional *conduct* credit for the time he spent in prison between the original sentencing and resentencing. Accordingly, the Attorney General requested that the trial court review the amended abstract of judgment to determine whether a correction was required.

In response to the Attorney General's letter, the trial court issued an amended abstract of judgment dated February 3, 2012, reflecting that defendant was entitled to only the 256 days of presentence actual custody credit and the 128 days of presentence conduct credit that he was awarded at the original sentencing, i.e., defendant was not awarded any custody credit for the time spent in prison between the original sentencing and the resentencing. The abstract of judgment also reflected the base term as three years, incorrectly reflecting the doubling of the term pursuant to Penal Code section 1170.12 as an enhancement. Defendant filed a timely notice of appeal from the February 3, 2012, amended abstract of judgment.

DISCUSSION

Defendant raises two contentions on appeal concerning the February 3, 2012, amended abstract of judgment. His first contention concerns the manner in which his base sentence is reflected in that abstract of judgment. According to defendant, the trial court sentenced him to a base term of six years, comprised of a three-year upper term doubled to six years pursuant to Penal Code section 1170.12 based on his prior strike conviction. But the amended abstract of judgment shows in box 1 that the trial court imposed a three-year upper term base sentence and, in box 3, that it imposed a three-year *enhancement* pursuant to Penal Code section 1170.12. Defendant argues that the abstract should be modified to show in box 1 that he received a six-year base term. The Attorney General agrees.

Defendant is correct that enhancements are sentences that are added after a determination of the base term. (*People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433.) Therefore, we agree that the abstract should be modified to reflect a six-year base term in box 1, with only a one-year enhancement under Penal Code section 667.5, subdivision (b) in box 3.

Defendant next contends that the February 3, 2012, amended abstract of judgment fails to reflect the 706 days of actual custody credit he earned while in prison between the initial sentencing and the resentencing. The Attorney General again agrees.

In *People v. Buckhalter* (2001) 26 Cal.4th 20, 23, the court explained: “When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the ‘subsequent sentence.’ ([Penal Code] § 2900.1.) On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. Instead, he remains ‘imprisoned’ ([Penal Code] § 2901) in the custody of the Director ‘until duly released according to law’ (*ibid.*), even while temporarily confined away from prison to permit his

appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility, or under equivalent circumstances elsewhere, ‘prior to the imposition of sentence’ for a felony. ([Penal Code] § 4019, subds. (a)(4), (b), (c), (e), (f);. . . .) Instead, any credits beyond *actual custody time* may be earned, if at all, only under the so-called worktime system separately applicable to convicted felons serving their sentences in prison. ([Penal Code] § 2930, et seq., 2933.)”

The February 3, 2012, amended abstract of judgment correctly reflects that defendant is entitled only to conduct credit for time served in jail prior to his sentence, i.e., 128 days. But the amended abstract fails to reflect that defendant is entitled to an additional 706 days of actual custody credit for the time he served in prison between the initial sentencing and the resentencing, for a total award of actual custody credit of 962 days—256 days of presentence actual custody credit plus 706 days of actual custody credit for time spent in a state institution following the original sentencing. The amended abstract of judgment must be corrected accordingly.

DISPOSITION

The matter is remanded to the trial court with instructions to correct the February 3, 2012, amended abstract of judgment to reflect: (1) in box 1 a base term of six years, with box 4 checked, as it is currently, to show that defendant was sentenced pursuant to Penal Code section 1170.12, and in box 3 only a one-year prior prison term enhancement pursuant to Penal Code section 667.5, subdivision (b); and (2) that defendant is entitled to 962 days of actual custody credit and 128 days of presentence conduct credit, for a total award of custody credits of 1090 days. In all other respects, the judgment of conviction is affirmed.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.