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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.

THAD WARTH,

Defendant and Appellant.

B240683

(Los Angeles County
Super. Ct. No. SA076278)

APPEAL from a judgment of the Superior Court of Los Angeles County, Antonio Barreto, Jr., Judge. Affirmed as modified.

Marilee Marshall & Associates, Inc. and Marilee Marshall, 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, Assistant Attorney General, James William Bilderback, II, and Mark E. Weber, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Thad Warth, appeals from a judgment entered after a jury convicted him of firearm possession after having previously been convicted of a felony. (Former Pen. Code,¹ § 12021, subd. (a)(1) now § 29800, subd. (a)(1).) The information alleged defendant was in possession of a firearm on December 21, 2010. Count 1 alleged defendant had been convicted of burglary on June 23, 1988. Count 2 of the information alleged, on or between August 30, and September 1, 2010, defendant committed grand theft of property exceeding \$950. (§ 487, subd. (a).) The jury acquitted defendant of count 2 and two lesser included offenses of attempted grand and attempted petty theft. The jury deadlocked on a third potential lesser included offense of attempted petty theft. The trial court granted a mistrial as to the third lesser included offense. The trial court granted the prosecution's motion to dismiss count 2 pursuant to section 1385, subdivision (a).

The trial court placed defendant on formal probation for three years. Defendant was ordered to pay a: restitution fine of \$200 (§ 1202.4, subd. (b)(1)), \$200 (§ 1202.45); probation restitution fine of \$200 (§ 1202.44); \$40 court security assessment fee (§ 1465.8, subd. (a)(1)); and \$30 criminal conviction fee (Gov. Code, § 70373, subd. (a)(1)). The oral pronouncement of judgment gave defendant three days for actual time served. The trial court did not grant defendant any conduct credits. However, the minute order states that defendant received six days of credit consisting of three days of actual credit plus three days of conduct credit.

II. FACTS

Defendant met Lynn Henny through a dating Web site in July 2010. The two dated for about a month. Defendant went to Ms. Henny's home about 5 to 10 times. He

¹ All further statutory references are to the Penal Code unless otherwise indicated.

spent the night at her house on a few occasions. Defendant, who was an electrician, agreed to repair some pool lights at Ms. Henny's home. In August 2010, about a month into their relationship, Ms. Henny noticed the safe in her bedroom closet was open. She discovered that a number of items were missing from the safe. When she reviewed her home security monitor, Ms. Henny observed defendant removing items from her safe. Ms. Henny subsequently contacted the police.

As a result of the theft allegations, Los Angeles Police Department officers executed a search warrant on defendant's residence. The residence was owned by defendant's father. Defendant was the only person living in the home. But, defendant's father stored items there. While searching the residence, officers discovered a six-shot revolver loaded with five rounds. The revolver was found in a gun case underneath the bed in the master bedroom. Defendant slept in the master bedroom. Defendant told officers the gun belonged to him. Defendant kept the gun for self-protection.

Defendant had been convicted of felony burglary on June 23, 1988. Defendant testified that he did not believe the 1988 conviction was a felony. According to defendant, the last time he had any problems, he was "informed" that his conviction was a misdemeanor. At the sentencing hearing, defense counsel raised the issue of whether a June 23, 1988 minute order in a co-defendant's 1988 case suggested the prior conviction was only a misdemeanor. This was because the minute order showed a burglary conviction was reduced to a misdemeanor. The trial court rejected the contention that defendant's prior conviction was a misdemeanor based on the June 23, 1988 minute order in the co-defendant's case. The trial court noted that defendant had pled guilty on July 21 and was sentenced on September 29, 1988. The superior court file from the 1988 case indicated that defendant's burglary conviction had *not* been reduced to a misdemeanor.

III. DISCUSSION

We appointed counsel to represent defendant on appeal. After examination of the record, appointed appellate counsel filed an "Opening Brief" in which no issues were

raised. Instead, appointed appellate counsel requested this court to independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. On September 12, 2012, we advised defendant that he had 30 days within which to personally submit any contentions or arguments he wishes us to consider. No response has been received. We have examined the entire record and are satisfied appointed appellate counsel has fully complied with her responsibilities. No argument exists favorable to defendant on appeal. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

We asked the parties to address an issue related to presentence conduct credit. As previously noted, there is a discrepancy between the oral pronouncement not granting any conduct credit and the clerk's minute order granting three such days. Defendant is not entitled to any conduct credits. First, the trial court's oral pronouncement controls over the clerk's minute order. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075-1076) The clerk's error in the minutes may be corrected on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185, 189; *People v. Rosas* (2010) 191 Cal.App.4th 107, 113-114) Second, defendant's commitment offense was based on his firearm possession on December 21, 2010. Defendant was arrested on the same date. Defendant was released on bail on December 23, 2010. Defendant was sentenced on March 27, 2012. The current version of section 4019, subdivision (e) prohibits any presentence conduct credits because defendant was only in custody three days. (*People v. Garcia* (2012) 209 Cal.App.4th 530, 538-541; Stats. 2010, ch. 426, § 2.)

IV. DISPOSITION

The clerk's minute order is corrected to delete three days of conduct credit for a total presentence custody credit of three days. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.