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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE JAMES JOHNSON,

Defendant and Appellant.

C065475

(Super. Ct. No.
08F09869)

Defendant Willie James Johnson entered a negotiated plea of no contest to possession of marijuana while in state prison (Pen. Code, § 4573.6; undesignated section references are to this code) and admitted a strike prior (§§ 667, subds. (b)-(i), 1170.12) in exchange for a stipulated eight-year term to run consecutive to his current sentence.¹ Another strike prior was

¹ The oral plea agreement provided that defendant's sentence would run "consecutive to the time that he is currently serving

dismissed in the interests of justice. The trial court sentenced defendant to state prison for eight years.

Defendant appeals. He contends that he is entitled to additional presentence custody credit. We reject his claim and will affirm the judgment.

FACTS

In view of defendant's plea and his contention on appeal, a detailed recitation of the facts underlying the offense is not necessary. Suffice it to say that on September 7, 2008, while an inmate at a state prison, defendant was placed on a contraband watch. Correctional officers observed defendant pass 2.81 grams of marijuana contained within four separate balloons.

DISCUSSION

On October 15, 2004, defendant was sentenced to state prison for a term of five years for assault with a firearm. On July 31, 2009, Department of Corrections and Rehabilitation (DCR) released defendant on parole. That same day, defendant was transported to the county jail to face the marijuana charge to which he later entered his plea of no contest. At sentencing, the trial court awarded defendant presentence custody credit on the marijuana offense from July 31, 2009 (the date he was released on parole and was transported to county

on the incarceration on the most recent case, the 245." There is no indication on the abstract of judgment that defendant's sentence was consecutive to his current prison sentence. Defendant was paroled on the section 245 offense and weapon enhancement on July 31, 2009, before he entered his plea to the marijuana offense.

jail) to June 30, 2010 (the date of sentencing on the marijuana offense); the court awarded 335 actual days and 166 conduct days for a total of 501 days of presentence custody credit.

Defendant contends that he is entitled to additional presentence custody credit from April 13, 2009, to July 30, 2009. He claims that DCR erred in releasing him on parole for the assault offense on July 31, 2009. He claims he should have been released on April 13, 2009.² We conclude that defendant has failed to demonstrate on this record that he is entitled to additional presentence custody credit.

Background

According to defendant's prison chronological history form, DCR received defendant for the assault offense on October 21, 2004, and originally calculated his earliest possible release date (EPRD) as November 13, 2008. As a result of a disciplinary hearing in November 2005, defendant lost 30 days credit yielding a new EPRD of December 13, 2008. On April 13, 2007, defendant lost 30 days credit and an additional 360 days credit for conduct on separate dates, yielding a new EPRD of August 2, 2009, and resulting in a "WG [work group] Change." A June 13, 2007, notation reflects "transfer audit" and a September 17, 2007, notation reflects "intake audit."³ On March 24, 2008, a

² Defendant cites both April 12 and April 13. In the trial court, defendant and the prosecutor cited April 13, 2009.

³ According to the prosecutor, defendant was transferred from Old Folsom prison to New Folsom prison. The entries reflect

notation refers to a revised worksheet for defendant's recalculated EPRD. *The revised worksheet is not part of the record on appeal nor is the recalculated EPRD.* Defendant lost an additional 90 days of credit for conduct on three separate occasions (November 17, 2008, December 3, 2008, and February 6, 2009). On July 28, 2009, a notation states, "wanted by Sacramento District Attorney wrnt [sic] #08F09869" (the current marijuana offense). On July 31, 2009, defendant was paroled and released to Sacramento County on its warrant.

For defendant's current marijuana offense, the probation officer recommended that the trial court award 316 actual days from July 31, 2009, to June 11, 2010 (the date originally scheduled for sentencing).

Prior to sentencing, defendant filed a sentencing memorandum and claimed that the sentence on his current marijuana offense should commence on November 13, 2008, giving him an additional 259 actual days besides the 316 actual days listed in the probation report. He claimed that his originally scheduled parole date of November 13, 2008, was changed to August 2, 2009, because he lost credits due to a disciplinary hearing on a weapons charge. After he had been acquitted following a criminal trial on the weapons charge on March 13, 2009, he claimed the time was supposed to have been but was not

August 2, 2012, and July 31, 2011, as release dates which the prosecutor stated were "irrelevant, because they clearly were in error when these were calculated." Defense counsel commented that "2011 is simply a flat[-]out mistake. It's got to be."

restored.⁴ Because his parole date was in November 2008, he argued he could not obtain redress for the loss of his credits administratively with DCR which required application of the days as presentence custody credit towards his prison sentence in the current marijuana case.⁵

At sentencing, defense counsel acknowledged that defendant had lost additional credit as a result of several disciplinary hearings besides the weapons charge. Defense counsel revised his claim for additional credit, arguing that defendant's EPRD should have been April 13, 2009, and that defendant was entitled to presentence custody credit from that date rather than July 31, 2009.

The prosecutor disagreed, explaining that the current marijuana offense occurred in September 2008. Defendant waived time on his disciplinary hearing until the matter was adjudicated in criminal court. The prosecutor stated: "When a defendant is charged with either something that is a rules violation under 115 or something that qualifies as a rule violation, as well as a criminal case, the defendant has the right to a hearing on that matter within 10 or 15 days. The

⁴ An acquittal following a trial is dispositive in the inmate's favor with respect to disciplinary proceedings. (Cal. Code Regs., tit. 15, § 3316, subd. (c)(3).)

⁵ We note that any custody beyond the time a prisoner should have been paroled caused by the loss of credit due to a disciplinary proceeding which he is later acquitted in a criminal trial may be remedied by a shortened parole period. (§ 2932, subd. (g).)

defendant has the right to waive time on that hearing, if the matter is being prosecuted in municipal or superior court.”⁶ The prosecutor claimed that defendant waived time on the disciplinary hearing continuously until he pled to the marijuana charge in superior court and thus, a hearing date was never set.⁷ The prosecutor stated that if the violation had been proven at a hearing, then defendant would have likely lost 91 days. Defense counsel claimed the prosecutor was speculating on the amount of time defendant would have lost on the marijuana charge.⁸ The prosecutor stated: “Those drugs would have lost – given him a loss of credit of at least that amount of time, and he could have had that hearing prior to the criminal charges being heard in this case but chose not to. So [DCR is] allowed to keep him in up until the date of his parole or until the date he’s found guilty of the charged offenses. And in this particular case, he pled to the [marijuana] charge[]; therefore, he would have

⁶ An inmate may request postponement of a disciplinary hearing pending the outcome of the referral for prosecution. (Cal. Code Regs., tit. 15, § 3316, subd. (c).)

⁷ The postponed disciplinary hearing “shall be held within 30 days” after “[w]ritten notice is received that the criminal proceedings are terminated without an acquittal.” (Cal. Code Regs., tit. 15, § 3316, subd. (c)(1)(D).) Here, defendant was paroled before he entered his plea.

⁸ The unauthorized possession of marijuana in state prison is a serious rule violation which subjects a prisoner to progressive credit forfeiture against a determinate term of imprisonment: 121 to 130 days, 131 to 140 days, and 141 to 150 days, for a first, second, and third offense, respectively. (Cal. Code Regs., tit. 15, § 3323, subs. (a) & (d)(7)(A).)

suffered that 115 when he went back to custody and had his 115 hearing. [¶] So those - the time that he was held was not based on the fact that he has this acquittal [on the weapons charge]. That would have been recalculated prior to 4/13 of 09, which is when the defense said he would have been paroled, if he had been given back those credits of a year. But by that time, by 4/13 of 09, he had already been acquitted of [the weapons charge]. He was no longer being held on those charges, and it did not include the time of that extra year for the 360 days loss of credit under the 115 he had."

The prosecutor explained to the court that on October 15, 2004, defendant was sentenced to a five-year term on the assault with a firearm offense and if defendant had served the entire five years, his release date would have been October 15, 2009. When sentenced, the prosecutor stated that defendant had 75 days of presentence custody credit on the assault offense and when those dates were deducted, his release date would be in August 2009. The prosecutor noted that defendant also lost 150 days due to disciplinary hearings. The prosecutor commented that the chronological history from DCR did not "recalculate [defendant's] eligible parole date every single time something happens." The prosecutor agreed with the court's assessment that defendant's conduct both before and after the marijuana charge resulted in the loss of other credits. The prosecutor stated that defendant's release on parole on July 31, 2009, was the "absolute maximum time that [DCR] can keep him in"; the

prosecutor also noted the EPRD of August 2, 2009, which was listed on the chronological history document.

Defense counsel claimed that defendant's original parole date of November 13, 2008, was based on his 75 days of credit when he was sentenced plus 15 percent good-time credits. Had defendant not been docked the 360 days for the weapons charge, defense counsel claimed defendant's release date would have been April 13, 2009.

The prosecutor stated her understanding of what DCR does administratively when a defendant faces pending criminal charges:

"[T]hey continue to hold him until he either, A, requests his hearing on the charges that he has that are pending in superior court or municipal court. He requests his 115 hearing to determine whether or not he's going to have a credit loss, or they keep him until he paroled. [¶] And I had that in three other cases where the defendants are in county custody because they reached their maximum date, and they have never had a credit loss hearing under a 115 for conduct for which they'd been sitting in custody on. But they've been held up until their parole date because of the charges. So they are not getting the extra [good-time] credit that they would be getting, the 20 percent, the 15 percent."

In denying credits from April 13, 2009, to July 30, 2009, the court stated:

"I think under the circumstances, the [DCR] basically, by extending his parole [release date], I don't think they were

doing it based on the prior year. Given all of the subsequent loss of privileges and the pending criminal charges, to me, it's much more likely that they were, basically, in effect, taking away credits based on this [marijuana charge], and they couldn't do anything more because he hadn't requested a hearing. It would have just dragged on and on and on. [¶] By virtue of his plea, he's guilty of the offense. Clearly, it would have resulted in the loss of credit to the extent it had ever been T'd [sic] up in the same way."

The court awarded 335 actual days (July 31, 2009, to June 30, 2010) and 166 conduct days for a total of 501 days of presentence custody credit.

Analysis

Section 2900.5, provided, at the time of conviction, in relevant part, as follows:

"(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, . . . , prison, . . . , all days of custody of the defendant, . . . and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment,

"(b) For the purposes of this section, 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. Credit shall be given only once for a

single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

"(c) For the purposes of this section, 'term of imprisonment' includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence, and also includes any term of imprisonment, including any period of imprisonment prior to release on parole and any period of imprisonment and parole, prior to discharge, whether established or fixed by statute, by any court, or by any duly authorized administrative agency.

"(d) It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213."

The credit schemes for presentence and postsentence custody "are separate and independent" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) "Once a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration." (*Id.* at p. 31.)

"[DCR] calculates an earliest possible release date (EPRD) for each inmate. (§ 2932, subd. (e); Cal. Code Regs., tit. 15, § 3043, subd. (c)(5); Cal. Dept. of Corrections, Operations Manual (2000) § 73030.8.13.) To do so, it starts with the date

of sentencing, adds the total prison term imposed, and subtracts any presentence credit awarded. This establishes a maximum release date. From this date, [DCR] subtracts worktime credits the inmate has earned or is expected to earn in his current credit-earning status, adds back any worktime credits that have been denied or lost through disciplinary actions, and subtracts any denied or lost credits that have been restored. The result is the EPRD, with the proviso that it cannot exceed the maximum release date calculated from the total prison term less presentence credits. (Cal. Dept. of Corrections, Operations Manual, *supra*, § 73030.8.13.) The EPRD is predictive, in that it is subject to change. Therefore, such things as a change in the inmate's credit-earning status, the denial or loss of credit through disciplinary action, the restoration of previously denied or lost credits, or a subsequently imposed consecutive prison term will change the calculation. [DCR] recalculates the EPRD upon any such change and at six-month intervals. (§ 2932, subd. (e); Cal. Code Regs., tit. 15, § 3043, subd. (c)(5)(B).)" (*In re Tate* (2006) 135 Cal.App.4th 756, 759.) In other words, DCR, not the trial court, calculates the credit on the period in which defendant is confined in a DCR facility. (*In re Martinez* (2003) 30 Cal.4th 29, 32, 37; *Buckhalter, supra*, 26 Cal.4th at pp. 30-31, 40-41.)

In *In re Rojas* (1979) 23 Cal.3d 152, the petitioner, who had been serving a prison sentence for manslaughter when charged with an unrelated murder committed prior to the manslaughter, sought credit for time spent in county jail against his new

murder sentence which was to run concurrent to the remainder of his sentence for manslaughter. *Rojas* explained that the purpose of section 2900.5 was to ensure that a person held in custody pending trial would not serve a longer period of confinement upon conviction than a person who was not in custody pending trial. *Rojas* rejected the petitioner's claim, observing "[t]here is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense. Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*Rojas, supra*, 23 Cal.3d at p. 156.)

"[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194.) The rule of strict causation "stems from the conclusion that section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the sentence was the *true and only unavoidable basis* for the earlier custody." (*Id.* at p. 1192.) *Bruner* rejected the holding of *In re Atilas* (1983) 33 Cal.3d 805 that "duplicate

credit is due whenever the conduct at issue was 'a' basis for the presentence custody, even if not the only basis." (9 Cal.4th. at p. 1180.) "To the extent *Atiles* reaches a contrary conclusion, we overrule that decision." (*Id.* at p. 1194, fn. omitted.) "We acknowledge the difficulty [with the strict causation rule], but it arises from the limited purposes of the credit statute itself. The alternative is to allow endless duplicative credit against separately imposed terms of incarceration when it is not at all clear that the misconduct underlying these terms was related." (*Id.* at p. 1193.) It is defendant's burden to show that he is entitled to the credit claimed. (*Id.* at pp. 1193-1194.)

The evidence before the trial court did not demonstrate defendant's entitlement to credit from April 13, 2009, to July 30, 2009 (109 additional days). DCR's chronological history showed EPRDs, none of which were April 13, 2009. Defendant had an administrative remedy - he could have, and may have, challenged the denial of good behavior and participation credit and credit reductions which affected his EPRD through DCR's review procedure. (§§ 2932, 2933.) There had been a change in defendant's work group in 2007 which could have affected his ability to earn credit. The March 2008 revised worksheet with the recalculated EPRD was not presented to the trial court nor were the recalculated EPRDs which were supposed to have been done every six months. Defendant did not show that his custody in prison beyond April 13, 2009, was due solely to the marijuana

offense.⁹ Even assuming there was a disciplinary hearing pending on the marijuana offense, he remained in DCR's custody on the original offense which defendant has not shown was a "but for" cause of his loss of liberty for the current offense. Further, section 2900.5, subdivision (b) prohibits an award of duplicate credit when a consecutive sentence is imposed.¹⁰ Defendant entered his plea in exchange for a stipulated eight-year term to run consecutive to the sentence he was serving for the section 245 offense and another strike prior was dismissed in the interests of justice. Defendant has failed to show the trial court erred in relying upon the date of his parole and release to Sacramento County on its warrant, July 31, 2009, in

⁹ We reject defendant's claim that the prosecutor conceded that defendant's proper release date but for the pending disciplinary hearing on the marijuana charge was April 13, 2009, and that such concession binds the People on appeal. As the People claim, the prosecutor was surmising what had occurred since the evidence presented by defendant was incomplete. It was defendant's burden to demonstrate his entitlement to additional credit and the prosecutor opposed his request.

¹⁰ Consecutive sentences for in-prison offenses are treated differently than consecutive sentences imposed only under section 1170.1, subdivision (a). Consecutive sentencing of in-prison offenses is governed by section 1170.1, subdivision (c), which provides, in relevant part, as follows: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison . . . and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison."

calculating presentence custody credit on the current marijuana offense.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

MAURO, J.