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

<p>THE PEOPLE,</p> <p style="padding-left: 40px;">Plaintiff and Respondent,</p> <p style="padding-left: 40px;">v.</p> <p>OLIVER PASCAL DUBIN,</p> <p style="padding-left: 40px;">Defendant and Appellant.</p>	<p style="text-align: right;">C066961</p> <p style="text-align: right;">(Super. Ct. No. 07F9175)</p>
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This case comes to us pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Having reviewed the record as required by *Wende*, we will order an additional day of custody credit and otherwise affirm the judgment.

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

On October 25, 2007, defendant Oliver Pascal Dubin, a passenger in a van stopped by police officers, was found to be in possession of four baggies of marijuana, eight baggies of methamphetamine, and close to \$2,800 in cash. He was charged

with possession for sale and transportation of both substances. (Health & Saf. Code, §§ 11378, 11359, 11360, subd. (a), 11379, subd. (a).) Two prior narcotics convictions and three prior prison terms were also alleged. (Health & Saf. Code, § 11370.2, subd. (c); Pen. Code, § 667.5, subd. (b).)

On January 13, 2009, defendant pled guilty to transportation of methamphetamine and marijuana and admitted having two prior narcotics convictions and serving two prior prison terms. As part of the plea agreement, the trial court released defendant for one week to apply to a drug treatment program with the understanding that, if defendant appeared on the scheduled return date, he would be permitted to withdraw his plea to the transportation of marijuana count and to the prison priors (as well as to a count in an unrelated case). Defendant's maximum prison exposure would then be reduced to 10 years and the court would consider probation. Should defendant fail to appear, he would be sentenced to 13 years eight months.

Defendant appeared at the scheduled hearing and reported he had been accepted into the Delancey Street program in San Francisco. Defendant was released on bail and appeared March 17, 2009 for sentencing as ordered. The matter was referred to the probation department and a new date of May 5, 2009 was set for sentencing. Due to some problems with mail delivery and telephone messages, defendant had not met with the probation department prior to the hearing. The hearing was rescheduled for July 16, 2009.

The probation department's presentence report recommended that defendant be denied probation. At the July 16, 2009 sentencing hearing, the court explained it was offering defendant a different agreement than the one to which he had initially agreed. The court offered to place defendant on probation "in return for a greater sentence should you violate probation." The greater sentence would be 13 years. The court asked defendant if he was "willing to abide by this adjustment in your original negotiated plea" and defendant said he was. Defendant also waived all of his past custody credits. Accordingly, the court sentenced defendant to 13 years, suspended execution of sentence, reinstated probation, and released defendant, ordering him "to be enrolled in, and living at the Delancey Street program on or before August 7th, 2009." He was told to be in court on August 7, 2009 if he was not so enrolled.¹

After talking to his probation officer, defendant came to the incorrect conclusion that he had options available to him other than enrollment in the Delancey Street program by August 7, 2009 and, instead, appeared in court on that date. The court remanded defendant into custody and a petition for revocation of probation was filed.

After the August 20, 2009 probation revocation hearing, the court found that, although it did not believe defendant

¹ The plea in the unrelated case was vacated.

misunderstood that he was to be enrolled in the Delancey Street program by August 7, 2009, there was insufficient evidence that defendant had willfully violation probation. Accordingly, the court dismissed the petition for revocation of probation and reinstated probation on the condition defendant enroll in the Delancey Street program by August 27, 2009.

Defendant did not report to the Delancey Street program. On September 6, 2009, he was arrested in Mill Valley, Marin County, for possession of methamphetamine and drug paraphernalia. He was released from jail but failed to report to his probation officer. A warrant was issued for his arrest.

In May 2010, defendant was arrested in Las Vegas, Nevada, for possession of false identification. He had not reported to his probation officer as required since August of the previous year. He was returned to California and a probation revocation hearing was held on September 28, 2010. The court sustained the revocation petition as amended. On November 18, 2010, the court ordered execution of the previously imposed sentence of 13 years.

Defendant appeals.

Counsel filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

As an initial matter, we dismiss a portion of defendant's appeal. Defendant filed a notice of appeal on December 21, 2010. In addition to appealing the November 18, 2010 order executing sentence, defendant's notice of appeal purports to appeal from the court's August 20, 2009 order reinstating probation. This portion of defendant's appeal is untimely, as that order was an appealable order from which defendant did not timely appeal. (Pen. Code, § 1237 [appeal may be taken from order made after judgment, affecting party's substantial rights].)

An appeal is taken by filing a written notice within 60 days of rendition of the judgment or making of the order. (Cal. rules of Court, rule 8.308(a).) As a general rule, a timely notice of appeal is essential to appellate jurisdiction. (*People v. Fasanella* (1971) 14 Cal.App.3d 1004, 1008.) The current notice of appeal, filed December 21, 2010, was too late to attack the August 2009 order. That order is now final and binding and may not be attacked subsequently on an appeal from a later appealable order or judgment. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Accordingly, we dismiss that portion of defendant's appeal that purports to appeal from the August 20, 2009 order.

Our review of the record disclosed a custody credit error. The court awarded 165 actual days and 164 conduct days for a total of 329 days of presentence custody credit. We conclude that defendant is entitled to one additional conduct day pursuant to the September 2010 amendments to Penal Code former

sections 4019 and 2933. (Pen. Code, §§ 4019, former subds. (b) & (c) [as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50], 2933, subd. (e)(1) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

Effective January 25, 2010, Penal Code section 4019 was amended to give qualifying prisoners one day of conduct credit for each day of actual presentence custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Effective September 28, 2010, Penal Code section 2933 was amended to provide day-for-day conduct credits, but only for qualifying defendants sentenced to state prison. (Pen. Code, § 2933, former subd. (e); Stats. 2010, ch. 426, § 2.) The amendment eliminated the loss of one day of conduct credit when a defendant serves an odd number of actual days in presentence custody. Thus, pursuant to that amended version of Penal Code section 2933, defendant is entitled to 165 conduct days (rather than 164 conduct days), for a total of 330 days of presentence custody credit.

Additionally, we note several omissions from the abstract of judgment. The following fees and assessments were ordered by the trial court but not included on the abstract of judgment: a 10 percent administration fee on the \$200 restitution fine (Pen. Code, § 1202.4, subd. (l)); two \$30 criminal conviction assessments (Gov. Code, § 70373) for a total of \$60; a \$128 booking fee (Gov. Code, § 29550.2); and \$130 in fees and assessments on the \$50 criminal laboratory fee imposed pursuant to Health and Safety Code section 11372.5 (including \$50 pursuant to Pen. Code, § 1464, \$10 pursuant to Pen. Code,

§ 1465.7, \$5 pursuant to Gov. Code, § 76104.7, \$25 pursuant to Gov. Code, § 70372, and \$35 pursuant to Gov. Code, § 76000, subd. (a)(1)). Accordingly, we will direct the trial court to prepare an amended abstract of judgment reflecting these fees and assessments. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185-187.)

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

Defendant's purported appeal from the August 20, 2009 postjudgment order is dismissed. The November 18, 2010 order executing sentence is modified to provide conduct credit of one additional day, resulting in a total of 330 days of presentence custody credit. As modified, the order is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the additional day, as well as the omitted fines and fees, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

RAYE, P. J.

NICHOLSON, J.