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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER MICHAEL SMITHERS,

Defendant and Appellant.

C067128

(Super. Ct. No.  
NCR79776)

Defendant Christopher Michael Smithers pleaded guilty to felony resisting arrest (Pen. Code, § 69) and admitted a prior strike conviction. He was sentenced to a term of 32 months in state prison. He appeals, contending the trial court erred by failing to award him presentence custody credits as a result of a parole hold that was placed on him at the time of his arrest. We agree and remand the matter for resentencing.

## FACTS AND PROCEEDINGS

Defendant was arrested in July 2010 and charged with driving under the influence of alcohol with priors (Veh. Code, §§ 23152, subds. (a) & (b), 23550, subd. (a)), felony resisting arrest (Pen. Code, § 69), battery on a peace officer (Pen. Code, § 243, subd. (b)), driving on a suspended license (Veh. Code, § 14601.2, subd. (a)), and hit and run driving (Veh. Code, § 20002, subd. (a)), with enhancements for three prior prison terms (Pen. Code, § 667.5, subd. (b)) and a prior strike conviction (Pen. Code, § 667, subds. (b)-(i)). On the same date, he was booked on a parole violation.

In November 2010, defendant pleaded guilty to resisting arrest and admitted the prior strike conviction. In a presentence report, it was recommended that he not be given any presentence custody credits because he was also in custody on the parole violation.

At the sentencing hearing, which occurred in January 2011, defense counsel told the court that the parole violation was based solely on "these facts" and, consequently, he believed defendant was entitled to presentence custody credits. The court sentenced defendant but continued the matter to determine whether the parole violation was based solely on the current offense. The following day, the deputy district attorney reported to the court that, according to a parole agent, defendant's parole violation was based on "the incidents involved in this case," in addition to the consumption of

alcohol. After confirming defendant's parole violation was based on more than just the resisting arrest offense, the court found defendant was not entitled to presentence custody credits because "there were factors that he was violated on by [p]arole that were not involved in this offense." Defendant filed a notice of appeal.

In March 2011, defendant's appellate attorney wrote a letter to the trial court requesting that defendant be awarded presentence custody credits. According to the letter and attached documentation, prior to entering his plea in the current matter, defendant accepted an "optional waiver" of his right to a parole hearing, which preserved his right to a hearing if requested within 15 days of the completion of local proceedings.

California Code of Regulations, title 15, section 2641, subdivision (b) provides: "Optional Waiver. A parolee who is undergoing criminal prosecution may conditionally waive the revocation hearing, but retain the option to request a hearing as provided in this subsection. Upon receipt of a signed optional waiver, the Board at the central office calendar will determine whether there is good cause to revoke parole. This determination will be made without a hearing or personal appearance by the parolee. [¶] If the Board orders parole revoked and the parolee returned to custody, the parolee then may request a revocation hearing. A hearing request must be received by the Board no more than 15 days following sentencing or final disposition at the trial court level in the criminal

proceedings and no later than two months before expiration of the revocation period ordered by the Board at the central office calendar. Upon receipt of a hearing request, the Board shall schedule a revocation hearing. At the hearing the panel may take any appropriate action."

Following defendant's sentencing in the current matter, he requested a parole hearing, which took place one week later. According to the written summary from the hearing, all charges were dismissed except the resisting arrest allegation "in the int[erest]s of justice to match dismissed and guilty charges in minute order e-mailed by att[orne]y."

The trial court denied the request to amend defendant's presentence custody credits because it did not "involv[e] 'calculation error' of the custody credits." Defendant filed a second notice of appeal.

## DISCUSSION

Defendant contends he is entitled to credit for the period he was in custody prior to sentencing on the current matter because the same conduct underlying his conviction was the sole basis for his parole violation. This claim has merit.

Pursuant to Penal Code section 2900.5, a defendant is entitled to presentence custody credit "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (Pen. Code, § 2900.5, subd. (b).) The California Supreme Court has interpreted this language to mean "a prisoner is not entitled to

credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Thus, presentence custody credits should be denied toward a new term when such custody is "attributable to a parole revocation caused in part, but not exclusively, by the conduct that led to the new sentence." (*Id.* at pp. 1182-1183.) To be entitled to presentence custody credits, the defendant must establish that "the conduct which led to the sentence was a dispositive, or 'but for,' cause of the presentence custody." (*Id.* at p. 1180.)

In the present matter, at the time defendant was sentenced, the information before the trial court supported its determination regarding the denial of presentence custody credits. While we do not agree with the People that the denial of such credits could be premised on the conduct underlying the dismissed charges in the current matter (*People v. Williams* (1992) 10 Cal.App.4th 827, 834-835), defendant's parole initially was revoked for alcohol consumption as well, which is a separate basis from any of the charges filed against him in the present matter. (See *People v. Stump* (2009) 173 Cal.App.4th 1264, 1270-1273.)

However, defendant's waiver of a parole revocation hearing was conditional and preserved his right to request a hearing after his sentencing in the trial court. Defendant presented evidence to the trial court that, subsequent to his sentencing in the current matter, he exercised his right to a parole

revocation hearing, resulting in the dismissal of all grounds for revoking his parole other than the conduct underlying his current conviction. Thus, defendant established that the conduct leading to his sentence "was a dispositive, or 'but for,' cause of the presentence custody." (*People v. Bruner, supra*, 9 Cal.4th at p. 1180.) As a matter of equal protection, defendant cannot be denied credit for this period of custody merely because his parole revocation proceedings were completed after his sentencing on the current matter.

The trial court denied defendant's request to adjust his presentence custody credits because it did not involve a "calculation error.'" It appears the court believed it was without jurisdiction to correct defendant's presentence custody credits based on the information it received post-sentencing. This was incorrect. As defendant was legally entitled to presentence custody credits, the computation of credits "could be corrected at any time when brought to the attention of the court." (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 474; see *Dix v. Superior Court* (1991) 53 Cal.3d 442, 461 [trial court may consider circumstances arising after the original sentencing when recalling sentence pursuant to Penal Code section 1170, subdivision (d)].)

Although this court has authority to modify the judgment to provide defendant with presentence custody credits (Pen. Code, § 1260), we instead will remand the matter to the trial court for a determination of this issue, which involves factual determinations more properly resolved there.

## DISPOSITION

The order denying presentence custody credits is vacated and the matter is remanded to the trial court for a determination of such credits in accordance with the views expressed in this opinion. The court is directed to amend the abstract of judgment accordingly and to provide a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.