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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENT RAY CLOSE,

Defendant and Appellant.

C067615

(Super. Ct. No. CRF10-01138)

Defendant Brent Ray Close entered a plea of no contest to infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)-count I)¹ in exchange for a stipulated sentence of four years in state prison and the dismissal of the remaining counts and allegations. The court sentenced defendant accordingly. The court awarded 90 actual days and 44 conduct days for a total of 134 days of presentence custody credit.

¹ Undesignated statutory references are to the Penal Code in effect at the time of defendant's sentencing on March 4, 2011, unless otherwise specified.

Defendant appeals. His request for a certificate of probable cause (§ 1237.5) was denied. He contends the trial court failed to award one-for-one presentence custody credits. We agree and shall modify the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 5, 2010, a California Highway Patrol officer was informed by two separate drivers that a pickup truck was "out of control and the driver . . . was 'beating up a woman.'" The officer found and stopped the truck which was driven by defendant. Defendant, having failed field sobriety tests, was arrested for driving under the influence. His female passenger was crying and had multiple injuries. The officer saw a bag of marijuana on the floorboard and a further search revealed 100 grams of marijuana and prescription bottles with the passenger's name. The passenger was arrested for being under the influence. A driver and passenger of another vehicle informed the officer that they were forced off the road when defendant's truck swerved towards them. They were not hit but required assistance to get their vehicle out of a snow bank.

Defendant was charged with corporal injury to a cohabitant (count I) and assault with a deadly weapon, to wit, his truck, and by means of force likely to produce great bodily injury (count II). Defendant was also charged with two misdemeanors: being under the influence (count III) and driving with wanton disregard for the safety of persons and property (count IV). The accusatory pleading alleged two prior prison terms (§ 667.5,

subd. (b)) and a strike prior, a first degree burglary (§§ 459, 667, subds. (b)-(i)).

Defendant's negotiated plea to the corporal injury count provided for the dismissal of the remaining counts and allegations. The plea form reflects that defendant initialed the following two statements, the second immediately following the first:

"I understand that, as part of the plea agreement bargain, the following counts will be dismissed after sentencing: [¶] Ct II, III, IV, Priors[.]

"I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea." (See *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).)

At the entry of plea hearing, the court explained:

"THE COURT: All right. Mr. Close, I've been handed a green plea form with explanation and waiver of rights, felony, with some initials in these boxes and a signature where indicated. Are those your initials, is that your signature?

"[DEFENDANT]: Yes, Your Honor.

"THE COURT: Any questions about what you initialed or signed here?

"[DEFENDANT]: I believe I understood it.

"THE COURT: It's a yes or no answer.

"[DEFENDANT]: No.

"THE COURT: [Defense Counsel], let me just look through this real quick because there's one little issue we have to deal with. [¶] [Prosecutor], [Defense Counsel], my understanding of the plea agreement is as follows. There's no major change, we just have a box we have to deal with, is that [defendant], as we stated, is going to plea[d] to Count [I] for a stipulated term of four years, which is the maximum term allowable by law. [¶] All other charges would be dismissed. However, there could be a *Harvey* waiver as to Count [II], and by *Harvey* waiver, that means that the Court can consider that charge in terms of crafting the appropriate sentence and also ordering restitution. [¶] So, although you're not pleading to Count [II], which is a violation of [section] 245[, subdivision] (a)(1), the assault with a deadly weapon on two people in the other car, the Court can set restitution for any economic or out-of-pocket losses they have suffered. That is the plea agreement. [¶] [Defense counsel], because of that, [item] No. [2.e.2. of the plea form] needs to be checked in terms of restitution to the victims.

"[DEFENSE COUNSEL]: I thought we did that.

"THE COURT: No. Although I'm not sure there is any restitution, I think the Court needs to reserve that based on the *Harvey* waiver—or the plea agreement. [¶] So, Mr. Close, I've been handed this green form with some initials in these

boxes and a signature where indicated. Those are your initials, that's your signature; correct?

"[DEFENDANT]: Yes.

"THE COURT: Any questions about what you initialed or signed here, any questions about this form?

"[DEFENDANT]: No.

"THE COURT: Basically, the plea agreement is very simple. You're going to plead guilty or no contest to a violation of Count [I], a violation of Penal Code section 273.5, with a *Harvey* waiver on Count [II] only in terms of restitution. [¶] The Court's going to refer this to the probation department, and when it comes back, I'm going to sentence you to four years in state prison; correct? You understand that? And I'm also going to order restitution, if there is any, to the victims for any economic or out-of-pocket losses, okay? [¶] [Defense counsel], he has a question. Why don't you ask him.

"(Counsel confers with the defendant.)

"[DEFENSE COUNSEL]: He's concerned about the prior prison term and the prior-

"THE COURT: Everything else is going to be dismissed at some time, either today or at the time of sentencing.

"[DEFENDANT]: I understand.

"THE COURT: So all you're pleading to is a violation of [section] 273.5[, subdivision] (a), which is commonly known as

felony spousal battery, and I'm going to sentence you to the maximum term allowable by law, which is four years. And based on that agreement, the district attorney would then dismiss the remaining charges and enhancements and prior prison terms, everything, okay?

"[DEFENDANT]: (Nods head.)

"THE COURT: All right. Any questions so far?

"[DEFENDANT]: No.

"THE COURT: [Prosecutor], that is your understanding?

"[PROSECUTOR]: That is, Your Honor."

Shortly thereafter, the court reiterated:

"[THE COURT]: Also, I'm going to order that you make restitution for any economic or out-of-pocket losses suffered by the victim in Count [I] and the victims in Count [II], although you're not pleading to Count [II]. Do you understand that?

"[DEFENDANT]: Yes."

At sentencing in March 2011, the court awarded presentence custody credit of 134 days (90 actual and 44 conduct credits). Defense counsel believed the calculation was up-to-date and correct. Shortly thereafter, defense counsel noted that defendant claimed his entitlement to half-time credits. The prosecutor stated that defendant was so entitled in state prison and that he received "Bravo" credits for his presentence

custody. Defense counsel added nothing further on the credits issue.

DISCUSSION

Defendant contends he is entitled to additional credits under section 4019 because his ineligibility due to a strike prior, although pleaded, was not proved or admitted. The People respond that defendant's waiver pursuant to *Harvey, supra*, 25 Cal.3d 754, bars his challenge to the trial court's reliance upon the dismissed strike prior to calculate his presentence custody credit. The People also argue there is no pleading and proof requirement and that the amended statutes limiting credits do not constitute increased punishment.

Under section 4019, a prisoner in local custody may earn credit against his or her period of confinement under certain conditions. Effective January 25, 2010, section 4019 was amended to provide that certain prisoners may earn presentence custody credit at an increased rate (two days of conduct credit for every four days of actual custody time). (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) However, a prisoner who is required to register as a sex offender, has committed a serious felony, or has a prior serious or violent felony conviction (strike prior) is not entitled to the additional presentence custody credit and may only accrue credit at the prior rate of "one-for-two." (Former § 4019, subs. (b)(2) & (c)(2).) Effective September 28, 2010, section 2933 was amended to provide day-for-day conduct credits for qualifying defendants

sentenced to state prison. (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426, § 1.)

Decisional authority supports the conclusion that ineligibility for the additional presentence custody credits results in a defendant spending additional time in prison and is thus an increase in penalty. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1193 (*Lo Cicero*) [ineligibility for probation based on prior conviction is "equivalent to an increase in penalty"]; *In re Estrada* (1965) 63 Cal.2d 740, 745, 748 [amendment lessening punishment applies to acts committed before its passage if conviction not yet final]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 240 [applying *Estrada* to amendment involving custody credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [same].)

" "[B]efore a defendant can properly be sentenced to suffer the increased penalties flowing from . . . [a] finding . . . [of a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.'" (*Lo Cicero, supra*, 71 Cal.2d at pp. 1192-1193.) The strike prior must be pleaded and proved before it can serve as the basis for increasing defendant's punishment by denying him additional presentence custody credits under the amendments to former sections 4019 and 2933.

Here, the strike prior was alleged in the complaint but defendant did not admit the allegation nor did the People prove it. (See *Lo Cicero, supra*, 71 Cal.2d at pp. 1192-1193; §§ 969-969b, 1025, 1158.) Pursuant to a plea agreement, the strike prior was dismissed along with three other counts. There was a written *Harvey* waiver with respect to the dismissed counts, but not the allegations. The court also orally limited the waiver to dismissed count II. Further, there was no mention of one-for-one presentence conduct credits.

We agree with defendant that the plea agreement precluded the trial court from considering the strike prior. "The phrase '*Harvey* waiver' means the defendant has agreed that the court may consider facts behind dismissed or uncharged counts." (*In re Josh W.* (1997) 55 Cal.App.4th 1, 4, fn. 2.) Here, defendant's *Harvey* waiver in the plea form, which was not described as a *Harvey* waiver, was written in a limiting manner ["sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence [defendant] on the counts to which [he is] entering a plea"]. The trial court confirmed that the waiver was limited to consideration of only dismissed count II for purposes of sentencing and restitution. At the entry of plea hearing in December 2010, the court unequivocally stated dismissed count II would be considered solely for purposes of sentencing and restitution and made no mention of the misdemeanor counts and priors that were also being dismissed. When the court finished explaining the plea

agreement, the prosecutor agreed. "Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed [strike prior]." (*Harvey, supra*, 25 Cal.3d at p. 758.) The plea agreement could not reasonably be understood to have allowed the court to consider the strike prior for the purpose of sentencing and to deny additional conduct credits under former section 2933, subdivision (e).

Because the strike prior was not admitted or proved, defendant was eligible for the one-for-one credits that became available effective September 28, 2010. We will order the judgment modified accordingly.

DISPOSITION

The judgment is modified to provide for 90 actual days and 90 conduct days for a total of 180 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.