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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT GLEN HAMMONS,

Defendant and Appellant.

C067624

(Super. Ct. No.
CM033738)

Defendant Albert Glen Hammons entered negotiated pleas of guilty to felony possession of methamphetamine and misdemeanor resisting a peace officer in exchange for a stipulated three-year prison term and the dismissal of an allegation of a prior prison term. Defendant also entered a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*).

In March 2011, the trial court sentenced defendant to the stipulated term. It awarded 34 days of conduct credit for defendant's 69 days of presentence custody, based on defendant's unspecified prior "serious or violent felony conviction."

Defendant contends the trial court erred in restricting his conduct credit on the basis of a prior felony conviction that the prosecutor did not plead or prove. As we explain *post*, we agree that the restriction of conduct credit was error. We shall modify the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 23, 2011, defendant entered his pleas in exchange for a stipulated prison term and the dismissal of an allegation of a prior prison term for a 2005 conviction for an unspecified violation of Penal Code¹ section 245, subdivision (a)(1). The prosecutor apparently had also "agreed not to file a prior strike" even though defendant acknowledged that he had "[a] couple more strikes" without identifying the nature of the convictions that he believed were "strikes." Defendant also waived preparation of a full probation report.

As part of his plea, defendant initialed a provision in the plea form that indicated he agreed to the consideration of facts underlying dismissed counts for purposes of sentencing, commonly known as a *Harvey* waiver. The boilerplate waiver also assented to the consideration of "his prior criminal history and . . . any unfiled [or] dismissed . . . allegations . . . when . . . imposing sentence." (See *In re Knight* (1982) 130 Cal.App.3d 602, 605.)

¹ Further undesignated statutory references are to the Penal Code.

In March 2011, the trial court sentenced defendant to a three-year term in prison and six months concurrent on the misdemeanor charge, in accordance with the terms of the plea agreement. However, over the objection of defendant (based apparently on our decision in *People v. Jones* (2010) 188 Cal.App.4th 165, 183, review granted Dec. 15, 2010, S187135 [Jones]), it awarded only 34 days of conduct credit for his 69 days of presentence custody, stating defendant had an unspecified prior conviction for a "serious" or violent felony.²

Defendant's notice of appeal did not seek a certificate of probable cause (CPC).

Defendant's argument, essentially involving a question of law, does not implicate the facts underlying his convictions or any additional procedural facts. We accordingly omit further recitation of the record, and turn to our analysis of his claim.

DISCUSSION

I

Certificate of Probable Cause

We first consider the People's argument that defendant's failure to obtain a CPC precludes him from raising the credit issue on appeal. The People acknowledge that the plea did not contain any *express* provision regarding the trial court's calculation of conduct credits. (Cf. *People v. Buttram* (2003)

² This determination was apparently based on the unsubstantiated assertion to this effect in the probation officer's report, which stated only "*Prior serious/violent felony conviction" and did not contain any further details.

30 Cal.4th 773, 776-777 [reservation of discretion to set length of sentence; sentence length thus not element of plea requiring CPC].) But they contend his *Harvey* waiver (regarding the court's ability to consider his prior criminal history or any unfiled or dismissed allegations) was nonetheless an *integral* element of his plea. (Cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 73, 78-79 [claim that *stipulated* prison term in plea is disproportional is a challenge to element of plea and requires CPC].)

In interpreting the plea agreement, we may consider the People's failure at sentencing to assert defendant's *Harvey* waiver in opposition to defendant's objection, because the later conduct of the parties is evidence of their mutual understanding of their agreement. (*People v. Shelton* (2006) 37 Cal.4th 759, 767; see *People v. McClellan* (1993) 6 Cal.4th 367, 378 [dictum; defendant's failure to object to registration requirement at sentencing indicates it was not a significant element of his plea].) Considering the People's lack of response to defendant's section 4019 objection at sentencing, together with the totality of the circumstances surrounding defendant's execution of the boilerplate waiver, it does not appear that the consideration of prior convictions in the calculation of conduct credit was an *integral element* of the prosecution's consent to the plea agreement.

We therefore agree with defendant that his argument relates only to a sentencing issue that is collateral to his negotiated plea of guilty. He does not need a CPC to raise it on appeal.

II

Conduct Credit Calculation

As amended in September 2010 (see Stats. 2010, ch. 426, §§ 1, 2, 5 [amendments effective Sept. 28, 2010]), section 2933 and section 4019 provided that a defendant sentenced to state prison accrues presentence conduct credit for custody at a rate of "one-for-one" unless (as is pertinent) the defendant has a previous conviction for a violent or serious felony, in which case the rate is two days for each four-day period of custody.³

We had previously concluded disqualification from the more favorable one-for-one formula for conduct credits was equivalent to an increase in punishment, which requires the prosecution to plead and prove the disqualifying fact of a prior conviction for a serious felony; based on this requirement, we found that a trial court could strike the disqualifying fact for purposes of conduct credits. (*Jones, supra*, 188 Cal.App.4th 165, S187135.) Like *Jones*, other subsequent decisions touching on the issue are now pending in the Supreme Court awaiting the disposition of the lead case, *People v. Lara* (2011) 193 Cal.App.4th 1393 (review granted May 18, 2011, S192784), which had agreed with the analysis in *Jones*. (*People v. Koontz* (2011) 193 Cal.App.4th 151, review granted May 18, 2011, S192116 [agreeing with the result; no analysis of increased punishment or pleading and

³ We are not concerned here with the recent 2011 amendments to section 4019, which are effective July 2011 only for offenses committed after June 2011, and only if an appropriation to fund them is also enacted. (Stats. 2011, ch. 15, §§ 482, 636.)

proof]); *contra*, *People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted Aug. 31, 2011, S195672 [pleading and proof are not required and thus court cannot strike fact of prior conviction for purposes of conduct credits], *id.* at p. 661, fn. 4 [noting additional unpublished decisions on issue in which review granted]; *People v. James* (2011) 196 Cal.App.4th 1102, review granted Aug. 31, 2011, S195512 [no requirement to plead and prove, also noting no increase in punishment].)

Here, defendant's sole contention⁴ is based on the above-explained principle of the need for pleading and proof, contending the trial court could not have limited his conduct credits to the lesser rate without complying with this requirement, which a dismissed allegation cannot satisfy. The People respond the requirement does not apply to the application of section 2933, subdivision (e). But this is not an issue we need to reach, because we agree with defendant that restriction of his credit was, in this particular case, a violation of his right to due process.

Regardless of the Supreme Court's ultimate resolution of the issues of retroactivity, pleading and proof, and the power to strike a disqualifying prior conviction for purposes of conduct credits, and regardless of whether defendant's *Harvey*

⁴ Although we granted defendant's motion to further address the issue of conduct credit in supplemental briefing, and have read and considered the additional briefing, because, as explained *post*, we order the award of additional conduct credit on due process grounds, we decline to address and decide the equal protection issue presented by the supplemental briefing.

waiver was effective of itself to allow the trial court to consider the fact of a dismissed allegation of a prior conviction,⁵ the present record does not contain any evidence on which the trial court could have established defendant's ineligibility for one-for-one credit.

Nothing in the remarks of defendant or counsel at the hearings in this matter *established* the existence or nature of any of defendant's purported prior convictions, nor did the abbreviated probation report provide any basis for its conclusion that defendant had previously suffered a violent or serious felony conviction.

The People argue that defendant and counsel "admitted" defendant had a strike at the time of his plea, but this was neither a formal admission nor a stipulation made in the course of the plea colloquy. Rather, the record shows a chatty defendant musing that he had "a couple more strikes and a couple that [*sic*] couldn't strike me on [*sic*], to be honest" and defense counsel explaining his client's ramblings about being

⁵ This question also implicates the question of whether pleading and proof *of a fact* are required. (Compare *People v. Myers* (1984) 157 Cal.App.3d 1162, 1168 [pleading and proof required for facts establishing probation ineligibility, so waiver with respect to unfiled or dismissed allegations of prior convictions cannot be treated as tantamount to an admission of them without soliciting litany of waiver of trial rights] and *People v. Warner* (1978) 20 Cal.3d 678, 685, fn. 3 [dicta to same effect] with *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1349-1350 [pleading and proof do not apply to probation ineligibility], cited with approval in *People v. Wiley* (1995) 9 Cal.4th 580, 587.) We need not reach either question, as we explain above.

afraid "the D.A. is going to pull the deal" by telling the court, "[Defendant] has a prior strike, your Honor." No factual basis, nor even any description of the nature of the prior conviction, was sought or offered, either at the plea or later at sentencing. Even absent a "pleading and proof" requirement for a prior strike, some basis in fact other than defendant's musings and ramblings, made immediately prior to his plea of "guilty as all sin," is required.⁶

Further, the dismissed allegation established only that defendant's 2005 conviction involved section 245, subdivision (a) (1), which if committed only by means of force likely to inflict great bodily injury does not, without more, come within the definition of a serious felony. (§ 1192.7, subds. (c) (8) & (c) (31) [felony involving *personal* infliction of great bodily injury; assault with a deadly weapon].) Therefore the only prior conviction discussed in any detail was not necessarily one that qualified as a conviction for a serious or violent felony such that it would operate to restrict defendant's conduct credit.

Principles of due process apply to a trial court's limitation of conduct credits, which include a hearing at which the People have the burden of proof. (*People v. Duesler* (1988)

⁶ The People also argue that defendant "has never denied that he has a prior serious or violent felony conviction." Because the People bear the burden of providing a basis for denial of conduct credit, defendant's lack of denial is irrelevant--a fact of which the People should be well aware.

203 Cal.App.3d 273, 276, 277 [*Duesler*].) In the context of disqualifying *behavior*, if the People fail to satisfy this burden and the record as a result "fails to show that [a] defendant is not entitled to such credits . . . , he shall be granted them." (*People v. Johnson* (1981) 120 Cal.App.3d 808, 815.) Even though courts may make factual determinations in the course of imposing sentence that were not subject to pleading and proof (*Wiley, supra*, 9 Cal.4th at pp. 586-587), there must consequently be a rational evidentiary *basis* for sentencing determinations. (See *Duesler, supra*, 203 Cal.App.3d at p. 277 [noting that the United States Supreme Court held that due process in revoking an inmate's conduct credits requires the factfinder to identify the evidence on which it relied].) Lacking any such evidence in the present case,⁷ the trial court's limitation of conduct credits cannot be upheld. Accordingly, we must modify the judgment.

DISPOSITION

The judgment is modified to include 69 days of conduct credit. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a

⁷ The People argue that *Duesler* requires only notice of the prior and the opportunity to rebut and mitigate it. Even assuming that analysis is correct, the requirements of *Duesler* were not followed in this case. Here, the lack of any competent basis for the finding that defendant had suffered a qualifying conviction, coupled with the *complete* lack of any detail as to what that conviction might *be*, combined to deprive defendant of any meaningful notice such as *Duesler* requires.

certified copy to the Department of Corrections and
Rehabilitation.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.