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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL JASON GREGORY, Defendant and Appellant.	C068644 (Super. Ct. No. 11-357)

Defendant Samuel Jason Gregory pleaded guilty to corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a))[1]. The trial court sentenced defendant to a stipulated four-year state prison term with 180 days of presentence custody credit (120 actual and 60 conduct).

On appeal, defendant contends the trial court erred in relying on a dismissed strike allegation to reduce his presentence conduct credits. We affirm.

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[1] Undesignated statutory references to follow are to the Penal Code. All statutory references are to the statutes in effect at the time of defendant's sentencing.

BACKGROUND

We dispense with the facts of defendant's crime as they are unnecessary to resolve his appeal.

Defendant was charged with corporal injury to a cohabitant (§ 273.5, subd. (a)) and false imprisonment (§ 237, subd. (a)), one prior strike (a 2003 robbery conviction) (§§ 667, subd. (e), 1192.7, subd. (c)(19), 211), and three prior prison terms (§ 667.5, subd. (b)). By agreement, defendant pleaded guilty to a single count, the corporal injury count, and stipulated to a four-year prison term. The remaining charges were dismissed. Presentence conduct credits were not mentioned in the plea form or during the plea colloquy.

The plea form included a *Harvey*[2] waiver that read as follows:

"I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing: [¶] All other counts & special allegations to be dismissed. [¶] 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."

The probation report found that defendant was entitled to presentence credit consisting of 120 actual days and 120 days of conduct credits. A footnote to the presentence credit calculation stated: "Based on a 2003 conviction of 211 PC, the

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[2] *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

defendant is not eligible for day for day credits. However, a day for day calculation is submitted pursuant to the plea agreement."

The trial court asked about custody credits at the sentencing hearing. The prosecuting attorney who appeared at sentencing replied that the prosecuting attorney who had appeared previously reviewed the case with defense counsel at the time of the plea, who was "in agreement with everything but the *Cruz*[3] credits, indicating to me that he had only promised that the defendant would get day-for-day credits after sentencing and the presentence credits would be one for two, for a total of 60." The trial court replied, "It indicates, pursuant to the plea agreement, he was to be given day-to-day."

Defense counsel told the court: "My perspective . . . on this, I believe the law is, if you are sentenced to prison, you get day for day for county time. If you are not given state prison, you get one day for every two days."

The prosecuting attorney who appeared at sentencing said he understood defense counsel's position, and asked what promises were made by the prosecuting attorney who appeared at the time of the plea. Defense counsel replied: "Well, the agreement is that he will get half time in state prison. I have no disagreement . . . that we go to state prison and get day-for-day credit. And that is the law, and that was the plea

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[3] *People v. Cruz* (1988) 44 Cal.3d 1247.

agreement. There was no agreement on what his credit would be -- would be in custody up to today, I guess up until yesterday. That would be presentence credit. That is a difference of the interpretation of the law. They say 60, I say 120. He gets day-for-day once he goes to prison."

After further discussion, the trial court awarded 180 days of presentence credit, consisting of 120 days of actual time and 60 days of good time/work time or, conduct, credit.

DISCUSSION

Defendant contends he was entitled to 120 days of presentence conduct credit because the record did not establish he was convicted of the dismissed prior strike.

Defendant was sentenced on July 5, 2011. Under the law in effect at the time, a defendant was generally entitled to one day of conduct credit for every day of presentence custody credit. (Former § 2933; Stats. 2010, ch. 426, § 1.) A defendant who has a prior serious felony conviction is not subject to this provision (former § 2933, subd. (e)(3); Stats. 2010, ch. 426, § 1), but is instead awarded conduct credit consisting of two days credit for every four days of presentence custody. (Former § 4019; Stats. 2011, ch. 39, § 53.)

The trial court awarded custody credits under section 4019 by virtue of defendant's prior conviction for first degree robbery, a serious and violent felony. (§§ 1192.7, subd. (c)(19), 667.5, subd. (c)(9).) Defendant claims the denial of day-for-day conduct credits increases the time he will spend in prison and is therefore an increase in his punishment. Since

the strike allegation containing the robbery conviction was dismissed, defendant contends that this prior conviction cannot be used to limit his conduct credits.

In a case decided after briefing was concluded, the California Supreme Court held that a prior conviction does not have to be formally pled and proved in order to limit a defendant's conduct credits. (*People v. Lara* (2012) 54 Cal.4th 896, 907) (*Lara*).) Due process gives defendant the right to "sufficient notice of the facts that restrict his ability to earn credits and, if he does not admit them, a reasonable opportunity to prepare and present a defense. [Citations.]" (*Id*. at p. 906.)

In *Lara*, the People alleged a prior serious felony conviction in the pleadings, but dismissed the allegation as part of the plea agreement. (*Lara, supra*, 54 Cal.4th at p. 900.) The serious felony allegation in the pleadings, when coupled with a reference to the conviction in the probation report, provide sufficient notice and proof to satisfy the defendant's due process rights. (*Id*. at p. 907.)

Here, the People alleged a prior serious felony conviction in the pleadings, defendant executed a *Harvey* waiver allowing the use of dismissed priors at sentencing, and the probation report referenced the dismissed prior conviction as limiting his conduct credits. This is stronger evidence of notice and proof than evident in *Lara*. Applying *Lara*, we reject defendant's claim.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

DUARTE, J.