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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANN MARIE VANCE,

Defendant and Appellant.

C069088

(Super. Ct. No.
CM032520)

Defendant Ann Marie Vance was sentenced to state prison after pleading guilty to possessing controlled substances for sale. Defendant contends the trial court erred by failing to award her presentence custody credit for time spent in residential rehabilitation facilities. Because we cannot determine on this record what credit, if any, she might be entitled to, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 14, 2010, defendant was charged with possessing methamphetamine and marijuana for sale (counts 1 & 3; Health & Saf. Code, §§ 11378, 11359) and with possessing Dilaudid (count 2; Health & Saf. Code, § 11350, subd. (a)). It was alleged as

to all counts that defendant had previously been convicted of manufacturing controlled substances. (Health & Saf. Code, § 11379.6.)

On April 28, 2011, defendant entered a plea of guilty to counts 1 and 3; count 2 and the prior conviction allegation were dismissed with *Harvey*¹ waivers. According to the probation report and counsels' stipulation at the plea hearing, on May 12, 2010, after a traffic stop of defendant's van, a search of the van and its occupants found methamphetamine packaged for sale and marijuana. On the same date, narcotics agents searched defendant's residence and found additional marijuana packaged for sale.

On June 23, 2011, the trial court sentenced defendant to an aggregate prison term of two years eight months. The court awarded 56 days of presentence custody credit (28 days actual credit and 28 days conduct credit). Neither the trial court nor counsel mentioned any credit to which defendant might be entitled for time spent in residential drug treatment facilities.

DISCUSSION

Defendant contends she is entitled to "at minimum" 143 days of presentence custody credit for time spent in residential rehabilitation. She also contends that trial counsel's failure to raise the issue at sentencing does not forfeit it, but if we

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

find otherwise, counsel's silence constituted ineffective assistance of counsel.

As we shall explain, on this record we cannot find that defendant is entitled to the amount of credit she claims or to any other ascertainable amount of credit for residential rehabilitation time. Her relief, if any, must come by way of habeas corpus.

Applicable Law

"In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, *including, but not limited to, any time spent in a . . . rehabilitation facility . . . or similar residential institution*, all days of custody of the defendant . . . credited to the period of confinement pursuant to Section 4019 . . . shall be credited upon his or her term of imprisonment[.]" (Pen. Code, § 2900.5, subd. (a),² italics added.)

A defendant is entitled to credit under section 2900.5, subdivision (a), for time spent in a residential substance abuse treatment program if the placement was "custodial" and the custody was attributable to the proceedings relating to the conduct for which the defendant has been convicted. This may include Proposition 36 placement in a drug treatment program as a condition of probation. (§ 2900.5, subs. (a), (b); *People v. Davenport* (2007) 148 Cal.App.4th 240, 245.)

² Undesignated section references are to the Penal Code.

"The term 'in custody' as used in section 2900.5, subdivision (a) has never been precisely defined. *People v. Reinertson* (1986) 178 Cal.App.3d 320, 326 [citation] reviewed several cases in which courts approved the granting of custody credit for time spent in various facilities. The court concluded: 'It is clear from the words of the statute and from judicial decisions that, for purposes of credit, "custody" is to be broadly defined. [Citations.] . . . The courts which have considered the question generally focus on such factors as the extent freedom of movement is restricted, regulations governing visitation, rules regarding personal appearance, and the rigidity of the program's daily schedule. [Citation.] [¶] While no hard and fast rule can be derived from the cases, the concept of custody connotes a facility rather than a home. It includes some aspect of regulation of behavior. It also includes supervision in a structured life style.' (*Id.* at pp. 326-327, parallel citations omitted.)" (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1921-1922.)

"The question of whether a particular facility should be regarded as sufficiently restrictive as to amount to custody constitutes a factual question [citation] [.]" (*People v. Ambrose, supra*, 7 Cal.App.4th at p. 1922.) Likewise, the question of how much time a defendant spent in such a facility is a factual question.

Because defendant challenges the trial court's implied finding that the evidence did not show entitlement to presentence custody credit for time spent in residential

treatment facilities, we review the court's finding under the substantial evidence standard. (*People v. Valdez* (2004) 32 Cal.4th 73, 104; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Facts

On June 3, 2010, arguing for defendant's own recognizance (OR) release pending the preliminary hearing, defense counsel noted that the trial court had said it might grant OR release "if the defendant had a program." Counsel continued: "Defendant has obtained a program, Northern California Treatment Services. The problem with that, in fairness to Mr. Noel [the prosecutor], is that after a 30-day blackout, that treatment becomes intensive outpatient sober living. And Mr. Noel wants a residential program. [¶] So she's making a new request today for consideration of OR based upon the progress she has made [¶] But, that said, . . . I'm going to be on the phone with programs and see if I can get her . . . an inpatient program. [¶] What she's telling me is she thinks she can switch or maintain an inpatient program even in that same program after 30 days is up. That's one of the things I intend to find out before Tuesday." The trial court confirmed that the prosecutor had no objection to OR release "if there's . . . a program that is customarily used in our county to which the defendant has been accepted and it's an inpatient program -- we're not talking about a 30-day program, but an extended period[.]"

On June 8, 2010, the trial court asked defense counsel: "As I understand it, Mr. Short, your client does have a 30[-]day residential program set up where she will be on blackout with Northern California Treatment?" After counsel answered "yes" and the prosecutor submitted the matter, the court told defendant: "I am going to release you to the program. You are going to be remanded, but you are going to be released to the program, and you are to comply with the conditions of the program."³ The court then set the matter for arraignment on July 15, 2010.

On July 15, 2010, defendant waived formal arraignment and entered a not guilty plea. Defense counsel said: "As the Court can see, [defendant]'s doing well in Northern California Treatment Services. Mr. Anderson indicates that if she does what's told of her, then her outdate would be December 8th." However, counsel did not explain whether the term "outdate" meant that defendant was still on inpatient status.

On October 7, 2010, the date set for jury trial setting, defense counsel said: "The Court had allowed [defendant] out of custody to go to a program, Nor Cal Treatment [sic], and she . . . successfully completed the blackout period. Had 83 days of the program and she had a problem with an old boyfriend, so

³ Thus, the question whether defendant could remain on inpatient status in this program after the 30-day blackout period remained unanswered.

she left that program and she has been staying since with . . .
[¶] . . . [¶] . . . her sponsor in A.A."⁴

The trial court replied: "I'm a little troubled with this information. Initially, she was to get into Skyway House Residential Program, and then she entered into the Northern California Treatment Services and was supposed to be there for 180 days. And now, I can't tell from this letter when she actually left that program.^[5] I don't have anyone from Northern California Treatment Services here."

Counsel said defendant left the program on September 1, then continued: "I'm going to ask to set the trial long to give her a chance. She's got two programs lined up. She has Salvation Army in Chico. She's been told she'll have a bed there. This was back in the first part of September. As you know, that's a busy schedule, so she's still waiting for that. We also have Tammy Muserelli at VOTCA. It's a state licensed certified alcohol and drug program." The prosecutor submitted the matter.

⁴ Defendant does not contend that time spent living with her A.A. sponsor would qualify for credit under section 2900.5, subdivision (a).

Counsel did not further explain the nature of defendant's "problem with an old boyfriend," or how such a problem could have developed if defendant was in a residential treatment program restrictive enough to qualify as custodial for purposes of section 2900.5, subdivision (a).

⁵ The letter to which the trial court referred is not in the record.

The trial court stated its concern that "you're just going from program to program and not really addressing these issues." Counsel replied: "Your Honor, if I may. She is fully prepared to commit to six months at Salvation Army or the other program, if she's able to get there. It's a matter of transitions. The doors have been opened."

The trial court set the matter for jury trial setting on October 28, 2010, then added: "*And the minutes will reflect that you are to be here in court with proof of a long-term residential treatment program as a condition of your release O.R. on that date.*" (Italics added.)

On October 28, 2010, defense counsel said: "The Court wants to know if [defendant] is in a program. She's been doing real well and The Well has given us the paperwork indicating that she's accepted. However, she feels that she's not financially able to sustain that. [¶] She's applied to Salvation Army and the Salvation Army in Chico has provisionally accepted her, and they're telling her she's in line for the next bed but they wanted some medical background. She's provided the first part of that which she has handed me a copy of, but she's not fully into that program yet. [¶] So she is working with The Well. We have confirmation of that. The Well knows that because of the financial constraints that she will probably end up at Salvation Army. And I think that's agreeable to the Court. [¶] In the meantime it's on for setting. My request would be that we waive time . . . and set this out to March to give her time to have a track record in . . . either of those

programs. And perhaps at that time we'd be in a position to resolve it."

The trial court said: "I guess I'm not clear, Mr. Short. Is she living at The Well now?" Counsel replied: "She's not living there; she's attending the day program. If the Court orders it, she can go into the residential program, but the problem is she doesn't have funds to sustain that. So she's now trying -- why she's working with The Well on a regular basis, she's applied to Salvation Army for the residential program and Chico has accepted her. I do have a letter to that effect."

The trial court said: "All right. Well, counsel, I have been pretty clear about what the Court's expectation was. *She was to be in residential by today's date. She's not in residential treatment as of today.*"⁶ (Italics added.)

The trial court then set the matter for January 24, 2011, for jury trial.

On January 13, 2011, at the trial readiness conference, defense counsel told the trial court: "[Defendant] is currently in the Visions of the Cross Residential Treatment Program in Redding. I confirmed that this afternoon by telephone with the manager at the Redding office, and he tells me that [defendant] is in a blackout period for 30 days. She began that yesterday." Counsel added that he and the prosecutor jointly requested to vacate the current jury trial date and continue the matter for

⁶ Defendant's appellate recital of the facts does not mention the October 28, 2010, hearing.

at least 30 days to see how defendant would be doing in the program at that time. The prosecutor submitted the matter.

The trial court noted that on October 28, 2010, defendant had said she was going to reside at The Well. Defendant agreed. The court then asked if she had now changed her mind and gotten into the Visions of the Cross program; she said "Yes." The court then modified its prior OR release order to state that defendant would reside at Visions of the Cross. The matter was set for February 17, 2011, for resetting of jury trial.

On February 17, 2011, the matter was continued to April 28, 2011. On that date, as noted above, defendant entered her change of plea.

The probation report, dated June 15, 2011, stated: "The defendant said she entered the Northern California Treatment Service in June of 2010 but left before completing the program because her former husband located her and she had to leave because of a prior domestic violence incident. She said she entered and completed a 60[-]day inpatient program with 'Visions of the Cross' in Redding and subsequently completed a 60[-]day sober living environment (*unconfirmed*)." (Italics added.) The report calculated presentence custody credit without reference to any alleged time in residential treatment.

The record does not contain documentation of any kind from any program in which defendant claimed to have participated. Nor did any representative of any of those programs ever appear and testify before the trial court.

At the sentencing hearing, as noted above, defense counsel (David Nelson, appearing "in association with William Short") spoke generally of defendant's "willingness to enter into treatment and to do all that she was asked to do and imposed upon her while she was out of custody[,]" but did not assert that defendant was entitled to presentence custody credit for time spent in residential treatment facilities.

Analysis

Defendant asserts that she "completed at least [83] days in one residential rehabilitation program . . . and thereafter completed [60] days of residential rehabilitation at a second facility. . . . She also spent time in sober living facilities, though it is not clear that such time qualifies. . . . Thus, at minimum, the 143 days of residential rehabilitation should have been credited to [defendant]'s prison sentence imposed."

Unfortunately for defendant, the record before us does not support this assertion. Defendant cites only to the claims of trial counsel and her own statements to the probation officer, ignoring the facts that (1) on the sole occasion when the trial court demanded proof of defendant's residential treatment status, she failed to provide it, and (2) she also failed to provide such proof to the probation officer.

But even if we were to accept the undocumented assertions on which defendant relies, we could not possibly determine from those assertions either the exact amount of time she spent in residential treatment programs or whether their conditions were sufficiently restrictive to qualify as custodial under section

2900.5, subdivision (a), because there is no documentation in this record on either point.

Defendant asserts that the failure of her counsel at sentencing (Mr. Nelson) to raise the issue showed that, unlike Mr. Short, Mr. Nelson was "presumably . . . unaware" of the issue. We see no reason so to presume. On this record, which is devoid of documentation that defendant spent any particular amount of time in any qualifying residential treatment facility, it would be just as reasonable to presume that Mr. Nelson did not raise the issue because he was aware he could not support a request for any particular number of days of credit. Because this presumption is consistent with the record before us, we also cannot find that Mr. Nelson's failure to raise the custody credit issue constituted ineffective assistance of counsel.

Substantial evidence supported the trial court's implied finding that defendant was not entitled to presentence custody credit for time spent in residential treatment facilities.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.