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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL DARYLE ZIERKE,

Defendant and Appellant.

C069940

(Super. Ct. Nos. P07CRF0382,  
P11CRF0280)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

In case No. P07CRF0382 (case 382), defendant Paul Daryle Zierke inflicted corporal injury on his female cohabitant on September 7, 2007. On September 19, 2007, he entered a plea of no contest to violating Penal Code section 273.5, subdivision (a) and was granted probation for a term of three years subject to certain terms and conditions. (Unspecified section references that follow are to the Penal Code.)

On June 9, 2008, defendant admitted violating probation by committing new offenses and failing to comply with certain terms and conditions. The court reinstated probation, extending the period to June 9, 2011.

On January 25, 2010, defendant admitted violating probation by failing to comply with certain terms. The court reinstated probation, extending the period to January 25, 2012.

On June 16, 2011, defendant vandalized a car window and threatened the victim. On September 19, 2011, defendant entered a plea of no contest to misdemeanor criminal threats and felony vandalism in case No. P11CRF0280 (case 280) and admitted violating probation in case 382 in exchange for an aggregate state prison sentence of four years. The same day, the court sentenced defendant accordingly (in case 382, the upper term of four years for cohabitant abuse, and in case 280, a concurrent low term of 16 months for felony vandalism, and a concurrent 10-day term for misdemeanor criminal threats).

On October 21, 2011, at a hearing held to clarify credits, the court awarded 219 actual days and 219 conduct days for a total of 438 days of presentence custody credit in case 382. The court did not award any credit in case 280.

Defendant filed a notice of appeal and only cited the date of the hearing on custody credits (October 21, 2011).

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

In response to defense appellate counsel's letter dated February 24, 2012, the trial court modified the judgment, providing for 231 actual days and 231 conduct days for a total of 462 days of presentence custody credit in case 382. The court awarded 96 actual days and 96 conduct days for a total of 192 days of presentence custody credit in case 280.

We requested supplemental briefing asking the parties (1) to explain the scope of defendant's appeal as it relates to sentencing matters in general and (2) to discuss the effect of *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). The People did not address the first issue in view of defendant's *Wende* brief. Defense appellate counsel responds that defendant did not file an appeal within 60 days from the sentencing hearing on September 19, 2011 but did file an appeal within 60 days from the credit hearing on October 21, 2011. We accept defense appellate counsel's concession that the only issue is the credit issue.

Defendant claims that he is entitled to the credit the trial court awarded upon defense appellate counsel's modification request. Since he was sentenced on September 19, 2011 when former section 2933, subdivision (e) was in effect, defendant claims he is entitled to day-for-day credit for all presentence custody time he served from the date of his arrest to the executed state prison sentence. The People respond that defendant earned conduct credit at different rates and thus the credits require recalculation. We agree with the People that different rates apply.

*Brown, supra*, 54 Cal.4th 314 determined that the January 25, 2010 amendment to section 4019 (Stats. 2009, 3d Ex. Sess., ch. 28, § 50) "applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Brown*, at p. 318.) Different rates necessarily apply when custody time overlaps the operative date of the January 2010 amendment. (*Id.* at p. 322.)

Defendant contends that he is entitled to the formula for calculation of credit that was in effect at the time he was sentenced on September 19, 2011. Former section 2933, subdivision (e) (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010, and repealed by Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011) provided for day-for-day credit except for certain prisoners. (Former § 2933, subd. (e)(1)-(3).) Defendant relies upon the language which states that one day is deducted

from a period of confinement for each day served “*from the date of arrest* until state prison credits pursuant to this article are applicable to the prisoner.” (Former § 2933, subd. (e)(1), italics added.) Defendant argues, “Given the fact that defendants sentenced on or after September 28, 2010 would have been arrested some time prior to that date, the words of former section 2933, subdivision (e) that day-for-day credits should be accorded ‘from the date of arrest’ clearly reflects the Legislature’s intent to apply the enhanced credit provisions to all qualified defendants sentenced on or after September 28, 2010.” We disagree.

As in *Brown*, “[d]efendant’s reading would violate section 3 by causing any legislative change in the credit-accrual rate to operate retroactively without an express declaration of retroactive intent.” (*Brown, supra*, 54 Cal.4th at p. 322.) The language “from the date of arrest” does not reflect that the Legislature intended a retroactive application; it does not constitute an express retroactivity provision. (*Id.* at p. 319.) Former section 2933, subdivision (e) was amended when section 4019 was further amended (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010) and the Legislature indicated its intent in subdivision (g) of that section: “The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp *for a crime committed on or after the effective date of that act.*” (Former § 4019, subd. (g), italics added.) Defendant’s crime occurred in 2007, long before the effective date. We conclude that defendant is not entitled to the formula for calculation of his custody credits under former section 2933, subdivision (e) in case 382.

In case 382, defendant committed the offense on September 7, 2007. He was in custody for the offense off and on from September 7, 2007 to September 19, 2011 (September 7, 2007 to September 19, 2007; July 11, 2008 to September 29, 2008; January 10, 2010 to February 19, 2010; and June 16, 2011 to September 19, 2011). Defendant’s actual days in custody to January 24, 2010, totaled 109 days. (*People v.*

*Culp* (2002) 100 Cal.App.4th 1278, 1283-1284 [conduct credits are calculated based on the aggregate number of days in noncontinuous periods of presentence custody].) For this period of time, he is entitled to 54 conduct days for a total of 163 days of presentence custody credit. (Former § 4019, subs. (b) & (c); *People v. Caceres* (1997) 52 Cal.App.4th 106, 110; *People v. Smith* (1989) 211 Cal.App.3d 523, 527 [actual days divided by four, multiplied by two, no rounding up].) Defendant's actual days in custody from January 25, 2010 to February 19, 2010 (26 days) and from June 16, 2011 to September 19, 2011 (96 days), totaled 122 days. For this period of time, defendant earned day-for-day credit with no rounding up or 122 conduct days pursuant to former section 4019 (Stats. 2009, 3d. Ex. Sess., ch. 28, § 50) for a total of 244 days of presentence custody credit. (*Brown, supra*, 54 Cal.4th at p. 322 [prisoners whose custody overlapped January 2010 operative date earn credit at different rates].) Added together, defendant's actual days (109 + 122 = 231 days) and conduct days (54 + 122 = 176 days) total 407 days of presentence custody credit in case 382.

In case 280, defendant committed the offense on June 16, 2011. He was in custody from June 16, 2011 to September 19, 2011, when he was sentenced to a *concurrent* term in state prison. As the People note, defendant is entitled to dual credits; but for his arrest in case 280, he would have remained free of custody in case 382 (§ 2900.5, subd. (b); *People v. Bruner* (1995) 9 Cal.4th 1178, 1192, fn. 9; *In re Joyner* (1989) 48 Cal.3d 487). Pursuant to former section 2933, subdivision (e)(1) which was in effect at the time defendant committed his offense in case 280, defendant is entitled to 96 actual days and 96 conduct days for a total of 192 days of presentence custody credit.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified, reducing the conduct credit in case No. P07CRF0382 to 176 days and, when added to actual days of 231, totals 407 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. In case No. P11CRF0280, the credit awarded (96 actual days and 96 conduct days for a total of 192 days of presentence custody credit) is correct. As modified, the judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.

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