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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER CHAVEZ,

Defendant and Appellant.

C070379

(Super. Ct. No. 09NCR06985)

In 2009, defendant pled guilty to multiple nonviolent drug offenses. Imposition of sentence was suspended and defendant was granted Proposition 36 probation. Various fines and fees were imposed. Defendant was ordered to pay \$195 in attorney fees. Defendant did not appeal from that order.

In December 2011, defendant admitted a third violation of his probation and probation was revoked. Defendant was sentenced on the 2009 charges in January 2012 to a term of three years in jail, with an additional one-year term for a prior prison term enhancement. Defendant was awarded 66 days of actual credit and 22 days of good time credit, for a total of 88 days of presentence credit. On February 9, 2012, defendant filed his notice of appeal from the January 20, 2012, judgment. He appeals the imposition of

attorney fees on several grounds. As to this issue, the appeal is untimely. In their brief, the People contend we should reverse the trial court's postsentence award of additional custody credits under Penal Code section 4019.¹ We find the trial court's grant of additional custody credits resulted in an unauthorized sentence and we order the trial court to correct the custody credits to reflect an award of 22 days of presentence credit.

DISCUSSION

I

Attorney Fees Order

Defendant's sole contention on appeal is that court erred in ordering him to pay attorney fees, as there was no notice of a hearing and no finding he had an ability to pay the fees. The People concede that the trial court did not provide defendant with the required notice and hearing under Penal Code section 987.8, but contend we do not have jurisdiction of the appeal, as the notice of appeal was not timely filed.

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' [Citation.]" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) In an order for a criminal appeal to be timely, the notice of appeal must generally be filed within 60 days of the issuance of the order being appealed. (Cal. Rules of Court, rule 8.308(a).) This time requirement is mandatory and "appellate courts are without jurisdiction to consider an appeal which has been taken subsequently to the expiration of the statutory period. [Citation.]" (*People v. Slobodion* (1947) 30 Cal.2d 362, 365-366.) There is no question that the January 2012 order imposing sentence after the revocation of probation is appealable and defendant filed a timely appeal from that order. The February 2012 notice of appeal was timely and effectively vested us with jurisdiction as to that order.

¹ In April 2012, defendant filed a motion in the trial court, requesting additional credits under the amendments to Penal Code section 4019. The trial court granted the request and filed an amended abstract of judgment reflecting the award of an additional 44 days of good time credit for a total of 132 days of presentence credit.

The order for attorney fees, however, was not part of the January 2012 order. Rather, it was made as part of the probation order on December 9, 2009. Where imposition of sentence is suspended and probation is granted, the order granting probation is a final judgment for purposes of appellate review. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796; *In re DeLong* (2001) 93 Cal.App.4th 562, 571.) “In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment.” (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) That is, when a court grants probation “a defendant has the opportunity to challenge the sentence in an appeal from the order granting probation. [Citation.] If the defendant allows the time for appeal to lapse during the probationary period, the sentence becomes final and unappealable. [Citation.] This is so regardless of the fact the defendant will not serve the sentence unless the court revokes and terminates probation before the probationary period expires.” (*Ibid.*) Thus, contrary to defendant’s claim, the order for attorney fees was not an interim order, it was appealable at the time it was made. (Pen. Code, § 1237, subd. (a).) Defendant’s timely notice of appeal of the January 20, 2012, judgment vested this court with jurisdiction; but, any errors with respect to the order granting probation, including the order for attorney fees, are not reviewable in *this* appeal because defendant’s appeal is untimely as to these matters.

II

Conduct Credits

In their brief, the People contend we should reverse the trial court’s postsentence award of additional custody credits as an unauthorized sentence. Pursuant to Penal Code section 1237.1, after filing the notice of appeal, defendant filed a motion with the trial court requesting it award him an additional 44 days of good time credit. He argued he was entitled to additional credits based on the most recent amendments to Penal Code section 4019 because the prospective application of those amendments violated equal

protection. The trial court granted defendant's request on April 30, 2012. A few months later, the California Supreme Court rejected the argument that the prospective application of the conduct credit provisions of Penal Code section 4019 violates equal protection principles. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *People v. Brown* (2012) 54 Cal.4th 314, 328-330.) Accordingly, defendant was not entitled to the additional 44 days of custody credits and the People are correct the award of those additional credits resulted in an unauthorized sentence. (See *People v. Gisbert* (2012) 205 Cal.App.4th 277, 280-282.) We may correct this sentence, as an unauthorized sentence may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.)

Defense counsel claims defendant has "most likely been released from custody."² As such, he cites *People v. Tanner* (1979) 24 Cal.3d 514, to support his claim it would be unjust to remand him to custody.

In *Tanner*, the California Supreme Court determined the trial court had unlawfully granted the defendant probation and a one-year jail term rather than send him to prison. Since the defendant had completed both the jail term and probation and because sending the defendant to prison for a second incarceration would have been unjust, the Supreme Court "declined to order the defendant to serve the required prison term. [Citation.]" (*People v. Statum* (2002) 28 Cal.4th 682, 695, 697.)

As of the writing of this opinion, defendant remains in custody and thus, *Tanner* has no application. However, even if defendant has been released, it is the general rule that a defendant may be reincarcerated if he has been prematurely released from custody on the basis of an unauthorized sentence. (*People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1759.) *Tanner* represents an exception to this general rule of reincarceration (*Lockridge*, at p. 1759) and since it was decided, the Supreme Court has "never relied on

² As of November 19, 2012, according to defendant's counsel, defendant remained in custody in the Glenn County Jail.

it to pretermite the correction of a sentence that was illegally or improperly imposed” (*People v. Statum, supra*, 28 Cal.4th at p. 696). The Supreme Court has also since questioned whether *Tanner* remains good law. (*Statum*, at pp. 696-697.)

Tanner applies only when the judicial mistake arises from an uncertainty in the law. (*People v. Tanner, supra*, 24 Cal.3d at p. 521.) It has been further limited “to circumstances in which (1) the defendant has successfully completed an unauthorized grant of probation; (2) the defendant has returned to a law-abiding and productive life; and (3) ‘unusual circumstances’ generate a ‘unique element’ of sympathy, such that returning the defendant to jail ‘would be more than usually painful or “unfair.” ’ [Citation.]” (*People v. Statum, supra*, 28 Cal.4th at pp. 696–697, fn. 5.)

This defendant cannot satisfy the requirements of *Tanner* and *Statum*. If defendant has been released from custody, he remains on probation until 2016. Thus, he has not completed his grant of probation. Nor can we say this case presents such a “unique element” of sympathy that returning defendant to custody is unusually unfair. Defendant was initially *correctly* sentenced and awarded 22 days of presentence custody credits. It was only in April 2012 he was incorrectly awarded the additional custody credits. He has not been out of custody for a substantial period of time. Unlike *Tanner*, we can find no mitigating circumstances related to the perpetration of his original crimes. (*People v. Lockridge, supra*, 12 Cal.App.4th at p. 1760.) Furthermore, in the two years he was on probation prior to this imposition of sentence, he violated probation three times, once while in custody. The facts of this case are entirely unlike the unique circumstances in *Tanner* and the general rule of reincarceration applies.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment to reflect that defendant is entitled to 66 days of actual credit, 22 days of conduct credit under Penal Code section 4019, for a total award of custody credits of 88 days, and to forward a

certified copy to the Glenn County Sheriff's Department. In all other respects, the judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.