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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK RENE ROSILES,

Defendant and Appellant.

C071039

(Super. Ct. No. CRF11-598)

On December 9, 2011, pursuant to a plea bargain, defendant Frank Rene Rosiles, pled no contest to kidnapping (count 1; Pen. Code, § 207, subd. (a)),¹ robbery (count 2; § 211), first degree burglary (count 3; §§ 459, 460), second degree burglary (count 4; §§ 459, 460), and kidnapping to commit robbery (count 5; § 209, subd. (b)(1)). He also admitted the service of two prior prison terms (§ 667.5, subd. (b)).

¹ Undesignated statutory references are to the Penal Code.

As part of the bargain, per *People v. Cruz* (1989) 209 Cal.App.3d 560 (*Cruz*), defendant was released from custody pending sentencing conditioned upon, inter alia, his appearing for sentencing as scheduled and obeying all laws. If he complied, then counts 1, 4, and 5 would be dismissed and he would be sentenced to prison for nine years four months. If he did not comply, he faced a maximum term of 20 years to life.

On March 16, 2012, defendant admitted violating the *Cruz* condition that he obey all laws. In exchange for his admission, defendant was to receive dismissal of the simple kidnapping charge (count 1) and a new case filed against him, which was the basis for the *Cruz* violation.² He then would be sentenced to a total term of 11 years 8 months to life, the sentence consisting of six years for the first degree robbery (count 2), stayed pursuant to section 654; the low term of two years for the first degree burglary (count 3), a consecutive term of eight months for the second degree burglary (count 4), and two years for the prior prison term enhancements, for a total determinate term of four years eight months. The determinate term was to be followed by a consecutive term of seven years to life for the aggravated kidnapping (count 5), bringing the total term to 11 years 8 months to life.

On April 23, 2012, the court imposed sentence in accordance with the March 16 agreement. The court credited defendant with 281 days of presentence custody credit (141 days actual, 140 days conduct). The court also imposed various fines and fees as detailed in the abstract of judgment.

² Although the law violated was not stated, according to the probation officer's report the new case involved violations of Vehicle Code sections 2800.2, subdivision (a), and 2800.1, as well as a violation of Penal Code section 148, subdivision (a)(1).

FACTUAL BASIS FOR THE PLEA³

On October 27, 2011, defendant and Jessica Lopez drove to Crystal Hardaway's residence, a trailer, to retrieve some property Lopez had left there. After getting Lopez's property, defendant and Lopez left the trailer. Shortly thereafter, Hardaway received a telephone call asking for Lopez and went outside to see if Lopez was still there. Hardaway saw defendant coming out of her garage carrying several items of her property. Hardaway told defendant to put them back, which he did.

That night, Hardaway returned to her residence about 10:15 p.m. and saw defendant's car in her driveway. Hardaway got out of the vehicle and defendant grabbed her from behind; took her phone, flashlight, and purse; and forced her inside her residence. Defendant tied up Hardaway and took her jewelry, watches, and laptop computer. After defendant left, Hardaway freed herself and called 911.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks this court to review the record to 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 have elapsed and we have received no communication from defendant.

Our review of the record discloses an error in custody credit calculation.

Error in Custody Credit

At the commencement of the April 23, 2012, sentencing hearing, the court stated: "I've reviewed the memorandum submitted by Defense counsel [regarding custody credits]. I've also reviewed a couple of treatises. I believe all parties are then in

³ Defendant agreed that the preliminary hearing transcript and the police report could be considered as the factual basis for his plea. The facts are taken from these documents.

agreement that the Defendant is entitled to custody credit on his determinate sentence.” Both defendant’s counsel and the prosecutor agreed with the court’s assessment.

The court continued, “Okay. And then looking at the sentencing here, the custody credits are going to be -- since the crime is committed after October 1st, 2011 [referring to the Criminal Justice Realignment Act of 2011 (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53; and Stats. 2011, 1st Ex. Sess., ch. 12, § 35; hereafter Realignment Act)], he would be receiving essentially 4019 credits, two for two, after he gets to four days, which he would be receiving essentially 100 percent credits in this matter.” After imposing sentence and fines and fees, the court stated, “And, again, we’ve already done the custody credits,” however the court had made no calculation.

Even though the court did not state the numerical amount of present custody credits it was awarding, the court’s minutes and the abstract of judgment for the determinate sentencing show defendant was credited with 141 days for actual custody plus 140 days for conduct.

First, it matters not that defendant’s crimes were committed after October 1, 2011, because the crime of kidnapping for the purpose of robbery (count 5), is a violent felony (see § 667.5, subds. (c)(7) [“Any felony punishable by death or imprisonment in the state prison for life”] & (c)(14) [“Kidnapping”]). A violent felony precludes defendant’s being sentenced under the Realignment Act (see § 1170, subd. (h)(3)).

Because defendant is being sent to state prison for a violent felony, his conduct credits are limited to 15 percent by section 2933.1.⁴

⁴ For persons convicted of violent felonies as defined by section 667.5, subdivision (c), section 2933.1, subdivision (c), provides: “Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, . . . shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).”

Consequently, defendant is entitled to 21 days of conduct credit (141 actual multiplied by 0.15).

DISPOSITION

The matter is remanded to the Yuba County Superior Court with directions to amend its records to reflect that defendant's presentence custody credit is 21 days. The court is to prepare an amended abstract of judgment reflecting this change and forward a copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.