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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY PETER BUZO,

Defendant and Appellant.

C075222

(Super. Ct. No. SF120913D)

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK LOUIS BUZO,

Defendant and Appellant.

C075222

(Super. Ct. Nos. SF120913C
& SF122163B)

Brothers Troy Peter Buzo and Nick Louis Buzo each pleaded guilty to various offenses arising from an attempted robbery in Stockton.¹ Pursuant to a negotiated plea agreement, Troy and Nick were sentenced to terms of 21 years eight months and 22 years eight months, respectively. As part of their plea agreements, Nick and Troy each waived 120 days of presentence custody credits.

Troy and Nick raise several issues on appeal. First, Nick contends the trial court erred in failing to itemize fees and fines on the record. Second, Troy and Nick both contend the trial court erred in imposing a \$114 law enforcement fee pursuant to Penal Code section 1202.5.² Third, Troy contends the trial court erred in implementing his 120-day credit waiver, thereby causing him to lose conduct credits to which he would otherwise be entitled. Each brother joins in any of the other's claims that might benefit him.

The People concede the first and second issues, and we agree. With respect to the third issue, we conclude that the parties left the implementation of defendants' credit waivers to the trial court's discretion. We further conclude the trial court's implementation of defendants' credit waivers, and resulting difference in conduct credits, was not significant in the context of the plea bargain as a whole. Accordingly, we modify the judgment and remand with directions to the trial court to correct the abstracts of judgment. The judgment is otherwise affirmed.

¹ We refer to defendants by their first names to avoid confusion.

² Undesignated statutory references are to the Penal Code.

BACKGROUND³

A. *Factual Background*

1. Case No. SF120913

On July 10, 2012, Nick and Troy drove their father's car to a drug store in Stockton. At approximately 10:30 a.m., they entered the store, accompanied by two other individuals, yelling, "Get down on the ground, it's a robbery." In the ensuing chaos, one of the pharmacists pulled out a gun and fired, accidentally hitting a customer.

The would-be robbers hit another car as they were fleeing the store parking lot. They were eventually apprehended.

2. Case No. SF122163

On October 25, 2012, Nick participated in a violent assault on another inmate while in custody at the San Joaquin County Jail. The assault appears to have been the result of a gang dispute.

B. *Plea and Sentencing Hearings*

On July 10, 2013, Troy and Nick each pleaded guilty in case No. SF120913 pursuant to a negotiated plea agreement. Both brothers pleaded guilty to attempted robbery (§§ 664/211), robbery (§ 211), and participation in criminal street gang activity (§ 186.22, subd. (a)), with associated gang and firearm enhancements (§§ 186.22, subd. (b)(1), 12022.53, subds. (b), 12021.5, subd. (a), 12022.5, subd. (a)). In addition, Nick pleaded guilty to assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) in case No. SF122163. As part of their plea agreements, both brothers waived 120 days of custody credits. There is nothing in the record to suggest that the parties discussed -- or even considered -- the manner in which defendants' credit waivers would be implemented.

³ We derive the facts from the statement of factual basis for the pleas.

During Troy’s plea hearing, the trial court asked: “Mr. Buzo, the court is going to further confirm, because I don’t recall having done this, that you understand that you are waiving four months of custody credits with this plea?” Troy responded: “Yes, Your Honor.”

During Nick’s plea hearing, the trial court asked: “I want to confirm that you’re understanding that you are waiving four months of custody credit in exchange for this plea. [¶] Do you understand that, sir?” Nick responded, “Yes.”

Troy and Nick appeared for sentencing on September 25, 2013. Both brothers were represented by the same attorney. At the time of sentencing, Troy and Nick had each been in custody for 443 days.⁴ Pursuant to their plea agreements, Troy was sentenced to a term of 21 years eight months and Nick was sentenced to a term of 22 years eight months. Both brothers were granted custody credits for 371 days (323 actual days plus 48 conduct days).

The following colloquy took place during Troy’s sentencing:

“THE COURT: . . . [¶] The Court will note that the defendant is waiving 120 days of credits. Let me give you the credits calculation.

“THE CLERK: Three hundred twenty-three actual days, plus 48 good time, for a total of 371.

“[TROY’S COUNSEL]: I’m sorry, that is after the 120 is subtracted?”

“THE CLERK: Correct.

⁴ Troy’s opening brief incorrectly asserts that the sentencing hearing took place on September 16, 2013, instead of September 25, 2013. As a result, Troy erroneously argues that he had been in custody for 434 days at the time of sentencing. We also note that we have not been provided with a probation report for Nick in case No. SF120913. Consequently, we do not have the probation officer’s calculation of Nick’s actual days in custody at the time of sentencing. Nevertheless, we take judicial notice of the fact that Nick was also in custody for 443 days at the time of sentencing.

“THE COURT: And, sir, you will be given credit for 323 days of actual custody time served, plus additional conduct credits, good time/work time, of 48 days for a total of 371 days of credit for time served.”

The following colloquy took place during Nick’s sentencing:

“THE COURT: ¶¶ . . . ¶¶ The Court will note again that Mr. Buzo had waived 120 days of credits, and we will calculate the credits on that basis.

“THE CLERK: Three hundred twenty-three actual days, 48 good time, for a total of 371.

“THE COURT: Sir, you will be given credit for 323 [days of] actual custody time served, plus additional conduct credits i.e. good time/work time 48 days, total of 371 days credit for time served.”

In addition, Troy and Nick were ordered to pay restitution fines and fees in the amount of \$912 and \$632, respectively. The trial court did not separately designate fines and fees on the record. However, the clerk’s minutes and abstracts of judgment show that Troy and Nick were each ordered to pay a \$114 law enforcement fee pursuant to section 1202.5.

Troy and Nick both filed timely notices of appeal and obtained certificates of probable cause.

DISCUSSION

I

Section 1202.5 Fine

Nick contends the trial court erred by failing to itemize fees and fines on the record. Troy joins in any of Nick’s claims that might benefit him. Both brothers also contend the trial court erred in imposing a \$114 law enforcement fee pursuant to section

1202.5, which authorizes one \$10 fee per defendant per case.⁵ (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) The People concede both issues.

II

Credit Waiver

Next, Troy challenges the trial court's implementation of his 120-day credit waiver. Troy contends the trial court should have subtracted 120 days from the 509 days in total credits to which he would otherwise be entitled (443 actual days plus 66 conduct days), for a total award of 389 days of credits. Instead, the trial court subtracted 120 days from Troy's 443 days in custody -- that is, the trial court subtracted the agreed upon figure of 120 days *actually* served from the 443 days *actually* served -- resulting in 323 days of actual time. The trial court then added 48 days of conduct credits (based on 323 days), for a total award of 371 days. Thus, Troy contends the trial court's approach resulted in a waiver of 138 days, rather than the agreed upon 120 days, a difference of 18 days. Nick, whose identical credit waiver was implemented in exactly the same way, joins in any of Troy's claims that may benefit him.

Troy does not explain why the trial court's implementation of the credit waiver was improper. He does not contend that the trial court violated any statute or local practice. Nor does he contend that the trial court violated the parties' plea agreement. Instead, he merely observes he would have received more conduct credits had the trial court employed a different approach. We conclude the parties left the implementation of defendants' credit for time *served* waivers to the trial court's discretion. We further conclude the trial court's implementation of defendants' credit for time *served* waivers,

⁵ Section 1202.5, subdivision (a) provides in pertinent part: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, . . . the court shall order the defendant to pay a fine of ten dollars (\$10) in addition to any other penalty or fine imposed."

and resulting difference in defendants' conduct credits, was not significant in the context of the plea bargain as a whole.

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*), overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 185-186.) “[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” (*Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433].) Failure of the state to honor the agreement violates the defendant's due process rights for which the defendant is entitled to some remedy. (*Walker, supra*, 54 Cal.3d at p. 1024.)

However, the imposition of an additional sentence term does not constitute a violation of a plea agreement if the term was not encompassed by the parties' plea negotiations. (*In re Moser* (1993) 6 Cal.4th 342, 357 [length of parole]; *People v. McClellan* (1993) 6 Cal.4th 367, 380 [registration as a sex offender].) Moreover, “the variance must be ‘significant’ in the context of the plea bargain as a whole to violate the defendant's rights. A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations.” (*Walker, supra*, 54 Cal.3d at p. 1024.)

In this case, there is nothing in the record to suggest the parties' agreement hinged on the 18 days of conduct credit or even considered the implementation of defendants' credit for time *served* waivers during their plea negotiations. Certainly, there is nothing to suggest they made any particular approach to the implementation of the credit waivers an element of their plea bargain. Accordingly, we conclude the parties left the matter to the trial court's discretion.

We further conclude the implementation of defendants' credit for time served waivers, and the 18-day difference in defendants' conduct credits, was not " 'significant' in the context of the plea bargain as a whole." (*Walker, supra*, 54 Cal.3d at p. 1024.) As noted, Troy and Nick each pleaded guilty to attempted robbery, robbery, and participation in a criminal street gang and were sentenced to 21 years eight months and 22 years eight months in state prison, respectively. Their counsel clearly understood the trial court's approach to the credit waivers, confirmed that the court would be subtracting 120 days from defendants' actual time *served*, and did not object during either brother's sentencing hearing. Their failure to object confirms defendants did not consider the 18-day difference significant in the context of their plea bargains as a whole. (Cf. *People v. McClellan, supra*, 6 Cal.4th at p. 378 ["Indeed, to the extent the trial court record sheds any light upon the issue before us, defendant's failure to object at the sentencing hearing suggests that he did not consider the registration requirement significant in the context of his plea agreement."].) Accordingly, we conclude the trial court's implementation of defendants' credit waivers did not violate their plea agreements or result in punishment significantly greater than they bargained for. (*Walker, supra*, 54 Cal.3d at p. 1026.)

DISPOSITION

The judgment is modified to strike the \$114 law enforcement fine and impose one \$10 fine plus the applicable penalty assessments as to each defendant pursuant to section 1202.5. The matter is remanded and the clerk of the superior court is directed to prepare amended abstracts of judgment reflecting these modifications, itemize all fines, fees, and assessments, and reflect the statutory bases therefore. The clerk is further directed to

forward copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.