

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD WESLEY BRODERSON,

Defendant and Appellant.

C078670

(Super. Ct. No. 11F4650)

This case came before the trial court for resentencing under Proposition 47, which reduced many crimes from felony to misdemeanor, including petty theft with a prior, for which defendant Richard Wesley Broderson was originally sentenced. (Pen. Code, §§ 666, subd. (a), 1170.18, subd. (a).) That original sentence was a stipulated prison term of six years four months (based on defendant's no contest plea), calculated as follows: for petty theft with a prior, the midterm of two years, doubled to four years because of a prior strike, plus one-third the midterm of eight months for resisting an officer, doubled

to 16 months because of the prior strike, plus one year for a prior prison term enhancement.

The facts behind these crimes were that defendant left a grocery store without paying for items in his shopping cart. When an employee confronted him, defendant pointed a knife at her that had a three-to-five inch blade and said, “ ‘fuck you.’ ” Then he fled to a nearby gas station where police found him with two knives on his person. During defendant’s arrest, he spit on one of the officers, tried to kick out the window of a police car, and told the officers, “ ‘I will shoot all you officers’ ”

Because of Proposition 47, the petty theft with a prior had to be redesignated a misdemeanor and the resisting an officer (the only remaining felony) had to be made the principal term. There was no dispute about this. At the resentencing hearing, the trial court started out by saying: “[Defendant] had already ple[d guilty to [resisting an officer]. That was the subordinate term. But what I’ll do is turn that into the base term. And it’s doubled . . . he did admit to a strike allegation. [¶] So the sentence will be doubled, 3 years times 2 for 6 years. The sentence is six years in state prison.” Defense counsel interrupted and said that he believed that in the original plea form, defendant agreed to only the midterm for the resisting an officer charge. Using that midterm, defense counsel continued, defendant’s sentence should not be the aggravated term of three years, doubled to six, but rather, the midterm of two years, doubled to four. The court disagreed, stating that “[i]t was a stipulated sentence . . . [h]e pled to time, six years and four months.”¹ Defendant’s counsel agreed but added, “Right, and the only way to get there . . . is the midterm doubled.” The court again stated that its “plan would be to

¹ The court was correct, as the plea form states only to what crimes defendant was pleading no contest (namely, petty theft with a prior and resisting an officer), what admissions he was making (namely, he had a strike and had served a prior prison term), and his maximum state prison sentence (namely, “6 years, 4 months”).

strike the [prior conviction allegation]. You can't get to the six years, four months. But what we can do is get to the six years." Addressing defense counsel's specific argument, the court stated, "[y]ou're not going to be able to convince me there was a special specific agreement as to the midterm to get to the 6 years, 4 months. That was just one of those ways to get to that amount of time." The court then finished up with sentencing, selecting a one-year concurrent jail term for the petty theft with a prior and striking the prior prison term enhancement, for a total sentence of six years.

Defendant appeals, contending first that "the court abused its discretion in choosing the [upper] term . . . solely on the basis that imposition of it permitted the court to most closely approximate the prior stipulated sentence." He also contends (and the People agree) there is a clerical error in the minutes and abstract of judgment with regard to credits. We agree only with defendant's second contention.

DISCUSSION

I

The Trial Court Acted Within Its Discretion In Selecting Defendant's Sentence

Defendant first argues that the trial court erred in voicing its desire to get as close to the original stipulated sentence as possible as the sole supporting reason for imposing the upper term sentence on the resisting offense. Although he agrees that the trial court may exercise its discretion and consider all components when resentencing, defendant points out that in selecting the upper term the trial court cited no aggravating factors in support, but only the fact of the original stipulation and the court's desire to impose a sentence of similar length.

At resentencing, "[a] judge's subjective determination of the value of a case and the appropriate aggregate sentence, based on the judge's experiences with prior cases and the record in the defendant's case, cannot be ignored. A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria.

. . . “In making its sentencing choices . . . the trial court undoubtedly considered the overall prison term to be imposed” ’ ’ (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.) An example of this occurred where a defendant entered a negotiated plea to 10 years, including what the parties thought was a six-year *middle* term for a robbery. (*People v. Kelly* (1999) 72 Cal.App.4th 842, 844.) When it turned out that six years was the *upper* term and defendant tried to get his sentence reduced by two years, the trial court upon resentencing imposed the upper term of six years. (*Ibid.*) The appellate court affirmed, explaining as follows: the “record indicate[d] the negotiated plea included a sentence of six years for the robbery count if appellant pled guilty. Although the [trial] court and the parties mistakenly thought six years constituted the middle term, necessitating revision by the [trial] court to maintain that length of time, appellant did ultimately get the benefit of his bargain. That those six years represent the upper rather than middle term . . . is not fatal, particularly since aggravating factors do exist to justify an upper term.” (*Kelly*, at p. 845.)

Here, as in *Kelly*, the facts of the offenses of conviction that resulted in the stipulated sentence have not changed. The parties agreed that the criminal conduct to which defendant pled merited a certain sentence. The only thing that changed was the conduct’s classification; a portion of the conduct now constitutes a misdemeanor rather than a felony. There is no reason why the stipulation should not be a factor in the trial court’s assessment of the appropriate sentence.

Here, similar to *Kelly*, the parties came to a negotiated disposition for six years four months. When it turned out that Proposition 47 no longer allowed the entire sentence imposed, the court had to recalculate that sentence, exercising its discretion to strike the one-year prior prison term enhancement and to impose the upper term on the redesignated principal term of resisting an officer. That the recalculation results in imposition of the upper rather than the middle term is not fatal. Further, as the People point out, the court was justified in viewing the resisting offense as aggravated as

defendant spit on one of the officers. There was no abuse of discretion in the court's recalculating defendant's sentence to impose the upper term and arriving at a sentence that approximated (so long as it did not exceed) the original sentence.

II

The Minutes And Abstract Of Judgment Must Be Corrected

To Reflect 80 Days Of Original Credit

As to defendant's second contention, he is correct that the minutes and abstract of judgment contain a clerical error in the recording of defendant's credits. At resentencing, the court stated defendant's original credits were "54 actual, 26 good time, work time credits" for a "total of 80 days." The minutes and abstract, however, reflect an incorrect total of 70 days of original credit. The minutes and abstract must be corrected.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct: (1) the minutes from February 19, 2015, to reflect that the original credit was for a total of 80 days (instead of 70); and (2) the abstract of judgment to reflect on page 2 under item 11 "other orders" that the "original total" is 80 days (not 70). The trial court is further directed to forward a copy of the corrected abstract to the California Department of Corrections and Rehabilitation.

/s/
Robie, Acting P. J.

We concur:

/s/
Mauro, J.

/s/
Duarte, J.