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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTANA E. BELMONT,

Defendant and Appellant.

D058844

(Super. Ct. No. SCD200633)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

In this custody credit case, Santana E. Belmont has been given credit for all time served after he was taken into custody by local authorities in the current case. What makes this case somewhat unusual is the fact that at the time Belmont was put in local custody in the current case, he was serving a prison sentence in a prior case and that prior sentence was later vacated in an unrelated habeas proceeding.

Although it is clear Belmont served more time in the *prior* case than was lawful, Belmont is not entitled to credit in the current case for any period before he was charged in the current case. Neither the applicable statutes nor logic require we find Belmont was held in custody in the current case during any period prior to commencement of the current case.

We must also reject Belmont's alternative argument that he should be given custody credit in the current case from the time the trial court in the current case sent the prison warden where Belmont was incarcerated an order directing the warden to produce him to local authorities. As we explain, although an order to produce is, as a practical matter, similar to a law enforcement agency "hold" and will likely operate to prevent an inmate's release in the event he is no longer being incarcerated on an earlier conviction, there is nothing in the record here which establishes when the prison received notice of the order to produce Belmont. It is well established the defendant in a criminal proceeding bears the burden of establishing his entitlement to presentence credit, including in this case when the prison received notice of the order to produce. Having failed to show when the prison received notice of the order to produce, Belmont is not entitled to credit for any period before he was actually taken into custody on the new allegations. Accordingly, we affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

1. *2003 Attempted Manslaughter Conviction*

On September 17, 2003, Belmont was sentenced to a total of eight years six months in prison. The eight and one-half-year term was imposed for an attempted voluntary manslaughter conviction with firearm and prior prison term enhancements. (Pen. Code,¹ §§ 664/192, subd. (b)(2), 12022, subd. (b), 667.5, subd. (b).) In addition to the voluntary manslaughter conviction, Belmont was also convicted of assault with a deadly weapon and spousal battery. (§§ 245, subd. (a)(1), 273.5, subd. (a).) The sentences on those convictions were stayed. (§ 654.)

2. *2007 Perjury Conviction*

While Belmont was in prison on the attempted manslaughter conviction, he filed three habeas corpus petitions which contained false statements of material fact. On August 4, 2006, the district attorney filed a complaint against Belmont alleging perjury, conspiracy to commit perjury, subornation of perjury, and preparing a false paper for a fraudulent purpose. (§§ 182, subd. (a)(2), 118, subd. (a), 127, 134.) In addition, the complaint alleged Belmont had served two prior prison terms and had suffered one prior strike conviction. (§§ 667.5, subd. (b), 667, subds. (b)-(1).)

¹ All further statutory references are to the Penal Code.

On August 8, 2006, the trial court issued an order to produce Belmont. The order directed the warden of the prison where Belmont was serving his sentence on the attempted voluntary manslaughter conviction to produce Belmont to the San Diego County Sherriff on the sheriff's demand. On September 13, 2006, Belmont was taken into custody by the sheriff and on September 22 he was arraigned on the perjury charges. A jury found Belmont guilty of each substantive allegation and the trial court found the alleged enhancements true.

On October 17, 2007, Belmont was due to be released from prison on the 2003 attempted manslaughter conviction. Coincidentally, however, October 17, 2007, was also the date on which he was sentenced on the perjury conviction. The trial court sentenced Belmont to 12 years in prison on the perjury conviction and gave him one day of custody credit.

3. Federal Habeas Proceedings

In 2010 a federal court, in response to Belmont's habeas corpus petition, vacated Belmont's attempted manslaughter conviction. The district attorney elected not to retry the attempted manslaughter charge and instead the trial court lifted the stay on the spousal battery conviction and resentenced Belmont to five years in state prison. Because of time Belmont served before the 2003 convictions, the new spousal battery sentence had expired well before he was taken into custody in September 2006 by the sheriff in the current perjury case.

4. Resentencing

In light of the fact Belmont's new sentence on spousal battery expired before the perjury charges were filed, the trial court conducted a separate hearing on the custody credit available to Belmont in the perjury case. The trial court gave Belmont credit from the date he was taken into custody by the sheriff on the perjury case, September 13, 2006, until the date of his sentencing in the perjury case, October 17, 2007. In addition to the credit he was given for the actual time he served before sentencing in the perjury case, the trial court gave Belmont 196 days of conduct credit.

DISCUSSION

I

By way of background we note that had the attempted voluntary manslaughter conviction survived Belmont's federal habeas challenge, the trial court's initial sentencing in the perjury case, by which Belmont only received credit commencing at the end of the attempted voluntary manslaughter sentence, would have been appropriate. Where a defendant commits a crime while incarcerated on a prior charge, the defendant may not receive custody credit on the new charge until any sentence on the prior charge is complete. (*In re Rojas* (1979) 23 Cal.3d 152, 155-156.) "There is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense." (*Ibid.*)

However where, as here, charges are brought on a second crime and proceedings or the sentence in the prior case are thereafter vacated, the prisoner is entitled to credit in the second case from the time he or she was taken into custody in the second case. (*In re Marquez* (2003) 30 Cal.4th 14, 20-21 (*Marquez*)). In *Marquez* the defendant was taken into custody in Santa Cruz County on burglary allegations and shortly thereafter Monterey County placed a hold on him with respect to a second burglary. Eventually, the Santa Cruz burglary charges were vacated and the prisoner sought credit in the Monterey case from the time the Monterey hold was placed on him while he was being held in Santa Cruz. The Supreme Court agreed with the defendant "because his custody after placement of the Monterey County hold was attributable to both his Santa Cruz *and* Monterey County cases, dismissal of the Santa Cruz County charges still left him with the Monterey County sentence against which credit for all of his custody from placement of the Monterey County hold until imposition of sentence could be applied." (*Id.* at p. 21.)

II

Relying on section 1170.1, subdivision (c), Belmont argues he is entitled to more than the credit allowed under *Marquez*. Belmont argues he should have been given credit for the period between the date his sentence on the spousal battery conviction would have expired and the date he was taken into custody by the sheriff in September 2006. Like the trial court, we reject this contention.

Section 1170.1, subdivision (c) states: "In the case of any person convicted of one or more felonies committed while the person is confined in a state prison or is subject to re-imprisonment for escape from custody and the law either requires the terms to be served consecutively or the court imposes consecutive terms, the term of imprisonment for all the convictions that the person is required to serve consecutively shall commence from the time the person would otherwise have been released from prison. If the new offenses are consecutive with each other, the principal and subordinate terms shall be calculated as provided in subdivision (a). This subdivision shall be applicable in cases of convictions of more than one offense in the same or different proceedings."

As the trial court noted, section 1170.1 subdivision (c) has no application here. At the time Belmont was sentenced on the perjury convictions in 2007, the spousal battery sentence was stayed under section 654. Thus at that point no law or order of the trial court did *or could* require that the perjury sentence be served consecutively to the stayed spousal battery sentence. Moreover, when in 2010, as a result of Belmont's successful federal habeas proceedings, his sentence on the attempted voluntary manslaughter conviction was vacated and the sentence on the spousal battery conviction was imposed, consecutive sentencing was not possible because Belmont's spousal battery sentence had expired, well before perjury allegations were even filed.

Because the spousal battery sentence and the perjury sentence could never have been served consecutively, Belmont's case is plainly outside the express terms of section 1170.1 subdivision (c). Moreover, Belmont's argument is beyond the limits of logic. We

do not believe the Legislature would ever intend to provide a criminal with actual or conduct credit in a criminal proceeding for any period *before* those proceedings commenced. Indeed, the court in *Marquez* directly rejected such a possibility. In discussing the impact of the Monterey County hold, the court stated: "had petitioner's Santa Cruz County *presentence* custody been attributable solely to the Santa Cruz County charges (that is, had Monterey County never placed a hold), dismissal of the Santa Cruz County charges would have left petitioner with no sentence against which credit for that period could be applied." (*Marquez, supra*, 30 Cal.4th at pp. 20-21.) Here, Belmont seeks credit for periods before the perjury charge was even brought; as in *Marquez*, this is a period with no sentence against which credit could be applied.

III

In the alternative, Belmont argues he should have been given credit from the time the trial court ordered him to be produced to the sheriff on August 8, 2006, rather than from the time he was taken into custody by the sheriff on September 13, 2006. We disagree.

Section 2900.5, subdivision (b) provides in pertinent part that credit for jail time "shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." In *Marquez*, in applying section 2900.5, subdivision (b) to the period following the Monterey hold, the court stated: "[A]fter Monterey County placed a hold on petitioner, his custody was attributable to the charges in *both* counties. Thus, once Santa Cruz County dismissed its

charges, all custody following Monterey County's hold . . . is properly characterized as 'attributable to [the Monterey County] proceedings related to the same conduct for which the defendant has been convicted.' " (*In re Marquez, supra*, 30 Cal.4th at p. 20.)

There are obvious practical similarities between a hold placed by a local law enforcement agency on a jail inmate being held by another local law enforcement agency on different charges and an order to produce a prisoner held in a state prison on an unrelated conviction. We think it is reasonable to assume that, given notice of an order to produce, prison officials would treat the order like a hold and would not release the defendant in the event proceedings under which the defendant was being held in prison were terminated. The difficulty we have here is that nothing in the record shows when the prison received notice of the order to produce Belmont as opposed to when, on September 13, 2006, Belmont was actually taken into custody by the sheriff. The burden of proof of entitlement to presentence custody credit is on the defendant. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.) It is not up to the trial court to fill in evidentiary gaps of time in determining presentence custody credit. (*People v. Purvis* (1992) 11 Cal.App.4th 1193, 1199.) Thus, because Belmont failed to show that he was entitled to any credit before he was actually taken into custody by the sheriff on September 13, 2006, the trial court did not error in declining to provide such credit.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.