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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD KOZMER,

Defendant and Appellant.

D061413

(Super. Ct. No. SCD237680)

APPEAL from a judgment of the Superior Court of San Diego County, Desiree A. Bruce-Lyle, Judge. Affirmed as modified with directions.

Harold Kozmer entered a negotiated guilty plea to petty theft with a prior (Pen. Code, § 484/666, subd. (a)).<sup>1</sup> Under the plea bargain, the trial court referred Kozmer to the parole reentry court, and sentenced Kozmer to a two-year prison term if he was not accepted by the parole reentry court. Kozmer was accepted into the parole reentry court, but left the program 10 days later. Subsequently, the trial court imposed and executed the

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<sup>1</sup> All statutory references are to the Penal Code.

two-year prison term. The court awarded Kozmer 30 days of custody credit. Kozmer appeals, contending he was entitled to an additional 52 days of custody credit.<sup>2</sup>

### FACTS

On November 14, 2011, Kozmer stole four jackets, valued at \$800, from Ace Uniforms. At the time, he was on parole. Police arrested Kozmer on November 17 after recognizing him from a law enforcement flyer issued in connection with the theft. On December 2, he pleaded guilty to the theft count and admitted he had three previous convictions for theft-related crimes.

On December 8, Kozmer's parole in another case was revoked retroactive to November 17. The revocation was based on his arrest in this case, absconding and methamphetamine use. He signed an optional waiver to serve 135 days in custody for the parole violations to be served after sentencing in this case. The parole reentry court accepted Kozmer on January 3, 2012, but he resigned from the program on January 13. On January 23, the trial court reinstated Kozmer's sentence to the stipulated two-year prison term. The court awarded him a total of 30 days credit--20 days of actual credit and 10 days of conduct credit under section 4019.

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<sup>2</sup> At oral argument the People, contrary to their position in their appellate brief, took the position consistent with Kozmer that he is entitled to an additional 52 days of custody credit. We disagree with both because their position is based on presumed information relating to his parole revocation sentence not before either the trial court or this court.

## DISCUSSION

Kozmer contends he should have received an additional 52 days of custody credit. The People at oral argument agreed that Kozmer should be awarded an additional 52 days of custody credit. We disagree with both parties.

Before a presentence custody credit issue can be raised on appeal, the appellant must first file a motion in the trial court raising the credit issue unless there are other issues raised in the appeal. (§ 1237.1; *People v. Acosta* (1996) 48 Cal.App.4th 411, 426-428, fn. omitted.) "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." (§ 1237.1.) "If a dispute arises as to the correct calculation of credit days, such [dispute] should be presented on noticed motion 'for resolution to the court which imposed the sentence and which has ready access to the information necessary to resolve the dispute.'" (*People v. Fares* (1993) 16 Cal.App.4th 954, 958.)

No objection to the award of custody credits was made at Kozmer's sentencing, and no motion for correction in the trial court appears in the record on appeal. However,

Kozmer argues the requirement of section 1237.1 was met by his pro per filing of a petition for habeas corpus in superior court.<sup>3</sup>

In the interests of judicial economy, we assume for purposes of this appeal that the filing of the pro per petition for writ of habeas corpus satisfied the requirement of section 1237.1. (Cf. *People v. Clavel* (2002) 103 Cal.App.4th 516, 518.)<sup>4</sup>

Under section 2900.5, an incarcerated person is entitled to credit against his or her sentence for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) Additionally, section 4019 provides that a criminal defendant may earn additional presentence custody credits against his or her sentence for performing assigned labor and/or by complying with institutional rules and regulations. (§ 4019, subds. (b), (c).) Section 4019 credits are commonly called conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) For crimes committed on or after October 1, 2011, section 4019 provides inmates are eligible for presentence conduct credit calculated on the basis of two days of conduct credit for every two days of actual custody. (§ 4019, subds. (b), (c) & (f).)

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<sup>3</sup> This habeas corpus petition filed below is not in the record of appeal. However, Kozmer has requested we take judicial notice of the order denying this petition. We grant this portion of Kozmer's motion for judicial notice. The remaining portion of Kozmer's motion for judicial notice is denied.

<sup>4</sup> Some appellate decisions have concluded that an appellate court may resolve the issue of presentence custody credits, notwithstanding section 1237.1, when it is economical to do so; for example, when time credits are not the only issue on appeal and the fact finding involved is simply arithmetical or ministerial. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270.)

There is a caveat, however, in the calculation of custody credits. A defendant is entitled to presentence custody credit "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) In *People v. Bruner* (1995) 9 Cal.4th 1178, our Supreme Court construed section 2900.5 as requiring a rule of strict causation to be applied in cases in which the same conduct is implicated in multiple proceedings: "[W]e hold . . . that where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Bruner*, at pp. 1193-1194.) In other words, " '[a] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole *reason* for his loss of liberty during the presentence period.' " (*People v. Callahan* (2006) 144 Cal.App.4th 678, 685, quoting *Bruner*, at p. 1191, italics added by *Callahan*.)

This is such a case. When, on December 8, 2011, the parole authorities revoked Kozmer's parole in the earlier case, it cited three reasons for the revocation: his commission of petty theft with a prior, absconding, and methamphetamine use. The parole authorities ruled the revocation was retroactive to November 17, 2011.

The trial court here did not explain how it calculated the custody credits it awarded to Kozmer other than stating he was entitled to 20 days of actual credit and 10 days of conduct credit. A logical and reasonable inference is that the trial court awarded the 20 days of actual credit by calculating the number of days between Kozmer's arrest and the

day the Department of Corrections revoked his parole. There was no error in this part of the court's calculation. Until the parole revocation, Kozmer was incarcerated for one reason--his commission of petty theft with a prior. He was therefore entitled to custody credits for that period of time against his sentence for the theft because the additional reasons for Kozmer's incarceration were not applicable until his parole was revoked on December 8, 2011.

Nonetheless, the court's award of 10 days of conduct credits was erroneous. Apparently, the court calculated the conduct credits under former Penal Code section 4019. Because his offense was committed after October 1, 2011, the latest version of section 4019 applied. (*People v. Verba* (2012) 2012 Cal.App.LEXIS 1143.) The trial court should have awarded Kozmer 20 days of conduct credit.

The parties' arguments concerning credit against the 135 days of custody resulting from violation of parole are not before this court because they are based on matters not before the trial court and outside the record on appeal. (See fn. 3, *ante* [denying portion of motion for judicial notice].) The trial court was concerned with custody credits against its two-year sentence for the theft offense and not with any credits against the custody resulting from the parole violation.

#### DISPOSITION

The judgment is modified to grant an additional 10 days of section 4019 conduct credit to Kozmer for a total custody credit of 40 days. The judgment is affirmed in all other respects. Upon the issuance of the remittitur, the superior court clerk shall prepare

an amended abstract of judgment and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

We refer the parties to California Rules of Court, rule 8.272(c)(1).

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.