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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK LEE MITCHELL,

Defendant and Appellant.

E052304

(Super.Ct.No. FWV033891)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Sachs, Judge. Affirmed as modified.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Frederick Lee Mitchell appeals from his conviction of violations of Health and Safety Code sections 11350, possession of cocaine (count 1), 11351, possession of cocaine for sale (count 3), and 11352, subdivision (a), sale or transportation of cocaine (count 4). Defendant contends: (1) the trial court erred in failing to obtain a supplemental presentence report, or, in the alternative, he received ineffective assistance of counsel because his trial counsel failed to request a supplemental report; (2) he should be awarded additional custody credits under Penal Code¹ section 4019; (3) the trial court erred in failing to award actual days of custody credit after the original sentencing date; and (4) the abstract of judgment must be corrected to reflect that defendant was convicted of sale or transportation of cocaine in count 4 instead of count 5. The People correctly concede that defendant was entitled to additional actual credits and that the error in the abstract of judgment requires correction. We find no additional errors.

II. FACTS AND PROCEDURAL BACKGROUND

The underlying facts are not relevant to the issues on appeal. In brief, undercover officers purchased rock cocaine from defendant in two separate transactions, and when defendant was being booked at the police station, a piece of rock cocaine fell out of his sock. (*People v. Mitchell* (Nov. 30, 2009, E045760) [nonpub. opn.], pp. 2-4.) Defendant was convicted of two counts of possession of cocaine for sale (Health & Saf. Code,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

§ 11351, counts 1 and 3) and one count of sale or transportation of cocaine (Health & Saf. Code, § 11352, subd. (a), count 4). (*People v. Mitchell, supra*, E045760, p. 2.)

In the previous appeal,² this court held that the trial court erred in failing to instruct the jury on the lesser included offense of simple possession of cocaine (Health & Saf. Code, § 11350) as to count 1. (*People v. Mitchell, supra*, E045760.) We remanded for resentencing with directions to either retry the count or to proceed as if remittitur issued convicting defendant of the lesser-included count and to resentence him accordingly. We affirmed the judgment in all other respects. (*Id.* at pp. 5-7, 10-11.)

The district attorney elected not to refile, and count 1 was deemed a conviction of simple possession. The trial court resentenced defendant on September 17, 2010, to 10 years eight months in prison. The only change from the previous sentence was that the trial court sentenced defendant to eight months instead of one year for count 1.

Additional facts are set forth in the discussion of the issues to which they pertain.

III. DISCUSSION

A. Supplemental Presentence Report

Defendant contends the trial court erred in failing to obtain a supplemental presentence report.

1. Additional Background

Before defendant's initial sentencing, the probation department filed a report on June 16, 2008. The report noted that defendant was ineligible for probation under section

² We have taken judicial notice of our file in case No. E045760.

1203, subdivision (e)(4) because he had at least four prior felony convictions and he did not appear to be a suitable candidate for probation supervision. After defendant's prior appeal and this court's remand, the trial court resentenced defendant without a supplemental probation report.

2. *Standard of Review*

When a defendant is statutorily ineligible for probation, we apply deferential abuse of discretion review to the trial court's decision not to obtain a supplemental probation report before resentencing. (*People v. Grumble* (1987) 196 Cal.App.3d 1058, 1064.)

3. *Analysis*

Defendant had at least four prior felony convictions. (*People v. Mitchell, supra*, E045760, p. 4.) A defendant who has two previous felony convictions is statutorily ineligible for probation. (§ 1203, subd. (e)(4).) Probation may be granted to such a defendant only in an unusual case where the interest of justice would best be served. (§ 1203, subd. (e).)

Section 1203, subdivision (b)(1) requires the trial court to order a probation report before judgment is pronounced for persons "convicted of a felony" who are "eligible for probation." California Rules of Court, rule 4.411, requires the court to order a supplemental probation report if significant time has passed since the original report was prepared. When the defendant is eligible for probation and is entitled to a probation report, the report can be waived "only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that there shall be no waiver

unless the court consents thereto.” (§ 1203, subd. (b)(4).) When, as here, the defendant is statutorily ineligible for probation, he does not have the right to a probation report under section 1203 or California Rules of Court, rule 4.411; however, the trial court has discretion to order a report. (*People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432.) When the defendant is ineligible for probation, the failure to request a probation report waives any right to a supplemental probation report. (*Id.* at p. 1431.) As this court explained in *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1556, footnote 7 (Fourth Dist., Div. Two), “A defendant should not be allowed to stand silent when the court proceeds without a supplemental probation report, gamble that a trial court will impose a lesser term of imprisonment and then urge reversal for the failure to obtain the report without being required to make some showing that he was prejudiced thereby.”

Defendant relies on *People v. Brady* (1984) 162 Cal.App.3d 1, 7, for the proposition that, upon remand for resentencing, the sentencing court must obtain an updated probation report, including information regarding the defendant’s behavior during the pendency of the appeal, if the sentencing court has discretion to alter the length of the defendant’s imprisonment. However, defendant fails to acknowledge that *Brady* has been abrogated on precisely that point. (*People v. Bullock* (1994) 26 Cal.App.4th 985, 989 (*Bullock*) [holding that *Brady* was wrongly decided and that ordering a probation report for a probation-ineligible defendant is discretionary, not mandatory, with the trial court].)

In *Bullock*, the court held the trial court had not abused its discretion in failing to order an updated probation report before resentencing the defendant. The court explained, “There was no request by appellant for an updated report, no evidence that the trial court acted on incomplete information or that there was information which appellant wished to have considered that was not. [Citation.] [¶] Appellant has offered nothing to indicate the information before the trial court was incomplete or inaccurate. We are entitled to presume that the sentencing court properly exercised its discretion in imposing sentence absent contrary evidence.” (*Bullock, supra*, 26 Cal.App.4th at pp. 990-991.) We likewise find no abuse of discretion.

B. Assistance of Counsel

Defendant contends, in the alternative to his previous argument, that he received ineffective assistance of counsel because his trial counsel failed to request a supplemental probation report.

A defendant who claims he received ineffective assistance of counsel in the trial court must establish both that his counsel’s performance fell outside “the wide range of reasonable professional assistance” (*Strickland v. Washington* (1984) 466 U.S. 668, 689) and that the deficient performance caused prejudice (*id.* at p. 687).

Here, defendant has not suggested that any change in his circumstances has occurred since the initial probation report, other than he had spent additional time in custody, and he has not suggested the trial court acted on incomplete information. We therefore conclude defendant has failed to meet his burden of showing that it is reasonably probable he would have received a more favorable outcome but for defense

counsel's failure to request a supplemental report. We reject his claim of ineffective assistance.

C. Section 4019 Custody Credits

Defendant contends he should be awarded additional custody credits under the version of section 4019 in effect when he was resentenced.³

When defendant was originally sentenced in August 2008, section 4019 provided that defendants could accrue conduct credit at the rate of two days for every four days of actual presentence custody. Under this formula, he accrued 229 days of conduct credit based on 459 days of actual custody. When defendant was resentenced on September 17, 2010, section 4019 provided that defendants would accrue conduct credits at the rate of four days for every four days of actual presentence custody.

Section 2900.1 provides: "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts." In *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*), our Supreme Court stated that when an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must, under section

³ The issue whether section 4019 applies retroactively to judgments not yet final is currently pending before our Supreme Court. (See *People v. Brown III (James Lee)* (2010) review granted June 9, 2010, S181963.) However, this case does not present an issue of retroactivity, but instead is limited to whether our remand encompassed previously awarded custody credits.

2900.1, recalculate the actual time the defendant has served and credit that time against the subsequent sentence. (*Buckhalter, supra*, at p. 23.) However, once a convicted felon is sentenced, committed, and delivered to prison, a limited remand for correction of sentencing errors does not restore him to presentence status for purposes of sentencing credit statutes. (*Id.* at p. 38.)

In *Buckhalter*, the remand to the trial court was on sentencing issues only. (*Buckhalter, supra*, 26 Cal.4th at pp. 40-41.) Here, because the prosecutor elected not to refile charges on count 1, defendant's conviction of that count was deemed a conviction of the lesser included offense of simple possession, and, as in *Buckhalter*, the only issue on remand was a sentencing issue. Of course, *Buckhalter* is not precisely on point, because in that case no issue arose as to presentence credits before the initial sentencing. However, the court's language is instructive. The court expressly rejected the proposition that "an appellate remand that requires the exercise or reexercise of sentencing discretion necessarily results in a full resentencing. (*Id.* at p. 34.) Here, we remanded for the limited purpose of retrying count 1 or deeming it to be a conviction of the lesser-included offense and resentencing on that count accordingly. Notably, we affirmed the judgment in all other respects. (*People v. Mitchell, supra*, E045760, p. 11.) We therefore conclude that under our limited remand, the trial court was not mandated to revisit the issue of presentence custody credits even though the statutory scheme was amended after defendant's initial sentencing.

D. Actual Custody Credits

Defendant contends the trial court erred in failing to award actual days of custody credit for the time between his original sentencing and the resentencing hearing.

The People correctly concede that defendant was entitled to 757 days of additional actual credits. In *Buckhalter*, the Supreme Court held that trial courts must add additional actual credits upon a remand for resentencing, but should not award additional conduct credits under the presentence formula. (*Buckhalter, supra*, 26 Cal.4th at p. 41.) We will therefore direct the trial court to award defendant an additional 757 days of actual custody credit.

E. Correction of Abstract of Judgment

Defendant contends the abstract of judgment incorrectly reflects that he was convicted in count 5 of sale or transportation of cocaine. In fact, as the People correctly concede, he was convicted of that offense in count 4. We shall order the abstract of judgment corrected accordingly.

IV. DISPOSITION

The trial court is directed to award defendant an additional 757 days of actual custody credit and to issue an amended abstract of judgment reflecting that defendant was convicted of sale or transportation of cocaine in count 4 instead of in count 5. The trial court is further directed to forward a certified copy of the corrected abstract of judgment

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

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.