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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.

DAVID ALEXANDER BARTON,

Defendant and Appellant.

E052492

(Super.Ct.No. FBA1000530)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed as modified.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant David Alexander Barton guilty of two counts of receiving stolen property. (Pen. Code, § 496, subd. (a), counts 2 & 3.)^{1 2} Defendant admitted that he had served four prior prison terms. (§ 667.5, subd. (b).) The trial court sentenced him to a total term of seven years in state prison, consisting of the upper term of three years on count 2, the upper term of three years on count 3, to run concurrent with count 2, and one year for each of the prison priors. The court awarded him 213 days of presentence custody credits (125 actual plus 88 conduct).

On appeal, defendant contends that: 1) the court committed reversible error by failing to state its reasons for imposing the upper term; and 2) he is entitled to additional presentence custody credits under the amendment to section 4019 that went into effect on January 25, 2010. (Sen. Bill No. 3X 18 (2009-1010 3d Ex. Sess.), Stats. 2009, ch. 28, § 50.) The People concede, and we agree that defendant is entitled to additional presentence custody credits. We accordingly modify the judgment with regard to the calculation of credits, but otherwise affirm.

FACTUAL BACKGROUND

A residential burglary occurred on July 28, 2010. The next day, defendant and three companions were subjected to a parole compliance check at a motel. During the

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² A first amended information charged defendant with residential burglary (§ 459) in counts 1 and 3, and receiving stolen property (§ 496, subd. (a)) in counts 2 and 4. Defendant was acquitted of count 1, and count 3 was dismissed. The receiving stolen property charge in count 4 was renumbered to count 3.

course of that check, the police found numerous items in the motel room and in a car that belonged to one of defendant's friends. Those items were later identified as the property of the residential burglary victim.

Between April and July 2010, Brian McMillan's home was burglarized twice. One of the items that he noticed missing was a unique coin collection. During that same time period, defendant's neighbor noticed that defendant had a coin collection in his possession. Defendant's neighbor took the coins and gave them to a friend to turn in to the police. The coins were later identified as belonging to McMillan.

ANALYSIS

I. Defendant Was Properly Sentenced to the Upper Term

Defendant argues that the court committed reversible error when it failed to adequately state reasons on the record for the imposition of the upper term. Although it appears that the court did not clearly state its reasons for imposing the upper term, any error was harmless, since the record contains ample reasons to support the upper term.

A. Relevant Background

In pronouncing sentence, the court stated: “[A]s to Count 2, the crime of receiving stolen property, Court will sentence you to the aggravated term of three years. [¶] As to Count 4, the crime of receiving stolen property, the Court will also sentence you to three years in State Prison. Those terms are to be run concurrent with each other. . . . [¶] The prior convictions having been found true, Court will sentence you to an additional four years, one year per prior. [¶] Your total State Prison commitment is a period of seven years. Court will obviously be denying probation. [¶] Your history, your criminal

history and the circumstances regarding the offense, indicate that you—although you may be eligible for probation, Court does consider and deny that because of your criminal history and this particular crime[;] you’ve pretty much been living a criminal lifestyle since 1990.”

B. Any Error Was Harmless

Defendant correctly asserts that the court was required to state on the record its reasons for selecting the upper term. Section 1170, subdivision (b), provides that: “The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” Here, the court did refer to defendant’s criminal history and the circumstances regarding the offense. However, as pointed out by defendant, the court’s comments appeared to be in reference to its denial of probation. Nonetheless, it is not necessary to reverse, “as there is no reasonable probability that a result more favorable to [defendant] would occur if the matter were remanded for a more explicit statement of reasons by the trial court. [Citation.]” (*People v. Green* (1988) 200 Cal.App.3d 538, 543 (*Green*)). The probation report contained a two-page summary of defendant’s 15 prior convictions, six of which were felony convictions. His criminal history spanned a period of 20 years. The report listed five factors in aggravation, including the following: 1) the manner in which the crime was carried out indicated planning, sophistication, or professionalism; 2) the crime involved an attempted or actual taking or damage of great monetary value; 3) defendant’s prior convictions as an adult were numerous and of increasing seriousness; 4) defendant had served prior prison terms;

and 5) defendant's prior performance on probation was unsatisfactory. The report listed no mitigating factors.

Defendant contends that, pursuant to section 1170, subdivision (b), the prison priors could not support the imposition of the upper term because the court imposed a sentence for each prison prior. He states that it is impossible to know whether the court impermissibly relied on the fact of his prison priors to impose the upper term on counts 2 and 3, since the court failed to state its reasons for doing so. He argues that, if the court did not rely on the prior convictions, "then it is doubtful that there was a permissible basis upon which the court could have imposed the upper term." We disagree. Defendant's criminal history extended far beyond his prison priors, and there were numerous factors in aggravation to support the upper term.

We conclude it would be idle to remand for a statement of reasons for imposition of the upper term. (See *Green, supra*, 200 Cal.App.3d at p. 543.) In view of the record, it seems improbable that "a result more favorable to defendant would be obtained by remand for resentencing; nor would justice be served by expending our valuable judicial resources in such a fashion." (*People v. Swanson* (1981) 123 Cal.App.3d 1024, 1034.)

II. The Court Improperly Calculated Defendant's Custody Credits

Defendant argues that all of his presentence custody credits should have been calculated under the January 25, 2010 amendment of section 4019 (the January 25, 2010 amendment).³ The People concede, and we agree.

A. *Relevant Background*

The probation report sets forth defendant's custody credits as follows: for days spent in custody from August 7, 2010 through September 27, 2010, the probation department calculated 52 actual credits plus 52 conduct credits, pursuant to the January 25, 2010 amendment, for a total of 104 credits; for days spent in custody from September 28, 2010 through December 9, 2010, the probation department calculated 73 actual credits, plus 36 conduct credits, for a total of 109 credits. The probation department thus recommended that defendant should be awarded a total of 213 credits (104 plus 109). The court followed this recommendation and awarded 213 days of credit.

B. *All of Defendant's Custody Credits Should Have Been Calculated Pursuant to the January 25, 2010 Amendment*

The Legislature amended section 4019 effective January 25, 2010, to provide for the accrual of presentence credits at twice the previous rate for all prisoners, except those required to register as a sex offender, committed for a serious felony, or who had a prior

³ We note that section 4019 has been amended twice since January 2010, but those amendments only apply to crimes committed after certain dates. The discussion in this opinion concerns the amended version of section 4019 that became effective on January 25, 2010. Thus, any reference to "section 4019" will concern that version of section 4019, unless otherwise specified.

conviction for a serious or violent felony. (§ 4019, subds. (b)(2) & (c)(2).) The January 25, 2010 amendment provided for four days' credit for every two days served—in effect, a two-to-one ratio—for eligible prisoners. (§ 4019, subd. (f).)

The Legislature amended section 4019 again, effective September 28, 2010. This amendment revived the old calculation, which had been in effect prior to January 25, 2010, so that once again, eligible prisoners would receive six days' credit for every four days served. (Sept. 28, 2010, § 4019, subd. (f).) Significantly, the September 28, 2010 amendment to section 4019 included subdivision (g), which specified that the new rate would only apply for crimes committed on or after the effective date of the amendment, which was September 28, 2010.

In this case, defendant was sentenced on December 9, 2010, for crimes that occurred between March 2, 2010 and July 27, 2010. In other words, he was convicted of crimes that occurred after the enactment of the January 25, 2010 amendment and prior to the effective date of the September 28, 2010 amendment to section 4019. However, the probation department's calculation clearly reflects one-for-one credits from the date of defendant's arrest through the last effective day of the January 25, 2010 amendment, and reduced credits (six days of credit for every four days served), from the effective date of the September 28, 2010 amendment to section 4019, through the date of sentencing. The court followed this calculation, and this calculation is reflected in the abstract of judgment. The court should have calculated credits for defendant's entire presentence confinement period under the January 25, 2010 amendment since his crimes were committed before September 28, 2010. He served a total of 125 actual days in custody,

so he should have been granted 124 days of conduct credits, for a total of 249 credits.⁴

We thus order the judgment modified to award defendant an additional 36 days of presentence conduct credit, for a total of 249 days of presentence credit. The abstract of judgment should be amended to reflect that defendant was awarded total credits of 249 days, consisting of 125 actual days and 124 days under section 4019.

DISPOSITION

The judgment is modified to award presentence credit consisting of 125 days of actual custody time, plus 124 days of presentence conduct credit, for a total of 249 days of presentence credit. The superior court clerk is directed to generate a new minute order reflecting this modification. The clerk is also directed to amend the abstract of judgment to reflect the award of 249 days of presentence custody credit, and to forward a copy of both the new minute order and the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.

⁴ See *In re Marquez* (2003) 30 Cal.4th 14, 25-26 (stating preamendment formula for calculating conduct credits).