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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.

TRACY ORLANDO EVANS,

Defendant and Appellant.

E053536

(Super.Ct.No. FVA1000991)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed as modified with directions.

Kathleen Woods Novoa, 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, Michael T. Murphy and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Tracy Orlando Evans was charged by information with second degree commercial burglary (Pen. Code,¹ § 459, count 1), grand theft of personal property (§ 487, subd. (a), count 2), and receiving stolen property (§ 496, subd. (a), count 3). It was also alleged that he had served one prior prison term. (§ 667.5, subd. (b).) Defendant entered a plea agreement and pled guilty to count 3 in exchange for a three-year state prison term, which was suspended, and a grant of probation, including 180 days in county jail. The court sentenced defendant on May 6, 2011, in accordance with the agreement.

On appeal, defendant contends that: (1) the trial court erred in failing to calculate his presentence custody credits under the amendment to section 4019 that went into effect on January 25, 2010 (Sen. Bill No. 3X 18 (2009-2010 3d Ex. Sess.)) (the January 25, 2010 amendment); (2) the court abused its discretion when it imposed drug-related probation conditions and a counseling condition; and (3) the court erred when it awarded attorney fees without holding a hearing to determine his ability to pay. The People concede, and we agree, that defendant is entitled to presentence custody credits under the January 25, 2010 amendment to section 4019. We accordingly modify the judgment with regard to the calculation of credits. We also remand the matter with instructions regarding the dismissal of counts 1 and 2 and the section 667.5, subdivision (b), allegation. Otherwise, we affirm the judgment.

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

FACTUAL BACKGROUND²

The victim owned a home in the city of Fontana. He was not living in the home, but was in the process of selling it. He left the house secured on June 26, 2010, and returned the next day to discover that the garage door had been forced open. Numerous items were missing from the house. The victim noticed that there were “drag marks” leading from his backyard to his neighbor’s house, so he called the police to investigate. Several of the victim’s belongings were found in his neighbor’s garage. The house where the items were found belonged to defendant’s girlfriend. Defendant was staying there on the night in question.

ANALYSIS

I. The Court Improperly Calculated Defendant’s Custody Credits

Defendant contends that, while the court indicated he was entitled to conduct credits under section 4019, it failed to actually calculate the number of conduct credits. The court only stated that he would receive “credit for 19 actual previously served” days. Defendant argues that he is entitled to 19 days of conduct credits under the January 25, 2010 amendment of section 4019.³ The People concede. We agree that the court should

² The factual background is taken from the preliminary hearing transcript.

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.

have calculated the number of conduct credits, but conclude that defendant is entitled to 18 days of conduct credit, not 19.

A. Relevant Background

The probation report recommended that defendant serve 180 days in jail “with credit for time served, a matter of nineteen (19) days, plus conduct credit pursuant to PC4019.” At sentencing, the court stated that defendant was to serve “180 days in county jail, credit for 19 actual previously served.” The court then discussed some of the other probation terms. At the end of the hearing, the court added, “The credits on this matter, it looks like it’s one for one credits.” The minute order followed the probation report and stated, “credit for time served, a matter of 19 days, plus conduct credit pursuant to PC4019”

B. The Court Should Have Calculated Defendant’s Custody Credits

As the parties agree, because defendant was sentenced on May 6, 2011, for crimes that occurred in June 2010, the January 25, 2010 amendment applies. The January 25, 2010 amendment provides for the accrual of two days of conduct credit for every two days of presentence custody for any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c). (Former § 4019, subd. (f).) Defendant served a total of 19 actual

days in custody, so he should have been granted 18 days of conduct credits.⁴ We thus order the judgment modified to award defendant 18 days of presentence conduct credit, for a total of 37 days of presentence credit. The minute order should be amended to reflect that defendant was awarded total credits of 37 days, consisting of 19 actual days and 18 days under section 4019.

II. Defendant Forfeited His Objections to the Probation Conditions

Defendant challenges the imposition of probation condition Nos. 14-18 and 20, which consist of drug and alcohol-related conditions and a counseling requirement. He contends that these conditions are not reasonably related to his offense or future criminality. The People argue, and we agree, that defendant forfeited his right to challenge these probation conditions since he failed to object to them at the sentencing hearing.⁵

In *People v. Welch* (1993) 5 Cal.4th 228, our Supreme Court held that a defendant cannot argue for the first time on appeal that a probation condition is unreasonable. In doing so, the court expressly disapproved of a number of cases holding otherwise. (*Id.* at p. 237.) The court stated that the sentencing court has broad discretion to determine what conditions should be imposed, and that “[m]ost conditions . . . stem from the sentencing court’s general authority to impose any ‘reasonable’ conditions that it ‘may determine’ is

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

⁵ We note that defendant filed a reply brief, but did not dispute the People’s assertion that he forfeited his claims regarding the probation conditions.

‘fitting and proper to the end that justice may be done’ (§ 1203.1.)” (*Id.* at p. 233.)

The court then explained: “A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis. [Citations.]” (*Id.* at p. 235.) The court therefore held that “failure to timely challenge a probation condition on ‘*Bushman/Lent*’ grounds in the trial court waives the claim on appeal.”⁶ (*Id.* at p. 237.)

In other words, “the time to object is at the pertinent hearing, not for the first time on appeal. [Citation.]” (*In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 971.)

Defendant here was clearly given a reasonable opportunity to object to the probation conditions. Indeed, he objected to some of the conditions. However, he failed to object to the conditions he now complains of. At the time of sentencing, defense counsel confirmed that he received a copy of the probation report with the probation conditions. The court asked the parties if there were any comments, and defense counsel objected to the amounts of the restitution fees listed in the probation report. As a result, the court stayed the victim restitution fine in term No. 23 and set a contested restitution hearing. The court placed defendant on probation, adopting the rest of the probation conditions listed in the probation report. The court asked defendant if he had a chance to read all the

⁶ See *People v. Lent* (1975) 15 Cal.3d 481, 486; *In re Bushman* (1970) 1 Cal.3d 767, 776-777.

terms of probation and asked if it was okay with defendant that it did not read them all in open court. Defendant said yes. The court told defendant, “They’re all binding upon you.” The court then asked if he accepted probation on the terms listed, and defendant said yes.

In sum, the court was vested with broad discretion to select appropriate probation conditions, and defendant had ample opportunity to influence the court’s decision. He cannot now object to the terms for the first time on appeal.

III. The Trial Court Did Not Err in Ordering Defendant to Pay Appointed Counsel Fees

Defendant argues that the court erred in ordering him to pay \$150 in attorney fees without conducting a hearing to determine his ability to pay, as required by section 987.8.⁷ He asserts that the matter must be remanded for a hearing on his ability to pay. In response, the People argue that defendant has forfeited his claim by failing to object, that he received adequate notice that the matter would be heard as part of the sentencing hearing, and that any error in not holding a hearing was harmless since there was sufficient evidence to support the court’s finding of his ability to pay. We conclude that the court properly ordered defendant to reimburse the appointed counsel fees.

“Section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. [Citation.]” (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1205.) Subdivision (b) of section 987.8

⁷ Defendant cites to section 987.6, but this reference appears to be in error, since that statute concerns state payments to the counties for providing legal counsel to those who cannot afford counsel.

requires notice of a hearing to determine ability to pay. It provides: “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, *the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof.*” (Italics added.) We observe that “section 987.8 does not contain any language either mandating a separate hearing or prohibiting consideration of reimbursement for legal costs as part of the sentencing process.” (*People v. Phillips* (1994) 25 Cal.App.4th 62, 76 (*Phillips*).

First, we agree with the People that defendant’s failure to object in the trial court forfeited his right to make the argument on appeal. (See *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395 [Fourth Dist., Div. Two] (*Whisenand*)). At the sentencing hearing, the court expressly found that defendant was self-employed and had the ability to generate income, before ordering him to reimburse \$150 in attorney fees. “Counsel did not offer any objection to the court’s order for reimbursement on grounds of notice, lack of preparation, or lack of an opportunity to present evidence. The absence of any such objection indicates that defendant was not surprised by the court’s consideration of his financial status and the subsequent order for reimbursement. [Citation.]” (*Phillips, supra*, 25 Cal.App.4th at p. 75.) If a timely objection had been made, the court could have allowed testimony on defendant’s ability to pay or could have scheduled another hearing to allow further preparation time. (*Whisenand, supra*, 37 Cal.App.4th at p. 1395.)

Second, defendant suffered no prejudice from the court's alleged failure to hold a hearing to determine his ability to pay, since the record supports the conclusion that he had the ability to pay the fee. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1076 [if the reviewing court reaches the ability-to-pay issue, any error is not prejudicial unless there is a reasonable probability that, but for the error, the result would have been more favorable].) We note that defendant did not, and does not, claim he lacked the ability to pay attorney fees. Instead, he compares the court's finding of his ability to pay attorney fees with the court's finding that he did *not* have the ability to pay the cost of preparing the presentence report, or the cost of probation supervision fees. However, the court's finding that he was unable to pay those other costs did not necessarily preclude a finding that he had the ability to pay attorney fees. The court apparently did not order him to pay those other costs, in light of the fact that he was going to have to pay restitution. Moreover, those costs were presumably more than \$150.

“Ability to pay” is statutorily defined as “the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him” (§ 987.8, subd. (g)(2).) The factors include: “(A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (*Ibid.*)

“Ability to pay does not necessarily require existing employment or cash on hand.”

(*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) According to the probation officer's report, defendant had the ability to obtain employment. He was in good health. He was not on any medication. He was self-employed and worked in general construction. We further note that the probation report reflects that defendant had \$2,500 in cash, on his person, at the time of his arrest. It also shows that he had \$10,000 in assets.

Given this information, there was sufficient evidence for the court to find that defendant had the ability to reimburse \$150 in appointed counsel fees. Therefore, any error in the court failing to hold a hearing on his ability to pay was not prejudicial, since there is no reasonable probability that, but for the error, the result would have been more favorable.

IV. The Matter Should Be Remanded to Dismiss Counts 1 and 2 and the Prison Prior

Although not raised as an issue by the parties, we note that the plea agreement did not mention the dismissal of counts 1 and 2 or the section 667.5, subdivision (b) allegation, and neither the court nor the parties mentioned the counts or allegations at the plea or sentencing hearing. We will remand the matter for the record to be corrected to reflect the dismissals.

Here, the plea agreement stated that the information charged defendant with commercial burglary (§ 459), grand theft of personal property (§ 487, subd. (a)), and receiving stolen property (§ 496, subd. (a)). It also stated that defendant desired to plead guilty to the receiving stolen property charge in count 3, in exchange for a suspended three-year state prison sentence and 180 days in county jail. However, the plea agreement did not mention that counts 1 and 2, or the prison prior allegation were to be

dismissed. The court sentenced defendant to the three-year term on count 3, and suspended the sentence, as agreed under the plea bargain. His sentence was not enhanced by the prison prior. There was no reference by the parties or the court to counts 1 or 2 or the prison prior at the change of plea hearing or sentencing hearing.

It appears that the parties intended counts 1 and 2 and the section 667.5, subdivision (b) enhancement to be dismissed, since neither party objected to the court's sentence.⁸ However, as discussed, the court never actually dismissed these counts or the enhancement. We note that the minute order from the sentencing hearing reflects that, on motion of the People and pursuant to the plea agreement, the court dismissed counts 1 and 2 and struck the prison prior. In the interest of completeness and accuracy, we will remand the cause for the People to add a term to the plea agreement, stating that counts 1 and 2 and the prison prior enhancement are to be dismissed. (See § 1260 [reviewing court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].) We will also direct the trial court hold a hearing to enforce the terms of the amended plea agreement.

DISPOSITION

The matter is remanded for the People to add a term to the plea agreement to dismiss counts 1 and 2 and the prison prior enhancement. The trial court is directed to hold a hearing to enforce the terms of the amended plea agreement. Furthermore, the

⁸ Defendant's opening brief states that he pled guilty to receiving stolen property, and that "[t]he remaining counts, and prison prior were dismissed." He cites to the plea agreement, in support of this statement, but the plea agreement makes no mention of any such dismissals.

judgment is modified to award presentence conduct credit of 37 days, consisting of 19 days of actual custody time, plus 18 days of presentence conduct credit pursuant to section 4019. The superior court clerk is directed to generate a new minute order reflecting this modification. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

RICHLI
J.