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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.

ANGELA MARIE CRANFILL,

Defendant and Appellant.

E053615

(Super.Ct.No. FMB1000305)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed in part; remanded with directions in part.

Neil Auwarter, 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, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

In September 2010, defendant and appellant Angela Marie Cranfill pled guilty to petty theft with a prior (Pen. Code, § 666)^{1, 2} and admitted that she had suffered one prior prison term (§ 667.5, subd. (b)). In return, defendant was placed on formal probation with various terms and conditions for a period of 36 months.

Defendant subsequently violated probation. After the trial court found true that defendant had violated a term of her probation, it terminated defendant's probation and sentenced her to a total term of four years in state prison with credit for time served. On appeal, defendant contends: (1) the trial court abused its discretion in imposing an upper term; and (2) the trial court erred in denying her presentence custody credits. As explained below, we find that the matter must be remanded to allow the trial court to calculate defendant's presentence conduct credits. We, however, reject defendant's remaining contention.

I

FACTUAL AND PROCEDURAL BACKGROUND

On July 6, 2010, defendant entered a Walmart store and stole property belonging to the store.

On July 30, 2010, a felony complaint was filed charging defendant with petty theft with a prior. (§ 666.) The complaint also alleged that defendant had suffered one prior prison term. (§ 667.5, subd. (b).)

¹ The parties later stipulated to change the petty theft with a prior offense to second degree burglary by interlineation.

² All further statutory references are to the Penal Code unless otherwise indicated.

On September 14, 2010, defendant pled guilty as charged and admitted the prior prison term allegation. In return, defendant was promised placement into a drug court program and formal probation.

On September 28, 2010, defendant was placed on formal probation for a period of 36 months with various terms and conditions. Relevant terms and conditions included: (1) “Serve 33 days in a San Bernardino County Jail facility, with credit for time served Defendant waives PC4019 credits to participate in Drug Court” (term No. 1); (2) violate no law (term No. 2); (3) neither use nor possess drugs (term No. 11); and (4) stay 100 yards away from a Walmart store (term 21). At that time, the parties stipulated to change the petty theft with a prior offense to second degree burglary by interlineation. In exchange, the People asked the trial court to dismiss two unrelated open cases against defendant.

In December 2010, defendant violated probation by using Vicodin while she was participating in drug court. On December 28, 2010, the trial court ordered that defendant remain in custody while she applied for mental health court because defendant was six months pregnant and the court feared for her baby’s safety.

On January 25, 2011, the trial court transferred defendant from drug court to mental health court and added additional probationary terms and conditions to the prior terms. Defendant was provided a copy of those terms.

On May 2, 2011, after defendant waived her right to a formal probation revocation hearing pursuant to *People v. Vickers* (1972) 8 Cal.3d 451, the trial court found true that defendant had violated term No. 2 of her probation by being arrested for shoplifting at a

Walmart store.³ The trial court thereafter terminated defendant's probation and sentenced her to a total of four years in state prison as follows: the upper term of three years for the second degree burglary offense and one year for the prior prison term allegation.⁴ In addition, the trial court awarded defendant 59 actual days of presentence custody credits, but did not award defendant any conduct credits.⁵

On May 17, 2011, defendant filed a notice of appeal.

II

DISCUSSION

A. *Upper Term Sentence*

Defendant contends that the trial court abused its discretion when it sentenced her to the upper term of three years for shoplifting medication for her son. We disagree.

³ The May 2, 2011, minute order reads, "Defendant admits violation(s) of probation, as to term(s) 2." However, the record does not contain a formal admission by defendant. Rather, it appears that the trial court found defendant to be in violation of her probation. The trial court stated, "She has previously waived her right to have a formal *Vickers* hearing to determine whether or not she is in violation of termination and pronouncement of judgment. And the court finds she is in violation based upon the new arrest."

⁴ We note that at the May 2, 2011 hearing, the trial court stated defendant was being sentenced for "a violation of petty theft with priors, a felony, Count Number 4, to the aggravated term of 3 years." However, the record is clear defendant was being sentenced on count 1, second degree burglary.

⁵ The People agreed to dismiss or not file any charges relating to the new shoplifting offense.

Rule 4.420 of the California Rules of Court⁶ states in pertinent part: “(a) When a sentence of imprisonment is imposed, . . . the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. [¶] . . . [¶] (b) . . . [T]he sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. . . .”

Courts have broad sentencing discretion, and we review a trial court’s sentencing choices, including whether to reinstate probation or impose a prison sentence, and whether to impose the upper term, for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We must affirm unless there is a clear showing the sentencing choice was arbitrary, capricious or irrational. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) A trial court abuses its discretion when it relies on circumstances that are not relevant to its decision or that otherwise constitute an improper basis for the decision. (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196.)

A trial court is “required to specify reasons for its sentencing decision, but [is not] required to cite ‘facts’ that support its decision or to weigh aggravating and mitigating circumstances.” (*People v. Sandoval, supra*, 41 Cal.4th at pp. 846-847.) “[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.” (*Id.* at p. 848.) “[T]he existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for

⁶ All further references to rules are to the California Rules of Court.

the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813; see also § 1170, subd. (b); rule 4.420(b).) “The court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’” (*Sandoval*, at p. 848.)

Here, the trial court imposed the upper term for several reasons. The trial court noted that defendant had “a history of misdemeanor” offenses, as well as “going to prison for theft-related offenses,” such as false imprisonment and vehicle theft.⁷ The trial court also pointed out defendant’s prior probation violation for using Vicodin and driving without a license while participating in drug court. It further noted that defendant continued to commit criminal offenses, despite being placed in both the drug and mental health courts.

The trial court also heard defendant’s statements in mitigation. Defendant explained that she had shoplifted “drops for her son” and not to feed her drug habit as she had done in the past, and that she was doing well in her program and testing clean. The trial court commended defendant on her progress, considered the pertinent circumstances in aggravation and circumstances in mitigation, and concluded an upper term sentence was warranted in this case.

This was well within the wide discretion a trial court has in sentencing a defendant and was not even close to being an “arbitrary, capricious or patently absurd” decision. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

⁷ We note that the record does not contain a probation report, but the trial court reviewed defendant’s criminal history at the sentencing hearing.

Defendant argues that the trial court should have sentenced her to the middle term because she had “successfully attended narcotics classes and tested clean during her probation,” and because the current incident of shoplifting was motivated “not by drug use but by the medical needs of her son.” However, because (1) defendant’s prior convictions are numerous, (2) she was on probation when the crime was committed, and (3) her prior performance on probation was unsatisfactory, the trial court felt that the upper term was appropriate. Again, that decision was well within the trial court’s discretion.

We conclude that the trial court did not abuse its discretion in sentencing defendant to the upper term.

B. *Presentence Custody Credits*

Defendant also contends that because she did not validly waive presentence conduct credits, the trial court erred in denying her those credits. She further asserts that even if a waiver could be inferred, such waiver would only apply to conduct credits previously accrued and, therefore, she should still be entitled to presentence custody credits after the original sentence.

The People respond that defendant validly waived conduct credits pursuant to section 4019 at the original sentencing hearing held on September 28, 2010; and that she is only entitled to presentence conduct credits accruing after September 28, 2010.

Criminal defendants convicted of felonies are entitled to (1) credit for time spent in custody prior to sentencing or as a condition of probation (§ 2900.5) and (2) credit for good conduct and work performed during presentence custody (§ 4019). A defendant

may specifically waive the right to custody credits, provided that waiver is voluntarily and intelligently made. (*People v. Johnson* (1978) 82 Cal.App.3d 183, 187-188 [Fourth Dist., Div. Two].) “To determine whether a waiver is knowing and intelligent, the inquiry should begin and end with deciding whether the defendant understood he [or she] was giving up custody credits to which he [or she] was otherwise entitled.” (*People v. Burks* (1998) 66 Cal.App.4th 232, 236, fn. 3; see also *People v. Arnold* (2004) 33 Cal.4th 294, 309.) “[A] custody credit waiver may be found to have been voluntary and intelligent from the totality of the circumstances, even if the sentencing court failed to follow the ‘better course’ of specifically advising the defendant regarding the scope of his [or her] waiver.” (*People v. Burks*, at p. 235.)

The record here shows that at the September 28, 2010, sentencing hearing, the trial court discussed the terms of probation and explained that defendant was ineligible for “[section] 4019 credits because of her acceptance into drug court.” The trial court thereafter asked defendant whether she had reviewed all the terms and conditions of probation, whether she understood those terms, and whether she accepted those terms. Defendant responded in the affirmative to each of these questions. At the end of the sentencing hearing, the trial court again asked defendant if she had reviewed all of the terms and conditions of probation. Defendant responded, “Yes, sir.” Term No. 1 specifically states, “Serve 33 days in a San Bernardino County Jail facility, with credit for time served *Defendant waives PC4019 credits to participate in Drug Court.*” The trial court also asked defendant whether she needed the court to read the probation terms and conditions to her in open court. Defendant replied, “No, sir.” Defendant thereafter

accepted all of the terms and conditions of her probation and did not object when the trial court awarded defendant 33 days for actual days spent in custody. The record here demonstrates that, “from the totality of the circumstances” (*People v. Burks, supra*, 66 Cal.App.4th at p. 235), defendant knowingly and intelligently waived her right under section 4019 to presentence conduct credits.

Relying on *People v. Black* (2009) 176 Cal.App.4th 145 [Fourth Dist., Div. Two], defendant claims that “the record shows not an intelligent waiver of conduct credits, but an incorrect legal finding by the court that [defendant] was ‘ineligible’ for conduct credits.” Defendant’s interpretation of the record is mistaken. We do not discern from the trial court’s comment about ineligibility that defendant was not legally entitled to conduct credits, but that she was barred from receiving section 4019 conduct credits because she had waived them in order to participate in drug court.

In *People v. Black, supra*, 176 Cal.App.4th 145, this court found a valid waiver where the defendant signed and initialed a drug court application and agreement that stated she had waived any section 4019 credits as a condition of participation. (*Id.* at pp. 152, 154-155.) We explained that the defendant had not only signed the agreement, but she also had initialed next to the paragraph indicating she could read and understand English and that she had sufficient time to read her statement of rights and the agreement. In addition, during a hearing held the same date the defendant had signed the agreement, she responded in the negative to the trial court’s inquiry of whether she had any questions. (*Id.* at pp. 154-155.) This court concluded that under those circumstances, the defendant was fully aware that she was giving up her right to any credits previously

accrued under section 4019 in order to participate in the drug court rehabilitation program. (*Ibid.*)

Here, although the record does not contain an agreement or drug court application and the written plea form does not indicate defendant was waiving any type of credits, the totality of the circumstances show that defendant knowingly and intelligently waived section 4019 credits in order to participate in drug court. Defendant received a copy of the terms and conditions of her probation. Term No. 1 specifically stated that defendant waived section 4019 credits to participate in drug court. Defendant repeatedly acknowledged to the trial court that she had reviewed, understood, and accepted the terms and conditions of her probation. Accordingly, we find defendant validly waived her conduct credits at the September 28, 2010, sentencing hearing.

However, the record does not show defendant waiving future section 4019 credits earned. The People concede that the waiver in this case was not to future credits earned, and agree that defendant should have been awarded section 4019 credits for any time spent in custody after September 28, 2010, and that a limited remand to properly calculate credits is thus appropriate. Under these circumstances, we agree that it is appropriate for us to remand the matter for the limited purpose of allowing the trial court to calculate and award any credits earned after September 28, 2010. (See, e.g., *People v. Black, supra*, 176 Cal.App.4th at pp. 156-157.)

II

DISPOSITION

The case is remanded for the limited purpose of calculating conduct credits under section 4019 for time spent in local custody after September 28, 2010. The Superior Court of San Bernardino County is directed to determine defendant's conduct credits earned after September 28, 2010, to amend its minutes accordingly, and to correct the abstract of judgment. The superior court clerk is directed to forward a copy of the amended abstract of judgment and minute order to the Department of Corrections and Rehabilitation indicating the court's award of conduct credits.

In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

RICHLI

J.

CODRINGTON

J.