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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.

BOYD JESSE HAGEN,

Defendant and Appellant.

E053819

(Super.Ct.Nos. FMB008494 &  
FMB700050)

OPINION

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

Lynelle K. Hee, 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, Brad Weinreb and William M.  
Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Boyd Jesse Hagen was on probation in two cases. After finding that he had waived his right to a *Vickers*<sup>1</sup> hearing, a trial court found that he had violated his probation terms when he tested positive for drugs. The court sentenced him to a total term of 19 years eight months. On appeal, defendant argues that: (1) he never waived his right to a *Vickers* hearing; (2) the trial court erred in calculating his presentence custody credits; and (3) the trial court failed to dismiss one of his prior prison convictions (Pen. Code, §667.5, subd. (b))<sup>2</sup> and, therefore, erroneously sentenced him to an additional one year in prison. The People concede that the court erred in calculating defendant's presentence custody credits and in failing to dismiss the prison prior. We will remand the matter to the superior court to dismiss the prison prior, and we modify the judgment to award additional presentence custody credits. Otherwise, the judgment is affirmed.

### PROCEDURAL BACKGROUND<sup>3</sup>

On September 21, 2006, defendant pled guilty, in case No. FMB008494, to possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a), count 1.) He also admitted that he had suffered two prior prison terms. (Pen. Code, § 667.5, subd. (b).) The trial court placed him on probation under Proposition 36.

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<sup>1</sup> *People v. Vickers* (1972) 8 Cal.3d 451 (*Vickers*).

<sup>2</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

<sup>3</sup> The facts underlying defendant's offenses are not relevant to the issues raised on appeal.

On June 8, 2007, defendant pled guilty, in case No. FMB700050, to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and possession of ammunition by a felon (Pen. Code, § 12316, subd. (b)(1)). He also admitted that he had four prior convictions for possession of methamphetamine for sale (Health & Saf. Code, § 11370.2, subd. (a)) and had served four prior prison terms (Pen. Code, § 667.5, subd. (b)). The court terminated his Proposition 36 probation in case No. FMB008494, and placed him into drug court in both cases. Defendant was put on supervised probation for three years on specified conditions, including that he participate in a drug court rehabilitation program.

It was later alleged that defendant tested positive for drugs and thereby violated his probation. On January 29, 2010, the court summarily revoked defendant's probation and issued a bench warrant. Defendant subsequently appeared in court and denied the violation allegation. The court set a *Vickers* hearing for April 25, 2011. That hearing was continued to May 9, 2011.

On May 9, 2011, the court stated that defendant was no longer amenable to the drug court program and that he had waived his right to have a formal *Vickers* hearing. The court found that defendant had violated his probation terms by failing to follow and comply with all the drug court terms. It then terminated probation and proceeded to sentence him. In case No. FMB700050, the court sentenced him as follows: the upper term of three years on count 1, a consecutive eight months on count 2, plus three years on each of his four prior possessions for sale convictions, and one year for each of his four prior prison term convictions, for a total term of 19 years eight months.

In case No. FMB008494, the court sentenced defendant to the upper term of three years, plus one year for both of his prior prison term convictions, for a total of five years.<sup>4</sup> The court ordered the terms to be served concurrent with the terms in the other cases.

## ANALYSIS

### I. The Record Indicates That Defendant Waived His Right to a *Vickers* Hearing

Defendant contends that he was denied his due process rights when the trial court found him in violation of probation without a *Vickers* hearing. He asserts there is no evidence in the record to support the court's finding that he waived his right to a probation revocation hearing and, therefore, the case must be remanded for the court to hold such hearing. We disagree.

#### A. *Background*

At an ex parte hearing on January 29, 2010, probation on both cases was revoked based on a positive drug test. The court issued a bench warrant. Defendant appeared in custody on April 21, 2011, and was advised of his rights. He denied the violation allegation. The court set a *Vickers* hearing for April 25, 2011, and the matter was later continued to May 9, 2011.<sup>5</sup>

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<sup>4</sup> The court actually stated that the total term was six years, but this appears to have been an error. (See § III, *supra*.)

<sup>5</sup> There were no recorded transcripts of the hearings on April 21, 2011 and April 25, 2011.

On May 9, 2011, the court called the case for hearing. The court reviewed the case, as follows: “[Defendant] was accepted into drug court, and then he was sent to the Salvation Army program back on January 26, 2010. And then a bench warrant was issued. He fled the Salvation Army program and tested positive for drugs, and a bench warrant was issued on January 29th, 2010. He’s been in the wind since that date for more than one year.”

The court then stated: “The Court is at this time finding that he is no longer amenable to the drug court program. He has waived his right to have a formal *Vickers* hearing. And the Court finds he is in violation of his probation terms, to follow and comply with all the drug court terms, and his probation is now going to be terminated.” The court asked if there was any legal cause why sentence should not be pronounced, and defense counsel said no. The court asked if anyone wished to be heard, and defense counsel responded: “*Just on the Court’s indicated sentence that we discussed in chambers.* I think there are several alternatives to a consecutive sentence. One is to stay part of the sentencing, or not impose sentencing. And third is to run all or part of them concurrent and ask the Court not to impose the maximum.” (Italics added.) Defense counsel then submitted. The prosecutor asked the court to impose the maximum sentence, and submitted. The court proceeded to revoke defendant’s probation and sentence him.

#### B. *Defendant Apparently Waived His Right to a Formal Hearing*

Probationers are entitled to due process protections prior to revocation and termination of probation, including notice and an opportunity to be heard. (*Vickers*,

*supra*, 8 Cal.3d at pp. 457-458.) A probationer may waive his *Vickers* rights. (*In re Moss* (1985) 175 Cal.App.3d 913, 930.) “The voluntariness of a waiver is a question of law which we review de novo. [Citation.] To make this determination, we examine the particular facts and circumstances surrounding the case, including the defendant’s background, experience and conduct. [Citation.]” (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.) A probationer can waive the formal requirements of notice and a hearing and admit a probation violation through the conduct of his attorney and his own silence. (See *People v. Dale* (1973) 36 Cal.App.3d 191, 194-195.)

The record does not reflect that defendant was denied due process, as notice and an opportunity to be heard can be inferred from the record. A supplemental probation report dated January 26, 2010, states that on December 26, 2009, defendant “was found in violation of probation regarding a ‘dirty’ drug test and remanded into custody.” The report states that defendant was terminated from the drug court program, and he was facing a possible sentence of over 19 years in state prison. The probation officer noted defendant’s lengthy prior record and his multiple relapses and opined that defendant’s probation violation “reflect[ed] addiction rather than an unwillingness to comply with court mandates.” The report recommended that defendant be ordered to complete six to 12 months at the Salvation Army program, and that the case be converted to regular probation status upon completion of the program. In the alternative, the probation officer recommended that defendant be allowed to enter a new plea to a lower sentence. Although the record does not include a proof of service for this document, probation

reports are usually served on defense counsel and the court. (See § 1203, subd. (b)(2)(E).)

Furthermore, the record indicates that defense counsel discussed defendant's probation violation waiver and sentence with the court in chambers. At the start of the May 9, 2011 hearing, the court stated that defendant tested positive for drugs, found that he was no longer amenable to the drug court program, and stated that "he has waived his right to have a formal *Vickers* hearing." Neither defendant nor his counsel objected. Instead, defense counsel asserted that there was no legal cause why sentence should not be pronounced. Counsel referred to a chambers discussion that had occurred regarding the court's indicated sentence. Thus, the circumstances indicate that defendant had voluntarily waived his right to a formal probation revocation hearing in chambers, and he was prepared to be sentenced immediately.

In any event, any error in the trial court finding defendant in violation of probation without a formal *Vickers* hearing was harmless, given the undisputed evidence that defendant relapsed and used drugs. The probation report states that he tested "dirty" for drugs on or around December 26, 2009. Defendant was interviewed on January 11, 2010, and admitted that he relapsed, stating that it was "a spur of the moment stupidity." Thus, he violated the probation term that prohibited him from using or possessing any controlled substance without a medical prescription. Remanding the matter in order for the court to hold a formal probation revocation hearing would be a waste of judicial resources.

## II. The Trial Court Erred When Calculating Defendant's Presentence Custody Credits

Defendant claims three errors in the calculation of his presentence custody credits: (1) the court failed to award the correct number of actual credits in case No. FMB700050; (2) the court improperly found that he waived his section 4019 conduct credits; and (3) his conduct credits should be calculated under former section 2933.1, subdivision (e)(1). The People correctly concede.

### *A. Defendant Is Entitled to Additional Days of Actual Credits in Case No. FMB700050*

The trial court's determination of presentence custody credits in case No. FMB700050 was apparently based on the probation officer's credit memorandum. The memorandum lists various periods of incarceration and a total of 315 actual days. The court, accordingly, awarded defendant 315 credits for actual days in custody. However, the memorandum reflects a miscalculation of the total actual days, as it failed to include the 20 days defendant was in custody from April 20, 2011 to May 9, 2011. Thus, defendant should be awarded an additional 20 days for a total of 335 actual credits.

### *B. Defendant Did Not Waive Section 4019 Credits*

In sentencing defendant in case No. FMB700050, the court stated that "[h]is 4019 credits were waived." Similarly, in sentencing him in case No. FMB008494, the court stated that he was "not eligible for 4019 credits." However, as the People concede, there is nothing in the record showing that defendant waived his right to the credits.

*C. Defendant Was Entitled to Presentence Credits Under Former Section 2933, Subdivision (e)(1)*

While defendant argues that he did not waive his credits under section 4019, he also argues that he was entitled to presentence conduct credits under former section 2933, subdivision (e)(1), which was in effect when he was sentenced on May 9, 2011. It provided, in relevant part:

“Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” (Former § 2933, subd. (e)(1), amended by Stats. 2010, ch. 426 (S.B. 76), § 1, eff. Sept. 28, 2010.)<sup>6</sup>

Former section 2933, subdivision (e)(3), provided that presentence conduct credits were to be calculated under section 4019, and not section 2933, if the prisoner was required to register as a sex offender; was committed for a serious felony, as defined in Section 1192.7; had a prior conviction for a serious felony, as defined in Section 1192.7; or a violent felony, as defined in Section 667. 5. Since none of those exceptions applied to defendant, his presentence credits should have been calculated under former section 2933, subdivision (e)(1).

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<sup>6</sup> Section 2933 was subsequently amended. (Stats. 2011-2012, 1st Ex. Sess., ch. 12 (A.B.17), § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.)

According to the probation officer's credit memo, in case No. FMB008494, defendant served 348 days in county jail before being sentenced to state prison. Thus, he was entitled to 348 days of conduct credit. His presentence credits should be corrected to reflect a total of 786 days (348 actual + 348 conduct + 90 residential).<sup>7</sup>

In case No. FMB700050, defendant served 335 days in county jail before being sentenced to state prison. Thus, he was entitled to 335 days of conduct credit. His presentence credits should be corrected to reflect a total of 760 days (335 actual + 335 conduct + 90 residential).

### III. The Trial Court Failed to Dismiss The First Prison Prior

Defendant contends that the court neglected to dismiss the first prison prior in case No. FMB008494 at the plea hearing or initial sentencing hearing. Consequently, at the final sentencing hearing on May 9, 2011, the court erroneously sentenced defendant to one year on the first prison prior. The People correctly concede that the court erred in this respect.

Generally, a clerical error is one inadvertently made. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*Ibid.* [judge misspoke].) A court "has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.]" (*In re Candelario* (1970) 3 Cal.3d 702, 705.)

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<sup>7</sup> We note that a defendant is entitled to custody credits for any time spent in a residential treatment program. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318; § 2900.5.)

Defendant entered a plea agreement, in which he pled guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1), and admitted the second and third prior prison convictions. Pursuant to the plea agreement, the first prior prison term alleged in the felony complaint was to be dismissed. The court failed to do so, and neither party mentioned the court's failure to dismiss the prison prior. When defendant was subsequently found to be in violation of his probation, the court sentenced him as follows: "To the aggravated term of 3 years. Consecutive to that are the 667.5 1-year priors, *which were two*. So it is actually 3 years, plus he had three 1-year priors. Total term of 6 years." (Italics added.)

The court initially stated at the sentencing hearing that defendant had two prison priors; however, for some inexplicable reason, the court sentenced him on three prison priors. As the People note, the minute order from the May 9, 2011 sentencing hearing and the abstract of judgment both reflect that the court just sentenced defendant on the second and third prison priors, in accordance with the plea agreement.

Thus, the record indicates that the parties intended the prior prison allegation to be dismissed, and it is evident the court's failure to order the dismissal was inadvertent. Accordingly, we will direct the trial court to dismiss the first prior prison allegation.

#### DISPOSITION

The judgment is modified to award defendant presentence credits as follows: (1) in case No. FMB008494, defendant is entitled to 348 days of conduct credits, for a total of 786 days of presentence credits (348 actual days, plus 348 conduct credits, plus 90 days of actual credits for the time spent in a residential facility); (2) in case

No. FMB700050, defendant is entitled to an additional 20 days of actual credits, and 335 conduct credits, for a total of 760 days of presentence credits (335 actual days, plus 335 conduct credits, plus 90 days of actual credits for the time spent in a residential facility). Furthermore, the trial court is directed to order the dismissal of the first prior prison allegation in case No. FMB008494. The trial court is directed to amend the sentencing minute order of May 9, 2011, and the abstract of judgment to reflect the above modifications and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

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HOLLENHORST  
\_\_\_\_\_ J.

We concur:

RAMIREZ  
\_\_\_\_\_ P. J.

KING  
\_\_\_\_\_ J.