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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.

TOMMY MERRICK HOSEY,

Defendant and Appellant.

E054443

(Super.Ct.No. RIF153631)

OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Johnson, Judge. Affirmed with directions.

Renee Paradis, 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, Barry Carlton and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Tommy Merrick Hosey challenges the trial court's award of presentence custody credits. We agree that he is entitled to additional credits, but not

the amount he claims. We therefore affirm with instructions that the trial court amend the abstract of judgment to reflect the correct amount of credits.

STATEMENT OF THE CASE¹

On February 11, 2010, defendant pleaded guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), possession of marijuana (Health & Saf. Code, § 11357), and possession of drug paraphernalia (Health & Saf. Code, § 11364). He also admitted six prison priors. (Pen. Code, § 667.5, subd. (b).)² The trial court placed him on 36 months' formal probation.

On February 14, 2010, defendant was arrested for carrying a concealed weapon and possession of drug paraphernalia; a parole hold was placed on him the same day. Probation was summarily revoked on February 19.

At the probation revocation hearing on April 8, 2010, defendant admitted the violation, was reinstated on probation, and ordered to serve 270 days in custody. He was awarded 211 days credit, consisting of 151 days of actual custody and 60 days credit under section 4019. As a result, defendant had 59 days remaining to serve.

Meanwhile, on March 10, 2010, a probable cause hearing was held on the alleged parole violation. Defendant was given a seven-month parole term after he admitted the violation for possession of a dirk or dagger, as well as for failure to report.

¹ The only issue defendant raises is the amount of presentence credits to which he is entitled. Accordingly, we find it unnecessary to summarize the facts underlying his conviction.

² All further statutory references are to the Penal Code.

On April 14, 2010, defendant was moved from local custody to a state prison facility to serve the remainder of his term. He served his concurrent parole and probation terms and was released from custody on September 12, 2010.

On August 4, 2011, the court found that defendant had again violated probation by failing to report to his probation officer. On August 26, the court denied probation and sentenced defendant to four years in state prison. It awarded him 272 actual days and 272 days good time credits for a total of 544 days presentence credit. He was not awarded credit for the period from April 15, 2010 to September 12, 2010, when defendant was in state prison for the concurrent probation and parole terms.

Defendant filed a notice of appeal, and subsequently made a motion in the trial court to award him additional presentence custody credits. The trial court denied the motion.

DISCUSSION

Defendant contends he is entitled to an additional 60 days of presentence custody credits for the time he spent in state custody as a condition of probation. We agree with the People that defendant is entitled to 59 days credit.

The superior court denied defendant's motion for an award of additional credits citing *People v. Bruner* (1995) 9 Cal.4th 1178. *Bruner* held that where "presentence custody stems from multiple, unrelated incidents of misconduct" such custody is not credited against subsequent custody unless defendant shows that the conduct underlying the custody was "but for" the cause of the restraint. (*Id.* at pp. 1193-1194.)

The People concede, and we conclude, that *Bruner* does not apply in this case. As the Supreme Court explained in *In re Marquez* (2003) 30 Cal.4th 14, 20, the “but for” rule in *Bruner* applies to those cases involving “the possibility of duplicate credit that might create a windfall for the defendant.” (*Id.* at p. 23.) This is not such a case. Just as in *Marquez*, this is not a duplicate credit case. Defendant was ordered to serve time in custody as a condition of his probation, but was not credited for this time when he was ultimately sentenced. He could not have applied those credits with respect to his parole custody, so there is no possibility of duplicate credit. Moreover, the basis for his confinement regarding his probation condition was the same basis for his concurrent parole violation custody. Thus, defendant was entitled to 59 days credit for this time. (§ 2900.5, subd. (b).)

Contrary to defendant’s assertion, he is not entitled to 60 days credit, but 59 days credit for the actual time served. Defendant contends that had he served his probation revocation term of 59 days in county jail, he would have served 30 days of actual custody before being release. He concludes, therefore, that he is entitled to 30 days of actual custody credit, plus an additional 30 days of conduct credit pursuant the version of section 2933 in effect at the time of his sentencing on August 26, 2011. Because defendant did not serve this time in local custody, he did not earn conduct credits during this period under section 4019, subdivision (a)(2), which applies to cases where the defendant is “confined in or committed to the county jail.”

The People point out that the sentencing court made another error in calculating defendant's custody credits.³ A portion of the postarrest time in custody should have been calculated under the former version of section 4019. He was arrested on November 5, 2009, and remained in custody until February 11, 2010. During this period, an amended version of section 4019 was operative from January 25, 2010 to September 27, 2010, entitling defendant to accrue conduct credits at a rate of two days for every two days of actual time in custody. (Former § 4019, subd. (f), as amended by Stats. 2009, ch. 28, § 50.) Prior to January 25, 2010, conduct credits could be accrued at a rate of two days for every four days of actual time in presentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f), 2008].) Because his time in custody overlapped the statute's operative date of January 25, 2010, defendant earned credit at two different rates. (*People v. Brown* (2012) 54 Cal.4th 314, 322.)

Defendant was in custody for 81 days from November 5, 2009 to January 24, 2010. He was thus entitled to 81 days actual custody plus 40 days of conduct credit for a total 121 days.

Defendant was in local custody several times after January 25, 2010, totaling 191 actual days. He was thus entitled to accrue conduct credits on a two-for-two rate for a

³ We may resolve this matter because the error in computing the actual custody days is a simple computation error, which has resulted in an unauthorized sentence and does not involve any disputed fact or exercise of discretion. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.)

total of 190 days.⁴ Adding this amount to the actual days, he was entitled to a total of 381 days credit. To this total, defendant was entitled to 59 days actual days credit as previously discussed. Thus, defendant should have received 440 days credit for the time in custody after January 25, 2010, plus 121 days earned from November 5, 2009 through January 24, 2010. Therefore, defendant is entitled to a total of 561 days presentence credits.

DISPOSITION

The judgment is affirmed. The superior court clerk is directed to amend the abstract of judgment to reflect that defendant is entitled to 561 days of presentence credit, consisting of 331 actual days and 230 conduct credits, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.

⁴ Section 4019 was amended again, effective September 28, 2010, to restore the original, lower credit-earning rate, but this version is inapplicable here because it applied only to crimes committed on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.)