

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFTON WAYNE MAXWELL,

Defendant and Appellant.

E054536

(Super.Ct.No. CR60589)

**ORDER MODIFYING OPINION  
AND DENIAL OF PETITION  
FOR REHEARING**

[NO CHANGE IN JUDGMENT]

Appellant’s petition for rehearing is denied. The opinion filed in this case on November 13, 2012, is modified as follows:

1. On page 8, in the second full paragraph, strike “2,662” and insert “2,688.” In addition, strike “324” and insert “350.” Hence, the sentence should read, “Defendant should therefore have been awarded a total of 2,688 days of presentence custody credits; 2,338 actual days in custody plus 350 conduct credits.”

2. On page 9, in the disposition, strike “2,662” and insert “2,688.” Further, strike “324” and insert “350.” Hence, the sentence should read, “The judgment is

modified to award defendant a total of 2,688 days of presentence custody credits (2,338 actual days in custody plus 350 conduct credits).”

Except for the modifications hereinabove set forth, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

KING  
J.

MILLER  
J.

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFTON WAYNE MAXWELL,

Defendant and Appellant.

E054536

(Super.Ct.No. CR60589)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, 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, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Clifton Wayne Maxwell appeals following a guilty plea, claiming the sentencing court made a mathematical error when it imposed sentence. We agree with the parties and will modify the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

On December 27, 1994, defendant discovered his car had been stolen from his stepfather's garage. Several days later, defendant, who was unarmed, along with four other men, three of whom were armed, went to the home of Jerry Jefferson, the person who they believed stole defendant's car. After the car was discovered in Jefferson's garage, two of the armed men approached the house, fired shots, and killed Jefferson. (*Maxwell, supra*, 606 F.3d at pp. 565-566.)

In 1998, a jury found defendant guilty of first degree murder. (Pen. Code, § 187.) Defendant was subsequently sentenced to a total term of 25 years to life in state prison. (*Maxwell, supra*, 606 F.3d at pp. 565-566.)

Following numerous appeals, in 2010, the United States Court of Appeals for the Ninth Circuit granted defendant's petition for writ of habeas corpus and ordered the matter remanded for a new trial. (*Maxwell, supra*, 606 F.3d at pp. 566, 577.)

On June 27, 2011, the trial court granted the People's motion to amend the information to add a voluntary manslaughter charge. (Pen. Code, § 192, subd. (a).) Pursuant to a negotiated plea agreement, defendant thereafter pled guilty to the voluntary

---

<sup>1</sup> The facts are taken from the United States Court of Appeals, Ninth Circuit's opinion in *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561 (*Maxwell*). The opinion is

manslaughter charge, in exchange, the remaining allegations were dismissed. The parties also agreed that defendant would serve a total prison sentence, including the time he had already served, of 23 years at 85 percent. The parties also agreed that defendant's sentence would be converted to 11 years with defendant waiving some of the time he had already served in state prison. During the oral taking of the plea, the trial court confirmed with the parties and defendant that the plea agreement provided for an 11-year sentence and that defendant would waive sufficient credits to guarantee he would be released three years from the date of the plea, June 27, 2011.

On July 15, 2011,<sup>2</sup> defendant was sentenced to the upper term of 11 years in state prison, and waived 3,808 days of presentence custody credits.<sup>3</sup> The trial court awarded defendant 2,488 days of credit (2,164 actual days and 324 days of conduct credits). Thus, the time remaining on defendant's sentence was 11 years minus 2,488 days of credit, "leaving him with a balance of 1,328 days to serve in state prison."

---

attached as Exhibit C to defendant's request for judicial notice, which was granted by this court.

<sup>2</sup> The reporter's transcript notes the date of the sentencing hearing as July 17, 2011; however, that day was a Sunday. The clerk's minute order notes the date of the sentencing hearing as Friday, July 15, 2011.

<sup>3</sup> Defendant had been in custody since his arrest on March 7, 1995. By the time of the sentencing hearing, defendant had earned 5,972 actual days of credit plus 895 days of conduct credits, for a total of 6,867 days of presentence custody credits.

## DISCUSSION

Defendant contends the sentencing court made a mathematical error when it imposed sentence. Specifically, he claims that the court should have sentenced him to an additional 1,077 days of incarceration from the date of sentencing rather than 1,328 additional days in custody. The People agree that the court erred in calculating defendant's sentence, but claim that the court should have imposed an additional 1,167 days of custody. To effectuate the terms of the plea agreement, we agree with defendant that the sentencing court should have sentenced defendant to an additional 1,077 days of custody.

At the time defendant's plea was taken on June 27, 2011, the following colloquy, confirming the negotiated plea agreement, occurred between Judge Edward D. Webster and the parties:

“THE COURT: All right. [Defendant], it's a little bit of an unusual plea, but it's my understanding that you're going to plead guilty to voluntary manslaughter, the amended Count 3, and that Count 1 and Count 2 would be dismissed.

“It's also understood that you would be sentenced to state prison for 11 years, which is the upper term for voluntary manslaughter. *But the sentence is going to be structured in such a way that you'll have to do 3 additional years from today's date.*

“Is that correct, Mr.—is that right?

“[PROSECUTOR]: More or less, your Honor, Based on—

“[DEFENSE COUNSEL]: More or less, depending on the credits. But we tried as best we can to estimate it'd be about 3 years less the—3 years at 85 percent.

“THE COURT: I can get him with probably three or four days within three years. *So it’s contemplated I’m trying to get as close to three years from today’s date as possible; right?*

“[DEFENSE COUNSEL]: That’s correct.

“[PROSECUTOR]: Basically, yes.

“THE COURT: All right. So [defendant], since you’ve already done 16 years in custody, it’s contemplated you’re going to be waiving a lot of your *Johnson*<sup>4</sup> credits *so that we can just give you enough credits to ensure that you get out in about three years plus or minus a couple of days from today’s date.*

“Is that your understanding?

“THE DEFENDANT: Yeah.

“THE COURT: All right. Do you have any questions about that part of it?

“THE DEFENDANT: No.

“THE COURT: Okay. So, essentially, you’re going to be probably waiving 8 or 9 years of time that you’ve already got credit, but that’s to your benefit because now *you’ve got a guaranteed date of getting out in 3 years* as opposed to being kept for 25, 30, or even 50 years, depending upon how well you appear before the Board of Prison Terms.

“THE DEFENDANT: Yes.”

---

<sup>4</sup> *People v. Johnson* (2002) 28 Cal.4th 1050 (*Johnson*). A *Johnson* waiver is the waiver of a statutory right to credit for time served against a subsequent sentence. (*Id.* at pp. 1054-1055.)

Defendant thereafter pled guilty to voluntary manslaughter. The matter was continued for sentencing.

Prior to sentencing, the probation department submitted a supplemental memorandum, outlining defendant's negotiated plea agreement and custody credits. The memorandum stated: ". . . as [a] result of the negotiated disposition in the instant matter, the defendant is expected to serve a total of 23 years (7,300 actual days) in custody although the maximum confinement for the convicted charge is only 11 years (3,492 actual days). Given the defendant's current custody credits of 5,972 actual days, this officer has calculated the defendant would owe an additional 1,328 actual custody days in order to complete the specified 23-year commitment. The defendant has agreed to remain in custody and waive a certain number of actual days to prevent the instant matter from becoming a 'paper commitment.' As such, this officer has calculated as of the hearing date [July 15, 2011] *the defendant will need to waive 3,808 actual days already served to fulfill the requirements of the negotiated disposition. This will leave the defendant with 2,164 actual days and 324 days of credit pursuant to Penal Code section 2933.1*"

At the sentencing hearing, wherein Judge Roger A. Luebs presided, the prosecutor explained the plea agreement as follows: "[Defendant] has approximately 16 years, nine months worth of credits. His upper term on the charge he took was 11 years. So he had to waive a considerable amount of time he has already served so we can get to a total sentence of 23 years what his actual sentence is. So, [defendant] still owes a balance of 1,161 days."

After Judge Luebs summarized his understanding of the negotiated plea agreement, the prosecutor and defense counsel reviewed the supplemental memorandum from the probation department and asked the court to follow the recommendation. A discussion thereafter ensued wherein Judge Luebs tried to confirm his understanding of the plea agreement. Judge Luebs then sentenced defendant to 11 years in state prison, and following the probation department's recommendation, awarded defendant 2,488 days of presentence custody credits, "leaving him with a balance of 1,328 days to serve in state prison."

Defendant argues that the imposed sentence requires him to serve 174 actual days more in custody than provided for in the negotiated plea agreement and, therefore, his sentence must be modified. We agree.

A plea agreement is a three-part contract that requires the consent of the defendant, the People, and the trial court. (*In re Kenneth H.* (2000) 80 Cal.App.4th 143, 148.) When a defendant enters a guilty plea in exchange for specified benefits, such as for an agreed maximum punishment, both the defendant and the prosecutor must abide by the agreement's terms. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on another ground as stated in *People v. Villalobos* (2012) 54 Cal.4th 177, 182-186.) If a plea rests in any significant degree on a promise or agreement of the parties so that it can be said to be part of the inducement or consideration, the promise must be fulfilled. (*Ibid.*) Failure of the state to abide by the agreement violates the defendant's due process rights, and the defendant has a constitutional right to some remedy. (*Ibid.*) In assessing whether there has been a violation of a plea agreement, the reviewing court should look

first to the specific language of the agreement to ascertain the expressed intent of the parties and should seek to carry out the parties' reasonable expectations. (*People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1384.)

In the present matter, the record is clear that defendant received a greater sentence than to which he agreed. Defendant's negotiated plea agreement called for a sentence of three years, plus or minus a few days, from the date he pled guilty, June 27, 2011. At the time defendant pled guilty, the court confirmed with the parties that defendant's sentence would be "structured in such a way that [defendant would] have to do 3 additional years from [June 27, 2011]." The court also confirmed with defendant that he would be waiving a considerable amount of his *Johnson* credits "to ensure that [he] [got] out in about three years plus or minus a couple of days from [June 27, 2011]." Hence, under the terms of the plea agreement, defendant's release date should be June 27, 2014, three years from the date defendant pled guilty.

As such, in order to comply with the terms of the plea agreement, defendant would need to serve an additional 1,096 days from the date defendant pled guilty, June 27, 2011, to three years from that date, June 27, 2014, less the time he served awaiting sentence (19 days), for a total of 1,077 days. Defendant should therefore have been awarded a total of 2,662 days of presentence custody credits; 2,338 actual days in custody plus 324 conduct credits. Defendant's sentence should be modified accordingly. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)

We also note that the amended abstract of judgment filed on March 21, 2012, incorrectly notes that defendant was convicted by a "jury," and should be corrected to

reflect that defendant was convicted by “plea.” The amended abstract of judgment also incorrectly states the date sentence was pronounced as “04-06-98.” However, it appears that defendant was sentenced on July 15, 2011.

DISPOSITION

The judgment is modified to award defendant a total of 2,662 days of presentence custody credits (2,338 actual days plus 324 conduct credits). The clerk of the superior court is directed to amend the minute order of the July 15, 2011 sentencing hearing to reflect the modifications expressed in this opinion. The trial court is directed to amend the amended abstract of judgment to reflect the modifications expressed in this opinion and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.) The judgment as thus modified is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

KING  
J.

MILLER  
J.