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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.

HECTOR BARRON MARTINEZ,

Defendant and Appellant.

E054854

(Super.Ct.No. INF058061)

OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Johnson, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

John F. Schuck, 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.

A jury found defendant and appellant Hector Barron Martinez guilty of committing a lewd and lascivious act on a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)¹ The jury also found true that in the commission of the offense defendant engaged in substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).) As a result, defendant was sentenced to a total term of eight years in state prison with credit of four days for time served.

On appeal, defendant contends that the trial court erred in failing to award him presentence custody credits for the time he served for his failure to appear at the original sentencing hearing. We agree and will remand the matter to allow the trial court to recalculate defendant's custody credits.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2006, defendant digitally penetrated his girlfriend's four-year-old daughter's vagina. In April 2007, a felony complaint was filed and an arrest warrant was issued.

Defendant was eventually arrested and taken into custody on January 6, 2009, and released on January 9, 2009, earning four days of custody credit.

On July 27, 2011, a second amended information was filed charging defendant with committing a lewd and lascivious act on a child under the age of 14 years. (§ 288, subd. (a).) The information also alleged that in the commission of the offense, defendant engaged in substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).)

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On August 3, 2011, a jury found defendant guilty as charged. The jury also found the substantial sexual conduct allegation to be true.

A sentencing hearing was scheduled for September 16, 2011. Defendant failed to appear at that hearing and a bench warrant was issued.

Defendant was subsequently taken into custody and appeared in court on October 5, 2011.² At that time, a sentencing hearing was scheduled for October 21, 2011.

At the October 21, 2011 sentencing hearing, the trial court sentenced defendant to a total term of eight years in state prison and awarded defendant four days for time served. At that time, defendant's trial counsel explained that defendant's failure to appear at the original sentencing hearing was "just a misunderstanding between him and our office telling him that the matter was continued." Counsel further noted that defendant "didn't run," "[h]e was at home that day," and that defendant had "made every single appearance up until that date." The court denied defendant any additional days of presentence custody credits, stating: "At the time that the [probation] report was issued, there were four days of credit time. I think the only additional time that's been served was as a result of being picked up on the warrant for failure to appear. So the defendant would not be entitled to credit for those days. Total credits would be the four days as indicated in the report."

² The record is unclear as to when defendant was arrested. It appears that defendant was already in custody at the time of the October 5, 2011 hearing, since the minute order states, "Remains Remanded to custody of Riverside Sheriff."

On October 25, 2011, defendant filed a notice of appeal.

DISCUSSION

Defendant contends that he is entitled to presentence custody credit for the time he was in custody for failing to appear at his original sentencing hearing to his rescheduled sentencing hearing on October 21, 2011, because he was in custody for “the same conduct” for which he had been convicted. The People argue that defendant is not entitled to additional credits because the custody following his failure to appear was not attributable to the lewd conduct that caused his conviction.

Criminal defendants convicted of felonies are entitled to credit for time spent in custody prior to sentencing (§ 2900.5) and credit for good conduct and work performed during presentence custody (§ 4019). “[I]t is the duty of the sentencing court to calculate actual days spent in custody pursuant to section 2900.5, subdivision (d).” (*People v. Thornburg* (1998) 65 Cal.App.4th 1173, 1175-1176, disapproved on other grounds in *People v. Buckhalter* (2001) 26 Cal.4th 20, 40.) When the facts are undisputed, a defendant’s entitlement to custody credits presents a question of law for the appellate court’s independent review, since the trial court has no discretion in awarding custody credits. (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 473.)

The computation of presentence custody credits is governed by section 2900.5, which in “subdivision (a) provides, in pertinent part, that ‘when a defendant has been in custody . . . all days of custody . . . shall be credited upon his or her term of imprisonment’” (*People v. Lathrop* (1993) 13 Cal.App.4th 1401, 1403.)

A limitation is stated in subdivision (b) of section 2900.5, which specifies, “‘For the

purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses” for which sentences are imposed. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414.) “The crucial element of the statute is not where or under what conditions the defendant has been deprived of his liberty but rather whether the custody to which he has been subjected ‘is attributable to charges arising from the same criminal act or acts for which the defendant has been convicted.’ (§ 2900.5, subd. (b).)” (*In re Watson* (1977) 19 Cal.3d 646, 651; see also *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 203.)

The California Supreme Court addressed a similar issue in *In re Marquez* (2003) 30 Cal.4th 14, 20-24 (*Marquez*). The defendant in *Marquez* was convicted of separate offenses, first in Santa Cruz County and later in Monterey County. His Santa Cruz conviction was reversed on appeal and later dismissed. The defendant sought presentence credit against the Monterey County conviction for the time he spent in custody between his conviction in Santa Cruz and sentencing in Monterey. The court held that he was entitled to the credits. (*Id.* at p. 17.) The court reasoned that when Monterey placed a hold on the defendant, his time in custody was attributable to charges in both counties. Once the Santa Cruz charges were reversed and dismissed, the time became attributable to the Monterey County charge in light of the custody hold. (*Id.* at pp. 22-23.) The court explained, “[o]nce the appellate court reversed [the defendant]’s

Santa Cruz County conviction, he was returned to a situation indistinguishable from that of a defendant who had been charged in that county, but never tried.” (*Id.* at p. 22.)

Here, defendant was arrested on or about October 5, 2011, based upon his failure to appear at his original sentencing hearing in this case. The record supports the conclusion that at the time of his arrest, defendant was arrested in conjunction with the proceedings in this case. The bench warrant placed on defendant was a result of his failure to appear at the original sentencing hearing in this case. In addition, the People never filed separate charges against defendant for his failure to appear. As in *Marquez, supra*, 30 Cal.4th 14, once the failure to appear charge was not filed, the new period of incarceration became attributable solely to the proceedings in this case. Under these circumstances, defendant is entitled to credit for the time he spent in custody from when he was “picked up” on the arrest warrant until the October 21, 2011 sentencing hearing.

Relying on *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), the People argue that defendant’s conduct in failing to appear at the sentencing hearing in this case was “not any conduct attributable to the lewd acts.” In *Bruner*, the court emphasized that “[s]ection 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings.” (*Bruner, supra*, 9 Cal.4th at p. 1191.) The defendant in *Bruner* was sentenced to 12 months after his parole was revoked, and he “received full credit against this term for the time spent in jail custody” between his arrest and the parole revocation. (*Id.* at p. 1181.) While serving his 12-month sentence, the defendant pleaded guilty to cocaine possession charges in a new information and received a concurrent 16-month sentence for that conviction. (*Ibid.*)

The court held that he was not entitled to duplicate credit against the new sentence. (*Id.* at p. 1183.) Although the presentence custody the defendant in *Bruner* argued should be credited was at least arguably “attributable to proceedings related to the same conduct for which the defendant ha[d] been convicted,”³ (§ 2900.5, subd. (b)) the defendant had already received credit for that time. A rule of “strict causation” applies in such “multiple restraint” cases, the court held. (*Bruner*, at p. 1180.) “[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint.” (*Bruner*, at pp. 1193-1194.)

In *Marquez, supra*, 30 Cal.4th 14, our Supreme Court recognized an exception to the strict causation rule in certain multiple restraint cases not involving a possibility of duplicate credit. The court emphasized that the case was not a duplicate credit case. (*Id.* at p. 23.) Unlike in *Bruner*, the *Marquez* court explained, “the choice is not between awarding credit once or awarding it twice. The choice is instead between granting [the defendant] credit *once* for his time in custody between December 11, 1991, and April 2, 1992, or granting him *no credit at all* for this period of local custody.” (*Id.* at p. 23.) To

³ The defendant in *Bruner* was on parole for armed robbery when the warrant for his arrest on three parole violations (absconding from parole supervision, credit card theft, and a positive drug test for cocaine) issued. (*Bruner, supra*, 9 Cal.4th at p. 1181.) During a search incident to his arrest for the parole violations, he was found in possession of rock cocaine. (*Ibid.*) Cited and released on his own recognizance on the possession charge, he remained in custody on the parole violations. (*Ibid.*) His parole was later revoked based on the three violations plus the possession offense. (*Ibid.*)

deny him that credit “would render this period ‘dead time.’” (*Id.* at p. 20; accord *People v. Gonzalez* (2006) 138 Cal.App.4th 246, 254 [court held that the 315 “‘dead time’” days should have been assigned to the auto theft case, since the relevant period of custody was attributable to both the domestic violence and the auto theft cases].)

As in *Marquez*, the choice here was not between awarding credit once or awarding it twice; the credit for the time in question was only awarded against a single case—this case. Thus, there was no possibility that duplicate credit would create a windfall for defendant. Otherwise, as in *Marquez*, “the vast majority of the time served during [the period in question] would become ‘dead time’ that was not attributable to any case, in contravention of *Marquez*.” (*People v. Gonzalez, supra*, 138 Cal.App.4th at p. 254.)

This is plainly not a case like *Bruner*, and the People’s reliance on that decision is misplaced. Defendant was not seeking duplicate credit here, and there was never any risk that he would receive a “credit windfall.” (*Bruner, supra*, 9 Cal.4th at p. 1193.) *Bruner*’s rule of strict causation does not apply.

The People’s reliance on *People v. Pruitt* (2008) 161 Cal.App.4th 637 is also misplaced. The defendant in *Pruitt* pleaded no contest to burglary and was placed on probation. He was later arrested and jailed on an unrelated charge of receiving stolen property. Several months after he was arrested, while he continued in custody on the receiving charge, his burglary probation was summarily revoked. The receiving charge was thereafter held to constitute a probation violation; the defendant’s original sentence was imposed; and the receiving charge was dismissed. In calculating his sentence, the trial court refused to grant credit for the time spent in custody on the receiving charge

prior to the summary revocation of his probation. (*Id.* at pp. 640-641.) The Court of Appeal affirmed the trial court's calculation of custody credit, holding that the defendant was not entitled to custody credit for the receiving charge detention because it was not based on the conduct that led to his original conviction. (*Id.* at p. 649.)

Following *Pruitt*, because defendant's time in custody for his failure to appear at his sentencing hearing in this matter *was related* to the conduct underlying defendant's original conviction, defendant is entitled to credit for presentence custody attributable to the failure to appear arrest. Moreover, as defendant points out, the People's reasoning would be contrary to our Supreme Court's holding in *Marquez* and would lead to unjust results. It also appears that defendant's failure to appear at his original sentencing hearing in this matter was due to his trial counsel.

Accordingly, defendant is entitled to presentence custody credits from the time he was rearrested for his failure to appear (on or about October 5, 2011) until his sentencing hearing on October 21, 2011.

DISPOSITION

The matter is remanded to the trial court for calculation of additional presentence custody credit in accordance with the views expressed in this opinion. Once the credits have been calculated, the trial court shall modify the abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.