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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.

BRYANT GUERRERO,

Defendant and Appellant.

E055551

(Super.Ct.No. INF050701)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Affirmed with directions.

Ava R. Stralla, 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, William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Bryant Guerrero guilty of committing a lewd and lascivious act on a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)<sup>1</sup> Defendant was sentenced to the upper term of eight years in state prison with credit of 1,096 days for time served. Defendant's sole contention on appeal is that he is entitled to presentence credits from the date California placed a hold without bail on him in Nevada.

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

Defendant committed the instant offense in California in April 2005, and a felony complaint was filed on May 20, 2005. Defendant subsequently went to Las Vegas, Nevada, committed a robbery, and was arrested on January 25, 2008. Upon being booked into Las Vegas custody, a no-bail hold was placed on defendant due to his outstanding arrest warrant on the instant matter.

Defendant later pled guilty to the Nevada robbery and was sentenced on March 16, 2009. In the Nevada case, imposition of sentence was suspended and defendant was placed on probation with credit of 392 days served. Defendant was arrested on this case on March 16, 2009, in Nevada, and extradited to California for trial. He was booked into the Riverside County jail on March 27, 2009.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The details of defendant's criminal conduct are not relevant to the limited legal issue raised in this appeal. Those details are set out in defendant's opening brief, and we will not recount them here. Instead, we will recount only those facts that are pertinent to the issue we must resolve in this appeal.

On December 1, 2010, defendant was convicted of committing a lewd and lascivious act on a child under the age of 14 years. (§ 288, subd. (a), count 4).<sup>3</sup>

On November 30, 2011, defendant was sentenced to the upper term of eight years in state prison. At that time, defendant objected to the amount of presentence custody credits awarded to him, and the trial court continued the sentencing hearing for further briefing and consideration of the presentence custody credits issue only.

On February 10, 2012, a hearing was held on the issue of presentence custody credits. At that time, the trial court found that the period of 392 days previously credited to defendant's Nevada sentence for his robbery conviction could not be deemed attributable to the instant matter unless defendant showed that he would have been at liberty during that period if not for the California hold. Defendant testified that he was arrested in Nevada on January 25, 2008; that his bail was set at \$20,000 to \$25,000; and that he was told about the California arrest warrant when he was booked into custody in Nevada. He further stated that he had the means to post bail, and that he had called several bail bond companies, but all of them informed him that there was no point in posting bail because he would have been transported to jail in California anyway.<sup>4</sup>

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<sup>3</sup> The jury was unable to reach a verdict on counts 1, 2, 3, and 5, as well as on the enhancement allegations attached to counts 1, 2, 3, and 4. The trial court declared a mistrial as to those counts and allegations. The People later dismissed those additional counts and allegations.

<sup>4</sup> We note that the Las Vegas police report states defendant "had an outstanding warrant out of California with a no bail for Burglary. [The arresting officer] confirmed the warrant and booked him."

He acknowledged that he had received credit for the time he served when he was sentenced on the Nevada case.

The trial court asked defendant why he remained in custody in Nevada for 415 days instead of asking for a speedy trial, pleading guilty, and getting out in 30 days or so. Defendant responded that he had an opportunity for an early plea in the Nevada case, but that he wanted to go to trial; and that later he decided to forego his right to trial and pled guilty. Defendant also stated that his first plea deal offer was probation, but he was not sure when the deal was offered.

The trial court found that defendant had not shown his burden of proving entitlement to double credit for the time credited to his Nevada conviction. The court awarded defendant total presentence conduct credits in the amount of 1,096 days in this case as follows: 23 days of actual custody not awarded to defendant in his Nevada case (defendant was in custody in Nevada from Jan. 25, 2008, to March 16, 2009, for a period of 415 actual days in custody, but the Nevada court awarded defendant with 392 days of custody for his Nevada sentence); 13 days of actual custody while defendant remained in Nevada from March 16, 2009, until he was booked into the Riverside County jail on March 27, 2009; and 917 days of actual custody from March 27, 2009, to September 30, 2011. Defendant therefore received a total of 953 days of actual credit, plus 143 days of conduct credits.

## II

### DISCUSSION

Defendant maintains that he is entitled to custody credits for his time spent incarcerated in Nevada because it was attributable to his conduct in this case when California placed a hold on him without bail. In other words, defendant argues that “but for” the no-bail hold placed on him by Riverside County, he would never have served time in Nevada. We find defendant’s arguments too tenuous to entitle him to custody credits for his time spent in Nevada custody.

Section 2900.5, subdivision (b), provides that “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.” “[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period. Thus . . . his criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.]” (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191 (*Bruner*).

In *Bruner, supra*, 9 Cal.4th 1178, the court discussed the application of section 2900.5, subdivision (b). The defendant in that case sought presentence credit on his prison term for cocaine possession where he had served presentence custodial time for a parole revocation based on the same cocaine possession, but also because he absconded from parole supervision, had a dirty drug test, and had stolen a credit card. The court held, consistently with two prior cases—*In re Rojas* (1979) 23 Cal.3d 152 and *In re*

*Joyner* (1989) 48 Cal.3d 487 (*Joyner*)—that “where 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. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was ‘a’ basis for the revocation matter as well.” (*Bruner*, at pp. 1193-1194.) Under this “‘strict causation’” standard, no credit is allowed “unless the conduct leading to the sentence was the *true and only unavoidable basis* for the earlier custody.” (*Id.* at p. 1192.)

The burden of proof belongs to the defendant and, as noted in *Bruner*, this burden may be difficult to meet “because it requires a prisoner seeking credit for a multiple-cause presentence restraint to ‘prove a negative’—i.e., that the restraint would not have occurred but for the current crimes alone.” (*Bruner, supra*, 9 Cal.4th at p. 1193.) However, this burden “arises from the limited purposes of the credit statute itself. The alternative is to allow endless duplicative credit against separately imposed terms of incarceration when it is not at all clear that the misconduct underlying these terms was related.” (*Ibid.*)

Here, defendant argues that since he demonstrated that he would have bailed out and been free of custody on the Nevada charge but for the hold placed on him by Riverside County in this case, he has met the “but for” causation test.

The Supreme Court in *Joyner, supra*, 48 Cal.3d 487, applied section 2900.5 in a factual situation analogous to this case. In that case, arrest warrants issued in California charging the defendant with robbery and grand theft. (*Id.* at p. 489.) The defendant was thereafter arrested in Florida for unrelated crimes committed in that state. (*Ibid.*) When the Florida authorities discovered the outstanding California arrest warrants, they placed a hold on the defendant at the California authorities' request. (*Id.* at pp. 489-490.)

The defendant pleaded guilty to the Florida charges, was sentenced to concurrent terms of three years in Florida state prison, and received presentence custody credit for the entire time he was in custody in Florida prior to his sentencing there. (*Joyner, supra*, 48 Cal.3d at p. 490.) The defendant was then extradited to California where he pleaded guilty to the robbery and grand theft charges. (*Ibid.*) The California trial court sentenced defendant to a four-year prison term which ran concurrent to the Florida terms pursuant to section 669. (*Ibid.*) The California trial court, however, expressly denied the defendant's request for presentence custody credit for the entire time he was in custody on hold in Florida and in custody in California. (*Ibid.*)

The defendant in *Joyner, supra*, 48 Cal.3d 487, filed a petition for a writ of habeas corpus that the Court of Appeal denied. (*Id.* at p. 490.) The defendant then filed a writ of habeas corpus in the Supreme Court, which issued an order to show cause. (*Id.* at p. 491.) According to the defendant, he was entitled to "presentence custody credits against his California sentence for custody time in Florida and California from the date a 'hold' was placed against him for the California offenses until he was sentenced in California, all of which time ha[d] already been credited against [the defendant's] Florida sentence."

(*Id.* at p. 489.) The Supreme Court characterized the issue before it as “the recurring troublesome question of when custody is ‘attributable to proceedings related to the same conduct for which the defendant has been convicted’ within the meaning of section 2900.5, subdivision (b).” (*Ibid.*)

In denying the defendant’s petition, the court in *Joyner, supra*, 48 Cal.3d 487, held that “a period of time previously credited against a sentence for unrelated offenses cannot be deemed ‘attributable to proceedings’ resulting in a later-imposed sentence unless it is demonstrated that the claimant would have been at liberty during the period were it not for a restraint relating to the proceedings resulting in the later sentence. In other words, duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of strict causation. Under this test, [the defendant] has not demonstrated entitlement to the credits he seeks.” (*Id.* at p. 489.)

Defendant claims that his case is distinguishable from *Joyner* because “the Las Vegas authorities had confirmed the no-bail hold prior to their even booking [him],” and that he had testified “that when he sought a bail bond from several bail bond agencies, he was informed ‘there was no point [to posting bail] because [he] would have waited for California to pick [him] up . . . .’” First, contrary to defendant’s assertion, *Joyner* does not speak in terms of what the defendant *might have done*. It concerns itself only with what the defendant *actually did*. In this case, as in *Joyner*, there is no evidence that defendant made any attempt to obtain his release by posting bond in the Nevada robbery case. Defendant merely testified that he had the means to post bail, but because of the no-bail hold, it was pointless. There is no evidence in the record before us that defendant even

attempted to make the bail in the Nevada case. Thus, there is no basis for defendant's assertion that he had met "his burden to prove that the conduct that led to his conviction in the California case was the sole reason he remained in custody in Nevada without bailing out."

Defendant also did not plausibly explain why he did not plead guilty at an earlier opportunity in the Nevada case, but gave several reasons why he did not and ended up receiving the same deal, probation, as he received more than a year later. Defendant did not state when the initial offer was made. In addition, defendant had not shown that he would not have received some custody time in the Nevada robbery case that was equivalent to the 13 months that was credited to his Nevada sentence. It is unknown whether or not if defendant would have accepted the prosecutor's offer early or the Nevada prosecutor may have required defendant to spend a year in local custody before being released on probation. While the existence of the no-bail hold limitation on defendant's freedom shows that his incarceration had a "dual basis," this does not satisfy the *Joyner* "but for" test.

Defendant provides no logically persuasive argument whatsoever that the facts in this case are different from those in *Joyner*, or that, somehow, the holding in *Joyner* should not be applied here. In our view, the two cases are indistinguishable, save the fact that the second set of crimes in *Joyner* occurred in Florida and those here occurred in Nevada. Therefore, just as the defendant in *Joyner, supra*, 48 Cal.3d 487, defendant here is not entitled to duplicative credit for that time period against his sentence in this case because he cannot show that, but for this case, he would have been at liberty.

We, however, agree with the People that defendant is entitled to an additional 61 days of actual time and nine days of conduct credits because the sentencing hearing was held on November 30, 2011, and defendant was given credit only through September 30, 2011. The judgment should therefore be modified.

II

DISPOSITION

The judgment is modified to award defendant an additional 70 days of presentence credits (61 actual days plus 9 conduct credits), for a total of 1,166 days of presentence credit. The superior court clerk is directed to amend the minute order of November 30, 2011, and the abstract of judgment to reflect 1,166 days of presentence credit (1,014 actual days in custody plus 152 conduct credits) and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.) The judgment as thus modified is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

KING

J.