Filed 2/19/13 P. v. Carroll CA4/2

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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. MARVIN MAURICE CARROLL, JR., Defendant and Appellant.	E056055 (Super.Ct.No. FVI1200110) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed in part; remanded with directions in part.

Alan S. Yockelson, 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, Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Marvin Maurice Carroll, Jr., pled guilty to misdemeanor battery. (Pen. Code, § 243, subd. (e)(1).)[1] In return, the remaining allegations were dismissed, and defendant was placed on probation with various terms and conditions, including serving 47 days in local custody and paying a total of $602 in assessments and fees. Defendant's sole contention on appeal is that his delayed release from county jail requires that his fines and fees be stricken. The People agree that defendant may be entitled to offset the fines and fees imposed and request the matter be remanded. As explained *post*, we will remand the matter.

DISCUSSION[2]

Defendant pled guilty on February 24, 2012, and was sentenced to probation for a period of 36 months with various terms and conditions, including serving 47 days in county jail with credit of 47 days for time served. Defendant's release was thereafter issued. However, defendant was not promptly released from custody pursuant to the terms of his plea agreement. Defendant therefore claims that he is entitled to have the monetary value of 22 days (release date of Mar. 17, 2012) applied as credit toward his fines and fees, and the remaining fines and fees should be stricken. Pursuant to Penal Code section 2900.5, the People agree that defendant is entitled to an offset of the fines and fees imposed for any excess custody served, but they contend the matter should be

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

[2] 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 respondent's brief, and we will not recount them here.

remanded because the record is unclear as to when defendant was actually released from custody. The People further maintain that the provision of Penal Code section 2900.5 to offset fines and fees does not apply to the mandatory court security and criminal conviction assessment fee of $70. (Pen. Code, § 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1).)

Section 2900.5, subdivision (a), provides in pertinent part that "when the defendant has been in custody, including, but not limited to, any time spent in a jail" or related facility, "all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. . . . [W]here the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines."

We agree with defendant that by its explicit terms, section 2900.5, subdivision (a), requires a grant of credit against his fines. The statute provides that "all days of custody," specifically including all days "credited to the period of confinement pursuant to Section 4019," shall be applied first to reduce the "term of imprisonment imposed," and thereafter to "any fine" imposed "on a proportional basis, including, but not limited

to, base fines and restitution fines," at a specified rate of not less than $30 dollars per day, or more in the discretion of the court. (§ 2900.5, subd. (a).)

Defendant argues that he is entitled to have the monetary value of 22 days applied toward his "remaining fines and fees." He further asserts that he "served 22 [additional] days in jail," which multiplied by $30 per day pursuant to sections 2900.5, subdivision (a), and 1205, subdivision (a), equals a total of $660, which must be applied toward his "fines and fees," including the $70 court security and criminal conviction assessment fee.

However, we agree with the People that the matter must be remanded to the trial court because the record on appeal does not show the date defendant was actually released from custody. The record shows defendant pled guilty and was sentenced on February 24, 2012. At an April 4, 2012, hearing, defendant was out of custody, and stated that he "got out like two weeks ago," but did not specify an exact release date. In his notice of appeal, defendant indicates that he was not released from custody in accordance with his plea agreement, but does not specify the date of his release. Hence, because the record on appeal does not shed light on defendant's exact release date from custody, the matter must be remanded to allow the trial court to determine the exact number of days defendant served in excess custody beyond his agreed to sentence.

We also agree with the People that while the fines imposed may be offset, the $70 mandatory court security and criminal conviction assessment fees may not be credited. "A fine is punitive." (*Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 748.) The term "fine" in section 2900.5, subdivision (a), includes "state and county penalty assessments." (*People v. McGarry* (2002) 96 Cal.App.4th 644, 647-648.) Section

2900.5, subdivision (a), also is applicable to "restitution fines," since restitution fines are penalties. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-362.) "[R]estitution fines are distinct from restitution orders . . . ." (*Id*. at p. 362.) Hence, "direct restitution to redress economic losses is not a criminal punishment," (*People v. Brunette* (2011) 194 Cal.App.4th 268, 284) and a defendant's excess time in custody does not relieve him of the obligation to pay victim restitution.

In addition, the language of Penal Code section 2900.5, subdivision (a), does not apply to assessment fees pursuant to Penal Code section 1465.8, subdivision (a)(1), and Government Code section 70373, subdivision (a)(1). (See *People v. Robinson* (2012) 209 Cal.App.4th 401, 407.) The court operations assessment pursuant to Penal Code section 1465.8, subdivision (a)(1), and the court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1), are not considered punitive. (*People v. Wallace* (2004) 120 Cal.App.4th 867, 876; *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 6-7.) "Thus, under [Penal Code] section 2900.5, subdivision (a) if a defendant is 'over-penalized' by serving presentence days in custody in excess of his imposed imprisonment term, those excess days are to be applied to the defendant's court-ordered payment of monies that serve as punishment, as opposed to court-ordered payment of monies for nonpunitive purposes." (*People v. Robinson*, at p. 407.) Accordingly, Penal Code section 2900.5 is not applicable to the mandatory court security and criminal conviction assessment fee of $70 here.

DISPOSITION

The matter is remanded to the trial court to determine the exact number of days defendant served in excess custody beyond his agreed to sentence and the amount to be credited against his fines and fees, excluding the court operations assessment pursuant to Penal Code section 1465.8, subdivision (a)(1), and the court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1). In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.