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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.

MARC JAY BRUNER,

Defendant and Appellant.

E056154

(Super.Ct.Nos. FMB1100511,
FMB1100554)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Steven S. Lubliner and Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Peter Quon, Jr. and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Marc Jay Bruner pleaded guilty in two separate cases to charges including simple possession of methamphetamine. He was placed on probation, but

eventually, he violated his probation in both cases and was sentenced to a total of seven years, to be served in jail pursuant to realignment. (Criminal Justice Realignment Act of 2011, Stats. 2011, chs. 12, 15.)

Defendant now contends:¹

1. The trial court erred by imposing two prior prison term enhancements based on prior prison terms that defendant had served concurrently.
2. The trial court miscalculated defendant's presentence custody credit.
3. The trial court erred by failing to award presentence conduct credit for the period between defendant's rearrest and sentencing.
4. The trial court erred by ordering that defendant was entitled to postsentence conduct credit at a "two for four" rate rather than a "one for one" rate.

The People concede defendant's second and third points. We agree with his first and fourth points. Accordingly, we will reverse in part and remand with directions.

I

PROCEDURAL BACKGROUND

In October 2011, in case No. FMB1100511 (511 case), defendant pleaded guilty to simple possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) He admitted one prior prison term enhancement. (Pen. Code, § 667.5, subd. (b).) Pursuant to a plea bargain, he was placed on probation for three years under Proposition 36.

¹ Defendant's opening brief also raised two additional contentions that he expressly abandoned in his reply brief.

Later in October 2011, in case No. FMB1100554 (554 case), defendant pleaded guilty to one count of simple possession of methamphetamine and one count of disobeying a court order. (Pen. Code, § 166, subd. (a)(4).) He admitted four prior prison term enhancements. Pursuant to a plea bargain, he was placed on probation for three years.

In January 2012, defendant's probation in both cases was revoked. In the 511 case, he was sentenced to four years, to be served in jail. In the 554 case, he was sentenced to seven years, to be served in jail. The sentences were to be served concurrently.

II

PRIOR PRISON TERM ENHANCEMENTS

Defendant contends that two of the prior prison term enhancements in the 554 case cannot both be imposed, because they arose out of prison terms that were served concurrently.

A. *Additional Factual and Procedural Background.*

In the 554 case, defendant admitted a prior prison term enhancement allegedly arising out of a conviction for possession of a controlled substance on August 19, 2005. Defendant also admitted a prior prison term enhancement allegedly arising out of a conviction for receiving stolen property on June 15, 2006.² The plea bargain form

² This conviction actually occurred on July 1, 2005.

specified that the “[s]entencing [r]ange” on each enhancement was “+1,” but that defendant would be actually sentenced to Drug Court.

At defendant’s request, we have taken judicial notice that, on May 10, 2006, on each of the two prior convictions, he was sentenced to prison for two years, to be served concurrently.

B. *Analysis.*

Under Penal Code section 667.5, subdivision (b), subject to certain additional qualifications that are not at issue here, a prior prison term enhancement can be imposed “for each prior *separate* prison term” (Italics added.) Two or more concurrent prison terms are not “separate” prison terms for this purpose. (Pen. Code, § 667.5, subd. (g); *People v. Burke* (1980) 102 Cal.App.3d 932, 944.) Thus, the trial court erred.

The People argue that defendant cannot raise this issue because he did not obtain a certificate of probable cause.

“Penal Code section 1237.5 provides that a defendant may not appeal ‘from a judgment of conviction upon a plea of guilty or nolo contendere’ unless the defendant has applied to the trial court for, and the trial court has executed and filed, ‘a certificate of probable cause for such appeal.’ [Citation.] ‘Despite this broad language, . . . two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the

crime and the penalty to be imposed.’ [Citation.]” (*People v. Shelton* (2006) 37 Cal.4th 759, 766.) Here, defendant’s appeal comes within the exception for issues regarding the penalty to be imposed.

The People characterize the “+1” on the plea bargain form as a negotiated sentence. They cite *People v. Shelton, supra*, 37 Cal.4th 759, which stated that “[a] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself” and thus requires a certificate of probable cause. [Citation.]” (*Id.* at p. 766.)

Shelton, however, involved a negotiated maximum sentencing “lid.” (*People v. Shelton, supra*, 37 Cal.4th at p. 764.) The Supreme Court held that the parties’ agreement to the lid, when viewed in accordance with general contract principles, necessarily included an agreement that the trial court had the legal authority to impose the lid sentence. (*Id.* at pp. 767-769.) Thus, on appeal the defendant could not challenge the trial court’s authority to impose the lid sentence unless he obtained a certificate of probable cause. (*Id.* at p. 769.) The court acknowledged, however, that a defendant could “reserve, either expressly or impliedly, a right to challenge the trial court’s authority to impose [a] lid sentence.” (*Ibid.*)

Here, by contrast, the negotiated sentence was probation. At that point, there was no need for the parties to negotiate the maximum sentence that the trial court could impose if defendant violated probation. The only reason to set forth the sentencing range was to bring home to both sides the benefits that defendant was gaining by entering into

the plea bargain. Accordingly, the plea agreement provided that “+1” was the “[s]entencing [r]ange,” rather than a negotiated sentence or a negotiated lid. This is clear from the fact that the agreement also specified the sentence on the substantive offense as a range, namely “16-2-3.”

Thus, defendant is not challenging the validity of the plea, nor is he challenging the validity of any sentence negotiated as part of the plea. He is merely challenging the penalty imposed as a result of proceedings subsequent to the plea. This does not require a certificate of probable cause.

The People also argue that defendant forfeited his present contention by accepting the plea bargain. Like their previous argument, this argument assumes that “+1” on each of the prior prison term enhancements was a negotiated sentence provided for in the plea bargain. (See, e.g., *People v. Hester* (2000) 22 Cal.4th 290, 295 [plea bargain providing for specified sentence forfeits claim that sentence is unauthorized].) For the reasons already discussed, it was not.

We therefore conclude that the trial court could not impose two prior prison term enhancements based on the terms that defendant had served concurrently. Hence, we will strike the punishment on one prior prison term enhancement. This reduces the total sentence to six years.

III

PRESENTENCE CUSTODY CREDIT

Defendant contends that, in the 554 case, the trial court miscalculated his presentence custody credit.

The trial court awarded defendant 85 actual days of presentence custody credit. However, defendant had actually served 91 days in presentence custody.

The People concede the point. We will direct the trial court to correct the error on remand.

IV

PRESENTENCE CONDUCT CREDIT

Defendant contends that he was entitled to presentence conduct credit under Penal Code section 4019 from January 14, 2012, when he was rearrested, rather than February 27, 2012, when he was sentenced. The People concede the point. We agree. (See *People v. Black* (2009) 176 Cal.App.4th 145, 155 [Fourth Dist., Div. Two].) We will remand with directions to do the necessary recalculation.

V

POSTSENTENCE CONDUCT CREDIT

Defendant contends that, in the 511 case, the trial court erred by ordering that he was entitled to postsentence conduct credit on a “two for four” basis rather than a “one for one” basis.

Penal Code section 4019 used to provide presentence conduct credit on a “two for four” basis — two days of credit for every four days of actual custody. (Pen. Code, former § 4019, subds. (b), (c), (f), Stats. 2010, ch. 426, § 2.)

In 2011, however, it was amended to provide credit on a “two for two” basis — two days of conduct credit for every two days of actual presentence custody. (Pen. Code, § 4019, subds. (b), (c), (f), Stats. 2011, ch. 15, § 482.)

The Legislature specified that this amendment “shall apply prospectively and shall apply to prisoners who are confined . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (Pen. Code, § 4019, subd. (h), Stats. 2011, ch. 39, § 53.)

Penal Code section 4019 was also amended, effective October 1, 2011, so as to provide *postsentence* conduct credit for felons committed to jail, rather than prison, under realignment. (Pen. Code, § 4019, subd. (a)(6), Stats. 2011-2012, 1st Ex. Sess., ch. 12, §§ 35, 46.)

By contrast, postsentence conduct credit for felons committed to prison was governed — and still is — by Penal Code section 2933, which provides credit on a “one for one” basis. (Pen. Code, § 2933, subd. (b).)

Here, the charged crime occurred on September 23, 2011. Defendant was sentenced on February 27, 2012. Because he had waived presentence custody credit, the trial court did not award any. However, it ordered that postsentence custody credit be awarded on a “two for four” basis under the “[o]ld” version of Penal Code section 4019.

Under *People v. Hul* (2013) 213 Cal.App.4th 182, the trial court erred. *Hul* held that Penal Code section 4019, subdivision (h) means what it says — if the crime was committed before October 1, 2011, the defendant is not entitled to postsentence conduct credits on a “two for two” basis under Penal Code section 4019, and instead, postsentence conduct credits must be “calculated at the rate required by prior law.” However, the rate required by prior law is the rate set forth in Penal Code section 2933, namely “one for one” credit. This is true even though the defendant now serves the sentence in jail rather than in prison. (*People v. Hul, supra*, 213 Cal.App.4th at p. 187.) As *Hul* noted, this view is supported by the highly regarded manual, *Felony Sentencing After Realignment* (Sept. 2012), by Judge J. Richard Couzens and Justice Tricia A. Bigelow.

We agree with *Hul*. The cases the People have cited dealt with presentence conduct credit, not postsentence conduct credit. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48-52; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1549-1553.)

We therefore conclude that the trial court erred.

VI

DISPOSITION

The punishment on the prior prison term enhancement based on the June 15, 2006 conviction is stricken. The judgment with respect to presentence custody, presentence conduct credit, and postsentence conduct credit is reversed, and the matter is remanded with directions to recalculate presentence custody and conduct credit and to redetermine

defendant's entitlement to postsentence conduct credit. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.