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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.

WESTLEY DEON PIERCE,

Defendant and Appellant.

E057568

(Super.Ct.No. FSB1200121)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed, with directions.

Neil Auwarter, 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, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Westley Deon Pierce pled guilty to two counts of the sale of cocaine base (counts 1 & 3 – Health and Saf. Code, § 11352, subd. (a)),¹ one count of felon in possession of a firearm (count 20 – Pen. Code, § 29800, subd. (a)), and admitted a prior conviction for possession of cocaine base for sale (§ 11370.2, subd. (a)).² The court sentenced defendant to an aggregate, determinate term of imprisonment of eight years as contemplated in his plea agreement. The court awarded defendant a total of 399 days custody credit consisting of 267 actual and 132 conduct days. On appeal, defendant contends the court erred in awarding defendant credit under former Penal Code section 4019 instead of the current version of section 4019, which would entitle him to additional conduct credits. We affirm.

PROCEDURAL HISTORY

The People charged defendant by information with five counts of the sale of cocaine base (counts 1, 3, 5, 7, & 13 – § 11352, subd. (a)), six counts of possession of cocaine base for sale (counts 2, 4, 6, 8, 12, & 14 – § 11351.5), and five counts of active participation in a criminal street gang (counts 15, 16, 17, 18, & 19 – Pen. Code § 186.22,

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

² As recognized by the parties, the abstract of judgment erroneously reflects defendant admitted a prior prison term under Penal Code section 667.5, subdivision (b), rather than a prior narcotics offense under section 11370.2, subdivision (a). We shall direct the superior court to correct the abstract of judgment.

subd. (a)).³ The People additionally alleged defendant had suffered three prior narcotics convictions (§ 11370.2, subd. (a)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)). The People alleged counts 1 through 6 and 15 through 17 occurred in September 2011. The People alleged the remainder of the charges occurred in October and November 2011.

On October 5, 2012, defendant pled guilty to counts 1 and 3, and admitted one prior narcotics allegation pursuant to a plea agreement. This plea agreement added count 20 to which defendant also pled guilty. No date for the occurrence of the offense in count 20 was enumerated. The remaining counts and allegations were dismissed.

Defendant's plea agreement specified he would be sentenced to five years on count 1 and a consecutive three years on the special allegation. The plea agreement additionally reflected defendant would receive a total of 399 days custody credit, composed of 267 actual and 132 conduct days pursuant to the "old" formula of awarding presentence credits. The court sentenced defendant and awarded him custody credit as prescribed in his plea agreement.

³ The People charged counts nine through 11 solely against defendant's codefendant, Billy Clyde Edwards. Edwards is not a party to this appeal.

On April 22, 2013, defendant filed a motion in the superior court to correct the presentence credits awarded. He contended he was never put on notice count 20 occurred prior to October 1, 2011, and the People failed to allege or prove that it had. Thus, according to defendant, the court had a duty to determine when defendant committed the offense in count 20 or, in the absence of evidence to make such a determination, to award defendant custody credit under the new Penal Code section 4019 formula. The court denied the motion.

DISCUSSION

Defendant maintains this court must award him custody credits under the new Penal Code section 4019 formula because the People failed to carry their ostensible burden to prove defendant committed the count 20 offense after its effective date. We disagree.

“The sentencing court is responsible for calculating the number of days the defendant has been in custody before sentencing and for reflecting the total credits allowed on the abstract of judgment. [Citation.]” (*People v. Black* (2009) 176 Cal.App.4th 145, 154.) It is the obligation of the court to determine at the time of sentencing the actual time and conduct credits to be awarded against the sentence. (Cal. Rules of Court, rule 4.310.) “[I]t is the business of the trial court, and not the appellate court, to determine the credit to which the defendant is entitled by reason of pre-sentence confinement.” (*People v. Montalvo* (1982) 128 Cal.App.3d 57, 62 (*Montalvo*)).

“It is the trial court, and not the appellate court, which has the capability of determining the facts from which the credit may be computed. If the court does not have enough facts at the time of sentencing, its duty is to direct ‘the sheriff, probation officer or other appropriate person’ to produce the information. At the time sentence is pronounced, the defendant and his attorney will be present and will have seen what is in the reports submitted to the court on this subject. . . . [A]ny dispute as to the amount of allowable credits shall be resolved at that time.” (*Montalvo, supra*, 128 Cal.App.3d at p. 62.)

Under former Penal Code section 4019, subdivision (f), effective September 28, 2010, through September 30, 2011, it was the intent of the Legislature that six days of custody credit be awarded for every four days a defendant spent in actual custody so long as he met the statute’s requirements. (Stats. 2010, ch. 426, §§ 1, 2, 5.) Under current Penal Code section 4019, subdivision (f), effective October 1, 2011, defendant may earn four days of custody credit for every two days spent in actual custody. (Stats. 2011, ch. 39, § 53.) Current Penal Code section 4019’s formula for credit awards applies to prisoners confined for a crime committed on or after its effective date. (Pen. Code, § 4019, subd. (g).)

Here, the court had adequate information with which to award defendant the proper custody credits. First, both the other counts to which defendant pled guilty were committed before the effective date of the new version of Penal Code section 4019, although a number of the counts with which the People initially charged him occurred

after that date. This is strong circumstantial evidence the parties took the credit calculation into consideration before entering into the plea bargain. Thus, the plea bargain inferentially reflects an intent to allege the offense committed in count 20 occurred in September 2011, just like counts 1 and 3.

Second, the plea bargain specifically enumerates the calculation of credits defendant would be awarded. The court awarded credits exactly as so enumerated. Thus, defendant cannot reasonably argue he was not put on notice the People were alleging count 20 occurred before October 1, 2011. Third, the plea agreement explicitly reflected defendant would be awarded presentence credits pursuant to the old Penal Code section 4019 formula.

Finally, codefendant Edwards's plea bargain explicitly reflected calculation of conduct credits under the "new" Penal Code section 4019 formula, as all the offenses with which the People charged him occurred after the effective date of the current version of Penal Code section 4019. Therefore, the court, the People, and both defendants were aware of the requisite manner of the calculation of custody credits in both cases with respect to the applicability of both versions of Penal Code section 4019. The court awarded defendant the proper amount of credits.

DISPOSITION

The superior court is directed to correct defendant's abstract of judgment to reflect a true finding on a Penal Code section 11370.2, subdivision (a) enhancement, rather than a Penal Code section 667.5, subdivision (b) enhancement. The corrected abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

RICHLI

J.

CODRINGTON

J.