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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL WAYNE HAVNER,

Defendant and Appellant.

F062423

(Super. Ct. No. VCF214336)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Poochigian, J. and Detjen, J.

## STATEMENT OF THE CASE

On December 3, 2008, the Tulare County District Attorney filed criminal complaint number VCF214336 in superior court charging appellant Russell Wayne Havner with criminal threats (Pen. Code,<sup>1</sup> § 422) with a prior serious felony conviction (§ 667, subd. (a)(1)), a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d)), and two prior prison terms (§ 667.5, subd. (b)).

On April 24, 2009, appellant pleaded not guilty to the substantive count and denied the special allegations.

On July 2, 2009, appellant entered into a negotiated plea bargain. He withdrew his plea of not guilty, entered a new plea of no contest, and admitted the two prior prison terms. In exchange, the prosecutor dismissed the prior serious felony conviction and the court struck the prior strike allegations. Under the plea agreement, appellant was to receive an initial grant of probation, and, if he violated the terms of that probation, he could potentially be sentenced to five years in state prison.

On August 18, 2009, the court placed appellant on formal probation for three years subject to service of 353 days in county jail. The court granted appellant 353 days of credit for time served.

On March 25, 2010, the court revoked appellant's probation based upon an alleged violation of terms and conditions.

On January 19, 2011, appellant was arraigned, and he denied the violation.

On March 4, 2011, the court found appellant in violation of the terms of his probation based on his conviction in case No. VCF233945.<sup>2</sup>

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

<sup>2</sup> In case No. VCF233945, appellant received a term of 20 years plus 150 years to life in state prison. Appellant also appealed the judgment in that case (No. F062308).

On March 30, 2011, the court denied appellant's request for reinstatement of probation and sentenced him to a total term of six years in state prison. The court imposed a four-year term on the criminal threats conviction and two consecutive one-year terms for the prior prison term enhancements. The court awarded 290 day of custody credits (253 days for actual time served plus 37 days of conduct credit under § 2933.1). The court imposed a \$1,200 restitution fine (§ 1202.4, subd. (b)) and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45).

On May 4, 2011, appellant filed a timely notice of appeal.

### **STATEMENT OF FACTS**

Because appellant pleaded no contest, the following facts are taken from the report and recommendation of the probation officer filed August 18, 2009:

At 11:00 a.m. on November 9, 2008, Tulare County Sheriff's deputies were dispatched the home of appellant's parents. Appellant's father reported that appellant had threatened his adult sister. According to the father, appellant had come to his parents' home at 2:30 a.m. that day and was upset about an argument that occurred with his sister. Appellant told his father, " 'Lisa needs to watch what she's doing cause she's being disrespectful. She is out of line and I'm gonna have someone take care of her.' " Appellant also said, " 'It'll be handled, they won't hurt her real bad.' " Appellant went on to say, " 'I'll have to deal with this you don't know what I have to do.' " Appellant claimed to his father that he was chosen by God to deal with all child molesters. The father advised appellant that he was on active parole and needed help for mental health issues. Appellant's father feared for his family's safety because appellant claimed to have ties to the Mafia and local gangs.

Deputies contacted appellant's sister, Lisa B. She advised them that appellant went to her Woodlake home at 10:30 p.m. the previous day. She said that she and appellant had a pleasant conversation and parted with a hug and kiss. Lisa said her 15-

year-old son, his cousin, and a friend accompanied appellant on the visit. The boys had spent the night at her parents' home. Several hours after their visit, appellant called Lisa and told her the boys had disrespected him. When Lisa asked what happened, appellant said, " 'If you shut the f\*\*k up I'll tell you.' " Lisa told appellant not to speak with her in such a way. Appellant responded, " 'F\*\*k you, I'm gonna go,' " and hung up the telephone. Lisa called appellant back to ask the whereabouts of her son. Appellant said, " 'I'm gonna break you in half, you are being a bitch. I'm gonna have you taken out, I'm gonna kill you.' " Lisa told appellant she was going to call the sheriff's department. She later called the sheriff's department and learned that the boys had been dropped off at her parents' home and were fine.

Lisa told deputies she believed appellant was unstable and capable of carrying out his threats. Lisa's husband and her parents also talked to deputies. Each said that appellant's behavior was getting worse. They said they had trouble with appellant in the past, and they feared for their safety. Parole agents detained appellant for violation of parole based on his behavior with his family. At Tulare County Jail, officers questioned appellant about the incident, and he recalled speaking with his sister, but said he did not want to talk with her over the phone. He said Lisa took his comments as an insult, and she said she was going to call the sheriff. Defendant was upset during the call, and told Lisa he was going to have someone break her leg.

On November 14, 2008, appellant returned to the California Department of Corrections and Rehabilitation on a violation of parole. He served his time on the violation and returned to Tulare County Jail, in custody, on April 23, 2009. Appellant was released from jail on July 2, 2009.

## DISCUSSION

### **I. THE TERM OF IMPRISONMENT FOR APPELLANT'S CONVICTION FOR CRIMINAL THREATS SHOULD BE REDUCED TO TWO YEARS**

Appellant contends and respondent concedes appellant's term for criminal threats must be reduced to two years.

Respondent explains: "Section 422 is a wobbler punishable 'by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.' (§ 422.) Although the complaint alleged that appellant had suffered a prior serious and violent felony for first degree burglary ..., appellant never admitted that he had suffered that offense. In any event, the trial court struck appellant's offense for purpose of sentencing.... Consequently, appellant's offense in case VCF214336 was punishable by 16 months, two years, or three years in state prison. (§ 18.) It follows that the court improperly imposed a term of four years. Therefore, although appellant's conviction must be affirmed, the judgment should be modified to reflect the middle term of two years, with two one-year enhancements under section 667.5, subdivision (b), for a total term of four years."

### **II. PRESENTENCE CUSTODY CREDITS**

Appellant contends he is entitled to an additional 365 days of presentence credits because the probation officer made mathematical errors in calculating the actual number of days appellant had served in custody and because the trial court erred in limiting his credits under section 2933.1.

Respondent contends this court should decline to address the issue of presentence custody credits because appellant did not object to the calculation of credits when he was granted probation in the trial court, did not object to the calculation of credits when he was sentenced to prison in the trial court, and apparently did not raise the issue in the trial court by postsentencing motion.

Section 1237.1 states: “No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.” When other issues are litigated on appeal, as here, section 1237.1 does not require defense counsel to file a motion to correct a presentence award of credits to raise that question on appeal. (*People v. Florez* (2005) 132 Cal.App.4th 314, 318.)

Appellant offers the following calculation of credits:

“In this case, the probation report set forth the time that appellant had served in actual custody, which included 130 days from 3/5/10 to 7/12/10; 72 days from 1/18/11 to 3/30/11; 70 days from 4/23/09 to 7/2/09; 160 days from 11/14/08 to 4/23/09; and 5 days from 11/9/08 to 11/14/08. The probation report incorrectly added these numbers (5 + 160 + 70 + 130 + 72)<sup>3</sup>, and came up with 235 days; however, a correct adding of these numbers show[s] that appellant had served 437 days in actual custody. Thus appellant was entitled to 437 days credit for actual time he served in custody.

“Further, the trial court erroneously calculated appellant’s conduct credits under section 2933.1. Criminal threats is not a violent felony for purposes of section 2933.1 (see Pen. Code, § 667.5, subd. (c)), so the limitation of credits contained in that section simply did not apply, and appellant’s conduct credits should have been calculated under section 4019. Thus, appellant was entitled to 218 days of conduct credits (437 divided by 4 times 2).”

Appellant requests that this court order appellant’s presentence custody credits to be 437 days of actual time in custody, plus an additional 218 days of conduct credits, for a total of 655 days of presentence credits. Respondent notes that appellant was in the

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<sup>3</sup> The probation officer actually transposed digits in making his computation, erroneously reporting that appellant served “106 days” between November 14, 2008, and April 23, 2009, rather than the correct figure of 160 days.

custody of the California Department of Corrections and Rehabilitation from November 14, 2008, through April 23, 2009, on a parole violation and does not appear entitled to credits during this period. In reply, appellant contends “it is likely that appellant’s parole was violated based on his commission of the criminal threats offense, and the probation officer correctly gave appellant presentence for this time because his custody on the parole violation was attributable to his commission of the criminal threats offense.”

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to what is commonly called actual time credit: credit against the term of imprisonment for all days, including partial days, spent in custody before sentencing. (§ 2900.5, subd. (a); *People v. King* (1992) 3 Cal.App.4th 882, 886.) In addition, under sections 2933, subdivision (e) and 4019, subdivisions (b) and (c), a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor and compliance with rules and regulations. These forms of presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

“Penal Code section 2900.5 provides that a convicted person shall receive credit against his sentence for all days spent in custody, including presentence custody (subd. (a)), but ‘*only* where the custody to be credited is attributable to proceedings related to the *same conduct* for which the defendant has been convicted’ (subd. (b), italics added). The statute’s application is clear when the conduct that led to the conviction and sentence was the sole cause of the custody to be credited. But difficult problems arise when, as often happens, the custody for which credit is sought had multiple, unrelated causes.” (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180 (*Bruner*).)

The Supreme Court’s decision in *Bruner* is the controlling authority on this issue. In that case, the Supreme Court held 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.” (*Bruner, supra*, 9 Cal.4th at pp. 1193-1194.) Rather, as “a general rule ... 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.” (*Id.* at p. 1191.)

In the instant case, appellant has not specifically shown that the conduct which led to his conviction was the sole reason for his loss of liberty between November 14, 2008, and April 23, 2009. In addition, appellant has not specifically shown that, but for the conduct which led to his conviction, he would have been free between November 14, 2008, and April 23, 2009.

Respondent nevertheless thoughtfully suggests that “[a]ided by its administrative support, including the probation department, the trial court is in the best position to resolve factual disputes over custody credits. (*People v. Fares* [(1993) 16 Cal.App.4th 954, 957.])” In our view, the trial court is in the best position to address appellant’s entitlement to presentence custody credits in light of the rule of *Bruner* and the matter should be remanded for further sentencing proceedings.

### **DISPOSITION**

The superior court is directed to reduce the term of imprisonment on the substantive count to two years, with two one-year enhancements under section 667.5, subdivision (b), for a total term of four years. Further, the superior court is directed, pursuant to section 1237.1 and *People v. Bruner, supra*, 9 Cal.4th at p. 1180, to review the calculation of custody credits for errors, to amend the abstract of judgment accordingly, and to transmit certified copies of the amended abstract to all appropriate parties and entities. In all other respects, the judgment is affirmed.