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

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN CARLOS AGUILERA,

Defendant and Appellant.

F062466

(Super. Ct. No. F09902681)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Alex Green, 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, Charles A. French and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Poochigian, J. and Detjen, J.

This is an appeal from a judgment entered after a jury found defendant Juan Carlos Aguilera guilty of possession for sale of a controlled substance. (See Health & Saf. Code, § 11351.) Defendant contends the court erred in limiting his ability to impeach the credibility of the arresting officer and in its award of custody credit. We modify the conduct credits, but otherwise affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On April 22, 2009, Fresno police officers served a search warrant at defendant's auto repair shop. They found two golf ball-sized pieces of black tar heroin, a scale, syringes (one of which contained heroin), and packaging material. While other officers searched the premises, Detective Diana Trueba spoke with defendant in front of the business. According to Trueba, when she told defendant why they were at the premises and read him his *Miranda*¹ rights, defendant, who was handcuffed, said, "I've got what you want" and gestured toward his pocket. Trueba found 25 or 26 aluminum foil bindles of heroin in the pocket. Defendant told Trueba he was selling heroin to pay for his own heroin addiction. Trueba acknowledged at trial that there were omissions and inconsistencies between this account and the account given in her police report and her previous testimony in the case. Defendant testified he was not given the *Miranda* advisements until he was being transported to the police station, he did not state to Trueba that he was selling heroin, and he did not know who had left the balls of heroin in the restroom of his shop; he said only the bindles in his pocket belonged to him. He denied any intent to sell heroin.

Defendant was charged by information with one count of violation of Health and Safety Code section 11351. The information also alleged that defendant possessed for sale "14.25 grams and more of a substance containing heroin, within the meaning of Penal Code section 1203.07[, subdivision] (a)(1) and Health and Safety Code

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

section 11352.5[, subdivision] (1).” (Those sections limit probation and require a fine, respectively, when a defendant possesses for sale the required quantity of heroin.) On March 30, 2011, the jury found defendant guilty of the charged crime and found true the quantity allegation. On May 9, 2011, the court sentenced defendant to the lower term of two years in prison. The court awarded credit for three days of pretrial custody, together with two days of conduct credit.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his request to examine Trueba concerning her inconsistent testimony in a previous, unrelated case. In essence, according to defendant’s proffer, Trueba testified at the preliminary hearing in the unrelated case that certain persons were present at the time of a drug sale. At trial in the unrelated case, she testified that an additional person (a confidential informant) was present. When the prosecution declined to identify the confidential informant, the unrelated case was dismissed.² Trial counsel in the present case sought to impeach Trueba’s credibility by introducing the conflicting accounts of the drug sale in the unrelated case. After the trial court ruled that this evidence had limited probative value, would consume undue time, and was likely to confuse the jury (see Evid. Code, § 352), defense counsel requested, in the alternative, that she be permitted to simply ask Trueba

² Detective Howard Tello, who appeared in the present case as an expert witness on the issue of possession for sale, but did not testify concerning defendant’s statements at the time of arrest, had also testified in the unrelated proceeding. According to the proffer, Tello also testified at the preliminary hearing in that case that the confidential informant was not present at the sale. He did not testify at trial in the unrelated case because, after Trueba’s testimony, the case was dismissed before Tello was called as a witness. As a result, there was no inconsistent testimony by Tello. Defense counsel in the present case, however, also wanted to impeach Tello with Trueba’s inconsistent testimony at the trial. While this raises issues not present with respect to Trueba’s inconsistent prior testimony, we will not separately analyze those issues, since the net result concerning lack of prejudice is the same for both witnesses, even though the underlying analysis of error might differ.

whether she had lied in the unrelated case.³ The court concluded that defense counsel had presented no “authority for the proposition that [she was] entitled to ... cross-examine a witness about a wholly independent subject matter for the purpose of trying to find -- essentially, to discover whether there is some relevant testimony that the witness may have to give[.]” The court reiterated its Evidence Code section 352 ruling, excluding the use of evidence from the unrelated proceeding to impeach the credibility of Trueba and Tello. On appeal, defendant does not seek reversal of his conviction and remand for a new trial. Instead, he seeks remand for a hearing at which the trial court would determine whether there is “evidence impugning the[] credibility” of the two detectives. If such impeachment evidence exists, according to defendant, he “must be permitted to demonstrate” that there “is a reasonable probability of a different outcome had the evidence not [been] excluded.”

We need not determine whether the trial court abused its broad discretion under Evidence Code section 352. Even if there was clear evidence that Trueba and Tello had knowingly given false testimony in the unrelated proceeding (which there is not, on the record before us), such impeachment would only have undermined Trueba’s testimony concerning defendant’s admission that he was engaged in the sale of heroin. However, wholly apart from any statements he may or may not have made to Trueba, there was overwhelming evidence of defendant’s guilt. He possessed, upon his person, 25 or 26 bindles of heroin packaged for individual sale. He also possessed, at his place of business, two additional large pieces of heroin and sales paraphernalia. As a result, it is not reasonably probable that a result more favorable to defendant would have occurred if the jury had disbelieved Trueba’s testimony concerning defendant’s admissions. Under

³ The trial court relied in part upon the statement of the trial court in the unrelated case, at the time of dismissal of the charges, that the court was “not making a finding based upon the record as it exists” that Trueba had intentionally presented false testimony at the preliminary hearing in the unrelated case.

these circumstances, reversal or remand for further proceedings is unwarranted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 59.)

Defendant also contends that, pursuant to Penal Code⁴ section 2933 (as that section existed at the time of his sentencing), he was entitled to one additional day of conduct credit, that is, three days of conduct credit based on his three days of actual presentence custody.

The Attorney General agrees that defendant served three days of presentence custody and is entitled to three days of conduct credit, instead of the two days of conduct credit awarded by the trial court. The Attorney General contends, however, that such credit should be handled administratively by the California Department of Corrections and Rehabilitation (CDCR).

Section 2933, subdivision (e), in effect at the time defendant was sentenced, stated, in relevant part: “(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner. [¶] (2) A prisoner may not receive the credit specified in paragraph (1) if it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by, or has not satisfactorily complied with the reasonable rules and regulations established by, the sheriff, chief of police, or superintendent of an industrial farm or road camp...” We agree that, under the circumstances delineated in that section, defendant appears to be entitled to three days of presentence conduct credit.

⁴ All further statutory references are to the Penal Code unless otherwise indicated.

We disagree, however, that the presentence conduct credit determination is made administratively by the CDCR.

The Director of CDCR has the duty of determining postsentence custody credit (*People v. Mendoza* (1986) 187 Cal.App.3d 948, 954); and subdivisions (a) through (d) of section 2933 deal with the postsentence credit scheme. Presentence credit, however, is determined by the trial court.

Section 2900.5, subdivision (d), requires a sentencing court “to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section.” Section 2900.5, subdivision (a), states: “[W]hen the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment.”

While section 2900.5 does not refer to section 2933, it also does not preclude a trial court’s application of section 2933 pursuant to its duties under section 2900.5. Further, local custody conduct credit of section 2933, former subdivision (e) is the same kind of credit, and (except in limited circumstances set out in subd. (e)(3), but not relevant here) is in lieu of, the section 4019 conduct credit that is expressly referred to in section 2900.5. By means of the probation officer’s presentence report or through information presented to the trial court by the prosecutor, the trial court is uniquely positioned to determine whether the defendant is disqualified from section 2933, former subdivision (e) conduct credit, for example, by reason of his or her refusal to perform assigned work. (See § 2933, former subd. (e)(2).) Accordingly, we hold that a trial court’s duties under section 2900.5 include calculating and awarding section 2933, former subdivision (e) local custody conduct credit.

Nothing in the record indicates the trial court found defendant to be disqualified from section 2933, former subdivision (e) conduct credit. We, therefore, modify the sentence in this case to award a total of three days of presentence conduct credit, instead of the two days previously awarded by the trial court.

DISPOSITION

The judgment is modified to award defendant three days of presentence conduct credit. As modified, the judgment is affirmed. The superior court shall cause an amended abstract of judgment to be prepared and distributed appropriately.