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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO NUNEZ,

Defendant and Appellant.

F063773

(Super. Ct. No. VCF241165)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

J. Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Kane, J., and Detjen, J.

Appellant, Alfredo Nunez, pled no contest to transportation of a controlled substance (count 1/Health & Saf. Code, § 11379, subd. (a)), possession for sale of a controlled substance (count 2/Health & Saf. Code, § 11378), being a felon in possession of a firearm (count 3/Pen. Code, § 12021, subd. (a)(1)),<sup>1</sup> and false personation (count 4/§ 529). Nunez also admitted two prior conviction enhancements (Health & Saf. Code, § 11370.2, subd. (c)) and an arming enhancement (§ 12022, subd. (c)) in each of counts 1 and 2 and three prior prison term enhancements in each of the four counts (§ 667.5, subd. (b)). Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we will make certain modifications to the judgment and affirm it as modified.

### **FACTUAL AND PROCEDURAL HISTORY**

On August 23, 2010, at approximately 12:53 p.m., Tulare police detectives stopped a car driven by Nunez because it did not have a front license plate.<sup>2</sup> Nunez told the detectives he did not have a driver's license and identified himself as Manuel Lopez with a date of birth of January 12, 1972.

Nunez gave the detectives permission to search his car. Under the ashtray the detectives found a baggie containing 25 grams of methamphetamine. They also found \$543 on Nunez during a pat search.

Nunez was arrested and his car was impounded. A search of the car at the police station uncovered a handgun that had been stolen in Sacramento.

During an in-custody interview, Nunez identified himself as Ladimir Vasquez before he realized his mistake and again identified himself as Manuel Lopez. Nunez had

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

<sup>2</sup> The probation report erroneously states that this incident occurred on August 23, 2011. This apparently resulted in some of the errors in the calculation of Nunez's presentence custody credits that are discussed below.

in his possession a forged driver's license in the name of Manuel Lopez. His true identity was discovered when a live scan was run on him.

On December 14, 2010, the district attorney filed an information charging Nunez with the four offenses he pled to and one count each of forgery (count 5/§ 470, subd. (a)), possession of a false compartment (count 6/Health & Saf. Code, § 11366.8, subd. (a)), giving false information to a police officer (count 7/§ 148.9, subd. (a)), and driving without a valid license (count 8/Veh. Code, § 12500, subd. (a)). Counts 5 and 6 each also alleged three prior prison term enhancements.

On April 18, 2011, the court denied Nunez's *Marsden*<sup>3</sup> motion.

On August 16, 2011, the court denied a second *Marsden* motion by Nunez.

On August 29, 2011, Nunez filed a motion to quash a warrant and for disclosure of the identity of a confidential informant.

On September 9, 2011, Nunez entered his plea in exchange for the dismissal of the remaining counts and allegations and a stipulated sentence of 11 years 8 months. The court then vacated Nunez's motion to quash and for disclosure of the informant's identity.

On October 7, 2011, the court sentenced Nunez to an aggregate term of 11 years 8 months as follows: an aggregate 11-year term in count 1 consisting of the aggravated term of four years on his transportation of methamphetamine offense, a three-year arming enhancement, a three-year prior conviction enhancement and a one-year prior prison term enhancement, a consecutive eight-month term on his possession for sale conviction in count 2, and concurrent, aggravated terms of three years each on counts 3 and 4. The court also stayed: 1) a prior conviction enhancement and two prior prison term enhancements in count 1; 2) the arming enhancement, two prior conviction

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

enhancements, and three prior prison term enhancements in count 2; and 3) three prior prison term enhancements in counts 3 and 4. Additionally, the court awarded Nunez 67 days of presentence custody credit consisting of 45 days of presentence actual custody credit and 22 days of presentence conduct credit against the sentence it imposed in each count.<sup>4</sup>

Nunez's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*Wende, supra*, 25 Cal.3d 436.) Nunez has not responded to this court's invitation to submit additional briefing.

However, our review of the record disclosed that the trial court erred by: 1) failing to award Nunez presentence custody credit from the date of his arrest on August 23, 2010; 2) awarding presentence custody credit against the consecutive term it imposed in count 2; 3) imposing more than two prior conviction enhancements and more than three prior prison term enhancements; 4) staying some of the prior conviction and prior prison term enhancements and one of the arming enhancements; and 5) listing the prior conviction enhancements in section 2 of Nunez's abstract of judgment.

### ***Presentence Custody Credit***

A defendant is entitled to presentence actual custody credit for each day he spends in presentence custody. (§ 2900.5, subd. (a).) From the date of his arrest on August 23, 2010, through the date of his sentencing on October 7, 2011, Nunez was in presentence

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<sup>4</sup> On October 20, 2011, pursuant to Nunez's request for modification, the trial court increased Nunez's award of presentence custody credit to 116 days consisting of 58 days of presentence actual custody credit and 58 days of presentence conduct credit. This increase apparently resulted from the court awarding Nunez presentence custody credit through October 20, 2011, the date the court heard Nunez's request for modification and its award of one-for-one presentence conduct credit.

actual custody 411 days. Thus, the court erred when it awarded Nunez only 45 days of presentence actual custody credit for this period of time.

Further, from January 25, 2010, through September 27, 2010, section 4019 provided for two-for-two presentence conduct credit (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, p. 4428). Beginning October 1, 2011, section 4019 was amended to again provide for two-for-two presentence conduct credit (Stats. 2011, ch. 15, § 482, p. 498 & Stats. 2011, ch. 39, § 53, p. 1731; Stats. 2011-2012, 1st Ex. Sess. 2011, ch. 12, § 35, p. 5976).

Nunez was in custody 36 days from August 23, 2010, through September 27, 2010, and 7 days from October 1, 2011, through October 7, 2011, for a total of 43 days. Thus, based on the two-for-two formula pursuant to the versions of section 4019 in effect during these time periods, these 43 days of presentence actual custody credit entitled Nunez to 42 days of presentence conduct credit (43 days  $\div$  2 = 21.5 days; 21 days  $\times$  2 = 42 days.)

From September 28, 2010, through September 30, 2011, section 2933 provided for one-for-one presentence conduct credit for defendants sentenced to prison (Stats. 2010, ch. 426, § 1, p. 2087). During that time period Nunez was in custody 368 days. At one-for-one conduct credit, this entitled Nunez to an additional 368 days of presentence conduct credit. Therefore, from the date of Nunez's arrest on August 23, 2010, through the date of his sentencing hearing on October 7, 2011, Nunez was entitled to 411 days of presentence actual custody credit and 410 days of presentence conduct credit (42 days + 368 days = 410 days), for a total of 821 days of presentence custody credit (411 days + 410 days = 821 days).

Moreover, “[c]redit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.” (§ 2900.5, subd. (b); *In re Joyner* (1989) 48 Cal.3d 487, 491.) Thus, the court also erred

when it awarded Nunez presentence custody credit against the consecutive eight-month term it imposed in count 2.<sup>5</sup>

### *The Enhancements*

“Sentence enhancements are generally of two types: those which go to the nature or status of the offender, and those which go to the nature or circumstances of the offense. [Citation.] An enhancement which is based on the defendant’s conduct in committing the charged offense, such as the personal use of a weapon or the infliction of great bodily harm, is imposed on the count to which it applies. [Citation.] Enhancements based on prior convictions are status enhancements. *Because they are related to the status of the offender, rather than the manner of commission of a crime, they are applied only once, in arriving at an aggregate sentence.* [Citations.]” (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057, italics added, fn. omitted.)

“The [prior conviction] enhancements provided for in section 11370.2 are status enhancements, in that they pertain to defendant’s status as a drug conviction recidivist. [Citation.]” (*People v. Edwards, supra*, 195 Cal.App.4th at p. 1058.) “Prior prison term enhancements are [also] status enhancements which can be imposed only once, on the aggregate sentence. [Citation.]” (*Id.* at p. 1060.)

Nunez had only two prior convictions for transportation or sale of a controlled substance. Therefore, the court erred when it imposed more than two prior conviction enhancements pursuant to Health and Safety Code section 11370.2. Similarly, since prior prison terms are imposed only once in arriving at an aggregate sentence and Nunez

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<sup>5</sup> However, “where an accused person is held in custody on a number of charges and upon conviction he is ordered to serve concurrent sentences, the time to be credited pursuant to section 2900.5 must be credited to each of them. [Citation.]” (*People v. Schuler* (1977) 76 Cal.App.3d 324, 330, fn. omitted.) Thus, the court correctly applied its award of presentence custody credit against the concurrent terms it imposed in counts 3 and 4.

served only three prior prison terms, the court erred by imposing more than three prior prison term enhancements.

Further, “[u]nless a statute says otherwise, an enhancement may be *imposed* or *stricken*, but ... may not be *stayed*; to do so is an illegal sentence. [Citation.]” (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231, italics added.) Therefore, the court also erred when it stayed terms it imposed on some of the prior conviction and prior prison term enhancements and on one of the arming enhancements.

Additionally, section 2 of Nunez’s abstract of judgment is designated for listing enhancements that attach to particular counts; whereas, section 3 is designated for listing enhancements for prior convictions. Thus, the court erred when it listed Nunez’s prior conviction enhancements in section 2, rather than in section 3, of Nunez’s abstract of judgment.

Following an independent review of the record we conclude that with the exception of the issues discussed above, no other reasonably arguable factual or legal issues exist.

### **DISPOSITION**

Nunez’s award of presentence custody credit as to counts 1, 3, and 4, is increased to 821 days as calculated above and his award of presentence custody credit as to count 2 is stricken. Additionally, the enhancements that were stayed by the trial court are also stricken. The trial court is directed to prepare an amended abstract of judgment that is consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.