

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKIE DELEON BAKER,

Defendant and Appellant.

F063816

(Super. Ct. No. BF133419A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Larry A. Errea,
Judge.

James F. Johnson, 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, Daniel B. Bernstein and
Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Gomes, Acting P.J., Kane, J., and Poochigian, J.

Appellant, Frankie Deleon Baker, pled no contest to indecent exposure with a prior conviction (count 1/Pen. Code, § 314)¹ and admitted allegations that he had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)).

In his opening brief Baker contends: 1) the court abused its discretion when it denied his *Romero*² motion; 2) the trial court erred in its award of presentence custody credit because it failed to award him presentence custody credit for time he served on a parole violation; and 3) he was denied the effective assistance of counsel at his sentencing hearing by defense counsel's failure to move the court to award him presentence custody credit for this period of time.

On April 25, 2012, after briefing was complete in this matter, Baker filed a motion in the trial court seeking presentence custody credit for the time he served on the parole violation noted above.

On June 28, 2012, the trial court granted Baker's motion and awarded him presentence custody credit through the date of the hearing, including for the time he served on his parole violation.³

On September 18, 2012, this court directed the parties to brief certain issues relating to the court's June 28, 2012, award of presentence custody credit. In a supplemental letter brief, Baker concedes that the court erred in awarding him presentence custody credit from the time he was in custody from November 3, 2011, through June 28, 2012. He also contends: 1) the court erred by its failure to calculate and memorialize in his abstract of judgment the actual days he spent in custody from November 3, 2011, through June 28, 2012; 2) the matter must be remanded to the trial

¹ All further statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 14 Cal.4th 497 (*Romero*).

³ The court's ruling on the motion rendered Baker's second and third contentions moot.

court for further proceedings; and 3) he was denied the effective assistance of counsel in pursuing his April 25, 2012, motion.

We will affirm the trial court's denial of Baker's *Romero* motion and reverse its order granting Baker presentence custody credit for the time Baker served on his parole violation and for the time he spent in custody from November 3, 2011, through June 28, 2012. We will also modify the judgment accordingly and affirm it as modified.

FACTS

On January 9, 2010, Eleticia Zaldana, a security guard at the Beale branch of the Kern County Library (the library) in Bakersfield, observed Baker masturbating as he looked at her. Baker fled before he could be detained.

On June 5, 2010, Tamekia Brown was studying at the library when she saw Baker looking at her as he masturbated.

On July 10, 2010, Vicki Kenefsky was on the library's second floor when she noticed Baker two to three feet away, masturbating as he looked at her.

On July 28, 2010, the library's supervising librarian reported to police that there had been numerous recent incidents involving Baker indecently exposing himself to library patrons and that he had been seen masturbating in the library.

On August 4, 2010, Bakersfield Police Officer Brent Stratton showed Brown and Zaldana a photo lineup and they each identified Baker as the man they observed masturbating in the library. Officer Stratton contacted Baker's parole officer who authorized the placement of a parole violation hold on Baker.⁴

⁴ Baker was on parole for a 1997 conviction for indecent exposure with a prior conviction when he committed the above-noted indecent exposure offenses.

On August 5, 2010, Baker was taken into custody on a parole violation. Later that day he was arrested on three counts of felony indecent exposure that were based on the three incidents at the library discussed above.

On August 10, 2010, he was placed in the physical custody of the California Department of Corrections and Rehabilitation (CDCR).

On August 12, 2010, Baker's parole was violated.

On August 16, 2010, the district attorney filed a complaint in the instant case (case No. BF133419A) charging Baker with three counts of indecent exposure with a prior conviction.⁵ The complaint also charged Baker with four prior prison term enhancements (§ 667.5, subd. (b)) and alleged that Baker had a prior conviction within the meaning of the three strikes law.

On October 14, 2010, while serving time on his parole violation at Wasco State Prison, Baker was naked in his cell when he made eye contact with a female correctional officer and began masturbating (case No. SF015998A).

On June 1, 2011, he was paroled and returned to local custody.

On July 6, 2011, Baker was released on bail.

On June 29, 2011, Baker entered into a plea bargain in the instant case which provided that in exchange for his no contest plea to count 1 and his admission of the three strikes allegation, the remaining counts and enhancements in that case would be dismissed, along with case No. SF015998A, which had not yet been filed.

On August 11, 2011, Baker's bail was revoked and he was remanded back into custody.

⁵ Count 1 was based on the June 5, 2010, indecent exposure incident, count 2 on the July 10, 2010, incident, and count 3 on the January 9, 2010, incident.

On October 19, 2011, defense counsel filed a *Romero* motion asking the court to dismiss Baker's prior strike conviction.

At Baker's sentencing hearing on November 2, 2011, the court denied his *Romero* motion stating:

“The Court has reviewed the pleadings in the opposition as well as the letters that are contained in the moving papers[.] [A]lthough it appears from those letters there is some good Mr. Baker does in the community, the court cannot overlook the amount of bad that he's done in the community.

“The court cannot find any, not knowing what the prior courts may have ... reasoned in striking the priors, the Court can't at this point feel that there is [a] basis for the Court to ... strike that prior and therefore the motion or invitation as it is entitled will be denied....”

The court then sentenced Baker to a four-year term, the middle term of two years doubled because of Baker's prior strike conviction. The court also awarded Baker 132 days of presentence custody credit consisting of 88 days of presentence actual custody credit and 44 days of presentence conduct credit. The court's award of presentence custody credit included only five days, August 5, 2010, through August 9, 2010, that Baker was in custody on his parole violation.

DISCUSSION

The Denial of Baker's Romero Motion

Baker contends the court abused its discretion when it denied his *Romero* motion because it did not consider many relevant factors, including that his current offense was not violent and was relatively minor, that he was in a long-term relationship with his girlfriend, and that he had been employed full time and provided financial support for his family. We disagree.

In *People v. Williams* (1998) 17 Cal.4th 148, the Supreme Court articulated the standard for striking prior convictions under the three strikes law, as follows:

“We therefore believe that, in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to ... section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth.” (*People v. Williams, supra*, 17 Cal.4th 148 at p. 161.)

A trial court’s decision whether or not to strike a prior conviction for purposes of the Three Strikes law is subject to review under the deferential abuse of discretion standard. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433-1434.) Under this standard, the ruling will be upheld unless it “‘falls outside the bounds of reason’ under the applicable law and the relevant facts.” (*People v. Williams, supra*, 17 Cal.4th at p. 162.) As explained in *People v. Carmony* (2004) 33 Cal.4th 367 at pages 376-377:

“In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citation.] Second, a “‘decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

In denying Baker's *Romero* motion it is clear the court considered all the relevant circumstances because they were contained in the moving papers to the motion and/or the probation report. The record is also clear that the court understood and exercised its discretion not to strike Baker's prior conviction and it amply supports the court's ruling. Baker's criminal record stretched back to the early 1990's when as a juvenile he was adjudicated of several offenses, including assault, and he served one commitment to the Division of Juvenile Justice (formerly the California Youth Authority). As an adult, Baker was convicted of numerous misdemeanors and felonies and he served four prison terms. He also violated his probation on at least three occasions and his parole three times. Moreover, Baker's criminal conduct was increasing in seriousness in that he committed the three offenses charged in case No. B133419A while on parole for another indecent exposure offense, he brazenly committed the July 10, 2010, offense while standing next to his victim, and he committed the offense charged in case No. SF015998A while incarcerated in prison awaiting prosecution in case No. B133419A. Further, Baker received a score of 9 on a Static-99 risk assessment test which placed him at a high risk of reoffending. Thus, we conclude that the court did not abuse its discretion when it denied Baker's *Romero* motion.

Baker's Award of Presentence Custody Credit

Introduction

At the June 28, 2012, hearing on Baker's motion to correct his award of presentence custody credit, defense counsel called Parole Agent Pam Walker to testify. Agent Walker testified that Baker had three parole agents in June of 2010 but she was not sure if she had been one of them. Walker also testified that Baker's parole was violated in August 2010, based on "[s]everal counts of indecent exposure" that occurred at the library. During cross-examination, Walker testified that she did not know the dates of occurrence for the indecent exposure offenses that resulted in Baker's parole being

violated. She also testified that to the best of her recollection, Baker's parole was violated based on "multiple instances" "maybe two" and that she did not recall any other reasons for Baker's parole being violated.

Following Walker's testimony, defense counsel argued that Baker was entitled to presentence custody credit for the time he served on his parole violation because his parole was violated for the conduct underlying the three indecent exposure counts in the instant case. Defense counsel further argued that Baker was entitled to presentence custody credit through the date of the hearing. The court agreed and awarded Baker presentence custody credit of 985 days consisting of 657 days of presentence actual custody credit and 328 days of presentence conduct credit.

The Trial Court was not Required to Calculate and
Memorialize in Baker's Abstract of Judgment the Days he Spent in
Custody from November 3, 2011, through June 28, 2012

Baker cites *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*), to contend that the trial court was required to calculate the days he spent in custody from November 3, 2011, the day after he was sentenced, through June 28, 2012, the day the court heard his motion to correct his award of presentence custody credit, and to memorialize these days in his abstract of judgment. We disagree.

In *Buckhalter* the Supreme Court held, "[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody." (*Buckhalter, supra*, 26 Cal.4th at p. 29.) Credit for these days should be awarded in the new abstract of judgment. (*Id.*, at p. 41.)

Buckhalter is inapposite because although Baker's prison term was already in progress when the trial court conducted the June 28, 2012, hearing, it was not modified at that hearing as the "result of an appellate sentence remand." Therefore, we conclude that

the court was not required to calculate the actual days Baker spent in custody from November 3, 2011, through June 28, 2012, or to memorialize these days in Baker's abstract of judgment.

Baker is not Entitled to Presentence Custody Credit for Time he Served on his Parole Violation or for the Time he Served In Custody After he was Sentenced on November 2, 2011

Baker contends that the basis for his parole revocation cannot be determined from the appellate record. He also cites *People v. Wischemann* (1979) 94 Cal.App.3d 162 (*Wischemann*) to contend that this matter must be remanded to the trial court for it to “determine the actual ground on which [Baker's] parole was revoked based on the records of the CDCR.” We will reject these contentions.

Section 2900.5, subdivision (a), provides that time spent in confinement before sentencing shall be credited against any prison term ultimately imposed. Subdivision (b) of section 2900.5 limits such credit to situations “where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.”

“As the Supreme Court explained in *People v. Bruner* (1995) 9 Cal.4th 1178, 1191 [40 Cal.Rptr.2d 534, 892 P.2d 1277], ‘[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.’ Defendant's sentence may not be credited with presentence custody time attributable to a parole or probation revocation based in part upon different criminal conduct. [Citations.] In *Bruner*, the Supreme Court concluded, ‘[W]here 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.’ (*People v. Bruner, supra*, 9 Cal.4th at pp. 1193–1194.) [T]he burden is on the

accused to establish entitlement to presentence custody credit. (*People v. Bruner, supra*, 9 Cal.4th at pp. 1193–1194 & fn. 10; [citations].)” (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1257-1258.)

Here, at the June 28, 2012, hearing, Parole Agent Walker testified that Baker’s parole was violated for “several counts of indecent exposure” that were based on conduct that occurred at the library. Although Walker was uncertain of the exact number of indecent exposure incidents that resulted in Baker’s parole being violated, it is clear from her testimony that it involved at least two such incidents. In any event, Baker did not present any other evidence at this hearing. Thus, even if Walker’s testimony was insufficient to prove that Baker’s parole was violated for conduct other than that underlying the count he pled to, we would nevertheless conclude that Baker is not entitled to presentence custody credit for the time he served on his parole violation because he did not meet his burden of establishing his entitlement to this credit.

Further, since Baker was sentenced on November 2, 2011, he was not entitled to presentence custody credit for time he spent in custody after that date because “[o]nce a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits” (*Buckhalter, supra*, 26 Cal.4th at p. 31.)

Moreover, *Wischemann* does not compel remand of the instant case to the trial court because it is easily distinguishable. In that case the record did not contain any evidence of “the duration of defendant’s incarceration” such that the appellate court was unable to resolve the credit issue raised by the defendant. (*Wischemann, supra*, 94 Cal.App.3d at pp. 174-175.) Here, the record discloses the actual days Baker was in custody and the only issue is whether Baker is entitled to presentence custody credit for the days he served on his parole violation. However, since Baker did not meet his burden of showing that he is entitled to such credit in the instant case, there is nothing preventing this court from determining Baker’s entitlement to presentence custody credit.

Accordingly, we conclude the court erred when it awarded Baker presentence custody credit for the time he served on his parole violation and for his time in custody from November 3, 2011 through June 28, 2012.

Baker's Ineffective Assistance of Counsel Claim

Baker contends that his defense counsel's failure at his June 28, 2012, hearing to present documentary evidence from CDCR showing the basis for his parole revocation shows she failed to investigate the "factual and legal aspect of [Baker's presentence custody credit] claim" and, thus, provided Baker with ineffective representation. Baker further contends that it is reasonable to conclude from Parole Agent Walker's testimony that he may be entitled to presentence custody credit for the time he served on his parole violation. Thus, according to Baker, it is reasonably probable that but for defense counsel's ineffective representation in failing to "investigate" the CDCR records, the result would have been more favorable to Baker. We will reject these contentions.

"The burden of proving a claim of ineffective assistance of counsel is on defendant, and he must prove his claim by a preponderance of the evidence. [Citation.] Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. [Citation.] 'The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result.' [Citation.] A claim of ineffective assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome. [Citation.]" (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1298.)

However, ineffective assistance of counsel claims based on matters outside the record on direct appeal are more appropriately raised in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) Baker's ineffective assistance of counsel claim relies on CDCR records that are not part of the appellate record. Therefore, he must raise this claim in a petition for writ of habeas corpus.

Baker's Entitlement to Presentence Custody Credit

Baker was in custody on his parole violation from the date of his arrest on August 5, 2010, through June 1, 2011, and, for the reasons discussed above, was not entitled to presentence custody credit for this period of time. Aside from the above time period, Baker was in custody in the instant matter from June 2, 2011, through July 6, 2011, when he was released on bail, for a total of 35 days. He was remanded back into custody on August 11, 2011, and remained there through November 2, 2011, when he was sentenced, for a total of 84 days. Thus, Baker was entitled to a total of 119 days of presentence actual custody credit (35 days + 84 days = 119 days) and 58 days of presentence conduct credit (119 days ÷ 4 = 29.75 days; 29 days x 2 = 58 days) for a total of 177 days of presentence custody credit (119 days + 58 days = 177 days).

DISPOSITION

Baker's award of presentence custody credit is reduced from 985 days to 177 days as calculated above. 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.