

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

ISAAC ARANO,

Defendant and Appellant.

F069108

(Super. Ct. No. VCF243556)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

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

Appellant Isaac Arano was convicted of two felonies and sentenced to an aggregate 16-year prison term. Following a timely appeal, this court remanded to the trial court for it to stay the term imposed on one count and for resentencing on another count.

On this appeal, Arano contends the court violated his right to be present and his right to the effective assistance of counsel by resentencing him without a hearing and without him or his defense counsel being present. Respondent contends that the court did not err when it resentenced Arano and, alternatively, that any error in resentencing Arano outside the presence of Arano and his counsel was harmless. Additionally, Arano contends the trial court erred by its failure to recalculate his custody credit. While we reject Arano's claim that his rights were violated, we agree that his custody credit must be recalculated and, therefore, we modify his award. In all other respects, we affirm the judgment.

FACTS

On October 6, 2010, Arano approached a man and a woman on the St. John's pedestrian pathway in Visalia, California and punched the man with something metal that was cupped in his palm and wrapped around his knuckles. After accusing the man of being a Norteño gang member, Arano shouted the name of a local gang. The man received a gash over his left eye that required several stitches to close.

On April 6, 2011, a jury convicted Arano of assault with a deadly weapon and/or force likely to produce great bodily injury (count 1/Pen. Code, § 245, subd. (a)(1))¹ and participation in a criminal street gang (count 3/§ 186.22, subd. (a)). The jury also found true a great bodily injury enhancement (§ 12022.7, subd. (a)) in each count, multiple gang enhancements in count 1 (§ 186.22, subd. (b)(1)(A), (B), & (C)), and a personal use of weapon enhancement in count 3 (§ 12022, subd. (b)(1)).

¹ All further statutory references are to the Penal Code.

On June 30, 2011, the court sentenced Arano to an aggregate 16-year term.

On November 7, 2013, in an unpublished opinion (*People v. Arano* (Nov. 7, 2013, F063106) [nonpub. opn.]) this court found that since “both the section 12022.7, subdivision (a) enhancement and the section 186.22, subdivision (b)(1)(C) enhancement” in count 1 pertained to “the infliction of great bodily injury on the same victim in the commission of a single offense,” only the greater of these enhancements could be imposed. (See § 1170.1, subd. (g).)² Thus, we stated that “[t]he proper remedy [was] to reverse the trial court’s sentence and remand the matter to allow the court to *restructure* the sentence so as to not violate section 1170.1, subdivision (g).” (Italics added.) Additionally, we held that the trial court should have stayed the term it imposed on count 3, pursuant to section 654, because the only evidence of appellant’s active participation in a gang was evidence associated with the other charged offenses, particularly the assault charge in count 1. (See *People v. Mesa* (2012) 54 Cal.4th 191, 199.) Thus, we remanded the matter stating, in pertinent part: “The matter is remanded for resentencing regarding count 1. The sentence imposed on count 3 should be stayed[.]”

On February 20, 2014, without Arano, defense counsel, or the prosecutor being present, the trial court issued an “Amended Minute Order” that, in pertinent part, stated the following: “IT IS HEREBY ORDERED that the minute order dated June 30, 2011[,] and the Abstract of Judgment filed on July 7, 2011, are deemed amended to reflect the following: [¶] In Count 1 Special Allegation PC 12022.7, the Court strikes the punishment previously imposed; Count 3 is ... stayed in its entirety. All other orders issued remain in full force and effect.”

² Section 1170.1, subdivision (g), in pertinent part, provides: “When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense.”

The court also issued an amended abstract of judgment showing that Arano's aggregate prison term was reduced to 13 years, the middle term of three years on his assault with a deadly weapon conviction in count 1, a 10-year gang enhancement in that count, a stayed term in count 3, and stayed terms on the great bodily injury and arming enhancements in count 3. The trial court, however, did not recalculate appellant's custody credit.

DISCUSSION

Arano's Resentencing

Arano contends that his resentencing on February 20, 2014, was a "critical stage of the proceedings" because this court vacated "the entire sentencing package" as to count 1 and ordered the trial court to "*reconstruct the sentence.*" Thus, according to Arano, the trial court violated his state and federal constitutional right to be present and his right to counsel by resentencing him without a hearing and without him or his counsel being present. He further contends the error is prejudicial per se and requires remand. We disagree.

"A defendant has a right to be present at critical stages of a criminal prosecution[.]" (*People v. Wilen* (2008) 165 Cal.App.4th 270, 286.) "A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution, as well as by article I, section 15 of the California Constitution and by sections 977 and 1043 of the California Penal Code. [Citations.] A defendant, however, "does not have a right to be present at every hearing held in the course of a trial." [Citation.] A defendant's presence is required if it "bears a reasonable and substantial relation to his full opportunity to defend against the charges." [Citation.] [Citations.] 'Sections 977 and 1043 do not require the defendant's presence, or a written waiver, unless that standard has been met. [Citations.]' [Citation.] 'The defendant must show that any violation of this right resulted in prejudice or violated the

defendant's right to a fair and impartial trial.” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1052.)

Moreover, “[t]he Sixth Amendment right to the assistance of counsel applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake.” (*People v. Crayton* (2002) 28 Cal.4th 346, 362.) A “critical stage” of the proceedings is a step in a criminal proceeding that holds significant consequences for the accused. (*Bell v. Cone* (2002) 535 U.S. 685, 695-696.) Although a resentencing can be a critical stage in the proceedings if it meets this test, *it is not a critical stage when resentencing is purely a ministerial act, with no discretion given to the sentencing judge*; the absence of counsel in these circumstances is not prejudicial. (*Hall v. Moore* (2001) 253 F.3d 624, 627-628 (*Hall*).)

When the trial court *must impose a lower sentence* after a successful post-sentencing motion or appeal, a defendant is not entitled to be present or to counsel because this is not a critical stage in the proceedings. (*United States v. Jackson* (1991) 923 F.2d 1494, 1496-1497 (*Jackson*).) As explained by the *Jackson* court:

“This exception to the presence-at-sentencing requirement is logical and fair given the requirement’s constitutional base and rationale: to ensure that at sentencing--a critical stage of the proceedings against the accused--the defendant has an opportunity to challenge the accuracy of information the sentencing judge may rely on, to argue about its reliability and the weight the information should be given, and to present any evidence in mitigation he may have. [Citations.] For an initial sentencing, or even *a resentencing where an entire sentencing package has been vacated on appeal*, a hearing at which the defendant is present with counsel will generally be necessary to accomplish this purpose. But in the context of *a remedial reduction of sentence after a successful ... challenge to the legality of the original sentence*, this necessary process has already occurred. There has already been a sentencing hearing at which the defendant had the opportunity to rebut evidence in the presentence investigation report and to present evidence in mitigation; the sentencing judge has made the necessary credibility determinations and exercised the necessary discretion to fashion a sentencing package which he has determined, in fact, is the appropriate penalty considering the defendant’s

conduct and level of culpability. If the prison terms imposed on some but not all of the counts are then held to be illegally long, the illegal terms must be reduced; but the whole process need not start anew. In constitutional terms, *a remedial sentence reduction is not a critical stage of the proceedings*; so, the defendant's presence is not required." (*Jackson, supra*, 923 F.2d at pp. 1496-1497, italics added.)

Arano's prior appeal did not result in vacating the "entire sentencing package." Instead, we remanded the matter for the trial court to stay the term imposed on count 3 and for it to "restructure" Arano's sentence so it did not violate section 1170.1, subdivision (g), which the court could only accomplish by imposing the greater of two enhancements in that count and striking the other. Since Arano's resentencing involved only a remedial sentence reduction, in accord with *Jackson*, we conclude that the resentencing hearing was not a critical stage of the proceedings.

Arano misplaces his reliance on *Hall, supra*, 253 F.3d 624, to contend his resentencing was a critical stage in the proceedings because the entire sentencing package as to count 1 was set aside and the trial court was ordered to "reconstruct [his] sentence." In *Hall*, the appellate court reversed the defendant's sentences on all three of his convictions "because it found that 'at least' three out of the five reasons that the trial court identified for the departure [from sentencing guidelines] were invalid." (*Id.* at p. 625.) In reversing the sentences, the court stated:

"This court has recognized that 'when a criminal sentence is vacated because one of the convictions has been reversed, it becomes void in its entirety; the sentence -- including any enhancements -- has "been wholly nullified and the slate wiped clean."' [Citation] Consequently, when a sentence is vacated and remanded for re-sentencing, the district court has the discretion to 'reconstruct the sentence.' [Citation.] That is the case here. It is clear from the record that the entire sentencing package was set aside. Therefore, Hall's presence and his counsel's presence were a necessity, not a 'luxury.'" (*Hall, supra*, 253 F.3d at p. 628.)

Hall is inapposite because it involved the setting aside of the entire sentencing package, whereas Arano's entire sentencing package was not set aside. As previously noted, here we remanded the instant matter for the limited purpose of allowing the court

to stay the term imposed on one count and for it to impose the greater and strike the lesser of two enhancements in another count. Further, unlike *Hall*, where the trial court had discretion on remand to “reconstruct” the defendant’s sentence, neither of these actions required the court to exercise any discretion with respect to the entire sentence or as to the two counts involved. Therefore, since the February 20, 2014, resentencing was not a critical stage in the proceedings, we further conclude that the trial court did not violate Arano’s constitutional right to be present or his constitutional right to counsel when it reduced Arano’s sentence from 16 years to 13 years without Arano or his counsel being present.

Arano’s Custody Credit

Respondent agrees with Arano’s contention that the trial court should have calculated the actual time he had been in custody. We also agree.

“When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the ‘subsequent sentence.’” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23.)

Since the remand here resulted in a modification of Arano’s felony sentence, the court erred by its failure to calculate the actual time Arano spent in custody through the date it resentenced him. Further, determining the number of additional days Arano spent in custody from the date of his original sentencing until the court resentenced him is a simple matter. Therefore, we will calculate the actual time Arano has been in custody and credit it against his sentence.

Arano was in presentence actual custody 118 days through the date of his sentencing on June 30, 2011. From July 1, 2011, through June 30, 2012, Arano spent 366 days in actual custody because 2012 was a leap year; from July 1, 2012, through June 30, 2013, he spent 365 days in actual custody, and from July 1, 2013, through February 20, 2014, he spent an additional 235 days (31 days [July] + 31 days [August] +

30 days [September] + 31 days [October] + 30 days [November] + 31 days [December] + 31 days [January] + 20 days [February] = 235 days). Thus, Arano is entitled to an additional 966 days of actual custody credit (366 days + 365 days + 235 days = 966 days) for a total of 1,084 days of actual custody credit (118 days + 966 days = 1,084 days).

DISPOSITION

The judgment is modified to increase Arano's credit for the days he has actually spent in custody from 118 days to 1,084 days. The trial court is directed to prepare an amended abstract of judgment that incorporates this increase in actual custody credit and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.