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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO PIMENTEL,

Defendant and Appellant.

G044873

(Super. Ct. No. 07NF3490)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed as modified.

Michelle Rogers and Victoria Barana, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ricardo Pimentel challenges the sentence imposed on his convictions for burglary and receiving stolen property. He contends the court should have stayed execution of sentence on the receiving stolen property conviction. He further contends the court incorrectly limited his presentence conduct credits. The Attorney General agrees on both points. We modify the judgment accordingly, and affirm.

FACTS

A Placentia police officer went to a house to investigate a report of a burglary in progress. Defendant and another man ran from the home to a van, and drove off. The van eventually stopped, and the men started running away. Another officer apprehended and searched the men. Defendant had jewelry and credit cards stolen from the home.

After trial, a jury found defendant guilty of burglary (Pen. Code, §§ 459, 460)¹ and receiving stolen property (§ 496, subd. (a)). At a bifurcated bench trial, the court found defendant suffered two prior strike convictions (§§ 667, subds. (d), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A)), two prior serious felony convictions (§ 667, subd. (a)(1)), and had served one prior prison term (§ 667.5, subd. (b)).

The court imposed a total term of 35 years to life in state prison. The sentence comprised a term of 25 years to life for burglary and two consecutive five-year terms for the serious felony priors. The court struck the prior prison term.

The court also imposed a concurrent term of 25 years to life for receiving stolen property. It stated that if “the principals of [section] 654 appl[ied] in this case,” it would have stayed that term because the acts of receiving stolen property and burglary

¹ All further statutory references are to the Penal Code.

“did, in fact, occur simultaneously or at the same occasion involving the same set of operative facts.”

The court awarded defendant a total of 1,405 days of presentence credits. The credits comprised 1,222 days of actual custody credit and 183 days of conduct credit. Adopting the parties’ calculations, the court limited the conduct credits to 15 percent of the days in actual presentence custody. (See § 2933.1.)

DISCUSSION

Defendant contends the court wrongly failed to stay execution of the sentence on the receiving stolen property conviction, and wrongly restricted his conduct credits. The Attorney General concedes both errors, with good reason.

First, the court should have stayed execution of the receiving stolen property sentence pursuant to section 654. The “Three Strikes” law mandates consecutive, unstayed sentences on felonies “not committed on the same occasion, and not arising from the same set of operative facts.” (§ 667, subd. (c)(6); accord *People v. Hendrix* (1997) 16 Cal.4th 508, 512.) “By implication, consecutive sentences are not mandatory under [section 667,] subdivision (c)(6) if the multiple current felony convictions are ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts.’” (*Hendrix*, at pp. 512-513; accord *People v. Danowski* (1999) 74 Cal.App.4th 815, 821.) And “[w]here the ‘same occasion/same operative facts’ test is satisfied . . . the three strikes law does not similarly mandate that the trial court ‘shall’ do anything. In such a case, there is no ‘notwithstanding any other law’ provision to override section 654. Section 654 applies of its own force.” (*Danowski*, at p. 823.) And so “where, as here, the three strikes law does not mandate consecutive sentencing, section 654 applies to sentencing under the three strikes law.” (*Id.* at p. 824.)

Here, the court found the burglary and receiving stolen property convictions “did, in fact, occur simultaneously or at the same occasion involving the same set of operative facts.” Thus, execution of the sentence on the receiving stolen property conviction should have been stayed. (§ 654; see also *People v. Allen* (1999) 21 Cal.4th 846, 867 [burglary and receiving stolen property convictions; court properly stayed execution of the receiving stolen property sentence].)

Second, the court should not have limited defendant’s conduct credits pursuant to section 2933.1. That statute limits conduct credits to 15 percent of the days in actual presentence custody for certain defendants (§ 2933.1, subd.(c)), including those “convicted of a felony offense listed in subdivision (c) of Section 667.5.” (*Id.*, subd. (a).) But section 667.5, subdivision (c), does not list receiving stolen property. And it lists burglary only “wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.” (*Id.*, subd. (c)(21).) That fact was neither pleaded nor proved here — to the contrary, the homeowner testified she was at a hardware store during the burglary.

Thus, the court should have awarded conduct credits pursuant to the generally applicable statute, section 4019 — not section 2933.1. Here, that would be 610 days: 1,222 days in actual presentence custody, divided by four and rounded down to the nearest whole number, then multiplied by two.² (§ 4019; accord *People v. Philpot* (2004) 122 Cal.App.4th 893, 908.) The Board of Prison Terms may use these credits in determining defendant’s release date after he has served his minimum term. (*Philpot*, at p. 909.)

² Because defendant has a prior serious felony conviction, he may not invoke the short-lived January 2010 amendment to section 4019 increasing the award of conduct credits. (See former § 4019, subs. (b)(2) & (c)(2); Stats. 2009, ch. 28, §§ 50, 62; Stats. 2010, ch. 426, § 2.)

DISPOSITION

The judgment is modified to (1) stay execution of the sentence imposed on the receiving stolen property conviction, and (2) award 610 days of conduct credits, for a total presentence credit award of 1,832 days. The court is directed to prepare an amended abstract of judgment accordingly, and forward it to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.