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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.

REY BENAVIDEZ,

Defendant and Appellant.

G046436

(Super. Ct. No. 08WF1333)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed as modified.

Thomas Owen, under appointment 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, William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Rey Benavidez of sexual intercourse with a child 10 years or younger, T.C., digital penetration with a child 10 years or younger, T.C., attempted lewd act upon a child under 14 years of age, A.L., and misdemeanor indecent exposure after unlawful entry. Benavidez appealed and in our prior nonpublished opinion (*People v. Benavidez* (June 28, 2011, G043412)), we reversed his conviction for committing an attempted lewd act upon a child under 14 years of age and concluded the trial court failed to make the requisite findings for imposition of the sex offender fine. We remanded the matter. On remand, the trial court concluded Benavidez did not have the ability to pay the sex offender fine and struck the sentence on count 4. The court, however, refused to award him additional actual credits from the time of his first sentencing hearing to the date the court struck the sentence on count 4. As we explain below, we conclude Benavidez was entitled to additional actual credits.

FACTS

Because of the limited issue on appeal, we need not provide a detailed recitation of the facts, which can instead be found in our prior nonpublished opinion. (*People v. Benavidez, supra*, G043412.) Suffice it to say, a jury convicted Benavidez of sexual intercourse with a child 10 years or younger (Pen. Code, § 288.7, subd. (a)) (count 1),¹ digital penetration with a child 10 years or younger (§ 288.7, subd. (b)) (count 2), attempted lewd act upon a child under 14 years of age (§§ 664, subd. (a), 288, subd. (a)) (count 4), and misdemeanor indecent exposure after unlawful entry (§ 314, subd. (1)) (count 5). The trial court sentenced him to a total prison term of 44 years as follows: 25 years to life on count 1, a consecutive term of 15 years to life on count 2, a consecutive upper term of four years on count 4, and a concurrent one year in jail on count 5. The court ordered him to pay a \$300 fine pursuant to section 290.3.

¹

All further statutory references are to the Penal Code.

In our prior opinion, *People v. Benavidez, supra*, G043412, we reversed Benavidez’s conviction for count 4 because the trial court erred in allowing the prosecutor, after the close of evidence, to amend count 4 to charge Benavidez with the same offense against a new victim. We also concluded the court did not make the necessary findings to support imposition of the section 290.3 sex offender fine. Our disposition read, “We reverse Benavidez’s conviction on count 4. We remand the matter to the trial court for consideration of whether Benavidez has the ability to pay the sex offender registration fine. In all other respects, the judgment is affirmed.”

On remand in November 2011, the trial court ordered the probation department to prepare a supplemental report. The following month, Benavidez filed a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118.

At a hearing the following month where Benavidez was present, the trial court indicated there were two matters before the court, Benavidez’s *Marsden* motion and the sentencing issues discussed in our prior opinion. Based on our directions in our prior opinion (*People v. Benavidez, supra*, G043412), the court struck the section 290.3 sex offender fine based on the probation department’s finding Benavidez did not have the ability to pay. The court also “instruct[ed] . . . the clerk to amend the abstract of judgment to strike the . . . conviction for count 4, and reflect that the overall sentence now then becomes 40 years state prison, rather than 44 years state prison.”

After the court resolved the *Marsden* motion, the court inquired whether there were any additional issues. Defense counsel asserted that based on *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*), the court needed to recalculate Benavidez’s actual credits. The court responded the fact it had struck four years of prison time “doesn’t necessarily affect the sentencing scheme that was in place at the time of sentencing, correct.” Defense counsel agreed. The court stated “that other than a new

abstract of judgment indicating that count 4 no longer exists, the court's been reversed on that, and that the abstract of judgment deleting the \$300 [section] 290.3 fine, that everything else would appear to remain the same." Defense counsel responded the issue was whether this hearing was a new sentencing hearing. The prosecutor did not believe it was. The court ruled it was not going to recalculate actual time but advised defense counsel to bring any contrary authority to its attention and the court would recalculate actual time.

Benavidez appealed February 1, 2012. On April 20, 2012, Benavidez's appellate counsel sent the trial court a letter indicated he was entitled to additional actual time credits pursuant to *Buckhalter, supra*, 26 Cal.4th 20.

DISCUSSION

Section 2900.1 provides: "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."

In *Buckhalter*, the trial court resentenced defendant after a remand on appeal. Defendant argued that a limited appellate remand for resentencing vacated his original sentence in all respects, his status became as though he had never been sentenced, and he was thus entitled to presentence conduct credits pursuant to section 4019. (*Buckhalter, supra*, 26 Cal.4th at pp. 22-23.) In denying defendant section 4019 conduct credits for the period between his original sentencing and resentencing, the court held that once a defendant is committed to prison, his custody is thereafter considered service of his sentence, and a remand with respect to a sentence the defendant is already serving does not render him eligible for conduct credits of the presentence kind. (*Buckhalter, supra*, 26 Cal.4th at p. 33.) Although the court held he was not

entitled to additional section 4019 conduct credit, defendant was nevertheless entitled to local presentence credit for the actual days he had spent in custody prior to resentencing, whether in jail or in prison, pursuant to 2900.1. The California Supreme Court held the trial court was required to award defendant such credit at resentencing and to include in the amended abstract of judgment that award of presentence credit. (*Buckhalter, supra*, 26 Cal.4th at pp. 40-41.)

Here, after we reversed Benavidez's conviction on count 4, the trial court struck the conviction. The court indicated Benavidez's sentence was reduced from 44 years in prison to 40 years in prison. Although we would not characterize the hearing as a typical sentencing hearing and the court did not reimpose sentences on the other counts and enhancements, the court did reduce Benavidez's sentence. The court's striking four years from Benavidez's sentence was a modification of his sentence and he was entitled to additional actual custody credits. Thus, *Buckhalter's* holding requires we reverse the judgment to the extent the trial court failed to recalculate Benavidez's actual custody credits.

At resentencing, Benavidez was entitled to be awarded 688 days of actual presentence credits from the date of his first sentencing hearing, March 11, 2010, to the date of resentencing, January 27, 2012. Thus, the proper award of presentence credit was a total of 1,349 days of credit, consisting of 1,263 days of actual presentence credit (688 days plus the previously-awarded 575 days of actual credit), and 86 days of section 4019 presentence conduct credits.

DISPOSITION

The judgment is modified to reflect presentence credit of 1,349 days, consisting of 1,263 days of actual presentence custody credit and 86 days of section 4019 presentence conduct credits. After issuance of the remittitur, we direct the clerk of the

superior court to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation, division of Adult Operations. As modified the judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.