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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LEON,

Defendant and Appellant.

H036972

(Monterey County

Super. Ct. Nos. SS091538,

SS091634, SS092482)

In a negotiated disposition of three separate cases, defendant Jose Leon pleaded no contest to inflicting corporal injury on a child (Pen. Code, § 273d, subd. (a)),¹ inflicting corporal injury on a spouse (§ 273.5, subd. (a)), making criminal threats (§ 422), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). He was sentenced to five years in prison.

On appeal, defendant challenges the allocation of his presentence credit. Relying on *In re Marquez* (2003) 30 Cal.4th 14 (*Marquez*) and *People v. Gonzalez* (2006) 138 Cal.App.4th 246 (*Gonzalez*), he claims entitlement to the benefit of 481 days of credit that is currently “‘dead time,’ that is, time spent in custody for which he receive[d] no benefit.” (*Marquez*, at p. 20.) We modify the judgment.

¹ Further statutory references are to the Penal Code unless otherwise noted.

I. Background

The details of defendant's crimes are irrelevant to the issues he raises on appeal, so we need not recount them. Arrested on November 2, 2009, he was subsequently charged by three separate informations with numerous offenses committed on May 23, June 20, and November 1, 2009. The three cases were resolved by a combined plea bargain on April 21, 2011. Pursuant to that agreement, defendant entered no contest pleas to inflicting corporal injury on a child (§ 273d, subd. (a)) in the first case, to inflicting corporal injury on a spouse (§ 273.5) and making criminal threats (§ 422) in the second case, and to assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) in the third case, in exchange for a total prison term of five years and dismissal of all remaining counts. The court found that the preliminary examination transcripts provided a factual basis for defendant's pleas.

At the sentencing hearing, the district attorney summarized the agreed-upon sentence as follows: "So the 273(d) is [a] four-year term, which is a middle term. And then the case with the 273.5, it's one-third the mid, which is one year and that's to run consecutive. The sentence for the 422 in that case is concurrent. And then the third case with the 245(a)(1) is to run concurrent to both cases."

The trial court sentenced defendant to the agreed-upon five-year term. The court selected the section 273d, subdivision (a) offense as the base term and imposed the middle term of four years. "There are zero credits on that," the court stated, "because it is a consecutive sentence." When defendant's trial counsel objected that "the sentence may be consecutive, but this is the base term," the court responded, "We're going to put those credits on the other case. He'll get credits, but you don't get dual credits if it's consecutive."

In the second case, the court imposed "an additional term of one year" (one-third the middle term) on the section 273.5 count, to be served consecutively. "In that case," the court declared, "he has credits of 846 days. That breaks down to 564 actual, 282

good time/work time.” The court imposed the middle term of two years on the section 422 count, to be served concurrently “with any and all other sentences.” “The total fixed term between [the first and second cases] is five years.”

In the third case, the court imposed the middle term of three years on the section 245, subdivision (a)(1) count, to be served concurrently with any other sentence. “He has credits of 846 days,” the court said. “That breaks down to 564 actual, 282 good time/work time.”

The remaining counts were dismissed on the district attorney’s motion. Defendant filed a timely notice of appeal.

II. Discussion

Defendant contends the trial court erred in awarding zero presentence credits in the first case and 846 in the second—a decision that effectively caused him to forfeit the 481-day difference between those 846 days and the 365-day sentence to which they were allocated. We agree.

Former section 2900.5 provides that “[i]n all felony and misdemeanor convictions, . . . when the defendant has been in custody, . . . all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment.” (Former § 2900.5, subd. (a); Stats. 1998, ch. 338, § 6.) But “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.” (Former § 2900.5, subd. (b).)

As our high court has noted, “‘section 2900.5, subdivision (b), is “difficult to interpret and apply.’”” (*Marquez, supra*, 30 Cal.4th at p. 19.) Two high court cases, *People v. Bruner* (1995) 9 Cal.4th 1178, 1194 (*Bruner*) and *Marquez*, are instructive.

In *Bruner*, the court emphasized that “[s]ection 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings.” (*Bruner, supra*, 9 Cal.4th at p. 1191.) Bruner was sentenced to 12 months after his parole was revoked, and he “received full credit against this term for the time spent in jail custody” between his arrest and the parole revocation. (*Id.* at p. 1181.) While serving his 12-month sentence, Bruner pleaded guilty to cocaine-possession charges in a new information and received a concurrent 16-month sentence for that conviction. (*Ibid.*) The court held that he was not entitled to duplicate credit against the new sentence. (*Id.* at p. 1183.) Although the presentence custody Bruner argued should be credited was at least arguably “attributable to proceedings related to the same conduct for which [he] was convicted”² (former § 2900.5, subd. (b)), he had *already* received credit for that time. A rule of “‘strict causation’” applies in such “‘multiple restraint’” cases, the court held. (*Bruner*, at p. 1180.) “[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.” (*Bruner*, at pp. 1193-1194.)

In *Marquez*, the court recognized an exception to the strict causation rule in certain multiple restraint cases not involving a possibility of duplicate credit. Marquez was arrested in Monterey County on suspicion of first degree burglary and released on bail a few days later. (*Marquez, supra*, 30 Cal.4th at p. 17.) Two weeks later, he was arrested

² Bruner was on parole for armed robbery when the warrant for his arrest on three parole violations (absconding from parole supervision, credit card theft, and a positive drug test for cocaine) issued. (*Bruner, supra*, 9 Cal.4th at p. 1181.) During a search incident to his arrest for the parole violations, he was found in possession of rock cocaine. (*Ibid.*) Cited and released on his own recognizance *on the possession charge*, he remained in custody on the parole violations. (*Ibid.*) His parole was later revoked based on the three violations *plus the possession offense*. (*Ibid.*)

in Santa Cruz County on suspicion of another burglary. (*Ibid.*) He remained in custody in Santa Cruz County, and Monterey County placed a “hold” on him. (*Ibid.*) The Santa Cruz County case was tried first; Marquez was convicted and sentenced to prison, with credit for his time in custody between the date of his arrest in Santa Cruz County and sentencing. (*Id.* at p. 18.) He was then transferred to Monterey County, and convicted and sentenced in that case.

He appealed both convictions. His sentence in the Santa Cruz County case was ultimately vacated and the charges dismissed. (*Marquez, supra*, 30 Cal.4th at p. 18.) Marquez then sought to have the time he spent in custody from the day he was sentenced in the Santa Cruz County case to the day he was sentenced in the Monterey County case credited against his sentence in the Monterey County case. (*Ibid.*)

The California Supreme Court held that the plain meaning of section 2900.5, subdivision (b) supported Marquez’s claim. The court explained that the time for which he sought credit could properly be deemed “‘attributable to proceedings related to the same conduct for which [he] ha[d] been convicted’” in the Monterey County case. (*Marquez, supra*, 30 Cal.4th at p. 20.) The case was not a duplicate credit case, the court emphasized. Unlike in *Bruner*, “the choice is not between awarding credit once or awarding it twice. The choice is instead between granting [Marquez] credit *once* for his time in custody between December 11, 1991, and April 2, 1992, or granting him *no credit at all* for this period of local custody.” (*Id.* at p. 23.) To deny him that credit “would render this period ‘dead time.’” (*Id.* at p. 20.)

This court applied these principles in *Gonzalez*. Gonzalez was on probation for domestic violence when he was arrested on auto theft and other charges. While awaiting trial, he assaulted another inmate. A jury convicted him in the auto theft case. In a negotiated disposition of the other two cases, he pleaded no contest to battery with serious bodily injury in the assault case and admitted a probation violation in the domestic violence case. His pleas and admission were entered in exchange for a four-

year sentence on the battery count, a consecutive one-year sentence on the probation violation, and consecutive eight-month sentences on each of the felony counts in the auto theft case. (*Gonzales, supra*, 138 Cal.App.4th at p. 250.) The parties agreed that his total sentence would be six years and four months “for the entire package” and that the remaining charges and enhancements would be dismissed. (*Ibid.*) The court imposed the agreed-upon sentence and awarded presentence credit.

On appeal, defendant challenged the allocation of presentence credit for the 319 days he spent in custody between the date of his arrest in the auto theft case and the date of the inmate assault. (*Gonzales, supra*, 138 Cal.App.4th at p. 250.) The trial court had assigned those days to the domestic violence case, along with 361 days that were indisputably correctly allocated to the same case, for a total of 680 days. (*Ibid.*) Since the sentence in the domestic violence case was only one year, the result (680-365) was 315 days of “‘dead time’” credit. (*Gonzales*, at pp. 250-251.)

This court held that the 315 “dead time” days should have been assigned to the auto theft case, since the relevant period of custody was attributable to both the domestic violence and the auto theft cases. (*Gonzales, supra*, 138 Cal.App.4th at p. 254.) As in *Marquez*, the choice was not between awarding credit once or awarding it twice; the credit for the time in question was only awarded against a single case—the domestic violence case. (*Ibid.*) Thus, there was no possibility that duplicate credit would create a windfall for Gonzalez, and *Bruner*’s rule of strict causation did not apply. (*Id.* at p. 252.) “[O]nce the few days of custody left to complete the sentence in the domestic violence action were credited to [Gonzalez], the remaining custodial time should have been characterized as solely attributable to the [auto theft] case and allocated accordingly.” (*Id.* at p. 254.) Otherwise, as in *Marquez*, “the vast majority of the time served during [the period in question] would become ‘dead time’ that was not attributable to any case, in contravention of *Marquez*.” (*Ibid.*)

A similar result is warranted here. This is plainly not a case like *Bruner*, and the Attorney General's reliance on that decision is misplaced. Defendant was not seeking duplicate credit here, and there was never any risk that he would receive a "credit windfall[]." (*Bruner, supra*, 9 Cal.4th at p. 1193.) *Bruner*'s rule of strict causation does not apply.

Marquez and *Gonzalez* control the result here.³ Defendant was arrested for all of his crimes on the same day, so his presentence custody was unquestionably attributable to all three cases. The three cases were resolved by a combined plea bargain for a total term of five years.

It is undisputed that defendant had 846 days of presentence credit on the day of sentencing. It is undisputed that since the sentences in the first and second cases were consecutive, those 846 days could be assigned *either* to the first or to the second case, but not to both. (Former § 2900.5, subd. (b).) Assigning them to the one-year sentence imposed in the second case, however, resulted in 481 days of "dead time." This contravened *Marquez*. The 846 days should have been assigned to the four-year sentence imposed in the first case. (*Marquez, supra*, 30 Cal.4th at pp. 22-23; *Gonzalez, supra*, 138 Cal.App.4th at pp. 253-255.)

³ We are not persuaded by the Attorney General's attempt to distinguish *Marquez* and *Gonzalez* on grounds that defendant's three cases were never consolidated and "nothing in the record supports the inference this was 'a package deal.'" She does not explain why formal consolidation (or the lack thereof) matters, and we do not think it does. *Marquez*'s two cases were not consolidated. The outcome in *Gonzales* did not turn on the incident of formal consolidation. As to the Attorney General's second point, we think the record supports an inference that the cases here were resolved in a package deal. At plea hearing, the court referred to a single "negotiated disposition" for a "total term" of five years. The probation report makes several references to a "[t]otal fixed term of 5 years in state prison in all cases." At sentencing, the prosecutor stated that she was "prepared to submit on the five-year stipulated prison term."

III. Disposition

The judgment is modified to reflect 564 “actual” and 282 “good time/work time” credit in the first case, zero “actual” and zero “good time/work time” in the second case, and 564 “actual” and 282 “good time/work time” credit in the third case. As modified, the judgment is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.