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

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN RENEE BEDFORD,

Defendant and Appellant.

H037165

(Santa Cruz County

Super.Ct.No. F18843)

This case comes to this court for the second time. Originally, the case came to this court on review pursuant to *People v. Wende* (1979) 25 Cal.3d 436 in H036523. While the case was pending, however, appellant filed a motion to correct presentence conduct credits in the Santa Cruz County Superior Court. This appeal arises from the partial denial of that motion.¹ For reasons that follow, again, we affirm the judgment.

*Facts and Proceedings Below*²

According to Jane Doe,³ on the evening of February 22, 2010, she encountered appellant and an unknown white male at the Santa Cruz Metro bus station. When a bus arrived, appellant and the unknown male followed her onto the bus and sat down next to her. The unknown male told Jane that he wanted to have sex with her.

¹ On this court's own motion, we have taken judicial notice of the record in H036523.

² We take the facts from our opinion in H036523.

³ We refer to the victim in this case as Jane Doe to protect her anonymity.

Jane got off the bus near her home. Soon after she arrived home, appellant and the unknown male knocked at her door. They asked to use the restroom; Jane allowed them into her home. While there, appellant and the unknown male ate her food, used her cellular telephone and proceeded to smoke marijuana and methamphetamine. Jane overheard them talking about taking her money and jewelry. She became fearful and locked herself in her bedroom. When she came out, the unknown male forced her back into the bedroom and raped her at knife point. Soon after, appellant and the unknown male left.

The following morning, when Jane was letting out her cat, appellant and the unknown male jumped over her patio fence. The unknown male forced her into the bedroom by holding a knife to her face. He forced her onto her back and sat on top of her as he covered her mouth with his hand; he demanded she give him her money and cellular telephone. In the meantime, appellant went into Jane's living room and took her purse, cellular telephone, charger, \$20 in cash and her Wells Fargo bank card. Appellant and the unknown male fled on foot.

The Santa Cruz County District Attorney charged appellant with one count of forcible rape while acting in concert (Pen. Code, § 264.1, count one), two counts of first degree burglary (Pen. Code, §459, counts two and three) and one count of first degree robbery (Pen. Code, § 211, 212.5, subd. (a), count four).

Pursuant to a negotiated disposition, appellant entered a written plea to one count of first degree burglary (§ 459),⁴ which had been charged as count two in the information filed March 26, 2010. Count two of the information alleged that appellant had committed the crime of "FIRST DEGREE BURGLARY, PERSON PRESENT, in violation of PENAL CODE SECTION 459, a Felony." A subsequent paragraph of the information informed appellant that the offense "is a serious felony within the meaning of Penal Code

⁴ All undesignated section references are to the Penal Code.

section 1192.7(c) and a violent felony within the meaning of Penal Code [section] 667.5(c)." Yet another succeeding paragraph informed appellant "It is further alleged that the above offense is a violent felony within the meaning of Penal Code 667.5(c) in that another person, other than an accomplice, was present in the residence during the commission of [count two]."

In the plea form that appellant initialed and signed, appellant acknowledged that by pleading guilty or no contest to a serious or violent felony he understood that "jail or prison conduct/worktime credit [he] may accrue will not exceed 15%." In exchange for his plea, appellant was promised that he would be admitted to probation or would receive the "lid" of two years in state prison, and the remaining counts would be dismissed at sentencing.

On October 29, 2010, the court suspended imposition of sentence and granted appellant probation. The court ordered that appellant enter and successfully complete at least one year in the Jericho residential drug treatment program. The court imposed various fines and fees including an \$800 restitution fund fine pursuant to section 1202.4.

Subsequently, on December 3, 2010, the probation department filed a probation hold (§ 1203.2) in which it was alleged that appellant had left the drug treatment program.

On January 20, 2011, following a contested probation revocation hearing, appellant was found to have violated his probation. Specifically, the court found that appellant had willfully and intentionally violated his probation by leaving the drug treatment program. The court sentenced appellant to four years in state prison on the underlying crime. The court imposed various fines and fees and awarded appellant 312 days of custody credits, but only 46 days of conduct credits pursuant to section 2933.1, subdivision (c).

Appellant filed a timely notice of appeal on January 24, 2011.

Appellant's counsel filed an opening brief in which no issues were raised and asked this court for an independent review of the record as required by *People v. Wende*, *supra*, 25 Cal.3d 436. On November 14, 2011, after reviewing the entire record for error, this court filed an opinion in which we found that there were no meritorious issues on appeal.

As noted, before we filed our opinion, on June 24, 2011, appellant filed a motion to correct presentence custody credits in the Santa Cruz County Superior Court. In his motion, appellant argued that the trial court erroneously calculated his conduct credits under section 2933.1, and in so doing limited his conduct credits to 15 percent. In essence, appellant asserted that the limit on conduct credits in section 2933.1 did not apply to him because his current conviction did not qualify as a violent felony. Appellant based this argument on the premise that he did not admit that another person, other than an accomplice, was present in the residence during the commission of the burglary.⁵

On July 5, 2011, the motion was scheduled to be heard, but the court continued the matter to allow the People to submit a response to appellant's motion. On July 15, 2011, at the continued hearing, the court noted that the written plea form that appellant had signed indicated that appellant was pleading to a strike and the preliminary hearing

⁵ Appellant requested that he be awarded one extra day of actual credit. He asserted that there were 263 days between and including the arrest date of February 26, 2010, and the date on which he commenced the Jericho treatment program (November 15, 2010); and 50 days between and including the date he was returned to jail pursuant to the probation hold (December 2, 2010) and the date the trial court found him in violation of his probation (January 20, 2011). These calculations are correct as far as they rely on those dates. However, as appellate counsel conceded in his *Wende* brief in H036523, the record is "ambiguous as to whether" appellant "was arrested on December 2, 2010 or on December 3, 2010." At the hearing on appellant's motion to correct credits, it appears that the People conceded that appellant was arrested on December 2, 2010; however, there is no evidence in the record to support that concession. We will, nevertheless, accept the People's concession and agree that appellant should be awarded 313 days of actual credit. This change in actual days does not change the conduct credits awarded pursuant to section 2933.1; for the purposes of custody credits 15 percent of 313 is still 46 days.

transcript, which the court had read, showed that there was a person "present in the residence other than [appellant]." ⁶

Discussion

15 Percent Restriction on Custody Credits

Appellant argues that his conduct credits must be awarded pursuant to section 4019 and not pursuant to section 2933.1 because he was not convicted of a violent felony.

Initially, the People respond that this court's opinion in H036523 precludes appellant from raising this claim. The People assert that the law of the case doctrine applies in this case.

Certainly, "the law-of-the-case doctrine 'prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 441.) Thus, "[W]here an appellate court states a rule of law necessary to its decision, such rule " 'must be adhered to' " in any " 'subsequent appeal' " in the same case, even where the former decision appears to be " 'erroneous' " " [Citations.]" (*Ibid.*)

Without doubt, this court considered the award of custody credits in determining that there were no meritorious issues on appeal in H036523. Nevertheless, because appellate counsel filed a *Wende* brief in which no issues were raised, or even suggested to guide our review, and appellant did not file a supplemental letter brief placing his custody credit award at issue, we were not required pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, to reflect any contentions raised and the reasons that they failed. (*Id.* at p. 120.) Accordingly, we did not state "a rule of law" necessary to our conclusion that no meritorious issues existed in the case. We will, therefore, address this issue.

Under section 2900.5, a defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody before sentencing.

⁶ On January 20, 2012, we granted the People's motion to augment the record with the transcript from the preliminary examination.

(§ 2900.5, subd. (a).) A defendant also may earn additional "conduct credit" for willingness to work and for good behavior. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Section 4019 is part of a statutory scheme authorizing credits for time spent in presentence custody. Section 4019 is one of several "separate and independent credit schemes for presentence and postsentence custody" related to felony sentencing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Thus, "[e]veryone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct. (§§ 2900, subd. (c), 2900.1 2900.5, subds. (a), (b).)" (*Ibid.*) Hence, section 2900.5 gives credit for the actual days spent in presentence custody, in addition to any section 4019 credits.

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in presentence custody or one third off their sentence. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [section 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence custody credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits or approximately one-half off a defendant's sentence) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared these September 28,

2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.) At the same time, the Legislature amended section 2933, subdivision (e), to provide one day of conduct credit for each day a defendant spends in custody prior to incarceration in state prison. (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010; § 2933, subd. (e)(1) [prisoner shall have one day deducted from his or her period of confinement for every day he or she served in a county jail].)⁷ Similar to the January 2010 amendment to section 4019, however, defendants who were required to register as sex offenders, were committed for a serious felony, or had a prior conviction for a serious or violent felony were not entitled to the enhanced rate for accrual of conduct credit. (Stats. 2010, ch. 426, § 1.)

That being said, section 2933.1, subdivision (c) provides "*Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).*" (Italics added.) A person specified in subdivision (a) of Penal Code section 2933.1 is "*any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5.*" (Italics added.) Relevant here, subdivision (c) of section 667.5 states, "For the purpose of this section, 'violent felony' shall mean any of the following: . . . [¶] (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary."

⁷ Penal Code Section 2933 has been amended again. (Stats. 2011–2012, 1st Ex.Sess., ch. 12, § 16, eff. Sept. 21, 2011.) In this decision, "section 2933" refers to the statute made effective on September 28, 2010.

Accordingly, appellant's presentence conduct credits were subject to the limitation in section 2933.1 only if it was charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

Here, there is no question that in the information the People did charge that a person was present in the residence during the commission of the burglary. The " 'charged and proved' " terminology of section 667.5 "safeguard[s] the defendant's right to notice of the facts the prosecution intends to prove as well as the due process requirement that the People actually prove the facts required either for imposing an increased penalty or for making decisions regarding the severity of the sentence" (*People v. Garcia* (2004) 121 Cal.App.4th 271, 278-279.) " '[T]he purpose of the charging document is to provide the defendant with notice of the offense charged. [Citation.] The charges thus must contain in substance a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense or in any other words sufficient to afford notice to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense.' " (*People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936.) The information identified the conduct at issue as well as the specific statutory provisions the prosecution contended were at issue. Further, the transcript of the preliminary hearing here details the conduct the prosecution was contending constituted the burglary with which appellant was charged; the prosecution presented evidence that the victim was in the residence at all times when appellant and his accomplice were there. Thus, the preliminary hearing transcript detailed the conduct that the prosecution contended constituted the statutory violations.

As to who may make a special finding that a non-accomplice was present during the commission of the offense, "just as determining whether a prior conviction is a serious or violent felony for purposes of the 'Three Strikes' law is within the province of the trial court [citation] so too determining whether a defendant's current conviction for

first degree burglary is a violent felony for the purpose of calculating presentence conduct credits is properly part of the trial court's traditional sentencing function." (*People v. Garcia, supra*, 121 Cal.App.4th at p. 274.)⁸

Undoubtedly, the plea form that appellant signed indicated that he was pleading to count "2 PC 459: Burg 1st." Nonetheless, just as the original sentencing court explicitly found,⁹ at the hearing on appellant's motion to correct his custody credit award, the court found that a person other than an accomplice was present in the residence during the commission of the burglary. We reject appellant's assertion that the trial court was not entitled to make its own independent determination as to whether the burglary constituted a violent felony because this was a plea bargain to only a first degree burglary count. When appellant pleaded, he pleaded guilty/no contest to count two, which, as noted, was a first degree burglary charge with the allegation that a person other than an accomplice was present in the residence during the commission of the offense. Nothing in the record supports the conclusion that the prosecutor moved the court to strike this

⁸ In *People v. Garcia, supra*, 121 Cal.App.4th 271, the defendants argued they were entitled under *Apprendi v. New Jersey* (2000) 530 U.S. 466 to a jury determination of whether their current offense was a violent felony for purposes of subdivision (a) of section 2933.1. (*People v. Garcia, supra*, 121 Cal.App.4th at p. 276.) The court rejected this argument, stating: "Contrary to Garcia and Castillo's contention, section 2933.1, subdivision (c)'s limitation on presentence conduct credits is not a sentencing enhancement and does not operate to increase the maximum six-year penalty prescribed for first degree burglary. [Citation.] Rather, the provisions for presentence conduct credits function as a sentence 'reduction' mechanism outside the ambit of *Apprendi*. [Citations.] The limitation on conduct credits for defendants convicted of violent felonies represents a legitimate policy decision by the Legislature to provide greater protection to the public from dangerous offenders who might otherwise be paroled at an earlier date. [Citation.] Lessening the 'discount' for good conduct credit does not increase the penalty beyond the prescribed maximum punishment and therefore does not trigger the right to a jury trial identified in *Apprendi*." (*People v. Garcia, supra*, 121 Cal.App.4th at p. 277.)

⁹ In sentencing appellant after the probation revocation hearing, the court found that appellant was present when "another person . . . raped the victim in this case"; and appellant "stole the victim's belongings while she was in the bathroom [*sic*]."

allegation.¹⁰ Moreover, at the initial sentencing hearing, when discussing appellant's custody credit award, the prosecutor pointed out that appellant had pleaded to "a violent strike." Appellant's plea to count two was as charged.¹¹ The fact that defense counsel did not contest the prosecutor's statement, and did not object when the court awarded credits "pursuant to 2933.1" further reinforces our conclusion that appellant pleaded to count two as charged.

Accordingly, we turn to the issue of whether the trial court's finding was supported by substantial evidence. "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *People v. Reilly* (1970) 3 Cal.3d 421, 425.) Reversal on the basis of insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conclusion of the trier of fact]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) In assessing the sufficiency of the evidence, we consider both the evidence presented as well as all reasonable inferences we can deduce from the evidence. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204.)

"The plain meaning of 'present in the residence' is that a person, other than the burglar or an accomplice, has crossed the threshold or otherwise passed within the outer walls of the house, apartment, or other dwelling place being burglarized." (*People v.*

¹⁰ In fact the record reinforces the conclusion that appellant was pleading to a violent felony; as the prosecutor pointed out to the court at the July 5, 2011 hearing, when he spoke to appellate counsel, appellate counsel "indicated that he had recently received an email trail between the district attorney's office and defense counsel, which . . . makes it pretty clear that [appellant] was indeed pleading to a violent felony." Appellate counsel, who was present in the courtroom acting as trial counsel, did not dispute this statement.

¹¹ On this court's own motion we had the record augmented with the minute order from the September 2, 2010 plea hearing. The minute order indicates that appellant "pleads GUILTY to Ct(s) 2."

Singleton (2007) 155 Cal.App.4th 1332, 1337.) Appellant stipulated that a factual basis for his plea to count two could be found in the preliminary hearing transcript; and a guilty plea admits every element of the charged offenses. (*People v. Wallace* (2004) 33 Cal.4th 738, 749.)

The preliminary hearing transcript overwhelmingly establishes that Jane was present in her home on February 22, 2010, during the burglary charged as count two. When interviewed by police after the incident, appellant even admitted "they were all three of them at the house." Since the record establishes that Jane was inside the house when appellant burglarized her house, rendering his burglary conviction a violent felony under section 667 .5, subdivision (c)(21), the court properly limited his presentence conduct credits under section 2933.1.

Equal Protection

Appellant argues that pursuant to equal protection principles, the amendment to section 4019 effective October 1, 2011, must be retroactively applied to him. Appellant asserts that he is entitled to presentence jail credits of four days for every two days that he served under the amended versions of Penal Code sections 2933 and 4019 that became effective October 1, 2011.

Certainly, effective October 1, 2011, again, the Legislature amended sections 4019 and 2933. In so doing, the amendment to section 4019 deleted conduct credit restrictions imposed on defendants with prior serious or violent felony convictions, those committed for serious felonies, and persons required to register as sex offenders. (Stats. 2011, ch. 15 § 482, Stats 2011-2012, ch.12, § 16.) These statutory changes reinstated one-for-one conduct credits. (§ 4019, subds. (b), (c).) However, the new statute applies only to crimes that were "committed on or after October 1, 2011." (§ 4019, subd. (h).)

As noted *ante*, however, appellant's presentence jail credits are limited to 15 percent of his actual time served pursuant to section 2933.1. This section applies "Notwithstanding any other law" (§ 2933.1, subd. (a).) Accordingly, appellant

cannot raise an equal protection challenge here. " 'One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is *actually* aggrieved by its operation.' [Citation.]" (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212, italics added.) Simply put, the record must contain evidence showing that appellant is actually aggrieved by the law he attacks. (*People v. Black* (1941) 45 Cal.App.2d 87, 96.) Since appellant's credits were awarded under section 2933.1 and not section 4019, he cannot sustain an equal protection challenge to section 4019 here.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.