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

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MICHAEL HALL,

Defendant and Appellant.

H037318

(Santa Clara County
Super. Ct. No. B1051508)

In a negotiated disposition, defendant David Michael Hall pleaded no contest to three felony drug possession counts (Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a)) and admitted allegations that he had suffered a prior “strike” conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12)¹ and served two prior prison terms (§ 667.5, subd. (b)). The trial court denied his *Romero* motion² and sentenced him to 32 months in prison. The court awarded 218 days of presentence custody credit “plus 108 days pursuant to [section] 4019, for a total of 326 days.”

On appeal, defendant challenges the amount of conduct credit that the court awarded. He claims (1) that he was entitled to an additional 110 days of conduct credit because his juvenile adjudication for robbery (§ 211) was not a “conviction” under

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

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

former section 2933's statutory exception to one-for-one credit, and (2) that the failure to award him one-for-one credit retroactively under the October 1, 2011 version of section 4019 violated his right to equal protection. We conclude that his first contention has merit.³ We modify and affirm the judgment.

I. Background

The details of defendant's crimes are irrelevant to the issues he raises on appeal, so we need not recount them. He committed his crimes on December 24, 2010. Arrested that same day, he spent 218 days in presentence custody. The felony complaint specially alleged that he had suffered two prior juvenile adjudications for robbery (§ 211) and served two prior prison terms, for assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1)) and for transportation and/or sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). One of the juvenile adjudication allegations was stricken on the district attorney's motion (§ 1385). Defendant admitted the remaining allegations.

At sentencing, the only discussion about presentence credit occurred when the probation officer asked, "May I provide the credits, please?" She informed the court that defendant had "218 actual days plus 108 calculated at one-third time, for a total of 326." The court awarded "218 actual days plus 108 days pursuant to PC 4019, for a total of 326 days." Defendant filed a timely notice of appeal.

II. Discussion

Defendant claims he was entitled to an additional 110 days of presentence conduct credit because his juvenile adjudication for robbery (§ 211) was not a "conviction" under

³ As this conclusion renders defendant's second contention moot, we need not address it.

former section 2933's statutory exception to one-for-one credit, and he had no other "serious" or "violent" felony convictions (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19)) that would make the exception applicable. The Attorney General concedes the merit of defendant's position. She argues, however, that his claim constitutes "a challenge that affects the validity of his no contest pleas," which is not properly before us because defendant failed to obtain a certificate of probable cause (§ 1237.5). She also argues that defendant forfeited his claim by failing to raise it in the trial court. We reject both contentions.

The record does not support the Attorney General's first contention. Purporting to quote from the record, she argues that "[a]t the time of his no contest plea, [defendant] signed a waiver of rights form and initialed the following pertinent agreements: [¶] 28. I understand that jail or prison conduct/work-time credit I may accrue will not exceed 15%. [based on a] ONE PRIOR STRIKE CONVICTION — if *Romero* denied. [¶] 29. I understand that if I am admitting that I have suffered a prior strike conviction, I will not be eligible for probation and I am subject to a mandatory state prison sentence of twice the term otherwise provided, with a maximum sentence of 32 months, if *Romero* denied [¶] 30. I understand that if I am admitting that I have suffered a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment. [¶] * * * [¶] 32. I understand that if I am admitting that I have suffered two or more prior strike convictions, I am ineligible to receive prison work-time credits."

This statement by the Attorney General misquotes and mischaracterizes the record in a number of respects. We begin with paragraph 28 of the waiver form, which in fact says only, "I understand that jail or prison conduct work-time credit I may accrue will not exceed 15%." The extra language that the Attorney General added to that paragraph is not, in fact, a part of it. More importantly, *defendant did not initial Paragraph 28*; the box for initials after that paragraph instead contains an X. Based on other paragraphs that

have X's in the signature boxes (e.g., Paragraph 53, which begins "(Only if you are NOT represented by an attorney)," it is clear that each X was intended to signify that the particular paragraph was not part of the plea agreement.

Proceeding to paragraph 29, the record in fact reads as follows. The printed heading above paragraphs 29 and 30 is "ONE PRIOR STRIKE CONVICTION." A handwritten addition to that heading says "—IF *Romero* denied." Paragraph 29 states (with handwritten portions designated by italics), "I understand that if I am admitting that I have suffered a prior strike conviction, I will not be eligible for probation and I am subject to a mandatory state prison sentence of twice the term otherwise provided, with a minimum sentence of *32 months if Romero denied* and a maximum of *32 months (pursuant to plea)* in the state prison." Defendant initialed the box after paragraph 29. He also initialed the box after paragraph 30, which the Attorney General correctly quotes. *He did not initial* the box after paragraph 32, which the Attorney General correctly quotes while neglecting to mention that it appears under a different heading—"TWO OR MORE PRIOR STRIKE CONVICTIONS."

Contrary to the Attorney General's assertion, the waiver form that defendant signed reflects no agreement about *presentence* credit. On the page of the form that the Attorney General cites, defendant simply acknowledged his understanding that "the maximum sentence for the charges to which I am pleading guilty or no contest is 10 years and 8 months." On the same page, he further acknowledged that "[m]y attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charge(s) and admit the allegation(s) listed above, the court will sentence me as follows: [¶] a. State Prison for 32 months SP TOP; defense to run *Romero*." Several pages later, after the heading "ONE PRIOR STRIKE CONVICTION" on the form, the handwritten addition "—IF *Romero* denied" appears. In the paragraph immediately below that heading, defendant acknowledged his understanding that "if I am admitting that I have suffered a prior strike conviction, I will not be eligible for probation and I am subject to a

mandatory state prison sentence of twice the term otherwise provided, with a minimum sentence of 32 months if *Romero* denied and a maximum of 32 months (pursuant to plea) in the state prison.” In the following paragraph, defendant acknowledged his understanding that “if I am admitting that I have suffered a prior strike conviction, *prison* work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.” (Italics added.) The waiver form cannot be read as limiting defendant’s credit for presentence jail time.

There was no discussion about presentence credit at the plea hearing. Before taking defendant’s pleas, the court clarified the parties’ understanding. “[M]y understanding is that [defendant] will enter a plea of guilty or no contest as charged. He will admit all remaining allegations in return for a sentence of 32 months in the state prison, top-bottom. [¶] However, this is without prejudice to running a *Romero* motion. . . . [¶] If the *Romero* motion is successful, [defendant] may be sentenced by the Court to the state prison for a term of 16 months or two years or the Court also will have an option of placing [defendant] on probation; in which case, he may be required to serve up to one year in the county jail as a condition of probation. [¶] Is that the understanding of the parties?” Defendant and both counsel responded that it was.

The court then addressed defendant, and the following colloquy occurred: “THE COURT: Okay. [¶] If your *Romero* motion is denied, then it’s 32 months, top-bottom, in the state prison. Do you understand that? [¶] [DEFENDANT]: Yes, Your Honor. [¶] THE COURT: And if I grant your *Romero* motion, I can still sentence you to prison, but that will be for either 16 months or two years. Do you understand that? [¶] [DEFENDANT]: Yes, Your Honor. [¶] . . . [¶] THE COURT: And, Mr. Hall, this is very important, and that is I make no promises to you or to the People as to the outcome of the *Romero*. I will keep an open mind and then make my decision. Do you understand that? [¶] [DEFENDANT]: Yes, I do, Your Honor.” Presentence credit was never mentioned at the plea hearing, and we find nothing in the hearing transcript to suggest

that any limitation of presentence credit was a part of the bargain. Defendant's appeal cannot properly be characterized as an attempt to alter the terms of the plea agreement.

The Attorney General's second contention, that defendant forfeited his claim by failing to raise it in the trial court, also lacks merit. As the California Supreme Court explained in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*) "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its *discretionary* sentencing choices." (*Id.* at p. 353, italics added.) "Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Ibid.*) The rule does not apply to nondiscretionary sentencing choices. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Id.* at p. 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstances in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*Ibid.*)

An incorrect award of presentence credit results in an unauthorized sentence that can be corrected at any time. (*People v. Shabazz* (1985) 175 Cal.App.3d 468, 473-474 ["Whether appellant was entitled to credit under the facts found was a question of law as to which the court had no sentencing discretion. . . . Including the credits in appellant's sentence resulted in a sentence which was not authorized by law, and which therefore could be corrected at any time when brought to the attention of the court."]; *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818-819 [denying writ relief; holding that the superior court properly set aside its original order "*reducing* Wilson's prison sentence by allowance of conduct credits contrary to the law" even though the time for appeal or

review by extraordinary writ had passed].) Here, the essence of defendant's claim is that the sentence the court imposed was unauthorized. His failure to raise the issue below does not preclude him from raising it here. (*Scott, supra*, 9 Cal.4th at pp. 353-354.)

Proceeding to the merits of defendant's claim, we find the Attorney General's concession appropriate. The version of section 2933 in effect during defendant's entire presentence incarceration provided that "[n]otwithstanding section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison . . . for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served . . . from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426, § 1.) The statute excepted from its one-for-one credit scheme any prisoner required to register as a sex offender, committed for a "serious felony," or with a prior conviction for a "serious" or "violent" felony. (Former § 2933, subds. (e)(3).) It provided that former section 4019, not section 2933, applied to those prisoners. (Former § 2933, subd. (e)(3).)

Section 2933 had been amended by Senate Bill No. 76 in September 2010. (Stats. 2010, ch. 426, § 1.) The same bill also amended section 4019. (Stats. 2010, ch. 426, § 2.) Under the 1982 version of section 4019, prisoners were eligible to earn six days' credit for each four days actually served—in effect, a ratio of three days earned for every two served. (Former § 4019, subds. (b), (c), (f); Stats. 1982, ch. 1234, § 7.) A January 25, 2010 amendment made prisoners eligible for four days' credit for every two days served—in effect, a ratio of two days earned for every one served. (Former § 4019, subds. (b)(1), (c)(1), (f), as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) The September 28, 2010 amendment restored the former three-for-two ratio for prisoners who committed their crimes on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.) The probation department and the trial court calculated defendant's presentence conduct credit under this version of section 4019, awarding him 108 days

instead of the 218 he would have received had his conduct credit been calculated under former section 2933.

But former section 4019 did not apply here, because defendant did not come within any of the exceptions to former section 2933's one-for-one conduct credit scheme. He admitted three priors—one for robbery (§ 211), one for assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1)), and one for transportation and/or sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). Robbery is both a “serious” and a “violent” felony. (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) But defendant committed the robbery as a juvenile, and a prior juvenile adjudication is not a prior *conviction* within the meaning of the conduct credit statutes. (*People v. Pacheco* (2011) 194 Cal.App.4th 343, 346 (*Pacheco*).) Defendant's robbery adjudication did not render him ineligible for one-for-one credit under former section 2933. (Former § 2933, subd. (e)(3); *Pacheco*, at p. 346.)

Defendant also had a prior conviction for violating former section 245, subdivision (a)(1), which punished assault with a deadly weapon *or* “by means of force likely to produce great bodily injury.” (Former § 245, subd. (a)(1).) Assault with a deadly weapon is a “serious felony” (§ 1192.7, subd. (c)(31)), but assault by means of force likely to produce great bodily injury is not. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1063, 1065 (*Delgado*).) Defendant was convicted of the latter crime. His former section 245, subdivision (a)(1) conviction did not make him ineligible for one-for-one credit either. (*Delgado*, at p. 1065.)

Defendant also had a prior conviction for transporting or selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)). That crime is a “serious felony” only if the controlled substance is sold to a minor. (§ 1192.7, subd. (c)(24).) The Attorney General does not contend, and nothing in the record suggests, that defendant's conviction involved a minor. Thus, none of the former section 2933, subdivision (e)(3) exceptions applied here. It follows that the trial court erred in calculating defendant's

conduct credit under former section 4019. Defendant should have received one-for-one conduct credit under former section 2933.

III. Disposition

The judgment is modified to reflect 218 “actual,” 218 (not 108) “local conduct,” and 436 (not 326) “total credits.” The judgment is further modified to delete the check mark in the box labeled “4019.” The trial court shall prepare an amended abstract of judgment reflecting these modifications and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.