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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO COTA BECERRA,

Defendant and Appellant.

H037373

(Monterey County

Super. Ct. No. SS101773)

Mario Cota Becerra, the defendant herein, suffers from a form or forms of schizophrenia. His mental condition may have been an impetus to a history of stealing from people. In the current case, he pleaded no contest to second degree robbery. (Pen. Code, §§ 211, 212.5, subd. (c).) On appeal, he claims that confining him in state prison is unconstitutional given his mental illness. He also claims that the trial court committed errors regarding his presentence credits.

We will modify the judgment with respect to defendant's presentence credits, and as so modified will affirm it.

FACTS AND PROCEDURAL BACKGROUND

On July 22, 2010, defendant jumped over the counter of a pizza parlor, pushed an employee aside, and took \$27 from the cash register. A medical doctor appointed to assess his competence to stand trial (Pen. Code, §§ 1368 et seq., 4011.6) found him unable to do so. Under treatment with psychotropic medications, defendant's condition

improved, and eventually he pleaded no contest to second degree robbery. He was given a three-year prison sentence but placed on probation. Thereafter a probation violation petition was filed against him, alleging failure to keep an appointment with his doctor and to take his psychotropic medications. The trial court revoked his probation and, over counsel's objection that defendant was sufficiently mentally ill that committing him to prison would violate the Eighth Amendment, imposed the prison sentence.

DISCUSSION

I. *Eighth Amendment Claim*

Defendant renews his claim that confining him in a California prison under current conditions violates his right to be free of cruel and unusual punishments under the Eighth and Fourteenth Amendments to the United States Constitution.

Defendant relies on *Brown v. Plata* (2011) 563 U.S. ___ [131 S.Ct. 1910], which concluded that the mental health care provided to California prison inmates violated the Eighth Amendment. "The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This . . . requires . . . a reduction in overcrowding." (*Id.* at p. ___ [131 S.Ct. at p. 1947].)

The record offers no indication, however, that the conditions that led to the *Brown* decision remain. As noted, the high court linked inadequate mental health care to overcrowding. The state thereafter enacted the so-called realignment legislation to eliminate overcrowding. The initiative has reduced overcrowding. "Quarterly figures released by the California Department of Corrections and Rehabilitation . . . show that during the first 8 months of Assembly Bill 109's . . . implementation, commonly referred to as 'realignment,' there has been a 41% reduction in new prison admissions as of March 31, 2012, and a drop of 28,300 in the prison population as of May 31, 2012." (UPDATE: Eight Months into Realignment: Dramatic Reductions in California's Prisoners, Center on Juvenile and Criminal Justice (June 2012), available at http://www.cjcj.org/files/Realignment_update_June_19_2012.pdf, as of Dec. 21, 2012.)

In addition, the high court’s conclusions regarding generally inadequate mental health care in prison do not establish as a matter of law that defendant himself will suffer behind prison walls. On direct appeal, we are limited to the four corners of the record, and defendant does not advise us of anything in the record that might support his claim that his own care will be unconstitutionally deficient. There are too many imponderables for his appeal to succeed. (See *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 534-535 [rejecting contention that prominent individual’s imprisonment would violate Eighth Amendment’s cruel and unusual punishments clause; nothing in the record suggested that other inmates would necessarily be able to torment the prisoner, given the availability of special security measures], disapproved on other grounds in *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3, with *Norrell* in turn superseded by statutory amendment as described in *People v. Kramer* (2002) 29 Cal.4th 720, 722.) After defendant reaches state prison, we presume his mental condition will be evaluated.¹ He might then be prescribed the same medication that enabled him to understand the

¹ Section 3075.1 of title 15 of the California Code of Regulations, titled “Intake Processing,” provides:

“(a) A CDC Form 188-L (Rev. 3/89), Cumulative Case Summary, shall be prepared for each inmate committed to the department [i.e., the California Department of Corrections and Rehabilitation] and shall include:

“[¶] . . . [¶]

“(5) A psychiatric/psychological evaluation, when completed pursuant to (c) below.

“[¶] . . . [¶]

“(b) Information affecting an inmate’s conditions of confinement or parole and sentence shall be solicited from sources outside the department, with or without the inmate’s consent, and shall include California Youth Authority commitment history within the last five years and history of any federal, state or local commitment.

“(c) A psychiatric or psychological evaluation shall be prepared for each inmate whose behavior or background information causes staff to believe a serious mental problem may exist.”

criminal proceedings against him and rationally assist in his defense (see Pen. Code, § 1367 et seq.) after his initial inability to do so. In that case, even if *overall* care for the mentally ill remains inadequate in the prison system since the time the United States Supreme Court issued its opinion, defendant's *individual* mental condition might be under control and he might not be affected by any such deficiency.

Although “[a]n appeal is ‘limited to the four corners of the [underlying] record on appeal,’ ” “[h]abeas corpus is not.” (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1.) “ ‘[H]abeas corpus may be sought by one lawfully in custody for the purpose of vindicating rights to which he is entitled in confinement.’ [Citations.] Those rights include not only statutory or constitutional violations, but also violations of administrative regulations.” (*Gomez v. Superior Court* (2012) 54 Cal.4th 293, 309, fn. 10.) Should defendant or others perceive that defendant is receiving constitutionally inadequate medical care while in prison, defendant is not foreclosed from petitioning for a writ of habeas corpus.

II. *Presentence Conduct Credits*

On April 8, 2011, the trial court sentenced defendant to probation. On May 11, 2011, the authorities arrested defendant and placed him in jail. On September 9, 2011, the court revoked defendant's probation and committed him to state prison. These facts led to a series of complicated calculations regarding presentence credit. Defendant claims in essence that the court erred in granting excessive conduct credit on April 8, doing so by incorrectly including time he spent at Atascadero State Hospital. As a result, he claims, the court erroneously took the 390-day total it calculated and reduced it to 365 days pursuant to a waiver defendant had executed. During the April 8 proceedings, the court concluded that in order to apply the cap, it had to reduce defendant's 260 days of actual custody to 245 days. Defendant claims that this was a miscalculation, made possible by the court's erroneous inclusion of his time at Atascadero State Hospital within the 365-day cap he agreed to.

At the time of the original sentencing on April 8, 2011, defendant had served 260 days in custody, 196 of them in county jail and 64 at the Atascadero State Hospital. For all of these days, he is entitled to custody credit. (Pen. Code, § 2900.5, subd. (a).) At that time, the trial court granted 130 days of conduct credit, for a total of 390 days of presentence credit. (Pen. Code, former § 4019, subds. (b)(2), (c)(2), (f); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010 [version in effect from Jan. 25 to Sept. 27, 2010, including July 22, 2010, when defendant committed the robbery].)

During the same proceeding, defendant agreed to forgo any right he might have to presentence credits in excess of 365 days. (See *People v. Lara* (2012) 54 Cal.4th 896, 903, fn. 3; *People v. Black* (2009) 176 Cal.App.4th 145, 152.)

After these proceedings took place, defendant was released on probation. He was rearrested on May 11, 2011, for the probation violations alleged in this case, after spending 32 days out of jail. At the time of his sentencing and commitment to state prison on September 9, 2011, he had spent an additional 122 days in custody. Defendant's prior credit waiver did not apply to those days, however. At the April 8, 2011, dispositional hearing, the court explained, and defendant indicated his understanding, that he was "waiv[ing] . . . credits above 365 days" but that it was a "limited . . . credit waiver," meaning that if he was "confined on a future probation violation [he would] receive credit for any future confinement."

Incorrectly calculating custody credits results in an unauthorized sentence that is correctable at any time. (*People v. Duran* (1998) 67 Cal.App.4th 267, 269-270.)

Defendant is correct that the trial court erred in awarding excessive conduct credits on April 8, 2011, inasmuch as conduct credits were not available for the time he spent at Atascadero State Hospital. Although a state hospital is an institution of confinement for purposes of Penal Code section 2900.5 custody credit, it is not a penal institution for purposes of Penal Code section 4019 conduct credit (*People v. Callahan* (2006) 144 Cal.App.4th 678, 686). Thus, defendant argues, those 64 days should not have been

included in the calculation of conduct credits—they apply only to custody credits under Penal Code section 2900.5.

The People agree that the conduct credit calculation was erroneous because the court should not have considered in that calculation the time defendant spent at Atascadero State Hospital. As noted, if the 64 days spent at Atascadero are excluded, then defendant’s penal custody time was 196 days and, because he was convicted of a serious felony (Pen. Code, § 1192.7, subd. (c)(19)) but was not sentenced to prison at the time, his conduct credit should have been calculated as 98 days, i.e., 50 percent of the 196 days (Pen. Code, former § 4019, subs. (b)(2), (c)(2), (f); Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010 [version in effect from Jan. 25 to Sept. 27, 2010, including July 22, 2010, when defendant committed the robbery]; see *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) Accordingly, his total custody credits at the April 2011 hearing should have been 358 days—the 64 days at Atascadero State Hospital, the 196 days in jail, and the 98 days of conduct credit. This placed him under the 365-day credit cap he agreed to.²

As of September 9, 2011, when the trial court committed defendant to state prison, he had served 382 days in custody: 196 days in jail initially, 122 days in jail following

² Defendant argues that if the cap he accepted impinges on his credits, he did not agree to it knowingly and intelligently. A defendant “may waive presentence credits, including conduct credits, as part of a negotiated disposition.” (*People v. Lara, supra*, 54 Cal.4th 896, 903, fn. 3.) The trial court said, “in order to be placed on probation . . . you are to waive your right to receive credits above 365 days. Do you understand that . . . ?” Defendant replied, “Yes, your Honor.” In similar circumstances, *People v. Black, supra*, 176 Cal.App.4th at pages 152-155, concluded that the defendant had made a knowing and intelligent waiver of Penal Code section 4019 credits. But because we have calculated defendant’s credits to fall below the 365-day limit set by the cap he agreed to, the cap had no effect on his entitlement to credits and there is no need to address his ancillary argument that he did not agree to the cap in a knowing and intelligent manner.

his arrest on May 11, 2011, and 64 days at Atascadero State Hospital. So those are his total custody credits.

The next question is defendant's Penal Code section 2933.1 conduct credits as of September 9, 2011, when, to repeat, the trial court committed him to state prison. These amounted to 318 potential days—the 64 days spent at Atascadero would not count under Penal Code sections 2933.1 or 4019—but defendant's eligibility is reduced to 15 percent of that 318-day amount because second degree robbery is a violent felony and he was sentenced to prison. (*Id.*, §§ 667.5, subd. (c)(9), 2933.1, subds. (a), (c); *People v. Daniels* (2003) 106 Cal.App.4th 736, 739.) Fifteen percent of the 318 days in penal custody amounts to 47 days of conduct credits. Defendant argues that it should be 48 days, but the actual calculation at 15 percent is 47.7 days, and we round this number down (see *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816) because subdivision (c) of section 2933.1 gives violent offenders who are sent to prison presentence credit that “shall not exceed 15 percent.” Adding this amount to the 382 days of custody credit previously calculated results in a total of 429 days of presentence credit, not the 430 days that defendant argues he is entitled to.

DISPOSITION

The judgment is modified to award defendant 382 days of actual custody credit under Penal Code section 2900.5 and 47 days of conduct credit under Penal Code section 2933.1, for total presentence credits of 429 days. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.