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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JARVIS ADAMS,

Defendant and Appellant.

H037475

(Monterey County

Super. Ct. No. SS111342)

Defendant Jarvis Adams pleaded no contest to one count of grand theft (Pen. Code,<sup>1</sup> § 487, subd. (a))<sup>2</sup> and admitted one prior strike conviction (§ 1170.12, subd. (c)(1)). The trial court struck the prior conviction pursuant to section 1385 to avoid having to double the prison sentence. The court refused to strike the strike for purposes of defendant's postsentencing conduct credits. The court also found that defendant was not entitled to presentence custody credit since he had been released from jail the same day he was arrested.

Defendant argues that he is entitled to one day of credit for the partial day he was in custody and, as a result, the trial court should be allowed to decide whether or not to use his strike to limit presentence conduct credit to which he might have been entitled

<sup>1</sup> Further unspecified statutory references are to the Penal Code.

<sup>2</sup> We have taken judicial notice of the record in the prior appeal (*People v. Joseph* (Jan. 28, 2011, H033740) [nonpub. opn.]).

under the law in effect at the time. We accept the first argument only and shall modify the judgment accordingly.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

On July 1, 2011, Home Depot store personnel observed defendant sneaking out a rear door with a number of new power tools in a shopping cart. Defendant fled the scene that day but returned a few days later. Defendant admitted the theft and also admitted he had stolen other items in the past and sold them all on Craigslist. He was arrested on July 5, 2011 and released from custody the same day.

After initially pleading not guilty, defendant agreed to change his plea to no contest and admit the strike “on the condition that he receive the court’s indicated sentence of striking the strike, upper term three years, with the Court exercising its discretion to impose the one-fifth credit limitation under Penal Code section 2900.”

The trial court determined to “strike[] the strike by agreement” and sentenced defendant to the upper term of three years in prison. There was some discussion about whether or not the strike should apply for purposes of calculating section 2900 conduct credits and the court concluded that the strike was “stricken for the purpose of doubling the term only.” The court imposed fines and fees and found presentence custody credits to be “zero.”

## **II. DISCUSSION**

### *A. Presentence Custody Credits*

Defendant first argues that he is entitled, under section 2900.5, to one day of presentence custody credit for the half day he spent in jail following his arrest. Although section 1237.1 requires a defendant to ask the superior court to correct its calculation of presentence custody credits before bringing an appeal on the issue, the rule does not apply if there are other issues that only the appellate court may resolve. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427.) Since defendant has also raised a separate issue

in this case, we shall consider the issue of his presentence custody credit even though he has not raised it in the superior court.

Section 2900.5, subdivision (a), provides, in pertinent part, “In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail . . . all days of custody of the defendant, . . . shall be credited upon his or her term of imprisonment . . . .” These are actual custody credits, not the conduct credits to which the People mistakenly refer. “Since section 2900.5 speaks in terms of ‘days’ rather than ‘hours,’ it is presumed the Legislature intended to treat any partial day as a whole day. [Citation.] . . . Had the Legislature intended otherwise, it could easily have provided for credit on the basis of 24-hour periods instead of days. Thus, the ‘days’ in section 2900.5 must be interpreted to include partial days.” (*People v. King* (1992) 3 Cal.App.4th 882, 886, quoting *People v. Smith* (1989) 211 Cal.App.3d 523, 526.)

The People do not dispute that defendant spent one partial day in custody prior to his sentencing. Accordingly, we shall modify the judgment to award defendant one day of presentence custody credit.

#### *B. Presentence Conduct Credits*

Former section 2933, subdivision (e)(1) provided that a prisoner sentenced to the state prison under section 1170 for whom the sentence was executed was entitled to one-to-one conduct credits for presentence custody but the provision did not apply if the prisoner “has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5.” (Former § 2933, subd. (e)(3); see Stats. 2010 (Reg. Sess.), ch. 426, § 1, pp. 2086-2087, eff. Sept. 28, 2010.)<sup>3</sup> Defendant argues that since he is entitled to credit for time in custody this court should remand the matter

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<sup>3</sup> The provision was subsequently repealed. (Stats. 2011-2012 (1st Ex. Sess.) ch. 12, § 16, pp. 5962-5963.)

for the trial court to exercise its discretion under section 1385 to strike the strike for purposes of this additional credit provision.

As the People correctly point out, the trial court expressly stated that it was striking the strike for purposes of calculating the prison term only. And as defendant also notes, the question whether the trial court could exercise its discretion under section 1385 to strike a strike for purposes of calculating conduct credits was pending before the Supreme Court when the briefs were filed in this case. Since then the Supreme Court has concluded that section 1385 does not permit a court to disregard the historical facts that disqualify a local prisoner from earning day-for-day conduct credits under former section 4019. (*People v. Lara* (2012) 54 Cal.4th 896, 900.) No different rule would apply to the code section at issue here. Accordingly, remand is not warranted.

### III. DISPOSITION

The judgment is modified to add one day of presentence credit for time in actual custody. (Pen. Code, § 2900.5.) As modified, the judgment is affirmed.

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Premo, Acting P.J.

WE CONCUR:

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Mihara, J.

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Márquez, J.