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

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY McCORMICK,

Defendant and Appellant.

H038603

(Monterey County

Super. Ct. Nos. SS110923 &

SS112106)

Defendant Jeffrey McCormick asserts the trial court erred in denying him additional presentence custody credit. Defendant argues he is entitled to dual credits under *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), because his parole was revoked for the same conduct that gave rise to the criminal charges in this case. Defendant also argues he is entitled to additional credits because he was denied effective assistance of counsel, and the trial court erred in its overall calculation of credit.

STATEMENT OF THE FACTS AND CASE

During a surveillance of a residence in January 2011, Monterey Sheriff Deputies stopped defendant while he drove away from the house. Defendant had two detached door panels from a Toyota 4-runner, two backpacks, and burglary tools in the car. A search of the garage of the house under surveillance yielded additional interior car parts, and license plates that had been reported stolen. Inside one of the backpacks found in defendant's car was a credit card belonging to Alicia Hahn. When officers contacted

Ms. Hahn, they discovered she had reported her Toyota 4-runner stolen, and when she recovered it, she found the bumper, door panels and much of the car's interior equipment had been stolen from it. Ms. Hahn identified the Toyota 4-runner parts in defendant's possession as belonging to her car.

In July 2011, defendant was charged by information in case No. SS110923A with possession of stolen property (a vehicle) with a prior conviction for vehicle theft (Pen. Code, § 496d, subd. (a)), possession of stolen property (stolen license plate) (Pen. Code § 496), possession of stolen property (stolen car parts) Pen. Code, § 496, subd. (a)), and dissuading a witness (Pen. Code, § 136.1, subd. (b)(2)). The information also alleged defendant possessed burglary tools as a misdemeanor (Pen. Code § 466), and that defendant had served three prior prison terms (Pen. Code, § 667.5, subd. (b).)

In November 2011, defendant was charged in a complaint in case No. SS112106A with transportation of a controlled substance (Health & Saf. Code, § 11378, subd. (a)), possession of a controlled substance for sale (Health & Saf. Code, § 11378), and use of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). In addition, the complaint alleged defendant committed the offenses while on bail, and that he had served two prior prison terms. (Pen. Code §§12022.1, 667.5, subd. (b).)

In February 2012, defendant entered no contest pleas in both cases. In case No. SS110923A, defendant pleaded no contest to one count of buying or receiving a stolen vehicle with a prior conviction, and admitted having served two prior prison terms. The court sentenced in him six years in prison.

In case No. SS112106A, defendant pleaded no contest to possession of a controlled substance. The court sentenced defendant to two years in state prison, to run concurrent with the six year term imposed in case No. SS110923A.

The probation report filed in this case was related to defendant's custody credits. It stated that defendant violated a term of parole that he not possess credit cards, in

addition to the criminal charges in case No. SS110923A. The report stated that defendant had received credit for time served from January 21, 2011 until May 26, 2011 for the parole violation. The report concluded that defendant was not entitled to credit for case No. SS110923A during the period he was serving time for the parole violation.

DISCUSSION

Defendant asserts the trial court erred in denying him presentence custody credit for the period he was serving a term for a parole violation, because the parole violation, possession of a credit card, was based on the conduct underlying the charges in this case, specifically, the possession of stolen property charge. While the trial court found that there was an independent basis for the parole violation, defendant asserts there is no support in the record for such finding.

In addition, defendant asserts he was denied effective assistance of counsel, because his attorney failed to request he be remanded on SS110923A while he was in custody on SS112106A. Finally, defendant argues that he is entitled to additional credit because the trial court erred in its overall credit calculation.

Dual Credits for Parole Violation

Here, defendant's parole was violated because he "violated a specific term of parole not to possess or have access to credit cards, in addition to being found in violation for the instant case." Defendant asserts that because he was charged with possession of stolen property from Alicia Hahn, and the only credit card that was found in his possession was one belonging to Alicia Hahn, there was no independent basis for the parole violation for having a credit card in his possession. As a result, defendant argues he is entitled to dual credit for the current charges and the parole violation.

Penal Code 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, . . . all days of custody of the defendant, including days served as a

condition of probation in compliance with a court order, . . . shall be credited upon his or her term of imprisonment” However, subdivision (b) specifies, “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. . . .”

In *Bruner, supra*, 9 Cal.4th 1178, 1194, the California Supreme Court acknowledged that it is not always a straightforward matter to determine a defendant’s entitlement to presentence credits under section 2900.5 where multiple proceedings are in play. For that reason, in order “ ‘to provide for section 2900.5 a construction which is faithful to its language, which produces fair and reasonable results in a majority of cases, and which can be readily understood and applied by trial courts’ ” (*id.* at p. 1195), the *Bruner* court developed a rule of strict causation for cases where the same conduct is implicated in multiple proceedings. Thus, the *Bruner* court held that “where 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.” (*Id.* at pp. 1193-1194.) The *Bruner* court approved of a number of decisions which reasoned that a prisoner’s “criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.]” (*Id.* at p. 1191.) To put it another way, “a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period.” (*Ibid.*)

In *Bruner*, the Supreme Court acknowledged the potential unfairness of the strict causation rule it applied, but explained, “it arises from the limited purposes of the credit statute itself. The alternative is to allow endless duplicative credit against separately imposed terms of incarceration when it is not at all clear that the misconduct underlying

these terms was related. . . . [S]uch credit windfalls are not within the contemplation of section 2900.5.” (*Bruner, supra*, 9 Cal.4th at p. 1193, fn. omitted.) Responding to the suggestion a rule of strict causation in these circumstances worked an undue hardship on defendants, the Court noted a “defendant’s burden, while onerous, is not necessarily impossible” (*Id.* at p. 1193, fn. 10.) Thus, a defendant in custody on multiple causes, such as parole violations and new charges, bears the burden of establishing that he is entitled to presentence custody credits. (*Id.* at pp. 1193-1194.)

People v. Stump (2009) 173 Cal.App.4th 1264 (*Stump*) is particularly instructive on the application of *Bruner* to the facts of the instant case. In *Stump*, the defendant was convicted of driving under the influence of alcohol with a prior felony within 10 years (Veh. Code, § 23152, subd. (a)), and driving with a blood-alcohol content of at least .08 percent with a prior felony within 10 years (*id.* subd. (b)). Stump was arrested on July 16, 2006. At the time of his arrest he was on parole with special conditions prohibiting him from, among other things, drinking alcohol or driving without his parole officer’s permission. Stump was found to have violated the terms of his parole not just by committing the two charged offenses, but also for drinking alcohol and not obtaining the permission of his parole officer before driving. (*Stump, supra*, 173 Cal.App.4th at p. 1268.) Stump was arraigned “with respect to the July 16, 2006 incident” on December 20, 2006 and remained in custody through the date of sentencing in May 2008. (*Ibid.*) He was awarded credits for the period of December 20, 2006, through sentencing, but denied credits for the period of his prearraignment custody (i.e., from July 16, 2006, through December 20, 2006). (*Ibid.*)

On appeal, Stump challenged the court’s failure to award credits for his prearraignment custody, asserting that this period, “was ‘attributable to proceedings related to the same conduct for which’ he was convicted” because “there was only one ‘single, uninterrupted, incident of misconduct,’ and ‘. . . a single episode of criminal

behavior may [not] be parsed into separate acts in order to deny the award of credit for revocation custody’ ” (*Stump, supra*, 173 Cal.App.4th at pp. 1268, 1271.)

The court in *Stump* noted that *Bruner* was not “directly on point” because “[t]he decision in [that case], inasmuch as it addressed only a fact pattern with completely unrelated incidents—alleged parole violations and a subsequent cocaine possession—did not address a fact pattern such as the one before us, where all of the acts in question were temporally related.” (*Stump, supra*, 173 Cal.App.4th at p. 1271.) The question presented, the court stated, was “how the *Bruner* ‘but for’ test should be applied when a defendant engages in a course of illegal conduct, such as drunk driving, that encompasses certain independent acts, none of which would be illegal per se, but each of which happens to be a separate ground for a parole violation, such as driving (without parole officer permission), or consuming alcoholic beverages in any amount?” (*Ibid.*)

The court answered that question as follows: “In the case before us, the conduct for which defendant was arrested gave rise to two drunk driving charges (violations of Veh. Code, § 23152, subds. (a), (b)). It is not the case that ‘but for’ a drunk driving charge defendant would have been free of parole revocation custody. He still would have been held for driving, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. Likewise, he still would have been held for consuming alcohol, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. [¶] Penal Code ‘section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the sentence was the *true and only unavoidable basis* for the earlier custody.’ (*Bruner, supra*, 9 Cal.4th at p. 1192.) Here, the conduct of driving under the influence of alcohol, for which defendant was sentenced in the underlying action, was not the ‘only unavoidable basis’ for the custody. The act of driving without permission was a basis for the earlier custody. The act of drinking alcohol, irrespective of driving, was a basis for the earlier custody.

“Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant’s liberty.” [Citation.]’ (*Id.* at p. 1184.)” (*Stump, supra*, 173 Cal.App.4th at p. 1273.)

Here, defendant would not have been free of custody “but for” the criminal charges. Like *Stump*, this is not a case in which the conduct leading to the sentence was the “*true and only unavoidable basis*” for the period of custody in question. (*Bruner, supra*, 9 Cal.4th at p. 1192.) Defendant violated his parole by having a credit card in his possession. That is not illegal per se. When officers discovered the credit card, defendant was in violation of his parole, regardless of whether the credit card was obtained legally or illegally. Since defendant was not merely in possession of a credit card in violation of his parole, but he was also found in possession of a number of stolen car parts, stolen license plates, and a stolen car, he cannot establish that “but for” the criminal charges he would not have been in custody. Accordingly, the trial court properly denied defendant credits for the period from January 21, 2011 to May 26, 2011.

Ineffective Assistance of Counsel

Defendant argues he was denied effective assistance of counsel because his attorney failed to request he be remanded on SS110923A while he was in custody on SS112106A. Had counsel made such request, defendant asserts that the time he spent in custody on SS112106A would have also been credited toward SS110923A.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. (*Id.* at p. 689.) Tactical errors are generally not deemed reversible, and counsel’s decision making must be evaluated in the context of the available facts. (*Id.* at p. 690.) To the extent the record on

appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

“Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)” (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

Further, we need not speculate as to the trial counsel’s state of mind. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) Defendant’s claim of ineffective assistance therefore fails since he was not prejudiced by any perceived omissions made by his trial counsel. Defendant was ultimately sentenced on both cases based on a negotiated disposition that included concurrent time. There is nothing in the record to suggest that the negotiated disposition did not take into account the time defendant had served or the credits he had earned. Without more information, it would be pure speculation for us to find defendant was actually prejudiced by his counsel’s failure to request he be remanded on SS110923A. Defendant was not denied effective assistance of counsel.

Incorrect Calculation of Credits

Defendant asserts that aside from his two additional arguments of error in his award of credits, he is also entitled to two additional days of credit because the trial court erred in its overall calculation.

The two days of credit that defendant asserts were omitted were the day he was arrested, and the day he was remanded into custody on SS110923A. Defendant was

arrested on that case on January 20, 2011, and remanded on the case on January 11, 2012; however, the probation report stated that defendant began serving his time for the parole revocation on January 21, 2011, and did not earn credit for SS110923A until January 11, 2011.

For the purpose of credit under Penal Code section 2900.5, custody should be calculated from the date of arrest. (*People v. Black* (2009) 176 Cal.App.4th 145, 154.) Here, defendant was arrested for SS110923A on January 20, 2011, but did not begin serving his time for the parole violation until the next day, January 21, 2011. Therefore, defendant is entitled to a day of custody credit for January 20, 2011.

In addition, the record shows that defendant was remanded into custody in SS110923A on January 10, 2012; however, the probation report stated that his first day of custody was January 11, 2012. Since defendant was in custody on SS110923A on January 10, 2012, he must receive credit for that day.

DISPOSITION

The judgment is modified to reflect two additional days of custody credits. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.