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

THE PEOPLE,

Plaintiff and Respondent,

v.

FAUSTINO FLORES,

Defendant and Appellant.

H039281

(Monterey County  
Super. Ct. Nos. SS121770A,  
SS122419A)

Defendant Faustino Flores pleaded no contest to two felony counts of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and a misdemeanor count of resisting arrest (Pen. Code, § 148, subd. (a)(1)). The trial court suspended imposition of sentence and placed him on probation for three years.

On appeal, defendant contends the trial court erred by imposing gang-related probation conditions. Defendant also contends, and the Attorney General concedes, that he is entitled to additional custody credit for the time he spent in custody attributable to both his probation violation and his more recent offenses. We will modify the judgment to include the correct amount of custody credit and affirm the judgment as so modified.

## **BACKGROUND<sup>1</sup>**

### ***A. First Conviction (Case No. SS121770A)***

On September 16, 2012, Monterey County Sheriff's deputies contacted defendant and conducted a records check on him. The deputies learned that defendant was on probation with search terms. They proceeded to search defendant and found four bindles of methamphetamine and several Oxycontin pills.

On September 18, 2012, the District Attorney filed a complaint charging defendant with two counts of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Defendant pleaded no contest to count 1, and count 2 was dismissed. The trial court placed defendant on probation pursuant to Proposition 36 (Pen. Code, § 1210.1). His probation conditions did not include any gang conditions.

### ***B. Second Conviction (Case No. SS122419A) and Probation Violation***

On December 19, 2012, Salinas police officers were patrolling a motel when they contacted defendant. Defendant initially gave the officers a false name, but the officers determined his true identity based on his tattoos. When the officers asked defendant to move towards them, he fled up the motel stairway. The officers followed him, and defendant continued to run until he fell. Defendant struggled with the officers when they tried to detain him. After the arrest, the officers searched defendant and found methamphetamine. He also admitted to smoking methamphetamine earlier that night.

On December 21, 2012, the District Attorney filed a complaint charging defendant with possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), being under the influence of a narcotic (Health & Saf. Code, § 11550, subd. (a)), and resisting arrest (Pen. Code, § 148, subd. (a)(1).) On January 2, 2013, in exchange for felony probation, defendant pleaded no contest to possessing a controlled substance and resisting arrest. Defendant also admitted violating probation in case No. SS121770A based on the

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<sup>1</sup> The factual background is based on the probation report.

same conduct. The trial court placed him on formal probation for three years and ordered him to serve 180 days in county jail, “concurrent with all other cases.” His probation conditions included gang conditions.

***C. Probation Conditions in Case No. SS122419A***

The trial court imposed the following gang-related probation conditions in Case No. SS122419A: “Not visit or remain in any area you know, have reason to know, or are told by the Probation Officer to be a gang-gathering area. (The term ‘gang’ in these conditions of probation refers to ‘criminal street gang’ as defined in PC § 186.22.)” “Not associate with any individuals you know or are told by the Probation Officer to be gang members, drug users, or on any form of probation or parole supervision.” “Not possess, wear, use or display any item you know, have reason to know, or have been told by the Probation Officer to be associated with membership or affiliation in a gang, including, but not limited to, any insignia, emblem, button, badge, cap, hat, scarf, bandanna, or any article of clothing, hand sign, or paraphernalia to include the colors red.” “Do not obtain any new gang tattooing upon your person while on probation supervision. You shall permit photographing of any tattoos on your person by law enforcement.”

**DISCUSSION**

***A. Gang-Related Probation Conditions***

Defendant contends the trial court erred by imposing gang-related probation conditions. He claims there is no rational nexus between the prohibited conduct and deterring future criminality.

**1. Probation Report**

The probation officer recommended imposition of gang-related probation conditions. The probation report noted that on the evening of December 19, 2012, defendant had been loitering at a motel, which was “frequented by individuals selling drugs, as well as gang members.” The report also addressed defendant’s gang involvement, stating: “At the time of his arrest, the defendant asked to be housed with

active Norteño gang members. He stated to the [probation officer] that he does not ‘gang bang,’ but he associates because of his family ties and friends from the neighborhood.” In 2003, the juvenile court had imposed limited gang conditions for a misdemeanor offense defendant committed that year. Defendant had committed one other juvenile offense and 10 prior adult offenses. No gang conditions had been imposed in those 11 cases.

## **2. Sentencing Hearing**

Defendant objected to the gang conditions at the sentencing hearing on January 31, 2013. He argued that he “has never had a gang case ever, even as a juvenile. He has no gang tattoos. [¶] In fact, the only nexus that is indicated is that he has – he had asked to be housed with the Nortenos, because he has some family that are involved there, and he felt safer. [¶] So certainly, saying he would feel safer in a particular pod doesn’t mean that he is a gang member. It doesn’t mean that he is a gang associate.”

The prosecutor responded that there was a sufficient nexus between the probation conditions and preventing future criminality. He argued: “Number 1, the defendant does state that he would like to be in the Norteno gang pod. As well . . . there was a case from 2003 where he had limited gang terms. . . . [I]t is everybody’s desire Mr. Flores has a successful period of probation. Associating with gang members when an individual has a background in drugs who has a background in violence, the notion of being successful on probation is further hampered by any association with gang members.”

The probation officer agreed that the conditions were appropriate “based on his housing [and] based on statements that [defendant] does associate with gang members. And as a juvenile, he was on limited terms.”

The trial court found that the evidence in the record justified imposition of the gang conditions. The court relied on defendant’s request to be housed with Norteños and his statement that “he had associated with gang members because of his family ties and friends from the neighborhood.” The court also relied on defendant’s 2003 juvenile case,

stating that “albeit old, there were limited gang terms and conditions.” In support of its ruling, the court cited to *In re Laylah K.* (1991) 229 Cal.App.3d 1496 and *People v. Lopez* (1998) 66 Cal.App.4th 615 (*Lopez*), where courts upheld gang conditions because the defendant had ties to a criminal street gang. The court noted, “I should also add it is a known fact that gang members often sell narcotics to fund illegal activity in the community, and they associate with other drug users. This would be a term imposed to help the defendant with [probation].”

Defendant objected again after the trial court’s ruling. Specifically, he objected to the statements in the report regarding his gang involvement. He emphasized that he had explicitly told the probation officer he was not a gang member. He also denied using the word “associate[s]” to describe his relationship with the Norteño gang. Rather, defendant claimed he said “he had people in his family and knew people that were gang members, but he never used the word associate. That was the actual term that probation used . . . .”

### **3. Analysis**

“We review conditions of probation for abuse of discretion. [Citations.] Generally, ‘[a] condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .” [Citation.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]” (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380.)

Defendant contends there was no nexus between the gang conditions and preventing future criminality because his offenses were not gang related, he denied being a gang member, 10 years had elapsed since he had been subject to gang conditions as a

juvenile, and the same trial court did not impose gang conditions for his first offense (case No. SS121770A).

Defendant compares this case to *People v. Brandão* (2012) 210 Cal.App.4th 568, 574 (*Brandão*), where this court considered whether a no-gang-contact probation condition was “reasonably related to a risk that defendant will reoffend.” As in this case, the defendant in *Brandão* pleaded no contest to possessing a controlled substance, and nothing in the record indicated that the offense was gang related. (*Id.* at pp. 570, 576.) However, in *Brandão*, the probation report stated that the defendant “had never been involved with any criminal street gangs, nor did he have any family members who associated with such groups.” (*Id.* at pp. 570-571.) This court held that the trial court erred by imposing the challenged condition, because “the record divulge[d] (1) no ties between defendant and any criminal street gang, (2) no such ties involving any member of defendant’s family, and (3) no criminal history showing or strongly suggesting a gang tie.” (*Id.* at p. 576.)

Unlike in *Brandão*, here the evidence supports the trial court’s imposition of the gang conditions. On the night of his crimes, defendant was in an area that was “frequented by individuals selling drugs, as well as gang members.” At booking, defendant asked to be housed with Norteño gang members because “he associates because of his family ties and friends from the neighborhood.” Although defendant denied using the word “associate[s],” he admitted “he had people in his family and knew people that were gang members.” In addition, a juvenile court had previously imposed limited gang conditions on defendant for a misdemeanor offense.

As the trial court recognized, this case is similar to *Lopez, supra*, 66 Cal.App.4th 615. In *Lopez*, the appellate court upheld the imposition of gang terms on a defendant convicted of a non-gang-related crime. (*Id.* at pp. 624-625.) The probation report showed that the defendant had admitted gang membership, he was young (in his early 20’s), and he had a lengthy history of juvenile and misdemeanor adult offenses. (*Id.* at

p. 626.) Based on these facts, the trial court concluded that “ ‘[a]ssociation with gang members is the first step of involvement in gang activity.’ ” (*Id.* at p. 624.) Therefore, “disassociation from gang-connected activities was an essential element of any probationary effort at rehabilitation because it would insulate him from a source of temptation to continue to pursue a criminal lifestyle,” thus serving to prevent future criminality. (*Id.* at p. 626.)

Defendant argues that this case is distinguishable from *Lopez* because there, the defendant admitted being an actual gang member. (*Lopez, supra*, 66 Cal.App.4th at p. 622.) However, the *Lopez* court stressed that whether the defendant was a current gang member was not “critical.” (*Id.* at p. 624.) Here, defendant had gang ties as he requested to be placed in the Norteño gang housing and admitted having family and friends that were gang members. Furthermore, as in *Lopez*, defendant had a lengthy history of juvenile and adult misdemeanor offenses, which shows a “consistent and increasing pattern of criminal behavior.” (*Id.* at p. 626.) In fact, one of these prior offenses resulted in the imposition of limited gang terms on defendant. Hence, the trial court was within its discretion to impose gang conditions as “rehabilitation and public safety by forbidding conduct reasonably related to future criminality. [Citation.]” (*Ibid.*)

### ***B. Custody Credit***

Defendant contends, and the Attorney General concedes, that he is entitled to additional presentence credit in case No. SS121770A for the time he spent in custody for committing the offenses in the second case (case No. SS122419A). We find the concession appropriate.

#### **1. Proceedings Below**

The probation report states that in case No. SS12770A, defendant was in custody for nine days, from September 16, 2012, to September 24, 2012. The report also states that he was in custody for 44 days, from December 19, 2012, to January 31, 2013, which

was attributable to both cases: the probation violation in case No. SS121770A and his offenses in case No. SS122419A.

At the sentencing hearing, defendant argued that he was entitled to dual credit under *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*) for the 44 days of custody. However, the trial court only awarded him 17 days of credit (9 days of actual custody credit plus 8 days of conduct credit) in case No. SS12770A. The 44 days of custody were credited only to case No. SS122419A.

## **2. Analysis**

“Penal Code section 2900.5 provides that a convicted person shall receive credit against his [or her] sentence for all days spent in custody, including presentence custody (subd. (a)), but ‘*only* where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted’ (subd. (b), italics added).” (*Bruner, supra*, 9 Cal.4th at p. 1180.) Thus, if the time served for violating probation was based solely on the same conduct that led to the later criminal sentence, the defendant is entitled to presentence credit for the time served for the probation violation. (*People v. Williams* (1992) 10 Cal.App.4th 827, 834-835.)

The record establishes that the time defendant served for violating probation was based solely on the crimes for which he was convicted in case No. SS122419A, namely, possessing a controlled substance and resisting arrest. Accordingly, defendant was entitled to dual application of the 44 days in custody as presentence credit in case No. SS121770A.

Therefore, we determine that defendant is entitled to the following credit in case No. SS121770A: 9 days of actual custody credit and 8 days of conduct credit for the time spent in custody from September 16, 2012, to September 24, 2012, plus 44 days of actual custody credit and 44 days of conduct credit for the time spent in custody from December 19, 2012, to January 31, 2013, for a total of 53 days of actual custody credit and 52 days of conduct credit. (Pen. Code, § 4019, subds. (b), (c), (f).)

**DISPOSITION**

In case No. SS121770A, the judgment is modified to reflect that defendant is entitled to 105 days of credit (53 days of actual custody credit and 52 days of conduct credit). As modified, the judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MÁRQUEZ, J.

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GROVER, J.