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

THE PEOPLE,

Plaintiff and Respondent,

v.

CINDY BERNAL,

Defendant and Appellant.

H040492

(Monterey County

Super. Ct. Nos. SS120131 &
SS120495)

Defendant Cindy Bernal pleaded guilty to various criminal offenses. As a condition of probation, she waived a portion of her presentence custody credits pursuant to *People v. Johnson* (1978) 82 Cal.App.3d 183 (*Johnson*). After she violated the terms of her probation, the trial court sentenced her to prison and awarded 802 presentence custody credits. On appeal from the judgment of conviction, defendant contends that the trial court misapplied the *Johnson* waiver in calculating her credits, and that she should have been awarded 1,044 credits. As set forth below, defendant has failed to show any error in the calculation of her credits, and we will affirm.

BACKGROUND¹

On January 4, 2013, defendant pleaded guilty to residential burglary (Pen. Code, § 459), being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)), and misdemeanor active gang participation (Pen. Code, § 186.22, subd. (a)). As part of the plea, she admitted a prior prison term allegation (Pen. Code, § 667.5, subd. (b)).

At a sentencing hearing on May 8, 2013, the trial court suspended imposition of sentence and placed defendant on probation for a period of three years. At the time of the hearing, defendant had a total of 630 presentence custody credits (420 days of actual custody credits and 210 days of conduct credits). As a condition of probation, defendant entered a *Johnson* waiver. The trial court described the *Johnson* waiver at the hearing: “I’m also going to have [defendant] waive any credits over 365, meaning it will be permanent and for all purposes. So the credits between 365 and 630 are waived permanently and for all purposes.” The trial court then stated, “You agree to that, [defendant]?” Defendant responded, “Yes.”

On June 13, 2013, the People filed a petition alleging that defendant had violated the terms of her probation. At a contested probation violation hearing on September 13, 2013, the trial court found that defendant had violated the terms of her probation.

At a hearing on November 15, 2013, the trial court revoked defendant’s probation and imposed a prison term of seven years eight months. The trial court awarded defendant a total of 802 presentence custody credits, explaining that defendant had 401 days of actual custody credits and 401 days of conduct credits.

¹ The facts underlying defendant’s offenses and probation violation are not relevant to the issue presented on appeal. We therefore will not summarize those facts.

DISCUSSION

Defendant contends that the trial court erred in awarding her 802 presentence custody credits. She asserts that the trial court misapplied her *Johnson* waiver, and that a proper application of the *Johnson* waiver would have resulted in a total of 1,044 presentence custody credits. Her argument is premised on the theory that, pursuant to her *Johnson* waiver, she retained 365 days of actual custody credits plus all conduct credits associated with those 365 days of custody. As explained below, defendant's argument is meritless.

"A criminal defendant is entitled to accrue both actual presentence custody credits under Penal Code section 2900.5 and conduct credits under Penal Code section 4019 for the period of incarceration prior to sentencing." (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 395.) "A defendant may waive these statutory requirements, however." (*People v. Burks* (1998) 66 Cal.App.4th 232, 234 (*Burks*), citing *Johnson, supra*, 82 Cal.App.3d at pp. 187-188.) "It is now common practice for defendants to waive custody credits so as to avoid going to state prison after a probation violation. The waiver allows the court to reinstate probation on the condition that the defendant serve more time in jail." (*Burks, supra*, 66 Cal.App.4th. at pp. 234-235.) Such a waiver of credits is referred to as a *Johnson* waiver. (See *People v. Arnold* (2004) 33 Cal.4th 294, 307 [a "*Johnson* waiver is a waiver of a statutory right to credit for time served against a subsequent county jail or state prison sentence"].) A *Johnson* waiver "applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed." (*People v. Jeffrey* (2004) 33 Cal.4th 312, 315.)

Defendant contends that, pursuant to her *Johnson* waiver, she retained 365 days of actual custody credits *plus* all conduct credits associated with those 365 days of custody. Nothing in the record supports defendant's argument. At the time that defendant entered her *Johnson* waiver, she had 420 days of actual custody credits and 210 days of conduct

credits, for a total of 630 credits. In obtaining the *Johnson* waiver, the trial court specifically advised defendant that she was waiving “*any* credits over 365.” (Italics added.) The trial court emphasized that “the credits between 365 and 630 are waived permanently and for all purposes.” Defendant informed the trial court that she agreed to such a waiver of credits. The record thus shows that defendant retained a total of 365 credits and had no right to any credits over 365. The record in no way suggests that defendant retained 365 days of actual custody credits *plus* conduct credits associated with those 365 days of custody.

Defendant’s interpretation of her *Johnson* waiver is inaccurate. She therefore has failed to show any error in the calculation of her presentence credits. We must affirm.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.