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

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN LEE CONNER,

Defendant and Appellant.

H041326

(Monterey County

Super. Ct. No. SS121897)

Defendant Jonathan Lee Conner pleaded guilty to commercial burglary. Long after sentence was imposed, he brought a post-judgment motion contending that the trial court had erroneously failed to award credits for presentence confinement pursuant to a revocation of parole based in part upon the conduct underlying the conviction. On appeal he contends that the trial court erred by denying the motion. We find no error, and affirm.

BACKGROUND

In November 2006 defendant was placed on probation for receiving stolen property. In January 2010, after numerous violations of probation, he was sentenced to state prison. According to the probation report, the sentence was a “paper commitment” in that, by the time the sentence was executed, defendant’s credits for pre-confinement custody “equaled or exceeded [the] time imposed.” Nonetheless it resulted in

defendant's being on parole at the time of the events described below. He was also on probation in several misdemeanor cases.

According to the probation report, the current conviction arose from defendant's entry into a Goodwill Store in Marina, from which he stole a safe containing over \$2,000. The crime, which occurred on the evening of August 10, 2012, was captured on a video surveillance system, but did not result in defendant's immediate apprehension. Instead he was taken into custody on October 4, 2012, after officers received reports that he had violated a no-contact order by entering a residence occupied by his ex-girlfriend. They arrested him nearby for driving a "potentially stolen vehicle." On his person they found a small quantity of marijuana. At some point they identified him from the surveillance footage as the Goodwill burglar.

On October 9, the district attorney filed a complaint charging defendant with commercial burglary arising from the Goodwill incident, residential burglary arising from his entry into the former girlfriend's home, criminal contempt of a protective order involving domestic violence, and vehicle theft.¹ The complaint also charged a one-year enhancement for a prior prison term pursuant to Penal Code section 667.5.

On October 17, 2012, defendant entered a conditional plea of no contest to the commercial burglary charge with the understanding that the remaining charges would be dismissed.

Defendant had been placed under a parole hold on October 4, 2012. On October 19, 2012, a hearing officer conducted a hearing on probable cause to revoke parole. The charged grounds were (1) possession of alcohol, (2) residential burglary, (3) association with "prohibited or non-gang validated persons," (4) violation of a

¹ A police report indicated that the car occupied by defendant at the time of his arrest had been lent by defendant's father to the ex-girlfriend. The father eventually conveyed a disinclination to press charges.

protective order, (5) possession of marijuana, and (6) non-residential burglary. The burglary charges were amended to a grand theft charge, which defendant admitted. Probable cause was also found with respect to violation of a protective order and possession of marijuana. The remaining charges—use of alcohol and associating with prohibited persons—were dismissed. Parole was revoked and defendant was returned to custody for 180 days. The summary states that defendant “accepted” this disposition, presumably meaning that he did not insist upon the further hearing to which he would otherwise have been entitled. (See *Morrissey v. Brewer* (1972) 408 U.S. 471; *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 648.)

Sentencing in the criminal matter took place on November 16, 2012. Defendant’s entitlement to credits for pre-sentence confinement was a primary subject of discussion. The probation report noted that as of the sentencing hearing, defendant would have spent 44 days in jail since his arrest on October 4. The probation officer opined, however, that the parole hold furnished an independent cause of the confinement and thereby deprived defendant of credits pursuant to *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), and other cases (see discussion below). Defense counsel objected to this conclusion. After off-the-record proceedings, the court sustained the defense objection and struck the probation officer’s finding of ineligibility, “it being brought to the Court’s attention that the only admission at the parole violation was for the burglary.” Accordingly, the court suspended imposition of sentence and placed defendant on probation subject to conditions including that he “[s]erve 88 days in County Jail, credit for time served of 88 days (44 actual days plus 44 conduct/work credits).”

Defendant apparently remained confined pursuant to the parole revocation until January 1, 2013. On February 25, 2013, a deputy probation officer filed a petition to revoke or modify defendant’s probation on three grounds: (1) He had tested positive for THC; (2) he had stopped reporting to a behavioral intervention program on the third day

after entering it; and (3) he had not reported to his probation officer since February 4. The deputy asserted that on the day last mentioned, defendant informed her he was in the hospital and might remain there for some time; but hospital staff subsequently told the officer that defendant was discharged on February 5. The petition was amended on March 4 to allege, as a fourth ground, that defendant had been arrested by Seaside Police Officers on charges of violating Penal Code sections 166, subdivision (a)(4) (contempt of court order), and 148.9, subdivision (a) (false identification to a police officer).

On March 8, 2013, defendant admitted that he “violated probation as alleged in the petition.” The probation officer prepared a supplemental report allowing the credits initially awarded by the court, i.e., 44 days actual time plus 44 days conduct credit. The report noted an additional period of confinement from March 1 to 29, 2013, but found defendant ineligible for credit for that time pursuant to *Bruner* and other cases.

At a sentencing hearing on April 3, 2013, the court revoked and terminated probation and sentenced defendant to four years, consisting of the three-year upper term plus a one-year enhancement. The court did not specifically recite the amount of credit allowed in this case, but did refer to the credits due in a companion case and then asked, “Are there any other credit issues? Everyone’s good with that?” Defense counsel replied, “Yes.” The minute order and abstract of judgment both reflect an allowance of 44 days actual time served plus 44 days good and work time, for a total of 88 days.

Defendant filed a notice of appeal on April 22, 2013. Appellate counsel filed a brief asking this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We initially viewed the matter as governed by our decision in *People v. Serrano* (2012) 211 Cal.App.4th 496. When defendant failed to file the supplemental brief contemplated by that decision, we dismissed the appeal. Counsel then filed a petition for reconsideration, contending that full *Wende* review was required. We ultimately agreed, and conducted a full review resulting in an opinion stating that we

had found no arguable issues. (*People v. Conner* (Apr. 21, 2014, H039576) [nonpub. opn.] [p. 2].) We therefore affirmed the judgment of conviction. (*Ibid.*)

Less than three weeks after we issued our decision, and some six weeks before issuance of the remittitur, defendant’s appellate counsel filed a motion in the trial court for “an order awarding him an additional 90 days of actual custody credits under Penal Code section 2900.5, plus 90 days of conduct credits under section 4019, for a total additional credit of 180 days.”² (Fn. omitted.) The additional credits, asserted counsel, were “based on a 180 day parole violation which was not credited to defendant’s sentence based on the probation officer’s notation indicating that he was not entitled to them under *People v. Bruner*” The notice of motion further stated, “Because the legal basis for the entitlement to credits was not presented to this court at the sentencing hearing, and involves evidence which was not presented at said hearing, this motion is brought in the first instance in this court, rather than raised on direct appeal, under the compulsion of [Penal Code] section 1237.1.”

Supporting the motion was the declaration of appellate counsel, who averred that he had secured copies of the pertinent parole revocation decision and underlying police reports. Counsel argued that these documents showed that the parole board had revoked defendant’s parole for 180 days based upon his theft of the safe from Goodwill, his violation of the protective order, and his possession of marijuana. He argued that the

² Elsewhere in the motion defendant stated that he was entitled to 90 days in addition to the 44 already allowed, for “a total of 133 days of ‘actual’ credits.” Defendant does not adequately explain either figure. The court allowed 44 actual days at the earlier sentencing on November 16, 2012. Assuming the day of sentencing was included in the 44, and that he remained confined on the parole violation until January 1, 2013, it would appear that he spent 45 more days in custody following that sentencing, for a total of 89 days attributable to the parole violation. Since he has already received credit for 44 of those days, the most he would appear to be entitled to—if his argument were accepted—is an additional 45 actual days, plus conduct credit. Since we do not accept his argument, however, uncertainties about his arithmetic appear academic.

theft from Goodwill was the same conduct underlying the present conviction, the violation of the protective order furnished the basis for another charge in the same criminal proceeding, and the possession of marijuana, though uncharged, *could* have been charged, and would have been deemed “same conduct” under the *Bruner* rule had it been pleaded and dismissed, as the protective order count was. Accordingly, the argument concluded, defendant should have received credit for the entire period of his parole-related confinement.

At the court’s direction, the prosecutor filed a response conceding the court’s jurisdiction to grant relief but opposing the motion on the ground that the marijuana possession furnished an independent basis for the parole-related confinement. Attached to the opposition was a copy of the parole board’s “charge sheet” which described the factual grounds for the charges.

The court heard the motion for additional credits on June 18, 2014. At the outset the court asked why the motion was not barred by “waiver,” given that defendant had already appealed from his conviction without raising any issue of credits. The prosecutor replied that as he understood the applicable law, including decisions from this court, an error in credits could be raised at any time. The contrary position, he explained, “was not a strong argument,” especially by comparison to what he considered “a simple application of *Bruner*” barring relief on the merits. The court acknowledged that “that may be the easy way to get out of it,” but persisted in its view that “you don’t get this long” to raise such an issue. The prosecutor urged the court to nonetheless reach the merits, if only as an alternative ground of decision. The court ultimately did so, stating, “[F]irst of all, I think the waiver doctrine does apply. . . . [¶] If somehow it doesn’t apply, . . . the legal authority that deals with the issue is clearly in support of the probation officer’s original position, that was stated back when he was sentenced originally, that *Bruner* does apply; that it is a—he’s not entitled to it; that the reason he

was in custody included the fact that he was arrested for being in possession of less than an ounce of marijuana, and you—it may be a minor charge, but the fact of the matter is that was the basis for his continued detention. [¶] It wasn't limited exclusively to the charges to which he ultimately pled guilty. It didn't—11357(b) was not dismissed, so it's not like the cases that were cited. And so, the—on its face, on the substantive law, it fails also. I believe it fails procedurally and on the law. [¶] So, the motion for credits is denied.”

Defendant filed a notice of appeal on July 21, 2014, from the denial of additional credits.

DISCUSSION

I. Jurisdiction

Defendant insists, and respondent concedes, that the trial court had jurisdiction to correct its own supposedly erroneous denial of presentence custody credits. We will accept the concession in the interest of judicial economy. Given that premise, the denial of credits was appealable as an “order made after judgment, affecting the substantial rights” of defendant. (Pen. Code, § 1237, subd. (b); compare *People v. Gainer* (1982) 133 Cal.App.3d 636, 642 [dismissing appeal from order refusing to recall sentence, but finding miscalculation of custody credits on remand from prior appeal to be reviewable].)

II. Merits

Penal Code section 2900.5 (§ 2900.5), subdivision (a), broadly entitles a defendant to credit “upon his or her term of imprisonment” for “all days of custody” already served at the time of sentencing. The succeeding subdivision, however, subjects this entitlement to a significant qualification: “For the purposes of this section, 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.” (§ 2900.5, subdivision (b) (§ 2900.5(b)).)

In *People v. Bruner, supra*, 9 Cal.4th 1178, 1180, the court declared that under this provision, a defendant cannot obtain credit for presentence confinement unless he can “prove” that “the conduct which led to the sentence was a dispositive, or ‘but for,’ cause of the presentence custody.” In other words, if the defendant is also confined for some independent cause—such as a parole or probation revocation based on conduct distinct from that underlying the conviction—no credit is allowed. The defendant there was arrested on three alleged parole violations: absconding from parole supervision, stealing a credit card, and testing positive for cocaine use. (*Id.* at p. 1181.) When arrested, he was found to be carrying cocaine. (*Ibid.*) He was criminally charged and convicted of cocaine possession. (*Ibid.*) The trial court allowed no credit for presentence confinement, but the Court of Appeal ruled that the defendant was entitled to credit for that part of his confinement during which the cocaine possession was a ground of parole violation. (*Id.* at p. 1182.) In defending this result before the Supreme Court, the defendant emphasized the statute’s reference to custody “ ‘attributable to *proceedings related* to the same conduct for which the defendant has been convicted.’ ” (*Id.* at p. 1191, quoting § 2900.5, subd. (b); italics original.) The court rejected this focus because it “obscure[d] the limited legislative purpose of section 2900.5,” which was “only to prevent inequalities in total confinement among defendants . . . , which . . . arise solely because one defendant suffered presentence confinement while another did not.” (*Id.* at p. 1191.) If a defendant is confined in proceedings and for reasons entirely distinct from the criminal prosecution—as where probation or parole is revoked on some ground not forming a basis for the criminal conviction on which the defendant is sentenced—the allowance of credit would go beyond the Legislature’s purpose in adopting the statute. (See *ibid.*)

Application of these principles here seems straightforward. Defendant was confined by parole authorities not only because of the Goodwill theft but also because he

unlawfully possessed marijuana and violated a court order. “Section 2900.5 is not intended to bestow the windfall of duplicative credits against all terms or sentences that are separately imposed in multiple proceedings. And this is so even where, while serving other sentences, the defendant was also incidentally subject to restraint based on ‘proceedings related to the same conduct’ for which he now seeks sentence credit.” (*Bruner, supra*, at pp. 1191-1192, fn. omitted.) It follows that defendant was not entitled to credit against the present sentence based upon that confinement.

Defendant contends otherwise largely on the strength of *People v. Williams* (1992) 10 Cal.App.4th 827. The defendant there was charged with 13 felonies all arising from a single course of criminal conduct—apparently a gang rape—against a single victim. (*Williams, supra*, at p. 830.) After the charges were filed, probation in a prior case was revoked on the grounds that the defendant had sustained “ ‘new charges’ ” and had failed to “ ‘obey all laws.’ ” (*Id.* at pp. 829-830.) He eventually pled guilty to one count of rape in concert, and the other 12 counts were dismissed. (*Id.* at p. 830.) The trial court allowed no credit for presentence confinement, reasoning that probation had been revoked “not only because of the rape in concert, but because of the other dismissed charges as well. . . . [P]robation could have been revoked based on any one of the counts of the information other than . . . the one to which appellant entered a plea” (*Id.* at p. 832.) The Court of Appeal reversed, and while its rationale is far from plain, we believe it is best understood as holding that *factually related* charges do not furnish an independent basis for confinement for purposes of section 2900.5(b), even though some of the charges are dismissed prior to the defendant’s conviction on others. (See *id.* at pp. 832-835.)

Defendant points out that the Supreme Court cited *Williams* with approval in *Bruner*. (See *Bruner, supra*, 9 Cal.4th at pp. 1193-1984, fn. 10.) In doing so, however, the Supreme Court noted that the charges in *Williams* all “stemmed from the same

criminal episode,” such that the dismissal of some of them “did not mean that the revocation was based on conduct different from that leading to the criminal sentence.” (*Ibid.*) Here there is no sense in which the dismissed charges could be said to have “stemmed from the same criminal episode” as the charge on which defendant was convicted. The conviction rested on the theft of a safe from a commercial establishment; the dismissed charges, insofar as they were replicated in the parole proceeding, rested on entry into a residence in violation of a restraining order. These were entirely distinct incidents, separated in time by nearly eight weeks, and involving crimes of entirely different types having no apparent causal connection to one another.

Defendant asserts that the dismissed criminal charge for violation of a court order was “in the same procedural position as were the dismissed charges in *Williams*” (Citing *Bruner, supra*, 9 Cal.4th at pp. 1193-1194, fn. 10.) This is true only in the sense that the dismissed charges were *jointly pleaded* with the charge of which the defendant was ultimately convicted. While some of the language employed in *Williams* suggests that this might be enough to entitle a defendant to credit, we believe the Supreme Court meant to limit its approval of *Williams* to situations involving dismissed charges “stemm[ing] from the same criminal episode” as the charge underlying a conviction. (*Bruner, supra*, 9 Cal.4th at p. 1198, fn. 10.) Indeed, to hinge the applicability of section 2900.5(b) on the purely procedural circumstance of conjoined pleading seems contrary to the Supreme Court’s express condemnation of a reading of the statute that “focus[es] . . . on ‘proceedings’ rather than ‘conduct.’ ” (*Bruner, supra*, 9 Cal.4th at p. 1191.) While defendant’s view might be sustained under a “strained and hypertechnical reading” of the statute (*ibid.*), the more germane inquiry, given the statute’s purpose as described in *Bruner*, is whether the acts occasioning the defendant’s presentence confinement arose from “the same conduct” or, in the Supreme Court’s language, “stemmed from the same

criminal episode” as the offense on which the defendant is sentenced. (*Bruner, supra*, at pp. 1193-1194, fn. 10.)

Further, even if we were persuaded that *Williams* can or should extend to charges that are factually unrelated to the charge of which the defendant is convicted, we would find its holding inapposite here, since defendant’s parole revocation rested in part on *conduct that was not criminally charged at all*, i.e., his possession of marijuana. Defendant contends that the prosecutor’s failure to criminally charge him with this conduct is inconsequential because he *could* have been charged with it. This is true of course: his possession of less than an ounce of marijuana could have been criminally charged, though only as an infraction.³ (Health & Saf. Code, § 11357, subd. (b).) Had that occurred, defendant contends, “he would plainly be entitled” under *Williams* “to ‘same conduct’ credits.” He then asserts that “the possession of marijuana is part of the same course of conduct which led to his arrest on the more serious charges.” It would be “the height of absurdity,” he insists, to hold that this conduct cost him credits to which he would otherwise be entitled, merely because he was not criminally charged with it.

We see several deficiencies in this argument. First it misuses the phrase “course of conduct.” Defendant’s initial arrest was apparently predicated on suspicion of auto theft, and perhaps on his entry into the ex-girlfriend’s premises in violation of a no-contact order. The marijuana was only found in a search incident to arrest. At some

³ The fact that defendant could have been *charged* with marijuana possession does not mean he could have been *confined* on that ground. By statute, a person charged with an infraction *must be released* if he or she presents satisfactory identification and promises to appear. (Pen. Code, § 853.5, subd. (a).) “Only if the arrestee refuses to sign a written promise, has no satisfactory identification, or refuses to provide a thumbprint or fingerprint may the arrestee be taken into custody.” (*Ibid.*) It therefore appears highly likely that insofar as the marijuana possession was a cause of defendant’s confinement—as he concedes—it could have that effect *only* in the parole revocation proceeding, and not in the criminal proceeding hypothesized by defendant.

unknown time thereafter, he was recognized as the perpetrator of a burglary committed nearly eight weeks prior to his arrest. These events do not describe a “course of conduct” in any but the broadest sense of a series of unrelated actions. Further, the question is not the relationship, if any, among acts leading to defendant’s *arrest*, but the relationship, if any, between the acts giving rise to his presentence confinement and the conduct “for which [he] has been *convicted*.” (§ 2900.5, subdivision (b), italics added.) Here he was convicted for stealing a safe from Goodwill. There is no apparent connection between that conduct and his possession of marijuana two months later.

Nor do we find any “absurdity” in the proposition that this treatment depends on the prosecutor’s election not to charge the marijuana possession. That election was not without benefit to defendant: it prevented his exposure to another criminal conviction. Nor is it made absurd by the conception that the revocation of parole effectively “punished” him more severely than he could have been punished on a criminal charge of marijuana possession for personal use. It is the failure to conform to the conditions of parole—not the violation of the broader social norms embodied in the criminal law—for which the parole revocation was imposed.

Further, the rule advocated by defendant would generate its own absurdities, requiring a sentencing court to determine in every case of this kind whether the conduct underlying a parole or probation revocation *could have been pleaded* along with the charge of which the defendant is ultimately convicted. Defendant makes no attempt to defend such a regime; he simply insists that the alternative threatens absurd consequences. At this level of abstraction, those consequences appear considerably less absurd than the alternative he proposes.⁴

⁴ Another “absurdity” is suggested by defendant’s attempt to distinguish *People v. Stump* (2009) 173 Cal.App.4th 1264, on the ground that the uncharged misconduct held to provide an independent basis for confinement there—consumption of alcohol and driving a car—was not independently criminal, but justified confinement *only* because it

We are satisfied that the trial court did not err by refusing to award additional credit for presentence confinement.

DISPOSITION

The order denying the motion for additional credit is affirmed.

violated the defendant's parole. In this view, a parole violation that happens to also violate the norms underlying the criminal law may not be separately punished as a parole violation—even though not charged as a criminal offense—while a parole violation that does *not* violate those more general norms *may* support uncredited confinement—in effect, may be punished more severely than one that does.

RUSHING, P.J.

WE CONCUR:

MÁRQUEZ, J.

GROVER, J.

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