Filed 11/15/16 P. v. Wallace CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES FLOYD WALLACE, Defendant and Appellant.	2d Crim. No. B268821 (Super. Ct. Nos. KA094768, BA369068) (Los Angeles County)

Appellant James Floyd Wallace is currently serving a prison sentence that includes seven one-year prior prison term enhancements (Pen. Code,[1] § 667.5, subd. (b) [§ 667.5 (b)]). After he successfully applied to have five of his prior felony convictions designated as misdemeanors under Proposition 47, he petitioned for a writ of habeas corpus in the trial court claiming that the five enhancements based on those convictions must be stricken. The court denied the petition on the ground that Proposition 47 does

[1] All statutory references are to the Penal Code unless otherwise stated.

not apply retroactively to sentence enhancements under section 667.5(b).

Appellant purports to appeal from the order denying his habeas petition. Although that order is not appealable, in the interests of judicial economy we treat the appeal as a petition for writ of habeas corpus and deny the petition. (*People v. Garrett* (1998) 67 Cal.App.4th 1419, 1423.)

Appellant also timely appeals from an order denying his motion to correct his presentence custody credits. On appeal, he asks us to order that the judgment of conviction be corrected to reflect an award of an additional 168 days of presentence custody credit. We shall order the judgment amended accordingly. We also order that the abstract of judgment be modified to comply with our prior directive in affirming the judgment of conviction.[2]

FACTS AND PROCEDURAL HISTORY

In June 2010, appellant was convicted in Los Angeles Superior Court case number BA369068 of transportation or sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). The court suspended a six-year prison term and placed him on three years of probation. Appellant was also ordered to serve 220

---

[2] In an in propria persona supplemental brief, appellant claims he is entitled to 1,146 days of credit. Because he is represented by counsel, we need not consider briefs filed in propria persona. (*People v. Clark* (1992) 3 Cal.4th 41, 173, overruled on other grounds in *People v. Pearson* (2013) 56 Cal.4th 393, 461-462.) In any event, appellant fails to demonstrate he is entitled to the claimed credits. As we shall explain, appellant is entitled to an additional 168 days of custody credit, which amounts to a total of 818 days of credit.

days in county jail with credit for time served (110 days of actual custody credit and 110 days of good conduct credit).

In December 2010, appellant was remanded into custody for violating probation. In March 2011, he stipulated to a violation and was ordered to complete a one-year rehabilitation program. He was also ordered to serve 168 days in county jail with credit for time served (112 days of actual custody credit and 52 days of conduct credit). Probation was subsequently revoked again in July 2011 based on new charges. In November 2011, he was convicted in Pomona Superior Court case number KA094768 of resisting an executive officer (§ 69), evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a)), misdemeanor assault on a peace officer (§ 241, subd. (c)), and other offenses. Seven prior prison term allegations (§ 667.5(b)) were also found to be true. The court sentenced him in both cases to an aggregate term of 15 years and 8 months in state prison, which includes 1 year for each of the 7 prison priors. Appellant was awarded a total of 650 days of presentence custody credit, consisting of 220 days in case number BA369068 (110 days of actual custody credit and 110 days of conduct credit), and 430 days in case number KA094768 (215 days of actual custody credit and 215 days of conduct credit).

In subsequently affirming the judgment, we recognized that the trial court records erroneously indicated that appellant had been convicted of violating subdivision (b) of section 241 rather than subdivision (c). Accordingly, "[w]e direct[ed] the superior court to amend the minutes and the abstract of judgment to cite section 241, subdivision (c) in each reference to appellant's conviction of misdemeanor assault on a

peace officer." (*People v. Wallace* (Nov. 20, 2013, B238946 [nonpub. opn.], pp. 7-8.)

Shortly before we filed our opinion affirming the judgment, appellant filed an in propria persona motion in the Los Angeles Superior Court requesting that the abstract of judgment be corrected to reflect an award of 2,180 days of presentence custody credit, consisting of 1,090 days of actual custody credit and 1,090 days of good conduct credit. The court rejected that request, but concluded that the judgment erroneously failed to include the 168 days of custody credit previously awarded in case number BA369068. An amended abstract of judgment reflecting the award of these additional credits was filed on February 18, 2014. On March 5, 2014, however, the Pomona Superior Court filed another amended abstract of judgment that does not include the additional 168 days of credit. Although the amended abstract was filed in response to our directive in affirming the judgment of conviction, the error we sought to correct (i.e., that appellant was convicted of violating subdivision (c) of section 241 rather than subdivision (b)) is actually repeated.[3]

After the November 2014 enactment of Proposition 47, appellant applied to have five of his prior felony convictions reduced to misdemeanors under section 1170.18. All five applications were granted and the subject convictions were designated as misdemeanors. In July 2015, appellant petitioned for a writ of habeas corpus requesting that the five section

---

[3] In a section for "Other orders," the amended abstract of judgment states: "COUNT 1-MISD. 241(b)PC. DEF. SERVE 180 DAYS IN LOS ANGELES COUNTY JAIL. [¶] AMENDED ABSTRACT PER REMITTITUR DATED 01-28-14. TO ADD COUNT 1 MISD. MJA 03-05-14."

667.5(b) priors based on the convictions that are now misdemeanors be stricken. The People opposed the petition. His request for the appointment of counsel was denied. He then filed a petition for a writ of habeas corpus in the trial court, claiming that the five enhancements based on the convictions that are now misdemeanors must be stricken. The court summarily denied the petition, reasoning that Proposition 47 does not apply retroactively to sentence enhancements under section 667.5(b).

After his writ petition was denied, appellant, acting in propria persona, filed an ex parte motion to amend the abstract of judgment in case number BA369068 to reflect an award of 2,180 days of presentence custody credit. The motion was denied. Appellant subsequently filed another motion requesting that the abstract of judgment be corrected to reflect a total of 1,300 days of presentence custody credit. That motion was also denied, and appellant timely appealed.

DISCUSSION

Section 667.5(b) Priors

Appellant contends the court erred in refusing to strike the subject section 667.5(b) enhancements because the prior convictions upon which they are based are now misdemeanors. We disagree.

Proposition 47 reclassified certain drug and theft-related felony and "wobbler" offenses as misdemeanors. It also created remedies for persons previously convicted of one of the reclassified offenses. The first remedy applies to "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense . . . ." (§ 1170.18,

subd. (a).) Such a person "may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with [s]ections 11350, 11357, or 11377 of the Health and Safety Code, . . . as those sections have been amended or added by this act." (*Ibid.*) The second remedy applies to those who have already completed a sentence for one of the enumerated offenses. Those individuals can file an application with the court that entered the judgment of conviction to have the conviction designated as a misdemeanor. (§ 1170.18, subd. (f).) After relief is obtained under either of these provisions, the subject conviction "shall be considered a misdemeanor for all purposes," with the exception of the firearm restrictions that apply to convicted felons. (§ 1170.18, subd. (k).)

Appellant obtained his remedy under subdivision (f) of section 1170.18 by applying to have five of his prior felony convictions designated as misdemeanors. His current sentence does not include a conviction subject to recall and resentencing under subdivision (a) of section 1170.18, but it includes a section 667.5(b) enhancement based on the prior conviction that is now a misdemeanor. Although Proposition 47 makes no mention of sentence enhancements, appellant contends that the law entitles him to have the subject enhancements stricken because the predicate convictions must now be treated as "misdemeanor[s] for all purposes." (§ 1170.18, subd. (k).)

Our Supreme Court has granted review of several cases holding that the "misdemeanor for all purposes" designation in subdivision (k) of section 1170.18 does not apply retroactively to invalidate prior prison terms enhancements imposed under section 667.5(b). (See, e.g., *People v. Valenzuela*

(2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900; *People v. Williams* (2016) 245 Cal.App.4th 458, 470, review granted May 11, 2016, S233539; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 1, 2016, S233201.) We also conclude that the designation does not apply retroactively in this context. "[T]he language in subdivision (k) of section 1170.18 that a conviction that is reduced to a misdemeanor under that section '*shall be . . . a misdemeanor for all purposes*' is not significantly different from the language in section 17(b), which provides that after the court exercises its discretion to sentence a wobbler as a misdemeanor, and in the other circumstances specified in section 17(b), '*it is a misdemeanor for all purposes.*' (Italics added.) [I]n construing this language from section 17(b), the California Supreme Court has stated that the reduction of the offense to a misdemeanor does not apply retroactively. [Citations.] We presume the voters 'intended the same construction' for the language in section 1170.18, subdivision (k), 'unless a contrary intent clearly appears.' [Citation.]" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100.)

Nothing in the language of section 1170.18 or the ballot materials reflects such an intent. (*People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1100.) The statute's remedial provisions apply only to cases in which a person is currently serving a sentence for a conviction of a felony that is now a misdemeanor (§ 1170.18, subd. (a)) and cases in which a person convicted of such a crime has already completed his or her sentence (§ 1170.18, subd. (f)). Moreover, the statute goes on to instruct that "[n]othing in this and related sections is intended to

diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).) The section 667.5(b) enhancement at issue here is part of such a judgment.

Appellant misplaces his reliance on *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 in asserting that Proposition 47 was intended to invalidate section 667.5(b) enhancements included in final judgments. In both cases, the current offense was committed *after* the prior offense had already been reduced to a misdemeanor. (See *People v. Abdallah* (2016) 246 Cal.App.4th 736, 747 [§ 667.5(b) enhancement did not apply to defendant sentenced after his prior felony conviction had been designated as a misdemeanor under Proposition 47].) That is not the case here.

We also reject appellant's claim that subdivision (k) of section 1170.18 applies retroactively because the statute must be "broadly construed to accomplish its purposes" and "liberally construed to effectuate its purposes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 74.) None of the law's stated purposes, however, would be furthered by reducing the sentences of prisoners serving sentences for non-Proposition 47 offenses and whose sentences are enhanced to account for their recidivist behavior. Section 667.5(b) focuses on the defendant's status at the time he or she commits a new felony offense. When appellant committed his crimes, he stood convicted of a felony and had recently been released from prison. That he reoffended so soon after his release made him deserving of additional punishment. (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.) Nothing in the language of Proposition 47 or the related materials reflects an intent to absolve him of this additional punishment simply by

virtue of the fact that his prior conviction must now be considered a misdemeanor.

Finally, we reject appellant's claim that the rule of lenity compels us to rule in his favor. The rule applies as a tie-breaking principle where two reasonable interpretations of a statute stand in relative equipoise and the reviewing court can do no more than guess what the electorate intended. (*People v. Ramirez* (2014) 224 Cal.App.4th 1078, 1085; *People v. Manzo* (2012) 53 Cal.4th 880, 889.) There are not two equally reasonable interpretations of section 1170.18 at issue here.

Presentence Custody Credit

Appellant asks us to order that the judgment of conviction be amended to reflect he is entitled to an additional 168 days of presentence custody credit in case number BA369068.[4] We grant the request. In its February 7, 2014

---

[4] Although appellant timely appeals the November 24, 2015 order denying his in propria persona motion to correct presentence custody credits, counsel's claim on appeal is different from the one raised by appellant below. Counsel offers that he "raised the issue in his opening brief, rather than bring it to the attention of the two Superior Courts, because this Court had the Superior Court file at the time . . . (as it had ordered it in connection with a separate petition for writ of habeas corpus filed by appellant personally), and because the Superior Courts had indicated they would not consider any additional credit motions filed by appellant." The People do not dispute these assertions. Moreover, appellant filed numerous motions to correct his custody credits and timely appeals the denial of one such motion. In its order denying that motion, the trial court incorporated the February 7, 2014 order that awards the credits to which appellant claims he is entitled. In the interests of judicial

ruling, the Los Angeles Superior Court, in which case number BA369068 was prosecuted, recognized that appellant was entitled to the additional credits (112 days of actual custody credit and 56 days of good conduct credit) for the time he spent in custody following the revocation of his probation in December 2010. An amended abstract of judgment including these credits was accordingly filed on February 18, 2014. Two weeks later, the Pomona Superior Court, in which case number KA094768 was prosecuted, filed another amended abstract of judgment in response to our directive in affirming the judgment. That court, however, was apparently unaware of the other amended abstract or that appellant was entitled to the additional credits.

It is undisputed that appellant was awarded the subject credits despite the court's inadvertent omission in the March 5, 2014 amended abstract. The People nevertheless assert that appellant has failed to demonstrate he is entitled to the credits because the record fails to establish whether the time he spent in custody following the December 2010 probation revocation was attributable to case number BA369068, rather than the "new" offense that triggered the revocation. (See *People v. Pruitt* (2008) 161 Cal.App.4th 637, 649 [probationer not entitled to credit for time spent in custody on new charges following his arrest but prior to the summary revocation of his probation].) They offer that "[b]ecause the record does not demonstrate that appellant's probation was ever revoked during this period, he is not entitled to receive credit for his custody during this period against his sentence in case number BA369068."

---

economy and expediency, we exercise our discretion to address the claim.

We reject this assertion. In concluding that appellant was entitled to the credits, the Los Angeles Superior Court essentially found that the time he spent in custody following the December 2010 revocation of probation was solely attributable to case number BA369068. The record also makes clear that in March 2011, appellant was actually awarded the credits and was ordered to serve 168 days in county jail with credit for time served. The People did not challenge the award of credits at that time, nor did they challenge the court's February 7, 2014 ruling that amended the abstract of judgment to include those credits. By failing to challenge these rulings, the People have effectively forfeited the right to now claim that appellant is not entitled to the credits.[5]

Our Prior Directive In Affirming The Judgment Of Conviction

As we have noted, in affirming the judgment of conviction we directed the trial court to amend the minutes and the abstract of judgment to make clear that appellant had been convicted of violating section 241, subdivision (c) (misdemeanor assault on a peace officer) rather than section 241, subdivision (b) (misdemeanor assault on a parking control officer). The amended abstract filed in response to this directive still erroneously states, however, that appellant was convicted in violation subdivision (b)

---

[5] The People alternatively claim that appellant is in any event entitled to no more that 165 days of credit (i.e., 110 days of actual custody credit and 55 days of conduct credit) because the record reflects he was taken into custody on December 6, 2010, and admitted on March 25, 2011, that he had violated his probation. This claim erroneously presumes the credits were awarded the same day appellant admitted the violation.

of section 241. We shall once again order that the judgment be modified to correct this error.

DISPOSITION

The judgment in case numbers KA094768 and BA369068 is modified to reflect an award of 818 days of presentence custody credit, consisting of (1) 430 days of credit in case number KA094768 (215 days of actual custody credit and 215 days of conduct credit); and (2) 388 days of credit in case number BA369068 (222 days of actual custody credit and 166 days of conduct credit). The judgment is also modified to reflect that appellant was convicted of violating section 241, subdivision (c), rather than section 241, subdivision (b). The clerk shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

The appeal from the October 19, 2015 order denying appellant's petition for a writ of habeas corpus, which we treat as a petition for a writ of habeas corpus, is denied.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Steven D. Blades, Judge
Superior Court County of Los Angeles

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.