IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **EUGENE LEROY NEEDHAM**, Defendant and Appellant.	**C087234** Glenn County No. 16NCR11306

On Appeal from the Judgment and Order of the
Superior Court of California, Glenn County
Honorable Donald Byrd, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is from a guilty and no contest plea and is based on the sentence imposed, within the meaning of California Rules of Court, rule 8.304(b)(4)(B). It is authorized by Penal Code section 1237.

STATEMENT OF CASE

A. Butte County, case number 17CR00217.

A first amended information was filed by the Butte County District Attorney's Office on February 9, 2017, charging appellant with one count of possession of methamphetamine for sale (Health & Saf. Code, § 11378, count one), one count of identity theft (Pen. Code, § 530.5, subd. (a), count two), and one count of forgery relating to identity theft (Pen. Code, § 470, subd. (a), count three). (ACT 12-15.) The amended information further alleged seven enhancements for a prior conviction of a controlled substance (Health & Saf. Code, § 11370.2, subd. (a)), an out on bail enhancement (Pen. Code, § 12022.1), and five prison prior convictions (Pen. Code, § 667.5, subd. (b)). (CT 12-17.) On March 2, 2017, and pursuant to a joint plea agreement with Glenn County case number 16NCR11306, appellant pleaded no contest to count one, possession of methamphetamine for sale,

count two, identify theft, and admitted two controlled substance prior conviction enhancements. (ACT 22-27; ART 15-19.)

Twelve days later, appellant was sentenced to three years on count one, eight months on count two, and three years on each of the controlled substance prior convictions, for a total of nine years and eight months in county jail. (ACT 36-37.) Appellant was awarded a total of 128 days of custody credits. (CT 36.)

B. Glenn County, case number 16NCR11306.

A complaint was filed by the Glenn County District Attorney on August 3, 2016, charging appellant with two counts of transporting narcotics (Health & Saf. Code, § 11379, subd. (a), counts one and three), two counts of possession of narcotics for sale (Health & Saf. Code, § 11378, counts two and four), one count of transportation of marijuana (Health & Saf. Code, § 11360, subd. (a), count five), one count of possession of marijuana for sale (Health & Saf. Code, § 11359, count six), and one count of reckless driving with the intent to evade law enforcement (Veh. Code, § 2800.2, subd. (a), count seven.) (CT 1-4.) The complaint further alleged five enhancements for a prior conviction of a controlled substance (Health & Saf. Code, § 11370.2, subd. (a)). (CT 4.)

On March 7, 2018, appellant pleaded guilty to count seven, reckless driving with the intent to evade law enforcement (Veh. Code, § 2800.2, subd. (a).) (CT 25-31.) On April 13, 2018, the Glenn County trial court sentenced appellant under Penal Code section 1170.1, making the principal term count one of the Butte County case (possession of narcotics for sale, Health & Saf. Code, § 11378), and sentenced appellant to consecutive eight months on count two in the Butte County case, and a consecutive eight months on the reckless evading conviction in the Glenn County case. (SRT 11-12; SCT 1; CT 103-104.) Because a violation of Vehicle Code section 2800.2 is not eligible for county prison (*People v. Butcher* (2016) 247

Cal.App.4th 310, 319), appellant's aggregate sentence was ordered served in state prison. (RT 14.)

On May 22, 2018, appellant filed a notice of appeal in Glenn County and included both cases numbers. (CT 105.) Appellant's request for a certificate of probable cause, raising the issue of the new law under Senate Bill 180, was denied. (CT 106.) On November 19, 2018, this Court ordered the notice of appeal to be construed to include the Butte County case. (SCT 53.)

STATEMENT OF FACTS

A. Butte County, case number 17CF00217.

On January 12, 2017, appellant attempted to cash a fraudulent check at a business in Oroville. (ACT 28.) At the same time, appellant was in possession of a stolen check, 2.41 grams of methamphetamine, ten unused Ziploc baggies, a digital scale, and $600 in currency. (ACT 28-29.)

B. Glenn County, case number 16NCR11306.

On July 25, 2016, at approximately 10:21 p.m., law enforcement attempted to pull over appellant's car for incomplete registration. (CT 40.) When the lights and sirens of the police vehicle were activated, appellant continued driving and failed to yield. (CT 40.) Appellant drove over the center line, up on to the sidewalk, and over a grass field in an effort to evade law enforcement. (CT 40.) Upon arrest, appellant was in possession of $3,217 in currency, drugs, drug paraphernalia, and eight counterfeit $50 bills. (CT 41.)

ARGUMENT

I. THE TWO PRIOR FELONY DRUG CONVICTION ENHANCEMENTS MUST BE STRICKEN AND THE SENTENCES VACATED.

A. Procedural Background.

In Butte County case number 17CF00217, appellant admitted two prior conviction enhancements under Health and Safety Code section 11370.2: a 1997 conviction for violating Health and Safety Code section 11378 (case number SCM008357), and a 2000 conviction for violating Health and Safety Code section 11383.5. (ACT 13, 22.) Appellant was sentenced to three years for each prior conviction enhancement. (ACT 49.)

During the April 13, 2018 sentencing hearing in Glenn County, appellant argued the two Butte County prior conviction enhancements under Health and Safety Code section 11370.2 should be stricken based on a recent change in the law. (RT 13-14.) The prosecutor argued the Butte County sentence was final 90 days after imposition of original sentence. (RT 13.) Finding it had no jurisdiction, the trial court denied the request to strike the enhancements. (RT 13-14.)

B. The Glenn County Trial Court Is the Sentencing Court in Both Cases.

Penal Code section 1170.1 "provides an exception to the general rule that a sentence lawfully imposed cannot be modified once a defendant is committed and execution of his or her sentence has begun." (*People v. Baker* (2002) 144 Cal.App.4th 1320, 1329.) The statute provides a second court the power to modify a sentence previously imposed by a different court. (See *People v. Bozeman* (1984) 152 Cal.App.3d 504, 507.) California Rules of Court, rule 4.452 also addresses the issue:

> If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:
>
> (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case.
>
> (2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a). The principal term is the term with the greatest punishment imposed including conduct enhancements. If two terms of imprisonment have the same punishment, either term may be selected as the principal term.
>
> (3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision to impose one of the three authorized terms of imprisonment referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement. However, if a previously designated principal term becomes a subordinate term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a).

Consequently, rule 4.452 provides the second court the authority to modify the first sentence, and requires imposition of a single aggregate term. The language of rule 4.452 and section 1170.1, subdivision (a),

provides the combined sentence is the "final judgment of conviction" which the defendant may appeal under section 1237, subdivision (a). Section 1237, subdivision (a) refers to the "final judgment of "conviction" as a "sentence." As this Court previously explained, "[i]n pronouncing a single aggregate term and imposing the combined sentences as though they were all counts in the current case as required under sections 669 and 1170.1 and rule 4.452, the [second] trial court became the sentencing court for both the [first] and [second] cases. The [first] trial court was no longer a sentencing court, as its sentence was replaced by the consecutive sentence imposed by the [second] trial court." (*People v. Phoenix* (2014) 231 Cal.App.4th 1119, 1126.)

The plenary nature of the resentencing process, to allow for all sentencing choices, applies to an aggregate sentence imposed based on convictions from separate cases under Penal Code section 1170.1, subdivision (a), and California Rules of Court, rules 4.451(a) and 4.452. (See generally, *People v. Roach* (2016) 247 Cal.App.4th 178, 185-186.) Therefore, the Glenn County trial court was the sentencing court on both cases, and had the jurisdiction to modify the sentence in the Butte County case.

C. It was Error Not to Strike The Two Prior Felony Drug Conviction Enhancements.

On October 11, 2017, the Governor signed Senate Bill 180, which amended Health and Safety Code section 11370.2 as of January 1, 2018. Before the amendment, the law provided for a three-year sentence enhancement in every case in which a person was convicted of specified crimes relating to controlled substances based on prior convictions for specified controlled substance related crimes. Senate Bill 180 reduced the list of prior offenses qualifying for the enhancement to just one, Health and

Safety Code section 11380 (drug offense using a minor as agent). (Stats. 2017, ch. 677, § 1.)

It is a settled point of California law that newly enacted laws, which mitigate punishment for a crime are presumed to apply retroactively. (*In re Estrada* (1965) 63 Cal.2d 740 (Estrada).) The *Estrada* rule posits that a court must assume that the Legislature intended the sentence ameliorating legislation to apply to all defendants whose judgments are not yet final on the statute's operative date unless a contrary legislative intent is found in the language of the enactment or its legislative history. (*Id*. at p. 742.) The "consideration . . . of paramount importance" is whether the amendment lessens the punishment. If it does, that leads to the "inevitable inference that the Legislature must have intended that the new statute" controls. (*In re Estrada, supra,* 63 Cal.2d at p. 745.)

"Nothing in Senate Bill No. 180 indicates the Legislature intended prospective application only. (Stats. 2017, ch. 677, § 1.)" (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213.) Accordingly, Senate Bill 180 applies retroactively to cases in which the judgment was not yet final on January 1, 2018. (*Id*.)

On April 13, 2018, when appellant was re-sentenced and the aggregate judgment was imposed, it included six years for two prior conviction enhancements under Health and Safety Code section 11370.2, subdivision (a). However, based on the enactment of Senate Bill 180, appellant’s prior convictions did not qualify as triggering prior convictions under Health and Safety Code section 11370.2. Consequently, the Glenn County trial court did not have the authority to impose two three-year sentences under Health and Safety Code section 11370.2, and it was error

to not strike the enhancements. [1] Accordingly, the two prior felony drug conviction enhancements (Health & Saf. Code, § 11370.2, subd. (c)) must be stricken and the six-year prison sentence vacated.

II. THE ABSTRACT OF JUDGMENT MUST BE AMENDED TO REFLECT THE TOTAL NUMBER OF CUSTODY CREDITS AT THE TIME OF THE APRIL 13, 2018 SENTENCING.

Appellant must be awarded 393 actual days and 392 conduct credits for the days he served in custody after he was originally sentenced in Butte County on March 16, 2017, and when he was re-sentenced on April 13, 2018.

A. Relevant Factual Background.

At the April 13, 2018 aggregate sentencing hearing, appellant was awarded four actual days, plus four conduct credits for a total of eight days in the Glenn County case.[2] (RT 14-15.) Additionally, the trial court stated: "And his credits have already been established in the Butte County case. And I will make the same findings as to his credits in the Butte County case." (RT 15:7-10.) Therefore, appellant was awarded 128 days of pre-sentence custody credits as of March 16, 2017, when appellant was originally sentenced in Butte County. (ACT 49; CT 104-105.)

Based on a warrant issued on September 20, 2017, appellant was transported from Butte County jail to Glenn County jail, arriving on

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[1] If this issue is deemed forfeited based on defense counsel's failure to argue the Glenn County trial court had the authority and jurisdiction under Penal Code 1170.1 and California Rules of Court, rule 4.452, the issue should be considered under the rubric of ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668.) Defense counsel asserted he knew of no authority that would give jurisdiction to the Glenn County trial court to modify the Butte County sentence, specifically dismissing the sentences on the enhancements under Health and Safety Code section 11370.2, subdivision (a). (RT 13-14.)

[2] The abstract of judgment erroneously states four days. (CT 104.)

October 31, 2017. (CT 16-18, 34.) The single aggregate term and imposition of the combined sentence occurred in Glenn County on April 13, 2018.

B. The Glenn County Trial Court Failed to Properly Calculate and Award Custody Credits in Both Cases.

Pursuant to Penal Code sections 669 and 1170.1, and California Rules of Court, rule 4.452, Glenn County trial court became the sentencing court for both the Glenn County and Butte County cases; Butte County is no longer the sentencing court, as "its sentence was replaced by the consecutive sentence imposed by" the Glenn County trial court. (*People v. Phoenix, supra,* 231 Cal.App.4th at 1126.) Consequently, the Glenn County trial court's "duty as the new sentencing court to calculate and award all of defendant's credits, including those pertaining to the" Butte County case. (*Id*.) This duty to calculate credits includes "both the presentence custody credits and also the actual days the defendant served in prison custody on the earlier case when imposing consolidated sentences under rule 4.452." (*Id*. citing, *People v. Saibu* (2011) 191 Cal.App.4th 1005, 1012–1013.)

Here, the Glenn County trial court failed to make this calculation at the April 13, 2018 resentencing. Based on a warrant issued on September 20, 2017, appellant was transported from Butte County jail to Glenn County jail, arriving on October 31, 2017. (CT 16-18, 34.) No credits were awarded for the days served in custody between March 16, 2017 and April 13, 2018, which is 393 actual days. Thus, appellant should be awarded a total of 786 custody credits.

CONCLUSION

Based upon the forgoing, the two prior drug conviction enhancements (Health & Saf. Code, § 11370.2, subd. (a)), should be stricken and the related six year sentence should be vacated, and appellant should be awarded a total of 786 additional custody credits.

Respectfully submitted.

Dated: May 22, 2019

/s/ Kendall Dawson Wasley
Kendall Dawson Wasley

CERTIFICATE OF COMPLIANCE

I certify that pursuant to California Rule of Court 8.204 and Rule 8.360, the attached opening brief is proportionately spaced, has a typeface of 13 points and contains 2,513 words.

Dated: May 22, 2019

/s/ Kendall Dawson Wasley
Kendall Dawson Wasley

Re: *The People v. Needham*, Case No. C087234

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(Code Civ. Proc., § 1013a, subd. (3); Cal. Rules of Court, rules 8.71(f) and 8.77)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **May 22, 2019**, at Sacramento, California.

/s/ *Sebastion Lowe*
Sebastion Lowe

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Case Name: **The People v. Needham**
Case Number: **C087234**
Lower Court Case Number: **16NCR11306**

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