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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RYAN EHA,

Defendant and Appellant.

B266227

(Los Angeles County
Super. Ct. No. BA420869)

APPEAL from an order of the Superior Court of Los Angeles County, Ray G. Jurado, Judge. Reversed with directions.

Kevin D. Sheehy, 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, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant David Ryan Eha appeals from an order denying his petition for an order granting additional presentence custody and conduct credits. We reverse and remand for determination as to whether the trial court correctly calculated the presentence credits to which Eha is entitled.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2014, Eha was charged by felony complaint with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ four counts of vandalism causing damage over \$400 (§ 594, subd. (a)), and one count of resisting a police officer (§ 148, subd. (a)(1)).

On May 1, 2014, pursuant to a plea deal, Eha pled no contest to the two assault with a deadly weapon counts, and the trial court dismissed the remaining counts. The court suspended imposition of sentence and placed Eha on formal probation for a period of three years. The grant of probation required Eha to complete a six-month residential treatment program to address his mental health and substance abuse issues. Probation was also conditioned on service of 190 days in county jail, but Eha was credited with 190 days based on 95 days of actual custody plus 95 days of good time/work time.

At a restitution hearing on June 30, 2014, the trial court found Eha in compliance with the residential treatment program. However, the program subsequently requested that Eha be remanded for violations. At a probation violation hearing on August 27, 2014, Eha admitted the violations. The trial court

¹ All further statutory references are to the Penal Code.

found he had violated probation and revoked his probation. It remanded him into custody, noting that at his sentencing hearing in three weeks, he would be released and readmitted into the residential treatment program.

At the sentencing hearing on September 17, 2014, the court ordered probation reinstated and Eha readmitted to the residential treatment program. The court advised Eha, however, that it was requiring him to start the program anew, meaning he would not get any credit for the three months he served in the program. The court also conditioned probation on service of 44 days in county jail with credit for 44 days, consisting of 22 days of actual custody plus 22 days of conduct credits.

On September 30, 2014, the court held a progress report hearing and defense counsel confirmed that Eha was participating in the residential treatment program.

At the next progress report hearing on March 30, 2015, however, defense counsel reported that Eha left the residential treatment program in December 2014, had not reported to his probation officer, and counsel had not heard from him. The trial court revoked his probation and issued a no-bail bench warrant.

Eha was taken into custody, and the court held a probation violation hearing on April 30, 2015. The court noted Eha had continued to violate the rules of the residential treatment program, eventually walking away from the program on December 15, 2014. Defense counsel indicated Eha was willing to admit the probation violation and was requesting another chance to complete the residential treatment program. Based on the fact Eha was given two opportunities to complete the program and failed to do so, the trial court was unwilling to give him another

opportunity. The court stated that its indicated sentence was the low term of two years on each count, to run concurrently.

After Eha admitted the probation violation, the trial court implemented its indicated sentence and sentenced Eha to two years in state prison. It stated that “because [Eha] waived back time credits in the past, he’s to receive credit of 128 actual, plus 38 good time/work time, for a total of 166” days of presentence custody credit. The court did not specify when in the past Eha had waived credits.

On July 6, 2015, Eha filed a petition for an order granting presentence custody and conduct credit pursuant to sections 2900.5 and 4019. Claiming that he was in custody for 164 days, Eha requested actual custody credit for that amount of time. The trial court denied the petition on July 6, 2015, finding that Eha had received the correct amount of credit. Eha timely appealed.

DISCUSSION

Section 2900.5 provides that “a defendant sentenced either to county jail or to state prison is entitled to credit against the term of imprisonment for days spent in custody before sentencing as well as those served after sentencing as a condition of probation. [Citations.] This provision also applies to custodial time in a residential treatment facility. [Citation.]” (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053, fn. omitted.)

Eha contends he is entitled to 356 days of presentence custody credit, consisting of 223 days of actual custody and 133 days of conduct credits, rather than the 166 days he actually received. He asks us to direct the modification of the abstract of judgment to reflect total presentence custody credits of 356 days.

In his petition in the trial court, however, Eha sought only 164 days of presentence custody credit. Eha's appeal briefs do not explain the discrepancy between the 164 days he sought below and the 223 days he seeks on appeal. We cannot glean the explanation from the record.

Another gap in the record is the extent to which Eha waived entitlement to section 2900.5 credits under *People v. Johnson, supra*, 28 Cal.4th 1050.² Eha acknowledges the record suggests that he made a *Johnson* waiver at the September 17, 2014 sentencing hearing, when the trial court advised him that it

² In *Johnson*, the Supreme Court held that “a defendant may expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody. . . . As with the waiver of any significant right by a criminal defendant, a defendant's waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent. [Citation.]” (*People v. Johnson, supra*, 28 Cal.4th at pp. 1054-1055.) “The gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled under section 2900.5. [Citation.] . . . A defendant entering a straightforward and unconditional waiver of section 2900.5 credits has no reason to believe that the waiver is anything other than a waiver of such credits for all purposes.” (*People v. Arnold* (2004) 33 Cal.4th 294, 308-309.) Therefore, “when a defendant knowingly and intelligently waives local jail time custody credits after violating probation in order to be eligible for reinstatement on probation and thereby avoid a prison sentence, the waiver is for all purposes and applies to any future use of such credits should probation ultimately be terminated and a previously suspended state prison sentence imposed. [Citation.]” (*People v. Jeffrey* (2004) 33 Cal.4th 312, 316-317.)

would reinstate probation but it was requiring him to start the residential treatment program anew, meaning he would not get any credit for the three months he previously served in the program. Eha claims, however, that there is nothing in the record to show he waived future use of his 190 days of custody credits awarded when he entered his plea on May 1, 2014.

The People point out that Eha did not claim entitlement to the full 190 days in his petition. The People also note the absence from the record on appeal of transcripts of two hearings at which Eha may have made the “past” *Johnson* waiver to which the trial court referred at the April 30, 2015 probation violation hearing. Additionally, the People highlight significant questions about credits Eha is claiming for the period September 17, 2014 to December 15, 2014 and possible double-counting of credits for the period August 27, 2014 to September 17, 2014. The People concede, however, that there are doubts about the accuracy of the trial court’s calculations and that therefore Eha may well be entitled to additional presentence custody credits.

When, as is the case here, both parties agree that defendant is likely entitled to additional presentence custody credits but dispute the amount of additional credits, gaps in the record prevent the appellate court from resolving the dispute, and the defendant did not fully pursue his claims of credit below, the prudent course is to remand for a trial court determination of the correct calculation of credits the defendant is due. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428 & fn. 8; *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1557; *People v. Fares* (1993) 16 Cal.App.4th 954, 958.)

DISPOSITION

The order denying Eha's petition for an order granting presentence custody and conduct credits is reversed. The matter is remanded for the purpose of determining the correct calculation of the credits to which Eha is entitled and those as to which he may have waived.

SMALL, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.