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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE DEJESUS HORTA, Defendant and Appellant.	B279516 (Los Angeles County Super. Ct. No. BA448881)

APPEAL from judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed as modified.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Michael C. Keller,

Acting Supervising Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Jose DeJesus Horta was sentenced to 21 years 8 months in state prison following his conviction by jury of four felony offenses. Defendant contends on appeal: (1) the trial court did not understand that it had discretion to impose a concurrent sentence on defendant's conviction for dissuading a witness; (2) he was provided ineffective assistance of counsel when defense counsel failed to argue at sentencing that the court had the discretion to impose a concurrent sentence on the charge of dissuading a witness; and (3) the trial court miscalculated presentence custody credits and imposed an unauthorized domestic violence fee. We modify the judgment to reflect that defendant is entitled to a total of 242 days of presentence custody and conduct credits, strike the domestic violence fee, and affirm in all other respects.

PROCEDURAL HISTORY AND BACKGROUND[1]

The jury convicted defendant in counts 1 and 2 of inflicting corporal injury on a cohabitant resulting in a traumatic condition following a previous conviction (Pen.

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[1] Because the issues on appeal relate only to sentencing, we do not include a summary of the trial testimony.

Code, § 273.5, subd. (f)(1)),[2] in count 5 of dissuading a witness (§ 136.1, subd. (b)(1)), and in count 6 of making criminal threats (§ 422, subd. (a)). Defendant admitted suffering a prior conviction under the three strikes law (§§ 667 subd. (d) and 1170.12, subd. (d)), a prior serious felony conviction (§ 667, subd. (a)), and serving a prior prison term (§ 667.5, subd. (b).)

The trial court reviewed sentencing memoranda filed by the prosecution and defense prior to imposing sentence. Arguments on sentencing were presented by defense counsel and the prosecutor.

The court made comments regarding sentencing before, during, and after imposition of sentence. Prior to sentencing, the court stated it was aware of defendant's prior conviction for domestic violence, and that the current incident occurred "either during the time frame that he was completing [probation] or at the conclusion thereof." The court agreed with the prosecution's position that defendant "has not learned from his past." Defendant's conduct toward the victim was "egregious" and "outrageous." The court found no mitigating factors applicable to defendant's conduct.

The court then turned to the imposition of sentence. The court imposed a sentence of 10 years in state prison in count 1, consisting of the upper term of five years, doubled due to defendant's prior conviction under the three strikes

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[2] All statutory references are to the Penal Code unless otherwise specified.

law. The court imposed an additional five years for defendant's prior serious felony conviction pursuant to section 667, subdivision (a)(1). In count 2, the court imposed a consecutive term of 2 years 8 months, consisting of one-third of the midterm (14 months), again doubled due to the strike prior conviction. On the dissuading a witness charge in count 5, the court imposed a consecutive term of four years, calculated as the midterm of two years, doubled due to the prior conviction under the three strikes law. The court noted that pursuant to section 1170.15, "this particular charge will not be one third the midterm because of the nature of the offense and dissuading or threatening in the base offense, therefore this full midterm is consecutive." As to count 6, the court imposed a sentence of two years eight months, which was stayed under section 654. Defendant was awarded custody credit of 118 days and an equal amount of conduct credit, "for 238 total."[3] The court imposed a variety of fines and fees, including a $500 domestic violence fee under section 1203.097.

The court made additional comments after imposing sentence, not all of which can be reconciled for consistency. The court stated it did not have authority to strike "the 677

[3] The abstract of judgment contains the correct mathematical calculation of 236 days.

(*sic*) 5 year,"[4] although it did "reconsider it" and the court "would have been in favor of it," but could not do so "pursuant to statute." The court "considered the time frame for [defendant] to be less because [it] felt that perhaps he could have gained some education off of this incident. [¶] That does not lessen the egregiousness of the incidents that occurred, and that he has conducted up to this point. [¶] So the sentencing is for the most part by statute, Mr. Horta." The court added, "Further, to finally include on the record, the court did not strike the prior because the prior was far too close in time to this incident. [¶] He was still on probation on that matter when he committed this assault, and this assault did not just take place on one day, but took place on two days and several other counts that occurred because of these incidences. [¶] That is the basis for the court not . . . granting the request to strike the prior, but the court felt it was not appropriate in this case for his conduct."

DISCUSSION

Imposition of Consecutive Sentence

Defendant contends the trial court "misconstrued section 1170.15 to require the imposition of a consecutive sentence" when it sentenced defendant in count 5 for

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[4] We assume the court either misspoke, intending to refer to section 667, or there is a typographical error in the reporter's transcript.

dissuading a witness, and that he was provided with ineffective assistance of counsel for the failure to object on the issue. We see no indication of the record of any misunderstanding of section 1170.15 by the trial court.

"Absent an express statutory provision to the contrary, section 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions." (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] . . . [¶] Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion. [Citations.] Further, remand is unnecessary if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] '"[A] trial court is presumed to have been aware of and followed the applicable law." [Citations.]' [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228–1229.)

Section 1170.15 provides, in pertinent part, that "if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 . . . and that was committed against the victim of . . . the first felony, the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term

of imprisonment for the felony for which a consecutive term of imprisonment is imposed." *People v. Woodworth* (2016) 245 Cal.App.4th 1473 (*Woodworth*) held that section 1170.15 "does not contain an express provision depriving the trial court of the discretion afforded to it in section 669," and the trial court retains discretion to impose a concurrent term, but if a consecutive term is imposed, it must be for the full midterm under section 136.1. (*Id.* at pp. 1479–1480.) The *Woodworth* court reversed, because the trial court had sentenced with the misunderstanding that section 1170.15 "required imposition of a full consecutive sentence." (*Id.* at p. 1478.)

The trial court here, unlike the trial court in *Woodworth*, did not intimate, much less affirmatively state, that it lacked discretion to impose a concurrent rather than consecutive sentence on the charge in count 5 of dissuading a witness. After finding defendant's conduct to be "egregious," escalating in violence, and taking place over the course of two days, the court expressly referenced the nature of the offense when it decided to impose a consecutive sentence in count 5: "[This count] will not be one third the midterm because of the nature of the offense and dissuading or threatening in the base offense, therefore this full midterm is consecutive." Such findings comport with the criteria affecting whether a trial court imposes a consecutive rather than concurrent sentence (Cal. Rules of Court, rule 4.425(a)), as well as with aggravating factors in sentencing (Cal. Rules of Court, rules 4.421(a)–(b)).

Defendant points to the trial court's statement that it would have been "in favor" of striking the section 667, subdivision (a), five year enhancement, if it could do so, as an indication that the trial court "believed section 1170.15 required" a consecutive sentence. We disagree, as the court's various statements regarding the five year enhancement—that it was "in favor" of striking it, realizing it had no power to strike it, and explaining it "did not strike the prior because the prior was far too close in time to this incident"—make absolutely no reference to the unrelated sentencing issue regarding section 1170.15. On this record, defendant has failed to establish that the court misunderstood its discretion to impose a concurrent sentence in count 5.

Because there is no basis for concluding the trial court misunderstood its sentencing discretion, it follows that defendant's claim of inadequate assistance of trial counsel fails, as the record on appeal establishes neither deficient conduct or prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 693.)

Modification of the Judgment

Defendant contends the trial court miscalculated his presentence custody credit and imposed an unauthorized domestic violence fee. We agree and order a modification of the credits and deletion of the domestic violence fee.

In imposing sentence on the charged offenses, the court orally awarded custody credit of 118 days and conduct credit

of 118 days, "for 238 total." The calculation and total are both incorrect. The actual custody credit should have been 121 days, plus 121 days of custody credit for a total of 242 days. The trial court is to make the appropriate correction in the abstract of judgment.

We agree with the parties that the trial court should not have imposed the $500 domestic violence fee. That fee applies where probation is granted. Because defendant was sentenced to prison, the fee is not applicable and must be stricken. (§ 1203.097, subd. (a)(5)(A); *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520.)

DISPOSITION

The trial court is directed to modify the abstract of judgment to reflect 121 of custody credit and 121 days of conduct credit for a total of 242 days, and to delete the $500 domestic violence fee. In all other respects the judgment is affirmed.

KRIEGLER, Acting P. J.

We concur:

BAKER, J.

DUNNING, J.*

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