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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNIE JABAAR WELLS,

Defendant and Appellant.

B283997

(Los Angeles County
Super. Ct. No. YA095108)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Dismissed.

Waldemar D. Halka, 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, Marc A. Kohn and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Johnnie Jabaar Wells (defendant) pled no contest to charges in two separate cases. In the first case involving defendant's plea to an assault charge, the trial court sentenced defendant to four years in prison and calculated his good time and work time credits (conduct credits) at 50 percent of presentence time spent in custody. Subsequently, when imposing sentence in the other case, involving defendant's no contest plea to robbery, the trial court recalled the sentence in the assault case and imposed a new consolidated sentence of seven years for both cases, with defendant's conduct credits calculated at 15 percent of custody time. This, of course, reduced defendant's total amount of presentence credits. At the time defendant noticed his appeal from this judgment, which solely seeks a correction in his conduct credits, he had not presented a credit correction request to the trial court. We consider whether an appeal may properly be taken under such circumstances.

I. BACKGROUND

On November 3, 2016, the Los Angeles County District Attorney filed case number YA095108 (the Robbery Case) charging defendant with two counts of felony robbery (Pen. Code, § 211).¹ Two weeks later, the district attorney filed case number BA451860 (the Assault Case) charging defendant, who was then in pre-trial custody on the Robbery Case, with a single count of assault with a deadly weapon (§ 245, subd. (a)(1)) for hitting another inmate in the face with a hard plastic food tray.

¹ Undesignated statutory references are to the Penal Code.

The Assault Case was the first of the two cases to resolve. Defendant entered a no contest plea to an amended charge of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)) pursuant to an agreement with the People that the prosecutor described as follows: “The new disposition is four years without the strike allegation. He’ll be doing 50 percent on this one. It would be to the [section] 245[, subdivision (a)(4),] which is also a non-strike. Four years state prison.”² The trial court immediately sentenced defendant in accordance with the plea agreement—including, as to custody credits, an award of 332 credit days calculated as 166 actual days and 166 days of conduct credit.

Nearly a month later, defendant pled no contest to one count of second degree robbery (§ 211) in the Robbery Case. Before taking the plea, the trial court and counsel discussed on the record the terms under which defendant would plead no contest, which would require recalling the sentence imposed in the Assault Case. The trial court described the arrangement as follows: “It appears [defendant] in [the Assault Case] pled to a 245(a)(4), received four years state prison. It’s my understanding that the parties have agreed that I can order that case, recall the sentence, and . . . defendant will get a new sentence of one-third the mid term on that case, which is one-third of three years, which is one year, to run consecutive, I stress the word

² Before defendant entered his plea, the prosecutor gave him the following advisement (which he stated he understood): “If you have pending cases in this county or anywhere else, it is possible it may affect the disposition in those cases. I am not making any representations, including the one out of Inglewood [i.e., the Robbery Case].”

consecutive, because there w[ere] some misstatements here, to run consecutive to the [Robbery Case].”³ Defendant concurred that was the agreement.

Also before taking the plea, the trial court advised defendant (and a co-defendant in the same case who was also before the court) of the rights he would be waiving in pleading no contest and of the consequences of the plea. Among these advisements was the trial court’s request that defendant understand he would have to pay a restitution fine “and also understand [that because] these are violent felonies, as I indicated, you get only 15 percent credits in these cases.” Defendant confirmed he “underst[ood] each and every one of these consequences.”

Pursuant to the parties’ agreement, the trial court on May 1, 2017, sentenced defendant in the Robbery Case while recalling the sentence in the Assault Case and re-imposing sentence—treating the assault conviction as subordinate to the robbery conviction. Specifically, the court sentenced defendant to six years in prison for the Robbery Case (the middle term, doubled pursuant to the Three Strikes law) and one year in prison (one-

³ The trial court’s remark regarding “misstatements” referred to prior discussion of whether the sentence imposed in the Assault Case would run concurrent or consecutive to the Robbery Case. During that discussion, the court inquired whether defendant admitted a prior strike conviction in the Assault Case and defendant’s attorney responded, “Well, he says it’s a 50 percent case.” The trial court asked the clerk to obtain records concerning the Assault Case, and the court thereafter summarized the agreement among the parties as just quoted.

third the middle term of three years, consecutive) for the Assault Case.

At sentencing, defendant's attorney asked the trial court what the credits would be on the Assault Case and the court replied, "[w]e have to figure that out." The court reasoned robbery was a "violent prior" so defendant "only gets 15 percent credits," and the court initially calculated 32 days of conduct credit, which with credit for actual days in custody, resulted in a total of 245 days. After an off the record discussion, however, the court stated it would "recalculate [defendant's] credits because the court omitted the credits from September 7th to October 2nd." As recalculated, the trial court awarded defendant "239 days actual credit plus 36 [conduct credits] at 15 percent for [a] total of 275 days credit." Defendant did not object to the court's use of the 15 percent limitation to calculate conduct credits.

Defendant, in propria persona, noticed an appeal "from the deal bargain proceedings rendered against him on May 1, 2017," as well as "the sentence rendered against him on May 1, 2017." Waldemar Halka was subsequently appointed to represent defendant on appeal.

Mr. Halka filed an opening brief raising a single issue for consideration: "whether defendant . . . was denied the benefit of his plea bargained credits in [the Assault Case] in which he pled no contest to committing assault by means of force likely to cause great bodily injury, after he subsequently pled no contest to committing a separate and distinct robbery as part of a plea bargain in [the Robbery Case], [the Robbery Case] did not include any bargained-for credits or elimination of [the Assault Case] credits, and previously ordered [Assault Case] conduct credits were reduced by 85 percent." Mr. Halka's opening brief

acknowledged “depending how this Court views the issue presented, i.e. a credits issue, as opposed to a plea bargain enforcement issue, the instant appeal may or may not be operable under section 1237.1.”⁴

II. DISCUSSION

Section 1237.1 provides: “No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the calculation of presentence custody credits upon the defendant’s request for correction.”

Mr. Halka’s opening brief recognizes his appeal may be improperly taken in light of the dictates of section 1237.1, and he is correct in that regard. The sole issue presented for decision on this record⁵ is whether the sentencing court erred in limiting

⁴ Mr. Halka noted he had filed in the Superior Court, contemporaneously with the filing of the opening brief, a “Penal Code Section 1237.1 Credits Motion and Motion to Vacate Unauthorized Credit Sentencing in [the Assault Case and the Robbery Case].” We take judicial notice that defendant has noticed an appeal from the trial court’s subsequent ruling on this motion in case number B290261.

⁵ After the opening and respondent’s briefs were filed, defendant filed a motion in this court to augment the record on appeal with his post-judgment Superior Court motion to correct his presentence credits; a “Request to Transfer the Cause to the

defendant's conduct credits—including as to the assault conviction that served as part of the basis for the sentence imposed—to 15 percent of his actual time in custody notwithstanding his agreement that the court should recall the sentence the Assault Case and resentence him in conjunction with the sentence imposed for the Robbery Case conviction. A defendant must pursue a claim involving an allegedly erroneous calculation of custody credits in the trial court before seeking an appellate determination. (*People v. Fares* (1993) 16 Cal.App.4th 954, 958 [appropriate method of correction when the sole issue is addressing credit calculation errors is motion for correction in the sentencing court before formal appeal]; accord, *People v. Acosta* (1996) 48 Cal.App.4th 411, 425-426 ["There is no doubt . . . that the Legislature intended to require dismissal of an appeal where the only issue posited by the defendant involves an issue of presentence credits and the question was not preserved in the trial court"]; see also *People v. Alexander* (2016) 6 Cal.App.5th 798, 801.)

Los Angeles Superior Court for Reconsideration and Recalculation of Credits, a Full and Fair Credits Hearing with Notice to the Parties, and Express Findings of Fact and Conclusions of Law for Credit Rulings"; and a request to file a supplemental opening brief 30 days after "the superior court issues its new credits order (assuming defendant's transfer request is granted), or 30 days from denial of the transfer request." This court denied the motion and requests (while granting the Attorney General's augmentation motion, which established the trial court had ruled on defendant's post-judgment credit motion) and noted a post-judgment order concerning the calculation of presentence credits is separately appealable. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1557.)

Because Mr. Halka pursued the sole issue he raises without first obtaining a ruling from the trial court concerning the allegedly erroneous credit calculation, “the present appeal must be dismissed.” (*People v. Clavel* (2002) 103 Cal.App.4th 516, 519.)

DISPOSITION

The appeal is dismissed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIN, J.*

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