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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN JESS AREVALOS III, Defendant and Appellant.	2d Crim. No. B233266 (Super. Ct. No. 1362953) (Santa Barbara County)

John Jess Arevalos appeals the order revoking his probation and directing execution of the four-year state prison sentence that was suspended after he pled no contest to evading a police officer (Veh. Code, § 2800.2, subd. (a)). Appellant contends he is entitled to additional presentence custody credits. We affirm.

FACTS AND PROCEDURAL HISTORY

On July 18, 2010, appellant sped away from an officer attempting to conduct a traffic stop of appellant's vehicle. He was subsequently charged with one felony count of evading a police officer (Veh. Code, § 2800.2, subd. (a)), and three misdemeanor counts of driving with a suspended or revoked driver's license (Veh. Code, § 14601.1, subd. (a)). It was also alleged as to the evading count that appellant had served two prior prison terms (Pen. Code,[1] § 667.5, subd. (b)).

[1] All further undesignated statutory references are to the Penal Code.

Pursuant to a negotiated disposition, appellant pled no contest to the evading charge and admitted one of the prior prison term allegations. On December 16, 2010, the court sentenced appellant to four years in state prison, consisting of the upper term of three years plus one year for the prison prior. Execution of the sentence was suspended and appellant was granted five years probation, with terms and conditions including that he complete one year in a residential treatment program.[2] The court awarded appellant 89 days presentence custody credit, consisting of 45 days actual credit plus 44 days good conduct credit. Appellant was also ordered to serve 89 days in county jail, with credit for time served.

On December 26, 2010, appellant was arrested and charged in case number 1359705 with being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). The matter was also charged as a probation violation in the instant matter (case number 1362953). Pursuant to another negotiated disposition, appellant admitted violating his probation in the instant matter and pled no contest to the charge in case number 1359705. Appellant was sentenced to a year in jail in case number 1359705, subject to the agreement that he would be released from jail upon his admission to a residential treatment program. In the instant matter, probation was revoked and reinstated on the same terms and conditions with added gang conditions. In case number 1359705, appellant was awarded 145 days custody credit, consisting of 97 days actual custody credit and 48 days good conduct credit. Appellant expressly agreed that the custody credits he had earned up to that point were being applied in case number 1359705 and would not be applied in the instant matter toward any prison sentence that might be imposed if he were to violate probation again.

On April 12, 2011, appellant was released from jail and admitted to a residential treatment program. On April 25, 2011, he tested positive for marijuana and walked away from his treatment program. Probation was revoked and the matter was set for a probation violation hearing. Appellant admitted violating his probation, and the

[2] The record belies appellant's assertion that the court did not actually impose the four-year prison sentence in conjunction with the initial grant of probation.

court ordered execution of the previously suspended four-year state prison sentence. Appellant was awarded 112 days custody credit, consisting of 56 days actual custody credit and 56 days conduct credit.

Appellant filed a timely appeal. While the appeal was pending, appellant filed a motion in the trial court contending that he had not knowingly and intelligently waived his right to the custody credits that were instead applied in case number 1359705. The motion was denied.

DISCUSSION

Appellant contends the court erred in failing to award him credits for the time he spent in custody prior to the first revocation and reinstatement of his probation because he did not knowingly and intelligently waive his right to those credits as contemplated in *People v. Johnson* (1978) 82 Cal.App.3d 183, 188 (*Johnson*). We conclude otherwise.

First, appellant's agreement that the credits would not apply was included as a term and condition of his probation, which was reinstated in an order filed on March 28, 2011. Appellant did not appeal from that order, which has long since become final. His claim is thus forfeited. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 ["[A] defendant who elects not to appeal an order granting or modifying probation cannot raise claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation"].)

In any event, the claim lacks merit. Appellant did not waive any credits to which he was entitled, but rather merely agreed that they were to be applied against the one-year jail sentence separately imposed in case number 1359705. Notwithstanding appellant's claim to the contrary, he was not entitled to "dual credits" for the time he spent in custody prior to the first revocation of his probation, as contemplated in *People v. Bruner* (1995) 9 Cal.4th 1178. Although appellant's arrest for possession of a controlled substance was *a* basis of his restraint on the probation violation, it was not the only basis. As the court made clear to appellant, "[o]ne of the allegations in the violation is that you left the treatment program and you did not enforce [*sic*] probation, and there

are other bases for the violation of probation. Any one of those could cause you to be in violation of probation, and the court could impose the suspended state prison sentence that you pled to and agreed to accept . . . back on August 31, 2010." Because the possession charge in case number 1359705 was not the sole cause of his confinement on the probation violation in the instant matter, he was not entitled to duplicate custody credit against the separately imposed one-year jail terms. (*Bruner,* at pp. 1193-1194.)

To the extent appellant's agreement that the credits at issue would be applied against his sentence in case number 1359705 can be construed as a waiver of his right to have those credits applied in the instant matter, the record amply demonstrates the validity of that waiver. Criminal defendants convicted of felonies are entitled to credit for time spent in custody prior to sentencing or as a condition of probation (§ 2900.5), and to credit for good conduct and work performed during presentence custody (§ 4019).[3] Under section 19.2, however, a defendant may not be sentenced to the county jail as a condition of probation for more than one year.[4] Thus, "[i]t is now common practice for defendants to waive custody credits so as to avoid going to state prison after a probation violation. The waiver allows the court to reinstate probation on the condition that the defendant serve more time in jail. [Citation.]" (*People v. Burks* (1998) 66 Cal.App.4th 232, 234–235.) A so-called "*Johnson*" waiver "enables a sentencing court to reinstate a defendant on probation after he or she has violated

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3 "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment . . . ." (§ 2900.5, subd. (a).) "It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213." (§ 2900.5, subd. (d).)

4 Section 19.2 provides in relevant part: "In no case shall any person sentenced to confinement in a county or city jail . . . on conviction of a misdemeanor, or as a condition of probation upon conviction of either a felony or a misdemeanor, . . . be committed for a period in excess of one year . . . ."

probation one or more times, conditioned on service of an additional county jail term, as an alternative to imposing [or executing a previously imposed] state prison sentence." (*People v. Jeffrey* (2004) 33 Cal.4th 312, 315.) As the court in *Johnson* explained, "where a defendant who has spent a year in the county jail as a condition of probation subsequently commits a probation violation, the sentencing judge should not be forced to choose between ignoring the violation or imposing sentence to state prison. The court should be free to choose either of these options in the exercise of its discretion but it should also have the power, with the consent of the defendant, to fashion an intermediate disposition by modifying probation to provide for additional time up to one year in jail." (*Johnson, supra*, 82 Cal.App.3d at p. 188.)

"Since the *Johnson* decision, it is well settled that a defendant may waive custody credits as a condition of probation, or in exchange for other sentencing considerations." (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.) Any such waiver must be knowing, voluntary, and intelligent. (*People v. Arnold* (2004) 33 Cal.4th 294, 308 (*Arnold*); *Johnson, supra*, 82 Cal.App.3d at pp. 187-188.) "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." (*Arnold*, at p. 308.)

. Appellant contends the record fails to support a finding that he knowingly and intelligently waived his right to the custody credits at issue because the court never expressly asked him whether he was waiving the credits and he gave no answer to that effect. He further complains that he "was never told that, but for his willingness to give [the credits] up, he would otherwise have been entitled to be credited with time spent in custody leading up to the first revocation." The record, however, demonstrates that appellant fully understood his rights. Moreover, the record further shows that appellant gave up his right to the credits in exchange for valuable consideration, i.e., the court's agreement to reinstate him on probation instead of executing the previously imposed four-year prison sentence.

In explaining the negotiated disposition, the court stated "the agreement is that you admit the violation of probation; you waive your right to the probation violation hearing; you're pleading to the [charge in case number] 1359705. All the time is placed on the 1359705." In exchange, the court "would . . . not impose the suspended state prison sentence today." Appellant acknowledged that he had not been pressured to accept the agreement and affirmed that he was doing so of his "own free will and volition." The court went on to reiterate that "[t]he time . . . that's been spent in custody at this point in time from the probation violation, will all be placed on 1359705 and not on 1362953." The court subsequently emphasized that "the credits for the time from the violation in the 11550, and you picked up an 11550, which constitutes a violation of probation in 1362953. All those credits will be applied to 1359705, which means they will not be used as credit to a future prison sentence; do you understand that?" Appellant replied, "I understand that. So all the time I'm doing now it's not counting for my felony probation, only for the 11550?" The court accurately characterized this reply as "[w]ell stated." Appellant's agreement to have the credits applied in case number 1359705 is also memorialized in a written order signed by the court, appellant, and his attorney.[5]

Contrary to appellant's claim, the above-referenced colloquy and signed agreement are not merely a "discussion" or "explanation" of the law regarding presentence custody credits. Although the word "waiver" is never used, the record conveys appellant's understanding that he was entitled to have the custody credits applied against his sentence on the probation violation instead of the sentence separately imposed in case number 1359705. Otherwise, no agreement that the credits were to be applied in the other case would have been necessary. The court also admonished appellant that the credits would not be applied against any future prison sentence imposed following a subsequent violation of his probation, and appellant expressed his understanding to that effect. (*Arnold, supra*, 33 Cal.4th at p. 309.) Because the record demonstrates that

[5] The order states that appellant "is continued on probation on the terms and conditions as ordered on 12/16/2010 with added term(s) and condition(s)" including: "No credits applied on case 1362953; All credits from time in custody are applied to case #1359705 (97 actual + 48 gt/wt= 145 total as of 3/28/11)."

appellant knowingly, voluntarily, and intelligently waived the right to have the custody credits at issue applied in the instant matter for all purposes, the court did not err in failing to award those credits when it ordered execution of the previously imposed prison sentence.

The judgment (order revoking probation) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Kay Kuns, Judge

Superior Court County of Santa Barbara

California Appellate Project, Jonathan B. Steiner, Executive Director, Richard B. Lennon, Staff Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.