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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS GUILLERMO MARTINEZ, Defendant and Appellant.	B287338 (Los Angeles County Super. Ct. No. MA065894)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Reversed and remanded with instructions.

Jenny Brandt, 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, Assistant

Attorney General, Zee Rodriguez and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus Martinez violated his probation. The trial court reinstated probation after appellant agreed to waive 553 days of custody credit he had accrued and to participate in a 180-day residential drug treatment program.

Appellant subsequently committed another probation violation. At the revocation hearing, appellant requested credit for the 180 days he represented he had spent in the court-ordered residential drug treatment program. The trial court denied the request, reinstated appellant's original sentence of five years, and awarded him a total of 192 days of custody credit.

Appellant now contends that he should have received an additional 180 days of credit for the time he spent in the residential treatment program. In the alternative, he requests a remand for an evidentiary hearing to determine whether the program was custodial in nature. We agree with appellant that he is entitled to credit for time he spent in a custodial program; his waiver of the 553 days of back credit did not extend to future credits he might accrue. We accordingly reverse the judgment and remand with instructions for the trial court to hold a hearing on whether appellant spent time in a program and, if so, whether that program was sufficiently custodial to entitle him to credits.

BACKGROUND

Appellant pled no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and admitted a prison prior on

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

May 26, 2015. On June 2, 2015, pursuant to appellant's plea agreement, the trial court imposed a sentence of five years but suspended its execution and placed appellant on five years of formal probation.

At an October 26, 2016 hearing ("the 2016 hearing"), appellant admitted that he violated his probation by failing to obey all laws. The court revoked and immediately reinstated probation "on the same terms and conditions," plus certain modifications, including a requirement that appellant "enroll and successfully complete a 180-day live-in program." The court conditionally approved the Blueprint Recovery program in Palmdale and ordered appellant not to leave the program prior to successful completion or until authorized to do so by the program director, his probation officer, or the court. The court further ordered appellant to promptly report to the court if he left the program prior to completion.

In addition to agreeing to attend the treatment program, appellant agreed to waive custody credits he had earned to that point. He and the court had the following exchange:

The Court: "[Y]ou have the right to the credits that you've been earning, the time that you've been in custody. The time you've been in custody is 277 actual days plus 276 good time/work time, for a total of 553 days. [¶] What I . . . mean by that, if you got sent to state prison, you would have credit for that. It would be applied, reduce your sentence by 553 days. Does that make sense to you?

"The Defendant: Yes.

"The Court: Do you give up that right and essentially waive your back time as if you did not serve that time in custody?

"The Defendant: Yes.

"The Court: So that means, effectively, your - - the full sentence hanging over your head still exists. [¶] Does counsel join?

"[Defense Counsel]: Yes."

The court issued a minute order documenting the modified probation conditions. The minute order further stated, "Defendant waives all back time for all purposes." Appellant was released to Blueprint Recovery on November 10, 2016.

On August 31, 2017, the trial court summarily revoked appellant's probation and set the matter for a revocation hearing. The revocation hearing was continued several times before ultimately being held on December 4, 2017.

At the revocation hearing ("the 2017 hearing"), the trial court found appellant violated his probation. The court further found that appellant was not amenable to probation and executed the five-year sentence it originally imposed.

The court then determined that appellant was entitled to 96 days of actual custody credit, based on his revocation date of August 31, 2017, as well as an additional 96 days of good-time/work-time credits, for a total of 192 days. The court noted the minute order regarding appellant's waiver of back time, and informed him that he would get "zero credits up until the current arrest," i.e., no credits for any time between his release to the residential treatment program on November 10, 2016 and his arrest on August 13, 2017. Appellant said, "They didn't tell me that." The court then read into the record the colloquy quoted above, and remarked that appellant "waived his back time at that point for all of that time."

Appellant's counsel requested that appellant's receive credit "for the six months in-patient program," because appellant

"said he did 180 days on that." The court said that it did not think appellant was entitled to credit for that because he had waived his back time. When counsel pressed the issue of credits for time in the program, the court suggested there was no "legal basis to do that," because "it was a negotiated disposition."

Appellant told the court, "I waived the time without understanding, okay, that is fine. But after the fact I did six months, and I completed the program, and I should be eligible for credit for that." The court disagreed, and told him, "I have discretion to do that, and I don't think you received the benefit of that program." The court reiterated that appellant would receive 192 days of credit.

Appellant timely appealed.

DISCUSSION

I. Legal Standards

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Section 2900.5, subdivision (a) provides that a convicted person "shall be credited" with credit against his or her sentence of imprisonment for all days spent in custody, including time spent in a "rehabilitation facility . . . or similar residential institution," "including days served as a condition of probation in compliance with a court order." As this plain language suggests, "[t]he provisions of Penal Code section 2900.5 . . . apply to custodial time in a residential treatment facility as well as straight county jail time." (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.)

Entitlement to credits for time spent in a residential treatment facility "depends on whether such participation was a

condition of probation for the same underlying criminal conduct." (*People v. Davenport* (2007) 148 Cal.App.4th 240, 245.) "'It is not the procedure by which a defendant is placed in a facility that determines the right to credit, but the requirement that the placement be "custodial," and that the custody be attributable to the proceedings relating to the same conduct for which the defendant has been convicted. [Citations.] Courts have given the term "custody" as used in section 2900.5 a liberal interpretation.' [Citation.]" (*Ibid.*)

Whether restraints at a particular facility are sufficiently restrictive to constitute "custody" is a question of fact. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.) Factors relevant to the determination include the extent to which freedom of movement is restricted, the extent of regulations governing visitation, the facility's rules regarding personal appearance and other conduct, and the rigidity of the program's daily schedule. (*Id.* at p. 1921.) Restrictive residential treatment facilities may be found custodial. (See *People v. Rodgers* (1978) 79 Cal.App.3d 26, 31.) A defendant bears the burden of demonstrating his or her entitlement to presentence custody credit. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.)

"[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." (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055.) "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." (*Id.* at p. 1055.) "'To determine whether a waiver is knowing and intelligent, the inquiry should begin and end with deciding whether the defendant understood he [or she] was giving

up custody credits to which he [or she] was otherwise entitled.' [Citation.]" (*People v. Jeffrey*, *supra*, 33 Cal.4th at p. 320.) Whether a waiver of custody credits is knowing and intelligent is determined under the totality of the circumstances and is a question of law we review de novo. (See *People v. Arnold* (2004) 33 Cal.4th 294, 306; *People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

"It is 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." (§ 2900.5, subd. (d).) We apply a mixed standard of review to the trial court's determination. To the extent the trial court applies the statute to undisputed facts, such as determining whether a defendant was "in custody" for purposes of the statute, we apply a de novo standard of review. (*People v. Anaya* (2007) 158 Cal.App.4th 608, 611; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919.) To the extent the issue is the trial court's factual determination of the amount of time a defendant spent in custody and corresponding award of presentence credits, we apply a substantial evidence standard of review. (See *People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681.)

II. Analysis

The trial court concluded that appellant's waiver of 553 days of credit was a knowing and voluntary waiver of any right to credit he may have for participating in the court-ordered residential treatment program. The court alternatively concluded that appellant was not entitled to credits for several other reasons, including his no contest plea, alleged lack of benefit from the treatment program, and the court's discretion. The latter three bases were clearly invalid—section 2900.5, subdivision (a) specifically states that it applies to "all felony and

misdemeanor convictions, either by plea or by verdict," and that a defendant "shall be credited" with time spent in custody regardless of how effective the court believes that custody was. The parties accordingly focus on the scope and validity of appellant's waiver.

That waiver was, by its terms, exclusively backward-looking. The court advised appellant at the 2016 hearing that he was entitled to 553 days of credit at that point, and asked him if he was willing to "waive your *back time* as if you did not serve *that time* in custody." The minute order documenting the 2016 hearing also states that appellant "waives all *back time* for all purposes." No reasonable person would understand the court's 2016 admonition or minute order that to mean that he or she also was waiving any additional credits that might be earned in the future. Indeed, appellant told the court at the 2017 hearing that "they didn't tell me that" when he entered the waiver.

Respondent points out, accurately, that "neither appellant nor his defense counsel expressed any confusion or disagreement as to whether appellant's waiver included future custody credits to be earned in a residential treatment facility." That does not prove respondent's point that the 2016 waiver reached future custody credits. The court's explanation of the waiver was made in the explicit context of the 553 days of credit appellant already had earned, before the court even imposed the 180-day treatment condition. Appellant's silence does not amount to acquiescence to a forward-looking waiver. Such waivers are permissible, but the totality of the circumstances in this case does not support the conclusion that appellant knowingly made such a waiver here.

The question then becomes whether appellant carried his burdens of showing that he spent time at Blueprint Recovery and

that the facility was "custodial" within the meaning of section 2900.5. Respondent contends that appellant "made no effort to satisfy his burden of showing to the trial court that he was entitled to custody credit as a result of his time at Blueprint Recovery." Appellant replies that the record contains sufficient facts from which we can conclude he satisfied his burden. He points to his representation to the court that he spent 180 days in the program, buttressed by a lack of evidence that he appeared before the court due to leaving the program before its completion, as well as the court's order restricting him from leaving the program without authorization. Alternatively, he contends the point is waived because the prosecutor below did not contest his representation and did not dispute the custodial nature of Blueprint Recovery, or that we should remand the matter for an evidentiary hearing.

The record supports both parties' positions. Both sides were silent below as to the custodial nature of Blueprint Recovery, and the prosecution did not challenge appellant's unsupported assertion that he spent 180 days in the program. This silence can be attributed to the court's ruling that appellant was not entitled to credit due to his waiver; there was no opportunity for litigation regarding the custodial nature of the program or the amount of time appellant spent there. Imposing a forfeiture on either party would not be appropriate under the circumstances of this case. We accordingly agree with appellant that the matter should be remanded to give both sides the opportunity to develop the factual record. (See *In re Wolfenbarger* (1977) 76 Cal.App.3d 201, 206.)

DISPOSITION

The judgment of the trial court is reversed and the matter

is remanded. On remand, the trial court shall hold an evidentiary hearing at which appellant will bear the burden of proving, with appropriate evidence, (1) that he spent time at the Blueprint Recovery residential treatment facility, and, if so (2) that the facility is "custodial" within the meaning of section 2900.5, subdivision (a).

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COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

DUNNING, J. *

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