

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ALBERT ROSALES,

Defendant and Appellant.

B297866

(Los Angeles County
Super. Ct. No. TA146803)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Shultz, Judge. Affirmed in part, reversed and remanded with directions in part.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Michael R. Johnsen and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from his convictions for criminal threats and possession of a firearm following a no contest plea. Defendant argues that the trial court incorrectly calculated his presentence custody credits. His argument centers around whether the trial court struck defendant's firearm enhancement for all purposes (rendering the felony conviction not violent) or just for the purpose of calculating his punishment (making the felony conviction violent). If the conviction was not violent, defendant would be entitled to two days of conduct credit for every two days served under Penal Code section 4019.¹ If the conviction was for a violent felony, defendant would only be entitled to 15 percent conduct credits under section 2933.1, subdivision (a).

At sentencing, the trial court arguably expressed an intention to both sentence defendant for a violent felony with 15 percent conduct credits, *and* strike the firearm enhancement for all purposes. We conclude that the record is unclear as to the trial court's intention and remand for resentencing.

FACTS AND PROCEDURAL BACKGROUND

The People filed an information charging defendant with criminal threats (count 1) and possession of a firearm by a felon (count 2). Count 1 alleged that defendant personally used a firearm within the meaning of section 12022.5, and that he had sustained a prior serious felony conviction. Both counts alleged defendant had sustained a prior serious or violent conviction under the Three Strikes law.

¹ All subsequent statutory references are to the Penal Code.

On April 18, 2019, defendant pleaded no contest to both counts and admitted the firearm allegation, a prior strike, and a five-year prior serious felony enhancement. During plea discussions, the trial court noted that defendant was on probation for assault with a deadly weapon when the instant case was filed with a firearm allegation. Both the court and defense counsel acknowledged that the firearm allegation made the present crime a violent felony. The court agreed with defense counsel that it could strike the firearm allegation, but disagreed as to its effect on conduct credit.

Defense counsel first argued incorrectly, “If we strike it for purposes of sentencing, then it’s not a violent felony.” The court stated, whether the conviction is no longer for a violent felony is “[o]nly a question that someone smarter than me and gets paid more money than me can decide. [¶] I will advise [defendant] that it is, and that he will be serving 85 percent of his time, because I believe that’s what the Department of Corrections is going to do. There’s no case law on it, so I don’t know. It’s never been dismissible.”

Defense counsel argued that if the court struck the firearm allegation, “then it’s no longer a violent felony” and defendant “would get day-for-day credits here and 20 percent credits in the future.” The court was unpersuaded: “I understand. I mean, I understand your position. [¶] The problem is more significant than, what is the Department of Corrections going to do. The problem is present now because if it is considered a violent felony, and I believe it is, it would require me to limit his local conduct credits, as well as his post-conviction credits by the Department of Corrections, and that’s what I intend to do. I

think that's the appropriate thing, notwithstanding the fact that it may derail the disposition."

After a brief recess, the court then explained the terms of the negotiated agreement: defendant would enter an open plea to the court and admit the truth of all of the allegations, and the court would sentence him to four years in state prison and strike "the prior strike, the prior five-year prior, and the gun use as well." As to the credits, the court stated, "It is my opinion and belief that you will have to serve 85 percent of your sentence, and that is the way that I will operate." The court added that defense counsel had requested a certificate of probable cause to appeal "that very narrow decision" and that it would sign it.

For both counts, the trial court imposed the midterm sentence of two years, doubled to four years under the Three Strikes law (see § 667, subd. (e)(1)), and then ran count 2 concurrent to count 1. The court awarded defendant 276 days presentence credit, consisting of 240 days actual custody, plus 36 days conduct credit (15 percent) pursuant to section 2933.1, subdivision (c).

After the court sentenced defendant, defense counsel asked the court whether it was "striking and dismissing" the prior serious felony conviction enhancement and the firearm enhancement "for all purposes regarding sentencing in this case." The court replied yes. Before concluding the hearing, the court told the clerk, "[D]ismissal 1385 for all purposes on the . . . five-year prior and the gun use, but he admitted it."

Defendant filed a timely notice of appeal. The trial court granted defendant's request for a certificate of probable cause.

DISCUSSION

Defendant contends that the trial court should have awarded his presentence conduct credits under section 4019 rather than section 2933.1 because the court had stricken the firearm enhancement “for all purposes,” not just for punishment. Defendant’s argument ignores much of what the trial court said at sentencing; accordingly we remand for the trial court to resolve the ambiguity and state whether the firearm enhancement is stricken in its entirety or only for purposes of “the additional punishment.” (§ 1385, subd. (b)(1).)

a. Applicable Law

Generally, a person confined prior to sentencing may earn two days of conduct credit for every two days served under section 4019. (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1212.) However, section 2933.1, subdivision (a), restricts inmates convicted of certain violent offenses within the meaning of section 667.5, subdivision (c) to earning a maximum of 15 percent conduct credits. Any felony in which the defendant uses a firearm qualifies for this restriction. (§ 667.5, subd. (c)(8) [defining “violent felony” to include any felony where a personal use of a firearm under section 12022.5 is charged and proven].)

When a court intends to exercise its discretion to strike an enhancement, like the firearm enhancement at issue in this case, it has “two options” under section 1385. (*In re Pacheco* (2007) 155 Cal.App.4th 1439, 1442.) It can either strike or dismiss an enhancement “in its entirety” or strike only the “additional punishment for that enhancement.” (*Ibid.*; see also § 1385 subd. (b)(1) [“If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court

may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).”].)

In *In re Pacheco*, *supra*, 155 Cal.App.4th 1439, the defendant pleaded guilty to corporal injury on a cohabitant and admitted the allegation that he inflicted great bodily injury on the victim, as defined by section 12022.7, subdivision (a). (*Pacheco*, at p. 1441.) The trial court struck the punishment for the enhancement pursuant to section 1385, but defendant’s custody credits were calculated under the 15 percent rate of section 2933.1. (*Pacheco*, at pp. 1441-1442.) The defendant appealed the application of section 2933.1 to the calculation of his custody credits. The Court of Appeal held that where the sentencing court struck “only the punishment for the [great bodily injury] enhancement, and not the enhancement in its entirety, [the Department of Corrections and Rehabilitation] properly limited his custody credits to 15 percent.” (*Pacheco*, at p. 1442.) The court explained that in striking only the punishment for the enhancement, “[t]he fact of the enhancement . . . remained” and the defendant was still a person convicted of a violent felony who could only accrue no more than 15 percent of custody credit under section 2933.1, subdivision (a). (*Pacheco*, at p. 1444.)

b. The Record is Unclear Whether the Trial Court Struck the Enhancement for All Purposes or Only for Punishment

Whether the calculation of defendant’s conduct credits should be limited by section 2933.1 depends on whether the trial court struck the firearm enhancement for all purposes or struck only the additional punishment in this case. Here, the record

discloses that the court clearly intended to strike the firearm enhancement for some purpose but we are less certain whether the court intended to strike the enhancement for all purposes or only for punishment. The Attorney General argues the trial court was unaware of its discretion, and invokes the rule of remand.

“ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ ” (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).) “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.” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; *Gutierrez*, at p. 1391 [appropriate remedy is remand for resentencing].)

The record creates some ambiguity, in part because of a question defense counsel asked the court toward the conclusion of the sentencing hearing.

“The Court: I am striking and dismissing the five-year prior and the personal use of a firearm allegation, and I don’t believe any – actually, I don’t think I took an admission. Let’s make sure. I don’t believe there’s any one year priors alleged.

“[Defense Counsel]: The court is striking and dismissing those for all purposes regarding sentencing in this case?

“The Court: Yes.”

When counsel included in his question both “for all purposes” and “regarding sentencing,” the court’s answer became unclear. The ambiguity was not clarified by the judge’s final statement at the sentencing hearing: “Chante [who we presume is the clerk], Dismissal of 1385 for all purposes on the prior – excuse me – on the five year prior and the gun use, but he admitted it.” When imposing the sentence, the trial court expressly awarded defendant only 15 percent credit.

Ultimately whether the Attorney General is correct that the trial court did not understand its discretion or there was just some ambiguity in the record, the remedy is the same: remand to the trial court. (*In re H.D.* (2009) 174 Cal.App.4th 768, 779–780 [appellate court must remand where “it is unclear whether the juvenile court intended to fix the minor’s term of maximum physical confinement at 12 years eight months or something less, and whether the court understood it had the discretion to impose a maximum term other than the lower or middle term”].)

As a separate argument, defendant contends that we cannot remand because “[s]erving a longer sentence because of a decrease in presentence conduct credit . . . is the very definition of additional punishment.” We disagree. This argument presumes defendant was entitled to more presentence conduct credit. As we have explained, that is the issue to be decided on remand.

DISPOSITION

We remand for resentencing. On remand, the trial court must exercise its discretion to either strike the firearm enhancement for all purposes or only for punishment. Pursuant

to the stipulation by the parties at oral argument, the remittitur is issued forthwith. In all other respects, the judgment is affirmed.

RUBIN, P.J.

WE CONCUR:

BAKER, J.

KIM, J.