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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. ROBERT BOTARDO VELASCO, Defendant and Appellant.	B232375 (Los Angeles County Super. Ct. No. GA081151)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed in part with directions.

Ann Krausz, 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, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Robert Botardo Velasco, appeals from an April 11, 2011 final judgment of conviction following a jury trial. Defendant was convicted of second degree

commercial burglary in violation of Penal Code[1] section 459 and admitted he had served a prior prison term. We order that the abstract of judgment be corrected and a hearing be held on defendant's ability to pay a section 1202.5, subdivision (a) fee. Otherwise, we affirm the judgment.

On October 20, 2010, defendant was charged with second degree commercial burglary in violation of section 459. The information alleged defendant entered a Wal-Mart store with the intent to commit larceny on September 15, 2010. The information also alleged defendant had sustained two prior felony convictions. (§ 1203, subd. (e)(4).) Defendant also allegedly had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The jury trial commenced on April 6, 2011. The prosecution called three witnesses: Stephanie Villa, Alden Villacorte; and Deputy John Ybarra. Defendant called no witnesses.

Ms. Villa testified on September 15, 2010, she was watching the surveillance camera system in the Wal-Mart asset protection office. Ms. Villa saw defendant on the surveillance screen. Defendant's hands, which were placed on the upper section of his shopping cart, were covered by clothes. Ms. Villa zoomed in with the surveillance camera and saw videos in his hands. Ms. Villa immediately called her partner, Mr. Villacorte, on her cell-phone. Ms. Villa asked Mr. Villacorte to get a closer look at defendant. Mr. Villacorte saw defendant in the home-wares department. Mr. Villacorte then joined Ms. Villa at the asset protection office to watch defendant on camera.

Ms. Villa saw defendant toss clothing from his shopping cart onto a shelf. After defendant removed the clothes, Ms. Villa did not see the videos anymore; instead, she saw two thicker white boxes that could each accommodate three or four videos. Ms. Villa later saw defendant meet an unidentified woman. Defendant spoke with his accomplice and received some merchandise including a cell phone case from her. Later defendant and his accomplice went to the check-out register. Defendant placed the white

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

boxes, a backpack, a cell phone case, and a box of file folders on the conveyor belt. Defendant purchased the cell phone case and walked away from the register, leaving behind the rest of the items.

While the unidentified woman was purchasing the rest of the merchandise, Mr. Villacorte brought defendant to the asset protection office. Mr. Villacorte directed defendant's attention to a video camera. Defendant was asked if he knew the woman. Defendant denied knowing her. After defendant's accomplice purchased the items, she exited the store and made a phone call on her cell phone. Defendant's cell phone began to ring. But he did not answer his ringing phone. Mr. Villacorte again left to bring the unidentified woman to the asset protection office. When she walked into the office with Mr. Villacorte, defendant told her two or three times, "We don't know each other." Mr. Villacorte looked inside the bags of merchandise purchased by defendant's accomplice and took out the two white boxes. The two white boxes each contained three videos and games. The videos and games did not belong in the boxes. The jurors viewed a video of the entire series of events. Ms. Villa and Mr. Villacorte then called the Los Angeles County Sheriff's Department.

Two deputies arrived at the Rosemead Wal-Mart. Defendant's car was searched. The deputies found: a Wal-Mart employee badge bearing the name Robert; a blue-zippered bag containing numerous bar codes and receipts from Wal-Mart; a Wal-Mart bag containing personal computer video games, empty video game packages; and a folder containing addresses, phone numbers, and maps of Wal-Mart, Target and Office Depot stores.

After being convicted, defendant admitted the prior prison term allegations were true. On April 11, 2011, defendant was sentenced to three years in state prison. The mid-term sentence of two years was imposed, plus a term of one year pursuant to section 667.5, subdivision (b). The court gave defendant a total of 10 days custody credit plus 5 days of conduct credits. As will be noted, the presentence credit award was later corrected.

After defendant timely filed a notice of appeal on April 14, 2011, we appointed counsel to represent defendant. After examination of the record, appointed appellate counsel has filed a brief in which no issues are raised. Instead, appointed appellate counsel has asked us to independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441-442. (See *Smith v. Robbins* (2000) 528 U.S. 259, 264.) On October 20, 2011, we advised defendant he had 30 days within which to submit by brief or letter any contentions or argument he wished this court to consider. Defendant filed no response.

We asked the parties to brief several issues. The Attorney General has filed no response. First, when defendant was sentenced on April 11, 2011, he received credits for 10 days actually served and 5 days of conduct credit. On September 23, 2011, after the notice of appeal was filed, defendant filed an ex parte motion to increase his credits to 18 days actually served plus 18 days of conduct credits. The ex parte motion was not served on the Attorney General. On October 11, 2011, the trial court granted the motion. The order was not served on the Attorney General. There is no evidence the trial court's post-judgment correction order was ever served on the Department of Corrections and Rehabilitation. We agree with the trial court that defendant served 18 days of actual custody prior to the imposition of sentence. And we agree that defendant was entitled to 18 days of conduct credits.

On October 11, 2009, section 4019 was amended to provide for two days of credit for each two days served in custody. (Stats. 2009, ch. 28, § 50; Sen. Bill No. 18 (2009 3rd Ex. Sess.) § 50, p. 50.) However, in 2010, the two days of credit for each two days served calculation was amended. The traditional two days of credit for four days of custody calculation was reinstated in former section 4019, subdivision (f). (Stats. 2010, ch. 426, § 2; Sen. Bill No. 76 (2009-2010 Reg. Sess.) § 5, p. 4.) As noted, defendant was sentenced on April 11, 2011. On that date, pursuant to section 4019, subdivision (f), a defendant was entitled to two days of conduct and work credits for every four days of actual custody. But this so-called two-for-one conduct credit scheme applied to inmates confined for crimes committed *on or after* the amendment's effective date pursuant to

section 4019, subdivision (g). (Sen. Bill No. 76 (2009-2010 Reg. Sess.) § 5, p. 4.[2]) The information alleges the burglary was committed on September 15, 2010. The effective date of the amendment reinstating the two-for-one calculation was September 28, 2010. (*Ibid*.) Thus, Senate Bill No. 76 does not apply to defendant as he committed the burglary on September 10 and the reduced conduct credit provision did not become effective until September 28, 2010. The abstract of judgment must be corrected to reflect the October 11, 2011 post-judgment order granting defendant 18 days of credit for time actually served plus 18 days of conduct credits.

Second, the trial court should have imposed additional mandatory penalties and the surcharge on the $10 crime prevention fee under Penal Code section 1202.5. (*People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530.) The amount owed is $10 plus, in Los Angeles County, $26 for the penalties and the surcharge. Since there is an ability to pay requirement, upon remittitur issuance, the trial court is to make that determination. (*People v. Castellanos, supra,* 175 Cal.App.4th at pp. 1531-1533; *see also People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249-1250.)

Third, the trial court orally imposed a $10 crime prevention fee (Pen. Code § 1202.5, subd. (a)) but the abstract of judgment does not reflect this fee. The abstract of judgment must be corrected to include the $10 crime prevention fee depending on the outcome of the ability to pay ruling. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) The trial court is to actively and personally insure the clerk accurately prepares a correct amended abstract of judgment which reflects the modifications to the judgment we have noted. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

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[2] Section 4019, subdivision (g) stated in part, "The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail. . . . for a crime committed on or after the effective date of that act." (Sen. Bill No. 76 (2009-2010 Reg. Sess.) § 5, p. 4.)

Upon remittitur issuance, the trial court is to determine if defendant has the ability to pay the crime prevention fee *plus* the penalties and the surcharge. If so, they are to be orally imposed. If not, the fee is not to be imposed. Once the trial court makes its ability to pay determination, a corrected abstract of judgment is to be prepared and served on the Department of Corrections and Rehabilitation. The amended abstract must include the increased presentence credits ordered by the trial court on October 11, 2011. The judgment, as corrected by the October 11, 2011 order correcting the presentence credit award, is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.