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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARD HERNANDEZ,

Defendant and Appellant.

B267625

(Los Angeles County
Super. Ct. No. KA102935)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed as modified.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and Connie H. Kan, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Bernard Hernandez appeals the judgment following his resentencing pursuant to Penal Code section 1170.18,¹ enacted by Proposition 47, the Safe Neighborhoods and Schools Act (as approved by voters, Gen. Elec. (Nov. 4, 2014)) (Proposition 47). Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), appellant's counsel filed an opening brief requesting this court review the record and determine whether any arguable issues exist on appeal. Appellant filed a supplemental brief. After reviewing appellant's supplemental brief and the entire record, we find no arguable issue warranting reversal. We modify the judgment to award credits for the days appellant spent in custody between his sentencing and resentencing. We affirm the judgment as modified.

BACKGROUND

We set out the relevant facts of this case in a nonpublished disposition affirming appellant's convictions in his prior appeal. (*People v. Hernandez* (Aug. 24, 2015, B256010).) In brief, appellant was found in a hotel room in possession of forged credit, debit, and gift cards, identification cards and checks under different names, and tools to manufacture counterfeit credit cards. The jury found him guilty of five felony counts (counts 5 [§ 459], 8 [§ 496], 10 [§ 496], 15 [§ 470, subd. (b)] & 16 [Health & Saf. Code, § 11377]) and several misdemeanor counts not at issue here. The trial court sentenced him to an aggregate, second strike sentence of eight years. It dismissed three 1-year prior prison term enhancements under section 667.5, subdivision (b) in the interest of justice pursuant to section 1385.

On March 5, 2015, the public defender's office filed a petition on appellant's behalf for resentencing on all counts pursuant to section 1170.18. In response, the district attorney's office conceded appellant was eligible for resentencing on counts 8, 10, 15, and 16, but disagreed that count 5 for second degree burglary pursuant to section 459 was eligible for resentencing because it was based on appellant's entry into the hotel room with the intent to manufacture counterfeit access cards, not the intent to commit theft as required for misdemeanor shoplifting under the newly enacted section 459.5. The court

¹ All statutory citations are to the Penal Code unless otherwise noted.

held a hearing and granted the petition as to counts 8, 10, 15, and 16, but denied the petition as to count 5. It agreed that count did not fall within section 459.5 because appellant did not enter the hotel room with the intent to commit a form of theft, but with the intent to manufacture counterfeit credit cards.

The court conducted a full resentencing. It imposed an aggregate term of six years—two years for count 5, doubled to four years due to appellant’s prior strike conviction, plus two 1-year prior prison term enhancements it had previously stricken. It ordered the terms on his misdemeanor counts to run concurrently to the term on count 5. It awarded the same 247 days of custody credits and 247 days of conduct credits it had awarded at the original sentencing, and refused to grant any additional credits for the time appellant spent in custody after his original sentencing. Appellant timely appealed.

DISCUSSION

We appointed counsel to represent appellant on this appeal. After review of the record, appellant’s court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d at page 441. On February 22, 2016, we advised appellant he had 30 days to submit any contentions or issues he wished us to consider. He filed a supplemental brief raising various issues. We find none meritorious.

Appellant is incorrect that his second degree burglary offense is subject to resentencing under Proposition 47. Second degree burglary convictions pursuant to section 459 were unaffected by Proposition 47 unless they involved the intent to commit a theft and now fit within the definition of “shoplifting” in section 459.5. (*People v. Chen* (2016) 245 Cal.App.4th 322, 327.) Appellant’s conviction was based on the intent to manufacture counterfeit access cards in violation of section 484f, subdivision (a), not theft. We also reject his contention that his burglary conviction should be reduced because forgery under section 473 is now a misdemeanor under Proposition 47 if the value of the forged instrument does not exceed \$950. Although section 484f, subdivision (a) defines the manufacture of counterfeit access cards as forgery, nothing in Proposition 47 or its legislative history suggests the voters intended to allow resentencing for felony

burglary convictions based on the intent to commit felonies other than theft-related crimes, including felonies that would now be misdemeanors under Proposition 47.

Because Proposition 47 does not apply to appellant's second degree burglary conviction, we reject his contention that the addition of a value element to the forgery statute required his conviction to be reversed and reconsidered by a jury pursuant to *In re Estrada* (1965) 63 Cal.2d 740. Even if his offense did qualify for resentencing under Proposition 47, he is not automatically entitled to relief under *Estrada*. (See *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1336; see also *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257.) His counsel in his direct appeal was not ineffective for failing to raise this nonmeritorious issue.

Appellant also incorrectly contends the trial court exceeded its jurisdiction by imposing two 1-year prior prison term enhancements at his resentencing after it had dismissed those enhancements at his original sentencing. At his original sentencing, appellant admitted and the court found true the three prior prison term enhancements, but struck them "in the interest of justice in that the court is satisfied that an appropriate sentence has already been achieved." In this circumstance, nothing prevented the court from imposing two of those enhancements at appellant's resentencing. (See *People v. Garner* (2016) 244 Cal.App.4th 1113, 1117-1118 (*Garner*) [at Prop. 36 resentencing, court may impose prison term enhancements it had found true but had previously stricken].) Proposition 47 merely prohibits the trial court from resentencing appellant to a longer *aggregate* term than originally imposed, and here appellant was resentenced to six years, which was less than his original aggregate term of eight years. (§ 1170.18, subd. (e); *People v. Sellner* (2015) 240 Cal.App.4th 699, 702.)

Finally, appellant contends the trial court erroneously refused to award him additional custody and conduct credits for the time he spent in prison between his sentencing and resentencing. We asked the parties to address this issue. They agree, as do we, that he is entitled to additional *custody* credits for his days in custody between his original sentencing and his resentencing, for a total of 776 days of custody credits. (§ 2900.1; *People v. Buckhalter* (2001) 26 Cal.4th 20, 37; *Garner, supra*, 244

Cal.App.4th at pp. 1118-1119.)² We will direct the abstract of judgment to be corrected accordingly. We do not award any additional postsentencing conduct credits because the Department of Corrections and Rehabilitation is responsible for awarding them.

We have examined the entire record. We are satisfied no arguable issues exist and appellant's counsel has fully satisfied his responsibilities under *Wende*. (*Smith v. Robbins* (2000) 528 U.S. 259, 279-284; *Wende, supra*, 25 Cal.3d at p. 441; see *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

DISPOSITION

We modify the judgment to award appellant 776 days of custody credits. The 247 days of conduct credits reflected in the abstract of judgment remain the same. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

² Appellant claims he is entitled to 777 total days of custody credit, but that calculation is based on the incorrect resentencing date of October 7, 2015. He was resentenced on October 6, 2015.