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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.

ANDREW JOSEPH ACOSTA,

Defendant and Appellant.

B227581

(Los Angeles County
Super. Ct. No. YA 067922)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Brandlin, Judge. Affirmed with modifications.

William L. Heyman, 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, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

This appeal follows appellant Andrew Joseph Acosta's plea of no contest to attempted murder and his admission of a gang enhancement. He argues that the trial court should have dismissed two counts of conspiracy to commit murder pursuant to his plea agreement. Appellant also argues that he is entitled to three additional days of custody credits. We agree with appellant's arguments, modify the judgment, and affirm the judgment as modified.

FACTS AND PROCEDURE

1. Preliminary Hearing

Vilma Delgado testified that on April 10, 2007, Ruben Rizo shot her twice. Delgado knew Rizo because he was the father of Delgado's grandchild and had had a relationship with Delgado's daughter. Delgado recognized him on the day of the shooting. Rizo had previously threatened Delgado and her family.

Leanne Vargas witnessed the shooting but could not identify anyone. After the shooting, she saw the shooter run into a car. Someone had opened the back door of the car for the shooter to enter.

According to Detective Michael Ross, Nicolas Boligan told Ross that on the day of the shooting, Boligan drove appellant and Rizo. When they saw Delgado, Rizo said he wanted to kill Delgado, and Boligan made a U-turn and followed Delgado. Boligan parked in a driveway near Delgado's home. Rizo exited the car, headed towards Delgado, and fired two shots. Rizo then returned to the vehicle, and Boligan drove to his house. When they arrived there, Boligan told Rizo to hide the weapon in Boligan's garage, where officers later found it.

2. Appellant's Statement to Officers

The night before Delgado was shot, appellant was at Boligan's house, and Rizo arrived there with a gun. Rizo wanted to borrow Boligan's mother's car to go to Lawndale to shoot people. Rizo was not in a gang but did not like people from Lawndale. Rizo wanted to kill "the Lawndales." Detective Ross interpreted this to mean that Rizo wanted to kill "Lawndale 13 gang members." Appellant accompanied them. They did not find anyone to shoot. Appellant cleaned Rizo's gun that night.

In the morning, Rizo wanted to go out again. Appellant again cleaned Rizo's gun. Rizo, Boligan, and appellant drove around looking for the son of the "lady he [Rizo] lit up." Delgado, was the "lady he lit up" and Rizo did not like her son. Rizo had planned to shoot Delgado's son, but when he saw Delgado, he said "I'm just going to light her ass up." Boligan parked near Delgado's house, and Rizo ran out of the car and shot twice. Rizo then ran back into the car, which sped away. Appellant did not know if Delgado was hit. After the shooting, appellant cleaned the gun and stashed the gun for Rizo. Appellant and someone else dropped a casing into the sewer.

3. Information

In a three-count information, appellant, Boligan and Rizo were charged with the attempted willful, deliberate, and premeditated murder of Delgado (count 1), mayhem (count 2), and assault with a firearm (count 3). In an amended information, appellant was not charged with counts 1 through 3, but instead was charged in counts 4 and 5 with conspiracy to commit murder. In a second amended information, appellant was not charged with counts 1 through 3; count 4 was deleted; and appellant was charged in counts 5 and 6 with conspiracy to commit murder.

4. Plea

On September 30, 2008, the parties agreed that appellant would be sentenced to a determinate 17-year prison term. To achieve the sentence, the People amended the second amended information to add count 7 -- the attempted murder of Vilma Delgado. The People also added a gang enhancement to the attempted murder count.

Appellant pled no contest to conspiracy to commit murder (count 6) and to attempted murder of Delgado (count 7), and he admitted the gang enhancement attached to count 7. Defense counsel joined in the waiver of rights and stipulated to a factual basis for the plea based on the police reports, the preliminary hearing transcript, and the probation officer's report. The court accepted the plea.

5. Appellant's Motion to Withdraw His Plea

On February 25, 2010, a new attorney substituted in for appellant and appellant sought to withdraw his plea. At a subsequent hearing on appellant's motion, the

prosecutor who entered the plea agreement with appellant testified and explained that the parties had agreed appellant would plead to conspiracy to commit murder (count 6) and attempted murder (count 7). If appellant testified truthfully in the trial of his codefendants or did not testify at all (1) the People would dismiss the conspiracy count to which he pled guilty and (2) appellant would be sentenced to a 17-year determinate term. Counsel who represented appellant during the plea confirmed the prosecutor's understanding of the parties' agreement.

6. Trial Court Findings and Appeal

The court found there was a factual basis appellant committed a conspiracy to commit murder and the attempted murder of Delgado. The court sentenced appellant to prison for 17 years. No oral pronouncement at sentencing dismissed count 5 or count 6. But, a minute order stated that counts 1 through 5 were "dismissed due to plea negotiation." The court awarded appellant 1,093 actual days plus 163 days good time/work time credits for a total 1,256 days of custody credits.

This appeal followed.¹

DISCUSSION

Initially, appellant argued that there was no factual basis for his plea. In a letter dated February 14, 2012, appellant withdrew that argument. Appellant now contends (1) that the court should have dismissed counts 5 and 6 and (2) that he is entitled to additional presentence conduct credits. We agree with appellant's arguments.

Respondent does not challenge appellant's statement that counts 5 and 6 should have been dismissed. Instead, respondent argues that because those counts already were dismissed, no further action was necessary. However, at sentencing, no oral pronouncement was made concerning counts 5 and 6. The minute order reflects a dismissal of counts 1 through 5 "due to plea negotiation," but that statement is in error as

¹ We granted respondent's motion to dismiss the appeal in part, concluding that "[a]ppellant's challenge to the validity of his plea based on a claim of ineffective assistance of counsel shall not be considered by way of his current appeal."

counts 1 through 3 did not include allegations against appellant and count 4 was not included in the second amended information. The statement also was in error because it did not include count 6. The minutes therefore should be corrected to reflect the dismissal of counts 5 and 6 pursuant to the plea agreement.

The parties agree that appellant should have been awarded 1,095 days of presentence custody credits and 164 days of good time/work time credits. The judgment should be modified to reflect the additional days. Appellant spent 1,095 days in custody including the date of arrest and date of sentencing (*People v. Smith* (1989) 211 Cal.App.3d 523, 526-527) and was entitled to work time credit of 15 percent under Penal Code section 2933.

DISPOSITION

The judgment is modified to reflect the dismissal of counts 5 and 6 pursuant to the plea agreement and to reflect 1,095 days of presentence custody credits and 164 days of good time/work time credits. As modified, the judgment is affirmed. The court is directed to forward a new abstract of judgment to the Department of Corrections and Rehabilitation.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.