Filed 2/16/17 P. v. Breese CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DANNETTE CHERYL BREESE, Defendant and Appellant.	2d Crim. No. B266143 (Super. Ct. Nos. 2007045892 & 2008019921) (Ventura County)

Dannette Cheryl Breese appeals judgment after she pled guilty to three felonies in three separate cases within a single proceeding and admitted a prior felony conviction.

Appellant claims the trial court erred when it imposed multiple sentence enhancements for the single prior conviction and that it did not properly calculate and award credit for time served. We reverse and remand for redetermination of custody credits but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

In 2009, appellant pled guilty to the following counts in three separate cases:

1. Felony possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); Case No. 421);[1]

2. Felony possession for sale of a controlled substance (§ 11378; Case No. 892); and

3. Felony sale of a controlled substance (§ 11379, subd. (a); Case No. 921).

Appellant also admitted a prior conviction for felony possession for sale of a controlled substance (§ 11378). She was sentenced to three concurrent prison terms, including 3 two-year base terms plus 2 three-year enhancements under section 11370.2, subdivision (c), for a total of five years.[2] The trial court suspended the prison sentences and released appellant on formal probation for 36 months.

Numerous probation violations followed. At a probation violation hearing in 2013, the trial court granted appellant's request to place her on mandatory supervision in lieu of serving time in prison. The converted sentence was unauthorized, however, because appellant was not eligible for mandatory supervision.

At later probation violation proceedings in 2014, the trial court identified the sentencing error and placed the matter

---

[1] All further undesignated references are to the Health and Safety Code unless otherwise stated.

[2] The sentence enhancements were added in Case Nos. 892 and 921.

on calendar for a "clarification of sentence" because "the sentence is illegal." At appellant's request, her sentence was converted to a term of extended probation which was imposed nunc pro tunc as of the date that the unauthorized mandatory supervision began.

In 2015, as a result of further probation violations, the trial court revoked probation and ordered appellant to serve her previously suspended five-year concurrent prison terms in Case Nos. 892 and 921.[3] Appellant contends that the trial court erred when it imposed 2 three-year enhancements under section 11370.2, subdivision (c); failed to award credit for time served while appellant was on mandatory supervision; and failed to award certain custody credits.

DISCUSSION

The Trial Court Did Not Err When It Imposed the Sentence Enhancements

Appellant contends that the sentence enhancement pursuant to section 11370.2 is a status enhancement which can be added only once in arriving at an aggregate sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 402 (*Williams*); *People v. Tassell* (1984) 36 Cal.3d 77, 90 (*Tassell*), overruled on another ground by *People v. Ewoldt* (1994) 7 Cal.4th 380.)

The rule that status enhancements can be added only once in arriving at an aggregate sentence is derived from the language of Penal Code section 1170.1. (*Tassell*, *supra*, 36 Cal.3d at p. 91 ["[Penal Code] section 1170.1 . . . contains the instructions for computing consecutive sentences and makes it

---

[3] Because her felony conviction in Case No. 421 had been redesignated as a misdemeanor, appellant was sentenced to time served in that case.

clear that enhancements for prior convictions . . . are to be added just once as a component of the aggregate term"]; *Williams*, *supra*, 34 Cal.4th at p. 402 ["[T]his court in *Tassell* relied on the language of [Penal Code] section 1170.1 . . . in concluding that at sentencing a trial court must impose a sentence enhancement for a prior felony conviction . . . only once, regardless of the number of new felony offenses"].)

Penal Code section 1170.1 applies only to consecutive sentences. It states, in relevant part, that "when any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed under [Penal Code] [s]ections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions . . . ." (*Id.* at subd. (a).)

Here, the trial court imposed concurrent sentences. Penal Code section 1170.1, subdivision (a) is not triggered because the sentences are not "consecutive." *Edwards* and *Tillotson*, relied upon by appellant, do not apply. Unlike this case, those cases involved aggregate terms. (*People v. Edwards* (2011) 195 Cal.App.4th 1051, 1057, 1059; *People v. Tillotson* (2007) 157 Cal.App.4th 517, 542; see *Tassell*, *supra*, 36 Cal.3d at p. 90.)

Appellant Was Not Entitled to Custody Credits for Time Spent on Mandatory Supervision

Appellant argues that because she was on mandatory supervision from October 4, 2013, to September 11, 2014, she is entitled to credit for time served. (Pen. Code, § 1170, subd. (h)(5)(B).) We reject this contention.

There is a "long-standing rule" that "'defendants are estopped from complaining of sentences to which they agreed.' [Citation.]" (*People v. Buttram* (2003) 30 Cal.4th 773, 783.) Here, appellant was placed on mandatory supervision to "accommodate" her request that she remain out of prison in order to participate in residential drug treatment. After appellant returned to the trial court for yet another violation, she once again faced being sent to prison. Acknowledging that the split sentence was unauthorized, and seeking to avoid a prison term, appellant requested the nunc pro tunc order extending her probation.

Appellant's counsel proposed that "perhaps Your Honor could just fix the sentence so that it's an extension of probation as opposed to doing the split." The trial court said, "So go back and do a nunc pro tunc order that would extend probation?" To which counsel responded: "That would be my suggestion at this point . . . ." The trial court agreed with this proposal and said: "So if everybody is in agreement that I can legally just extend probation, then that's what I intend to do."

"'When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.' [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295 (*Hester*).) "The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*Ibid.*)

Numerous decisions have applied the policy discussed in *Hester* to bar challenges to a broad range of sentencing errors. (See, e.g., *People v. Beebe* (1989) 216 Cal.App.3d 927, 930-932 [trial court exceeded its jurisdiction by approving a plea permitting reduction of a "straight felony" to a misdemeanor on successful completion of probation, but defendant estopped from withdrawing the plea]; *People v. Ellis* (1987) 195 Cal.App.3d 334, 342-343, 347 [defendant estopped to attack her admission of, and the trial court's imposition of sentence upon, a prior serious felony, even though imposing the enhancement was an unlawful act in excess of court's jurisdiction]; *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1551-1552 [having received the benefit of his bargain, defendant waived objection to erroneous imposition of great bodily injury enhancement]; see also *People v. Couch* (1996) 48 Cal.App.4th 1053, 1058 [defendant estopped from challenging sentence because he agreed to accept it and thereby waived alleged errors, including ex post facto claim that he was not subject to the three strikes law because it was not in effect at the time of his current offense]; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 122-123 [defendant waived error in computation of sentence, which is within the court's fundamental jurisdiction and which does not exceed the terms of the plea bargain]; *People v. Jones* (1989) 210 Cal.App.3d 124, 136-137 [defendant estopped from challenging the erroneous imposition of a second five-year enhancement under Penal Code section 667, subdivision (a)].)

Appellant's sentence falls within *Hester*'s estoppel policy. Appellant received a significant benefit when the trial court accepted her proposal to issue a nunc pro tunc order extending her probation in lieu of prison. She cannot now better the bargain through the appellate process.

Remand Is Appropriate for Redetermination of Custody Credits

Appellant contends that when she was sentenced to prison the trial court failed to award custody credits in all of her cases for time spent in custody for probation violations in 2013. (Pen. Code, § 2900.5, subd. (b); *People v. Kunath* (2012) 203 Cal.App.4th 906, 908 (*Kunath*).) She concedes that custody credits were properly awarded in Case No. 892, but claims that her custody credits should be increased by 83 days in Case No. 921. She asks this court to correct the error by remanding for resentencing and redetermination of her custody credits.

In response, the People agree that the matter should be remanded for a recalculation of custody credits. But the People do not concede appellant's math, contending that her various postsentence violations may have resulted in earning credit on some but not all of her sentences. (*Kunath*, *supra*, 203 Cal.App.4th at p. 908 ["[W]hen concurrent sentences are imposed at the same time for unrelated crimes, the defendant is entitled to presentence custody credits on each sentence, provided he is not also in postsentence custody for another crime"].)

Because we cannot tell from the briefs and the record how the custody credits were calculated, we will order the matter reversed and remanded for redetermination of presentence custody credits and correction of the abstract of judgment. (*Kunath*, *supra*, 203 Cal.App.4th at p. 911; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 394 [remanding for determination of presentence custody credit because it "involves factual determinations more properly resolved [in the trial court]"].)

DISPOSITION

The judgment is reversed and remanded to the trial court for a redetermination of custody credits in Case No. 921 for

time spent in custody in 2013. The superior court shall thereafter forward the modified abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn M. Webb, Supervising Deputy Attorney General, and Abtin Amir, Deputy Attorney General, for Plaintiff and Respondent.