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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.

KIMBERLY MAYBEE,

Defendant and Appellant.

B233396

(Los Angeles County  
Super. Ct. No. SA075143)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Leslie E. Brown, Judge. As modified, affirmed.

James Koester, 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, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

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Kimberly Maybee appeals from the judgment entered after she was convicted of arson and using an explosive device. We reject her contention that we must remand for a new trial on the truth of certain prior conviction allegations because her admissions to those allegations were insufficient. However, because the trial court miscalculated her presentence custody credits, we modify the judgment to reflect the correct number of credits and affirm the modified judgment.

### **FACTS AND PROCEDURAL HISTORY**

On August 9, 2010, two Molotov cocktails were ignited outside a West Hollywood nail salon, causing minor exterior damage. Based in part on an eyewitness account and video surveillance footage, Kimberly Maybee was arrested and charged with arson (Pen. Code, § 451, subd. (c)), and use of a destructive or explosive device (Pen. Code, § 12303.3). The information also alleged that Maybee had eight prior convictions for purposes of the one-year sentence enhancement provided by Penal Code section 667.5, subdivision (b).<sup>1</sup>

After a bench trial, Maybee was convicted of both counts. A separate hearing was held first to adjudicate the prior conviction allegations and then to sentence Maybee. At that hearing, Maybee agreed to admit the truth of all eight prior conviction allegations.

The trial court asked the prosecutor “to take the admission of prior convictions, please.”

Maybee answered “yes” to six of the eight. As to two of the allegations, Maybee referred to the prosecutor’s sentencing memorandum to correct the conviction dates that were listed. The court amended the information to reflect the correct dates, and Maybee then answered yes when asked whether she admitted those allegations. Her lawyer joined in the admissions, and the court found that they were freely and intelligently made.

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<sup>1</sup> All further undesignated section references are to the Penal Code. We will hereafter refer to section 667.5, subdivision (b) as section 667.5(b).

The trial court then sentenced Maybee to an aggregate state prison term of 15 years, including eight years for the section 667.5(b) allegations. The court also awarded presentence custody credits of 380 days.

Maybee contends: (1) her admissions of the prior conviction allegations were invalid because the prosecutor did not mention section 667.5(b) and did not ask her whether the convictions resulted in separate prison terms or whether she had remained free from custody for at least five years; and (2) she is entitled to an additional 164 days of good conduct presentence custody credits.<sup>2</sup>

## DISCUSSION

### 1. *Maybee's Admissions to the Prior Conviction Allegations Were Proper*

A prior prison conviction allegation under section 667.5(b) “requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.” (*People v. Tenner* (1993) 6 Cal.4th 559, 563.)<sup>3</sup>

Generally, a defendant's admission to a sentencing enhancement allegation constitutes an admission of every element of the offense charged. (*People v. Thomas* (1986) 41 Cal.3d 837, 844; *People v. Bowie* (1992) 11 Cal.App.4th 1263, 1266.) When the information specifically alleges the prior convictions resulted in separate prison terms, and the defendant admits to the convictions, the admission applies to the separate

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<sup>2</sup> Maybee has filed a separate petition for a writ of habeas corpus (B238184), alleging that she received ineffective assistance of counsel because her trial lawyer failed to determine and then alert the court that one of her eight prior convictions did not result in a separate prison term. Respondent concedes that point and asks that we correct the error without first issuing an order to show cause. During oral argument, counsel for both parties agreed that no order to show cause need be issued before granting Maybee's habeas petition, and by separate order we will grant her petition.

<sup>3</sup> The last element – remaining free of custody and the commission of a new offense for five years – is commonly referred to as “the washout period.”

prison terms as well. (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 61 (*Cardenas*); *People v. Welge* (1980) 101 Cal.App.3d 616, 623 (*Welge*).)

The information in Maybee's case listed each of her prior convictions, and alleged that "a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." Under the decisions cited above, Maybee's admissions were sufficient.

Relying on *People v. Epperson* (1985) 168 Cal.App.3d 856 (*Epperson*) and *People v. Lopez* (1985) 163 Cal.App.3d. 946 (*Lopez*), Maybee asks us to depart from this rule. We decline to do so.

In *Epperson*, the information alleged a 1970 conviction for which the defendant was paroled in 1972, and a 1973 conviction for which he was paroled in 1975. Although his current offense did not take place until 1982, the information alleged that as to those convictions, he had suffered separate prison terms and had not remained free of custody for more than five years under section 667.5(b). When the trial court took the defendant's admissions to those allegations, he was asked, and admitted, as to each, that he served a separate prison term of one year or more and had not remained free of prison custody and free of the commission of an offense resulting in a felony conviction for five years after his release from prison.

The appellate court held that he had admitted only the fact of the convictions, not the existence of the requisite prison term or the failure to satisfy the five-year washout provision. (*Epperson, supra*, 168 Cal.App.3d at pp. 864-865.) No reported decision has ever cited *Epperson* with approval. We view *Epperson* as an anomaly that is perhaps best explained by the fact that the record before the trial court showed that the defendant

satisfied the five-year washout period as to at least one of the section 667.5(b) allegations.<sup>4</sup>

As for *Lopez*, *supra*, 163 Cal.App.3d 946, the defendant's admission of two prior burglary convictions was found insufficient to sustain allegations that those convictions were residential burglaries that qualified as serious felonies for purposes of the five-year enhancement provided by section 667, subdivision (a). Those admissions alone were not enough, the *Lopez* court held, where the information did not allege that they were residential burglaries, the defendant was never asked to admit that they were residential burglaries, and no evidence to that effect was introduced. (*Id.* at p. 950.) The same was true for the information's section 667.5(b) allegations and the requirement of proof that separate prison terms were served. The *Lopez* court then cited *Welge*, *supra*, 101 Cal.App.3d at pages 619, 623, as a contrasting authority that applied where the defendant admitted "prior convictions as charged." (*Lopez* at p. 951.) Therefore *Lopez* is also distinguishable because it was based in part on deficiencies in the information, while acknowledging that an admission to a properly pleaded prior conviction allegation was sufficient.

Maybee also argues that the general rule regarding the validity of an admission does not apply to this case because the court in *Cardenas*, *supra*, 192 Cal.App.3d 51, specified that by admitting prior convictions, the defendant is exposed to "possible sentence enhancement . . . if all three earlier prison terms are *found to be 'separate'* pursuant to subdivision (g)." (*Id.* at p. 61, italics added.) Based on this language, Maybee contends that her admissions are not valid because there was no evidence that her prior convictions resulted in separate prison terms.

*Cardenas* involved a defendant who, despite his admission to the section 667.5(b) allegations in the information, argued during his sentencing hearing that two of the

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<sup>4</sup> That is unlike this case, where there was nothing before the trial court, and therefore nothing in the record on this appeal, to show that any of Maybee's section 667.5(b) allegations did not involve separate prison terms or fell outside the five-year washout period. Evidence to that effect comes from outside the record and is considered in connection with Maybee's separate habeas corpus petition.

convictions were served during a single continuous prison commitment, and that therefore only one of them qualified under section 667.5(b). (*Cardenas, supra*, 192 Cal.App.3d at p. 55.) The primary issue was one of statutory interpretation – whether the timing of the convictions met the definition of “separate terms” set forth in section 667.5, subdivision (g). The *Cardenas* court noted the general rule that a defendant’s admission to section 667.5(b) allegations is considered sufficient when the information alleges that prior prison terms had been served, but then added the statement that Maybee relies upon: that by admitting the priors, the defendant exposed himself to possible sentence enhancement if the earlier terms were found to be separate under subdivision (g). (*Id.* at p. 61.)

The language of an opinion must be construed in light of the facts of the particular case, an opinion’s authority is no broader than its factual setting, and the parties cannot rely on a rule announced in a factually dissimilar case. (*Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1121.) When *Cardenas* is read with these rules in mind, the meaning of that court’s statement concerning the need for a finding that separate prison terms were served becomes clear: the finding was required in that case because the defendant raised the issue with the trial court, and despite admitting to the convictions, contended that separate terms had not been served. As did the court in *Lopez, supra*, 163 Cal.App.3d at page 951, the *Cardenas* court cited *Welge, supra*, 101 Cal.App.3d at pages 623 to 624 to support the proposition that admitting to prior conviction allegations that are properly spelled out in the information is ordinarily sufficient. We therefore conclude that Maybee’s admission to the prior conviction allegations as alleged in the information was sufficient.<sup>5</sup>

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<sup>5</sup> Maybee also argues that the failure to obtain a specific admission of the enhancement factors violates her Sixth Amendment due process rights. This argument hinges on the same issue as Maybee’s main argument, and is satisfied by our conclusion that her admissions to the section 667.5(b) allegations were proper.

2. *Maybe's Presentence Custody Credits Must be Recalculated*

At the sentencing hearing, the court calculated Maybee's good conduct credits at 50 days, which when added to her 330 days of actual custody credits, gave her a total of 380 days of presentence custody credits. However, as Maybee contends and respondent concedes, she was entitled to 164 days of good time/work time credit under the method of calculation prescribed by section 4019 that was applicable at the time. (*People v. Kimbell* (2008) 168 Cal.App.4th 904, 908-909 [divide by four the actual credit, discount the remainder, and multiply by two].)<sup>6</sup> We will order the abstract of judgment amended to reflect the correct total of credits.

**DISPOSITION**

The judgment is modified to reflect presentence custody credits of 494 days, comprised of 330 days of actual time plus 164 days of good conduct credit. As so modified, the judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment and transmit it to the Department of Corrections.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

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<sup>6</sup> Maybee suggests that the trial court awarded 50 days of credits because it mistakenly believed she had been convicted of arson under section 451, subdivisions (a) or (b), both violent felonies (§ 667.5, subd. (c)(10)), which calls into play the 15 percent limitation on good conduct credits (§ 2933.1, subd. (c)). Instead, she was convicted of arson under section 451, subdivision (c), which is not a violent felony.