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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.

EBONY FLEWELLEN,

Defendant and Appellant.

B293571

(Los Angeles County
Super. Ct. No. NA102400)

APPEAL from an order of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed as modified.

Tasha G. Timbadia and Richard Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Jason Tran and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals from the revocation of her probation. She argues that under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court's imposition of fines and assessments without an ability to pay hearing violated her federal and state due process rights. Defendant also argues that the trial court incorrectly calculated her presentence custody credits. We order the abstract of judgment amended to reflect 447 days of presentence custody credits. We otherwise affirm the judgment as modified.

FACTS AND PROCEDURAL BACKGROUND

In 2015, defendant stabbed her father in the bicep following an argument with him. In an amended felony complaint filed September 14, 2015, the People charged defendant with one count of assault with a deadly weapon and alleged that she personally inflicted great bodily injury upon the victim. Defendant pleaded no contest, and admitted the great bodily injury allegation.

On October 7, 2015, the trial court suspended the imposition of sentence, and placed defendant on formal probation for five years. As a condition of probation, the court ordered her to serve 365 days in a residential treatment program for alcoholism. The court awarded her presentence custody credits for 105 days, composed of 53 days of actual custody credit and 52 days of conduct credit.

In 2015 and 2016, defendant was in and out of custody and rehabilitation programs. She successfully completed the court-ordered rehabilitation program in September 2016.

On April 13, 2018, in separate case, defendant was sentenced to 10 years, 4 months in prison for assault with a

deadly weapon and criminal threats in Riverside County Superior Court.

On October 26, 2018, the trial court in the present case terminated defendant's probation after it determined that defendant violated probation by committing crimes in a Riverside County case. The court sentenced defendant to 5 years in state prison. The court ordered the sentence to be served concurrently with defendant's 10-year Riverside County sentence. The court also imposed a \$300 restitution fine (§ 1202.4) and a \$300 parole revocation fine (§ 1202.45), the latter of which was stayed. The minute order specified that the restitution fine would be paid from defendant's prison earnings. The court awarded defendant 215 days of custody credits, composed of 189 days of actual custody credit and 26 days of good time/work time credit.

Defendant filed a timely notice of appeal. While this appeal was pending, defendant filed a motion to correct the presentence custody credits. On May 28, 2019, the trial court considered the motion and awarded defendant additional credits, for a total of 449 days.

DISCUSSION

1. Defendant's Ability to Pay Fines

Defendant argues that, under *Dueñas, supra*, 30 Cal.App.5th 1157, the trial court violated her federal and state right to due process rights because the court imposed the assessments and fine without a hearing on her ability to pay. Defendant requests this court to vacate the assessments and stay the fine.

In *Dueñas*, a homeless, jobless mother of two children, who subsisted on public aid while suffering from cerebral palsy, appealed fines imposed against her despite the trial court's

finding that she could not pay them. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160-1161.) Dueñas was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. Dueñas had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. (*Ibid.*)

Dueñas had requested, and the trial court had granted, a hearing to determine her ability to pay a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), and a \$150 restitution fine (§ 1202.4, subd. (b)), as well as previously imposed attorney fees. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas presented undisputed evidence of her inability to pay, and the trial court waived the attorney fees. However, the court imposed the assessments and fine despite its finding that Dueñas was unable to pay them because it was statutorily required to impose them. (*Id.* at p. 1163.) The Court of Appeal held that the consequences Dueñas faced amounted to punishment on the basis of poverty, which the state and federal constitutional rights to due process and equal protection forbid. (*Id.* at pp. 1166–1172.)

Here, there is some evidence that defendant was indigent. At the October 2015 hearing when defendant was placed on probation, the trial court acknowledged that defendant would have trouble paying fines and fees as she could not work a job during her year-long stint at the rehabilitation facility. Defendant also wrote the court a letter in August 2016 that explained some of the circumstances leading to her assault. In

the letter she stated she was a single mother of three children subsisting on Section 8 housing vouchers and a monthly income of \$494.00 provided through Assistance for Dependent Children (AFDC). The People also noted in their respondent's brief: "The record does show that [defendant] left a residential treatment program because she was unable to pay the program's fees. However, it appears [defendant] was unable to pay due to an anomalous situation where she did not receive her state welfare benefits for one month." The record contains a letter from one of the programs confirming that defendant left the program in part because she was unable to meet her financial obligation.

Two years later, when defendant was sentenced following her probation violation, her situation was different. At this time, defendant had been out of the rehabilitation facility for over a year, and she had recently started serving a 10-year sentence for her April 13, 2018 conviction for assault with a deadly weapon and criminal threats in Riverside County. Defendant's lengthy sentence in the Riverside case will afford her sufficient time to pay off the fines with her prison wages. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant's ability to obtain prison wages].)

Because defendant's situation lacks the hallmarks that defined *Dueñas*, we decline to apply its reasoning here.

2. Custody Credits

The trial court initially awarded defendant 215 days of presentence custody credits, composed of 189 days of actual custody credit and 26 days of good time/work time conduct credit. In her opening brief, defendant argued the trial court's calculation did not account for several periods of confinement, such as when she was enrolled in residential treatment

programs. She asserted that she is entitled to an additional 260 days of custody credits, for a total of 475 days of custody credits. The People concede that the court miscalculated custody credits but claim defendant is entitled to 462 days.

While this appeal was pending, defendant filed a motion to correct the presentence custody credits. On May 28, 2019, the trial court considered the motion and awarded defendant additional credits, for a total of 449 days.

We conclude the trial court miscalculated defendant's credits, and have determined that defendant is due a total of 447 credits, as broken down below.

a. Applicable Law

A defendant accrues actual custody credits pursuant to Penal Code section 2900.5, and conduct credits pursuant to section 4019, for time spent in custody prior to sentencing. (§§ 2900.5, 4019; *People v. Arevalo* (2018) 20 Cal.App.5th 821, 827.) Actual custody credits are calculated by adding together “all days of custody” the defendant has served. (§ 2900.5, subd. (a).) This applies to “custodial time in a residential treatment facility as well as straight county jail time.” (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.) In contrast, under section 4019, a defendant can earn two days of conduct credit for every two days actually served. (§ 4019, subds. (b), (c), & (f).) However, a defendant convicted of a violent felony under section 667.5 “cannot earn good behavior credits under section 4019 exceeding 15 percent of the actual time of confinement in a local facility ‘prior to placement in the custody of the Director [of Corrections and Rehabilitation].’” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31-32, quoting § 2933.1, subd. (c).) We review the trial court’s

award of presentence custody credits de novo. (*Arevalo*, at p. 827.)

Conduct credit for time spent in an alcohol recovery center is not authorized by Penal Code section 4019, subdivision (a)(3), which only allows the trial court to award it to prisoners “ ‘confined in or committed to the county jail, industrial farm, or road camp or any city jail.’ ” (*People v. Moore* (1991) 226 Cal.App.3d 783, 785.) “Conduct credit for time spent in non-penal institutions is not authorized.” (*Ibid.*)

b. Defendant’s Credits

In the present case, defendant was taken into custody on August 16, 2015, following the assault. On September 16, 2015, defendant was convicted of assault with a deadly weapon causing great bodily injury (a violent felony). (See §§ 2933.1, subd. (a), 667.5, subd. (c)(8).) On October 7, 2015, the trial court placed defendant on formal probation on the condition she spend 365 days in a residential alcohol treatment program. The court awarded her custody credit for 105 days, composed of 53 days of actual custody credit and 52 days of conduct credit. As appellant’s opening brief now acknowledges, she was only entitled to seven days of conduct credit (15 percent of the actual time of confinement, rounded down to the nearest whole number) pursuant to section 2933.1 because defendant was convicted of a violent felony. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) Therefore, we conclude defendant was entitled to 60 days (53 plus 7) of total custody credits for time served prior to being placed on probation.

On October 13, 2015, defendant began her first residential treatment program, where she remained until December 30, 2015. She was there a total of 79 days, for which she received

actual custody credit. Pursuant to *People v. Moore, supra*, 226 Cal.App.3d at page 785, defendant was not entitled to any *conduct* credit for this period or any other time she spent in a residential treatment program.

On January 5, 2016, the trial court revoked defendant's probation because she had left the residential treatment program. Defendant was taken into custody on January 8, 2016, and remained in custody for 25 days until February 1, 2016 when she admitted the violation of her probation. Under the 15 percent calculation pursuant to section 2933.1, defendant was entitled to three days of conduct credit. For the time served during this period, she is entitled to a total credit of 28 days.

Defendant then enrolled in a second residential treatment program, where she remained until March 29, 2016. She is entitled to 57 days of actual credit for this period.

On April 6, 2016, after learning that defendant left the second residential treatment program, the trial court revoked her probation again. Defendant was taken into custody on April 7, 2016. On June 1, 2016, the court reinstated her probation and ordered her conditionally released to a representative of another residential treatment program. For this period between April 7 and June 1, defendant is entitled to 64 days of custody credits, composed of 56 days of actual custody credit and 8 days of conduct credit pursuant to section 2933.1.

The parties dispute how many custody credits defendant is owed from the period of June 1 to June 17. Defendant contends she was entitled to custody credits from June 1 to June 17. The People argue the record does not indicate that defendant was in custody from June 1 to June 17 because the court's June 1, 2016

minute order stated defendant was “conditionally released” on June 1, and her custody status was listed as “on probation.”

When read in its entirety, the minute order at issue stated defendant was “conditionally released to a representative of a recovery network for transport to safe refuge.” At the hearing on June 1, 2016, defense counsel identified “Safe Refuge” as a residential treatment program that was going to accept defendant. The court then stated: “I’m going to conditionally release you to a representative of the recovery network. . . . You’ll be picked up when there is a bed available for you at the Safe Refuge. I think they’re also working on some funding for you to make sure you can stay there. Once that is all in place, someone will come and pick you up and take you over to safe refuge. You need to continue and complete the safe refuge program.”

The next document in the record shows that defendant was court ordered into “the Rena B Recovery Center on June 17, 2016,” and successfully completed that residential treatment program on September 15, 2016. Based on those two documents alone it is unclear whether defendant was in custody from June 1 to 17, 2016.

We observe that in its May 2019 recalculation of credits, the trial court awarded defendant custody credit for the entire period of June 1 to June 17, 2016, with 15 percent good conduct credit. The trial court’s understanding of events was that defendant was in jail custody and not residential treatment during this early June period. Although the People urge us to reverse this finding and not to give defendant conduct credit for June 1st to 17th, they fail to provide us with sufficient evidentiary support.

We therefore agree with the trial court's calculation for this period of incarceration as nothing in the record expressly states defendant was out of jail custody during this time. The most reasonable inference from this language is that defendant remained in custody pending transfer to the program on June 17. Thus, she is entitled to 15 percent conduct credit, or two additional days for this particular period. Defendant is entitled to a total of 18 days custody credit (16 days custody and 2 days of conduct credit) for June 1st to 17th.

As defendant started in the third rehabilitation treatment facility on June 17th and successfully completed the program on September 15, 2016, she is entitled to 90 days of actual custody credit for that period.

On January 10, 2018, the court held a hearing to address a possible violation of defendant's probation. Defendant did not appear, and the court revoked her probation and issued a bench warrant. On April 13, 2018, defendant was sentenced in the Riverside case to 10 years, 4 months in prison for assault with a deadly weapon and criminal threats in case number RIF1074209-01.

On September 12, 2018, defendant was placed in custody in Los Angeles County in response to the court's warrant. On September 14, she appeared in court and the trial court's bench warrant was recalled. On September 17, the court was informed that defendant was convicted of assault with a deadly weapon and criminal threats in Riverside County, and had been sentenced to prison. On October 26, 2018, the court found defendant in violation of her probation, terminated probation, and sentenced her to five years in prison, to be served concurrent to her sentence in the Riverside case. For her 45 days in custody

(from September 12, 2018 to October 26, 2018), defendant is entitled to 51 days of credits, composed of 45 days of actual custody credit and 6 days of conduct credit.

In sum, defendant is entitled to a total of 447 days of custody credit, composed of 421 days actually served and 26 days of conduct credit. The following table summarizes our analysis.

Date Range	Days Served	Conduct Credit	Total Custody Credit
August 16, 2015 – October 7, 2015	53 in custody	7	60
October 13, 2015 – December 30, 2015	79 in rehab	0	79
January 8, 2016 – February 1, 2016	25 in custody	3	28
February 2, 2016 – March 29, 2016	57 in rehab	0	57
April 7, 2016 – June 1, 2016	56 in custody	8	64
June 1, 2016 – June 17, 2016	16 in custody	2	18
June 18, 2016 – September 15, 2016	90 in rehab	0	90
September 12, 2018 – October 26, 2018	45 in custody	6	51
TOTAL	421	26	447

We will order the abstract of judgment to be amended accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical errors reflected in abstract of judgment].)

DISPOSITION

We order the abstract of judgment amended to reflect a total 447 days of presentence custody conduct credits. We otherwise affirm the judgment.

RUBIN, P.J.

WE CONCUR:

MOOR, J.

KIM, J.