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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MICHAEL YOUNG, Defendant and Appellant.	B232353 (Los Angeles County Super. Ct. No. NA085683)

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

Alex Green, 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, Chung L. Mar and Victoria B. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Anthony Michael Young appeals from the postjudgment order revoking probation and executing a previously stayed five-year state prison sentence. He contends the trial court erred in not obtaining a supplemental probation report before his sentencing hearing and he is entitled to additional presentence conduct credits. We modify the conduct credits, but in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 17, 2010, defendant pleaded no contest to corporal injury to a spouse/cohabitant/child's parent (Pen. Code, § 273.5, subd. (a)) and admitted the allegation that he personally used a deadly and dangerous weapon, a baseball bat (*id.*, § 12022, subd. (b)(1)).[1] The court imposed and suspended the execution of a five-year state prison sentence (consisting of the upper term of four years on the corporal injury conviction, plus one year on the weapon enhancement) and placed defendant on formal probation for a period of five years, with various terms and conditions, including a protective order, directing defendant to stay away from the victims. Defendant was ordered to serve 365 days in county jail, less credit for 51 days.

On August 10, 2010, the People requested that defendant's probation be revoked. Before a probation violation hearing was held, the trial court declared a doubt as to defendant's competency and the proceedings were suspended. Defendant returned to court on January 27, 2011, after his competency was restored.

On March 29, 2011, the trial court held a probation violation hearing and found that defendant had violated probation by attempting to contact one of the victims. The court revoked probation and ordered defendant to serve the state prison sentence

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[1] The court dismissed a simple battery charge (Pen. Code, §§ 242, 243, subd. (a)) in the furtherance of justice.

previously imposed. The court gave defendant credit for 456 days in custody, consisting of 304 days of actual custody and an additional 152 days of conduct credit.

Underlying Offense[2]

Defendant was married but separated from Kimberly F. Kimberly F. had a restraining order against defendant, but she allowed him to stay at her house for about one month. On May 14, 2010, defendant had a verbal altercation with Kimberly's mother and threatened her with a knife. Defendant obtained a baseball bat and hit Kimberly F. on the side of the head with it. Kimberly F. and her mother locked defendant out of the house and called police.

Probation Violation Hearing

On June 17, 2010, Kimberly F. received a copy of the protective order directing defendant to stay away from her and have no contact with her. In July 2010, she received eight letters from defendant. In addition, between June 17 and July 28, defendant called her collect from jail approximately 100 to 150 times. She did not accept the calls.

Dr. Kaushal Sharma, who specializes in forensic psychiatry, testified for the defense. He reviewed several documents concerning the case. He first interviewed defendant on September 9, 2010. At the first meeting, Dr. Sharma came to two conclusions. First, based on defendant's answers to questions, he opined that defendant was dissimulated, meaning that he was a sick person pretending to be healthy. Second, Dr. Sharma believed defendant was suffering from schizoaffective disorder, i.e., a combination of schizophrenia and bipolar disorder, in which a person is not only having strange and "crazy" thoughts, but is also grandiose, religiously preoccupied, impulsive, and doing bizarre things. After the first interview, Dr. Sharma concluded that defendant was not competent to participate in a probation violation hearing.

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2 The facts are taken from the May 26, 2010 Probation Officer's Report Early Disposition.

Dr. Sharma interviewed defendant again on October 4, 2010. He concluded that defendant was not incompetent on the day he entered his no contest plea. On October 26, defendant was transferred to the Metropolitan State Hospital, where he received psychiatric medication and competency services. He was returned to jail on January 26, 2011.

On March 2, 2011, Dr. Sharma once again met with defendant. Dr. Sharma concluded that defendant had recovered his competency due to medication. He opined that there was a substantial likelihood that defendant's mental illness played a role in defendant's behavior in trying to contact Kimberly F. between June 17 and July 28, 2010. Dr. Sharma could not say whether defendant's mental illness was the only reason for defendant's behavior. He did note that when defendant's mental health improved, he did not make more telephone calls to Kimberly F.

At the conclusion of the probation violation hearing, the trial court found defendant was in violation of probation because he had tried to contact Kimberly F.

DISCUSSION

Failure to Obtain a Supplemental Probation Report

Defendant contends that the trial court erred in failing to obtain a supplemental probation report before sentencing defendant on the probation violation. We disagree and, in any event, the failure was harmless error.

On May 18, 2010, at defendant's arraignment, the court set the matter for an "early disposition hearing" on May 26, 2010. The probation department filed a "Probation Officer's Report Early Disposition" for the May 26 hearing, outlining defendant's criminal history, circumstances of the current offense, and the probation officer's recommendation that probation be denied. When defendant was sentenced on June 17, 2010, and placed on probation, the court did not obtain another probation report.

On August 10, 2010, the People requested that defendant's probation be revoked and, on August 20, the trial court ordered a supplemental probation report. The probation

department prepared a report for the next hearing date of September 10, 2010. It reported that defendant had not reported for probation supervision, had not made ordered payment, and had not attended counseling as ordered. Before a probation violation hearing could be held, the trial court declared a doubt as to defendant's competency and suspended criminal proceedings on September 29. Defendant returned to court on January 27, 2011, after his competency was restored.

On March 29, 2011, when the court found defendant in violation of his probation and imposed the previously suspended five-year state prison sentence, the court did not obtain a supplemental probation report.

California Rules of Court, rule 4.411(c) provides as follows: "The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." The time period that constitutes a "significant period of time" is not defined in rule 4.411(c). However, the Advisory Committee Comment to rule 4.411(c) explains: "Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court . . . . [¶] The rule does not require a new investigation and report if a recent report is available and can be incorporated by reference and there is no indication of changed circumstances. . . . If a full report was prepared in another case in the same or another jurisdiction within the preceeding [*sic*] six months, during which time the defendant was in custody, and that report is available to the Department of Corrections and Rehabilitation, it is unlikely that a new investigation is needed."

In *People v. Dobbins* (2005) 127 Cal.App.4th 176, the Court of Appeal held that the trial court erred by proceeding without an updated probation report where "the original probation report was prepared approximately eight months before the sentencing hearing . . . ." (*Id*. at p. 181.) After noting that the advisory committee recommended that the probation report have been prepared no more than six months before the sentencing hearing, the court explained: "This period was well in excess of the six months referred to by the Advisory Committee, and it included approximately two

months when defendant was not under the watchful eyes of custodial authorities but was rather released on probation, when he committed the conduct for which his probation was revoked." (*Ibid*.) The court did point out, however, "Our decision is necessarily predicated on the facts of this case, and we have no occasion to decide whether a supplemental or updated probation report might be warranted if less time had passed and/or defendant had not been released on probation." (*Id*. at p. 181, fn. 3.)

In *People v. Tatlis* (1991) 230 Cal.App.3d 1266, on which defendant relies in part, the court addressed the question whether a supplemental probation report is required on remand for resentencing. It noted that "[t]here is no statutory requirement that a sentencing court procure a probation report embodying facts pertaining to sentencing except when a person convicted of a felony is eligible for probation. (Pen. Code, § 1203, subd. (b).)" (*Tatlis*, *supra*, at pp. 1272-1273.) However, under subdivision (g) of Penal Code section 1203, the trial court has the discretion to order a current probation report containing facts pertaining to sentencing. (*Tatlis*, *supra*, at p. 1273.)

Based on the foregoing, the court concluded that on remand for resentencing, the determination whether to order a supplemental probation report is within the trial court's discretion. (*People v. Tatlis*, *supra*, 230 Cal.App.3d at p. 1273.) The court went on to note that if a defendant requests a supplemental probation report on remand, "the request in itself suggests the report will reveal favorable, or mitigating, information. At the least, the request puts the court on inquiry as to what kind of favorable information the defendant expects the report to reveal." (*Id*. at p. 1273.) While such "favorable information could be presented to the court in another form," a supplemental probation report "presents information in a cohesive fashion, facilitating the task of weighing newly revealed mitigating factors in the balance." (*Ibid*.)

In the instant case, defendant did not request a supplemental probation report.[3] There is no indication of any favorable information that would have changed the opinion

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[3] This does not constitute a forfeiture of defendant's claim on appeal because Penal Code section 1203, subdivision (b)(4), requires a waiver of a probation report to be by

of the judge if a supplemental report would have been prepared. Defendant's most recent probation report was prepared on September 10, 2010, six and a half months before sentencing on March 29, 2011. During the entire period of time, defendant had remained in custody "under the watchful eyes of custodial authorities." (*People v. Dobbins, supra*, 127 Cal.App.4th at p. 181.)

The two reports available to the trial court at the time of sentencing on March 29, 2011, contained information about defendant's background, his criminal history, statements by the victims, and his conduct on probation. While it is true, as defendant points out, that there was no discussion of his mental health condition in either report, there was a probation violation hearing during which Dr. Sharma testified about defendant's mental health. The trial court was well aware of defendant's mental health issues and was able to make an informed decision whether to allow defendant to remain on probation or impose the previously suspended state prison sentence. It is mere speculation as to what additional information would have been available to the trial court to help in assessing the appropriate sentence for defendant. The trial court did not err in proceeding with the sentencing on March 29, 2011, without ordering a supplemental probation report.

In any event, even if defendant was entitled to a supplemental probation report, the error was harmless. It is not reasonably probable he would have obtained a more favorable result had the report been ordered. (*People v. Dobbins, supra*, 127 Cal.App.4th at p. 182; see *People v. Watson* (1956) 46 Cal.2d 818, 834-836.)

The trial judge who sent defendant to prison was also the judge who reluctantly suspended execution of the sentence and placed defendant on probation. The following colloquy took place at the time defendant was "grudgingly" placed on probation:

"The Court: All right. Mr. Young, I have to tell you right now, I'll accept this plea grudgingly. I don't think you should get—I think you should go to state prison now.

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written stipulation or by an oral stipulation on the record in open court. (*People v. Dobbins, supra*, 127 Cal.App.4th at p. 182.)

"So basically, what that's telling you is: If you violate any terms and conditions of this probation, you're getting five years state prison.

"So if you think you can do this, more power to you. I think that's great—versus two years. So is this the plea you want to do?

"The Defendant: Yes.

"The Court: Yes? Thank you."

The trial judge later stated:

"The Court: Let me make something exceptionally clear—if I even hear that you made a collect call to their number or to that address, that will already be a violation of your probation, and you'll get the five years state prison. Do you understand that, sir?

"The Defendant: I had called—

"The Court: If I hear that you're even calling—I don't care if they accept. If I find out from the jail or I find out from them you're even calling that phone number, that's a violation of this protective order, and you're getting five years state prison."

From these colloquies, it is abundantly clear that there is no reasonable probability defendant would have received more favorable treatment had a new probation report been prepared. The trial court had already expressed its intent to send defendant to prison for any violation of the probation that the court had "grudgingly" given him, and defendant had violated probation on multiple occasions. There was no prejudice in the failure to obtain a supplemental probation report.

Defendant's Request for Additional Presentence Credits

A defendant sentenced to state prison is entitled to credit against the sentence imposed for all days spent in custody prior to sentencing, including days served as a condition of probation. (Pen. Code, § 2900.5, subd. (a).) In addition, the defendant may be entitled to conduct credits pursuant to Penal Code section 4019 (section 4019).

Defendant maintains that he is entitled to additional presentence conduct credits based on the most recent amendments to section 4019 under The Criminal Justice Realignment Act of 2011. We agree that he is entitled to additional conduct credits.

When the trial court ordered the previously stayed five-year sentence to be executed on March 29, 2011, it awarded defendant presentence custody credits of 456 days (304 actual days and 152 days of conduct credits) pursuant to subdivisions (a), (b), (c) and (f) of section 4019, which at that time provided an inmate was deemed to have served six days for every four days actually in presentence custody, unless the inmate failed to perform assigned work or abide by the facility's reasonable rules and regulations. (See *People v. Fry* (1993) 19 Cal.App.4th 1334, 1341.)

At the time defendant committed his crime and was convicted and sentenced, in May and June 2010, subdivisions (a), (b), (c) and (f) of section 4019 provided that an inmate was deemed to have served four days for every two days spent in actual custody. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010.)

Section 4019 was amended to provide six days of credit for four days of actual custody, but by the terms of the statute as amended, the changes in the statute applied only to prisoners whose crimes were committed on or after the effective date of the amendment, September 28, 2010. (*Id.*, subd. (f); Stats. 2010, ch. 426, § 2.) Because defendant's crime was committed before the effective date of this amendment, it did not apply to him. He thus was entitled to the four days of credit for two days of actual custody provision in effect at the time he committed his crime.

DISPOSITION

The judgment is modified to award defendant a total of 608 days of custody credit (304 actual days and 304 days of conduct credits). In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.