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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE SHELDON BARNES,

Defendant and Appellant.

B267096

(Los Angeles County
Super. Ct. No. KA099184)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Modified and, as modified, affirmed with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Stacy S. Schwartz, Deputy Attorney General,
for Plaintiff and Respondent.

Appellant Dale Sheldon Barnes appeals from the judgment entered following his convictions by jury on count 1 – attempted second degree robbery, count 2 – kidnapping to rob, and count 3 – second degree robbery, with admissions he suffered three prior felony convictions, three prior serious felony convictions, two prior violent felony convictions, and four prior felony convictions for which he served separate prison terms. (Pen. Code, §§ 664, 211, 209, subd. (b)(1), 667, subds. (a) & (d), 667.5, subds. (a) & (b).)¹ We modify the judgment and, as modified, affirm it with directions.

ISSUE

Appellant claims he is entitled to an additional 265 days of Penal Code section 2900.5, subdivision (a) custody credit.

DISCUSSION

Appellant Is Entitled to An Additional 265 Days of Custody Credit.

1. Pertinent Facts.

In the present case (super. ct. case No. KA099184), on August 7, 2013, the trial court initially sentenced appellant to prison and awarded him 348 days of Penal Code section 2900.5, subdivision (a) custody credit and 52 days of Penal Code section 4019 conduct credit. (*People v. Dale Sheldon Barnes et al.*, B250651; R.T., pp. 1801, 1803-1804.) Later, in *Barnes I*, we remanded for resentencing.

¹ The present appeal is appellant's second appeal. The first appeal led to our decision in *People v. Dale Sheldon Barnes et al.* (Apr. 10, 2015, B250651) [nonpub. opn.] (*Barnes I*). In *Barnes I*, we affirmed the judgment, except we reversed one of appellant's convictions, vacated his sentence, and remanded for resentencing. (*Barnes I*, at p. [9].) This appeal followed. In the present appeal, appellant's appointed counsel initially filed an opening brief which raised no issues and requested this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Following our review of the record, this court, by letter filed May 16, 2016, asked for, and later received, supplemental letter briefs from the parties on the issue of whether appellant was entitled to an additional 265 days of Penal Code section 2900.5, subdivision (a) custody credit. We take judicial notice of *Barnes I*, the record underlying *Barnes I* (*People v. Dale Sheldon Barnes et al.*, B250651), and the record in appellant's appeal in *People v. Dale Barnes et al.*, B256012 (discussed *post*). (Evid. Code, §§ 451, subd. (a), 452, subd. (d)(1), 455, subd. (a), 459, subds. (a) & (c).) The facts underlying appellant's present offenses are not pertinent to the present appeal.

Following remand, the trial court, on September 17, 2015, resentenced appellant to a total prison term of two consecutive terms of 25 years to life (each a Three Strikes law sentence), plus one determinate term of 25 years. On that date, the trial court acknowledged its August 7, 2013 credit award but awarded no additional presentence credit. There is no dispute appellant remained in custody in the present case from August 8, 2013 (the day after his initial sentencing date) to September 17, 2015, inclusive.

Meanwhile, in November 2013, in an unrelated case (super. ct. case No. LA072011), a jury convicted appellant of various crimes. (*People v. Dale Barnes et al.*, B256012; C.T., pp. 372-391.)² On April 29, 2014, the trial court in case No. LA072011 sentenced appellant to prison for “66 years, four months to life” (*People v. Dale Sheldon Barnes et al.*, B250651; R.T., pp. 2701, 2742) and appellant was “remanded to the custody of the sheriff forthwith . . . [t]o be delivered to the reception center designated by the director of the California Department of Corrections and Rehabilitation.” (*People v. Dale Barnes et al.*, B256012; C.T., p. 552.) From August 8, 2013 (the day after appellant’s initial sentencing date) to April 29, 2014, inclusive, is 265 days.

² *People v. Dale Barnes et al.*, B256012, was appellant’s appeal from the judgment in superior court case No. LA072011.

2. Analysis.

In *People v. Buckhalter* (2001) 26 Cal.4th 20, 23 (*Buckhalter*), our Supreme Court stated, “When . . . an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the ‘subsequent sentence.’ ([Pen. Code,] § 2900.1.)”³ However, in *In re Rojas* (1979) 23 Cal.3d 152, 154 (*Rojas*), our Supreme Court concluded “Penal Code section 2900.5 [does not entitle] a criminal defendant to credit towards his sentence for a period of presentence time spent in custody, if during that same period the defendant was simultaneously serving a prison term for a prior unrelated offense.”

In light of *Buckhalter*, appellant’s claim he is entitled to an additional 265 days of Penal Code section 2900.5, subdivision (a) custody credit in the present case for the period August 8, 2013, through April 29, 2014, inclusive, is well-taken.⁴ Respondent concedes appellant is entitled to the additional 265 days of custody credit. We accept the concession and we will award that additional credit.

³ *Buckhalter* concluded a defendant is not entitled to presentence Penal Code section 4019 *conduct* credit for that period. (*Buckhalter, supra*, 26 Cal.4th at p. 23.)

⁴ Based on *Buckhalter*, appellant is not entitled to additional *conduct* credit in this case and, based on *Rojas*, he is not entitled to additional custody credit in this case for any period after April 29, 2014. There is no dispute that during the period from April 30, 2014, to September 17, 2015, inclusive, appellant was serving a prison sentence in case No. LA072011, which involved offenses unrelated to the present offenses.

DISPOSITION

The judgment is modified by awarding appellant an additional 265 days of Penal Code section 2900.5, subdivision (a) custody credit, for a total presentence credit award of 613 days of Penal Code section 2900.5, subdivision (a) custody credit and 52 days of Penal Code section 4019 conduct credit and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the above modification.

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HOGUE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.