

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and
Respondent,

v.

MICHAEL GLAVISH,

Defendant and
Appellant.

B287131

(Los Angeles County
Super. Ct. No. PA082516)

APPEAL from judgment of the Superior Court of Los Angeles County, David Walgren, Judge. Affirmed as modified.

David W. Beaudreau, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Paul M. Roadarmel, Jr.,
Supervising Deputy Attorney General, Kristen J. Inberg,
Deputy Attorney General, for Plaintiff and Respondent.

On May 21, 2015, defendant and appellant Michael Glavish pleaded no contest to transporting methamphetamine for sale (Health & Saf. Code, § 11379, subd. (a) [count 1]),¹ possessing heroin for sale (§ 11351 [count 2]), possessing methamphetamine for sale (§ 11378 [count 3]), transporting heroin for sale (§ 11352, subd. (a) [count 4]), misdemeanor driving under the influence (Veh. Code, § 23152, subd. (e) [count 5]), and two counts of misdemeanor obstructing a peace officer (Pen. Code, § 148, subd. (a)(1) [counts 6 & 7]). With respect to count 5, Glavish admitted the allegation that he refused to submit to a chemical test. (Veh. Code, §23612.) He further admitted that he had suffered a prior conviction within the meaning of section 11370.2, subdivision (a), for violation of section 11379, and served three prior prison terms under Penal Code section 667.5, subdivision (b).

The trial court sentenced Glavish to 11 years in prison in count 4, consisting of the upper term of 5 years, plus 3 years for the section 11370.2, subdivision (a) enhancement, and an additional 3 years pursuant to Penal Code section 667.5, subdivision (b). Glavish received three consecutive

¹ All future statutory references are to the Health and Safety Code unless otherwise indicated.

terms of 1 year each in counts 1, 6, and 7, plus 6 months in count 5, for a total sentence of 14 years 6 months. The trial court suspended execution of sentence and placed Glavish on formal probation for 3 years.

In October 2017, the trial court revoked probation following a contested hearing, and ordered Glavish to serve the previously pronounced sentence of 14 years 6 months in state prison.

Glavish contends the three-year term imposed under section 11370.2, subdivision (a) must be stricken because his prior conviction for violation of section 11379 no longer constitutes a qualifying conviction for purposes of the statute following the enactment of Senate Bill No. 180. He also contends that the trial court miscalculated his custody credits.

DISCUSSION²

Section 11370.2

Senate Bill No. 180 was signed by the Governor on October 11, 2017, and became effective on January 1, 2018. The bill narrows the scope of the three-year enhancement under former section 11370.2, subdivision (a) to apply only to prior convictions for narcotics sales involving a minor in

² Because Glavish alleges only sentencing errors, the facts underlying his convictions are unnecessary to the appeal and we do not include them here.

violation of section 11380. (§ 11370.2, subd. (a).) Prior to the enactment of the bill, the three-year enhancement under section 11370.2, subdivision (a) applied to 11 enumerated offenses, including defendant's prior conviction for violation of section 11379. (Former § 11370.2, subd. (a).)

“When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) This principle applies to statutes governing penalty enhancements as well as statutes governing substantive offenses. (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) In cases where the judgment is not yet final, the recent amendments to section 11370.2 apply retroactively. (*People v. Millan* (2018) 20 Cal.App.5th 450, 456 [section 11370.2, subdivision (c) applies retroactively].)

“[An] order granting probation constitutes a final judgment of conviction under Penal Code section 1237 [citation], [and is] directly appealable.” (*People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1325 (*Rodas*).) Penal Code section 1237.5 and the implementing Rules of Court provide 60 days to file a notice of appeal from the probation order. (Pen. Code, § 1237.5; Cal. Rules of Court, rules 8.304(a) & (b), 8.308(a).) “If the time to appeal the probation order lapses without an appeal having been taken, . . . the defendant may not thereafter challenge the

underlying conviction when appealing a subsequent order revoking probation and imposing a suspended sentence.” (*Rodas, supra*, at p. 1325.)

In this case, the judgment of conviction imposing the three-year enhancement under section 11370.2 became final for retroactivity purposes in 2015, because Glavish did not appeal the court’s order granting probation. He is therefore not entitled to retroactive application of the 2018 amendment to section 11370.2, subdivision (a).

Custody Credits

The trial court awarded Glavish 782 days of presentence custody credit consisting of 694 days of actual custody and 88 conduct days.³ Glavish argues that he is entitled to between 4 and 57 additional custody credits for time served from September 11, 2015 through at least September 14, 2015, and possibly through November 6, 2015. He bases this contention on the following facts: (1) the minute order dated September 11, 2015 reflects that he was remanded to county jail on that date, (2) the minute

³ The court calculated Glavish’s presentence credits as follows: it awarded 180 days for the original 180-day jail sentence imposed on May 21, 2015; 60 days for two months spent in the Assessment Intervention Resources program; 365 days for a year spent in Maclay Recovery treatment program; 89 days served in jail following Glavish’s arrest on July 29, 2017; and 88 conduct credits for the 89 days spent in custody.

order dated September 14, 2017 reflects that he was to be conditionally released to a representative of Recovery Network Resources for the purposes of being transported to that program, and (3) the record reflects that he completed the Maclay Recovery program on November 6, 2016.

Given that he participated in the Maclay Recovery program for one year, Glavish posits that he must have commenced treatment there on November 6, 2015, and therefore been in custody from September 11, 2015, until that time. The Attorney General argues that the minute order dated September 14, 2017 reflects that Glavish's status was "on probation," and that there is no evidence in the record indicating that he was in custody from that time until November 6, 2015.

With respect to actual custody credits, "[Penal Code section] 2900.5, subdivision (a), states in pertinent part . . . : 'In all felony and misdemeanor convictions . . . , when the defendant has been in custody, including, but not limited to, any time spent in a jail . . . , all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019 . . . , shall be credited upon his or her term of imprisonment' (Stats. 2011, ch. 15, § 466, eff. Apr. 4, 2011, operative Oct. 1, 2011; see Stats. 1998, ch. 338, § 6, pp. 2718–2719, eff. Aug. 21, 1998, operative Jan. 1, 1999; see also Stats. 2011, ch. 15, § 636; Stats. 2011, ch. 40, § 3, eff. June 30, 2011.) A partial day spent in county jail is counted as a day of custody for which a defendant is entitled to credit. (*People v. King* (1992) 3

Cal.App.4th 882, 886; *People v. Smith* (1989) 211 Cal.App.3d 523, 526.)” (*People v. Jacobs* (2013) 220 Cal.App.4th 67, 77–78.) Conduct or “good time” credits are accrued at a rate of two days for every two days of actual custody. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.) There may only be an even number of credits awarded under this scheme, and rounding up is not permitted. (*Ibid.*) “The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time.” (*Id.* at p. 591; *People v. Scott* (1994) 9 Cal.4th 331, 354.)

We agree with Glavish that the record establishes he was in custody from September 11, 2015, through September 14, 2015, and is therefore entitled to an additional 4 custody credits and 4 conduct credits. The judgment must be modified and the abstract of judgment amended to award Glavish 698 days of custody credit and 92 days of conduct credit for a total of 790 days presentence custody credit.

In light of the conflicting evidence regarding Glavish’s custody status between September 15, 2015, and November 6, 2015, we conclude the record before us is insufficient to make a determination. The parties are free to litigate any credit issue, if they so choose, in the trial court. (See *People v. Kennedy* (2012) 209 Cal.App.4th 385, 394; *People v. Fares* (1993) 16 Cal.App.4th 954, 958; *People v. Hyde* (1975) 49 Cal.App.3d 97, 102; see also Pen. Code, § 1237.1.)

DISPOSITION

The judgment is modified to reflect 698 days of presentence custody credit and 92 days of conduct credit for a total presentence custody credit of 790 days. The judgment is affirmed in all other respects. Upon issuance of the remittitur, the superior court clerk is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

MOOR, J.

We concur:

BAKER, Acting P.J.

KIN, J.*

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