Filed 10/23/17 In re Davis CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re PHILIP MICAH DAVIS, on Habeas Corpus.	B283495 (Los Angeles County Super. Ct. Nos. LA077163-01 and BH011051)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. William C. Ryan, Judge. Petition granted.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Senior Assistant Attorney General, Julie A. Malone and Jennifer O. Cano, Deputy Attorneys General, for Respondent.

INTRODUCTION

A person serving a term in state prison ordinarily may earn one day of "worktime credit" for each day he or she participates in a qualifying work or training program, making it possible to reduce the term of incarceration by up to 50 percent. (*In re Pope* (2010) 50 Cal.4th 777, 779.) Penal Code section 2933.1,[1] however, limits such credit to 15 percent of the prison term for any person convicted of a qualifying violent felony, which under section 667.5, subdivision (c), incudes "[a]ny felony in which the defendant inflicts great bodily injury . . . which has been charged and proved as provided for in Section 12022.7."

Pursuant to a plea agreement, Philip Micah Davis admitted he inflicted great bodily injury on a child under the age of five years during the commission of a felony, within the meaning of section 12022.7, subdivision (d). In this petition for writ of habeas corpus, he contends the Department of Corrections and Rehabilitation nevertheless wrongly limited his worktime credit under section 2933.1, resulting in an improper extension of his release date. Davis argues his admission to the section 12022.7 allegation cannot serve as the basis for limiting his worktime credit because, among other reasons, section 12022.7, subdivision (d), does not apply where, as here, infliction of great bodily injury is an element of the underlying offense. We agree, and grant Davis's petition.

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1 Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Davis's Plea Agreement and Sentence*

In February 2014, while leading police on a 10-minute car chase during which he drove the wrong way on the 405 freeway, Davis collided with a vehicle carrying an infant girl and her parents, seriously injuring them all. Davis was arrested and charged with three counts of assault with a deadly weapon (§ 245, subd. (a)(1)), one count of attempting to elude a peace officer resulting in serious bodily injury (Veh. Code, § 2800.3, subd. (a)), one count of attempting to elude a peace officer by driving with willful disregard for the safety of persons or property (*id.*, § 2800.2, subd. (a)), and one count of driving the wrong way on a divided highway (*id.*, § 21651, subd. (b)). On all counts, the People alleged Davis personally inflicted great bodily injury on a child under the age of five years, within the meaning of section 12022.7, subdivision (d).

Pursuant to a plea agreement, Davis pleaded no contest to the felony charge of attempting to elude an officer resulting in serious bodily injury, and he admitted the allegation that in committing the offense he personally inflicted great bodily injury on a child under the age of five years within the meaning of section 12022.7, subdivision (d). Also pursuant to the plea agreement, the trial court sentenced Davis to the low term of three years for attempting to elude an officer resulting in serious bodily injury, "plus an additional term of no time for the 12022.7" admission, and dismissed all other charges. The court set a surrender date in 60 days, to allow Davis to complete a course of medical treatment.

B. *Davis's Worktime Credit*

Davis began serving his prison term in May 2015. Evidently because the abstract of judgment did not reflect that his conviction was for a violent felony or that he received a sentence enhancement under section 12022.7, the Department initially classified Davis as eligible to receive full worktime credit and calculated his earliest possible release date as June 21, 2016.

On June 16, 2016, however, a Department case records analyst informed Davis's correctional counselor that the Department had incorrectly calculated Davis's release date, that "upon clarification from the court and the Legal Processing Unit it was determined [he] should have only been receiving [15%] credits," and that his correct release date was December 7, 2017. That same day, Davis received written notice his release date was no longer June 21, 2016, but December 7, 2017. The notice included the following explanation for the change: "Clarification rec'd from LA Superior Court per pg. 9 sentencing trans. Admits PC 12022.7(a) stayed. Credit code per PC 2933.1/15%."

Davis filed administrative appeals with the Department, arguing it improperly recalculated his worktime credit under section 2933.1 because he was not convicted of a qualifying violent felony. Concerning his admission of the great bodily injury allegation under section 12022.7, subdivision (d), Davis maintained the trial court imposed a "'stayed' 12022.7 enhancement" as a "conditional offense in the event [he] failed to surrender on time," and "[a]s a result of [his] timely surrender, the enhancement was fully-stricken from the record, as evidenced by its omission from the Abstract of Judgment."

The Department denied Davis's administrative appeals. Citing the sentencing hearing transcript and the terms of Davis's

plea agreement as reflected on his plea form, the Department determined the trial court "imposed no time for the 12022.7 but did not strike or dismiss the enhancement." Thus, according to the Department, the section 2933.1 limitation on worktime credit applied.

C. *Davis's Petition for Writ of Habeas Corpus in the Superior Court*

Having exhausted his administrative remedies, Davis challenged the recalculation of his worktime credit and resulting extension of his release date by filing a petition for writ of habeas corpus in the superior court. Davis again argued there was no basis for limiting his worktime credit under section 2933.1 because the sentencing court "struck the enhancement" it had imposed under section 12022.7, as reflected by its absence on the abstract of judgment. He also argued his admission to the allegation under section 12022.7, subdivision (d), could not serve as the basis for the worktime credit restriction because subdivision (g) of section 12022.7 provided that subdivision (d) does not apply where, as here, infliction of great bodily injury is an element of the underlying offense.

The superior court denied Davis's petition. The court determined the Department properly relied on the sentencing hearing transcript, rather than the abstract of judgment, to conclude section 2933.1 limited Davis's worktime credit. The court also ruled that, although the sentencing court erred in imposing the enhancement under section 12022.7, subdivision (d), because inflicting great bodily injury was an element of the underlying offense, Davis could not challenge the error because

he admitted the section 12022.7 allegation as part of his plea agreement.

DISCUSSION

A. *Davis's Petition Is Not Moot*

On September 13, 2017 the Department filed a letter requesting we dismiss this petition as moot because "[o]n September 7, 2017, due to a Proposition 57 change in custody credits, [Davis] was released from prison." Davis filed a letter opposing that request. At oral argument, counsel for the Department conceded that, if we were to grant Davis's petition, "the time [Davis] was incarcerated beyond June 21st, 2016 could potentially be credited against [the] parole term" he is currently serving. Therefore, Davis's petition is not moot, and the Department's request to dismiss is denied. (See *People v. Gregerson* (2011) 202 Cal.App.4th 306, 321 [""[a] case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief""]; *In re Bush* (2008) 161 Cal.App.4th 133, 141 ["case law recognizes that time served in excess of the determinate term must be credited against the prisoner's parole period"]; *In re Carter* (1988) 199 Cal.App.3d 271, 273 [release on parole did not render habeas petition moot because "any [worktime] credits to which [the prisoner] was entitled may reduce his parole period"].)

B. *The Worktime Credit Restriction Did Not Apply*

"Section 2933.1 belongs to a group of statutes that authorize, limit, or prohibit the earning of presentence and postsentence credit for persons who are convicted of crimes and

sentenced to prison." (*In re Pope*, *supra*, 50 Cal.4th at p. 781.) "Persons who have been convicted of certain qualifying violent felonies . . . are subject to a restriction upon the postsentence worktime credit they may earn against their sentence. [Citation.] In these circumstances, postsentence worktime credit may be accrued at a 15 percent rate." (*Ibid.*) "The purpose of section 2933.1 is to ""protect the public from dangerous repeat offenders who otherwise would be released."""" (*In re Mallard* (2017) 7 Cal.App.5th 1220, 1226.)

Section 2933.1, subdivision (a), which contains the 15 percent limit on worktime credit, applies to "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5." (See *In re Mallard*, *supra*, 7 Cal.App.5th at p. 1225 ["under section 2933.1, if a person is convicted of a violent felony listed in section 667.5, subdivision (c) and is sentenced to state prison, the person's presentence conduct credits and postsentence worktime credits are both limited to 15 percent," fn. omitted].) Section 667.5, subdivision (c), lists a number of specific offenses, such as murder, mayhem, robbery, and "[a]ny felony punishable by death or imprisonment in the state prison for life." Section 667.5, subdivision (c), also has a "catch-all" provision that, in relevant part, includes "[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7." (§ 667.5, subd. (c)(8); see *People v. Hawkins* (2003) 108 Cal.App.4th 527, 530.) Section 12022.7, subdivision (d), the allegation Davis admitted here, provides: "Any person who personally inflicts great bodily injury on a child under the age of five years in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of

imprisonment in the state prison for four, five, or six years." Subdivision (g) of section 12022.7, however, provides that subdivision (d) "shall not apply if infliction of great bodily injury is an element of the offense."

Pursuant to his plea agreement, Davis admitted inflicting great bodily injury within the meaning of section 12022.7, subdivision (d), in connection with the felony offense to which he pleaded no contest. We agree with the Department that the sentencing hearing transcript, which controls, does not support Davis's contention that the sentencing court struck that admission. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 506 ["'[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls'"].) We also agree with the Department that, even assuming section 12022.7, subdivision (g), deprived the sentencing court of authority to accept Davis's admission of the section 12022.7 allegation, Davis cannot now challenge his sentence on that basis because he admitted the allegation pursuant to his plea agreement. (See *People v. Otterstein* (1987) 189 Cal.App.3d 1548, 1549-1551 [where, pursuant to a plea agreement, the defendant admits a section 12022.7 allegation and the trial court imposes a three-year enhancement, the defendant cannot argue on appeal the enhancement does not apply because great bodily injury is an element of his offense]; see also *People v. Buttram* (2003) 30 Cal.4th 773, 783 ["'defendants are estopped from complaining of sentences to which they agreed'"]; *In re Stier* (2007) 152 Cal.App.4th 63, 80 ["[p]arties are estopped from complaining of results or orders with which they expressed agreement"]; cf. *People v. Hester* (2000) 22 Cal.4th 290, 295 ["[w]hile failure to

object is not an implicit waiver of section 654 rights, acceptance of the plea bargain here was"].)

Davis's plea agreement, however, did not specify that his offense was a "violent felony" under section 667.5, subdivision (c), or that the 15 percent worktime credit restriction applied. Thus, the credit restriction applies only if Davis was "convicted of a felony offense listed in subdivision (c) of Section 667.5." (§ 2933.1, subd. (a).) And he was not. Attempting to elude an officer resulting in serious bodily injury is not one of the offenses listed in section 667.5, subdivision (c).

The only other possibility for restricting Davis's worktime credits under section 2933.1, subdivision (a), is that Davis's conviction met the definition provided in the catch-all provision in section 667.5, subdivision (c)(8): a "felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7." But his conviction did not meet that definition: The great bodily injury allegation against Davis was not "charged and proved as provided for in Section 12022.7" because, according to subdivision (g) of that section, subdivision (d) does not apply where, as here, "infliction of great bodily injury is an element of the offense." (See *People v. Beltran* (2000) 82 Cal.App.4th 693, 697 ["infliction of great bodily injury is an element of the felony offense of evading a pursuing peace officer" causing serious bodily injury under Vehicle Code section 2800.3]; see also *People v. Johnson* (2016) 244 Cal.App.4th 384, 391 [outside the context of jury instructions, "'serious bodily injury,' as used in section 243, and 'great bodily injury,' as used in section 12022.7, are essentially equivalent"]; *Hawkins*, *supra*, 108 Cal.App.4th at p. 531 ["the 'great bodily injury' contemplated by section 12022.7

is substantially the same as the 'serious bodily injury' element of section 243, subdivision (d)"].)

People v. Hawkins, *supra*, 108 Cal.App.4th 527 is on point. In that case, after a jury convicted the defendant of battery with serious bodily injury (§ 243, subd. (d)) and the People struck a section 12022.7 great bodily injury allegation that was not submitted to the jury, the trial court concluded the defendant was convicted of a violent felony as defined by section 667.5, subdivision (c)(8), and applied the worktime credit restriction. (*Hawkins*, at pp. 529-530.) The Court of Appeal, however, ruled the worktime credit restriction did not apply. (*Id.* at pp. 531-532.) The court rejected the People's contention that, "because a section 12022.7 enhancement allegation was charged in the information[ ] and the 'great bodily injury' contemplated by that section was proved when the jury found [the defendant] guilty of inflicting serious bodily injury under section 243, subdivision (d)," the defendant's crime was a violent felony under section 667.5, subdivision (c)(8). (*Hawkins*, at p. 530.) The court noted that section 12022.7 did not apply to the defendant's offense of battery with serious bodily injury because "'*great bodily injury is an element of the offense*.'"[2] (*Hawkins*, at p. 531, quoting § 12022.7,

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[2] The court in *Hawkins* applied the version of section 12022.7 in effect at the time the defendant committed his crime, subdivision (a) of which provided: "'A person who personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of three years, *unless infliction of great bodily injury is an element of the offense of which he or she is convicted*.'" (*Hawkins*, at pp. 530-

former subd. (a), now subds. (a), (g).) Therefore, the court concluded the defendant's offense was not "'charged and proved as provided for in Section 12022.7,'" and section 667.5, subdivision (c)(8), did not apply. (*Hawkins*, at pp. 530-531.)

Similarly, Davis's offense was not "charged and proved as provided for in Section 12022.7" because, as noted, infliction of great bodily injury was an element of his underlying offense and therefore section 12022.7 did not apply. (§ 667.5, subd. (c)(8).) For this reason, Davis's offense did not qualify as a violent felony under section 667.5, subdivision (c)(8), and the worktime credit restriction in section 2933.1 did not apply.

DISPOSITION

The petition for writ of habeas corpus is granted. We order that the date Davis was entitled to be released from prison was June 21, 2016.

SEGAL, J.

We concur:

PERLUSS, P. J. MENETREZ, J.*

531.) Subdivision (e) of that version provided the enhancement applied regardless of whether infliction of great bodily injury was an element of the offense if the offense involved domestic violence. (*Hawkins*, at p. 531.) The circumstances of the offense in *Hawkins* did not involve domestic violence. (*Id.* at p. 532.)

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