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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.

ZAKEE SHAKIR ABDUL-MALIK,

Defendant and Appellant.

B236737

(Los Angeles County Super. Ct.
No. BA378199)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry Hall, Judge. Affirmed and remanded with directions.

Alex Coolman, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Zakee Shakir Abdul-Malik was convicted by jury of three counts of perjury by declaration in violation of Penal Code section 118, subdivision (a).¹ In a separate proceeding, the trial court found defendant had suffered two prior convictions for rape in violation of section 261, subdivision (a)(2), within the meaning of the three strikes law. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i).)

Defendant was sentenced to 25 years to life in count 1 pursuant to the three strikes law. The trial court dismissed one prior strike conviction for purposes of counts 2 and 3, imposing consecutive terms of two years for both counts, for a total sentence of 29 years to life. Credit was given for 179 days in custody and 179 days of conduct credits, for a total of 358 days.

In his timely appeal from the judgment, defendant raises the following arguments: (1) the trial court denied defendant his right to personally address the court at the time of sentencing; (2) he was entitled to custody credits of 310 days and conduct credits in the same amount under the October 2011 amendment to sections 2933 and 4019; and (3) the trial court erroneously believed it was required to impose consecutive sentences in counts 2 and 3 under the three strikes law. The Attorney General argues the sentence in counts 2 and 3 was unauthorized and requests the case be remanded for resentencing. We modify the award of custody and conduct credits, remand for resentencing as to counts 2 and 3, and affirm the judgment in all other respects.

FACTS

Defendant, a convicted sex offender subject to registration under section 290, received Section 8 housing assistance since 2003. In his applications for Section 8 assistance in 2008, 2009, and 2010, defendant falsely stated under penalty of perjury that he was not required to register as a sex offender.

¹ All statutory references are to the Penal Code unless otherwise indicated.

DISCUSSION

I. *Allocution*

Defendant argues “he asked to speak as he was being sentenced to 29 years to life, but the trial court did not permit him to do so.” From this premise, defendant contends he was denied his right to speak in mitigation of punishment. Because defendant failed to make a timely request to testify in mitigation of punishment, the issue is forfeited.

A. Relevant Law

“California law, through section 1204, gives a criminal defendant the right at sentencing to make a *sworn* personal statement in mitigation that is *subject to cross-examination* by the prosecution. This affords the defendant a meaningful opportunity to be heard and thus does not violate any of defendant’s rights under the federal Constitution.” (*People v. Evans* (2008) 44 Cal.4th 590, 600 (*Evans*).) The right to make a sworn statement in mitigation of punishment is forfeited if the defendant does not offer to testify before the pronouncement of judgment. (*Ibid.*; *People v. Nitschmann* (2010) 182 Cal.App.4th 705, 708 (*Nitschmann*).)

B. Background

After conviction, defense counsel filed a motion for new trial, a sentencing memorandum, and a motion to dismiss prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The prosecution responded with a sentencing memorandum requesting a sentence of 25 years to life.

On the date of the probation and sentencing hearing, the trial court stated it had read and considered all of the paperwork filed in connection with the case. The court first addressed the motion for new trial, which was denied.

Having disposed of the new trial motion, the trial court asked defense counsel if defendant waived time for sentence and arraignment for judgment, and whether there was legal cause why judgment should not be pronounced. Defense counsel stated he would like the court to consider the *Romero* motion. The court heard argument on the *Romero* motion from the parties. After argument, the court engaged in a comprehensive analysis of the merits of the *Romero* motion. The court determined that it would impose a third strike sentence of 25 years to life in count 1, but dismiss one of the strikes as to counts 2 and 3 in order to impose a second strike, determinate sentences, as to those charges.

With the *Romero* motion resolved, the trial court proceeded to impose sentence, award custody and conduct credits, impose fines and fees, and advise defendant of his appeal rights. After judgment had been fully pronounced, defendant asked, “May I address the court?” The court replied, “No, sir, we’re done.”

C. Analysis

Defendant failed to make a timely request to provide a sworn statement in mitigation of punishment. The trial court had ruled on the motion for new trial, the *Romero* motion, and imposed judgment before defendant asked to speak. The issue is forfeited. (*Evans, supra*, 44 Cal.4th at p. 600; *Nitschmann, supra*, 182 Cal.App.4th at p. 708.)

II. Custody and Conduct Credits

The parties agree that defendant was entitled to 310 days of custody credits, rather than the 179 days awarded by the trial court. We order the judgment modified to reflect the correct number of days in custody.

The remaining issue is the amount of conduct credits defendant should receive. Defendant contended in his opening brief that under the October 2011 amendments to sections 2933 and 4019 and the equal protection analysis of *In re Kapperman* (1974) 11

Cal.3d 542, he is entitled to one-for-one conduct credits for each day in custody. In his reply brief, defendant concedes that our Supreme Court's intervening decision in *People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*) is contrary to his argument, and he acknowledges that we are bound to follow the holding in *Brown*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Based upon defendant's status as a sex offender and a person described in the three strikes law, defendant was entitled to 144 days of conduct credit. We order the judgment modified accordingly.

III. *Correction of the Sentence*

The Attorney General contends, and defendant concedes, that the case must be remanded for resentencing. The sentence in count 1 was an indeterminate term of 25 years to life. As a result of dismissal of the one strike prior conviction as to counts 2 and 3, the sentences as to those counts must be calculated separately under the determinate sentencing scheme. "Sentencing under these two sentencing schemes must be performed separately and independently of each other. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.) Only after each is determined are they added together to form the aggregate term of imprisonment." (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.)

The trial court sentenced defendant to an indeterminate term of 25 years to life in count 1. The court treated count 2 as a subordinate term to count 1, imposing one third of the midterm of three years (one year), doubled under the three strikes law, for a two-year term, to run consecutively to count 1. This was incorrect. The sentence in count 2 should have been treated as the principal term under the determinate sentencing law, and count 3 should have been treated as the subordinate term. We therefore remand the cause for sentencing in counts 2 and 3.

IV. Mandatory Consecutive Sentences

In a supplemental brief, defendant argues the trial court erroneously believed it was required by the three strikes law to impose consecutive sentences in counts 2 and 3, resulting in an abuse of discretion. We disagree. Consecutive sentences were required under the facts of this case.

V. Consecutive Sentences under the Three Strikes Law

“When a defendant is sentenced under the three strikes law (. . . § 667, subds. (b)-(i)) because he has previously been convicted of one or more serious and/or violent felony offenses (§ 667, subds. (b), (c)), the three strikes provisions mandate that ‘[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to [this section].’ (§ 667, subd. (c)(6); hereafter sometimes subdivision (c)(6).) By implication, consecutive sentences are not mandated under subdivision (c)(6) (or subd. (c)(7)) . . . if all of the current felony convictions are either ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts.’ ([*People v.*] *Deloza* [(1998)] 18 Cal.4th [585,] 591; [*People v.*] *Hendrix* [(1997)] 16 Cal.4th [508,] 513.)” (*People v. Lawrence* (2000) 24 Cal.4th 219, 222-223 (*Lawrence*), fns. omitted.)

Here, defendant clearly did not commit his three acts of perjury on the same occasion. To the contrary, each act was part of the annual application process for Section 8 housing. As a matter of law, acts occurring one year apart are not committed on the same occasion.

Nor did defendant’s three offenses arise out of the same set of operative facts. The convictions were based on independent acts of perjury by defendant. (*Lawrence, supra*, 24 Cal.4th at pp. 231-232, citing *People v. Durant* (1999) 698 Cal.App.4th 1393, 1405 [where elements of one offense are complete, a subsequent offense is not based on the

same set of operative facts].) Defendant's offenses were committed one year apart and therefore did not arise from the same set of operative facts. (*Lawrence, supra*, at p. 231 [interpreting "same set of operative facts" as "import[ing] the same concepts of closeness in time and space as the phrase 'same occasion'"].)

The trial court correctly ruled, as a matter of law, that consecutive sentences were required in counts 2 and 3.

DISPOSITION

The cause is remanded to the trial court for resentencing as to counts 2 and 3 under the determinate sentencing law. The trial court is directed to award custody credits of 310 days and conduct credits of 144 days. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.