

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE MORENO,

Defendant and Appellant.

B230474

(Los Angeles County
Super. Ct. No. PA067095)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Martin Gladstein, Commissioner. Affirmed in part as modified and reversed in part.

Roberta Simon, 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, James William Bilderback II and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Jesse Moreno appeals from a judgment entered after a jury found him guilty of kidnapping for carjacking (count 1), carjacking (count 2) and kidnapping (count 3). He contends, and the People concede (1) that his convictions for carjacking and kidnapping must be reversed because these crimes are necessarily included offenses of kidnapping for carjacking; (2) that a one-year enhancement imposed on count 1 under Penal Code section 667.5, subdivision (b),¹ must be stricken because it was based on the same prior felony conviction as the five-year enhancement imposed under section 667, subdivision (a)(1); and (3) that he is entitled to additional presentence actual custody and conduct credits. We reverse the convictions for carjacking and kidnapping, strike the one-year enhancement imposed on count 1 under section 667.5, subdivision (b), and modify the award of presentence credits.

BACKGROUND

On February 16, 2010, Moreno approached Moises Hernandez after Hernandez parked his Ford Focus on the street in front of his apartment building and exited the car. Moreno told Hernandez to get in the car and lifted up his shirt to reveal a gun tucked into his pants. Hernandez complied. Moreno got into the driver's seat of the car, pointed the gun at Hernandez's body and began to drive. Moreno told Hernandez he would shoot him if Hernandez called the police. After driving for about 15 to 20 minutes, Moreno stopped the car and let Hernandez get out. Hernandez went to a police station and reported the incident.

On April 6, 2010, police officers arrested Moreno at a gas station because he had an outstanding warrant for a misdemeanor offense. The officers searched Moreno and found the key to Hernandez's Ford Focus, which was parked at the gas station. The officers learned that the car had been reported stolen during a kidnapping and carjacking.

¹ Further statutory references are to the Penal Code.

At the police station, when an officer advised Moreno that he was suspected of grand theft auto, Moreno claimed that he had purchased the Ford Focus.²

Hernandez identified Moreno in a six-pack photo lineup, at the preliminary hearing, and at trial as the person who had stolen his Ford Focus on February 16, 2010.

A jury convicted Moreno of kidnapping for carjacking (§ 209.5, subd. (a)), carjacking (§ 215, subd. (a)) and kidnapping (§ 207, subd. (a)). The jury also found true the special allegation that Moreno personally used a firearm within the meaning of section 12022.53, subdivision (b). Moreno admitted prior conviction allegations under sections 667, subdivision (a)(1), 667.5, subdivision (b), and the Three Strikes Law (§§ 667, subds. (b)-(1), & 1170.12, subds. (a)-(d)). The prior conviction allegations were all based on Moreno's 1999 felony conviction for assault with a firearm.

On count 1 for kidnapping for carjacking, the trial court sentenced Moreno to life in prison with the possibility of parole, plus consecutive determinate terms of 10 years for the firearm enhancement under section 12022.53, subdivision (b), and five years for the serious prior felony conviction enhancement under section 667, subdivision (a)(1), for a total sentence of life plus 15 years. The court imposed and stayed the one-year prior prison term enhancement under section 667.5, subdivision (b). The court also imposed and stayed the sentence on counts 2 and 3. The court awarded Moreno 289 days of actual custody credit and 42 days of conduct credit, for a total of 331 days of presentence credits.

DISCUSSION

I. Convictions for Carjacking and Kidnapping

Moreno contends that his convictions for carjacking (count 2) and kidnapping (count 3) must be reversed because they are based on the same course of conduct as his conviction for kidnapping for carjacking (count 1) and are necessarily included offenses of kidnapping for carjacking. The People agree.

² At trial, Moreno testified that he purchased the Ford Focus from Hernandez on February 16, 2010. He did not have any documentation of the sale (receipt or pink slip). Moreno stated he did not know why Hernandez was claiming that he had stolen the car.

“‘[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.’ [Citation.]” (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) A defendant may not be convicted of both a greater and a lesser, necessarily included offense. (*Ibid.*)

Carjacking (§ 215, subd. (a)) is a lesser, necessarily included offense of kidnapping for carjacking (§ 209.5, subd. (a)). (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415; *People v. Contreras* (1997) 55 Cal.App.4th 760, 765.) Kidnapping (§ 207, subd. (a)) also is a lesser, necessarily included offense of kidnapping for carjacking. (See *People v. Medina* (2007) 41 Cal.4th 685, 701 [attempted kidnapping is a lesser included offense of attempted kidnapping for carjacking].) The crime of kidnapping for carjacking cannot be committed without also necessarily committing the crimes of kidnapping and carjacking.

The parties correctly conclude that carjacking and kidnapping are necessarily included offenses of kidnapping for carjacking, and Moreno’s convictions on counts 2 and 3 must be reversed.³

II. Prior Prison Term Enhancement (§ 667.5, subd. (b))

Moreno contends that the one-year enhancement imposed and stayed on count 1 under section 667.5, subdivision (b), must be stricken because it was based on the same prior felony conviction as the five-year enhancement imposed on count 1 under section 667, subdivision (a)(1). The People agree.

A court may not impose both the five-year enhancement under section 667, subdivision (a)(1), and the one-year enhancement under section 667.5, subdivision (b), based on the same prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) In this case, the trial court imposed both enhancements based on Moreno’s October 18, 1999 conviction for assault with a firearm.

³ Because we are reversing these convictions, Moreno’s contention that the section 667, subdivision (a)(1), enhancement should not have been imposed on counts 2 and 3 is moot and need not be addressed further.

As the parties correctly conclude, the proper remedy is to strike the one-year enhancement under section 667.5, subdivision (b). (*People v. Jones, supra*, 5 Cal.4th at p. 1153; *People v. Perez, supra*, 195 Cal.App.4th at p. 805.)

III. Presentence Credits

Moreno contends that he is entitled to one additional day of actual custody credit and one additional day of conduct credit. The People agree.

Moreno was taken into custody on April 6, 2010, and he was sentenced on January 20, 2011. He is entitled to actual custody credit for “[e]ach day of custody, including the first day and the date of sentencing.” (*People v. Downey* (2000) 82 Cal.App.4th 899, 920.) As the parties correctly state, the trial court should have awarded Moreno 290 days of actual custody credit, but only awarded him 289 days.

Because Moreno was convicted of a violent felony, he accrues conduct credit at a rate of 15 percent of his actual custody time. (§ 2933.1.) Fifteen percent of his actual custody credit (290 days) is 43.5 days. The trial court should have awarded Moreno 43 days of conduct credit, the greatest whole number which does not exceed 15 percent. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 816.) The trial court only awarded him 42 days.

We modify the award of presentence credits to reflect that Moreno’s actual custody credits are 290 days, his conduct credits are 43 days, and his total presentence credits are 333 days.

DISPOSITION

The convictions for carjacking (count 2) and kidnapping (count 3) are reversed. The one-year enhancement under section 667.5, subdivision (b), imposed on count 1 (kidnapping for carjacking) is stricken. The award of presentence credits is modified to reflect that Moreno’s actual custody credits are 290 days, his conduct credits are 43 days, and his total presentence credits are 333 days. In all other respects, the judgment is

affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.