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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.

SAM EDWARD ANDERSON,

Defendant and Appellant.

B245427

(Los Angeles County
Super. Ct. No. MA045300)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed as modified with directions.

Theresa Osterman Stevenson, 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, Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Sam Edward Anderson, appeals from a final judgment after a plea of no contest and subsequent revocation of probation. We affirm with modifications of his sentence. First, defendant is to be sentenced to state prison, not county jail. Second, defendant is to receive 30 days of conduct credit, not 31 days. Third, a \$200 parole restitution fine must be imposed.

II. BACKGROUND

On April 2, 2009, at approximately 10:30 a.m., a Los Angeles County Sheriff's Department deputy observed two occupants in a black Honda in Palmdale, California. The Honda was parked in front of an address on Titan Court. The Honda lacked a front license plate and had expired registration tags. Defendant, a passenger in the Honda, exited with the driver and entered a residence. After a few seconds, both exited the residence and walked past the Honda. Both were detained in order to cite the driver for Vehicle Code violations. The driver was then detained for not having a valid driver's license.

Defendant consented to a pat down search. The deputy smelled marijuana on defendant's person. The deputy asked if defendant had any narcotics. Defendant replied, "Just some weed in my pocket." The deputy searched defendant's person. The deputy retrieved a brown paper lunch bag from defendant's coat pocket. Inside the bag were 10 individually packaged baggies of marijuana and \$85 in currency which was rolled up. Defendant stated he bought the marijuana to smoke it.

On April 6, 2009, a felony complaint was filed against defendant. The complaint alleges one count of a violation of Health and Safety Code section 11359, possession of marijuana for purposes of sale. On May 1, 2009, defendant entered a no contest plea. On June 12, 2009, defendant was placed on 3 years of probation upon the condition he serve 60 days in county jail. The trial court imposed the following fines and fees on defendant:

a \$200 fine for victim restitution; a \$200 probation revocation fine, which was stayed; a \$20 court security fee; a \$50 laboratory fee plus \$130 penalty assessment; probation costs to be determined; and a \$30 criminal assessment fee. Probation costs were later assessed at \$3,488.

On April 27, 2010, defendant's probation was revoked for the first time. On May 27, 2010, defendant admitted he was in violation of probation. After finding defendant in violation, the trial court reinstated probation with a modified condition of 20 work days for Cal Trans.

On September 9, 2010, the probation department reported a second violation. Defendant had been arrested on September 7, 2010, for violating Penal Code section 273, subdivision (a), child endangerment. Defendant was released and ordered to report to the probation department no later than September 13, 2010. On September 30, 2010, the probation department provided a report indicating defendant had not been in contact as ordered by the trial court. On October 15, 2010, defendant's probation under the previous conditions was continued and the trial court ordered a supplemental progress report.

On May 5, 2011, the probation department reported defendant had failed to make payments toward his total financial obligation of \$3,988. The probation report also indicated defendant had failed to provide proof of: narcotics offender registration; drug program enrollment or completion; or completion of the Cal Trans hours. Additionally, defendant had sustained a new arrest.

On June 1, 2011, plaintiff admitted violating his probation terms based on a plea of no contest for violation of Penal Code section 273.6, violation of a protective order. Probation was revoked and reinstated with the following modification--defendant received the upper term of three years. Execution of the three-year sentence was stayed and defendant was required to serve two days in the county jail. Defendant received two days credit for actual time served. Defendant was ordered to take his final examinations and report to the probation department within 36 hours after his release from custody.

On April 25, 2012, defendant's probation was again revoked. The probation department submitted a report stating that defendant failed to: perform the Cal Trans service; attend drug rehabilitation; and register as a narcotics offender. On July 9, 2012, defendant appeared for a bench warrant hearing. Defendant explained he was unaware of the bench warrant and prior probation revocation hearing. Defendant had not performed the Cal Trans work because of financial issues and he was attending college. The trial court allowed defendant to remain out of custody and ordered a supplemental probation report be prepared.

In its report, the probation department indicated defendant had reported 36 times. However, defendant had failed to: make payments toward his \$3,988 obligation; provide proof of registration as a narcotics offender; and provide proof of completion of a drug rehabilitation program. Defendant had sustained two misdemeanor convictions in 2011 in Kern County for violations of Penal Code sections 243, battery, and 273.6, subdivision (a), protective order violation.

On July 23, 2012, defendant admitted violating his probation's terms and conditions. Defendant's probation was revoked and he was released on his own recognizance. Defendant was advised to have his affairs in order because the three-year sentence would be imposed at the next hearing.

On September 24, 2012, the trial court imposed a total term of three years in county jail purportedly pursuant to Penal Code section 1170, subdivision (h). The trial court imposed the following: a \$200 restitution fine; a \$30 criminal conviction assessment; a \$20 court operations assessment; a \$50 crime laboratory drug analysis fee; a \$130 criminal penalty assessment; and a \$10 criminal surcharge. Defendant received a total of 60 actual days of credits. This was later amended to 62 actual days plus 31 good time days of credits, for a total of 93 days.

III. DISCUSSION

We appointed counsel to represent defendant on appeal. After examination of the record, appointed appellate counsel filed an “Opening Brief” in which no issues were raised. Instead, appointed appellate counsel requested we independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. (See *Smith v. Robbins* (2000) 528 U.S. 259, 277-284.) On August 20, 2013, we advised defendant that he had 30 days within which to personally submit any contentions or arguments he wished us to consider. No response has been received.

We examined the entire record and asked the parties to brief the following issues. First, defendant was sentenced to county jail pursuant to Penal Code section 1170, subdivision (h). Defendant was sentenced to prison for three years on June 1, 2011, but the execution of sentence was suspended. Because he was sentenced prior to October 1, 2011, he may not be committed to county jail pursuant to Penal Code section 1170, subdivision (h). (*People v. Montrose* (2013) 220 Cal.App.4th 1242, 1247; *People v. Wilcox* (2013) 217 Cal.App.4th 618, 621; *People v. Kelly* (2013) 215 Cal.App.4th 297, 306; *People v. Mora* (2013) 214 Cal.App.4th 1477, 1481-1482; *People v. Gipson* (2013) 213 Cal.App.4th 1523, 1528-1530.)

We are persuaded that defendant was deemed “sentenced” on the date sentence was imposed and its execution stayed. Our colleagues in Division Two of this appellate district described sentencing: “In our view, the word ‘sentenced’ plainly means the time when the trial court first announced and imposed sentence as opposed to the time when the sentence was executed. [¶] There is an ‘important distinction, in probation cases, between orders suspending imposition of sentence and orders suspending execution of previously imposed sentences.’ (*People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*)). ‘When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. [Citations.]’ (*Ibid.*) ‘[W]here a sentence has actually been imposed but its execution suspended, “[t]he revocation of the suspension of execution of the judgment

brings the former judgment into full force and effect[.]’ [Citations.]’ . . . If a trial court ‘previously had imposed sentence, [it] must order that exact sentence into effect [citations].’ (*Id.* at p. 1088.) Thus, under *Howard*, imposition of sentence is equated with entry of a final judgment. When a final judgment is entered, everything about a defendant’s sentence is prescribed.” (*People v. Gipson, supra*, 213 Cal.App.4th at p. 1529.) Because defendant was sentenced on June 1, 2011, prior to October 1, 2011, he must be sentenced to state prison.

Second, defendant has received credit for 62 days in county jail actually served plus 31 days of conduct credits. Defendant is subject to Penal Code section 4019 as it was in effect when he began serving his term in county jail on June 12, 2009. (See *People v. Garcia* (2012) 209 Cal.App.4th 530, 535-539; Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) The modifications to Penal Code section 4019, which might have been more favorable to defendant, did not go into effect until at the earliest January 25, 2010. (*People v. Garcia, supra*, 209 Cal.App.4th. at p. 535.) Thus, defendant was entitled to two days of conduct credits for every four days actually served. If he served 62 days in county jail, he was only entitled to 30 days of conduct credits. There is no rounding up of conduct credits. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815, 817; *People v. Madison* (1993) 17 Cal.App.4th 783, 786-787.) Defendant is currently detained in county jail. Because defendant was erroneously sentenced to county jail instead of state prison, the trial court is to sentence him to prison and recalculate his custody credits once the remittitur issues.

Third, defendant did not receive a parole revocation fine pursuant to Penal Code section 1202.45. Defendant was not sentenced to prison. Defendant must have a Penal Code section 1202.45 parole restitution fine of \$200 imposed because his sentence will be changed from county jail to state prison. (Pen. Code, § 1202.45; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084.)

IV. DISPOSITION

Upon remittitur issuance, defendant is to be sentenced to state prison. Defendant must have a Penal Code section 1202.45 parole restitution fine of \$200 imposed. Defendant is entitled to 30 days of conduct credits. The trial court is directed to recalculate defendant's custody credits in light of his current county jail detention. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

KRIEGLER, J.

MINK, J.*

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