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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY DAVID FIORELLI, Defendant and Appellant.	A127150 (Napa County Super. Ct. No. CR146252)

Anthony David Fiorelli (defendant) appeals from a judgment upon his plea of guilty to driving under the influence (DUI) causing injury with prior convictions for DUI (Veh. Code, § 23153, subd.(a)) and resisting an officer (Pen. Code,[1] § 69). He contends that: (1) the trial court abused its discretion in not allowing him to withdraw his plea; (2) his trial counsel was ineffective because he failed to raise the issue of lack of advisement of section 2900.5 credits as a basis for withdrawal of the plea; and, alternatively, (3) he is entitled to additional presentence conduct credits under amended section 4019. We remand the matter for a recalculation of defendant's presentence credits and otherwise affirm.

I. FACTUAL BACKGROUND

On June 12, 2009, an information was filed charging defendant with DUI causing bodily injury, DUI with three or more priors, resisting an officer, misdemeanor battery on an officer and emergency personnel, and battery with an injury on emergency personnel.

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

The charges were based on defendant's driving a car into a large commercial sprinkler system while under the influence of morphine. Defendant and his passenger, April McManus, suffered injuries and were transported to Queen of the Valley Hospital. When the hospital cleared defendant for booking later that evening, he became very aggressive and resisted arrest. After defendant was handcuffed, he struggled violently with the arresting officer and lunged toward him, resulting in both of them falling to the floor. The officer was able to gain control over defendant and required assistance in taking defendant into custody. The officer suffered a severe tricep strain as a result of the incident.

On September 18, 2009, defendant pled no contest to DUI causing injury with prior DUI convictions and resisting an officer. The court dismissed the remaining counts. The court indicated that there would be no immediate state prison but that it would impose a minimum 180-day jail sentence and a residential treatment program. Defendant entered the plea, acknowledging that the court was going to order completion of a residential treatment program.

On October 14, 2009, the probation department submitted a report to the court recommending that defendant be placed on probation on conditions including that he complete a residential treatment program after he had served a minimum of 180 days in the county jail. The report also recommended that defendant "not receive any credit for time served in a residential treatment program." (Emphasis omitted.)

On October 19, 2009, defendant informed the court that he wanted to withdraw his plea. He stated, "Not because of what's in the report, but for other matters. Because I don't feel that this is—I don't feel this plea is in my best interests. I feel that I've taken this plea because I've been pressured by outside sources—not by Mr. Galeste [deputy public defender] himself, but by family members and friends . . . ." The court stated its earlier indicated sentence of probation conditioned on defendant's service of 180 days in jail and completion of a long-term residential treatment program, and informed defendant that if he did not want to do the residential treatment program and withdrew his plea, he

was looking at state prison if he was convicted. Defendant acknowledged that he understood the court's statement.

The following colloquy then occurred: "[THE COURT]: Well, I don't know how Mr. Fiorelli could believe that he was going to be able to complete the BI program[2] in lieu of going to a long term residential treatment program. And that's—is that one of the bases for Mr. Fiorelli wanting to withdraw his plea? [¶] [MR. GALESTE]: I believe that— [¶] [THE COURT]: Mr. Fiorelli? [¶] [DEFENDANT]: It is, but it's not. You know, I've never been to any type of treatment program and I think that jumping right into a residential treatment program when I haven't drank or had any kind of a substance abuse problem, you know, since I was probably a teenager, I think that's a little farfetched. I think that's a little bit unreasonable." The court thereafter appointed substitute counsel for defendant for the purposes of filing a motion to withdraw his plea and relieved Galeste from representing defendant.

Defendant moved to withdraw his plea, contending that he never wanted to accept the plea bargain but his attorney and mother talked him into it, that his attorney told him residential treatment might be changed to an outpatient program and he could withdraw his plea at any time, and that he was innocent of the charges. The court denied the motion, finding that defendant had not shown he was pressured to enter a plea. The court remarked it had clearly indicated to defendant that completion of a residential treatment program was part of the plea agreement and that defendant had acknowledged that he understood.

On December 4, 2009, defendant appeared for sentencing and informed the court that he was rejecting probation. The court sentenced defendant to two years in state prison with credits of 289 days (193 days of actual custody plus 96 days of section 4019 credit).

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[2] The probation report refers to BI as the "Community Corrections Service Center" program.

II. DISCUSSION

Defendant contends the trial court abused its discretion in denying his motion to withdraw the plea because he was never advised that he was required to waive section 2900.5 credits for time served in a residential treatment program. We conclude that this contention is without merit.

A court may, upon a showing of good cause, permit a defendant to withdraw a guilty plea. (§ 1018) "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.)

Here, the issue of credits never arose in the proceedings because defendant rejected probation and was not interested in a residential treatment program. His motion to withdraw his plea was not based on the issue of credits, but rather on his claim that he felt pressured to accept the plea, that he was advised he might be able to do outpatient treatment, and that he was innocent. Because defendant refused to enter a residential treatment program, whether he would have been required to waive credits was never addressed by the court.[3] The trial court did not abuse its discretion in not considering an issue that was never put before it.

Moreover, defense counsel was not ineffective in failing to raise the issue regarding waiver of credits for time spent in a residential treatment program as a basis for defendant's motion to withdraw his plea. Defendant adamantly refused to attend a program; that was his main reason for seeking to withdraw his plea—not that he would be required to waive credits for attending a program. There was simply no need to advise defendant concerning a waiver of credits when he had already indicated to the court that he was rejecting residential treatment. The record shows that defendant was well aware of the consequences of entering the plea and that he understood his refusal to enter into a residential treatment program would result in the court's sentencing him to state prison.

[3] We note that the probation report recommended defendant not receive any credits for time spent in a residential treatment program.

Defendant has failed to establish that he was denied the effective assistance of counsel. (See *People v. Harpool* (1984) 155 Cal.App.3d 877, 886 [defense counsel " 'not required to make futile objections or motions merely to create record impregnable to assault for claimed inadequacy of counsel' "].)

Finally, defendant contends that he is entitled to additional presentence conduct credits under amended section 4019. We agree.

Section 4019 was amended effective January 25, 2010, and provides that, except for crimes not involved here, "a term of four days will be deemed to have been served for every two days spent in actual custody." (See § 4019, subds. (b) & (c), as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) The legislation addressed the state's fiscal crisis by, among other things, awarding presentence conduct credits at a greater rate, thereby reducing jail populations. (See, e.g., Stats. 2009, 3d. Ex. Sess. 2009-2010, ch. 28, §§ 41, 50.) There is a split of authority on whether the amendments to section 4019 are retroactive. (See, e.g., *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552 (*Pelayo*) [amendments apply retroactively]; *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724 (*Hopkins*) [amendments apply prospectively].) The issue is currently pending before our Supreme Court in numerous cases. (See, e.g., *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782 [amendments retroactive]; *Pelayo*, *supra*, 184 Cal.App.4th 481 [same]; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260 (*Norton*) [same]; *People v. Landon* (2010) 183 Cal.App.4th 1096, review granted June 23, 2010, S182808 (*Landon*) [same]; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813 [same]; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [same]; *Hopkins, supra*, 184 Cal.App.4th 615 [amendments prospective]; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314 [same]; and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808 [same].)

We are persuaded on balance by the arguments favoring retroactive application of the amendments, a conclusion consistent with the reported cases from the First Appellate District (*Pelayo, supra*, 184 Cal.App.4th 481; *Norton, supra*, 184 Cal.App.4th 408; *Landon, supra*, 183 Cal.App.4th 1096) and with the legislation's stated aim of "address[ing] the fiscal emergency declared by the Governor" (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 62). Accordingly, we remand the matter for a recalculation of defendant's presentence credits.

III. DISPOSITION

The matter is remanded to the trial court with directions to recalculate defendant's credits under amended section 4019. The trial court shall prepare an amended abstract of judgment and forward a copy to California's Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RIVERA, J.

We concur:

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REARDON, Acting P.J.

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SEPULVEDA, J.