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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,

Plaintiff and Appellant,

v.

VINCENT T. GUTIERREZ,

Defendant and Respondent.

A128494

(Sonoma County  
Super. Ct. No. SCR522099)

After defendant violated the terms of his probation for the third time, the trial court agreed to place him in a treatment program in exchange for defendant waiving all credits for time served. When defendant again violated the terms of his probation, the trial court imposed a previously suspended state prison sentence. The court also granted defendant actual custody credits, under the mistaken belief that defendant had not previously waived the credits. The People appeal, arguing that the trial court erred in awarding the custody credits. We agree and reverse.

I.  
FACTUAL AND PROCEDURAL  
BACKGROUND

Defendant was charged by information on January 16, 2008, with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> with an allegation that he personally inflicted great bodily injury in the commission of the offense (§ 12022.7, subd. (a)). The charges involved an attack with a board on a man (with whom defendant had previously

<sup>1</sup> All statutory references are to the Penal Code.

fought); the attack broke the victim's arm. Defendant pleaded no contest on February 15, 2008. The plea form that defendant signed stated that he understood that although the trial court had indicated that it would not initially commit defendant to prison, there was "no agreement with the District Attorney's Office . . . ." The trial court employed an indicated sentence, whereby a defendant admits all charges and the trial court informs the defendant what sentence will be imposed; no prosecutorial consent is required.

(*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1146.)

On April 8, 2008, the trial court imposed a state prison sentence of six years (three years on the assault with a deadly weapon charge, plus a consecutive three-year term for the great bodily injury enhancement). Execution of that sentence was suspended, and defendant was placed on probation for three years with the condition that he serve one year in county jail.

During the year after defendant's release from jail in August 2008, defendant violated the terms of his probation twice, but had probation reinstated after additional conditions were imposed, including serving additional jail time. At the sentencing hearing on defendant's second violation of probation held on August 27, 2009, both the probation department and the prosecution recommended that defendant's prison sentence be imposed. The trial court (Judge Lawrence Antolini) asked defendant if he was willing to waive all custody credits (a total of 559 days, which included both actual custody credits and conduct credit) in exchange for having his probation reinstated, and defendant agreed.

Defendant subsequently violated the terms of his probation once again, and his probation was summarily revoked. At a hearing on the violation on November 24, 2009, defense counsel stated that defendant planned to admit the violation. The trial court (Judge Gayle Guynup) asked defendant if he understood that he faced a possible term of

up to six years in prison, and indicated that he would be awarded any credits to which he was entitled.<sup>2</sup> Defendant said he understood, and admitted the violation.

At a sentencing hearing on the probation violation held on January 7, 2010, the probation department and the People again recommended that the trial court impose the prison sentence that was initially suspended. The trial court (Judge Antolini) told defendant that the court would place defendant in the Jericho Project drug treatment program. The court stated, “What I’m looking back from you is you waive all past credits and you waive all credits while you’re in the program.” Defendant agreed. The prosecutor argued that defendant had “already waived most of his credits anyway,” and that defendant should be committed to prison. The trial court instead extended defendant’s probation to five years, and ordered that defendant serve six months in jail or until space opened up at Jericho. Regarding credits, the following exchange took place:

“THE COURT: . . . . And so reunderstanding that you are waiving—even though you are going to stay until bed space becomes available, you are waiving all time past, now, from today on, and everything in Jericho?

“THE DEFENDANT: Okay.

“THE COURT: Do you reaffirm that?

“THE DEFENDANT: Yes, sir.

“THE COURT: And that’s any penal institution; meaning, if you don’t finish Jericho, if you walk out of that place without graduating, you are going to maximum state prison with zero credits. [¶] Do you understand that?

“THE DEFENDANT: Yes, sir.” The minute order filed after the hearing states that defendant waived all credits (past, present, and future), and that defendant would have “zero cts [credits].”

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<sup>2</sup> Defendant was charged in a separate case in connection with the conduct that was the basis for the third probation violation. It is unclear whether the reference to credits was in connection with the separate case, or whether the trial court was unaware that defendant previously had waived credits in this case. Pursuant to a plea agreement, the trial court dismissed the separate case following a motion by the People, after defendant admitted the probation violation.

A few weeks later, defendant violated the terms of his probation when he was unsuccessfully discharged from Jericho and failed to report to the probation department. Defendant once again admitted the violation of probation. At a sentencing hearing before Judge René Chouteau on April 28, 2010, there was some confusion over whether defendant had previously waived credits. Defendant's attorney stated that defendant claimed his previous waiver of credits was "improperly done." The trial court, apparently referring to a probation department sentencing report dated August 10, 2009 (and so prepared before defendant ever entered a waiver of credits), stated, "I'm seeing 547 credits he's going to get," a reference to the 365 days of actual custody credit and 182 days of conduct credit defendant had as of August 2009, as reflected in the probation report. The court added, "There is no waiver of credits," another apparent reference to the August 2009 report. The prosecutor stated that "it's typically a person who's not given the benefit of treatment without waivers of treatment—" The court responded, "Oh, treatment credits. Perhaps. But he's got 547 days custody credits."

The court then ordered execution of the six-year prison sentence, imposed fines, and stated, "Now, you do get credit for time served." The prosecutor then referred the court to the probation department's sentencing report dated March 16, 2010, which correctly stated that defendant had waived all credits, stating, "Actually, Your Honor, he should have no—he should have zero credits, according to the calculation on page 4 [of the March 2010 report], based upon previous waivers, residential treatment, and for all purposes, actually." The court responded, "I see. I was looking at the older report. What I'm going to do is I'm going to give him his actual custody credit. 365 days. No conduct credits and no treatment credits."

The prosecutor objected to the granting of actual credits, stating that defendant "specifically negotiated for waiver of all credits, for a benefit of Jericho and all treatment facilities. He should have been directly committed to prison previously, and the People are respectfully objecting. I don't believe, given his waivers, that that's appropriate." The prosecutor also stated that "it appears that there was no benefit of the bargain if the defendant was given an opportunity at treatment, not a direct commitment to treatment,

and the Court withdraws and allows him those credits even after he failed.” The trial court stated, “I appreciate your position. Let me just say, I’ve made a vow not to do this, but in this particular case I think it’s appropriate, given my mistake in the report.” The abstract of judgment reflects 365 days of custody credit.

The People timely appealed. (§ 1238, subds. (a)(5) [People may appeal order after judgment affecting People’s substantial rights] & (a)(6) [People may appeal order reducing defendant’s prison sentence]; *People v. Minjarez* (1980) 102 Cal.App.3d 309, 312 [People permitted to appeal order granting custody credit pursuant to § 1238, subds. (a)(5) & (a)(6)].)

## II. DISCUSSION

The People argue that the trial court lacked authority to award defendant custody credits after he waived all past and future credits.<sup>3</sup> “When circumstances warrant, a court may sentence a felon to probation instead of prison, but condition probation on serving time in county jail. Such a county jail sentence cannot, however, exceed one year. (Pen. Code, § 19.2.) If the defendant thereafter violates probation, the court may exercise its discretion to reinstate probation conditioned on the defendant’s serving additional jail time—the rub being that the time the person has already spent in custody ordinarily counts against the one-year cap on county jail time. (§ 2900.5 [prisoners entitled to credit for time spent in custody].)” (*People v. Hilger* (2005) 131 Cal.App.4th 1528, 1531-1532,

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<sup>3</sup> The premise of the People’s opening brief was that awarding defendant custody credits violated the terms of “their plea bargain” that was negotiated through counsel with defendant. (*People v. Segura* (2008) 44 Cal.4th 921, 931, 935 [where People and defendant negotiate plea bargain that is accepted by trial court, court thereafter lacks authority to modify a condition of the agreement absent consent of both parties].) Defendant correctly argues that the People and defendant never entered into a plea agreement regarding defendant’s waiver of credits (or any other issue, including defendant’s no contest plea to the original charges against him), and the People failed to file a reply brief. We requested supplemental briefing to address whether the judge who ordered execution of defendant’s previously suspended prison sentence was authorized to award previously waived credits, notwithstanding the fact that no negotiated plea agreement between the prosecution and defendant governed the issue.

fn. omitted.) To avoid having to remand a defendant to prison for a probation violation where both the trial court and defendant prefer that additional time be spent in county jail, a defendant is permitted to waive custody credits in exchange for an extension of probation. (*Id.* at p. 1532.) This is sometimes called a *Johnson* waiver (*People v. Johnson* (1978) 82 Cal.App.3d 183), which may also be used to validly waive past and future credit for time spent in a residential drug treatment facility. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 315 (*Jeffrey*); *People v. Johnson* (2002) 28 Cal.4th 1050, 1052.) “A defendant denied credit under section 2900.5, subdivision (a) for time spent in an alcoholic treatment program as a probationary condition is given a greater incentive to succeed in that program and as a probationer, because he cannot manipulate the court into allowing him to simply satisfy his sentence based upon time spent drying out at a ranch, rather than in jail or prison. This sentencing option is a salutary goal for insuring optimum chances of success in a treatment program, while reserving an appropriate sentence if, despite the opportunity received, the treatment program and probation are not completed.” (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1925; accord *People v. Thurman* (2005) 125 Cal.App.4th 1453, 1461.)

Our Supreme Court has held that where a defendant validly enters a *Johnson* waiver, the waiver applies to the use of custody credits for all purposes (both to future confinement in county jail and state prison). (*People v. Arnold* (2004) 33 Cal.4th 294, 307 (*Arnold*); *Jeffrey, supra*, 33 Cal.4th at p. 318.) When a defendant repeatedly violates probation, “ ‘it is neither logical nor just to allow him to retract a custody credit waiver that enabled him to prolong his probation, leaving him no worse off after another violation than he was after the violation that prompted the waiver. [Citations.]’ [Citation.]” (*Arnold* at p. 307.) “A rule that gives back previously waived credits to a defendant as a consequence of his future violation of probation thus rewards him for his own misconduct. It is also unjust enrichment, as the defendant would be getting the benefit of the bargain reached at his original sentencing and later be permitted to revoke the consideration he gave up to obtain the benefit of that bargain. As a matter of sound

sentencing policy, the law should not afford probationers incentives or rewards for refusing to comply with the terms and conditions of probation.” (*Id.* at p. 308.)

Unlike many appeals involving a *Johnson* waiver, this is not a situation where defendant is trying to regain custody credits after validly waiving his or her entitlement to them, because the trial court here in fact *awarded* defendant credits (due to an initial mistaken belief, later corrected, that defendant had not previously waived them).<sup>4</sup> (Cf. *Jeffrey, supra*, 33 Cal.4th at p. 316; *Arnold, supra*, 33 Cal.4th at p. 299.) However, the same policy considerations at issue where a defendant challenges a credit waiver are applicable here. Granting credits to defendant, who had not once but twice before waived them, amounted to unjust enrichment. Defendant most recently had entered a “straightforward and unconditional waiver of section 2900.5 credits” (*Arnold* at p. 309) in exchange for a reinstatement of probation and an opportunity to complete a treatment program. By subsequently awarding part of those credits after defendant again violated probation, the trial court removed the consideration defendant gave for the deal, which rewarded defendant for his own misconduct. (*Id.* at p. 308.)

Defendant acknowledges that a valid waiver of credits “is binding on a defendant, and he cannot on his own initiative retract his waived credits if he is later sentenced to prison.” He nonetheless argues that trial courts are vested with broad sentencing discretion (*People v. King* (2010) 183 Cal.App.4th 1281, 1323), and that a court should not be bound by a valid waiver and should instead retain the ability to excuse a credit waiver “as a matter of grace.” First, the trial court here did not award defendant custody credits because it believed that a shorter sentence was appropriate, as defendant suggests.

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<sup>4</sup> At his sentencing hearing, defendant did contend that his waiver of credits was “improperly done,” and he asked his trial counsel “to do some research into it.” Because of the trial court’s mistaken belief that there was no waiver of credits (despite the fact that defendant stated, “I thought there was”), defendant dropped his argument that the waiver was improper. In his supplemental brief, defendant mentions in passing that the trial court did not consider his claim that the original waiver of his credits was improper. However, in the absence of any legal argument that the credit waiver was improper, we presume for purposes of this appeal that defendant’s waiver of credits was valid.

Instead, the court awarded the credits because it initially took that position under the mistaken belief that defendant had never waived them.

Second, the issue of custody credits “*does not involve a discretionary sentencing choice* but is purely a mathematical calculation.” (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485, italics added [defendant not entitled to custody credit unless he shows that conduct which led to conviction was sole reason for confinement].) This case is therefore distinguishable from the cases upon which defendant relies, which analyzed situations where a trial court retained discretion over a *sentencing* decision notwithstanding a plea bargain or indicated sentence. (*People v. Walker* (1991) 54 Cal.3d 1013, 1028 [remedy for breach of plea bargain should not curtail normal sentencing discretion of trial judge]; *People v. King, supra*, 183 Cal.App.4th at pp. 1323-1324 [discretion to impose consecutive sentences]; *People v. Delgado* (1993) 16 Cal.App.4th 551, 555 [ordering trial court to specifically perform on indicated sentence would impermissibly limit court’s normal sentencing discretion].)<sup>5</sup>

It may well be that in certain situations, it would be appropriate for the trial court to order that previously waived credits be applied toward a sentence imposed after a probation violation. The Supreme Court has analogized the waiver of custody credits to a defendant’s entry of a guilty plea. (*Arnold, supra*, 33 Cal.4th at p. 309.) Where a defendant enters a guilty plea, the trial court retains the inherent power to set aside the plea on its own initiative before entry of judgment in order to “ ‘prevent abuse of its process and to conform its procedures to the fundamentals of due process.’ ” (*People v.*

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<sup>5</sup> We recognize that, following defendant’s final probation violation, the trial court had great discretion to reinstate defendant on probation instead of imposing the previously suspended sentence. (§ 1203.2, subd. (b) [court may modify, revoke, or terminate probation of probationer who violates conditions of probation]; *People v. Rodriguez* (1990) 51 Cal.3d 437, 445 [trial courts granted “great discretion in determining whether to revoke probation”]; *People v. Medina* (2001) 89 Cal.App.4th 318, 321 [trial court retains discretion to reinstate probation where probation originally granted after imposition of sentence].) However, once the trial court exercised its discretion to impose the state prison sentence, an award of custody credits did not involve the court’s discretionary sentencing choice, but was “purely a mathematical calculation.” (*People v. Johnson, supra*, 150 Cal.App.4th at p. 1485.)



*Thomas* (1994) 25 Cal.App.4th 921, 925.) In the context of a waiver of conduct credits, there may arise a situation where a trial court concludes on its own motion that applying previously waived credits would prevent an abuse of process, such as where the original waiver was not knowing and intelligent. (*Arnold, supra*, 33 Cal.4th at p. 308 [waiver of custody credits must be knowing and intelligent]; *People v. Johnson, supra*, 28 Cal.4th at p. 1055 [same].)

Here, however, there were no such concerns about the fundamentals of due process. In response to defendant's request for a continuance to research whether defendant's waiver was valid, the trial court said that there was "no legal basis" for delaying sentencing, stating, "You do have the right to appeal on those types of thing, but I'm not going to delay the sentencing any further." The court nonetheless awarded custody credits solely because of "my mistake in the report," a reference to the judge's reliance on an outdated probation report that did not reflect defendant's waiver of credits. We do not consider the mistaken reliance on an outdated probation report to be sufficient grounds to permit the award of previously waived custody credits, because the waiver of credits should have applied for all purposes. (*Jeffrey, supra*, 33 Cal.4th at p. 318; *Arnold, supra*, 33 Cal.4th at p. 307.) Defendant claims that the record does not reveal the " 'mistake' " to which the judge was referring, and that "it is clear that the judge was evaluating what he believed to be the proper disposition of the case based on the circumstances that existed at the time he executed the sentence, and not on circumstances that existed months earlier." To the contrary, our review of the hearing transcript leaves no doubt that the judge's "mistake" was the reliance on an outdated probation report, because the court specifically stated that "I was *looking at the older report*." (Italics added.) It is thus clear that the trial court would not have awarded credits absent the mistake.

"A defendant entering a straightforward and unconditional waiver of section 2900.5 credits has no reason to believe that the waiver is anything other than a waiver of such credits for all purposes." (*Arnold, supra*, 33 Cal.4th at p. 309.) The same

is true here, notwithstanding the trial court's initial reliance on an outdated probation report in applying previously waived credits.

III.  
DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to enter an amended judgment in accordance with this decision. The abstract of judgment shall be modified to reflect no custody credits at the time of sentencing. The trial court is directed to prepare an amended abstract of judgment, and a certified copy of the modified abstract shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.