

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MEL COOKE,

Defendant and Appellant.

C042092
(Sup.Ct.No. S02CRF094)

APPEAL from a judgment of the Superior Court of El Dorado County, Jerald Lasarow, Judge. Reversed with directions.

George Bond, Executive Director and Bradley A. Bristow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, and Matthew L. Cate, Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a negotiated plea agreement, defendant pled nolo contendere to one count of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)). Defendant was granted probation on the condition he serve one year in county jail and

waive all conduct credits. Defendant subsequently admitted a violation of probation and was sentenced to state prison.

On appeal defendant contends his waiver of conduct credits did not apply to any conduct credits earned in prison. We agree. We find, however, that the trial court erred in sentencing defendant to the midterm of three years upon revocation of probation as it had already imposed a four-year sentence when probation was granted. Because defendant's admission of the probation violation was based on a three-year sentence, defendant must be granted the opportunity to withdraw the admission.

BACKGROUND

Defendant was charged with one count of corporal injury on a cohabitant, and it was alleged that he had a prior prison term (Pen. Code, § 667.5, subd. (b)). Pursuant to Penal Code section 1192.5, defendant entered into a plea bargain that specified no prison time. The trial court accepted the negotiated plea and struck the prior. The court refused to sentence defendant without a probation report.

At sentencing before a different judge, the court had "grave concerns about going along with the plea bargain." The court would accept the plea bargain with a one-year sentence, "a Johnson year. It would be a Johnson waiver for all purposes." The waiver was accepted and the court sentenced defendant to the upper term of four years, suspended execution of sentence, and placed defendant on probation. Among the conditions of probation were a one-year jail term and an order not to annoy,

harass, or threaten or commit acts of violence or abuse against the victim. The court issued a protective order.

Less than six weeks later, the People filed a petition to revoke probation. The petition alleged defendant violated probation by three counts of violating the protective order (Pen. Code, § 273.6, subd. (a)), and one count of harassing by telephone (Pen. Code, § 653m, subd. (a)).

In exchange for a three-year prison sentence, defendant admitted the violation of probation. The court indicated: "Further, it should be noted in the abstract that he has waived his right to receive conduct credits both in county jail and in state prison." The abstract noted: "JOHNSON WAIVER TAKEN - no time credits for county jail or state prison." Defendant was given credit for 120 days actual time.

DISCUSSION

I

Defendant's sole contention on appeal is that the sentence should be modified to strike the reference to a waiver of credits for time in prison so that it cannot be interpreted to waive conduct credits while in prison.

The Attorney General submits this issue is not cognizable on appeal because defendant did not obtain a certificate of probable cause. He argues that defendant is in effect challenging the validity of his plea, so a certificate of probable cause is required. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Defendant's claim is that he did not waive conduct credits in prison as a part of his plea bargain. He contends the trial court's sentence, which might be read to require such a waiver, is inconsistent with the terms of his plea bargain. The requirement of Penal Code section 1237.5 does not apply to claims of error subsequent to the entry of the guilty plea in determining the penalty to be imposed. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *People v. Delles* (1968) 69 Cal.2d 906, 909.) The issue is cognizable on appeal without a certificate of probable cause.

II

Before we address the scope of defendant's waiver, it is useful to provide some context for a waiver of custody credits. In *People v. Johnson* (1978) 82 Cal.App.3d 183, the court considered a problem facing sentencing courts when a probation violator is running up against the limits of Penal Code section 19a, that confinement in the county jail as a condition of probation not exceed one year, but the court considers state prison inappropriate. If the defendant received one year in jail as a condition of probation and later violates probation, "the court is faced with a Hobson's choice of the 'joint' or a 'straight walk.'" (*People v. Johnson, supra*, 82 Cal.App.3d at p. 187.) The court held "a proper interpretation of Penal Code section 2900.5 permits a defendant to knowingly and intelligently waive the provisions thereof that require all days of custody be credited to his sentence, including any period of imprisonment as a condition of probation." (*Id.* at p. 188.)

After *Johnson, supra*, 82 Cal.App.3d 183, it is settled that a defendant may waive time credits in exchange for probation or other sentencing considerations. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553; *People v. Harris* (1991) 227 Cal.App.3d 1223, 1227-1228; *People v. Zuniga* (1980) 108 Cal.App.3d 739, 742.) A defendant may also waive any right to future custody credits. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1923-1924.) A waiver must be knowingly and intelligently made with "awareness of its consequences." (*People v. Harris* (1987) 195 Cal.App.3d 717, 725.)

The Courts of Appeal are split on what a defendant must show to prove his *Johnson* waiver was not knowing and intelligent as to its effect on an eventual prison sentence. This issue is currently pending before the California Supreme Court. (*People v. Arnold*, review granted June 12, 2002, S106444; *People v. Jeffrey*, review granted June 12, 2002, S105978; *People v. Hilger*, review granted March 19, 2003, S113526.)

In *People v. Burks* (1998) 66 Cal.App.4th 232, the court put the burden on defendant to restrict a waiver only to time served in jail. "If a defendant wants to restrict the waiver of custody credits to extend the jail time he can serve, but preserve the same credits for future use against prison time, the burden should be on the defendant to propose that to the sentencing court for its approval." (*Id.* at pp. 236-237, fn. omitted.) The court believed an admonition that the credits would not be restored if defendant continued to violate

probation and was sent to prison was "illogical." (*Id.* at pp. 236-237, fn. 3.)

This court, in *People v. Harris, supra*, 195 Cal.App.3d 717, employed a fact-specific approach to determine the scope of the waiver. We awarded defendant credit against his prison sentence for custody time that had been waived where the record did not show defendant was aware he was giving away credits on a subsequent prison sentence. (*Id.* at pp. 722-726.) In *People v. Salazar, supra*, 29 Cal.App.4th 1550, 1553-1554, a waiver of prior credits "'for all time and for all purposes'" was held adequate to waive custody credits against a prison term.

Although the trial court referred to the waiver here as a *Johnson* waiver, it was not the same as the waiver approved in *People v. Johnson, supra*, 82 Cal.App.3d 183. Rather than waiving past custody credits so defendant could serve more than one year in jail as a condition of probation, here, defendant waived past and future conduct credits so he would serve one full year in jail as a condition of probation. The question is whether defendant also waived any future conduct credits that he might earn in prison.

To accept the plea bargain, the trial court required "a one year sentence, a *Johnson* year. It would be a *Johnson* waiver for all purposes." Before sentencing defendant, the following colloquy took place.

"THE COURT: Okay. Mr. Cooke, do you understand, number one, if you waive and give up your rights to earn good-time/work-time credits, not only will it apply in the county

jail when you serve time here, but if -- and let's hope there's not, but if you're violated on probation, if you go to prison, you'd get the maximum sentence, and you would only -- and you would have to waive and give up any good-time/work-time.

"Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: So that means let's assume you get sentenced to prison. You do a year here in the county jail here straight time. Let's assume now you get out and mess up. The Court then imposes a four year sentence. You would only get one year actual credit. You wouldn't get any good-time/work-time, and you wouldn't be able to go to the state prison and say, 'Wait a minute. I get my 50 percent conduct credit.'

"Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: And you clearly understand that this is a permanent waiver for good-time/work-time for both county jail and any state prison commitment or any other type of commitment the Court will order.

"Do you understand that?

"THE DEFENDANT: Yes.

"[¶] . . . [¶]

"THE COURT: But I want to make it clear to Mr. Cooke that it was an 1192 no state prison. There was nothing -- part of the plea bargain was not that he would enter a Johnson waiver for county jail and/or for all purposes. Now, if you don't want to do that, that's fine, Mr. Cooke. I have no problem with

that. Then you would withdraw your plea, and I would reset it for trial. But I want it clear if he's going forward, he's not going to be able to later on say, 'Well, wait a minute. That wasn't part of the plea agreement. I want to withdraw my plea.'

"So do you understand that, Robert?

"THE DEFENDANT: Yeah.

"THE COURT: That you won't be able to come back and say, 'Well, wait a minute. The agreement was only a year in county jail, not a hard year, so to speak. The agreement wasn't that I waive my good-time/work-time for all purposes.' So you have a right to withdraw your plea and go to trial. You also have a right to say, 'No, I'll accept the plea bargain with these additions.'

"Is that what you want to do?

"THE DEFENDANT: Yeah."

The Attorney General contends this colloquy shows that defendant waived both presentence and post-sentence conduct credits. Defendant contends his waiver extended only to presentence conduct credits. We agree with defendant's interpretation.

Defendant waived only credit for work and good behavior while in county jail under Penal Code section 4019, not also worktime credits in prison under Penal Code section 2933. The court stated the waiver applied "for all purposes" and if defendant went to prison. This language made for a knowing and intelligent waiver under *People v. Harris, supra*, 195 Cal.App.3d 717, and *People v. Salazar, supra*, 29 Cal.App.4th 1550. Rather

than attempting to obtain a waiver of Penal Code section 2933 worktime credits, the court was assuring that defendant's waiver was "knowing and intelligent" and that he understood he was giving up these Penal Code section 4019 conduct credits not only as to his jail term, but also as to a prison sentence upon a subsequent probation violation. The court spoke of "straight time" in reference only to the one-year jail term, not the possible four-year prison term. Under Penal Code section 4019, if all credit is earned, a term of six days is deemed to have been served for every four days of actual custody. This is the 50 percent credit to which the court referred.

The other reason we agree with defendant's interpretation of the waiver is that the trial court has no authority to obtain a waiver of Penal Code section 2933 worktime credits. Under Penal Code section 2900.5, subdivision (a), "all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment, . . ." The sentencing court has the duty to determine the presentence custody credit. (Pen. Code, § 4019, subd. (d).)

The pre- and postsentence credit systems serve disparate goals. "The presentence credit scheme, section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges. By contrast, the worktime credit scheme for persons serving prison

terms emphasizes penological considerations, including the extent to which certain classes of prisoners, but not others, deserve or might benefit from incentives to shorten their terms through participation in rehabilitative work, education, and training programs operated by the Department of Corrections." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) This post-sentence conduct credit is determined by the Director of Corrections. (Pen. Code, §§ 2930-2935; *People v. Buckhalter*, *supra*, at p. 31.) Because the Director of Corrections has the duty of determining prison behavior and worktime credits, it is an abuse of discretion for a sentencing court to determine prison credits before the administrative process is completed. (*People v. Chew* (1985) 172 Cal.App.3d 45, 50-51, disapproved on another point in *People v. Buckhalter*, *supra*, 26 Cal.4th at p. 40.) Prison worktime credit is under the jurisdiction of the Director of Corrections; the sentencing court has no authority to obtain a waiver of this credit.

III

At the time the trial court granted defendant probation, it imposed a sentence of four years, but stayed its execution. Having imposed a sentence, the court could not reduce the sentence to three years later. "We conclude that if the trial court has suspended *imposition* of sentence, it ultimately may select any available sentencing option. However, if, as here, the court actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of

that sentence, then the court lacks the power, at the precommitment stage (see § 1170, subd. (d) [of the Pen. Code]), to reduce the imposed sentence once it revokes probation.” (*People v. Howard* (1997) 16 Cal.4th 1081, 1084, italics in original.)

Defendant admitted his violation of probation was based on a promise of a three-year sentence. Because the court did not have the power to reduce the sentence from the four years previously imposed, defendant must be permitted to withdraw his admission of the probation violation.

DISPOSITION

The judgment is reversed with directions to permit defendant to withdraw his admission of the probation violation and to enter a new plea to that charge. If defendant’s prison sentence is executed, defendant is entitled to appropriate conduct credit while in prison as determined by the Director of Corrections.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.