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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KRIS ISAAC INGWELL,

Defendant and Appellant.

A106090

(Sonoma County
Super. Ct. No. SCR 31863)

Defendant challenges the denial of presentence credit against his six-year prison term. We remand the matter for recalculation of custody credits but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was on parole for assaulting his ex-girlfriend Connie Roberts and evading police. On December 9, 2001, defendant telephoned Roberts and threatened to kill her. Defendant was arrested, served with a protective order, and released. After learning of defendant's arrest, his parole agent spoke with defendant by phone and directed him to surrender to the parole office. Defendant failed to do so. His parole was suspended on December 13, 2001, and a parolee-at-large warrant was issued.¹

¹ On appeal, defendant requests that we take judicial notice of the parole officer's report, dated January 8, 2002. The request for judicial notice is unopposed. Normally we do not judicially notice documents that were not before the trial court, (See *People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1; *People v.*

Defendant continued to make threatening phone calls to Roberts. On January 3, 2002, while police were present in Robert's home, defendant left a message stating that he was parked nearby. Officers were dispatched to apprehend defendant, who led them on a high speed chase. Defendant abandoned his truck and fled on foot before being arrested.

Defendant was charged with evading arrest, two counts of making criminal threats, and one count of stalking. A parole hold was placed on him. Thereafter, defendant's new criminal case and the parole violation matter proceeded on parallel tracks. While criminal proceedings were pending, defendant's parole was violated based on the following misconduct: absconding from parole supervision; contacting the victim; making terrorist threats and annoying phone calls; and evading arrest. A prison term of 12 months was imposed and defendant completed that sentence on January 3, 2003.

Less than two weeks later, defendant posted bail in the new criminal case. However, he was arrested again on January 26, 2003 for another parole violation based on contact with the victim and criminal threats. The date and circumstances of these offenses are not described in the parole documents contained in the record. Defendant waived hearing, admitted the violations, and was ordered to serve an 11-month term.

Meanwhile, in his criminal matter, defendant pled guilty on February 3, 2003, to evading police. He also admitted a prior strike conviction. In exchange, the other counts were dismissed with a *Harvey*² waiver. Defendant waived time for sentencing.

Defendant was discharged from parole on June 23, 2003, and posted bail on the criminal case. He failed to appear for sentencing and was arrested on a bench warrant. On August 20, 2003, he was sentenced to six years in prison.

A further hearing was conducted on whether defendant should be given credit for prison time attributable to the parole violations. The court found that the offense of

Amador (2000) 24 Cal.4th 387, 394), but do so here. The report merely clarifies information provided by the probation officer at the sentencing hearing.

² *People v. Harvey* (1979) 25 Cal.3d 754.

absconding, which served as the basis for defendant's first parole violation, was unrelated to the charge for which he was convicted. The court made no express findings as to the second parole violation, but denied custody credits for that period.

DISCUSSION

Defendant asserts the court erred in failing to award him custody credits for the period January 26, 2003, to June 23, 2003, during which he was incarcerated for the *second* parole violation.³ However, defendant supports his argument with facts pertaining solely to the *first* parole violation, for which he was incarcerated from January 3, 2002 to January 3, 2003. At oral argument, defendant's counsel acknowledged that he was mistaken and advised that he was challenging the trial court's ruling regarding credits attributable to the *first* parole violation.

Penal Code section 2900.5, subdivision (b) provides that presentence credits shall be given "only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." In *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*), the Supreme Court held that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was 'a' basis for the revocation matter as well." (*Id.* at pp. 1193-1194.) The *Bruner* court approved of a number of decisions which reasoned that a prisoner's "criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.]" (*Id.* at p. 1191, original italics.)

³ Defendant suffered an earlier parole violation in 2000. However, for convenience, we refer to the two parole violations considered by the court as the first and second parole violations.

Defendant has the burden of proving entitlement to presentence credits. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.)

Background

In her presentence report, the probation officer wrote: “Defendant was serving a parole violation between 01/3/02 and 01/3/03 for conduct not related solely to the instant offense, and precluding overlapping credits per 2900.5(b) P.C.” At the sentencing hearing, the probation officer stated her belief that defendant was not entitled to credits earned while in custody for this parole violation. She advised the court: “[Defendant] was a parolee at large. Warrant was issued December 13, 2001. This evading arrest did not occur until January of 2002. He was arrested on the evading arrest as well as the parole violation. So it is not directly related to why a warrant was issued for his arrest as a parolee.” The court asked the probation officer, “[D]id the violation-of-parole allegation that preceded the event, do we know what it was for?” The probation officer was unable to provide this information. She was also unaware that defendant had been arrested for a second parole violation. The court continued the hearing for determination of custody credits.

In anticipation of the next hearing, the probation officer determined defendant’s custody credits, assuming concurrent sentencing with his parole violations. According to her calculations, defendant was in custody 366 days for his first parole violation and 149 days for the second violation. The parole officer provided the following information to the court:

“01-03-02 to 01-03-03	[first parole violation]:	366 days
01-04-03 to 01-14-03	[time between parole release and posting bail]:	11 days
01-26-03 to 06-23-03	[second parole violation]:	149 days
08-04-03 to 08-20-03	[in custody after bench warrant arrest]:	<u>17 days</u>
		543 days actual
		<u>270 days conduct</u>
		813 days total”

At the hearing, the probation officer discussed defendant's first probation violation only and reported her conversation with defendant's parole agent. According to the probation officer, a parolee-at-large warrant was issued "based on defendant's arrest on 12-9-01 in Napa County [for terrorist threats against the victim] plus defendant absconded from parole supervision." The probation officer clarified that defendant absconded after the December arrest. The court concluded that defendant's absconding from parole was unrelated to the offense for which defendant was convicted.

As to the second violation, the prosecutor argued that defendant had failed to demonstrate a relationship between those offenses and his conviction. The prosecutor stated, "I don't know, and I don't know if the court knows, what [the second parole violation] refers to." Defense counsel responded, "[The previous prosecutor] came in here, told this court that she made a call to the parole officer in Napa immediately upon his release [for the first violation], telling them that . . . he had incurred new law violations which are subject of the pending case. [The previous prosecutor] came in here and told this court that she made that call that got him arrested." The record contains no response by the court to these arguments.

At the conclusion of the hearing, the court asked the probation officer, "So what credits would that entitle the defendant to?" The probation officer answered, "If I'm understanding it correctly, it would be the 366, the 11 . . . and 17 days . . ." The court asked, "But not the 149?" to which the probation officers answered, "No."

First Parole Violation

Defendant's first parole violation was based on conduct charged in the information and his absconding from parole supervision. Defendant argues that his absconding is related to the offense for which he was convicted. He asserts that "but for" his threats against the victim, the parole agent would not have directed defendant to surrender himself in December 2001 and defendant never would have gone into hiding.

Defendant misunderstands the "but for" rule discussed in *People v. Bruner, supra*, 9 Cal.4th 1178. The Supreme Court in *Bruner* held that because the defendant's presentence parole custody stemmed from multiple, unrelated incidents of misconduct, he

could not establish that, “but for” the criminal charge, he would have been free. Accordingly, his presentence custody could not be credited against a later term of incarceration. (*Id.* at p. 1192.)

Here, defendant absconded from parole supervision after the alleged threat and stalking incidents. His choice to go into hiding constituted a separate act of misconduct that violated his obligations as a parolee. Consequently, the criminal charges for which he has been sentenced were not the sole basis for his presentence parole custody. The trial court therefore properly determined that defendant is not entitled to presentence custody credits for the time attributable to the first parole violation.

However, despite its ruling, the court relied on the probation officer’s misinformation to award defendant 366 days of actual custody credits. This was a mistake. In doing so, the court awarded defendant the custody credits that it had just determined were inapplicable. By written request of this court, counsel were asked to address at oral argument whether, assuming the correctness of the trial court’s ruling, defendant was entitled to 366 days actual custody credits. They both agreed he was not.

Second Parole Violation

At oral argument, the Attorney General pointed out that in view of the trial court’s mistake regarding the first parole violation and its ruling that defendant was not entitled to 149 days custody credit attributable to the second parole violation, defendant was entitled to only 28 days of actual custody credit. In rebuttal, defendant’s counsel asserted for the first time that defendant is also entitled to the 149 days custody credits. He argued that the second parole violation was based on the same conduct charged in defendant’s trailing felony matter, case number 414025, dismissed at sentencing as part of the negotiated disposition.

In general, we are not required to consider issues raised for the first time in oral argument. (*People v. Pena* (2004) 32 Cal.4th 389, 403.) However, in view of the trial court’s mistaken calculations, it is unclear whether the court intended to deny defendant credit for presentence custody attributable to the second parole violation. The court made no statement at the sentencing hearing regarding the second parole violation.

Nevertheless, the court awarded defendant custody credits for one parole violation but not the other. We are unable to discern whether the court intended that defendant be denied 366 days credit and awarded 149 days credit, or whether the court intended that defendant be denied custody credits as to both parole violations. Because of the state of the record, we cannot determine whether, as a legal matter, defendant is entitled to custody credit in connection with the second parole violation. We express no opinion in that regard. On remand, the court must clarify and, if necessary, correct its calculation of credits attributable to the second parole violation.

DISPOSITION

The portion of the judgment that awards presentence custody and conduct credits is vacated, and the matter is remanded to allow a correct award of credits. On remand, the trial court is directed to recalculate defendant’s custody credits in a manner consistent with this opinion and to forward a copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

Corrigan, Acting P.J.

We concur:

Parrilli, J.

Pollak, J.