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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDOLPH LOWELL SMITH,

Defendant and Appellant.

A107281

(Sonoma County
Super. Ct. No. SCR33161)

Randolph Lowell Smith appeals following his plea of guilty to attempted robbery. Smith contends that the trial court did not establish a sufficient factual basis for the plea and that the trial court erred in calculating his presentence custody credit. We agree that the court miscalculated defendant's custody credit, modify the judgment, and affirm the judgment as modified.¹

PROCEDURAL BACKGROUND

An information filed October 31, 2003, charged appellant Randolph Lowell Smith with one count of attempted robbery (Pen. Code, §§ 211, 664).² The information further alleged a prior strike conviction (§ 1170.12) and a prior prison term (§ 667.5, subd. (b)).

¹ In a separate order filed this date we deny Smith's writ of habeas corpus, case number A110569.

² All further statutory references are to the Penal Code unless otherwise indicated.

Smith pleaded guilty to the attempted robbery charge and admitted the prior strike and prison term. The trial court sentenced Smith to five years in state prison.

FACTUAL BACKGROUND³

Tambra Flinn was a manager at a Circle K store in Santa Rosa. On June 7, 2003, Flinn drove to a branch of Bank of America to deposit cash from the store; the cash deposit bag was under one of the seats in her car. A pickup truck, subsequently determined to be driven by Smith, merged into her lane in front of her. Both vehicles drove into the driveway of the bank and the pickup stopped, blocking Flinn's forward progress. A passenger, later identified as Tyrone, jumped out of the pickup and ran up to the driver's window of Flinn's car. He stuck his head through the window and yelled, "Give me the money. Give me the money." The man stuck his upper torso through the window and looked for the money.

Flinn was terrified and did not know what the man was going to do to her. She kept telling him that she was not going to give him the money and the robber kept demanding the cash. During this confrontation, Smith drove the pickup into the bank parking lot and turned right. Flinn took the opportunity to accelerate forward. The man demanding the cash continued to hang through her window for about 75 feet until Flinn made a quick turn and he fell onto the parking lot pavement.

While stuck behind the pickup, Flinn noticed that it had personalized plates, "CHIG." The police obtained the name of the registered owner, who was Linda MacKinzie. MacKinzie told the police that Smith was her roommate and that on the day of the robbery Smith was supposed to take the pickup to an auto shop to work on the brakes. Smith had possession of the pickup at the time of the robbery.

³ Because Smith pled guilty, this factual statement is based on the preliminary hearing testimony.

While in custody, Smith told a police detective that a friend named Christina Echelberger used to work at the Circle K store where Flinn was manager. Echelberger and Smith planned the robbery. Smith was the driver of the pickup used in the attempted robbery.

DISCUSSION

I. *Factual Basis for the Attempted Robbery Charge*

Smith contends that the trial court did not establish a sufficient factual basis for the plea to the attempted robbery charge. We disagree.

Under section 1192.5, a trial court must confirm that there is a factual basis for a defendant's plea before accepting a conditional plea of guilty or no contest.⁴ This statutory requirement, while not compelled by the federal Constitution, helps ensure that federal constitutional standards of voluntariness and intelligence are met. (*People v. Holmes* (2004) 32 Cal.4th 432, 438.) The purpose of the factual basis requirement "is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged." (*People v. Watts* (1977) 67 Cal.App.3d 173, 178, cited with approval in *Holmes*, at pp. 436, 439-440.) "Inquiry into the factual basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead." (*Watts*, at p. 178.)

A bare statement by a trial court that a factual basis exists is inadequate; the trial court must garner information from either the defendant or defense counsel to verify the factual basis for the plea. (*Holmes, supra*, 32 Cal.4th at p. 436.) "If the trial court

⁴ The People contend that Smith's plea was not a negotiated disposition subject to section 1192.5. (See *People v. Hoffard* (1995) 10 Cal.4th 1170, 1181 [trial court has no obligation to inquire regarding factual basis where plea "unconditioned upon receipt of a particular sentence or other exercise of the court's powers"].) Because we conclude that the trial court complied with the factual basis requirement, we do not reach that issue.

inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or question the defendant regarding the factual basis described in the complaint or written plea agreement.

[Citations.] If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.]” (*Ibid.*)

The court need only establish a prima facie factual basis for the charges; it need not interrogate the defendant about each element of the crime and possible defenses, it need not resolve factual disputes, and it need not convince itself that the defendant is guilty. (*Id.* at pp. 441-442.) The court has wide discretion to determine whether a factual basis exists. (*Id.* at p. 443.)

In this case, the trial court asked Smith whether he was guilty of the charge that “on June 7th of this year, here in this County, you were in violation of Penal Code Section 664, slash 211, in that you, unlawfully and by means of force and fear, attempted to take the personal property of Tamra Lee Flynn [sic].” Defense counsel interjected, stating “just so the record is clear, because my client may be a little confused about this, he’s a principal in that to the extent he was the driver who transported the person who attempted to take the item from the woman. I’ve explained to him as a principal, his culpability is the same.” Defense counsel then asked Smith, “Do you understand what I’m saying? You didn’t actually reach in and try to grab the item, but, rather, you were an aider and abettor as a principal. [¶]Do you understand that?” Smith stated that he did understand and then Smith pled guilty to the charge described by the trial court.

The factual basis developed by the trial court is adequate under *Holmes*. The Court there stated, “A reference to a complaint containing a factual basis for each essential element of the crime will be sufficient under section 1192.5 to establish the

factual basis for the plea.” (*Holmes, supra*, 32 Cal.4th at p. 440.) In *Holmes*, the trial court asked defendant if what he did was described in the complaint; the complaint “contained the charged offense, the names of defendant and the victim, the date and location of the charged offense, and a brief description of the factual basis for the charged offense.” (*Id.* at p. 443.) The relevant description of the factual basis in the complaint was simply that defendant “willfully and unlawfully assault[ed] Sandra R., with the intent to commit rape.” (*Id.* at p. 436.) The *Holmes* Court concluded, “Such a complaint provides a sufficiently precise factual account of the charged offense of assault with intent to commit rape. In short, the trial court’s questioning of defendant about the factual basis in the complaint was adequate to establish that defendant was cognizant that his acts did constitute the offense with which he was charged” (*Id.* at p. 443.)

In this case, the trial court stated aloud the relevant allegations in the information, which provided as much detail as the complaint in *Holmes*. Moreover, defense counsel’s interjection clarified that Smith’s role in the attempted robbery was that of the aiding and abetting driver of the car that transported the man who attempted to take property from the victim. The trial court established a sufficient factual basis for the plea.

II. *Custody Credit*

In June 2004, the trial court sentenced Smith and awarded 418 days of custody credit, reflecting 364 actual days and 54 days of conduct credit. On appeal, Smith contends that he should have received 182 days of conduct credit, for a total of 546 days of custody credit.⁵ As the People concede, the trial court erred in awarding only 54 days of conduct credit.

⁵ In March 2005, the trial court granted Smith’s motion for correction of presentence credit and awarded 182 days of conduct credit, but in November 2005 the trial court filed a new abstract of judgment returning to an award of only 54 days of conduct credit.

Under section 4019, a defendant is entitled to presentence conduct credit calculated “by dividing the number of actual presentence custody days by four and then multiplying this number by two (one day for good time and one day for work time).” (*People v. Bravo* (1990) 219 Cal.App.3d 729, 731.) Section 2933.1 limits to 15 percent the credit that may be earned by a defendant who has committed a “violent felony” as described in section 667.5, subdivision (c). (§ 2933.1; *People v. Thomas* (1999) 21 Cal.4th 1122, 1127.) The section 667.5, subdivision (c) list of offenses includes “any robbery,” but does not include “attempted robbery,” which is the offense to which Smith pled guilty. (§ 667.5, subd. (c)(9).) There is indication that the Legislature did not intend reference to an offense to encompass attempts to commit the offense, because section 667.5, subdivision (c) lists murder and attempted murder separately. (§ 667.5, subds. (c)(1) and (c)(12).) Because section 667.5, subdivision (c) does not describe attempted robbery as a violent felony, Smith should have received conduct credit under section 4019. Based on 364 actual days served, Smith is entitled 182 days of conduct credit, for a total of 546 days of presentence custody credit.

DISPOSITION

The judgment is modified to give Smith credit for 364 days of actual custody and 182 days of good conduct credit for a total of 546 days. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the modification, and to send a copy of the amended abstract to the Department of Corrections.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.