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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES EDWARD ROLLINS,

Defendant and Appellant.

A107877

(Alameda County  
Super. Ct. No. 145332A)

As part of a negotiated disposition, defendant Charles Edward Rollins pleaded no contest to a charge of transporting cocaine base in May 2003, and admitted a 1994 prior conviction for possession of cocaine for sale. He was placed on probation for the 2003 offense and ordered to serve a county jail sentence as a condition of reinstating his probation in an unrelated case. Following his release from jail, defendant was arrested on new drug charges. The trial court revoked his probation for the 2003 cocaine offense and sentenced him to eight years in state prison, including four years of enhancements based on his prior cocaine conviction. On appeal, defendant contends that the trial court erred in: (1) imposing sentence enhancements based on his admission of the 1994 conviction; and (2) failing to award him custody credits for the period of his confinement in county jail. We find merit in the latter contention and remand the matter to the trial court for a determination of the credits, if any, to which defendant is entitled for the period of his custody in county jail.

## I. BACKGROUND

According to testimony given at defendant's preliminary hearing, an undercover police officer approached defendant in West Oakland on May 15, 2003, and asked where he "could spend \$15." Defendant asked the officer if he wanted to buy heroin or crack cocaine. When told it did not matter, defendant took three marked five-dollar bills, walked away, and spoke to codefendant Marcus Teague. Teague walked away, spoke to codefendant Damien Johnson, who gave a piece of rock cocaine to defendant, who then gave it to the officer. Officers arrested defendant and found one of the marked bills in his possession.

Following his arrest, defendant was charged by felony complaint in case No. 145332A with transporting cocaine base. (Health & Saf. Code, § 11352, subd. (a).)<sup>1</sup> The complaint also alleged that defendant had suffered five prior convictions. As to the third prior conviction, the complaint alleged that defendant was convicted of violating section 11351 in December 1994, and that he "received a prison term therefor" (third prior conviction). The complaint further charged that the third prior conviction was within the purview of: (1) section 11370, subdivisions (a) and (c); (2) section 11370.2, subdivision (a); (3) Penal Code section 1203.07, subdivision (a)(11); and (4) Penal Code section 667.5, subdivision (b).

Defendant was also charged with violating his probation in an earlier, unrelated case, case No. S473495, apparently based on the same May 15, 2003 conduct charged in case No. 145332A.<sup>2</sup>

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<sup>1</sup> Unless otherwise specified all further statutory references are to the Health and Safety Code.

<sup>2</sup> As further discussed below, defendant contends that the May 15 conduct was the sole basis for the probation violation charged in case No. S473495. The People neither dispute this factual contention nor expressly concede it. The record on appeal strongly suggests that defendant's conduct and arrest on May 15, 2003 was the sole basis for the probation violation proceeding in case No. S473495, but it does not definitively establish the point.

Under a negotiated disposition of both the present case and the probation violation charged in case No. S473495, defendant agreed to plead no contest to the section 11352 offense charged in the complaint, admit the third prior conviction alleged in that case, and admit that he was in violation of his probation in case No. S473495. In return, defendant would receive five years of felony probation and credit for time served in case No. 145332A as of the sentencing date. In case No. S473495, defendant's probation status was to be revoked, and then restored in a modified form at sentencing. Under his modified probation, defendant was required to serve an additional year in county jail, less credit for time served to the date of sentencing, with the probation in case No. S473495 to terminate upon completion of his jail sentence.

Defendant completed his jail sentence and his probation in case No. S473495 on January 12, 2004. In April 2004, he was arrested for possession of heroin for sale. The People moved to revoke defendant's probation in case No. 145332A. Following a contested hearing, the trial court sustained the revocation petition. The court sentenced defendant to eight years in state prison, comprised of the four-year midterm for the section 11352 offense, a three-year enhancement under section 11370.2, subdivision (a), and a further one-year enhancement under Penal Code section 667.5, subdivision (b).<sup>3</sup> This timely appeal followed.

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<sup>3</sup> Section 11370.2, subdivision (a) requires the court to impose a "full, separate, and consecutive three-year term for each prior felony conviction of . . . [s]ection 11351." Penal Code section 667.5, subdivision (b) requires the court to impose a "one-year term for each prior separate prison term served for any [prior] felony," unless the defendant "remained free of both prison custody and the commission of an offense which results in a felony conviction" for at least five years following completion of the prior term served. Both enhancements may be imposed based on the same prior felony offense. (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936.)

## II. DISCUSSION

### A. *Imposition of Sentence Enhancements*

Defendant contends that when he admitted the third prior conviction he did not admit the enhancements. He maintains that his sentence is therefore illegal to the extent that it exceeds the four-year midterm sentence provided for by section 11352.

Before taking defendant's plea in this case, the trial court admonished him as follows: "By doing this, by this case as you probably know, the principal case carries three, four or five years in prison [as] the maximum exposure. The prior actually carries four years, three because it's another trafficking prior, and one because you did prison time on it. So, your exposure in the case would be nine years. [¶] I'm not suggesting that you violate the new probation you are going to get; but if you did, you would have a right to a hearing. If it were proved and were a bad enough violation, somebody could give you up to nine years in the joint behind this."

After being advised of the penal consequences of his proposed admissions, defendant admitted the third prior conviction as set forth in the complaint. The complaint specifically alleged that defendant was convicted of violating section 11351 and that he "received a prison term therefor." The complaint further alleged as to the third prior conviction that "a separate term of imprisonment was served therefor" and that defendant "did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term."

Defendant's admission of the third prior conviction without qualification necessarily admitted these factual predicates for the enhancements. "[A]n admission of prior convictions where the charging information specifically alleges the convictions resulted in prior separate prison terms is deemed an admission such prison terms were separately served." (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 61; see also, *People v. Welge* (1980) 101 Cal.App.3d 616, 623.) There is no reason to treat the allegations concerning the five-year "washout" period of Penal Code section 667.5, subdivision (b) any differently. By admitting the prior conviction, defendant admitted the enhancement

allegations subsumed under it and “voluntarily exposed himself to [a] possible sentence enhancement to the . . . extent permitted under [Penal Code] section 667.5, subdivision (b).” (*People v. Cardenas*, at p. 61.)

The section 11370.2 enhancement was also specifically pleaded as part of the third prior conviction allegation. The only factual predicate required for its application is a prior felony conviction for violating section 11351. (§ 11370.2, subd. (a).) By admitting the prior conviction, defendant necessarily admitted the sole fact needed to trigger the enhancement. Over and above the notice afforded by the complaint itself, and the trial court’s oral advisements about the penal consequences of defendant’s intended admission, the court was not required to further explain the nature or substantive effect of that admission.<sup>4</sup>

Defendant relies on *People v. Epperson* (1985) 168 Cal.App.3d 856 (*Epperson*) and *People v. Lopez* (1985) 163 Cal.App.3d 946 (*Lopez*). Neither case is persuasive on the record before us.

In *Epperson*, the defendant admitted two prior felony convictions before trial. As in this case, the prior conviction allegations specifically alleged that the defendant had served a separate prison term for each offense and that he had not remained free of prison custody or a felony conviction for five years. (*Epperson, supra*, 168 Cal.App.3d at p. 864.) Following his conviction for receiving stolen property, the trial court imposed enhancements for each of the prior felonies under Penal Code section 667.5, subdivision (b). (*Id.* at pp. 858–859.) On appeal, the People conceded that, contrary to the prior felony allegation, the defendant had in fact satisfied the five-year “washout” requirement in Penal Code section 667.5, subdivision (b), and that the appellate court should therefore strike the two years added for the priors. (*Id.* at pp. 863, 865.) The court complied. (*Id.* at p. 865.) Although the appellate court also opined that the

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<sup>4</sup> Defendant makes no contention in this case that he was not adequately advised of the procedural and constitutional rights he was waiving by admitting the prior conviction instead of proceeding to trial on it.

defendant had not admitted anything beyond the fact of his prior convictions (*id.* at pp. 859, 864–865), we do not find that portion of the opinion persuasive. First, the observation was superfluous in light of the People’s concession that the enhancements were improper and must be stricken.<sup>5</sup> Second, the Court of Appeal in *Epperson* failed to discuss or distinguish such earlier cases as *People v. Welge* and *People v. Ebner* (1966) 64 Cal.2d 297, 303, holding that a defendant’s admission of a prior felony conviction extends to all allegations concerning the felony contained in the information. (See also, *People v. Richard* (1987) 189 Cal.App.3d 1159, 1162 [defendant’s admissions of prior convictions extended to all allegations concerning the prior convictions contained in the information].) In our view, *Epperson* is not persuasive support for a rule requiring the defendant to assent on the record to each sentence of a prior conviction allegation when, as in this case, the allegation itself is drafted with specificity and the defendant is put on notice of the potential penal consequences of admitting it.

*Lopez* is also distinguishable. In that case, the Court of Appeal upheld the trial court’s order striking two prior serious felony allegations in the complaint, which the defendant had admitted. (*Lopez, supra*, 163 Cal.App.3d at pp. 948, 951.) The allegations failed to specify, and the defendant was never asked to admit, that his burglary convictions were for *residential* burglaries which would have qualified them as “ ‘serious felonies’ ” for purposes of Penal Code section 667, subdivision (a). (*Lopez*, at p. 950; cf.

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<sup>5</sup> According to defendant, the record in this case also “suggests” that he might in fact have been free from prison custody for more than five years before he suffered his next felony conviction in March 2002. Far from conceding that claim, the People point out that, according to the probation report, defendant was “returned for parole violation[s]” several times during the five year period. Although defendant contends these periods of confinement do not constitute “prison custody” for purposes of Penal Code section 667.5 (see *In re Panos* (1981) 125 Cal.App.3d 1038, 1043), the record is not sufficient to draw any conclusions on that point. The probation report also suggests that defendant *committed* the new felony offense (for which he was convicted in March 2002) *within* five years of his release from prison custody for the third prior conviction. To the extent defendant is now claiming that he in fact qualified for the “washout” exception under Penal Code section 667.5, he has not met his burden of demonstrating error on the issue.

*People v. Thomas* (1986) 41 Cal.3d 837, 839 [admission of burglary conviction without express admission of its residential character sufficient to permit imposition of serious felony enhancement].) The record in *Lopez* also failed to disclose any notice to the defendant that by admitting his prior burglary convictions he was: (1) admitting that he served separate prison terms for these convictions for purposes of Penal Code section 667.5; and (2) exposing himself to potential sentence enhancements. (*Lopez*, at pp. 950, 951.) The notice issues relied upon by the *Lopez* court are not present in this case.

Moreover, *Epperson* and *Lopez* were both decided before the California Supreme Court's adoption of the "totality of the circumstances" test for determining the voluntariness of pleas. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1178–1179 (*Howard*) [adopting totality of the circumstances test for evaluating the voluntariness of pleas]; *People v. Mosby* (2004) 33 Cal.4th 353, 359–361 (*Mosby*) [applying *Howard* standard to evaluate the voluntariness of prior conviction admission].) The continuing relevance of these earlier cases is questionable in light of *Howard* and *Mosby*.

The record in this case establishes that the third prior conviction allegation against defendant was drafted with specificity and that defendant was warned in plain terms of the potential penal consequences of admitting it. We find, under the totality of the circumstances, that defendant voluntarily and intelligently admitted his third prior conviction, along with the factual predicates required for that conviction to trigger sentence enhancements under section 11370.2, subdivision (a) and Penal Code section 667.5, subdivision (b).

### ***B. Custody Credits***

When defendant was sentenced to state prison, the trial court gave him custody credits for the period from his arrest on May 15, 2003 to September 2, 2003, the date he was sentenced under the negotiated disposition of case Nos. 145332A and S473495. The court also credited him for his custody from his second arrest on April 27, 2004 to August 16, 2004, the date he was remanded to state prison in case No. 145332A. Defendant contends that he was also entitled to credits for the county jail time he served

from September 2, 2003 to January 12, 2004, under the modified probation terms he agreed to in case No. S473495.<sup>6</sup> According to defendant, he is entitled to credit for the September–January period of incarceration because it was imposed based solely on the conduct for which he was eventually sentenced to state prison—the section 11352 offense he committed on May 15, 2003. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 30 [persons sentenced to prison for criminal conduct entitled to credit for all actual days of confinement solely attributable to the same conduct].)

Penal Code section 2900.5, subdivision (b) requires a defendant to be given credit for any time spent in confinement before sentencing “where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” The courts have construed this language to mean that the defendant bears the burden of showing that the presentence confinement claimed as a credit would not have occurred but for the same conduct for which the defendant is being sentenced. (See *In re Joyner* (1989) 48 Cal.3d 487, 489.)

The issues raised by defendant may be stated as follows: “(1) Would [defendant] have been at liberty [from September 2, 2003 to January 12, 2004] absent his [county jail term] being attributable to proceedings related to the same conduct for which he was subsequently sentenced? If so, presentence credits are applicable. (2) Conversely, would [defendant] have been [incarcerated during that period] on grounds having nothing to do with the proceedings relating to the same conduct for which he was subsequently so sentenced, [e.g.], for violating some other condition of probation? If so, such presentence credits are inapplicable.” (*People v. Williams* (1992) 10 Cal.App.4th 827, 832–833.)

The limited record available appears to support a “Yes” answer to the first question and a “No” answer to the second. We find no suggestion in the record

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<sup>6</sup> Defendant acknowledges that the only evidence in the appellate record of the date on which he was released from county jail is contained in a letter he wrote to the court some time before his release. If defendant is found to be entitled to custody credits for this period of incarceration, the date of his release from county jail must be determined on remand.

pertaining to the negotiated joint disposition of case Nos. 145332A and S473495 that defendant was charged with violating his probation on any ground other than the section 11352 offense with which he was charged in case No. 145332A. Furthermore, the People have not asserted that any such additional ground existed, and have not disputed defendant's contention that his section 11352 offense was the only basis for the proceedings to revoke his probation in case No. S473495. However, we do not have the record in the probation violation proceeding before us. It is possible that some other ground independent of defendant's May 15, 2003 offense was asserted in that proceeding (or that some other basis existed, such as a "hold" in an unrelated matter) that might have resulted in defendant being incarcerated during part or all of the September–January period. If so, then defendant will have the burden of proving that he would have been free during the period for which he seeks custody credits, but for the conduct to which he pleaded no contest in case No. 145332A. (See *People v. Bruner* (1995) 9 Cal.4th 1178, 1191–1195.)

The People's argument that defendant is not entitled to custody credit because he was incarcerated in case No. S473495 rather than case No. 145332A during the relevant time period simply ignores *People v. Bruner* and other controlling authority. The focus under the case law is on the conduct causing the defendant to be incarcerated, not the case or proceeding in which the decision to incarcerate him is rendered. (*People v. Bruner, supra*, 9 Cal.4th at pp. 1191–1192.)

This court has discretion to reject defendant's custody credit argument due to his failure to assemble an adequate appellate record. We opt not to do so in this case in light of the People's implicit concession that the factual basis for it is true. Instead, we remand the matter back to the trial court with instructions to confirm that the sole basis for the 2003 revocation proceedings in case No. S473495 was the conduct that occurred on May 15, 2003. If that fact is confirmed (and there is no evidence of other holds in effect during defendant's September–January county jail confinement) then defendant should be granted additional custody and good behavior credits earned for the period from September 2, 2003 until the actual date of his release, either on January 12, 2004 or such

other date as the court may determine from the records. If the record discloses another possible cause, independent of the conduct for which he was arrested on May 15, 2003, for which defendant would have been incarcerated during that period, then he should be given an opportunity to establish that the May 15 conduct was in fact the sole cause of his incarceration.

### **III. DISPOSITION**

The case is remanded back to the trial court for: (1) a determination of the custody credits, if any, to which defendant is entitled for the period of his confinement in county jail from September 2, 2003 in case No. S473495 in accordance with the views expressed herein; and (2) amendment of the abstract of judgment if additional credits are determined to be warranted. In all other respects, the judgment is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.