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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.
JOHN ALLEN CANCELLA,
Defendant and Appellant.

A105301
(Marin County
Super. Ct. No. SC109357)

John Allen Cancilla appeals the sentence imposed following his guilty plea to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and admission of two prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).) He contends the Marin County Superior Court lacked jurisdiction to sentence him because it failed to execute sentence within 60 days after it was notified that he had been committed to prison for another offense in Contra Costa County.

BACKGROUND

In December 1999, the Marin County Superior Court imposed a five-year prison sentence after appellant pled guilty to one count of methamphetamine possession and admitted two prior prison term enhancement allegations. The sentence was comprised of the upper term of three years for the drug offense, and consecutive one-year terms for each prior prison term enhancement. The court stayed execution of the sentence and placed appellant on probation for five years.

On August 26, 2003, the Marin County District Attorney petitioned to revoke appellant's probation, based on his July 23, 2003 conviction in Contra Costa County of

reckless driving while fleeing a peace officer. (Veh. Code, § 2800.2, subd. (a).)
Arraignment on the petition was set for September 22, 2003.

On September 12, 2003, pursuant to Penal Code section 1203.2a, Lonnie Morris, a Marin County Deputy Probation Officer, notified Marin County Superior Court Judge John S. Graham, the Marin County District Attorney, and Deputy Public Defender Gaile O'Connor by written memorandum that appellant received a 28-month prison sentence for the Contra Costa County conviction, and that on July 29, 2003, he was "housed" at San Quentin.¹ The memorandum referred to a hearing scheduled for September 19, 2003, but it did not identify the purpose of the hearing.

¹ The Contra Costa County sentence of the 16-month mitigated term, for the reckless driving conviction and a one-year enhancement for a prior prison term.

Penal Code section 1203.2a states, in relevant part: "If any defendant who has been released on probation is committed to a prison in this state . . . for another offense, the court which released him . . . on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he . . . was granted probation, in the absence of the defendant, on the request of the defendant made through his . . . counsel, or by himself . . . in writing

"The probation officer may, upon learning of the defendant's imprisonment, and must within 30 days after being notified in writing by the defendant or his . . . counsel, or the warden or duly authorized representative of the prison in which the defendant is confined, report such commitment to the court which released him . . . on probation.

"Upon being informed by the probation officer of the defendant's confinement . . . the court shall issue its commitment if sentence has previously been imposed. If sentence has not been previously imposed and if the defendant has requested the court through counsel or in writing in the manner herein provided to impose sentence in the case in which he . . . was released on probation[,] in his . . . absence and without the presence of counsel to represent him . . . the court shall impose sentence and issue its commitment or shall make other final order terminating its jurisdiction over the defendant in the case in which the order of probation was made. If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement. If the case is one in which sentence has not previously been imposed, the court is deprived of jurisdiction over defendant if it does not impose sentence and issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 30 days after defendant has, in the manner prescribed by this section, requested imposition of sentence.

Deputy District Attorney Al Charmatz, Deputy Public Defender O'Connor, and Deputy Probation Officer Patricia Bonelli appeared before Judge Graham at the September 19 hearing.² Appellant was not present; according to Deputy Public Defender O'Connor, he was in San Quentin. The September 19 hearing was characterized in its minutes as a "status report." None of the participants articulated the purpose of this hearing, but, given their comments, it was inferentially to set a date for a probation revocation hearing, for execution of the Marin County sentence imposed in December 1999, and for a determination of the interplay of the Marin County and Contra Costa County sentences. Probation Officer Bonelli stated the probation department wanted appellant "brought over" from San Quentin "so we can do a resentencing," but she needed to obtain the Contra Costa County abstract of judgment to "know which is going to be the principal term." The court noted its preference for "do[ing] it all at once." Deputy Public Defender O'Connor noted that "we'll need to get a transportation order. I think the district attorney has a way of doing that." O'Connor and Deputy District Attorney Charmatz informed the court that "they" (presumably San Quentin officials) "want" two or three weeks "to make the arrangements." The court set a hearing date for October 17.

On September 22, the date set for arraignment on the probation revocation, both counsel appeared, but appellant was not present. The "bench warrant [was] to remain

"Upon imposition of sentence hereunder the commitment shall be dated as of the date upon which probation was granted. If the defendant is then in a state prison for an offense committed subsequent to the one upon which he . . . has been on probation, the term of imprisonment of such defendant under a commitment issued hereunder shall commence upon the date which defendant was delivered to prison under commitment for his . . . subsequent offense. Any terms ordered to be served consecutively shall be served as otherwise provided by law.

"In the event the probation officer fails to report such commitment to the court or the court fails to impose sentence as herein provided, the court shall be deprived thereafter of all jurisdiction it may have retained in the granting of probation in said case."

outstanding,” the “matter to remain as set” for October 17, and “matter ordered off calendar.”

On September 25 an order, prepared by Deputy District Attorney Charmatz and signed by Judge Terrence R. Boren, was filed for appellant’s release and transportation to the Marin County Superior Court for his appearance on October 17 regarding “Charges pending against [appellant], Petition to Revoke Probation.” The order directed the Marin County sheriff to accept appellant from the California Correctional Center in Susanville, and directed the California Correctional Center, “or any other CDC Institution at which the defendant may have been placed,” to deliver appellant to the custody of the Marin County Sheriff.

At the October 17 hearing, Deputy District Attorney Charmatz informed the court that appellant was not present because, for unknown reasons, he was “picked up by Contra Costa before we could get him.” The following colloquy ensued:

“THE COURT: So what am I going to do here? We’re going to get another transportation order once we figure out where he is?”

“MR. CHARMATZ: Yes.

“THE COURT: So I just take this off calendar now?

“MR. CHARMATZ: We’ll track him and make sure we find out when he gets back to state prison.

“THE COURT: I could revoke his probation and put out a warrant. Why don’t I do that.

“MR. CHARMATZ: Fine.

“MS. O’CONNOR: Didn’t that already happen?

“THE COURT: I don’t know. Do we have an active warrant in this case?

“MS. O’CONNOR: I think there is one.

“THE COURT: We do have. Thank you.

“MS. O’CONNOR: So it’s off calendar?”

² Judge Graham presided over this hearing and all subsequent hearings pertinent to this

“THE COURT: Yes, taking it off calendar.”

Appellant was in court on December 30, 2003 at a hearing identified by the minutes as “appr [appearance] bench warrant: FTA.” At that hearing his attorney contended that, pursuant to Penal Code section 1203.2a, the court had lost jurisdiction to sentence him because more than 60 days had elapsed since the probation department’s September 12, 2003 memorandum notifying the court that appellant was serving a term at the Department of Corrections for his July 2003 Contra Costa conviction. The court continued the hearing to January 2, 2004, to permit the district attorney and the probation department to look into the matter.

At the January 2, 2004 hearing Deputy District Attorney Charmatz did not address the application of Penal Code section 1203.2a to the instant case. He argued, in substance, that appellant’s attorney had not demanded that appellant be sentenced within a certain amount of time, but had agreed that resentencing should not take place until the Marin County personnel (counsel, probation department, court) obtained all relevant information on the Contra Costa County conviction and appellant could be present in court.

The court concluded it had not lost jurisdiction over appellant. It observed that when it received the “timely” notice from the Probation Department that appellant was in custody, it “timely” contacted appellant’s attorney and arranged for appellant’s attorney to take “whatever steps necessary to communicate with [appellant] and find out what his wish was in the circumstances; and that’s what we’ve been doing, and that’s what’s consumed the time. . . .” It then lifted the execution of the suspended sentence for the 1999 Marin County conviction and imposed a total prison sentence of five years, eight months: the five year sentence originally imposed for the Marin County conviction, plus a consecutive eight months (one-third the midterm) for the 2003 Contra Costa County conviction.

appeal.

DISCUSSION

Appellant reiterates his contention that the court was without jurisdiction to execute the 1999 Marin County sentence because it failed to do so within 60 days of being informed of his prison commitment on the Contra Costa County offense.

“[Penal Code] section 1203.2a³ provides for 3 distinct jurisdictional clocks: (1) the probation officer has 30 days from the receipt of written notice of defendant’s subsequent commitment within which to notify the probation-granting court (2d par.); (2) the court has 30 days from the receipt of a valid, formal request from defendant within which to impose sentence, if sentence has not previously been imposed (3d par., 4th sentence); and (3) the court has 60 days from the receipt of notice of the confinement to order execution of sentence (or make other final order) if sentence has previously been imposed (3d par., 3d sentence). Failure to comply with any one of these three time limits divests the court of any remaining jurisdiction. (5th par.)” (*In re Hoddinott* (1996) 12 Cal.4th 992, 999.) The parties agree that the third “jurisdictional clock” is at issue in this case.

The probation department informed the Marin County Superior Court on September 12, 2003, that appellant had been committed to San Quentin for the Contra Costa County offense. Thus, under section 1203.2a, that court had until November 11, 2003, to execute the sentence it imposed in December 1999, or to make some other final order terminating its jurisdiction over appellant. (*Hoddinott, supra*, 12 Cal.4th at p. 999; see also fn. 1, *ante*.) It did not issue its commitment until January 2, 2004, 52 days beyond the final day for doing so.

Respondent contends the court retained jurisdiction over appellant because he waived his right to have the court issue its commitment order within 60 days of the date the court was informed of his prison commitment on the Contra Costa County conviction. Respondent refers specifically to the October 17, 2003 hearing, at which appellant was not present because he had been inexplicably returned to Contra Costa County. Respondent asserts that insofar as appellant’s attorney made no comment or objection to

³ All further section references are to the Penal Code.

the court taking the matter off calendar, she “consented” that the matter could be continued beyond the 60-day limitation that would expire November 11, 2003.

We disagree. Nothing on the record implies a true waiver, i.e., the intentional relinquishment of a known right. (*People v. Williams* (1999) 21 Cal.4th 335, 340, fn. 1.) Not only is there no basis to infer that appellant was aware of the right to which he was entitled under section 1203.2a, appellant himself had not yet made a court appearance in the instant matter as of the October 17 hearing. Therefore, he had never been presented the opportunity to waive his sentencing rights under section 1203.2a.

Even assuming, without deciding, that appellant’s attorney could make such a waiver on his behalf, the actions of appellant’s attorney at the October 17 hearing cannot reasonably be construed as intentionally giving up appellant’s right to a commitment on the Marin County conviction within 60 days of the court’s receiving the information about his commitment on his Contra Costa County conviction. When the court learned at the October 17 hearing that appellant was not present because he had been returned to Contra Costa County, it announced it was taking the matter off calendar and proposed summarily revoking his probation and issuing a warrant. The only response of appellant’s attorney was to remind the court that it had already issued a warrant and to then ask, “So it’s off calendar?” This response, and the absence of any comment by appellant’s attorney regarding the 60-day statutory limit, were not tantamount to an agreement that the matter could be continued beyond the 60-day limitation, or inconsistent with an intent to enforce appellant’s rights under section 1203.2a. On the contrary, insofar as there remained nearly four weeks until the expiration of the 60-day period, and appellant’s whereabouts were both apparently known to the district attorney and not geographically distant, appellant’s attorney could quite plausibly expect that the matter would be put back on calendar before the November 11 expiration date.

Section 1203.2a states unambiguously that when a court releases a defendant on probation, and that defendant is subsequently committed to prison for another offense, “If the [earlier] case is one in which sentence has previously been imposed, the court [that granted probation] *shall be deprived* of jurisdiction over defendant if it does not issue its

commitment or make other final order terminating its jurisdiction over defendant in the [earlier] case within 60 days after being notified of the [later] confinement.” (Italics added.) Because the court here did not order execution of appellant’s 1999 Marin County sentence (or make some other final order) by November 11, 2003, 60 days after it was notified of his confinement for his 2003 Contra Costa County conviction, it was divested of its jurisdiction to do so on January 2, 2004.

Given this conclusion, we need not address appellant’s contention that his upper term sentence for the methamphetamine conviction violated *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531].

DISPOSITION

The sentence imposed in Marin County case number SC-109357A is vacated. The matter is remanded with directions to prepare and forward to the Department of Corrections a corrected abstract of judgment reinstating the sentence imposed on July 23, 2003, in Contra Costa County case number 5-030748-8.

Jones, P.J.

We concur:

Stevens, J.

Simons, J.