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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.  
MARVIN HEARNE,  
Defendant and Appellant.

A103935  
(Solano County  
Super. Ct. No. VCR158002)

The trial court denied defendant's request for an award of presentence custody credits following revocation of his probation and execution of his previously imposed but suspended five-year state prison term. We conclude that defendant's prior waiver of credits did not include any future time spent in presentence custody, and direct the trial court to modify the judgment.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Pursuant to a negotiated disposition, defendant entered a guilty plea to one count of sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) on February 20, 2002.<sup>1</sup> After defendant was accepted at the Genesis House residential drug and alcohol treatment program, a five-year state prison term was imposed and suspended by the trial court on August 6, 2002. In accordance with the recommendation of the

<sup>1</sup> In light of defendant's plea and the nature of the issue presented in this appeal we need not discuss the facts that support the underlying conviction.

probation department, defendant was placed on probation for a period of five years upon the condition, among others, that he successfully complete the Genesis House residential treatment program. The probation report also recommended that as a condition of probation defendant “shall waive all credits,” and mentioned that he expressed a willingness to accept the credit waiver to attend a Category I residential treatment program.

At the sentencing hearing, defense counsel asked if the recommended waiver of credits included the time spent in Genesis House. The court explained that the waiver was interpreted “to mean past, present and future credits.” Defendant indicated that he understood his waiver encompassed “all” credits, and if he failed to successfully complete the Genesis House program he would be sentenced “without any credits.” The court then advised defendant that “[If] you’re violated on your probation, if you leave Genesis House, then you’ll serve five years and you won’t have any credit for all this time you’ve been in custody or the program. The court then stated that the probation order will indicate defendant “has waived all his credits, even past, present and future credits.”

Within a week of his entry into the Genesis House program on January 9, 2003, defendant was discharged for refusal to comply with program policies. He also failed to maintain contact with his probation officer after “absconding from the program.” On March 4, 2003, defendant’s probation was revoked and a bench warrant was issued for his arrest. He was arrested on April 26, 2003, and placed in custody.

At a probation revocation hearing on June 3, 2003, defendant admitted a violation of his probation. He subsequently filed a motion for presentence custody credits on the ground that he was not informed that his prior waiver “would apply to any future prison term.” Following a hearing on August 26, 2003, the motion was denied. On August 29, 2003, the suspended five-year upper term was executed, with no custody credits granted to defendant. This appeal followed.

## DISCUSSION

The sole argument made by defendant in this appeal is that he is entitled to “pre-sentence credit for the time he spent in custody after his arrest for violating his probation.” Defendant acknowledges his waiver of custody credits as a condition of his plea, but complains that the denial of credit for time “spent in custody between re-arrest and sentencing exceeds the scope of the waiver” entered when he was placed on probation. He claims that his waiver must be “limited to his accumulated pre-sentence credit and any time spent in Genesis House,” and cannot extend to any other “future credit.”

Absent a waiver, defendant was entitled to sentence credits upon revocation of his probation and imposition of a state prison term. “Under section 2900.5, a defendant sentenced either to county jail or to state prison is entitled to credit against the term of imprisonment for days spent in custody before sentencing as well as those served after sentencing as a condition of probation.” (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053.) However, “a defendant may expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody.” (*People v. Johnson, supra*, at pp. 1054-1055; see also *People v. Tran* (2000) 78 Cal.App.4th 383, 387-388.) “Because defendants may waive statutory provisions intended for their benefit, they may give up their right to section 2900.5 custody credits. [Citation.] Therefore, ‘a trial court has discretion to condition a grant or extension of probation upon a defendant’s express waiver of past and future custody credits’ [citation], as long as the defendant’s waiver is ‘knowing and intelligent’ in the sense that it was made with awareness of its consequences.” (*People v. Thurman* (2005) 125 Cal.App.4th 1453, 1460.) Defendant’s challenge to his waiver of presentence credits raises two interrelated issues that are determinative of the validity and extent of a waiver of rights—in this case, to sentence credits—upon entry of a plea: the voluntariness of the waiver, and the scope of the rights relinquished by the plea bargain.

“As with the waiver of any significant right by a criminal defendant, a defendant’s waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and

intelligent.” (*People v. Johnson, supra*, 28 Cal.4th 1050, 1055; see also *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.) “The gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled under section 2900.5.” (*People v. Arnold* (2004) 33 Cal.4th 294, 308.) “[B]efore a defendant agrees to waive custody credit to which he is entitled, he should understand the full consequences of the waiver.” (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922-1923.) “An awareness of the [full] consequences of waiving any right should include an understanding of the impact of that waiver on the amount of time a defendant may be incarcerated.” (*Id.* at p. 1922.) “There is no specific formula for advising a defendant of his or her rights, and none is required as long as the record, in light of the totality of circumstances, ‘shows by direct evidence that the accused was fully aware of his rights.’ [Citations.]” (*People v. Murillo* (1995) 39 Cal.App.4th 1298, 1304.) And even in the absence of a specific admonition on the record, a waiver of rights pursuant to a plea is not invalidated if the record otherwise shows, from the totality of circumstances, that it was voluntary and intelligent. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175; *People v. Salazar, supra*, at p. 1554, fn. 1.) “The voluntariness of a waiver is a question of law which appellate courts review de novo.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

A waiver of the right to credits upon imposition of sentence also cannot contravene the terms of the plea bargain. (*People v. Harris* (1987) 195 Cal.App.3d 717, 720-721.) “ ‘ ‘ ‘ A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound.’ ” ’ (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 911 [20 Cal.Rptr.2d 311].)” (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533.) “ ‘While no bargain or agreement can divest the court of the sentencing discretion it inherently possesses [citation], a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. . . .’ [Citation.]” (*People v. Cunningham* (1996) 49 Cal.App.4th 1044, 1047.) “ ‘When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms

of the agreement. The punishment may not significantly exceed that which the parties agreed upon.’ [Citation.] It is well settled that a disposition harsher than that agreed to by the court or the prosecution may not be imposed on a defendant.” (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 639; see also *People v. Masloski* (2001) 25 Cal.4th 1212, 1216-1217; *People v. Delgado* (1993) 16 Cal.App.4th 551, 554.) “Accordingly, ‘[w]hen either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made.’ ” (*People v. Collins* (1996) 45 Cal.App.4th 849, 863, quoting *People v. Collins* (1978) 21 Cal.3d 208, 214.) “Failure of the state to honor the agreement violates the defendant’s due process rights for which the defendant is entitled to some remedy.” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 636; see also *People v. Campbell* (1994) 21 Cal.App.4th 825, 829.)

Using the paradigm of contract law, a waiver of rights must be analyzed in terms of the reasonable expectations of the parties. (*People v. Kelly* (1994) 22 Cal.App.4th 533, 536; *People v. Nguyen* (1993) 13 Cal.App.4th 114, 120.) “[T]he scope of the waiver is approached like a question of contract interpretation—to what did the parties expressly or by reasonable implication agree?” (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.) “ ‘The court should accord an interpretation which is reasonable (Civ. Code, § 1643) and which gives effect to the intent of the parties as it may be interpreted from their entire agreement . . . .’ ” (*People v. Haney* (1989) 207 Cal.App.3d 1034, 1038-1039, citation omitted.) The crucial inquiry is whether the ultimate sentence imposed “involves a bargained-for provision related to the plea agreement or a judicially imposed, unrelated, unbargained-for term.” (*People v. Casillas* (1997) 60 Cal.App.4th 445, 453.)

We find that the waiver of credits by defendant was not knowing and voluntary, to the extent that it covered the days of time served between his arrest for probation violation and sentencing. Defendant was given notice in the probation report of the condition that he waive “all” sentence credits, without further explanation or specification. At the sentencing hearing on August 6, 2002, defense counsel specifically inquired if defendant’s credit waiver included “the time he’s spent in Genesis House.” The court responded that the waiver as recommended in the probation report

encompassed all “past, present and future credits.” Defense counsel then explicitly warned defendant that if he failed to complete the Genesis House program he would be sentenced without any credits. Defendant expressed that he understood the trial court’s admonition and was willing to waive all of his past, present and future credits to avoid a state prison term—which would have otherwise been reduced by his custody credits—and receive the benefits of a grant of probation. But the court then appeared to limit the broad scope of the waiver when it admonished defendant that if he violated probation and left the Genesis House, “you’ll serve the five years and you won’t have any credit *for all this time you’ve been in custody or the program.*” (Italics added.)

We have no quarrel with the principle that sentence credits may be properly waived for presentence time served following an arrest for a probation violation, if the defendant receives a proper admonition. (*People v. Arnold, supra*, 33 Cal.4th 294, 309.) When a defendant knowingly and voluntarily waives all custody credits, “the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed.” (*People v. Jeffrey* (2004) 33 Cal.4th 312, 315; see also *People v. Arnold, supra*, at p. 298.) “A defendant entering a straightforward and unconditional waiver of section 2900.5 credits has no reason to believe that the waiver is anything other than a waiver of such credits for all purposes.” (*People v. Arnold, supra*, at p. 309.) Here, however, the mention of the loss of all of defendant’s “future” credits was specifically limited by the court to “*all this time you’ve been in custody or the program,*” not any possible custody of unknown and indefinite duration after arrest for probation violation upon his failure to complete the residential treatment program. As we read the record in view of this limitation, the waiver of credits included all of his prior time served and any future time spent in the residential treatment program, but not any entirely uncertain and contingent post-arrest time served.<sup>2</sup>

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<sup>2</sup> That, in fact, was the extent of the credit waiver indicated in the supplemental probation report after defendant was arrested for the probation violation.

We therefore conclude that defendant did not knowingly and voluntarily waive credit for time served after his arrest for violation of probation. The case is remanded to the trial court with directions to amend the abstract of judgment to grant defendant credit for time served from the date of his arrest for violation of his probation until the date of sentencing.

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Swagger, J.

We concur:

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Marchiano, P. J.

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Margulies, J.