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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

[REDACTED],

Defendant and Appellant.

[REDACTED]

(Mendocino County
Superior Court
Nos.

[REDACTED]
: [REDACTED]
[REDACTED])

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the
Superior Court of the State of California
for Mendocino County

[REDACTED] Judge

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Nos. [REDACTED]
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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an appeal following a finding of a violation of probation and order executing a previously-suspended state prison sentence, which challenges the denial of presentence custody credits. The appeal is authorized by Penal Code section 1237, subdivision (b) as an appeal from a post-judgment order affecting the substantial rights of the parties, and by Penal Code section 1237.1, where the claim to additional credits was presented to and denied by the superior court.

STATEMENT OF THE CASE

██████████ entered a guilty plea to a count of first degree robbery on September 2, 2010. (CT 16, 21.) On October 8, 2010, imposition of sentence was suspended and she was placed on three years probation, with numerous conditions. (CT 66, 74-79.) One of those conditions was that she enroll in and complete a residential treatment program as directed by the probation department. (CT 74-79.) Another condition was that she serve 180 days in county jail, with day for day credit against that time for time served in a residential program. (CT 66.) The court order releasing her to the Friendship House treatment program stated that she would receive day-for-day credit only upon successful completion of the program. (CT 80.)

A first violation of probation petition was filed on November 10, 2010, alleging that ██████████ had failed to complete the program and her whereabouts were unknown. (CT 82.) Probation was summarily revoked and a bench warrant issued. (CT 83.)

██████████ was arraigned on an amended first violation of probation petition on March 23, 2018. (CT 87.) That petition included additional grounds of revocation related to her having absconded, and her subsequent arrest on the warrant in March, 2018. (*Ibid.*)

██████████ admitted the violation and was subsequently returned to probation. (CT 88, 89.) In returning her to probation, however, the court imposed the midterm sentence of four years on the underlying first degree robbery offense, execution of

sentence suspended. (CT 89.) She was ordered to serve additional county jail time, and probation continued on the same original terms and conditions. (*Ibid.*)

A second violation of probation petition was filed on July 31, 2018, alleging that [REDACTED] had been arrested on a charge of child endangerment, was found in possession of a controlled substance, possessed an open can of beer in her car, and refused to provide a saliva sample when requested by the police. (CT 131.) She admitted the violation, entered a plea in the new misdemeanor case, and was reinstated to probation on October 23, 2018. (CT 163, 165, 192.) As part of that negotiated disposition, she entered a “*Johnson*” waiver¹ of all of her previously-served custody credits, a total of 195 days. (CT 192, 204.) The order of probation revocation, reinstatement and modification listed the *Johnson* waiver, imposed a 90-day term in the county jail, and provided the option of day-for-day credit against that term for time spent in residential treatment upon successful completion [“The defendant enters a Johnson Waiver as to all previously served custody credits in this matter (195 actual days). The defendant is ordered to serve 90 days in county jail, with the option for day-for-day credit in residential treatment, upon successful completion”]. (CT 204.)

On July 17, 2019, the court found [REDACTED] in violation of probation based on her plea in a new case. (CT 217.) Prior to a global sentencing on her three active cases, the defense submitted a motion that she be awarded custody credits for the

¹ *People v. Johnson* (1978) 82 Cal.App.3d 183.

time spent in residential treatment, arguing that she had never entered a knowing and intelligent waiver of those credits. (CT 223.)

On September 5, 2019, probation was revoked and terminated, and the four year term ordered executed. (CT 256.) The court denied the request for residential treatment program credits, and determined that [REDACTED] was due credits of 127 actual days, and 19 good conduct days, for a total of 146 days presentence custody credits. (CT 256, 268.)

The defense renewed its request for an additional 71 days custody credit, and the matter was heard on September 30, 2019. (CT 261; Minute Order of 9-30-19.) The court denied the request. (M.O. 9-30-19.) A timely notice of appeal from the denial was filed on October 7, 2019. (CT 275.)

STATEMENT OF FACTS

On October 23, 2018, the court granted [REDACTED] the opportunity to return to probation. (RT16, pp. 281-284.)² But the court required that,

“in order to continue on probation, you need to enter what’s called a Johnson waiver, and I am going to require that you waive, if you wish to avail yourself of this opportunity, all of your previous custody credits. That is, 195 actual days that you served in county jail would need to be waived in order to reinstate you on probation. Are you willing to do so?” (RT16, p.283.)

² The Reporter’s Transcript lists volume numbers for each day of proceedings recorded, but is separated into only two bound volumes. Volume No. 1 contains volumes 1 – 15, and Volume No. 16 contains volumes 16 – 28.

██████████ agreed, and the court stated it would “reinstate probation. Having taken a *Johnson* waiver, will order that she serve 90 days in the county jail with early release to residential treatment. Day-for-day credit against the 90 days upon successful completion.” (*Ibid.*) At the conclusion of that hearing, the court further stated,

“She’s gotten a 90-day sentence in her felony case with probation having the authority to release her directly to an approved driver directly to a residential treatment program. She’ll receive day-for-day credit in her residential program against the 90-day sentence when she successfully completes her program.” (RT16, p. 287.)

At the hearing on the defense motion for residential treatment program custody credits (CT 223, 261), the court noted that there was no dispute that ██████████ did not successfully complete a residential treatment program. (RT16, p. 416.) The court reviewed the transcript of the October 23, 2018, reinstatement of probation and *Johnson* waiver, and denied the motion:

“I think it’s clear that Judge Mayfield wanted you to be successful on probation, Ms. ██████████. Of course, everyone wants you to be successful on probation.

And that you were to get a benefit against the 90-day sentence only if you successfully completed that residential treatment program.

And the record is clear that you didn’t complete that program. So I’m not going to grant those custody credits based on Judge Mayfield’s order...” (RT16, p. 417.)

ARGUMENT

I. THE TRIAL COURT WAS WITHOUT AUTHORITY TO DENY RESIDENTIAL TREATMENT PROGRAM CREDITS IN THE ABSENCE OF A KNOWING AND INTELLIGENT WAIVER BY APPELLANT

A. The Waiver of Presentence Custody Credits Must be Knowingly and Intelligently Entered with an Awareness of its Consequences.

A waiver of a right or privilege must be knowing, intelligent and voluntary. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242-243; *In re Tahl* (1969) 1 Cal.3d 122, 131.) A “knowing and intelligent” waiver of a right is one entered into with an awareness of its consequences. (*People v. Harris* (1987) 195 Cal.App.3d 717, 725, disapproved on another point in *People v. Arnold* (2004) 33 Cal.4th 294, 308.) While a defendant is free to waive her rights and other entitlements under the law, for that waiver to be enforceable, the defendant must understand the right or privilege and the consequences of abandoning it, and agree to voluntarily relinquish it. (*People v. Collins* (2001) 26 Cal.4th 297, 305 [discussing requirements for the waiver of constitutional rights]; *People v. Howard* (1992) 1 Cal.4th 1132, 1174-1179 [as to the waiver of constitutional rights, “we emphasize that explicit admonitions and waivers are still required in this state”].)

A plea or admission is valid “if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.” (*Howard, supra*, 1 Cal.4th at 1175.) As to the waiver of custody credits, the test is “whether the defendant understood he was relinquishing or giving up custody credits to

which he was otherwise entitled under Penal Code section 2900.5.”³ (*Arnold, supra*, 33 Cal.4th at 308; *People v. Burks* (1998) 66 Cal.App.4th 232, 236, fn. 3.) “An awareness of the 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. [Citations.]” (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922.)

Section 2900.5, subdivision (a), entitles a defendant to credit for time spent in a residential treatment program:

In all felony ... convictions ... when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, ... rehabilitation facility, ... or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, ... shall be credited upon his or her term of imprisonment.

(§ 2900.5, subd. (a).)

Subdivision (f) of section 2900.5 specifically declares that time spent in residential treatment facilities qualifies as presentence jail time for which credit is accrued. (*People v. Jeffrey* (2004) 33 Cal.4th 312, 318.)

A defendant who knowingly waives earned or future credits in exchange for a grant of probation, or, more commonly, for reinstatement to probation following a finding of a violation, will be held to his or her waiver. (*Arnold, supra*, 33 Cal.4th at 309.) “A defendant entering a straightforward and unconditional waiver of section 2900.5 credits has no reason to believe that the

³ All future statutory references will be to the Penal Code.

waiver is anything other than a waiver of such credits for all purposes.” (*Ibid.*)

As to the form of the waiver, “[t]he better practice is for sentencing courts to expressly admonish defendants . . . that such waivers will apply to any future prison term” in the event probation is revoked. (*Arnold, supra*, 33 Cal.4th at p. 309.) But the absence of an explicit advisement will not invalidate a credits waiver “by which the defendant *is otherwise found to have knowingly and intelligently relinquished*” her right to such credits. (*Ibid.*)

In this case, the trial court abused its discretion when it denied section 2900.5 credits earned by ██████ based solely on the trial court’s previous statement that she would receive credit against her sentence “when she successfully completes her program.” (RT16, p. 287.) ██████ was never advised of her right to such credits, and, more importantly, never agreed to waive those credits. In the absence of a knowing and intelligent waiver, ██████ is entitled to the actual custody credits she earned while in residential treatment.

B. The Trial Court’s Statement and Order Permitting Her Release to a Program Was Not a Valid Substitute for a Knowing and Intelligent Waiver of Credits by Appellant, and May Not be Deemed an Implied Waiver of Those Credits.

The issue in this case is whether ██████ entered a knowing and intelligent waiver of her future residential treatment program credits where she was never specifically advised of her entitlement to those credits and agreed to waive them. Rather, at the time the court agreed to return her to

probation following a second violation, the court required her to enter a *Johnson* waiver as to all of her previously-accrued credits. (RT16, p. 283.) The court canvassed her as to the terms of that waiver:

Ms. [REDACTED], in order to continue on probation, you need to enter what's called a *Johnson* waiver, and I am going to require that you waive, if you wish to avail yourself of this opportunity, all of your previous custody credits. That is, 195 actual days that you served in county jail would need to be waived in order to reinstate you on probation. Are you willing to do so? (RT16, p. 283.)

[REDACTED] agreed and the court noted the waiver and imposed an additional 90 days in custody "with early release to residential treatment. Day-for-day credit against the 90 days upon successful completion." (*Ibid.*) At the conclusion of that hearing, the court reiterated that,

Yes. She's gotten a 90-day sentence in her felony case with probation having the authority to release her directly to an approved driver directly to a residential treatment program. She'll receive day-for-day credit in her residential program against the 90-day sentence when she successfully completes her program. (RT16, p. 287.)

At no time, however, did the court elicit a waiver of those residential treatment program credits from [REDACTED]. The original order of probation, the terms of which carried over to her subsequent grants, and which [REDACTED] signed attesting that she had read and agreed to the conditions contained therein, did not contain a credits waiver of any type. (CT 74-79.) Condition six of the original order imposed a 180-day county jail sentence, with credit for 50 actual days previously served. (CT 74.) Condition 43

of that order required that she “enroll in and successfully complete a residential treatment program as directed by your Probation Officer,” with no mention of any forfeiture of credit should she not complete such a program. (CT 78.)

No limitation on credits was discussed at the time [REDACTED] was originally placed on probation. (RT1 37-44.) The only mention of such a limitation found in the record is contained within the court’s order permitting her release to the Friendship House residential treatment program. (CT 80.) That order concluded “the defendant will remain at Friendship House program and upon successful completion only, the defendant will receive day for day credit towards [her] jail sentence.” (*Ibid.*) The order was signed by the court and filed on October 28, 2010, well after the October 8, 2010 sentencing date on which [REDACTED] was granted probation. There is no indication that [REDACTED] was ever advised of the limitation within that order, an order presumably directed to the probation department and county jail officials in charge of her custody and transport to the program.

Similarly, no such advisement was communicated to [REDACTED] at the time of the reinstatement to probation. There, the court specifically advised her of its requirement of the *Johnson* waiver of previously-accrued credits, to which [REDACTED] agreed. (RT16, p. 283.) But its subsequent statement that she would receive “day-for-day credit in her residential program against the 90-day sentence when she successfully completes her program” was not included within the terms of the *Johnson* waiver, and no explanation of what the court’s statement actually meant was

ever provided. (RT16, p. 287.) In the absence of such an explanation, it cannot be said that ██████ entered a knowing and voluntary waiver of her future residential treatment program credits. No waiver was ever taken from her, and the court's statement alone cannot be deemed to constitute a knowing and voluntary waiver of those future credits by ██████.

The failure of the court to advise ██████ of her right to credits for the time spent in residential treatment, and to then elicit a waiver of those credits, precludes a finding of a knowing and intelligent waiver. Even under a "totality of circumstances" approach, no valid waiver can be found. (See *Howard, supra*, 1 Cal.4th at 1175 [plea or admission valid if record affirmatively shows voluntary and intelligent under totality of circumstances].) The written terms of probation, which appellant signed, did not contain any advisement as to her entitlement to residential program credits and an advisement that she would waive them if she failed to successfully complete treatment. Without some sort of advisement and explanation from the court, no such understanding can be imputed to appellant, a first-time adult offender who had never before been subject to a court's orders and probation department requirements. (CT 39-40.)⁴

⁴ ██████ had been previously declared a ward of the juvenile court, placed on probation, and ordered into out-of-home placement. That wardship and probation were terminated in December, 2002, approximately eight years prior to the original grant of probation by the superior court in this case, her first adult conviction. (CT 39-40.)

This case is unlike the cases in which defendants have been found to have entered valid credit waivers. In *People v. Burks*, the court canvassed the defendant on the record as to his willingness to waive the credits he had accrued up to that date, and the defendant agreed. (*Burks, supra*, 66 Cal.App.4th at 236.) In *People v. Salazar* (1994) 29 Cal.App.4th 1550, the court found a knowing and intelligent waiver of credits based on the totality of circumstances, circumstances which included the court having advised the defendant that he would be waiving all but a portion of his earned credits “for all time and for all purposes.” (*Id.* at 1553-1555.)

Similarly, in *Ambrose*, the court, in order to reinstate probation, insisted on a waiver of all previously-accrued credit, *as well as any future credits* defendant would earn while awaiting transport to and while in a residential treatment program, and the defendant agreed. (*Ambrose, supra*, 7 Cal.App.4th at 1920, emphasis added.) In *People v. Jeffrey*, the court specifically advised the defendant at sentencing that in order to be granted probation, she would be required to waive all previously accrued and future credits earned while in a treatment program, asked whether she had discussed such a waiver with counsel, and both defendant and counsel stated their agreement to the waiver. (*Jeffrey, supra*, 33 Cal.4th at 319.)⁵ It is that type of on-the-record

⁵ The court in *Jeffrey* stated, “For me to place you in this program, Ms. Jeffrey, you’ll have to waive all credits you have accrued previously and credits you would be entitled to on a day-for-day basis for the time spent in the [drug treatment] program. ¶ Did you have a chance to discuss that with your attorney? ¶ Are

advisement that is lacking in this case, and which precludes a finding of a valid waiver of appellant's residential treatment program credits.

The denial of program credits by the trial court was an abuse of discretion where it found "that you were to get a benefit against the 90-day sentence only if you successfully completed that residential treatment program. And the record is clear that you didn't complete that program." (RT16, p. 417.) That finding, to the extent it included an implied finding that [REDACTED] understood she was waiving her right to future program credits, is not supported by the record.

"To determine whether a waiver is knowing and intelligent, the inquiry should begin and end with deciding whether the defendant understood [she] was giving up custody credits to which [she] was otherwise entitled." (*Burks, supra*, 66 Cal.App.4th at 236, fn. 3.) [REDACTED] cannot be "otherwise found to have knowingly and intelligently relinquished" her right to such credits where the court never advised her of her right to such credits, and never elicited a waiver of them. (*Arnold, supra*, 33 Cal.4th at p. 309.) The prior *Johnson* waiver was not sufficient to encompass an additional waiver of future program credits where no mention of those credits was ever made during the course of the waiver colloquy.

The fact that the court wanted [REDACTED] to successfully complete treatment, and that she ultimately did not – two facts

you willing to waive those credits? ¶ You join in the waiver, [defense counsel]? (33 Cal.4th at 319.)

on which the court heavily relied in denying her request for additional credits – has no bearing on whether she understood and agreed to waive her credits if she did not complete the program. Accordingly, the trial court’s finding that [REDACTED] had entered a valid credits waiver is not supported by substantial evidence, and thus was an abuse of discretion. She is entitled to the sought-after actual custody credits earned during her time in residential treatment.⁶

CONCLUSION

Because [REDACTED] never entered a knowing and intelligent waiver of the credits she earned while in residential treatment, she is entitled to have those credits applied against her current sentence. This Court should remand this case to the superior court with an order that it amend the abstract of judgment to reflect the actual custody credits earned during the time [REDACTED] spent in residential treatment.

Dated: May 1, 2020

Respectfully submitted,

JONATHAN SOGLIN
Executive Director

[REDACTED]
Staff Attorney

Attorneys for Appellant

⁶ Note that [REDACTED] is not entitled to, and does not seek, conduct credits for the time spent in residential treatment. (See *Ambrose*, *supra*, 7 Cal.App.4th at 1924.)

CERTIFICATE OF WORD COUNT

Counsel for [REDACTED] hereby certifies that this brief consists of **3509** words (excluding cover page information, tables, proof of service, signature blocks, and this certificate), according to the word count of the computer word-processing program. (Cal. Rules of Court, rule 8.360(b)(1).)

Dated: May 1, 2020

[REDACTED]
Staff Attorney

DECLARATION OF SERVICE BY MAIL, EMAIL, AND ELECTRONIC SERVICE BY TRUEFILING

Re: *People v.* [REDACTED]

Case No.: [REDACTED]

We, the undersigned, declare that we are over 18 years of age and not a party to the within cause. We are employed in the County of Alameda, State of California. Our business address is 475 Fourteenth Street, Suite 650, Oakland, CA, 94612. Our electronic service address is eservice@fdap.org. On May 1, 2020, we served a true copy of the **Appellant's Opening Brief** attached on each of the following, by placing same in an envelope(s) addressed as follows:

Mendocino County Superior Court
Attn: [REDACTED]
(appeals@mendocino.courts.ca.gov)
(Served by Email)

[REDACTED]
(Appellant)
(Served by Mail)

Each said envelope was sealed and the postage thereon fully prepaid. We are familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in Oakland, California, on that same day in the ordinary course of business.

On May 1, 2020, we transmitted a PDF version of this document by TrueFiling to the following:

Xavier Becerra, Attorney General
Office of the Attorney General
(sfagdocketing@doj.ca.gov)
(Respondent)

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[REDACTED]

Mendocino County District Attorney
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We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 1, 2020, at Oakland and El Cerrito, California.

/s/ Elizabeth Wilkie
Elizabeth Wilkie
Declarant for Postal Delivery

/s/ BL Palmer
BL Palmer
Declarant for TrueFiling
And Email