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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLEMANTT ARNOLD,

Defendant and Appellant.

C037898

(Super. Ct. No.
CM007751)

Defendant Clemantt Arnold pleaded no contest to possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) with the understanding he would initially be given probation. He waived credit for time served in county jail up to that point. The trial court granted probation and ordered defendant to serve a short jail term as a condition of probation. Defendant's probation was, however, later revoked, and the trial court imposed a two-year prison sentence. At sentencing, defendant claimed he was entitled to custody credits

for the initial period of presentence confinement, but the trial court declined to award him credit for that period.

On appeal, defendant claims his initial waiver of presentence custody credits was not a knowing and intelligent waiver of credit toward a future prison sentence. We agree and conclude that defendant is entitled to credit for the time waived. Accordingly, this matter must be remanded to the trial court to recalculate defendant's credits.

FACTS

On October 21, 1997, defendant pleaded no contest to possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) Defendant was representing himself at the time. The plea agreement specified that defendant would initially be given probation.

The plea form included the following waiver: "I WILL WAIVE ALL CREDITS FOR JAIL TIME SERVED THROUGH 10-21-97." At the plea canvass, the court reiterated that defendant was going to "waive all time credits through today," and defendant agreed. But there was no explicit reference, either in the plea form or at the canvass, to indicate that the waiver applied to the state *prison* sentence the court could impose if defendant violated probation (as opposed merely to a county jail term that would likely be imposed as a condition of probation).

At sentencing, defendant clarified that his credit waiver meant that he would have to serve any additional jail term the court imposed as a condition of probation. Pursuant to the plea agreement, the trial court suspended imposition of sentence,

placed defendant on probation for three years, and ordered him to serve 60 days in county jail.

In 1998, a petition was filed alleging defendant had violated probation. Defendant admitted violating probation, and the matter was set for a dispositional hearing. On June 14, 1999, the trial court agreed to reinstate probation subject to certain conditions, including defendant's *Johnson* waiver of 94 days' actual credit plus related custody credits. (*People v. Johnson* (1978) 82 Cal.App.3d 183.) The 94 days was based on time served *after* entry of the initial plea, from October 22, 1997, to date. The court made sure defendant understood what a *Johnson* waiver was, explaining it applied to any jail term imposed as a condition of probation and to any future prison sentence. The court then asked if defendant agreed "to waive or give up any credits you have in this case?" Defendant agreed, and the court indicated defendant had "no credits as of today due to a Johnson Waiver" when it imposed an additional 90-day jail term.

In August 2000, another petition was filed alleging defendant had violated probation. The trial court found defendant had violated probation and revoked it. The court imposed a two-year prison sentence.

Defendant claimed he was entitled to approximately 500 days of custody credits toward his sentence, asserting he "was in custody a whole year prior to the plea bargain agreement, which is not mentioned at all in any of these reports." The court stated "that on June 14, 1999, when you were reinstated on

probation, you . . . waived those previous time credits. So you are not entitled to those." Defendant responded: "Those time credits were supposed to be for the 8 days that I was in custody the previous time, not the previous time before that. That was the understanding I had at the time of the plea." Nevertheless, the court awarded defendant presentence credits solely for time defendant had spent in custody in 2000 and 2001.¹

DISCUSSION

In *Johnson*, the court held that a defendant may waive custody credits pursuant to Penal Code section 2900.5. (*Johnson, supra*, 82 Cal.App.3d at pp. 188-189.) Such a waiver allows the trial court to avoid the one-year statutory limitation on county jail sentences, thereby allowing the court to impose additional jail time as a condition of probation. (*Id.* at pp. 185, 188-189; see also Pen. Code, § 19.2.) A *Johnson* waiver may be made for other sentencing considerations as well. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.)

The sole issue in this appeal concerns defendant's initial waiver of custody credits. Defendant claims that, at the time he initially pleaded no contest, he did not make a knowing and intelligent waiver of presentence custody credits toward a future prison sentence.

¹ According to defendant, he is raising another asserted error in the trial court concerning the calculation of his custody credits. This court's disposition will, of course, require the trial court to recalculate defendant's credits.

Preliminarily, we observe that the later, unequivocal waiver of defendant's credits upon reinstatement of probation is not an issue. At that time, defendant only waived 94 days of credit and related conduct credit that he had subsequently accrued. The court's colloquy of defendant must be understood in context. Consequently, the waiver did not include the period of time defendant had previously accrued.

Accordingly, we consider defendant's initial waiver of credits. The People concede that "[n]othing in the colloquy referenced the effect of the waiver on a future state prison sentence." The People therefore "concede that on this record, following [*People v. Harris* (1987) 195 Cal.App.3d 717 (*Harris*)], this Court could reasonably conclude that [defendant's] original waiver was not 'knowing and intelligent' as that term was used in *Harris*." However, the People claim that *Harris* was wrongly decided and that this court should instead follow *People v. Burks* (1998) 66 Cal.App.4th 232 (*Burks*). As we shall explain, we find *Harris* to be more persuasive than *Burks*.

In *Harris, supra*, 195 Cal.App.3d at pages 721-725, this court held a *Johnson* waiver invalid insofar as it was entered without the defendant knowing the waiver applied to a future prison sentence. In so holding, this court emphasized: "A 'knowing and intelligent waiver' of a right implies that the waiver was entered into with awareness of its consequences." (*Harris, supra*, at p. 725; cf. *People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922 ["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."].)

In *Burks*, the Third Division of the First District Court of Appeal concluded that to be valid, a *Johnson* waiver requires a defendant to understand that he or she is giving up custody credits and the waiver is "presumptively applicable to any future term of imprisonment." (*Burks, supra*, 66 Cal.App.4th at pp. 236-237 & fn. 3.) The court explained that "[i]f a defendant wants to restrict the waiver of custody credits to extend the jail time he can serve, but preserve the same credits for future use against prison time, the burden should be on the defendant to propose that to the sentencing court for its approval." (*Id.* at p. 236, fn. omitted.) In so holding, the *Burks* court emphasized that section 2900.5 treats credits uniformly and does not establish separate accounts for purposes of jail terms and prison sentences. (*Id.* at pp. 236-237.) The *Burks* court asserted that "*Harris* invites the defendant to claim the waiver was not knowing and intelligent because the court failed to remind him his waived credits would not be reinstated if he continued to violate probation." (*Id.* at pp. 236-237, fn. 3.)

We respectfully disagree with *Burks* and instead follow *Harris*. (*Burks, supra*, 66 Cal.App.4th 232; *Harris, supra*, 195 Cal.App.3d 717.) The import of *Harris* is not to ensure a defendant is reminded that credits will not be reinstated. Rather, *Harris* acknowledges that a simple waiver of credits may be misunderstood so as to apply specifically to whatever jail

term a defendant is facing as a condition of probation. We cannot say that a "presumptive consequence," i.e., the effect of the waiver on defendant's prison sentence, is one that is knowingly and intelligently waived. *Burks's* conclusion is inconsistent with not only *Harris*, but with *Johnson* itself. (See *Johnson, supra*, 82 Cal.App.3d at p. 188 ["We hold that a proper interpretation of Penal Code section 2900.5 permits a defendant to knowingly and intelligently waive the provisions thereof that require all days of custody be credited to his sentence, including any period of imprisonment as a condition of probation."].)

The People's argument to the contrary is not persuasive. The People claim *Harris* was "somewhat conclusory" and does not consider whether it was reasonable to believe a defendant seeking to obtain a jail term and probation, particularly after a violation of probation, is truly concerned about credit toward the prison sentence he or she is trying to avoid. But it is defendant who should make the decision and who must enter a knowing and intelligent waiver. And here the issue is defendant's initial waiver of credits. Defendant might have been unwilling to waive what appears to have been a substantial amount of credits, particularly since he was only facing the specter of a short sentence.

In short, the record indicated that defendant's initial waiver was not knowing and intelligent and that defendant was prejudiced thereby. The record does not indicate that defendant waived credits with knowledge the waiver applied, not only to

the jail term the court could impose as a condition of probation, but also to a future prison term. And defendant did not have an attorney to explain to him the scope of the waiver. Accordingly, defendant is entitled to credit for the initial period of presentence confinement, notwithstanding his waiver. (Cf. *Harris, supra*, 195 Cal.App.3d at pp. 725-726.)

DISPOSITION

The judgment is reversed and remanded to the trial court to recalculate defendant's custody credits. The court shall include any additional credit attributable solely to the conduct in the instant case (see *People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194), that was accrued through October 21, 1997. The trial court shall then enter an amended abstract of judgment and forward a copy of the same to the Department of Corrections.

BLEASE, Acting P. J.

I concur:

NICHOLSON, J.

DISSENTING OPINION OF CALLAHAN, J.

For the reasons stated in *People v. Burks* (1998) 66 Cal.App.4th 232, I respectfully dissent in this case. I am not persuaded that a waiver of time credits need include an explicit warning to defendant that he or she is waiving credit toward a possible prison sentence. In the sense that the waiver is unequivocal and unqualified, as it was here, it should be considered "presumptively applicable to any future term of imprisonment." (*Id.* at p. 237.)

CALLAHAN_____, J.