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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO CABRERA, Defendant and Appellant.	B190876 (Los Angeles County Super. Ct. No. VA026941)

APPEAL from a judgment of the Superior Court of Los Angeles County, William J. Birney, Jr., Judge. Affirmed as modified.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Lawrence M. Daniels, Deputy Attorney General, Mary Sanchez, Supervising Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION[1]

This case returns to us after our previous remand for resentencing (B181524). In 2004, a jury convicted defendant and appellant Rogelio Cabrera (defendant) of a 1994 attempted murder (Pen. Code, § 664/187[2]) and found that he personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced defendant to life in prison with the possibility of parole with a 13-year consecutive sentence based on a 10-year enhancement for personally using a firearm, and a three-year enhancement for personally inflicting great bodily injury. The trial court also imposed a $1,000 parole revocation fine under section 1202.45. Defendant appealed contending that his 10-year sentence on the firearm enhancement and parole revocation fine violated the prohibition against ex post facto laws in the United States and California Constitutions. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) Defendant also contended that the trial court's imposition of the upper term sentence for the firearm enhancement violated *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). We agreed with defendant's ex post facto argument, but rejected his *Blakely* argument, and remanded for resentencing.

On remand, the trial court sentenced defendant to five years in prison for the firearm use enhancement, five years being the upper term under section 12022.5, subdivision (a) at the time he committed his offense. The trial court did not modify its previous award of a total of 639 days of presentence credit, consisting of 426 days of actual custody credit and 213 days of conduct credit.

On appeal, defendant contends that the upper term sentence for the firearm use enhancement violates *Blakely*, *supra*, 542 U.S. 296, and that the trial court erred in failing to award him actual custody credit for the period from the date of his initial sentencing to and including the date of his resentencing. We affirm the upper term sentence for the

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[1] Because the issues on appeal solely address sentencing issues, we dispense with a recitation of the facts concerning defendant's substantive offense.

[2] All statutory citations are to the Penal Code unless otherwise noted.

firearm enhancement under section 12022.5, subdivision (a) and order the abstract of judgment modified to reflect 889 days of actual custody credit.

We requested supplemental briefing from the parties addressing the issue of whether defendant was awarded an extra day of presentence conduct credit. Because the trial court improperly awarded defendant an additional day of presentence conduct credit, we order the abstract of judgment modified to reflect 212 days of conduct credit.

DISCUSSION

I. The Trial Court Properly Sentenced Defendant to the Upper Term for the Firearm Use Enhancement

Defendant contends that his five-year upper term sentence for the firearm use enhancement under section 12022.5, subdivision (a) violates *Blakely*, *supra*, 542 U.S. 296 because it was based on the trial court's finding that the manner in which he committed his offense was "mean, vicious [and] cowardly, one of the worst I have seen" and was not based on facts found by the jury. Defendant acknowledges that *People v. Black* (2005) 35 Cal.4th 1238 resolved this issue against him and that we are bound by that decision under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, but raises the issue to preserve it for federal review. The trial court did not err.[3]

"'"The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, . . . and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular."'" (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) In his first appeal in this case, defendant argued

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[3] The issue of whether this aspect of California's sentencing law is constitutionally valid is before the United States Supreme Court in *Cunningham v. California*, cert. granted, Feb. 21, 2006, No. 05-6551, __ U.S. __, 126 S.Ct. 1329.

that his 10-year upper term sentence for the firearm use enhancement violated *Blakely, supra,* 542 U.S. 296 on the same ground asserted here. We rejected that argument, holding that "In *People v. Black* (2005) 35 Cal.4th 1238, the California Supreme Court held that California's determinate sentencing law does not violate *Blakely*, *supra*, 542 U.S. 296, and that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence under section 1170, subdivision (b) does not implicate a defendant's Sixth Amendment right under the United States Constitution to a jury trial. (*Id.* at p. 1255.)" Thus, under the doctrine of the law of the case, the trial court was bound by our previous ruling and that ruling forecloses appellate review of this issue. (*People v. Stanley, supra,* 10 Cal.4th at p. 786.)

Even if the doctrine of the law of the case did not bind the trial court or foreclose review of this issue, our Supreme Court's opinion in *People v. Black, supra,* 35 Cal.4th 1238 resolves this issue against defendant. Accordingly, the trial court did not err in sentencing defendant to the upper term for the firearm use enhancement.

II. Defendant's Credits

A. Actual Custody Credit

"[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) When a trial court resentences a defendant, it is "obliged, in its new abstract of judgment to credit him with all *actual* days he had spent in custody, whether in jail or prison, up to that time." (*Id.* at p. 37.) Defendant correctly contends that the trial court erred when it resentenced him because it failed to award him actual custody credit for the period from the date of his initial sentencing to and including the date of his resentencing. Respondent concedes the error.

Defendant was initially sentenced on January 20, 2005. At that time, the trial court awarded defendant 426 days of actual custody credit and 213 days of conduct

credit. Defendant was resentenced on April 28, 2006. At that time, the trial court failed to award defendant any additional actual custody credit. The period from January 20, 2005, to and including April 28, 2006, is 463 days. The abstract of judgment is ordered modified to reflect a total of 889 days of actual custody credit.

B. Conduct Credit

Presentence credits are calculated under section 4019.[4] (*People v. Brown* (2004) 33 Cal.4th 382, 405.) "Under section 4019, presentence conduct credit is calculated 'by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody. [Citation.]' (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341 [24 Cal.Rptr.2d 43].)" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1176, fn. 14.) In our credit calculations, we include the date of arrest (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124) and the date of sentencing (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-526). We treat a partial day in custody as a whole day for calculation purposes. (*People v. Smith*, *supra*, 211 Cal.App.3d at p. 526.)

At the time that defendant was initially sentenced, the trial court awarded him a total of 639 days of presentence credit consisting of 426 days of actual custody credit and 213 days of conduct credit. For those 426 days of actual custody credit, defendant was entitled to an additional 212 days of conduct credit: 426 divided by 4 rounded down equals 106, multiplied by 2 equals 212.[5] The parties agree that the trial court erred in awarding defendant 213 days of conduct credit.

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[4] Defendant committed his offense – attempted murder – on June 1, 1994. Section 2933.1, which limits presentence conduct credit for certain offenses listed in subdivision (c) of section 667.5, including attempted murder (§ 667.5, subd. (c)(12)), did not become effective until September 21, 1994 (Stats. 1994, ch. 713 (A.B. 2716), § 1), and thus does not operate to limit defendant's presentence conduct credit.

[5] Defendant was not entitled to an award of presentence conduct credit from the trial court under section 4019 for the additional 463 days he spent in actual custody in state

DISPOSITION

The judgment is affirmed. The abstract of judgment is ordered modified to reflect 889 days of actual custody credit and 212 days of conduct credit. The clerk of the superior court is directed to forward the corrected abstract of judgment to the Department of Corrections.

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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prison between his initial sentence and resentencing. (*People v. Buckhalter, supra,* 26 Cal.4th at pp. 29-30, 33-34.) The Department of Corrections is to calculate credit for that period under the scheme for earning credit applicable to persons incarcerated in state prison. (*Id.* at p. 31.)