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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.**  
**SHELLY JEAN JEFFREY,**  
**Defendant and Appellant.**

**A095147**

**(Solano County  
Super. Ct. Nos. FC170864,  
FC180308)**

Shelly Jean Jeffrey appeals from a judgment, contending that the trial court erred when sentencing her to prison for a probation violation because it refused to give her presentence credits for all of the time she had served in county jail and in an uncompleted drug treatment program. Defendant concedes that she waived those credits at the time probation was first imposed, but argues she did not make a knowing and intelligent waiver of them as against a subsequently imposed prison term. We conclude defendant was not entitled to such credits because she never expressly reserved her right to reclaim them against any future prison term, and affirm the judgment.

**BACKGROUND**

A criminal complaint filed against defendant in case number FC170864 charged her with wrongfully obtaining welfare benefits by misrepresenting that her son lived with her during the second half of 1997, when he did not do so (Welf. & Inst. Code, § 10980, subd. (c)(2)). She was also charged with five counts of perjury by declaration (Pen.

Code, § 118), one each month from July through November 1997, in conjunction with making the same false claim for welfare benefits. In a separate complaint filed in case number 180308, defendant was alleged to have been in possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). This complaint also alleged that, at the time of this offense, defendant was out on bail on her own recognizance in case number FC170864 within the meaning of Penal Code section 12022.1.

On January 20, 2000, in accordance with a plea agreement, defendant pleaded no contest to one count of obtaining welfare aid by misrepresentation (Welf. & Inst. Code, § 10980, subd. (c)(2)), and to one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Defendant also admitted the Penal Code section 12022.1 enhancement. Pursuant to the plea agreement, all other charges were dismissed.

On March 24, 2000, the trial court suspended imposition of sentence and granted defendant three years probation in both cases. In return for the court's placing her in a residential drug rehabilitation program, she was required to waive all time credits she had accrued previously, along with all credits she would be entitled to receive on a day-for-day basis for the time spent in the drug treatment program. Defendant acknowledged she had discussed the waiver of time credits with her counsel, who joined in the waiver.

In June 2000, the probation office filed a request for defendant's probation to be revoked due to her discharge from the drug treatment program on June 4, 2000, prior to completion. The superior court revoked defendant's probation and issued a bench warrant for her arrest.

On March 16, 2001, defendant admitted the probation violation. On March 30, 2001, the superior court ordered that probation remain revoked and sentenced defendant in each case to prison for concurrent two-year terms. She received credit against that sentence only for the 37 days earned after her probation had been revoked. This appeal followed.

#### DISCUSSION

Defendant's sole contention on appeal is that the court prejudicially erred by refusing to accord her presentence credits for time she had served in county jail prior to

her original grant of probation and for the time she had spent in the drug treatment program after being placed on probation. Defendant asserts that she did not make a knowing and intelligent waiver of those credits as against a subsequently imposed prison term. We find no error on the record before us.

The parties agree that a defendant may waive custody credits as a condition of probation, or in exchange for other sentencing considerations. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.) Such a waiver, however, must have been *knowing and intelligent* in the sense that it was made with *awareness of its consequences*. (*People v. Harris* (1987) 195 Cal.App.3d 717, 725.)

Here defendant contends she was not “fully aware” that her March 24, 2000 waiver of presentence credits and future credits for time served in the drug treatment program included a waiver of such credits against a subsequently imposed prison term. She argues that since a grant of probation had been part of the plea agreement entered into prior to the sentencing hearing, it would have been reasonable for her to assume that the purpose of her waiver of credits at the sentencing hearing was so the trial court would have the option, following any future probation violation, to impose a full year in county jail as a condition of a subsequent grant of probation. Although this explanation is plausible under the circumstances, the record of the proceedings below is silent as to defendant’s subjective understanding of the scope of her waiver.

Thus, we are faced with the question whether the credit waiver is enforceable as against a future term of imprisonment where, as here, the record is silent concerning the intended scope of defendant’s credit waiver. In *People v. Burks* (1998) 66 Cal.App.4th 232, the court enforced the waiver under similar circumstances, placing the burden on the defendant to prove an express agreement limiting the waiver if a future probation violation resulted in a prison sentence. In *Burks* the defendant had served one year in county jail as a condition of his initial grant of probation. After violating the terms of the probation, the defendant waived his custody credits to allow the trial court to reinstate probation on the condition that he serve an additional 90 days in county jail. Following the defendant’s second probation violation, the trial court reinstated probation without

imposing further jail time. However, upon the defendant's third probation violation, the trial court sentenced the defendant to two years in state prison, without permitting recapture of the waived custody credits. (*Id.* at p. 234.)

As in the present case, the defendant in *Burks* contended he did not understand at the time of the credit waiver that it would apply to a future prison term, and, therefore, the waiver was not knowing and intelligent. (*People v. Burks, supra*, 66 Cal.App.4th at pp. 234-235.) In *Burks*, as here, there was nothing in the record to support an inference that the defendant knew his waiver would be applied to a prison sentence imposed for a future probation violation. Nevertheless, the Court of Appeal affirmed the trial court's decision to refuse recapture of the credits. The court concluded that "If 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.) The court reasoned that nothing in the statutory scheme governing custody credits suggested that such credits are kept in dual accounts, one for use against jail time and one for use against prison time. "To the contrary, [Penal Code section 2900.5<sup>1</sup>] treats all credits uniformly, wherever accrued and wherever applied. Therefore, a waiver of custody credits is presumptively applicable to any future term of imprisonment." (*Id.* at pp. 236-237.) The court determined that to conclude otherwise would bestow a windfall on a defendant who violates probation, and would allow a defendant "to renegotiate a sentencing bargain that was honored by the court but not by the defendant . . . ." (*Id.* at p. 236.) The court further noted that if a defendant was informed by defense counsel that the waiver would not affect future prison time, but counsel neglected to inform the court of this aspect of the waiver, the defendant could seek relief by claiming ineffective

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<sup>1</sup> Subdivisions (a) and (c) of Penal Code section 2900.5 require all time spent by a defendant in custody, and all work time and good time credits accrued under Penal Code section 4019, to be deducted from the defendant's term of imprisonment, including any term served as a condition of probation.

assistance of counsel. (*Id.* at p. 237.) Defendant makes no ineffective assistance of counsel claim here.

We agree with the analysis in *Burks* and conclude the same principles apply in this case. We find nothing in the current record to overcome the presumption that defendant's waiver was applicable to any future term of imprisonment. The transcript of the March 24, 2000 sentencing hearing shows the court informed defendant that she would waive all credits she had accrued previously and credits she would be entitled to accrue for time spent in the residential treatment program. The court also confirmed with defendant that she had received an opportunity to discuss the waiver of credits with her attorney. Next, when the court asked whether defendant was willing to waive those credits, she responded "yes." In addition, the court asked her attorney whether he joined in the waiver, to which counsel also responded "yes."

Defendant argues that recapture of her credits is mandated under *People v. Harris, supra*, 195 Cal.App.3d 717. We disagree. In *Harris*, the defendant had been informed by the trial court prior to each waiver of custody credit that, if the defendant waived credits, the defendant could become subject to further time "in the county jail." (*Id.* at pp. 722-724.) There is no similar comment in this case, providing an objective basis for our defendant's conclusion that her waiver was effective only so long as any custody time imposed was local. Furthermore, we agree with the court in *Burks*, that a defendant who waives custody credit in order to receive a grant of probation properly bears the burden of establishing on the record that the custody credit waiver was limited in scope. To the extent that the holding in *Harris* may be interpreted as supporting a different allocation of that burden, then, like the court in *Burks*, we disagree with *Harris*. On the record before us, defendant has not met her burden to show her credit waiver was limited in scope.

DISPOSITION

The judgment is affirmed.

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Simons, J.

We concur:

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Jones, P. J.

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Stevens, J.