



The People v. Benigno Velasquez Arceo

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(Los Angeles County)

Benigno Velasquez Arceo appeals a judgment entered following our remand for resentencing. (People v. Arceo (May 17, 2010, B213721) [nonpub. opn.].) We order the trial court to: 1) amend the abstract of judgment to reflect an additional 781 days of actual custody credit, and 2) correct the sentencing minute order to delete the word "base" in the phrase "determinate base term." We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On October 25, 2006, Arceo and his co-defendant accosted and struck a man as he entered an electronics store. When the victim activated his cellular telephone to call police, Arceo discharged a firearm at the victim and the building. The victim suffered a gunshot wound to his upper leg and store windows were broken. Arceo and his co-defendant were members of the Puente criminal street gang. (People v. Arceo, *supra*, B213721.)

The jury convicted Arceo of attempted willful, deliberate, and premeditated murder, and shooting at an occupied building. (Pen. Code, §§ 664, subd. (a), 187, subd. (a), 246.)¹ The jury also found that Arceo committed the crimes to benefit a criminal street gang, and that he intentionally discharged a firearm causing great bodily injury. (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b)-(e).)² In an unrelated prosecution, Arceo was found in violation of probation following his conviction of possessing marijuana for sale. (People v. Arceo, Super. Ct. Los Angeles County, 2006, No. KA0706068; Health & Saf. Code, § 11359.)

At the initial sentencing on January 16, 2009, the trial court sentenced Arceo to consecutive terms of



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life imprisonment for the attempted premeditated murder and 25 years to life for the firearm enhancement; a concurrent five-year term for shooting at an occupied building; and an eight-month term for marijuana possession to be served consecutively to the indeterminate life terms. (People v. Arceo, supra, B213721.) Arceo appealed. We concluded that the court erred in calculating the indeterminate and determinate terms together and remanded for resentencing. (Ibid.)

On March 8, 2011, the trial court resentenced Arceo to a total determinate term of five years eight months and to an indeterminate term of life plus 25 years to life imprisonment. The court ordered the determinate and indeterminate terms to be served concurrently. The parties stipulated to the fines and fees previously imposed and the court awarded Arceo 831 days of presentence custody credit (actual and conduct), from arrest through initial sentencing on January 16, 2009. The court denied Arceo's later written motion to calculate his custody credit through the date of resentencing.

Arceo appeals and contends that the trial court erred by: 1) denying his request to award him additional custody credit through the date of resentencing, and 2) recording his sentence in the clerk's minutes as a "determinate base term."

DISCUSSION

I.

Arceo argues that the trial court erred by declining to calculate his actual custody credit from the date of initial sentencing through the date of resentencing. (People v. Buckhalter (2001) 26 Cal.4th 20, 29 ["[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"].) The Attorney General concedes that the court mistakenly believed it was the responsibility of the Department of Corrections and Rehabilitation to calculate the custody credit and agrees that Arceo is entitled to an additional 781 days of actual custody credit. The parties are correct that the trial court should have determined all actual days Arceo spent in custody, whether in jail or prison. (Ibid.)

II.

Arceo also contends that the trial court clerk improperly referred to his determinate term as "determinate base term" in the court minutes. He points out that a "base" term is one selected from a triad of terms specified for a particular criminal offense. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.405(2).) The Attorney General properly concedes that the trial court's minute order must be corrected nunc pro tunc.

Accordingly, we order the trial court to amend the abstract of judgment to reflect an additional 781 days of actual custody credit, and to forward the amended abstract of judgment to the Department of



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Corrections and Rehabilitation. The court shall also correct the sentencing minute order to delete the word "base" in the phrase "determinate base term." The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

We concur: YEGAN, J. PERREN, J.

1. All further statutory references are to the Penal Code unless stated otherwise.
2. Reference to section 12022.53 is to the version in effect prior to repeal effective January 1, 2012.

