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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

IN RE VINCENT MARQUEZ,

H022214

On Habeas Corpus.

(Monterey County
Superior Court
No. HC 3506)

Petitioner received a prison commitment out of Santa Cruz County and subsequently received a prison commitment out of Monterey County. His Santa Cruz County convictions were thereafter reversed, and he now seeks additional custody credit toward his Monterey County prison sentence for the period of time after he was committed to state prison in the Santa Cruz County case when he was in custody in Monterey County prior to his Monterey County prison commitment. We deny the petition.

Background

On July 8, 1991, petitioner was arrested for a burglary offense in Monterey County. He was released on bail on July 11, 1991. On July 23, 1991, he was arrested in Santa Cruz County for a burglary offense in Santa Cruz County. He has remained in custody ever since. Monterey County issued a bench warrant on August 8, 1991

and placed a hold on petitioner on August 21, 1991. Petitioner was tried in Santa Cruz County first and convicted. He was sentenced to a lengthy prison term for the Santa Cruz County offense on January 6, 1992 and given presentence custody credit for the entire period from July 23 to January 6. Petitioner was transferred to Monterey County on January 7, 1992 and was thereafter tried and convicted of the Monterey County offense. On April 2, 1992 petitioner was sentenced to a lengthy prison term for the Monterey County offense. He was given presentence custody credit for the four days he spent in custody in Monterey County in July 1991 and for the period from August 8, 1991 to January 3, 1992.¹

Petitioner appealed from both convictions. His Monterey County conviction was affirmed on appeal with a modification of the sentence from 30 years to 25 years in state prison, but his Santa Cruz County conviction was reversed and remanded for retrial. Upon remand, the prosecutor dismissed the Santa Cruz County case in November 1993. In May 1994, petitioner filed a habeas petition in Monterey County Superior Court seeking custody credit for the period from January 4, 1992 to April 2, 1992. He did not allege in his petition or submit any evidence that he would have been free from custody during this period but for the pending Monterey County case. In January 1995, his petition was denied. In May 1998, petitioner filed a virtually identical petition in this court raising the same issue. It was summarily denied.

In April 1999, he filed a virtually identical petition in the California Supreme Court raising the same custody credit issue. The Attorney General filed an informal

¹ Petitioner had represented to the Monterey County court that the Monterey County hold had been placed on August 8, 1991 and that his Santa Cruz County sentencing hearing had taken place on January 3, 1992. In fact, the hold had been placed on August 21 and the August 8 date was the date of the Monterey County bench warrant. The court noted that “as a sentenced inmate serving a prison sentence” petitioner would not be entitled to presentence credits after his Santa Cruz sentencing. Petitioner did not dispute that statement at the sentencing hearing.

response to the petition which asserted that the claim was procedurally barred but otherwise meritorious.² On September 22, 1999, the California Supreme Court issued an order to show cause (OSC) returnable in the Monterey County Superior Court directing the Department of Corrections to file a return addressing why petitioner was not entitled to the additional days of custody credit which he sought in his petition. By a separate letter, the Clerk of the Supreme Court informed the Monterey County Superior Court Presiding Judge that the issuance of the OSC “requires the appointment of counsel, a hearing, and the disposition of the petitioner’s claims on their merits. (See *In re Hochberg*, 2 Cal.3d 870, 875-876, fn. 4; *People v. Barton*, 21 Cal.3d 513, 519, fn. 3.)”

The Monterey County District Attorney (the DA) filed a return in the Monterey County Superior Court in November 1999 contesting petitioner’s entitlement to additional custody credit. The return alleged that petitioner was not entitled to the credit he sought because he “was a sentenced prisoner in an unrelated case” during the period in question. The return also sought an amendment of the original abstract of judgment to eliminate the custody credit granted to petitioner for the period from August 8, 1991 to January 3, 1992. Finally, the return asserted that petitioner was procedurally barred from seeking this credit because he had already litigated this claim before the superior court and this court and had filed prior petitions which had not raised this issue. In the points and authorities accompanying the return, the DA argued

² The Attorney General did, erroneously, assert that petitioner was entitled to 135 days of credit rather than the 134 days he sought. Petitioner had sought credit for the period from January 7, 1992 to April 2, 1992 rather than from January 3, 1992 to April 2, 1992. He had calculated this as entitling him to “92 actual days” and “42 additional days conduct credit’s [sic].” Assuming that he was seeking credit for the entire period that he had not previously received credit for, he would have been entitled to 90 actual days and 44 additional days of conduct credit. His total was therefore correct although his calculation was not.

that petitioner was not entitled to the credit he sought because he had not met his burden of establishing that he would have been free from custody during the period in question “but for the Monterey County hold.” The superior court did not appoint counsel for petitioner or hold a hearing, and petitioner, who was awaiting appointment of counsel, did not file a traverse. Instead, in December 1999, the superior court issued an order stating its reasons for denying petitioner’s petition both on procedural grounds and on the merits.

In May 2000, petitioner filed a petition for a writ of habeas corpus in the California Supreme Court. He raised two claims. The first claim was the same custody credit claim that had been raised below. He asserted: “Due to the reversal and dismissal of [the Santa Cruz County case], I am now entitled to additional custody and conduct credits in [the Monterey County case].” “It is my contention that since my Santa Cruz County conviction was reversed and the case was then dismissed, all of my custody time is now attributable only to the Monterey County matter . . .” He also argued that the credit “should be attributed” to the Monterey County case because the Monterey County case had been “the controlling case of the two.” He did not allege or submit any evidence that he would not have been in custody during the period in question but for the Monterey County case.

Petitioner also asserted as a separate claim that he had been deprived of due process because the Monterey County Superior Court had failed to appoint counsel as directed by the California Supreme Court. He stated that he had written to the superior court after receiving the DA’s return inquiring as to whether counsel would be appointed or he would have to file the traverse in pro per. No response was received to this inquiry. The next document petitioner received from the Monterey County Superior Court was the denial of his petition.

On November 1, 2000, the California Supreme Court issued the following order. “The Director of the Department of Corrections is ordered to show cause before

the Sixth District Court of Appeal, when the matter is ordered on calendar, why petitioner is not entitled to the relief requested. The return shall be filed on or before December 1, 2000. (See the Attorney General's informal response in S078495, filed July 29, 1999, conceding the underlying merits of petitioner's contention. See also *In re Harris* (1993) 5 Cal.4th 813, 839.)" We then appointed counsel to represent petitioner in this proceeding.

On January 10, 2001, the Attorney General filed a letter brief which it asked this court to treat as its "response" to the California Supreme Court's OSC. We assume that the Attorney General intends for this letter to be treated as the return. In its letter, the Attorney General withdrew its previous concession as to the merits of petitioner's claim. "[A]ny such concession was made in error because it was not based on the complete record that existed at that time. Any concession was also premature because respondent believed the issue had never been raised in the trial court. This Court should therefore not feel bound by respondent's ill-considered concession"

The Attorney General's letter consists of three parts. The first part is a statement of facts based on petitioner's exhibits in support of his petition. The second part is prefaced with the withdrawal of the concession and proceeds to a lengthy quotation of the superior court's order denying petitioner's petition. Finally, the Attorney General favors us with two paragraphs of analysis based solely on *In re Joyner* (1989) 48 Cal.3d 487. In a single sentence at the end of this analysis, the Attorney General apparently seeks to renew his assertion that petitioner's claim is procedurally barred. "Moreover, as the trial court properly found, this is petitioner's third petition on the issue, which constitutes abuse of the writ under *In re Clark*."

Petitioner's appointed counsel filed a traverse which incorporated each and every allegation in petitioner's May 2000 pro per petition to the California Supreme Court and denied any conflicting allegations in the Attorney General's "purported return." He argues that the dismissal of the Santa Cruz County case retroactively

establishes that petitioner's incarceration after he was sentenced to state prison in the Santa Cruz case was solely attributable to the Monterey County case. He distinguishes *Joyner* on the ground that it did not involve a subsequent reversal of the underlying conviction upon which the initial prison term was based. The traverse makes no explicit mention of petitioner's claim that the Monterey County Superior Court violated his right to due process by failing to appoint counsel to represent him during the proceedings on the habeas petition.

Analysis

There are two preliminary matters that can be readily resolved. First, it is unnecessary to engage in extended analysis of the Attorney General's procedural bar arguments. Although it is true that petitioner has filed numerous prior habeas petitions, this fact would not preclude him from obtaining relief here if his claim had merit. His prior petitions fall into two categories. The initial sequence of habeas petitions originated in the Monterey County Superior Court prior to the dismissal of the Santa Cruz County case and did not raise the custody credit issue. Clearly the claim that petitioner raises now could not have been raised then because he claims that the dismissal of the Santa Cruz County case is what entitles him to the additional credit in the Monterey County case. The second sequence of habeas petitions originated in the Monterey Superior Court after the dismissal of the Santa Cruz County case. These petitions raised the custody credit issue. Petitioner first sought relief in superior court and then, in sequence, in this court and the California Supreme Court. His superior court petition and his petition to this court were denied, but the California Supreme Court issued an OSC. The superior court then denied the petition, and petitioner again petitioned the California Supreme Court which again issued an OSC. While it is true that petitioner has raised this issue in several petitions, in light of the

California Supreme Court's issuance of OSCs as to each of petitioner's petitions to that court, we cannot find that petitioner has abused the writ.

Second, the second claim raised in petitioner's latest petition (which is not mentioned in his appointed counsel's traverse) need not be addressed. Petitioner asserted that he had been denied due process by the superior court's failure to appoint counsel to represent him after the California Supreme Court issued its first OSC. Because we have now appointed counsel, appointed counsel has filed a traverse and this matter has been heard in this court, petitioner has now received the due process which he asserted he had been denied.

We therefore proceed to the merits of petitioner's claim. "[C]redit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." (Pen. Code, § 2900.5, subd. (b).) "[A] defendant is not to be given credit for time spent in custody if during the same period he is already serving a term of incarceration." (*In re Rojas* (1979) 23 Cal.3d 152, 155-156.) "Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." (*Rojas* at p. 156.)

Petitioner had been released on bail in the Monterey County case when he was arrested in the Santa Cruz County case. He remained continuously in custody in Santa Cruz County on the Santa Cruz County case from the time of his arrest to the time of his sentencing. Only after he was sentenced to a lengthy prison term for the Santa Cruz County case was he transferred to Monterey County to stand trial on the Monterey County case. As a sentenced prisoner serving a state prison term for the Santa Cruz County case, he was not entitled to credit against the Monterey County case for time he served after sentencing in the Santa Cruz County case. Notably, he did not seek such credit at the time of sentencing in the Monterey County case. The

premise for petitioner's claim is that the subsequent reversal of the Santa Cruz County case retroactively establishes that the time he served after sentencing in the Santa Cruz County case could only have been attributable to the Monterey County case.

This theory lacks legal support. In *People v. Huff* (1990) 223 Cal.App.3d 1100, the defendant was on probation for a narcotics conviction when he was arrested on theft charges. The theft charges were subsequently dismissed, but his probation was revoked and he was sentenced to state prison for the narcotics conviction. He contended that he was entitled to credit against the term imposed for the narcotics conviction for the time he had spent in custody on the subsequently dismissed theft charges. (*Huff* at p. 1105.) The Second District rejected the contention that the subsequent dismissal of the theft charges "transmute[d]" the time in custody into time attributable to the narcotics charges. "While it is true that the new charges were eventually dismissed due to a failure to prosecute, so that there was no resulting sentence against which to credit appellant's time in custody on those charges, that fact does not transmute the custody to time attributable to the old charges." (*Huff* at p. 1105.) Clearly *Huff* rejected petitioner's transmutation theory.

Petitioner's theory also lacks evidentiary support. He did not submit any evidence that but for the Monterey County case he would have been free from custody during the period in question. Perhaps the converse might have been true. But for the Santa Cruz County case, petitioner might well have been free of custody prior to sentencing in the Monterey County case given that he had been able to achieve release on bail in Monterey County prior to his arrest for the Santa Cruz County case. This fact, however, would only establish that this period of custody was attributable to the Santa Cruz case not that it was attributable to the Monterey case.

We agree with *Huff* that the attribution of custody credit must be based on events as they actually occurred rather than on a post-hoc reevaluation in light of subsequent events. Because petitioner failed to establish that he would have been free

of custody during the period in question but for the Monterey County case when he had already received a prison commitment out of Santa Cruz County at that time, he is not entitled to custody credit for that period against his Monterey County prison commitment.

Disposition

The petition is denied.

Mihara, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.