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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MANUAL GARCIA VIDALES,

Defendant and Appellant.

C062494

(Super. Ct. No. 09848)

Although the jury convicted defendant, Jose Manual Garcia Vidales, of all charged offenses and found all weapon enhancements to be true, the jury could not reach a verdict on gang enhancements attached to two of the offenses. Defendant entered a negotiated admission to the gang enhancement attached to his conviction for conspiracy to commit a felony in exchange for dismissal of the second gang enhancement attached to his conviction for second degree robbery. He received a stipulated sentence of 11 years; that is, the upper term of five years for conspiracy, a consecutive upper term of four years for the attached gang enhancement, a consecutive one-year term for the

attached weapon enhancement, and a consecutive one-third the midterm or one year for the robbery conviction. The court sentenced defendant accordingly and stayed sentence on the remaining felony.

Defendant appeals. He did not obtain a certificate of probable cause. (Pen. Code, § 1237.5.) Based on his erroneous premise that his maximum exposure was 10 years, he contends: the agreed-upon 11-year sentence was unauthorized because Penal Code section 654 applied; counsel rendered ineffective assistance in advising defendant to enter his admission in exchange for the stipulated sentence; he did not knowingly enter the agreement; and the agreement was based on a mutual mistake. Because defendant is challenging the validity of his admission, we conclude that defendant's failure to obtain a certificate of probable cause renders his claims noncognizable on appeal. Moreover, he is estopped from complaining.

In *People v. Fulton* (2009) 179 Cal.App.4th 1230, this court decided that a defendant could not attack the validity of his admission of a prior prison term allegation without a certificate of probable cause. (*Id.* at p. 1237.) "We conclude that Penal Code section 1237.5 applies to an enhancement allegation to which a defendant has entered a plea." (*Ibid.*) *Fulton* also concluded that the defendant was "trifling with the courts by attempting to better the bargain on appeal. [Citation.]" (*Id.* at p. 1238.)

Here, after a jury convicted defendant of the underlying offenses and weapon enhancements, defendant entered a negotiated

admission to one gang enhancement in exchange for dismissal of a second gang enhancement and a stipulated sentence of 11 years in state prison. Penal Code section 1237.5 applies to the gang enhancement to which defendant entered his admission. He is trifling with the courts in arguing that his exposure was only 10 years. *Fulton* controls here. Defendant's contentions challenge his admission and are noncognizable on appeal without a certificate of probable cause. Further, by stipulating to the sentence and failing to reserve the Penal Code section 654 issue, he is estopped from raising it. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Pursuant to this court's Miscellaneous Order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. Defendant is among the prisoners excepted from the additional accrual of credit as he was committed for a violent felony (robbery). (Pen. Code, §§ 667.5, subd. (c)(9), 4019, subs. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) However, our review of this issue revealed an error in sentencing.

The trial court awarded 148 actual days and 74 conduct days pursuant to Penal Code section 4019 for a total of 222 days of presentence custody credit. Because defendant was convicted of robbery, a violent felony, his conduct credit was limited to 15 percent of his actual days. (Pen. Code, §§ 667.5, subd. (c)(9),

2933.1.) Thus, he is entitled to 22 conduct days for a total of 170 days of presentence custody credit. An unauthorized sentence may be corrected at any time. We will modify the judgment accordingly. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be corrected at any time]; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)¹

DISPOSITION

The judgment is modified to provide for 22 conduct days for a total of 170 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.

¹ In the interests of judicial economy, we have corrected the error without requesting supplemental briefing. If either party is aggrieved by this procedure, he may petition for rehearing (Gov. Code, § 68081).