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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD A. HALL,

Defendant and Appellant.

A136225

(San Mateo County  
Super. Ct. No. SC072790A)

**I. INTRODUCTION**

In February 2012, appellant pled no contest to one count of a multi-count information and admitted the truth of serious felony and strike allegations in an amended information dealing with his assault on a woman who was the mother of two of his children. After accepting that plea, the trial court sentenced appellant to seven years and eight months in prison, imposed fines on him, and awarded him conduct and custody credits. Appellant appeals, claiming that (1) the trial court's declination to consider striking a prior serious felony conviction was error because the possible basis of that decision, i.e., Penal Code section 1385, subdivision (b) (section 1385(b)),<sup>1</sup> is unconstitutional, (2) the trial court erred in several aspects of its award of conduct and custody credits, and (3) appellant received ineffective assistance of trial counsel regarding both issues. We agree that, as conceded by the Attorney General, appellant is entitled to some additional conduct credits; otherwise, we reject appellant's contentions

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<sup>1</sup> All subsequent statutory references are to the Penal Code, unless otherwise noted.

and thus affirm the judgment of the trial court. We do, however, remand the case to the trial court for correction of the award of conduct credits.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On November 11, 2010, appellant had a domestic dispute with Lori Houston, the mother of two of his daughters. On that day, appellant came to Houston's house in South San Francisco, stating to her that he wanted to "take the girls." Houston refused to let him in, so he began kicking her door. As appellant was kicking the door, Houston called 911. Appellant then kicked in the door and chased and choked Houston, and grabbed her cell phone out of her hands. Houston was able to retrieve another phone and called 911 again; when she did so, appellant could be heard yelling in the background. Houston was not seriously hurt, but did suffer considerable pain from appellant's assault.

Via an amended information filed on March 15, 2011, appellant was charged with four counts, namely: (1) assault by force likely to cause great bodily injury (§ 245, subd. (a)(1)); (2) residential burglary (§§ 459, 460, subd. (a)); (3) dissuasion of a witness or victim (§ 136.1, subd. (b)(1)); and (4) misdemeanor vandalism (§ 594, subd. (b)(2)(A)). The amended information also alleged several prior convictions and prison terms of appellant, to be noted hereafter.

On February 1, 2012, appellant pled no contest to the third count, i.e., dissuasion of a witness. He also admitted that that offense was a "serious felony or strike offense within the meaning of [section] 1192.7(c)(37) of the Penal Code."<sup>2</sup> Finally, appellant admitted the truth of the serious felony and strike allegations alleged with regard to that offense, i.e., that (1) on October 25, 2000, he had been convicted of assault with a firearm (§ 245, subd. (a)(2)), which (2) was both a serious felony and a strike under section 1170.12, subdivision (c)(1), and (3) he had served three prison terms, i.e., for the October 2000 assault, a July 1993 escape conviction (§ 4532, subd. (b)), and a March 2008 drug conviction (Health & Saf. Code, § 11350). In exchange for this plea, the remainder of the charges against appellant were dismissed.

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<sup>2</sup> This was done pursuant to *People v. West* (1970) 3 Cal.3d 595, 604-608.

On May 7, 2012, appellant filed a motion under section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike “all priors alleged under the ‘Three Strikes’ law in the interests of justice.” The prosecution opposed this motion on May 15, 2012.

A sentencing hearing was held on June 8, 2012. At that hearing, the trial court denied appellant’s *Romero* motion based on his prior criminal record, which included the granting of such a motion—by the same trial judge—in connection with appellant’s 2008 drug conviction. It then sentenced appellant to a term of seven years and eight months, consisting of a mitigated term of 16 months, doubled because of the prior strike, plus a five-year enhancement because of the prison term prior. Miscellaneous fines and fees were imposed, and appellant given credit for 350 actual days in custody, plus 70 days for good conduct credit. (The latter was limited to this amount, per the trial court, because of the Three Strikes law.) Several days later, the court amended its sentencing order by giving appellant a concurrent prison sentence of one year and four months for violating his probation in the 2008 drug case.

Appellant filed a timely notice of appeal on August 7, 2012.

### **III. DISCUSSION**

As noted, appellant raises three issues on appeal, i.e., that (1) the trial court erred in relying on an unconstitutional law, section 1385(b), in sentencing him, (2) the trial court incorrectly credited appellant with the custody and conduct credits to which he was entitled, and (3) he received ineffective assistance of counsel with regard to both issues. We shall discuss these contentions hereafter.

#### *A. Section 1385(b) is Not Unconstitutional*

In 1986, the Legislature added subdivision (b) to section 1385; it reads: “This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385(b).) The reasons for this enactment were summarized in *People v. Valencia* (1989) 207 Cal.App.3d 1042 (*Valencia*), where one of our sister courts was faced with the contention—identical to that being made by appellant here—that section 1385(b) was unconstitutional. The court

responded thusly: “Valencia contends [section 1385(b)] ‘unconstitutionally infringes upon the power of the judiciary by prohibiting the striking of prior § 667 felonies . . . .’ He cites no authority for this surprising assertion. Subdivision (b) of Penal Code section 1385 was enacted by the Legislature as an emergency measure expressly for the purpose of abrogating *People v. Fritz* (1985) 40 Cal.3d 227 ‘and to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under Section 667 of the Penal Code.’ (Stats. 1986, ch. 85, § 3; see *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) [¶] In *People v. Williams* (1981) 30 Cal.3d 470, 482 the California Supreme Court discussing Penal Code section 1385 as worded prior to the 1986 amendment stated, ‘Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent.’ The 1986 amendments to sections 1385 and 667 could not more clearly have expressed a contrary intent to judicial discretion in the area of prior serious felonies as enhancements under Penal Code section 667. As was said in *People v. Williams, supra*, 196 Cal.App.3d at page 1160, ‘The amended version of section 1385 removes from the trial court all discretion to strike the prior felony convictions, thus rendering imposition of a five-year enhancement for each such prior conviction a certainty.’ The Legislature’s power to limit trial court discretion in this way is beyond question. ‘We note at the outset “that in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and that such questions are in the first instance for the judgment of the Legislature alone.” [Citation.]’ [Citation.]” (*Valencia, supra*, 207 Cal.App.3d at p. 1045, fns. omitted.)<sup>3</sup>

Since *Valencia*, many of our sister courts have also considered or cited section 1385(b). None of their decisions regarding it have hinted in the slightest regarding its

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<sup>3</sup> See also, to the same effect regarding the history and purpose of section 1385(b), *People v. Salazar* (1987) 194 Cal.App.3d 634, 637, footnote 2. As noted there, at the same time section 1385(b) was enacted, the Legislature also amended section 667, subdivision (a)(1), the statute which provides a five-year enhancement for a prior “serious felony” conviction, to add the introductory phrase: “In compliance with subdivision (b) of Section 1385 . . . .”

possible unconstitutionality.<sup>4</sup> (See, e.g., *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561; *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383; *People v. Wilson* (2002) 95 Cal.App.4th 198, 201-202; *People v. Perez* (2001) 86 Cal.App.4th 675, 679; *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268-1269; *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282-285; *People v. Askey* (1996) 49 Cal.App.4th 381, 389; *People v. Lockett* (1996) 48 Cal.App.4th 1214, 1219; *People v. Samuels* (1996) 42 Cal.App.4th 1022, 1029 [discussing the companion statute, i.e., the amendment to § 667, subd. (a)(1)], disapproved on other grounds as stated in *People v. Deloza* (1998) 18 Cal.4th 585; see, generally, 3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, §§ 347(1), pp. 530-531; 439, pp. 690-693; 5 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 475, pp. 738-740.)

Even more importantly, in its 1996 decision in *Romero*, our Supreme Court dealt with section 1385(b). *Romero* basically addressed the issue of whether, considering the combined effects of sections 667, subdivision (f), 1385, and 1170.12, subdivision (d), a trial court retains the power to dismiss a prior conviction either on its own or the prosecutor's motion. (*Romero, supra*, 13 Cal.4th 497.) It held that it did, and that “the Legislature may completely bar a court from dismissing certain charges. But if it permits a charge to be dismissed, it cannot validly subject the court's exercise of that power to prosecutorial consent.” (3 Witkin, Cal. Criminal Law, *supra*, Punishment, § 439, pp. 690-693; see also *id.* at § 430, pp. 674-676; 5 Witkin, Cal. Criminal Law, *supra*, Criminal Trial, §§ 465, pp. 725-726; 475, pp. 738-740.)

In so holding, however, the *Romero* court made clear that legislative enactments limiting a court's power in this respect are valid. Indeed, in the opening paragraph of the court's opinion in *Romero*, it stated: “*Although the Legislature may withdraw the statutory power to dismiss in furtherance of justice*, we conclude it has not done so in the Three Strikes law.” (*Romero, supra*, 13 Cal.4th at p. 504, italics supplied.) It later

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<sup>4</sup> Indeed, in his opening brief to us, appellant concedes that there is “apparently unanimous appellate authority that regards imposition of the five-year enhancement as mandatory . . . .”

explained: “In *People v. Thomas* [(1992)] 4 Cal.4th 206, we upheld a law (§ 12022.5, subd. (a)) requiring the court to impose an enhanced sentence on any person who personally uses a firearm in the commission or attempted commission of a felony. Because the law made no exception for cases in which the prosecutor requested the court to strike, the separation of powers question at issue in this case was not implicated. The same is true of *People v. Tanner* [(1979)] 24 Cal.3d 514, in which we upheld a law (§ 1203.06) barring probation for certain defendants who used firearms in committing their offenses, and of [*Valencia*], *supra*, 207 Cal.App.3d 1042, in which the Court of Appeal upheld a law (§ 1385(b)) withdrawing courts’ power to strike prior serious felony conviction allegations made for the purpose of enhancing sentence under section 667, subdivision (a). None of these statutes purported to make the exercise of a judicial power subject to the prosecutor’s approval.” (*Romero, supra*, 13 Cal.4th at p. 516.)

Clearly, nowhere in this citation of both *Valencia* and section 1385(b) did the court suggest that there might be some constitutional problems with that statute. And it continued in that vein later in *Romero*, i.e., in the portion of its opinion rejecting the prosecutor’s argument “that section 1385(b) independently bars a court from striking prior felony allegations in Three Strikes cases, regardless of the language of the Three Strikes law.” (*Romero, supra*, 13 Cal.4th at p. 525.) For a variety of reasons, none of them necessary to reiterate here, the court held that the prohibition enunciated in section 1385(b) did not apply to cases brought under the Three Strikes law as enacted in 1994. (See *Romero, supra*, 13 Cal.4th at pp. 525-529.) But, again, the court never hinted that there might be any constitutional problems regarding section 1385(b). (*Ibid.*)

Perhaps even more significantly, the court has, very recently, effectively affirmed the validity of a very similar statute, section 1385.1, which provides that “[n]otwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court . . . .” (§ 1385.1.) In *People v. Mendoza* (2011) 52 Cal.4th

1056 (*Mendoza*),<sup>5</sup> the court held: “In light of section 1385.1, the court had no authority to strike the lying-in-wait special circumstance.” (*Id.* at p. 1075.) The *Mendoza* court then went on to reject the appellant’s contention that section 1385.1 “applied only when the striking would alter the defendant’s sentence,” stating that the “language of section 1385.1 is unambiguous in the breadth of its application.” (*Mendoza, supra*, at p. 1077.) Just so here regarding the very similar section 1385(b). And, therefore, clearly there was no ineffective assistance of trial counsel in not arguing that section 1385(b)—a provision not even mentioned in the trial court (see *ante*)—was unconstitutional.

Further, appellant’s reliance on our Supreme Court’s decision in *People v. Tenorio* (1970) 3 Cal.3d 89 (*Tenorio*) to support his argument regarding the unconstitutionality of section 1385(b) does not withstand examination. First of all, and as *Romero* made clear, *Tenorio* did not address the issue of a claimed “legislative restriction” of the “power to dismiss,” but only whether the *prosecution itself* has such power. (See *Romero, supra*, 13 Cal.4th at pp. 515-517.) And several of our Supreme Court’s decisions since *Tenorio* have made clear that the reach of that case is, indeed, so limited. Thus, in *Davis v. Municipal Court* (1988) 46 Cal.3d 64 (*Davis*), the court explained that *Tenorio* involved “a statutory provision which gave the district attorney the power to preclude a trial court from exercising its long established discretion, under Penal Code section 1385, to strike a prior offense for the purposes of sentencing. . . . [¶] . . . All of the subsequent cases applying *Tenorio* to invalidate legislative provisions have similarly involved statutes which authorized the exercise of a prosecutorial veto *after* the filing of criminal charges, when the criminal proceeding has already come within the aegis of the judicial branch.” (*Id.* at pp. 82-83.) That holding simply did not apply in the case before it, the court held, because it involved only the exercise of a local wobbler rule, i.e., whether the prosecutor charged the offense at issue as a felony or misdemeanor. (*Id.* at pp. 81-87.)<sup>6</sup>

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<sup>5</sup> *Mendoza* is not cited in either of the parties’ briefs to us.

<sup>6</sup> Also making clear that the principle enunciated in *Tenorio* applies *only* to the prosecutor’s absolute veto powers are: *Solberg v. Superior Court* (1977) 19 Cal.3d 182, 202, footnote 22; *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1083; and *In re*

Finally regarding the issue of the constitutionality of section 1385(b), the Attorney General contends in her brief to us that, because this contention was not made in the trial court, it is forfeited on appeal. In all candor, we have difficulty dealing with this contention because of the arguments of the respective parties in the trial court and that court's ruling.

In a presentencing motion to the trial court, his counsel first asked that court to "grant his motion to strike his prior conviction under *Romero*." However, in the very next paragraph, the same pleading then asked the court to grant appellant probation, stating: "Defendant does argue that the admission to the enhancement of his sentence further to Penal Code section 667 [subdivision,] (a) was an insistent condition by the People with [sic: without] which no disposition would occur. Defendant respectfully suggests that [the] Court should not allow the People to tie it's [sic] hands. *Without a grant of probation, the court must impose five additional years to the sentence of Defendant irrespective of the ruling under Romero.*" (Emphasis supplied.)

Notwithstanding this concession, nowhere in appellant's motion to the trial court was section 1385(b) cited.

Section 1385(b) was also not cited in the district attorney's opposition pleading filed a week later. But, curiously, that opposition conceded that the court had discretion to strike, stating: "While the People recognize that the court has discretion to strike the 'strike' allegation based on the authority conferred by Penal Code section 1385(a), we respectfully urge the court not to exercise that discretion because it does not serve the interests of justice." That brief went on to cite *Romero* and argue, based on appellant's substantial criminal record and the circumstances of his entry into Houston's home and subsequent assault on her, that the trial court should not dismiss the prior under section 1385, because a "dismissal not in furtherance of justice is an abuse of discretion requiring a reversal."

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*Weber* (1974) 11 Cal.3d 703, 720. Curiously, neither *Davis* nor any of these other cases distinguishing *Tenorio* are cited in either of the parties' briefs to us.

Lastly, the trial court also did not cite or mention section 1385(b) in its ruling denying appellant's motion to strike the charged enhancement. After hearing arguments from both counsel, the court made the following observations and rulings: "What's bothering me I suppose about this one is the five year prior leaves so little discretion to the Court. That's partly why I've listened considerably this morning, because it bothers me that the choices are as limited as they are. . . . [¶] . . . That's Mr. Hall's option in whether to go to trial and risk 20 years or take a chance on a trial. But at this point I can't find that Mr. Hall is deserving of another Romero grant. The last one was only two years before this offense occurred. And I can't find that he's an appropriate candidate for probation. His convictions continue to be serious. This one's serious. The last one was serious. The one two [sic: years] ago was serious. Probation isn't working. [¶] I can't grant Romero on these facts and I can't grant probation if I were to consider a Romero. Were there more choices on the length of the sentence that might be something I would give thought to. But as the conviction stands I have very limited options other than to grant Romero, which he doesn't deserve, and give him probation, which he doesn't deserve in my view. [¶] So having said that I believe I have no option except on Count 3 in the case ending in 90 to sentence him to the low term, which is 16 months, but doubled by virtue of the strike. And I'm required to impose the five years for the previous sentence for the previous conviction. If the laws were different I might consider other options."

Presumably, albeit certainly not definitely, via the next-to-the-last sentence quoted above, the trial court was referring to section 1385(b) (and, possibly, also, § 667, subd. (a)(1)).

In light of this history, but also in light of the constitutionality of section 1385(b) discussed above, we see no need to reach the issue of whether appellant has "forfeited" his right to right to argue that issue.

*B. The Issues of the Conduct and Custody Credits to Which Appellant is Entitled*

Appellant makes three contentions regarding errors the trial court allegedly made in awarding him conduct and custody credits. Before summarizing them, a bit of factual

background is appropriate regarding appellant's jail time and the relevant statute regarding such. As noted above, appellant committed the crime at issue here on November 11, 2010; he was taken into custody two days later, i.e., on November 13, 2010, and not released on bail until October 29, 2011. He was, therefore, in jail a total of 350 days.

At the sentencing hearing, the prosecutor argued that appellant's presentence conduct credits should be capped at 20 percent of his actual custody time of 350 days because he was being sentenced under the Three Strikes law. The court agreed, albeit incorrectly as the Attorney General concedes. This is so because that law's cap on conduct credit does not apply to presentence confinement, the confinement at issue here. (See *People v. Thomas* (1999) 21 Cal.4th 1122, 1125.) As a result of its agreement with the prosecutor's position, the trial court "capped" appellant's conduct credit at 20 percent of the 350 days he had been confined, i.e., at 70 days. But under the version of section 4019 applicable to appellant, the parties agree that his presentence conduct credits totaled 174 days, and that he is therefore entitled to 104 days additional conduct credits.

Next, appellant argues that he is entitled to an additional 29 days of conduct credit for the time he spent in presentence confinement on and after October 1, 2011, the operative date of the current version of section 4019. That version now provides for two days of conduct credit for every four days of time served. (See § 4019, subd. (f).) Appellant argues that this calculation should apply to the time he spent in jail from October 1 to October 29, 2011, i.e., that he should be entitled to 29 more days of credit for that portion of his presentence confinement. The Attorney General disagrees. We agree with the Attorney General's argument.

To reiterate the key dates involved with this issue, appellant committed the last, and relevant, crime on November 11, 2010. The version of section 4019 that he asks be made applicable to him, however, clearly states that it "shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h); hereafter § 4019(h).)

Both in terms of its clear language and several recent cases interpreting it, this version of section 4019 does not apply to appellant for the reasons that (1) he committed his offense 10 months before the effective date of this *prospectively-applied* statute and (2) the statute is valid as worded. (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 51-52 (*Rajanayagam*); *People v. Kennedy* (2012) 209 Cal.App.4th 385, 399-400 (*Kennedy*); *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552-1553 (*Ellis*).)

Appellant contends that the final sentence of the latest version of section 4019(h) allows him to receive the increased conduct credits for the presentencing days he served on and after October 1, 2011. However, and as pointed out by the Attorney General, several recent appellate decisions have rejected this interpretation of the latest version of section 4019(h), and have held that the clearly more explicit language of the next-to-the-last sentence of that provision negates any interpretation of the broader final sentence regarding whether the latter sentence means that the amendment can and should be applied retroactively. Those cases have all held that may not be. (See *Ellis, supra*, 207 Cal.App.4th at pp. 1552-1553; *Rajanayagam, supra*, 211 Cal.App.4th at pp. 51-52.)<sup>7</sup>

Finally, appellant contends that based both on statutory interpretation and application, and also under the doctrine of equal protection of the law, he is entitled to day-for-day conduct credit for the substantial period of time (over 10 months) he served before October 1, 2011. Again, the Attorney General disagrees.

For several reasons, we agree with the Attorney General. First of all, the amendment to section 4019 that provided for an increased conduct credit rate was specifically framed so as to make it *inoperative* for anyone at all until October 1, 2011.<sup>8</sup> As our Supreme Court held last year in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*),

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<sup>7</sup> In his reply brief, appellant expresses his disagreement with the holding in *Rajanayagam*, but in so doing cites no authority to the contrary nor the holding in *Ellis* which, as noted above, is consistent with *Rajanayagam*. (See also, agreeing with both of those cases regarding there being no retroactive application of the amendments to section 4019(h), *Kennedy, supra*, 209 Cal.App.4th at pp. 395-400.)

<sup>8</sup> For the full and rather complex history of the recent changes to section 4019, see *Rajanayagam, supra*, 211 Cal.App.4th at pages 48-50.

a prior amendment to section 4019 had no retroactive application, because (1) the statute specifically said that it applied prospectively (see section 4019(h)), (2) section 3 of the Penal Code provides similarly regarding provisions of that code unless the contrary is “expressly so declared” (§ 3), and (3) the “equal protection” doctrine does not mandate a different result. (*Brown, supra*, 54 Cal.4th at pp. 319-330.) As several cases have noted subsequent to *Brown*, its holding clearly applies to the current version of section 4019. (See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 (*Lara*); *Kennedy, supra*, 209 Cal.App.4th at pp. 395-400; *Ellis, supra*, 207 Cal.App.4th at p. 1552.)

Appellant’s equal protection argument also fails both because of the reasons stated in *Brown* (see *Brown, supra*, 54 Cal.4th at pp. 328-330; see also *Lara, supra*, 54 Cal.4th at p. 906, fn. 9), and also because “several legitimate reasons” existed for the Legislature to make the “increased level of presentence conduct credit applicable only to those who commit their crimes on or after October 1, 2011.” (*People v. Verba* (2012) 210 Cal.App.4th 991, 996-997; see also *Rajanayagam, supra*, 211 Cal.App.4th at pp. 53-56.) For all of these reasons, we have no difficulty in holding that appellant is not entitled to day-for-day credits for the presentencing time he was in jail prior to October 1, 2011.

Finally, both for the reasons stated above, i.e., that there was no error committed by the trial court regarding the final two conduct-credit issues discussed above, and also because these are the sorts of issues that can be raised the first time on appeal (see *People v. Acosta* (1996) 48 Cal.App.4th 411, 420-428), there was no ineffective assistance of counsel provided appellant in the trial court regarding this subject.

#### IV. DISPOSITION

The judgment, including the sentence imposed, is affirmed, except that appellant should be awarded 104 additional conduct credit days. The case is remanded to the trial court to correct the abstract of judgment in that respect.

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.