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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ALDERS SORENSON,

Defendant and Appellant.

C072059

(Super. Ct. Nos. NCR83401,
NCR83734)

A jury found defendant, John Alders Sorenson, guilty of driving under the influence (DUI), driving with blood-alcohol level at or above .08 percent, and failure to appear (FTA) while released on his own recognizance (OR). (Veh. Code, § 23152, subs. (a) & (b); Pen. Code, § 1320, subd. (b).)¹ He had previously admitted a prior DUI-related offense, a prior prison term, a strike (with a violent felony allegation

¹ Further undesignated statutory references are to the Penal Code.

dismissed), a charge of driving on a suspended license, and an on-bail allegation. (§§ 667.5, subd. (b), 1170.12, 12022.1; Veh. Code, § 14601.2.) The trial court sentenced defendant to prison for 10 years four months. Defendant timely appealed.

Defendant first contends the magistrate abused its discretion in continuing the preliminary hearing and therefore the trial court should have granted his motion to dismiss. He adds that the trial court improperly instructed on the FTA charge, no substantial evidence supports the FTA charge, and he is entitled to additional presentence credits. The People agree that he is entitled to additional credits, but disagree as to the appropriate amount. We shall modify the judgment to award additional credits, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pretrial Proceedings

On February 6, 2012, defendant was charged (case No. 83401) with various DUI charges and priors.

On March 23, 2012, a new complaint was filed (case No. 83734), and later amended, charging defendant with FTA while released on OR. Defendant was held to answer on the DUI case and waived a preliminary hearing on the FTA case. The ensuing informations tracked the complaints.

Over objection, the cases were consolidated.

Before the jury trial started, defendant pleaded guilty to driving on a suspended license. (Veh. Code, § 14601.2.) He also admitted a prior DUI conviction. The strike allegations (from an alleged 2009 first degree burglary conviction) were bifurcated. Defendant also admitted an on-bail allegation (§ 12022.1) as to the FTA count (*id.*, § 1320, subd. (b)). After jury selection, defendant admitted the strike and the People moved to dismiss parallel allegations of a serious prior felony.

This left the DUI and FTA charges for the jury to decide.

Trial Evidence

There are no substantive issues on appeal concerning the DUI charges. On August 21, 2011, defendant drove and his blood-alcohol level later tested at .19 percent.

The parties stipulated defendant was in Department 3 on February 22, 2012, for a 1:30 p.m. hearing, was released on OR, and was ordered to appear for a preliminary hearing at 9:00 a.m., on February 27, 2012, in Department 1; he was not present in Department 1 when his case was called, and he was arrested pursuant to a bench warrant on April 25, 2012.

The DUI arresting officer was in Department 1 on February 27, 2012, at 9:00 a.m., when defendant's preliminary hearing was set to begin, but defendant was not there, nor was he there when the case was later called. Department 1 is in a different building than Department 3. A court security officer testified defendant entered the building containing Department 3 on the *afternoon* of February 27, 2012, as shown on court security recordings.

The defense trial theory as to the FTA was that defendant misunderstood the time and precise location of his appearance. The People argued defendant remained at large for two months without returning to court, evidencing his guilt on the original DUI charges, and showing guilt on the FTA charge, despite his appearance in the wrong building at the wrong time on the right day.

DISCUSSION

I

Continuance of the Preliminary Hearing

Defendant contends the magistrate abused its discretion in continuing the preliminary hearing on the DUI charges, and the trial court should have granted his subsequent motion to dismiss. We disagree.

A. Procedural Background

The preliminary hearing on the DUI case began on Wednesday, February 22, 2012. Before testimony was taken, the prosecutor represented that “by the time my office sent the subpoena to the Highway Patrol, the arresting officer, Officer Burson, was on his days off and on his way to vacation, so he was unable to be served. He is currently out of state on vacation.” The People had followed their standard practice, which was to have CHP staff place a subpoena in an officer’s “box[,]” but because this particular officer had not returned “since then, he was not able to be served.” Defense counsel objected, stating “due diligence would have involved getting an Order from the Court having him served out of state.” After a break, defense counsel argued the motion to continue was untimely and “[t]here is no affidavit to support the motion.” When asked about the lack of a written motion, the prosecutor represented to the magistrate: “We received word from the Highway Patrol late this morning that Officer Burson would be unavailable” and “I brought the motion [at] the earliest possible time.” Defense counsel did not dispute this representation, or any of the factual representations made by the prosecutor to the magistrate.

The magistrate (Bottke, J.) found good cause and granted the oral motion to continue the case until Monday, February 27, 2012, releasing defendant on OR, a statutory requirement triggered by the continuance (§ 859b, subd. (b)).

On Friday, February 24, 2102, defendant filed a written motion to dismiss pursuant to section 859b, arguing there was no good cause for a continuance because the People had not served their witness or otherwise acted diligently. Defense counsel declared he spoke with the prosecutor twice before the preliminary hearing, including the day before the hearing, about the possible unavailability of a prosecution witness, but “[n]o agreement could be reached.” The People opposed the motion, contending they followed “standard protocol” for subpoenaing a CHP officer.

On February 27, 2012, the defense argued the motion to dismiss. The trial court (Scheuler, J.) denied the motion both because good cause had been found by the magistrate, and because good cause had been shown. Inasmuch as defendant had not appeared for the hearing, a bench warrant was issued.

B. *Analysis*

A preliminary hearing may be continued if the “prosecutor establishes good cause for a continuance beyond the 10-court-day period.” (§ 859b, subd. (b).) The magistrate has broad discretion in determining whether such a continuance is warranted. (See *People v. Henderson* (2004) 115 Cal.App.4th 922, 933.)

The prosecutor represented to the magistrate--without contradiction by the defense--that the normal procedure for serving a subpoena on local CHP officers had been followed in that a subpoena was left for the officer in a box normally used for such purposes, however, that particular officer had been on vacation and did not receive it timely, a fact the prosecutor had not learned until late that morning.

The magistrate found good cause to continue, despite the lack of a written motion, based on the record before it. (See § 1050, subd. (c).)

The facts of this case are analogous to those found sufficient to continue a scheduled *trial date* in another case, described as follows:

“The parties stipulated that: a subpoena was issued by the district attorney’s office for Officer Tanner on February 27, 2007, and was received by a Beverly Hills Police Department representative on that date; that Officer Tanner was not personally served with the subpoena and that the cadet responsible for serving the officer just left it in the officer’s box; and that Officer Tanner left on vacation on or about March 21, 2007. The deputy district attorney reported that on March 21 she received the subpoena back with a notation stating that the officer was on vacation, and that she confirmed with the . . . Department that the officer was on vacation.” (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 270 (*Jensen*).)

Jensen found that it was reasonable for the prosecutor in that case to arrange for the subpoena to be left in the peace officer's box, rather than requiring personal service, as might be required for other witnesses, because of a statutory provision allowing peace officers to be served via service on a superior or designated agent (§ 1328, subd. (c)): “[I]t appears that the prosecutor did exactly what she was supposed to do under the law: only days after the trial date was set, with weeks remaining until the trial date, she caused the subpoena to be transmitted to the Beverly Hills Police Department, where it was accepted. Service was complete at this point, at least with respect to the responsibilities of the attorney issuing the subpoena.” (*Jensen, supra*, 160 Cal.App.4th at pp. 272-273.) The court recognized that a peace officer's vacation is not itself normally good cause for a continuance, but that in the circumstances, the prosecutor did all that was reasonably required, *not knowing* that the officer was on vacation. (*Id.* at pp. 273-274.)

“Here, the statutory provisions, though designed to simplify the process of serving subpoenas on peace officers, instead created a complicated and unusual situation in which a police officer could be legally served with a subpoena and yet not be aware of that service, thus going on vacation apparently without knowing that he was defying a subpoena; and a prosecutor, secure in her knowledge that she had properly and timely subpoenaed her central witness, could be surprised the day before the trial when the Beverly Hills Police Department finally notified her that the officer was unavailable” (*Jensen, supra*, 160 Cal.App.4th at p. 274, fn. omitted.)

Jensen supports the magistrate's finding in this case that the prosecutor acted with reasonable diligence by relying on the standard method of serving local CHP officers in this case. Unless and until notified by the CHP that the particular officer was on vacation and that the normal effort to subpoena him would not work, the prosecutor had no reason to think extraordinary steps to secure the officer's attendance would be required.

Defendant contends that because the motion to dismiss before the trial court included a declaration by defense counsel that discussions with the prosecutor about an unavailable witness began on February 17 and continued on February 21, 2012, this

outweighed the prosecutor's mere representations to the court about learning of the officer's absence the day of the preliminary hearing, February 22, 2012, or at least raised a factual dispute requiring resolution by the trial court.

This claim was made for the first time in the reply brief. The *opening* brief stated without qualification that the prosecutor learned of the missing witness the morning of the preliminary hearing, and used that fact to bolster an argument about lack of diligence. To reverse course in the reply brief, and contend for the first time the fact of when the prosecutor learned of the unavailability of the CHP officer was in dispute, deprived the People of any opportunity to reply, and therefore the claim is forfeited. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

Further, the defense declaration did not state *which* witness's availability was being discussed, and in any event, the magistrate was free to disbelieve the defense declaration. (See *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660.) Moreover, in many cases judicial officers rely on the representations of counsel--officers of the court--without the need for a written declaration. (See, e.g., *People v. Ranger Ins. Co.* (2005) 135 Cal.App.4th 820, 824; *Aceves v. Superior Court* (1996) 51 Cal.App.4th 584, 591-594.) Here, as we have described *ante*, the representations made by the prosecutor to the magistrate were not disputed by defense counsel at the time they were made. "We normally review a trial court's ruling based on the facts known to the trial court at the time of the ruling." (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.) Accordingly, the magistrate could properly rely on the representations made by the prosecutor.

Based on what was presented to the magistrate, defendant has not shown an abuse of discretion in the order finding good cause to continue the preliminary hearing, and therefore the motion to dismiss was properly denied by the trial court.

II

Substantial Evidence of Failure to Appear

Defendant contends no substantial evidence supports the FTA conviction because there was no evidence his release complied with section 1318, detailing OR procedures. (See *People v. Mohammed* (2008) 162 Cal.App.4th 920, 933 [“because there was no evidence in this case of a written agreement conforming to section 1318 produced at trial, there was insufficient evidence to convict appellant of willful failure to appear while out on OR”].) In this case, however, the parties *stipulated* that defendant had been released on OR. The jury was instructed that as to stipulated facts, “[b]ecause there is no dispute about those facts, you must also accept them as true.” That obviated the need for proof of any subsidiary facts otherwise need to prove a valid OR release.

“A stipulation is ‘An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,’ [citation] and serves ‘to obviate need for proof or to narrow range of litigable issues’ [citation] in a legal proceeding.” (*County of Sacramento v. Workers’ Comp. Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1118, italics added.) “‘[W]hen a fact is undisputed, or the parties have stipulated to its existence, there is no “issue of fact” for the jury to resolve, and this aspect of the Sixth Amendment right to jury trial is not implicated. Otherwise stated, the federal Constitution gives an accused no right to have the jury decide the truth of a fact that the accused has elected not to contest.’” (*People v. Moore* (1997) 59 Cal.App.4th 168, 185-186, fn. 18; see *id.* at p. 181 [“Absent a stipulation” the trial court must submit factual questions to the jury].)

Due to the stipulation, there was no failure of proof. The stipulated facts together with the facts proven at trial constituted substantial evidence of defendant's FTA.²

III

FTA Instructions

Defendant makes two separate attacks on the instructions on the FTA count. We find no error.

A. Impermissible Mandatory Presumption Claim

Defendant contends the trial court gave a prohibited mandatory presumption instruction, in violation of the presumption of innocence. We disagree.

“A mandatory presumption tells the trier of fact that if a specified predicate fact has been proved, the trier of fact *must* find that a specified factual element of the charge has been proved, unless the defendant has come forward with evidence to rebut the presumed connection between the two facts. [Citations.] In criminal cases, a mandatory presumption offends constitutional principles of due process of law because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt.” (*People v. Williams* (2005) 130 Cal.App.4th 1440, 1444-1445.)

The trial court in this case instructed the jury in relevant part as follows:

“Every person who is charged with or convicted of the commission of a felony, who is released from custody on his own recognizance, and who in order to evade the process of the court, willfully fails to appear as required is guilty.

“Willful failure to appear within 14 days of the date assigned for appearance may be found to have been for the purpose of evading the process of the court.”

The jury was also instructed that the People had to prove defendant bore the specific intent “to evade the process of the court.”

² We note that the details of the OR release were irrelevant to the FTA defense, which was that defendant went to the wrong court building at the wrong time, tending to show he was confused or mistaken, but did not intend to evade court process. Proof of the details of the OR release process would have been time-consuming and unnecessary to this defense.

We have held that an instruction telling the jury that failure to appear within 14 days *should* lead the jury to presume intent to evade the process of the court was improper. (*People v Forrester* (1994) 30 Cal.App.4th 1697, 1700-1702 (*Forrester*)). But the instruction in this case permitted, but did not require, the jury to draw such an inference. That is how we previously held a jury *should be instructed* in FTA cases:

“Henceforth, in prosecutions for violation of Penal Code section 1320, subdivision (b), when the People have produced proof of defendant’s willful failure to appear within 14 days of defendant’s assigned appearance date, the trial court should instruct the jury that it is permitted, but not required, to infer therefrom that defendant intended to evade the process of the court.” (*Forrester, supra*, 30 Cal.App.4th at p. 1703.)

We also reject defendant’s claim there was no evidentiary basis for the instruction. His intent was at issue, and the jury was tasked with determining his intent based on his non-appearance, his failure to surrender for two months, his arrest pursuant to a bench warrant, as well as the defense evidence trying to show he was merely confused about the required appearance.

B. *Definition of OR Release*

Defendant faults the trial court for not instructing the jury on the precise legal meaning of OR release, a term of art defined by section 1318.

“ ‘The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.’ ” (*People v. Souza* (2012) 54 Cal.4th 90, 115.) But for the reasons stated earlier (Part II, *ante*), no factual issues about OR release remained to be decided. The parties’ stipulation made in the trial court relieved the People of the need to prove the statutory requirements of an OR release, as set forth in section 1318, were met.

IV

Presentence Custody Credit

Defendant contends he is entitled to additional presentence credit, a claim which the People concede in part. As we explain, we agree defendant is entitled to additional credit, but disagree with him as to how much.

A. Statutory Background

Section 4019 permits jail inmates to earn additional credit prior to being sentenced by performing labor (§ 4019, subd. (b)) or by good behavior during detention (§ 4019, subd. (c)). Such credits are referred to as “conduct credit.” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) “The very purpose of conduct credits is to foster constructive behavior in prison by reducing punishment.” (*People v. Lara* (2012) 54 Cal.4th 896, 906 (*Lara*).) Section 4019 and allied statutes have undergone several revisions since 2009. (See *People v. Garcia* (2012) 209 Cal.App.4th 530, 534-540 (*Garcia*) [describing bills].)

Under the *Bobb-Smith* “two-for-four” formula, section 4019 previously provided that for every four-day period a defendant served, she or he would be deemed to have served a six-day period, and therefore would be entitled to two days of conduct credit. (See *People v. Bobb* (1989) 207 Cal.App.3d 88, 97-98; *People v. Smith* (1989) 211 Cal.App.3d 523, 527 (*Smith*); Stats. 1982, ch. 1234, § 7, p. 4554.)

Senate Bill No. 18 amended section 4019, effective January 25, 2010, to enhance the number of presentence conduct credits for certain offenders. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Under that bill, most defendants--other than registered sex offenders, or those who committed or had prior convictions for serious or violent felonies--accrued “two-for-two” credits, two days of conduct credit for every two days of actual custody. (See *Garcia, supra*, 209 Cal.App.4th at pp. 535-536.) This change was deemed prospective in effect. (*People v. Brown* (2012) 54 Cal.4th 314 (*Brown*).)

Senate Bill No. 76, effective September 28, 2010, restored the “two-for-four” *Bobb-Smith* formula in effect prior to January 25, 2010 for persons committed to jail, but created a “one-for-one” formula for defendants sentenced to prison--except registered sex offenders, or those who committed or had prior convictions for violent or serious or felonies (such as defendant, who admitted a strike). Those persons were subject to the traditional *Bobb-Smith* formula. (Stats. 2010, ch. 426, §§ 1 & 2; see *Garcia, supra*, 209 Cal.App.4th at pp. 537-539; *People v. Hul* (2013) 213 Cal.App.4th 182, 185-186 (*Hul*)). This change was explicitly prospective. (See *Garcia, supra*, 209 Cal.App.4th at p. 538.)

The 2011 Realignment Act authorized conduct credit for local prisoners at the rate of two days for every two days spent in local custody. (Stats. 2011, ch. 15, § 482.) The amendment’s new formula was delayed to become effective October 1, 2011. (Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 35; § 4019, subd. (f).) Like the prior change, the new formula is explicitly prospective. (§ 4019, subd. (h).) It applies to persons, such as defendant, who have strikes. (See *Garcia, supra*, 209 Cal.App.4th at pp. 539-540.)

With this background in mind, the parties agree defendant is entitled to additional credits due to a mathematical error, because his incarceration based on the FTA charge took place after the “two-for-two” Realignment Act formula took effect. The parties also agree defendant’s actual total presentence custody time is 320 days. However, the parties continue to disagree on two different points, as we now discuss.

B. Credits for the FTA Case: Effect of Recall of Resentencing

A revised memorandum from the probation department listed defendant’s custody as occurring in two periods: First, on the DUI charges, defendant was in custody from August 21, 2011, through February 22, 2012, or 186 actual days. He absconded after being released on OR when the preliminary hearing was continued. (See Part I-A, *ante*.)

Defendant was captured on April 25, 2012, and was (as of the date of the memorandum) expected to remain in custody until the scheduled sentencing hearing date of August 21, 2012, for a period of 119 actual days.

The parties agree that the FTA was committed on February 27, 2012, and credits for time served after the arrest on April 25, 2012, and until sentencing should accrue at the “two-for-two” formula, explicitly applicable to crimes committed after October 1, 2011.³ But, as we explain *post*, the parties disagree as to when defendant was actually “sentenced” for purposes of this calculation.

At the initial sentencing hearing on August 21, 2012, without objection, the trial court found defendant had served 305 days of actual presentence custody, and awarded 152 days of conduct credits. On September 5, 2012, 15 days later, the trial court *resentenced* defendant and, without objection, found he had served 316 actual days and awarded him 158 conduct days, for a total of 474 days.

The present dispute centers on the nature of the 15-day period between the initial sentencing and resentencing hearings. The People view this period as constituting 15 “post-sentence” actual days that are credited by the prison system, not a presentence period. Defendant views the initial sentencing as “unauthorized” and of no effect, and asserts he remained in presentence custody until a lawful prison sentence was imposed at the resentencing.

³ As articulated by a probation memorandum, under the traditional *Bobb-Smith* “two-for-four” formula defendant earned 92 days of conduct credit for his first period of 186 days of custody on the DUI case, because he completed 46 four-day periods of custody and was entitled to two days of conduct credit for each such period. For the 119 day period of actual custody partly attributable to the FTA charge, defendant earned 118 days of conduct credit, because he completed 59 two-day periods of custody.

The bench warrant resulting in defendant’s arrest on April 25, 2012, was issued in the DUI case on February 27, 2012, and the FTA case was filed on March 23, 2012. For purposes of this appeal, we accept the view of the parties that custody between April 25, 2012, and sentencing is attributable only to the FTA case rather than to both cases.

At the initial sentencing, the trial court failed to impose any sentence on the DUI charge (Veh. Code, § 23152, subd. (a)), but imposed a base term for the driving with a blood-alcohol level of .08 percent or higher charge (Veh. Code, § 23152, subd. (b)), followed by a consecutive term imposed for the FTA charge. This failure to impose sentence on the DUI was error. The trial court should have imposed the sentence and stayed its execution. (§ 654; see *People v. Alford* (2010) 180 Cal.App.4th 1463, 1469-1472, approved by *People v. Duff* (2010) 50 Cal.4th 787, 795-796.) As defendant argues, the error resulted in “an unauthorized absence of sentence.” (*Alford, supra*, 180 Cal.App.4th at p. 1472.) The trial court recalled the sentence to correct it, as it was authorized by statute to do. (§ 1170, subd. (d).) On September 5, 2012, the trial court imposed and stayed execution of a sentence for the DUI. At the time the trial court invoked section 1170, subdivision (d), and for a long time before defendant’s crimes were committed, the recall section provided:

“When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.” (Stats. 2011, ch. 361, § 6.)⁴

In *People v. Johnson* (2004) 32 Cal.4th 260, our Supreme Court held the period between sentencing and resentencing pursuant to the recall provision of section 1170, subdivision (d) is *not* “presentence” time: “If the Legislature had intended section 4019

⁴ Although the wording has changed, the ability to recall a sentence was part of section 1170, subdivision (c) of the original Determinate Sentencing Law. (Stats. 1976, ch. 1139, § 273, p. 5141.)

conduct credits to apply to section 1170, subdivision (d), it could have used language similar to section 2900.5. (See [*People v.*] *Buckhalter* [(2001) 26 Cal.4th 20,] 33].) Thus, the implication is that section 1170, like section 2900.1, omits reference to presentence conduct credits under section 4019 because it refers to a prison sentence already in progress, and a recall of such a sentence does not restore a convicted felon to presentence status.” (*Johnson, supra*, 32 Cal.4th at p. 268; see *People v. Donan* (2004) 117 Cal.App.4th 784, 791-792.)

Thus, “a recall of sentence does not remove a prisoner from the custody of the Director of Corrections or restore the prisoner to presentence status. Consequently, the defendant is not entitled to earn credits at the presentence rate for time served between the original sentencing and resentencing. This is true for time the defendant is temporarily confined in local custody as well as time in state prison.” (3 Witkin & Epstein, *Cal. Criminal Law* (4th ed. 2012) Punishment, § 465(3), p. 742 (Witkin).) As we explained in a prior case, defendant was entitled to “presentence” credit for the day of sentencing, because he spent part of that day as a non-sentenced convict. (*Smith, supra*, 211 Cal.App.3d at pp. 526-527 & fn. 2.) Defendant “does not begin to accrue credits with the Department of Corrections in connection with his sentence until he is actually delivered into the department’s custody. In the interim, credits are awarded by virtue of section 2900.5, subdivision (e) which provides: ‘It shall be the duty of any agency to which a person is committed to apply the credit provided for in this section for the period *between* the date of sentencing and the date the person is delivered to such agency.’ (Italics added.)” (*Id.* at p. 526.) Thus, those 15 days between the sentencing hearing and resentencing hearing should be noted on the abstract to inform the prison authorities that time should be credited against defendant’s prison sentence as postsentence actual days

and credited by the prison authorities pursuant to section 2900.5, subdivision (e), as we explained in *Smith*.⁵

Accordingly, we modify the judgment (§ 1260) to amend the credit award as follows: Defendant is entitled to 186 actual and 92 conduct credits (278 days total) for the DUI case, and 119 actual and 118 conduct credits (237 days total) for the FTA case, for a total of 515 days of presentence actual and conduct credit, plus 15 days of postsentence actual custody days, for a grand total of 530 days of credit.

C. Credits for the DUI Charge

Defendant seeks “two-for-two” credits under the Realignment Act, effective October 1, 2011, either as a matter of statutory interpretation, or constitutional compulsion under the equal protection clause.⁶

1. Statutory Interpretation

Defendant contends he is entitled to the benefit of the new formula under principles of statutory interpretation. He acknowledges his contentions have been rejected by several published decisions, but asks us not to follow those decisions. However, we agree with those decisions, as we now explain.

⁵ The fact defendant remained in jail and had not been physically delivered to prison officials changes nothing. (3 Witkin, *supra*, Punishment, § 465(3), p. 742 [“the defendant is not entitled to earn credits at the presentence rate for time served between the original sentencing and resentencing. This is true for time the defendant is temporarily confined in local custody as well as time in state prison”].)

⁶ We reject the People’s assertion that these issues are forfeited. Section 1237.1 generally requires defendants to bring “an error in the calculation” of credits to the attention of the trial court. “[A]n error in ‘doing the math’ . . . constitutes the type of minor sentencing error at which section 1237.1 was clearly aimed. A determination of which version of a statute applies--especially when, as here, that determination involves application of constitutional principles--does not.” (*People v. Delgado* (2012) 210 Cal.App.4th 761, 766.) Here, defendant raises purely legal questions about which credit formula applies to his case, and therefore he may raise them for the first time on appeal. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

The Realignment Act added subdivision (h) to section 4019, which provides: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to [specified facilities] 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.”

Defendant contends section 4019, subdivision (h) contains an ambiguity that should be construed in his favor. Specifically, while the first sentence expresses the Legislature’s intent that application of the enhanced conduct credits are limited to defendants whose crimes are committed on or after October 1, 2011, the second sentence of the subdivision--in his view--implies any days earned by a defendant on or after October 1, 2011, should be calculated under the current law.

In *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), the appellate court concluded: “In our view, the Legislature’s clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.] The second sentence does not extend the enhancement rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless, especially in light of the fact the October 1, 2011, amendment to section 4019, although part of the so-called realignment legislation, applies based on the date a defendant’s crime is committed, whereas section 1170, subdivision (h), which sets out the basic sentencing scheme under realignment, applies based on the date a defendant is sentenced.” (*Ellis, supra*, 207 Cal.App.4th at p. 1553.)

People v. Rajanayagam (2012) 211 Cal.App.4th 42 (*Rajanayagam*) held, “[W]e cannot read the second sentence to imply any days earned by a defendant *after* October 1, 2011, shall be calculated at the enhanced conduct credit rate for an offense committed before October 1, 2011, because that would render the first sentence superfluous.” (*Id.* at p. 51.) “Instead, subdivision (h)’s second sentence attempts to clarify that those defendants who committed an offense before October 1, 2011, are to earn credit under the

prior law. However inartful the language of subdivision (h), we read the second sentence as reaffirming that defendants who committed their crimes before October 1, 2011, still have the opportunity to earn conduct credits, just under prior law. [Citation.] To imply the enhanced conduct credit provision applies to defendants who committed their crimes before the effective date but served time in local custody after the effective date reads too much into the statute and ignores the Legislature’s clear intent in subdivision (h)’s first sentence.” (*Id.* at p. 52.)

We agree with *Ellis* and *Rajanayagam*. (See also *Hul*, *supra*, 213 Cal.App.4th at pp. 186-187; *Garcia*, *supra*, 209 Cal.App.4th at p. 541 [following *Ellis*].) Because we can interpret the statutory intent by reading the statute as a whole, giving effect to all its parts, the rule of lenity, applicable where two plausible candidates of meaning stand in relative equipoise, does not compel interpreting the statute in defendant’s favor. (See *People v. Cornett* (2012) 53 Cal.4th 1261, 1271.)

2. Equal Protection

Defendant next contends he is entitled to the benefit of the new formula under principles of equal protection. We disagree.

“The essence of an equal protection claim is that two groups, similarly situated with respect to the law in question, are treated differently.” (*Grossmont Union High School Dist. v. State Dept. of Education* (2008) 169 Cal.App.4th 869, 892.)

Brown held that a prior amendment to section 4019 must be read prospectively only, even though the Legislature did not expressly so state, and even though this meant “prisoners whose custody overlapped the statute’s operative date . . . earned credit at two different rates.” (*Brown*, *supra*, 54 Cal.4th at p. 322.) *Brown* reasoned that “the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly

situated necessarily follows.” (*Id* at pp. 328–330; see *Lara, supra*, 54 Cal.4th at p. 906, fn. 9 [noting that the “day-for-day” credit formula created by the Realignment Act “does not benefit defendant because it expressly applies only to prisoners who are confined to a local custodial facility ‘for a crime committed on or after October 1, 2011. (§ 4019, subd. (h), italics added).”].)

Following *Brown*’s lead, two appellate courts have concluded that persons who commit crimes before and after the October 1, 2011, effective date of the new credit formula are *not* similarly situated, and therefore those on the “wrong” side of the dateline have not suffered an equal protection violation. (See *Ellis, supra*, 207 Cal.App.4th at pp. 1550-1552; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 396-397 (*Kennedy*).)

And although two other appellate courts have found the two groups to be similarly situated, those courts have held that treating those two groups differently is subject to rational-basis scrutiny--not “strict” scrutiny as defendant seeks to apply herein--and that the disparate treatment caused by legislative line-drawing regarding accrual of presentence credits survives such scrutiny. (See *People v. Verba* (2012) 210 Cal.App.4th 991, 995-997 (*Verba*); *Rajanayagam, supra*, 211 Cal.App.4th at pp. 53-56; see also *Kennedy, supra*, 209 Cal.App.4th at pp. 397-399 [groups *not* similarly situated, but also finding a rational basis for disparate treatment].)

Like the *Verba* court: “We see nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards in effect at the time they committed their offense.” (*People v. Verba, supra*, 210 Cal.App.4th at p. 997.)

Accordingly, even if we found the two groups similarly situated, we would find a rational basis for the disparate treatment, and therefore defendant has not established an equal protection violation in this case.

DISPOSITION

The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and forward a certified copy to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

MURRAY, Acting P. J.

HOCH, J.