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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO LARA PEREZ,

Defendant and Appellant.

D061162

(Super. Ct. No. FBV4161)

APPEAL from a judgment of the Superior Court of San Bernardino County, Miriam Ivy Morton, Judge. Affirmed as modified and remanded with directions.

In 2008 Gustavo Lara Perez was convicted of second degree murder (Pen. Code, § 187; all further statutory references are to the Penal Code) for a killing occurring in 1992. On May 29, 2009, he was sentenced to prison. Perez appealed, and this court affirmed his conviction, reversed an order denying his motion for a new trial and vacated the sentence. Respondent requests judicial notice of this court's opinion in that appeal, and we grant the request.

On December 1, 2011, on remand, the superior court denied Perez's new trial motion and sentenced him to 15 years to life in prison, with the possibility of parole. The court imposed a \$10,000 parole revocation fine (§ 1202.45). The court granted Perez presentence credits for 1,028 actual days spent in custody as of May 29, 2009, and awarded no conduct credits.

Perez appeals, contending the court's denial of conduct credits and imposition of the parole revocation fine violated the proscription against ex post facto laws. Perez also contends he is entitled to additional actual days' credit for the time he spent in custody between May 29, 2009, and December 6, 2011, which he erroneously states was the date of resentencing. Respondent correctly concedes Perez is entitled to conduct credits, and to actual credits for the period May 29, 2009, through December 1, 2011, and that the parole revocation fine must be stricken.

Perez is entitled to additional credit for the actual days he spent in custody between the date of the original sentencing hearing and the date of resentencing. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23.)

Section 2933.2, subdivision (d), which proscribes an award of conduct credits to a defendant convicted of murder, "shall only apply to murder that is committed on or after the date on which this section becomes operative." Section 2933.2 became operative in 1998. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1317.) Section 2933.1, which limits worktime credit to 15 percent for defendants convicted of violent felonies, including murder (§ 667.5, subd. (c)(1)), "shall only apply to offenses . . . that are committed on or after the date on which this section becomes operative." (§ 2933.1,

subd. (d).) Section 2933.1 became operative in 1994. (*People v. Camba* (1996) 50 Cal.App.4th 857, 867.) Application of the proscription in section 2933.2 and the limitation in section 2933.1 to Perez violates ex post facto principles. (*Weaver v. Graham* (1981) 450 U.S. 24, 35-36.)

Because section 1202.45 was enacted and became effective in 1995, after Perez's crime, the parole revocation fine must be stricken. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 676.)

DISPOSITION

The judgment is modified by striking the \$10,000 parole restitution fine (§ 1202.45). As so modified, the judgment is affirmed. The case is remanded to the trial court with the following directions. The court shall calculate and award Perez additional actual and conduct credits as set forth in this opinion. The court shall prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.