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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN RODGERS,

Defendant and Appellant.

D061203

(Super. Ct. No. SCD232089)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed as modified with directions.

A jury convicted Melvin Rodgers of possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Rodgers admitted three narcotics prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a) and Penal Code<sup>1</sup> section 1203.07, subdivision (a)(11).

The court sentenced Rodgers to a three-year term for his conviction. The court enhanced the sentence by six years for the prior convictions, but suspended that portion

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

of the sentence and ordered that Rodgers be subject to mandatory supervision for the six-year period.

The trial court granted Rodgers 292 days of actual custody credits and 146 credits under section 4019. Rodgers filed a timely notice of appeal.

Rodgers appeals challenging only the amount of custody credits he received.<sup>2</sup> Rodgers contends he is entitled to an additional 146 days of credit. The Attorney General correctly concedes that denial of the 146 additional days requested would violate the ex post facto clause of the United States Constitution. Accordingly, we will order the judgment modified to provide Rodgers with 146 additional days of custody credits.

#### DISCUSSION

The crime for which Rodgers was convicted occurred on October 26, 2010. He was sentenced on January 3, 2012. He was sentenced to a three-year term in county jail under the so-called realignment statute (§ 1170, subd. (h)(5)). Under that statute, persons, like Rodgers, who would have been sentenced to prison, will now serve their sentences in the county jail. Under the credits provision in place when he committed his crime, Rodgers would have been eligible for section 4019 credit of two days for each four days of actual presentence custody and the section 2933 credits or day-for-day credit in prison.

Rodgers argues, and the Attorney General agrees, that under the law at the time of the offense, he would have been entitled to section 2933, subdivision (e) credits when

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<sup>2</sup> Since this appeal does not raise any issue regarding the facts of the underlying offense we will omit the traditional statement of facts.

sent to prison. However, since section 2933, subdivision (e) has since been repealed as part of the realignment that would have the effect of limiting Rodgers to the section 4019 credits then effective of two days of conduct credit for every four days of actual custody. Thus, Rodgers, by now serving his "prison sentence" in local custody, is being denied the credits he would have received under the law as it existed at the time of the offense.

In *Weaver v. Graham* (1981) 450 U.S. 24, the court found the retrospective reduction in credits available for a custodial sentence violated ex post facto principles. (*Id.* at p. 36.) The court found that the statutory change had the effect of changing "the legal consequences of acts completed before its effective date." (*Id.* at p. 31; *Dobbert v. Florida* (1977) 432 U.S. 282, 293-294.)

The current sentence to what is effectively a prison term, served in local custody effectively denies Rodgers the benefit of section 2933, subdivision (e)(1) in effect at the time of his offense. Thus, we agree with the parties that Rodgers is entitled to 146 additional days of custody credits.<sup>3</sup>

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<sup>3</sup> In light of our conclusion that Rodgers is entitled to additional credits on ex post facto grounds, we do not address his arguments regarding equal protection.

## DISPOSITION

The judgment is modified by awarding Rodgers 146 additional days of custody credits. The superior court is directed to modify the abstract of judgment to reflect the additional credits. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.