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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM GIPSON,

Defendant and Appellant.

E050627

(Super.Ct.No. FRE007212)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed with directions.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons and Julie L. Garland, Assistant Attorneys General, Pamela Ratner Sobeck, Marissa Bejarano and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Gipson appeals from an award of presentence custody credits under Penal Code section 4019<sup>1</sup> after he admitted violating his probation and was sentenced to serve a prison term.

### FACTUAL AND PROCEDURAL BACKGROUND

Based on an incident that occurred on June 18, 2004, defendant was charged in a felony complaint with corporal injury to a cohabitant (§ 273.5, subd. (a)) and assault by means likely to produce great bodily injury to the victim (§ 245, subd. (a)(1)). He pled guilty on June 29, 2004, to one count of inflicting corporal injury on a spouse or cohabitant. (§ 273.5, subd. (a).) The trial court suspended pronouncement of judgment and granted defendant supervised probation for a period of five years subject to various terms and conditions. The facts of the offense are not relevant to the issue raised on appeal.

On January 7, 2009, the court issued a bench warrant when defendant failed to appear for a hearing. He was considered a fugitive until he appeared before the court in custody on February 9, 2010, to be arraigned on several allegations of violating the terms of his supervised probation. On March 26, 2010, defendant admitted violating his probation. As a result, the trial court revoked and terminated defendant's probation and sentenced him to state prison for a term of three years.

The trial court concluded defendant spent 31 days in presentence custody between 2004 and 2008 and an additional 46 days in presentence custody following

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

his arrest on the probation violation. For the 46 days defendant spent in custody following his arrest on the probation violation, the trial court concluded defendant was eligible to earn presentence conduct credits at an increased rate based on the amendment to section 4019 effective January 25, 2010.<sup>2</sup> The trial court further concluded defendant was entitled to credits under former section 4019 for the time he spent in presentence custody in 2004 and 2008. In sum, the trial court awarded defendant a total of 137 days of credit, composed of 77 actual days in presentence custody, plus 60 days of conduct credits.

Former section 4019 allowed a defendant to earn two days of presentence custody credits for every six days in presentence custody. Effective January 25, 2010, the Legislature amended section 4019 to provide for an increase in the amount of presentence custody credits to two days for every four days in presentence custody. However, the Legislature exempted certain defendants from accruing credits at the increased rate. These included anyone who was required to register as a sex offender and anyone who previously suffered a prior conviction for a serious felony, as defined in section 1192.7, or a violent felony, as defined in section 667.5. (§ 4019, subs. (b)(2) & (c)(2).) The amendments to section 4019, effective January 25, 2010,

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<sup>2</sup> We note that section 4019 has been amended several times since January 25, 2010. The discussion in this opinion concerns the amended version of section 4019 that became effective on January 25, 2010. Thus, any reference to section 4019 concerns the amended version of section 4019 that became effective on January 25, 2010. Any reference to “former” section 4019 concerns the version of section 4019 that was in effect prior to January 25, 2010.

allow a defendant who is required to register as a sex offender or who has a prior violent or serious felony to earn custody credits at the lower rate of two days for each six-day period of presentence custody.<sup>3</sup> (*Ibid.*)

In his opening brief, defendant argued he was entitled to the increased rate of custody credit provided for in the January 25, 2010 amendment to section 4019 for all of his presentence custody. In other words, defendant disagreed with the trial court's decision to apply former section 4019 to the time he spent in presentence custody between 2004 and 2008. In anticipation of the People's opposing brief, defendant conceded his probation report stated he had a prior conviction for robbery from 1974.<sup>4</sup> However, he argued this prior robbery conviction did not make him ineligible for the increase in custody credits, because an implied pleading and proof requirement should be read into section 4019, and the People had not pled or proved the disqualifying offense.

In opposition, the People argued defendant is ineligible for the increased custody credits because there is no pleading and proof requirement for purposes of

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<sup>3</sup> The trial court is responsible for calculating the number of days the defendant has been in custody before sentencing and for reflecting the total credits allowed under section 4019 on the abstract of judgment. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31.)

<sup>4</sup> A defendant may, of course, challenge information in a probation report. "If the defendant feels the probation report is insufficient or inaccurate, or is based upon unreliable information, he or she may present witnesses to counteract or correct any portion of the report." (*People v. Bloom* (1983) 142 Cal.App.3d 310, 320.) To warrant reversal based on inaccuracies in a probation report, a defendant must show the court relied on the information to the defendant's prejudice. (*People v. Peterson* (1973) 9 Cal.3d 717, 726-728.)

applying section 4019. As a result, the People argued defendant is disqualified for the increased credits simply because the robbery conviction in 1974, which is considered a prior serious felony, was mentioned in defendant's probation report. However, the People did not raise the disqualifying robbery during defendant's sentencing hearing on March 26, 2010, when the court awarded increased credits for the time defendant spent in presentence custody following his arrest on the probation violation.

However, after we issued a tentative opinion on the arguments made in the parties' original briefs, defendant's appellate counsel was advised by her client that his 1974 robbery conviction had been expunged. Thereafter, counsel was able to obtain a certified copy of a document showing the robbery conviction was indeed expunged on January 28, 1980, pursuant to section 1203.3. Counsel then filed a motion requesting that we vacate our tentative opinion, grant leave for supplemental briefing, and take judicial notice of the newly discovered evidence showing the robbery conviction was expunged. Along with the motion, counsel submitted a proposed supplemental brief. In an order filed October 18, 2011, we reserved ruling on the motion, but directed the submission of supplemental briefing by the parties addressing this court's jurisdiction and authority to take documentary evidence on the expungement of defendant's 1974 robbery conviction. In an order filed January 27, 2012, we approved the filing of the parties' supplemental briefs, vacated the tentative opinion, and reserved consideration of the request for judicial notice. The parties were advised we would issue a new tentative opinion and mail it with a notice of oral argument or waiver of oral argument.

## DISCUSSION

### *Judicial Notice*

After notice and an opportunity to be heard, a reviewing court may take judicial notice of the records of any court of this state. (Evid. Code, §§ 452, subd. (d), 459, subds. (a)-(d).) An official record of conviction is admissible as prima facie evidence of the existence of a prior conviction if it is certified as a correct copy by a public employee having legal custody of the record. (Evid. Code, §§ 452.5, subd. (b), 1530, subd. (a)(2).) In appropriate circumstances, we may take judicial notice of records pertaining to a prior conviction to make factual determinations relating to the sentencing process. (See, e.g., *People v. Wiley* (1995) 9 Cal.4th 580, 592-594 [indicating a reviewing court can take judicial notice of court documents to determine whether prior convictions alleged in a subsequent case arose from charges “brought and tried separately” under Pen. Code, § 667, subd. (a)(1), as a defendant has no right to have jury make this determination].)

Here, the parties submitted supplemental briefing in which they agree we can take judicial notice of the certified records submitted by defendant showing his 1974 robbery conviction was expunged on January 28, 1980, pursuant to section 1203.4. In the interests of justice, we agree with the parties and grant defendant’s request for judicial notice.

### *Expungement Under Section 1203.4*

In his supplemental brief, defendant contends he cannot be disqualified from accruing section 4019 credits at the increased rate; his prior robbery conviction was

expunged under section 1203.4, and it cannot be used against him in this proceeding because it was not pled and proved by the prosecution. We agree.

“ ‘A grant of relief under section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction and, with a few exceptions, to restore him to his former status in society to the extent the Legislature has power to do so [citations].’ [Citations.]” (*People v. Field* (1995) 31 Cal.App.4th 1778, 1787.) Having a conviction expunged under section 1203.4 does not negate the existence of the conviction as a legally cognizable fact or render it a legal nullity. (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1229-1230.)

When a defendant has a conviction expunged under subdivision (a) of section 1203.4, “he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, . . . *However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.*” (§ 1203.4, subd. (a)(1), italics added.) Thus, subdivision (a) of section 1203.4 includes an express pleading and proof requirement. Because the prosecution in this case did not plead or prove defendant’s prior robbery conviction in the trial court, it cannot be used against defendant in this subsequent prosecution to disqualify him from the increased credits available to him under section 4019.

### *Section 4019 Credits*

The parties disagree as to whether the trial court correctly applied a dual formula that awarded former section 4019 credits for the time defendant spent in presentence custody between 2004 and 2008, and at the increased rate effective January 25, 2010, for the time defendant spent in custody following his arrest on a probation violation in 2010. Defendant believes all of his section 4019 credits should have been awarded at the increased rate because he was sentenced after the effective date of the amendment.

Assuming defendant is not disqualified by his prior robbery conviction from receiving the increased credits effective January 25, 2010, the People contend the trial court correctly calculated defendant's credits using the dual formula. According to the People, applying the dual formula was appropriate, because the January 25, 2010 amendment to section 4019 is prospective rather than retroactive, so defendant is not entitled to increased credits for the time he spent in presentence custody in 2004 and 2008.

In *People v. Otubuah* (2010) 184 Cal.App.4th 422 [Fourth Dist., Div. Two], review granted July 21, 2010, S184314, we concluded the statutory amendments increasing section 4019 credits are not retroactive to defendants sentenced prior to January 25, 2010, the effective date of the amendments.<sup>5</sup> Some appellate courts have

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<sup>5</sup> A "retroactive law" is "[a] legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." (Black's

reached a different conclusion. The issue is presently before our Supreme Court, which has granted review in this and other similar cases that have addressed the issue. (*People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808.) While we await guidance from the Supreme Court, we continue to agree with our reasoning and decision in *Otubuah*.

In this case, the facts and circumstances are distinguishable from those in *Otubuah*, because defendant was sentenced after the effective date of the amendments. Whether the increased rate of accrual for presentence custody credits in section 4019 applies to all or only some of the time defendant spent in custody prior to sentencing is a question of statutory construction. “ ‘The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Ordinarily, the words of the statute provide the most reliable indication of legislative intent.’ ” (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) A de novo standard of review is applied when the trial court’s order turns on the interpretation of a statute. (*People v. Pearl* (2009) 172 Cal.App.4th 1280, 1288.)

“Conduct credits for presentence custody are credited to the defendant’s term of imprisonment ‘in the discretion of the court imposing the sentence.’ (Pen. Code, § 2900.5, subd. (a).) It is the duty of the sentencing court to determine ‘the total

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Law Dict. (8th ed. 2004) p. 1343, col. 1.) By contrast, a “prospective statute” is “[a] law that applies to future events.” (*Id.* at p. 1449, col. 1.)

number of days to be credited . . .’ for presentence custody. (Pen. Code, § 2900.5, subd. (d); [citations].” (*People v. Duesler* (1988) 203 Cal.App.3d 273, 276.) “The sheriff or the People have the burden to show that a defendant is not entitled to Penal Code section 4019 credits.” (*Ibid.*) “[B]efore a sentencing court may withhold conduct credits, the defendant is entitled to prior notice and an opportunity” to be heard. (*Id.* at p. 277.) In sum, section 4019 credits are either withheld or granted at the discretion of the court at the time of sentencing.

As of January 25, 2010, section 4019 read in part as follows: “(b)(1) . . . for each four-day period in which a prisoner is confined in or committed to a [jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned . . . . [¶] . . . [¶] (c)(1) . . . for each four-day period in which a prisoner is confined in or committed to a [jail], one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established . . . . [¶] . . . [¶] (f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, . . . .”

We acknowledge the People’s contention that there is some support in case law for the use of a dual formula to calculate an increase in credits. (*In re Stinnette* (1979) 94 Cal.App.3d 800; *In re Strick* (1983) 148 Cal.App.3d 906; *In re Bender* (1983) 149 Cal.App.3d 380.) However, these cases are distinguishable because the applicable statutory amendments or enactments at issue expressly provided for the use of a dual

formula. The amendments to section 4019 do not include any provision from which we could conclude the Legislature intended trial courts to award credits at two different rates. In other words, as written, the amendments do not limit a trial court's award of credits at the new, higher rate to days spent in custody after the January 25, 2010 effective date. Only the amended version of section 4019 was operative at the time defendant was sentenced on March 26, 2010. Without more, it is our view all of defendant's conduct credits should be calculated at the higher rate provided in the amended version of section 4019, because he was sentenced after the effective date of the amendments.

We therefore conclude the trial court incorrectly applied former section 4019 to the 31 days defendant spent in presentence custody between 2004 and 2008. In other words, all of defendant's section 4019 credits should have been awarded at the increased rate effective January 25, 2010. An unauthorized sentence may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) As a result, we will direct the trial court to modify defendant's sentence to include the increased credits for these days.<sup>6</sup>

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<sup>6</sup> Counsel has represented that defendant was released from custody on June 10, 2011, while this case was pending. However, we do not believe this renders the credit issue moot. "Notwithstanding his release, a sentence reduction . . . may still benefit [defendant] by reducing his parole period. [Citations.]" (*In re Young* (2004) 32 Cal.4th 900, 909, fn. 5.)

DISPOSITION

We affirm the judgment but remand the matter to the trial court with directions to recalculate defendant's presentence custody credits in accordance with the opinions expressed herein; direct the abstract of judgment and minutes to be amended accordingly; and forward the abstract of judgment and minutes to the Department of Corrections and Rehabilitation.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

CODRINGTON

J.