

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGER LEE HAYES,

Defendant and Appellant.

E053673

(Super.Ct.No. FMB1100053)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed with directions.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

Roger Lee Hayes, defendant, was convicted on two felony counts of indecent

exposure with prior convictions of indecent exposure (Pen. Code,¹ § 314, subd. (1)), and one count of misdemeanor brandishing an imitation firearm. (§ 417.4, subd. (a).) He was sentenced to an aggregate term of six years eight months in prison on the felonies, including three years for three prior prison terms (§ 667.5, subd. (b)), and a separate term of 180 days in county jail on the brandishing count. The court awarded credit for presentence time actually spent in county jail only against the misdemeanor jail term, and deferred the calculation of conduct credits. Defendant appealed.

On appeal, defendant argues the trial court (1) failed to make a finding of identity respecting the prior indecent exposure conviction, used to elevate the current offenses to felonies; (2) improperly refused to award conduct credits; (3) deprived defendant of increased conduct credits under the October 2011 amendment to section 4019; and (4) erred in applying all custody credit against the misdemeanor count, denying credits against the felonies. The People agree that defendant is entitled to conduct credits for presentence custody, but disagree with the remainder of defendant's assertions. We affirm with directions.

BACKGROUND

Darlene M. was familiar with defendant, whom she knew as Michael Hayes, because she had seen him sitting on a bench outside her church in the past. Darlene learned he had fallen on hard times so she and other members of the church gave him

¹ All further statutory references are to the Penal Code unless otherwise indicated.

money, food and clothing. Shortly before 7:00 p.m. on November 17, 2010, Darlene was sitting in church, waiting for a prayer meeting to begin. As she waited, defendant sat behind Darlene. Defendant tapped Darlene on the shoulder and when she turned around, she saw he was standing up, totally exposed. Darlene told defendant he needed to leave immediately and not return. She reported the incident when she got home at approximately 8:20 p.m. Later she picked defendant's picture out of a photographic lineup.

On December 23, 2010, Sandra V. was doing laundry at a laundromat at approximately 10:00 p.m, because the family washer was broken. She was alone in the laundromat except for a man she identified as the defendant, who attempted to flirt with her. Sandra tried to ignore the defendant. At one point she left the laundromat to get change and returned to put clothes in the dryer. After she closed the back door, defendant reentered, with his penis exposed, masturbating. Defendant walked in and out the back door approximately five times, masturbating each time. Sandra felt unsafe and left a message for her husband.

Sandra's husband, Leonel V., arrived about 20 minutes later, and, while her husband was present, Sandra saw defendant masturbating again. Sandra's husband went out through the back door and confronted defendant by pushing him. Leonel removed his jacket, preparing to fight the defendant, when the defendant took out a gun and threatened to shoot Leonel. Sandra called 911 to report the incident.

By way of an information, defendant was charged with two counts of indecent exposure, having previously been convicted under subdivision 1 of section 314. (Counts 1, 2.) He was also charged with one misdemeanor count of brandishing an imitation firearm. (§ 417.4, count 3.) It was further alleged that defendant had previously been convicted of three felonies for which he had served prison terms (prison priors). (§ 667.5, subd. (b).)

Defendant was tried by jury. On the first day of trial, defendant admitted the prison prior allegations. The admitted priors were under the name of Roger Finister. In the midst of trial, the court conducted a court trial on the issue of identity of the person convicted of the prior indecent exposure conviction from Long Beach, under the name of Roger Finister. Defendant was identified as the person who was booked, printed and photographed in Long Beach in connection with conviction on the prior indecent exposure under the name of Roger Finister. Fingerprint experts identified defendant as the person whose prints were taken in connection with the Long Beach case, which were the same as defendant's. Although the court did not expressly find that the defendant was the person so convicted, it ruled that evidence of the prior conviction for indecent exposure could go to the jury.

The jury found defendant guilty of all three counts and determined that the allegation that defendant was previously convicted of indecent exposure was true. At sentencing, the court imposed a sentence of 180 days for the misdemeanor brandishing count, and awarded 107 days credit against the jail term for presentence time in actual

custody. As to the felonies, the court imposed the upper term of three years for count 1, and a subordinate term of eight months on count 2, representing one-third the midterm, to run consecutive to count 1. The court ordered that count 3, the misdemeanor, would run consecutive to count 2. The court also imposed separate one-year terms for each of the prison priors for a total sentence of six years eight months. Defendant appeals.

DISCUSSION

1. Defendant's Identity Respecting the Prior Indecent Exposure Conviction Was Properly Established by the Court.

Defendant argues his felony convictions for indecent exposure should be reduced to misdemeanors because the court failed to determine his identity as the person who was previously convicted of indecent exposure. We disagree.

Section 1025 provides in part that when a defendant is charged with having suffered a prior conviction and enters a denial, the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or by the court if a jury is waived. (§ 1025, subd. (b).)

Section 1158 provides that whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, must find whether or not he has suffered such previous conviction.

Both sections 1025 and 1158 are part of a statutory scheme designed to provide for increased penalties for habitual offenders; section 1025 also reduces the possibility of

jury prejudice against an accused from the introduction of evidence of prior convictions during the trial of his guilt on the current offense. (*People v. Pierson* (1969) 273 Cal.App.2d 130, 132.) The general rule is that the procedures set out in sections 1025 and 1158 are requisites only when the prior offense is not an integral part of the current substantive offense charged, such as when the fact of the former conviction is not an element of the crime but merely a penalty-increasing device. (*Ibid.*)

If the court finds the defendant is not the person named in the conviction records, such a determination would end the matter. (*People v. Epps* (2001) 25 Cal.4th 19, 26.) Where the trial court finds that the defendant is that person, it may so instruct the jury. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165, citing *People v. Kelii* (1999) 21 Cal.4th 452, 458.) The jury then determines whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged. (*Epps*, at pp. 26-27.) An accused has no right to a jury trial on the issue of whether or not he is the person whose name appears on the documents admitted to establish the previous convictions. (*Garcia*, at p. 1165.)

The statute does not require the court use any special language in making its finding. (*People v. Belmares* (2003) 106 Cal.App.4th 19, 28.) In *Belmares*, like the present case, the court failed to make an express finding on the issue of identity, but it presented the section 969b packet to the jury and instructed the jury that defendant was “the person whose name appears on the documents admitted to establish the convictions.” (*Belmares*, at pp. 26-27.)

The reviewing court concluded that this instruction “constituted an affirmative act from which one arguably could infer a true finding on the issue of identity.” (*Belmares, supra*, 106 Cal.App.4th at p. 29, quoting *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440.) The instruction to the jury that a finding on identity had been made was treated as tantamount to a finding. The instruction given in *Belmares*, CALJIC No. 17.18.1 (2001 rev., 6th ed. 1996), is practically identical to the language of CALCRIM No. 3100, which was given in this case. It constituted an affirmative act from which one can infer a true finding on the issue of identity had been made.

Additionally, the bare fact that the trial court ruled that the section 969b packet was admissible in evidence and submitted to the jury establishes that the court made a finding on defendant’s identity as the person whose name appears on the documents. Evidence Code section 402 provides in part that a ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto. (Evid. Code, § 402, subd. (c).) Having admitted the prior conviction documents into evidence, the finding of defendant’s identity as the person whose name appeared thereon was implied.

Defendant’s reliance on *People v. Huffman* (1967) 248 Cal.App.2d 260 is misplaced. In that case, the issue related to the lack of any finding whatsoever on the prior conviction allegation, and did not involve a failure to make an express finding of defendant’s identity. The court failed to make any finding as the truth of the prior conviction allegation, and the issue was not presented to the jury for a finding, so the court’s silence was treated as an acquittal of the charge of the prior conviction. (*Id.* at p.

261.) Similarly, in *People v. Gutierrez, supra*, 14 Cal.App.4th 1425, the issue of the truth of the allegations of the prior convictions was not decided by the trier of fact and the defendant did not admit them. The court concluded, “When no words are used and the trier of fact fails to make a finding the effect is the same as a finding of ‘not true.’” (*Id.* at p. 1440.)

Here, the court admitted the documentary evidence relating to the prior conviction thereby impliedly finding that defendant was the person named in the documents. The jury was instructed that defendant had been found to be the person named in the documents and it returned a true finding on the prior conviction allegation. Defendant’s identity as the person named in the prior conviction was amply established to elevate the two indecent exposure offenses to a felony.

2. Defendant Is Entitled to Conduct Credits.

Defendant argues that the trial court failed to calculate his conduct credits as required under section 2900.5, subdivision (a). The People agree, and suggest that the case should be remanded for the calculation.

Subdivision (d) of section 2900.5 provides that it is the “duty of the court imposing the sentence to determine the date or dates of any admission to and release from custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213.” The intent of this provision is to assign the task of resolving factual and legal disputes to the sentencing court and to insure an adequate

record for appellate review and administrative application. (*People v. Blunt* (1986) 186 Cal.App.3d 1594, 1601.)

A failure to accurately award custody credits results in an unauthorized sentence, subject to correction at any time. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1140; *People v. Jack* (1989) 213 Cal.App.3d 913, 916-917.) As a mathematical calculation based on undisputed facts regarding the number of days defendant served in custody presentence, we can order the modification. However, we will address the actual calculation in the next section because it depends on which version of section 4019 controls.

3. Defendant Is Not Entitled to Retroactive Application of the October 2011 Amendment to Section 4019.

Defendant argues that he is entitled to day-for-day credits under the current terms of section 4019, as amended effective October 1, 2011. He acknowledges that by its express terms, the new statute applies only to defendants whose crimes were committed on or after October 1, 2011, but claims he is entitled to the credits by virtue of the equal protection clauses of the state and federal Constitutions.² We disagree.

² After noting that the Legislature had amended section 4019 approximately five times since January 1, 2010, we requested supplemental briefing from the parties. Neither of the 2010 amendments (Sen. Bill 18, 2009 Stats., ch. 28C; Assem. Bill 109, 2010 Stats., ch. 426) contained a provision indicating whether they applied prospectively or retroactively. However, all of the 2011 amendments contain such provisions, most likely in response to the appellate litigation of the issue.

A brief summary of the legislative history of section 4019 may be helpful. Prior to January 25, 2010, a prisoner could earn six days of credit for every four days actually served. (Former § 4019, subd. (f); Stats 1982, ch. 1234, p. 4553, § 7.) On January 25, 2010, an amendment went into effect by which a prisoner could earn four days of credit for every two days served in actual custody. (Sen. Bill 18; 2009 Stats., ch. 28C, § 50.) This amendment remained in effect until September 28, 2010, when the amount of conduct credits that could be earned reverted to six days for every four days in custody. (Sen. Bill 76; 2010 Stats., ch. 426.) By its express terms, the amendments contained in Senate Bill 76 applied to persons confined for crimes committed on or after the effective date of the act.

Assembly Bill 109, enacted on April 4, 2011, as part of the Criminal Justice Realignment, was introduced on January 10, 2011. That bill made express provision for prospective application to crimes committed on or after July 1, 2011. (Assem. Bill 109, 2011 Stats., ch. 15, § 482.) This amendment was part of the first legislative efforts relating to the Criminal Justice Realignment. Another bill introduced on the same day as Assembly Bill 109, was chaptered on June 30, 2011, and included a similar provision relating to section 4019, but made the operative date October 1, 2011. (Assem. Bill 117, 2011 Stats., ch. 39, § 53.)

Prior to the effective date of Assembly Bill 109, Assembly Bill 17X was introduced in an Extraordinary Session, to repeal Assembly Bill 109. (Legis. Counsel's Dig., Assem. Bill 17 (2011-2012 1st Ex. Sess.) 3 Stats. 2011, ¶ (6), p. 5914.) These

revisions, and the repeal of Assembly Bill 109, were signed into law on September 21, 2011, along with further legislative amendments pertaining to Criminal Justice Realignment Act. (Assem. Bill 17X, 2011 Stats., ch. 12A, § 35.) Under this bill, amendments to section 4019, which increased conduct credits to four days deemed served for every two days in custody, were made prospective only, and applied to crimes committed on or after October 1, 2011. (§ 4019, subd. (f); Assem. Bill 109; 2011 Stats., ch. 15, § 482.)

Defendant seeks retroactive application of the October 1, 2011, amendment to his crimes, which were committed in November 2010 and December 2010, respectively, before the effective date of the October 1, 2011, amendment. His argument in favor of retroactivity of the October 1, 2011, amendment is strikingly similar to arguments made regarding the retroactivity of the January 25, 2010, amendment. However, he is not entitled to retroactive application of that amendment for two reasons: (1) the California Supreme Court has recently determined that retroactive application of amendments to statutes relating to behavior credits is not constitutionally compelled (*People v. Brown* (2012) 54 Cal.4th 314, 318, 330); and (2) the version of section 4019 in effect at the time defendant committed his crimes expressly provided for prospective application, operative as to crimes committed on or after October 1, 2011, only.

Whether a statute operates prospectively or retroactively is a matter of legislative intent. (*People v. Brown, supra*, 54 Cal.4th at p. 319.) Thus, we must examine that intent. In performing this task, we first look at the plain and commonsense meaning of

the statute because it is generally the most reliable indicator of legislative intent and purpose. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) When the language of a statute is clear, we need go no further. (*Ibid.*; *People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

The amendment under consideration in *Brown* did not specify whether it applied prospectively or retroactively. Thus, the Supreme Court had to determine that issue. The Supreme Court held it did not apply retroactively because the version of section 4019 then in effect did not alter the penalty for any crime and did not address punishment for past criminal conduct. (*People v. Brown, supra*, 54 Cal.4th at p. 325.) The court reasoned that instead, the amendment addressed *future conduct* in a custodial setting by providing increased incentives for good behavior. (*Ibid.*)

The Supreme Court in *Brown* also pointed out that cases involving *custody* credit, at issue in *In re Kapperman* (1974) 11 Cal.3d 542, on which defendant relies heavily, are distinguishable and irrelevant to the inquiry because custody credit for actual time spent incarcerated is awarded without regard to behavior, and thus does not implicate the distinction between statutes that provide behavioral incentives (e.g., conduct credits) and statutes that “mitigate[e] . . . the penalty for a particular crime.” (*People v. Brown, supra*, 54 Cal.4th at pp. 326 [quoting *In re Estrada* (1965) 63 Cal.2d 740, 745], 330.) Under the holding of *Brown*, defendant is not entitled to retroactive application of the amendment to section 4019 that went into effect after he was sentenced.

The language of the amendment in effect at the time of defendant's crimes was not ambiguous. It clearly stated the legislative intent that the increased credit provisions would apply prospectively, only, and provided the operative date of the amendment. Defendant's crimes were committed in November and December of 2010. The version of section 4019 which was in effect at the time of the commission of defendant's crimes was the version enacted under Senate Bill 76, which decreased behavioral credits for persons whose crimes were committed between September 28, 2010, and October 1, 2011.

Defendant earned 107 days of credit for actual time served. Applying the law in effect at the time defendant's crimes were committed, he is entitled to six days credits for every four days served, for total conduct credits in the amount of 53 days, based on the version that was in effect between September 2010 and April 2011. (See Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2012), § 37.58, p. 1139.) We arrived at this number by dividing 107 days by four, and multiplying the result by two. (*In re Marquez* (2003) 30 Cal.4th 14, 26, citing *People v. Fabela* (1993) 12 Cal.App.4th 1661, 1664; see also *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) His total credit for time served is 160 days.

The superior court is directed to modify the judgment accordingly, and to forward an amended abstract to the Department of Corrections and Rehabilitation.

4. After Crediting the Misdemeanor, Any Balance of Defendant's Credit for Time Served is Attributable to His Felony Sentence So No Dead Time is Involved.

Defendant argues that the court erred in "restricting" his credit for time served to the misdemeanor and that he is entitled to credit against his felony sentence for any days in excess of the 180-day sentence for count 3. Respondent argues that since his total custody credits do not exceed 180 days, there are no excess days to apply to the felony counts. According to our calculation, defendant's custody credits (185 days) exceed the misdemeanor sentence of 180 days.

During the pronouncement of sentence, the court stated defendant's time in custody was related to count 3. The court went on to say, "He may have been in custody on these other cases, however, they weren't - - he wasn't necessarily in custody. He could have been in custody individually just for that one case." For that reason, the court awarded 107 days of credit against the 180 day misdemeanor sentence. Later, the court repeated that it was "only finding his credits for the misdemeanor count."

Section 2900.5, subdivision (a), provides in relevant part that when the defendant has been in custody, all days of custody shall be credited upon his or her term of imprisonment. Subdivision (b) of section 2900.5 provides that credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted, and credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

A defendant is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485.) If the defendant is neither serving probation time nor serving a prison sentence, then the proceedings causing that custody must be determined and credit applied against the sentence in that proceeding. (*People v. Brown* (1980) 107 Cal.App.3d 858, 863.) The term “legal proceedings” as used in section 2900.5, refers to “all proceedings authorized or . . . instituted in a court . . . [for] the enforcement of a remedy.” (*People v. Williams* (1992) 10 Cal.App.4th 827, 833-834.)

The prohibition in section 2900.5, subdivision (b), against duplicate credits is not violated where the custody for which credit is sought had multiple, unrelated causes, and his custody is attributable to each. (*People v. Gonzalez* (2006) 138 Cal.App.4th 246, 252; see also *In re Marquez, supra*, 30 Cal.4th at p. 20 [credit for time served on multiple charges pending in more than one county].) A consecutive sentence is part of the “term of imprisonment” against which custody credits must be applied. (*People v. Lacebal* (1991) 233 Cal.App.3d 1061, 1065-1066, citing *People v. Riolo* (1983) 33 Cal.3d 223, 227, 228-229.) Thus, where a defendant is charged with, tried and convicted of multiple counts in a single proceeding, for which he is sentenced to consecutive sentences, all the counts are considered part of the proceedings against the defendant, as that term is used in section 2900.5, subdivision (b). (*Riolo*, at pp. 227-228; *People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414.)

Because consecutive terms were imposed and the court ordered the misdemeanor sentence to run first, the credits are allocated among the convictions, applicable first to the misdemeanor sentence. The balance is applied to the consecutive counts; to do otherwise would result in five days of dead time after the misdemeanor sentence was completed. (*People v. Gonzalez, supra*, 138 Cal.App.4th at p. 254; *People v. Adrian* (1987) 191 Cal.App.3d 868, 877.)

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting the credits modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. Except as modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.