

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

HENRY ALVARADO,

Defendant and Appellant.

E053707

(Super.Ct.No. FVI901186)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, 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, Gary W. Schons, Assistant Attorney General, Garrett Beaumont and Gil Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Following a probation revocation hearing, the trial court found that defendant and appellant Henry Alvarado violated four terms of his probation. The trial court thereafter revoked and reinstated defendant's probation. On appeal, defendant challenges the sufficiency of the evidence to support the revocation of his probation. He also asserts, and the People concede, that he is entitled to an additional seven days of actual custody credits.

We agree with the parties that defendant is entitled to an additional seven days of actual custody credits, and direct the trial court to calculate defendant's conduct credits pursuant to Penal Code section 4019.¹ We, however, reject defendant's remaining contention and, otherwise, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

On June 2, 2009, a felony complaint was filed charging defendant with first degree residential burglary (Pen. Code, § 459; count 1) and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count 2).

On June 10, 2009, pursuant to a negotiated agreement, defendant pled guilty to count 2. In return, count 1 was dismissed, and defendant was placed on supervised probation for a period of three years with various terms and conditions.

On March 10, 2011, the probation officer filed a petition to revoke defendant's probation alleging that defendant had violated four terms and conditions of his probation

¹ All future statutory references are to the Penal Code unless otherwise stated.

² Because this appeal is from the contested probation revocation hearing, the facts of the underlying offense are irrelevant to this appeal.

by: (1) failing to cooperate with the probation officer in a plan of rehabilitation and follow all reasonable directives of the probation officer (term No. 4); (2) failing to keep the probation officer informed of his residence and give written notice to the probation officer 24 hours prior to moving (term No. 7); (3) failing to pay victim restitution in the amount of \$5,000 plus a 10 percent administrative fee at the rate of \$100 per month (term No. 13); and (4) failing to pay the restitution fine in the amount of \$200 (term No. 14).

On May 11, 2011, a contested probation revocation hearing was held under *People v. Vickers* (1972) 8 Cal.3d 451. At that time, defendant's probation officer Fernando Sanchez testified. Sanchez explained that on March 3, 2011, defendant submitted a monthly report to the probation office and listed his address as 9383 Aguave Drive in the City of Hesperia. On March 8, 2011, Sanchez attempted to conduct a home visit with defendant. When he arrived at the listed address, he knocked on the front door but did not receive any answer. In accordance with procedure, he thereafter proceeded to determine whether there were any signs of occupancy in the home. Once he looked through a window, he noticed that there was "no window treatment[s], no shades, no nothing," only a single chair positioned in the center of the living room. He elaborated that he "could see right through the house and there was no furniture whatsoever besides that chair." Based on his past experiences, Sanchez concluded that the house was vacant.

Sanchez also explained that a probationer is required to inform his or her probation officer of any "special instructions," such as security codes to get into the property, or if they live in the rear or upper floor of the home. Defendant had not provided Sanchez with any such special instructions. Later, in preparation of the May 4,

2011 supplemental report, defendant and his parents (the owners of the house) informed Sanchez that the house was in foreclosure and that there was “no furniture in the bottom of the house.”

Sanchez further testified that defendant had not paid any fines or made any victim restitution payments as ordered by the trial court. Defendant claimed that he had not been able to find employment in three years. Sanchez believed that defendant was “very employable,” and that he was not making an effort to obtain gainful employment.

Defense counsel implied that defendant had lived at the listed residence but only occupied the second story of the two-story house, and that he had no means to pay victim restitution or his fines. In support, defendant called Sanchez as a defense witness, as well as his mother and girlfriend.

Sanchez acknowledged that the residence was a two-story house and that he did not look through the windows of the upper story. He also conceded that he did not have a chance to examine the upper floor of the house.

Defendant’s mother testified that defendant and his girlfriend were living at the listed address on March 8, 2011, and that she had constantly visited defendant at that address. She stated that defendant’s belongings and furniture were on the upper floor of the residence, and that there was no furniture on the bottom floor.

Defendant’s girlfriend testified that she lived at the listed address with defendant and her two children on March 8, 2011. She explained that she had moved into the house the day before defendant was arrested and had been visiting defendant previously at that address for over seven months. She also claimed that there was no furniture on the first

floor of the house, but that there was furniture on the second floor, and that she only used the first floor for cooking. She further noted that defendant's personal possessions were in the house, and that she and defendant had received mail at that address.

Following argument, the trial court found defendant to be in violation of his probation by failing to keep his probation officer informed of his place of residence, failing to cooperate with the probation officer, and failing to pay victim restitution or his fines. In regard to defendant's employability, the trial court noted the following: "He is an able-bodied young man. There's no reason that he can't work. I understand that times are tight. There ain't no reason that he can't work, even working under the table for somebody. He can still do that. Like Mr. Sanchez said, [defendant] has to have some impetus, apparently, to find a job." The trial court thereafter revoked and reinstated defendant's probation on the original terms of probation, with the modification of extending defendant's probationary period to May 4, 2014. The court indicated that defendant was to serve 365 days in county jail, and awarded him 147 days of actual credit for time served.

DISCUSSION

A. *Probation Revocation Hearing*

Defendant contends that there was insufficient evidence to support the trial court's finding that he had changed his address without notifying his probation officer. He further asserts that in the absence of another basis, failing to pay victim restitution or his fines was an insufficient basis to revoke his probation.

“Our trial courts are granted great discretion in determining whether to revoke probation. [Citation.] Such discretion ‘implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.’” (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.) The level of certainty required to support a probation revocation is less than that required to support a criminal conviction. Section 1203.2, subdivision (a), authorizes probation revocation “‘if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the [probationer] has violated any of the conditions of his or her probation’” (*Rodriguez*, at p. 440.) The Supreme Court has interpreted “reason to believe” under section 1203.2, subdivision (a), to impose a preponderance-of-the-evidence standard. (*Rodriguez*, at p. 446.) This standard of proof “‘simply requires the trier of fact “to believe that the existence of a fact is more probable than its nonexistence.’”” (*In re Angelia P.* (1981) 28 Cal.3d 908, 918, superseded by statute on other grounds as stated in *In re Cody W.* (1994) 31 Cal.App.4th 221, 229.) On review, we determine whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which supports the trial court’s findings and we must draw all inferences and intendments in favor of the trial court’s ruling. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848.)

1. Violation of Residence Condition

Here, the evidence supports the trial court’s determination that defendant failed to keep his probation officer informed of his current residence and failed to give written notice 24 hours prior to moving. The trial court could reasonably infer that defendant

changed his address without notifying his probation officer. Sanchez testified that on March 3, 2011, defendant submitted a monthly report to the probation office and listed his address as 9383 Agave Drive in the City of Hesperia. When Sanchez attempted to contact defendant at his listed address on March 8, 2011, he received no answer at the front door and observed no signs of occupancy in the home. The house was devoid of window treatments, as well as furniture, with the exception of a single chair positioned in the center of the living room. Based on his training and past experiences, Sanchez concluded the house to be vacant. Additionally, defendant had not informed Sanchez that he lived solely on the upper level of the two-story house.

Defendant's insufficiency of the evidence claim is based primarily on the testimony of his mother and girlfriend, who both claimed that defendant lived at the listed address but only occupied the second floor of the two-story house. However, "it is the exclusive province of the [factfinder] to determine the credibility of a witness" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The trial court heard and saw the testimony of all the witnesses, and it disbelieved the conflicting testimony of defendant's mother and girlfriend. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1253-1255.) We will not second-guess the trial court's credibility determination in accepting the probation officer's version of events. (*Ibid.*) Contrary to defendant's claim, substantial evidence here shows that defendant had changed his residence without notifying his probation officer and failed to keep his probation officer informed of his current address.

Defendant's reliance on *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*) is misplaced. In *Buford*, the reviewing court concluded the trial court's findings were not supported by substantial evidence and that, therefore, the court "abused its discretion in revoking probation based upon the evidence before it." (*Id.* at p. 985.) But the facts in that case were dramatically different from those in the record before us. First, the probation officer in *Buford* (who testified and was implicated in overseeing the defendant's probation) was obviously inadequate in both respects: the appellate court noted that the probation officer sent a letter to the defendant at the wrong address, was unable to recall whether he had told the defendant that he was required to report regularly, and was generally unfamiliar with the defendant's file. (*Id.* at p. 984.)

Second, the record in *Buford* disclosed that the defendant kept in touch with his probation officer. Although the defendant failed to appear for a meeting with his probation officer, three days later he did call and make an appointment for the following day, which he kept. (*Buford, supra*, 42 Cal.App.3d at p. 983.) The defendant failed to keep his next appointment but again called and arranged another meeting, which he again failed to keep. Eventually, the defendant showed up the next day. The defendant had failed to respond to a letter from the probation department, but it was later determined that the letter was sent to the wrong address. (*Id.* at pp. 983-984.) Another letter was sent to the defendant's last known address, advising him that his probation officer would be forced to revoke probation if he did not report. The defendant did appear at the probation office and never again missed a scheduled appointment. (*Ibid.*) The appellate court concluded that the defendant's "probation file revealed that, at worst, he was tardy

and undependable in reporting. However, on the few occasions when he failed to keep an appointment, he attempted to remedy the situation by making another appointment.” (*Id.* at p. 985.) The *Buford* court further pointed out that the defendant could not be faulted for failing to respond to a letter that was sent to an address other than his last known address. Additionally, once the letter was sent to the defendant’s last known address, he did respond and never again missed a prearranged meeting. (*Ibid.*)

Third, regarding the changes in the defendant’s residence in *Buford*, the court noted: “There was no showing that [the defendant] had not kept the department informed of his address, and there was no evidence from which it could be inferred that [he] had attempted to evade his probation officer.” (*Buford, supra*, 42 Cal.App.3d at p. 986.)

From this statement, defendant here argues that “there was no evidence that [he] was seeking to evade his probation officer and there is no evidence he missed any monthly reports.” The standard of review in *Buford* was, as the appellate court repeatedly noted, an abuse of discretion. (*Buford, supra*, 42 Cal.App.3d at pp. 985-987.) On the record before it, the *Buford* court noted that there was no showing of an attempt to “evade” the probation department. It was not saying, or even implying, that such an attempt had to be shown before probation could be revoked.

Here, substantial evidence existed for the trial court to conclude, by a preponderance of the evidence, that defendant failed to keep his probation officer informed of his current address, and that he had changed his address without notifying his probation officer. The evidence does not support a finding that defendant was tardy and undependable in reporting; rather, it indicates he failed to properly keep the probation

officer apprised of where he was actually residing. There is no evidence that defendant attempted to remedy his mistake in reporting his change of address.

We conclude that *Buford* is distinguishable, and that there is substantial evidence to support the trial court's finding that defendant did violate the residence condition.

2. Failure to Pay Fines and Victim Restitution

Ample evidence also exists to show that defendant failed to pay his fines and victim restitution, which was ordered by the trial court. Indeed, defendant does not dispute this fact. Rather, he claims that “in the absence of another basis to violate probation, the failure to pay fines or restitution is an insufficient basis to revoke probation.” Because we find that defendant violated his probation by failing to keep his probation officer informed of his current address and because he changed his residence without notifying his probation officer, we reject this claim.

Defendant's reliance on *Bearden v. Georgia* (1983) 461 U.S. 660, 672-673 (*Bearden*) to support his position is meritless. Unlike defendant here, the defendant in *Bearden* was imprisoned upon his inability to pay a fine, and the sentencing court failed to inquire into the reasons for the failure to pay. (*Id.* at pp. 672-673.) The United States Supreme Court held that to revoke probation on the grounds that the probationer had failed to pay a fine, without inquiring into whether that failure was willful, violated the Fourteenth Amendment. (*Bearden, supra*, 461 U.S. at pp. 672-673.) The Supreme Court explained: “[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to

do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." (*Id.* at p. 672.)

Here, the trial court not only inquired in regard to defendant's inability to pay, which it found incredible, but it also reinstated defendant on probation. Accordingly, *Bearden* is inapposite.

Based on the foregoing, the trial court did not abuse its discretion in finding a probation violation.

B. *Presentence Custody Credits*

Defendant claims, and the People correctly concede, that the trial court miscalculated his actual custody credits by seven days. We also agree.

The probation report indicates defendant's actual custody credits to be 147 days as of May 4, 2011. However, defendant spent an additional seven days awaiting trial for the probation revocation hearing, which was held on May 11, 2011. As such, defendant is entitled to an additional seven days of actual custody credits. The May 11, 2011 minute order should, therefore, be amended to reflect a total of 154 days of actual custody credits rather than 147 days.

Defendant also argues that the trial court erred in failing to calculate his conduct credits pursuant to section 4019, and that he is entitled to the enhanced presentence conduct credits provided by the amended version of section 4019, which became

effective on January 25, 2010.³ Defendant thus asserts that he is entitled to 154 days of conduct credits, for a total of 308 days. Further, defendant contends that he, therefore, should have been released from custody on June 9, 2011, and that all the days he served after that point should result in reduction of his fines and victim restitution pursuant to section 2900.5, subdivision (a).

The People agree that the trial court failed to calculate defendant's conduct credits pursuant to section 4019, but disagree that all of defendant's conduct credits must be calculated under the amended version of section 4019. The People further maintain that the matter must be remanded to the trial court, because the trial court never calculated defendant's conduct credits, even though it was required to do so under section 2900.5, subdivision (a). Defendant replies that this court should calculate his conduct credits to not further waste "tax payer dollars."

A defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing. (§ 2900.5, subd. (a).) A defendant may also earn additional presentence credit for satisfactory performance of

³ We note that section 4019 had been amended again. Effective September 28, 2010, section 4019 was amended to return to its wording prior to January 25, 2010. The latest statutory change will apply only to crimes committed after September 28, 2010. (§ 4019, subd. (g).) Hence, the September 28, 2010 version of section 4019 is not applicable here because it expressly applies only to defendants who are confined for a crime committed on or after September 28, 2010. The discussion in this opinion concerns the prior amended version of section 4019, which became effective on January 25, 2010. Thus, any reference to section 4019 or the 2010 amendment 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.

assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (*id.*, subd. (c)). “‘Conduct credit’ collectively refers to worktime credit pursuant to section 4019, subdivision (b), and to good behavior credit pursuant to section 4019, subdivision (c). [Citation.]” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Under former section 4019, a defendant earned two days of conduct credit for every four actual days served in local custody. However, in October 2009, the Legislature passed Senate Bill No. 3X 18 (2009-2010 3d Ex. Sess.), which, among other things, amended section 4019 to increase conduct credits for defendants who have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. (§ 4019, subds. (b)(1), (c)(1).) These defendants are now eligible to earn two days of conduct credit for every two days of actual custody. (*Ibid.*) The amendments to section 4019 went into effect on January 25, 2010.

The California Supreme Court has stated that the trial court imposing a sentence has the *responsibility* to calculate the exact number of days the defendant has been in custody prior to sentencing, add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30; see also § 2900.5, subd. (d) [the sentencing court is required to determine the number of days of custody and any conduct credits earned pursuant to § 4019].) This duty cannot be delegated to the probation department or counsel. (See, e.g., *In re John H.* (1992) 3 Cal.App.4th 1109, 1111.)

The trial court here did not award defendant any presentence conduct credit. It did not deny him the credit either, but left the issue unresolved. It was the trial court's duty to calculate these credits as required by section 2900.5. Defendant is entitled to have the trial court undertake this housekeeping matter. We will order further proceedings accordingly.

DISPOSITION

The trial court is directed to calculate defendant's presentence conduct credits pursuant to section 4019. In addition, the superior court clerk is directed to amend the May 11, 2011 sentencing minute order to reflect a total of 154 days of actual presentence custody credits. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

RICHLI

J.

MILLER

J.