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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Defendant and Appellant,

v.

THEO N. DELAGARZA,

Defendant and Appellant.

E056306

(Super.Ct.No. FSB1003496)

OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed.

Gregory S. Cilli, 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, Peter Quon, Jr., Randall D. Einhorn, and Stacy A. Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Theo Delagarza is serving three years in local custody after pleading guilty to assaulting a man with a knife and violating probation twice. Defendant argues

he is entitled to pre-sentence conduct credits because, although he initially waived the right to receive them as part of the initial plea bargain, the trial court later altered the terms of his probation to allow for conduct credits if he successfully completed the Inroads program in county jail. We conclude that defendant is not entitled to the conduct credits because, although he completed the Inroads program, he violated his probation only a day after his release, and thus defeated the entire objective of the agreement under which he was to receive the conduct credits.

### **FACTS AND PROCEDURE**

On August 18, 2010, defendant got into a fight with a man. Defendant attempted to stab the man in the stomach with a knife but missed. He did, however, succeed in slashing the man in the neck.

On October 6, 2010, the People charged defendant with attempted murder (Pen. Code, §§ 664/187, subd. (a))<sup>1</sup> and assault with a deadly weapon (§ 245, subd. (a)(1)). The People alleged that defendant personally used a deadly weapon during the attempted murder (§ 12022, subd. (b)(1)) and that he personally inflicted great bodily injury during both crimes (§ 12022.7, subd. (a)).

On November 18, 2010, defendant pled guilty to an added count, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). This is a non-strike offense.

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

At sentencing on December 22, 2010, the trial court<sup>2</sup> imposed a three-year suspended sentence, placed defendant on probation for three years, and ordered him to serve 365 days in jail. The court awarded 124 days of actual pre-sentence custody credit but awarded no conduct credits. This is because defendant waived “all 4019 credits prospectively and retroactively” as part of the plea agreement. The trial court orally discussed this waiver with defendant and clearly explained that “if you violate probation and you get sentenced to state prison you won’t get any conduct credits then either. You’re giving them up for all time, okay.” After repeating this explanation, giving examples of how it would work if defendant were to violate his probation, and ascertaining that defendant understood, the trial court took defendant’s waiver.

On December 5, 2011, defendant’s probation was revoked. On that date, defendant admitted to each of the probation violations listed in the revocation petition. Pursuant to a stipulation between defendant and the People, defendant waived all previous custody time except for the most recent 12 days. The trial court<sup>3</sup> reinstated and continued defendant’s probation, but modified it so that defendant would be credited with both the 12 days he had just served and section 4019 conduct credits of 12 days. The court ordered that defendant would accumulate section 4019 credits “from this point forward,” but that he would have to petition the court for release and adjustment of

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<sup>2</sup> Hon. Bryan F. Foster, presiding.

<sup>3</sup> Hon. Bryan F. Foster, presiding.

credits to include the section 4019 days. Defendant was to petition the court after successfully completing the Inroads program in the county jail.<sup>4</sup>

At a probation review hearing held on April 3, 2012, the trial court<sup>5</sup> deemed Term One of defendant's probation to have been completed, in that he had completed the Inroads program and the jail time. The court ordered defendant released from custody early and gave him credit for 365 days of time served. The court did not award defendant any conduct credits. Neither defense counsel nor the People mentioned the conduct credits. Probation was scheduled to terminate on December 21, 2013.

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<sup>4</sup> The court's exact words are as follows: "What the plan is is for you to waive all of your actual time that you've actually served as far as credits for that—to waive all that plus the conduct credit with the exception of the 12 days that you served so far. [¶] . . . [¶] And then it's stipulated between the parties that you would continue to earn credits from this point forward with credit for 12 days actual with 12 days conduct for total of 24 days. You're going to be sentenced to probation, 365 days county jail with an order that you attend the Inroads program. Upon successful completion of Inroads you're then to . . . notify your counsel, and at that point they'll set another court date. You'll be released from custody and credits readjusted at that time. . . . [¶] . . . [¶] You understand that you waive credits today? If you get in trouble, you don't finish Inroads, you're never going to get those credits back. Do you understand that?"

"Probation previously revoked is now reinstated and continued on the same terms and conditions with the following modification. Defendant is to serve—term one is modified. Defendant is to serve 365 days in the San Bernardino County Jail facility with credit for time served a matter of 12 days actual plus 12 conduct for a total of 28 days per stipulation; that the defendant will be entitled to accumulate good and work time credits under 4019 from this point forward. [¶] The defendant is ordered to attend the Inroads program the county jail offers; to successfully complete that. Upon completion of the Inroads program the defendant is entitled to petition the court for release from custody, at which time credits will be readjusted to indicate a total credits of both actual and conduct of 365 days."

<sup>5</sup> Hon. William Jefferson Powell, IV, presiding.

Just three days later, on April 6, 2013, the People filed a probation revocation petition, in which they alleged defendant was found on April 4, 2013 in a vehicle with a known gang member, thereby violating the condition of his probation that he “Not associate with persons known to defendant to be gang members or frequent places of known gang activity.” Defendant also failed to provide law enforcement with a copy of the terms and conditions of his probation.

The probation revocation hearing was held on May 7, 2012. Defendant admitted the violation. Defense counsel asked for section 4019 conduct credits to be calculated. The trial court<sup>6</sup> referred to the original plea agreement in which defendant waived all conduct credits prospectively and retroactively, and so declined to award any conduct credits whatsoever. The court revoked and terminated defendant’s probation and ordered him to serve the previously suspended term of three years, in local custody, with credit for 399 days actual and zero conduct credits. This appeal followed.

Defense counsel asked the trial court to put on calendar a hearing regarding the recalculation of the credits in this case. On October 31, 2012, the trial court<sup>7</sup> held the requested hearing. The People objected to adjusting the credits. The trial court denied defendant’s motion.

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<sup>6</sup> Hon. William Jefferson Powell, IV, presiding.

<sup>7</sup> Hon. William Jefferson Powell, IV, presiding.

## DISCUSSION

Defendant contends he is entitled to section 4019 conduct credit beginning with the 12 days from November 23, 2011 to December 5, 2011, and ending with his sentencing hearing on May 7, 2011. This is because on December 5, 2011, the trial court modified the conditions of probation to award him 12 days of conduct credits, plus future credits if he successfully completed the Inroads program.

The People's response is twofold. First, the trial court on December 5, 2011, had no authority to release defendant from the waiver of conduct credits that defendant made as part of the original plea agreement. Second, the trial court on December 5, 2011, made the conduct credits conditional upon defendant's successful completion of probation, not just the Inroads program, and defendant did not successfully complete his probation.

It appears to us that that the trial court was not without authority to modify Term One of defendant's probation, despite its potential nullification of the waiver in the plea agreement, precisely because the People and defendant specifically negotiated and stipulated to this very arrangement. (See *People v. Segura* (2008) 44 Cal.4th 921, 931 [“Once the court has accepted the terms of the negotiated plea, “[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree.” [Citation.]’ [Citations.]”].) Here, as a prelude to modifying the terms of defendant's probation to include the possibility that he could earn back the section 4019 conduct credits that he had previously agreed to waive, the trial court on December 5, 2011, referred to “a series of negotiations between the People and the

defense.” The court also stated that “it’s stipulated between the parties” that defendant could earn conduct credits if he successfully completed the Inroads program.

We find it a more difficult question whether defendant fulfilled his part of the bargain, and thus earned the right to receive section 4019 conduct credits, when he completed the Inroads program but violated his probation only a day after his release from custody. As set forth more fully above, the trial court made the following statements at the December 5, 2011, hearing to describe the new agreement between the parties regarding the circumstances under which defendant was to earn the privilege of petitioning the court for conduct credits.

“Upon successful completion of Inroads you’re then to -- you’ll notify your counsel, and at that point they’ll set another court date. You’ll be released from custody and credits readjusted at that time.” This contemplates the following scenario: 1) defendant would complete Inroads; 2) his counsel would petition the trial court for release and conduct credits; and 3) at a hearing in response to that petition the court would release defendant and calculate his credits to include conduct credits. What actually happened was: 1) defendant completed Inroads; 2) the court held a probation review hearing on April 3 at which it ordered defendant released and gave him credit for 365 days actually served, with no mention by any of the parties of conduct credits; 3) defendant violated probation on his first full day of release; and 4) at the probation revocation hearing on May 7, 2012, the trial court sentenced defendant to three years in local custody, with credit for time actually served. Defense counsel for the first time asked for the conduct credits but the trial court denied them per the original plea

agreement; none of the parties brought up the revised probation terms of December 5, 2011.

At the December 5, 2011, hearing, the court also told defendant, “You understand that you waive credits today? If you get in trouble, you don’t finish Inroads, you’re never going to get those credits back. Do you understand that?” The People argue this was the trial court telling defendant he would lose the conduct credits if he did not successfully complete the terms of his probation.

Finally, the trial court reiterated the revised terms of probation. “The defendant is ordered to attend the Inroads program the county jail offers; to successfully complete that. Upon completion of the Inroads program the defendant is entitled to petition the court for release from custody, at which time credits will be readjusted to indicate a total credits of both actual and conduct of 365 days.”

There is no indication in the record that defense counsel petitioned the trial court for the conduct credits after defendant completed Inroads, and no discussion of these credits in the transcript of the April 3, 2012, hearing. An interesting dilemma would have arisen had the trial court, prior to releasing defendant, recalculated his credits to include conduct credits, given that defendant subsequently violated his probation. However, the court did not recalculate the credits at the time it released defendant from jail with 20 months remaining on his probation, and we find this to be a factor in our final determination.

After reviewing the record on appeal, we take away that the People and the defense engaged in considerable off-the-record negotiations in an effort to give defendant

the opportunity to avoid a strike and a state prison term, and to encourage defendant to reject the gang lifestyle and turn his life around. These efforts began with the initial plea bargain, continued through the first probation violation and finally ended after defendant violated his probation for the second time. The initial negotiations and plea agreement resulted in defendant pleading guilty to a non-strike felony instead of the two strike felonies with which he was initially charged—attempted murder and assault with a deadly weapon, with personal use and great bodily injury enhancements. One of the terms of probation, as agreed to in the plea bargain, was that defendant have his gang tattoos removed. At the urging of the People, the trial court found “unusual circumstances” allowing it to grant probation rather than a state prison term, given defendant’s “youthfulness and the fact that he had no significant prior criminal offenses.” On the face of the plea agreement is written in capital letters, bookended by double asterisks, “\*\* NON-STRIKE – NO DEADLY WEAPON\*\*” to ensure that, despite testimony to the contrary during the preliminary hearing, this offense could never be used as a strike offense in the future.<sup>8</sup>

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<sup>8</sup> At the change of plea hearing held on November 18, 2010, the following discussion took place in open court regarding the factual basis for the plea:

“[The COURT]: Both sides stipulate to a factual basis as contained in the preliminary hearing transcript?

“[The PEOPLE]: Yes.

“[DEFENSE COUNSEL]: With the exception in the preliminary hearing there was some testimony that a deadly weapon may have been used. So with that exception we stipulate.

“[The PEOPLE]: Your Honor, the understanding he’s going to get probation when he’s in jail. Regardless what probation says that’s the understanding.

*[footnote continued on next page]*

Even after defendant violated probation the first time, the trial court commented on the People's continued willingness to work with defendant to avoid serious consequences. At the beginning of the December 5, 2011, parole revocation hearing at which it modified defendant's probation terms to allow him to earn conduct credits, the trial court stated: "In this matter my understanding there's been a series of negotiations between the People and the defense. The People are of the mind that it would not be in the best interest of society to send you to state prison, and so they worked out an arrangement to keep you here locally and hopefully get the life skills necessary to stay out of trouble."

Later in that same hearing the prosecutor emphasized the additional opportunity it was giving to defendant to change his life: "And your Honor, I would just ask the Court to note, and I expressed thanks to the Court—Mr. Delagarza, the Court didn't have to agree to this and so the Court is giving you an opportunity—this judge is giving you the opportunity to make things right. You have your mom and your brother here today, and

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*[footnote continued from previous page]*

"[The COURT]: I understand it. I think what he's concerned about is if he gets in trouble in the future and they can go back and the transcript be used as a strike.

"[The PEOPLE]: That will be an impossibility considering the language on the plea. This could never be used as a strike considering what's on the plea, the language. I could never—

"[The COURT]: I agree with you, but I also understand that's the defense's position it may.

"[The PEOPLE]: Fair enough.

"[The COURT]: I take it it is stipulated by both sides that the—if we strike all of the terms that deal with the use of a potential weapon in the conduct of this incident that with that omission in mind the remainder of the preliminary hearing gives a factual basis."

you have a D.A. here that's supporting you, trying to get you squared away. If you come back, you'll disappoint everybody in this courtroom."

The defendant replied "I want to thank you for giving me another opportunity in getting out in society."

Given: 1) the entirety of the parties' and the court's continued efforts to shield defendant from suffering the full, harsh consequences of the first crime he committed as a juvenile; 2) that all participants in these proceedings contemplated giving defendant one last opportunity to avoid state prison if he would conform his actions to the expectations of society; 3) the trial court's words to defendant, "If you get in trouble, you don't finish Inroads, you're never going to get those credits back,"; and 4) especially that the trial court did not in fact recalculate defendant's credits when he was released, we can only conclude that an essential, if not perfectly enumerated, condition precedent to having defendant's credits recalculated to include conduct credits was that he actually fulfill each of his probation conditions for the remainder of the probation term. This he did not do, and so is not entitled to conduct credits.

**DISPOSITION**

The trial court's ruling declining to award section 4019 conduct credits is affirmed.

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RAMIREZ  
P. J.

We concur:

KING  
J.

CODRINGTON  
J.