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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.

FRANK TERRY BROWN, JR.,

Defendant and Appellant.

E059157

(Super.Ct.No. FMB1300204)

OPINION

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

Cynthia M. Jones, 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, Charles C. Ragland, and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Frank Terry Brown pled guilty to a lewd act upon a child who was 15 years old and 10 years younger than he (count 1; Pen. Code, § 288, subd.

(c)(1))<sup>1</sup>. The court sentenced defendant to the negotiated term of two years' imprisonment. On appeal, defendant contends the court erred in denying his request for a hearing regarding a purported inaccuracy on the court ordered Static-99 report, in not awarding him an additional day of conduct credit, and in imposing a \$280 restitution fine.<sup>2</sup> We affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

In October 2011, about a month after the victim, defendant's girlfriend's daughter, turned 15 years of age, the then 28-year-old defendant began having sexual intercourse with the victim several times a week. The relationship continued until defendant went to prison in another matter in December 2012. Defendant performed oral sex on the victim regularly beginning in January or February 2012. The victim also performed oral sex on defendant a number of times.

The victim's mother never found out because she was "never around." Prior to her relationship with defendant, the victim dropped out of school to take care of the house

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

<sup>2</sup> After we issued our tentative opinion, defendant filed a motion for leave to file supplemental briefing contending we resolved defendant's arguments on issues not proposed or briefed by the parties. On July 30, 2014, we granted defendant's motion. We have read the parties' supplemental briefs and find no reason to depart from the reasoning of our tentative opinion.

<sup>3</sup> The parties stipulated the police reports and complaint would provide the factual basis for the plea.

and her younger sibling because, “her mother would not come home” “on a regular basis”. Defendant remained at the apartment, initially as a father figure to the victim. However, the victim soon came to have romantic feelings for him.

At some point, defendant, the victim, the victim’s sister, and the victim’s mother were evicted from the apartment. They all moved in with defendant’s mother. After his arrest, defendant’s mother was evicted, leaving the victim, her mother, and her sister without a home. A relative of the victim allowed her and her sister to move in with him, but not her mother. The victim’s mother became homeless. The victim was seven months pregnant with defendant’s child when the relationship was reported to the San Bernardino County Sheriff’s Department in March 2013.

Defendant admitted having consensual sex with the victim. Defendant admitted performing oral sex on the victim and that the victim had performed oral sex on him. Defendant said he believed the child the victim was pregnant with was his.

On May 3, 2013, the People charged defendant by felony complaint with a lewd act upon a child who was 15 years old and 10 years younger than he (Count 1; § 288, subd. (c)(1)) and oral copulation of a person under 16 by a person over 21 years of age (count 2; § 288a, subd. (b)(2)). Defendant pled guilty to the count 1 offense in return for the People’s agreement he would be sentenced to the midterm of two years. Defendant requested immediate sentencing.

The court sentenced defendant to the agreed upon term of two years’ imprisonment and awarded seven days of actual and six days of conduct credit. The

court ordered victim restitution in the amount of \$280. The court additionally ordered the preparation of a Static-99 report.

The Static-99 report reflects defendant scored a four, “which places him in the Moderate to High Risk Category for being charged or convicted of another sexual offense, if he is released on probation.” Defendant incurred one point for never having lived with a lover for at least two years: “Although the defendant stated he had a 7 yr relationship with the victim’s mother and lived with her during that time period, the defendant’s supervising officers described the relationship as on and off again, at no time did the defendant live with the victim for a continuous period of 2 yrs. or more.”

At a subsequent hearing, defense counsel requested a hearing on the report because he believed the report may have erroneously found, based on hearsay evidence, that defendant did not live with the victim’s mother continuously for more than two years; thus, garnering him an additional “point” and raising his risk factor from Low-Moderate to Moderate-High. The court denied the request for a hearing: “The court finds that the Static-99 report is proper. It is to be submitted to the Department of Corrections, who will then do their own Static-99 report after he’s getting close to the time for release, where they will review all the information and do their own evaluation, and that would be his opportunity for a review of this information that’s been provided by the probation department.”

## DISCUSSION

### A. Hearing on the Static-99 Report.

Defendant contends the court deprived him of his constitutional right to due process by divesting him of the opportunity to challenge the contents of the Static-99 report. We disagree.

“When a defendant subject . . . has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence.” (Former § 1170, subd. (d).) A “trial court’s discretion to impose a sentence both at the initial sentencing hearing and upon a recall of the sentence under section 1170 [is] defined by the terms of the plea . . . .” (*People v. Blount* (2009) 175 Cal.App.4th 992, 996-997.) A stipulated term of imprisonment in a “plea agreement is a clear and unequivocal expression of the parties’ intent in entering the agreement. [Citation.]” (*Id.* at p. 997.) Section 1170 “certainly does not allow the court to alter the terms of a plea agreement agreed to by the parties and the trial court.” (*Id.* at p. 998.)

Here, the court ordered the Static-99 report prepared for “possible [section] 1170, subdivision (d), relief thereof.” However, defendant had already been sentenced to the negotiated term of two years’ imprisonment. Nothing in the record indicates the court

was considering recalling and resentencing defendant. Regardless, even if it had so indicated, it had no power to do so. (*People v. Blount, supra*, 175 Cal.App.4th at p. 998.) The court did not deprive defendant of due process because it did not, and could not, rely upon the Static-99 report to recall defendant's negotiated sentence to impose a lesser term.

B. Custody Credit.

Defendant contends the court erred in failing to award him seven, rather than six, days of custody credits. The People agree. We disagree with both parties and hold, on this record, that the court awarded defendant the proper amount of credit.

“A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647; accord *People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.) Under current section 4019, subdivision (f), effective October 1, 2011, a defendant may earn four days of custody credit *for every two days spent in actual custody*. (Stats. 2011, ch. 39, § 53, italics added.)

Employing the method of custody calculation prescribed by the court in *In re Marquez* (2003) 30 Cal.4th 14, 25-26, we find defendant is entitled to six days of conduct credit. (*People v. Chilelli, supra*, 225 Cal.App.4th at p. 591 [Defendant not entitled to one-for-one conduct for custody credits pursuant to current section 4019, subdivision (f)], citing *People v. Dieck* (2009) 46 Cal.4th 934, 943.) Seven actual days divided by two equals 3.5. We discard the remainder and multiply the result by two. Three times two

equals six. Thus, defendant was entitled to only six days of conduct credit, the precise amount the trial court awarded him. (*Ibid.*)

Defendant contends that pursuant to former section 2933, subdivision (e)(1), he was entitled to one-for-one custody credits for the actual number of days of jail time he served. Custody credits awarded pursuant to section 2933 apply to offenses committed during its effective operation. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1336-1337.) Former section 2933, subdivision (e), effective January 25, 2010, to September 27, 2010, read, “A prisoner sentenced to the state prison under Section 1170 shall receive *one day of credit for every day served* in a county jail, city jail . . . after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019.” (Italics added.) Former section 2933, subdivision (e)(1), effective September 28, 2010, to September 30, 2011, provided, “Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have *one day deducted from his or her period of confinement for every day he or she served* in a county jail, city jail . . . from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” (Italics added.) Prior to January 25, 2010, and its current version effective October 1, 2011, section 2933 did not nor does not provide for day-for-day conduct credit for actual local custody time.

Although the felony complaint alleged defendant had committed the offenses “on or about August 1, 2011,” the police report makes it clear the offenses did not occur until

October 2011, when the one-for-one custody credit provisions of former section 2933, subdivision (e)(1), were no longer in effect. Thus, the court granted defendant the correct number of custody credits.

### C. Restitution Fine.

Defendant contends the court violated constitutional ex post facto proscriptions by ordering he pay \$280 as a restitution fine pursuant to section 1202.4, subdivision (b), when, at the time he committed the offense, the minimum fine was \$200. We hold defendant forfeited the issue on appeal by failing to object below. To the extent the issue was not forfeited, we hold the court acted within its discretion in imposing the \$280 fine.

At the time of defendant's offense, former section 1202.4, subdivision (b), required the court to impose a restitution fine in an amount "not less than two hundred dollars . . . ." The Legislature amended section 1202.4 subdivision (b), effective January 1, 2012, to require a restitution fine in an amount no less than \$280.

"In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime.

Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. *Express findings by the court as to the factors bearing on the amount of the fine shall not be required.*" (§ 1202.4, subd. (d), italics added.)

"An objection to the amount of restitution may be forfeited if not raised in the trial court. 'The unauthorized sentence exception is "a narrow exception" to the [forfeiture] doctrine that normally applies where the sentence "could not lawfully be imposed under any circumstance in the particular case," for example, "where the court violates mandatory provisions governing the length of confinement." [Citations.] The class of non[forfeitable] claims includes "obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.'" [Citation.] The appropriate amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is excessive." (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218; accord *People v. Nelson* (2011) 51 Cal.4th 198, 227.)

Here, because section 1202.4, subdivision (b), permits the court to impose maximum restitution fines of \$10,000, the court's imposition of a \$280 fine was not unauthorized. As such, defendant forfeited any contention the fine was excessive by failing to object below. Finally, the record does not support defendant's contention the court intended to impose the minimum fine. The circumstances of the instant case involved the then 28-year-old defendant's engagement in numerous sexual encounters

with the 15-year-old victim during which he impregnated her. The court's imposition of a restitution fine slightly above the minimum, but well below the maximum amount permissible, was well within the court's discretion.

DISPOSITION

The judgment is affirmed.

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CODRINGTON  
J.

We concur:

McKINSTER  
Acting P. J.

MILLER  
J.