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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.

JONATHAN MICHAEL TERCEIRA,

Defendant and Appellant.

E061509

(Super.Ct.No. FMB1300071)

OPINION

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

Michelle Christine Zehner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

On February 19, 2013, a felony complaint charged defendant and appellant John Michael Terceira with evading an officer with willful disregard for the safety of persons

and property under Vehicle code section 2800.2, subdivision (a) (count 1). On March 25, 2013, defendant pled guilty in exchange for sentencing to drug court. Defendant also admitted that the present charge constituted a violation of his probation in case No. FMB1200377, for an August 18, 2012, violation of Penal Code<sup>1</sup> section 273a, subdivision (a) (causing a child to suffer injury).<sup>2</sup>

At a hearing on May 6, 2013, defendant was assigned to drug court relating to three matters: FMB1300071 (the present case for evading an officer); FBM1200377 (the above-mentioned probation violation); and MMB1300057 (a misdemeanor violation of Health & Saf. Code, § 11364, subd. (a), for possession of drug paraphernalia in San Bernardino County). The misdemeanor possession case was terminated as unsuccessful. Defendant was sentenced to 90 days of jail time with credit for 90 days served, thus closing that matter. As specified in his plea, defendant was accepted into drug court and placed on 36 months of supervised probation on the remaining two matters.

On October 22, 2013, the trial court revoked probation and issued a bench warrant for defendant's arrest after he tested positive for methamphetamine on October 21, 2013. Defendant allegedly left the county without giving notice to his probation officer.

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

<sup>2</sup> At this hearing, trial counsel informed the court of an existing case in Riverside County from February 14, 2013, relating to felony possession of drug paraphernalia in case No. BAF1300193. The court confirmed that the Riverside case would not constitute a violation of defendant's probation terms in the present case. The sentencing on the Riverside matter was handled separately from the present case and is not at issue in this appeal.

On October 25, 2013, defendant was arrested in Alameda County for felony assault with a deadly weapon under section 245, subdivision (a)(1). Defendant admitted to possessing and being under the influence of methamphetamine at the time of his arrest. On April 15, 2014, defendant was convicted of felony assault with a deadly weapon, Alameda case No. H55522, and sentenced to serve 365 days in jail and five years of probation.

On June 30, 2014, following the completion of his Alameda County jail sentence, defendant was transferred to San Bernardino County for a hearing. Defendant had previously waived his right to a formal hearing. The court, therefore, moved to sentencing after finding that defendant was in violation of his probation terms. In the present case of evading an officer, the court sentenced defendant to the upper term of three years based on defendant's criminal history.

The court awarded defendant 130 days of actual credit. No credits under section 4019 were awarded based on defendant's prior waiver of those credits as a condition of admission into the drug court program. On the remaining matter (causing a child to suffer injury), the court sentenced defendant to 90 days with credit for 90 days served, closing that case.

On July 9, 2014, defendant filed a timely notice of appeal. On appeal, defendant contends that the trial court erred in failing to award him custody credits under section 4019 for the time he spent in custody after entering his plea in March 2013. We agree with defendant and remand this case for the limited purpose of calculating and awarding section 4019 credits.

## **FACTUAL AND PROCEDURAL HISTORY**

On February 8, 2013, defendant led police on a high speed car chase during which he committed several traffic violations. The officers identified defendant as the driver from several witnesses and surveillance videos.

## **DISCUSSION**

### **A. DEFENDANT’S ARGUMENT REGARDING HIS PROBATION CONDITIONS IS MOOT**

Defendant contends that several of his probation conditions are unconstitutionally broad and vague for failing to have a “knowledge requirement.” Defendant requests that we modify the conditions to include an “appropriate knowledge element.”

Notwithstanding defendant’s argument, as the People point out, defendant is currently serving his sentence in prison and not subject to any probation terms. Defendant’s argument, therefore, is moot.

### **B. SECTION 4019 CREDITS**

Defendant contends that the trial court erred in failing to award him custody credits under section 4019 for “the time he spent in custody relating to this case after his plea was accepted on March 25, 2013.”

The People argue that defendant “is precluded from making this claim on appeal because he did not obtain a certificate of probable cause. A certificate of probable cause is required whenever an appeal challenges the validity of a plea. [Defendant’s] appeal does just that, because the waiver of custody credits was part of his plea agreement.” Here, defendant is not challenging the validity of his plea. He is arguing that he is

entitled to section 4019 credits because he did not waive such credits for time served *after* he entered his plea on March 25, 2013. We agree with defendant.

In this case, defendant pled guilty in exchange for sentencing to drug court. As part of this plea, defendant waived his section 4019 credits accrued until he signed the plea agreement. At the original sentencing hearing, the trial court granted defendant 67 actual custody credits, but explained that defendant “will not receive 4019 credits because he’s being accepted into the drug court program, and he has waived that right.” Defendant does not challenge this order. Defendant challenges the order on June 30, 2014; defendant contends that the trial court erred in failing to credit him with conduct credit earned after he signed his plea agreement.

It is well settled that a defendant can expressly waive entitlement to custody credits—including conduct credits—as a condition to a grant of probation, as defendant did here. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1052; *People v. Black* (2009) 176 Cal.App.4th 145, 154 [Fourth Dist., Div. Two] (*Black*).) However, “[a]s with the waiver of any significant right by a criminal defendant, a defendant’s waiver of entitlement to . . . custody credits must, of course, be knowing and intelligent.” [Citation.] ‘The gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled . . . .’” (*Black*, at p. 154.)

Defendant knowingly and intelligently waived his entitlement to the 67 days of conduct credit that the trial court referred to at the May 6, 2013, sentencing hearing, and he makes no claim to those 67 days of conduct credit. However, defendant argues that he

did not make a knowing and intelligent waiver of his right to conduct credit in addition to those 67 days. According to defendant, the trial court did not explain to him that he would be waiving his right to conduct credits that he might earn in the future, and he therefore did not knowingly and intelligently waive his right to such credits. We agree.

We first note that no mention of a section 4019 waiver was made when defendant pled guilty or on the plea agreement form. The first time section 4019 was mentioned was at the hearing wherein defendant was referred to drug court. At this hearing, the trial court granted defendant 67 actual custody credits, but explained that defendant “will not receive 4019 credits because he’s being accepted into the drug court program, and he has waived that right.” This statement cannot reasonably be understood to have communicated to defendant that he was waiving his right to conduct credits beyond the 67 days of conduct credit that the trial court specifically referenced. The trial court said nothing about waiving conduct credits that defendant might earn if, in the future, he once again found himself in local custody. Moreover, the minute order from the hearing indicates that “[d]efendant waives PC4019 credits” with regard to the 67 days of actual custody credits. There is no mention of waiving section 4019 credits with regard to future custody credits. Therefore, defendant did not make a knowing and intelligent waiver of any conduct credits other than the 67 days that he had already earned as of the May 6, 2013, hearing.

Notwithstanding, the People argue that defendant waived all section 4019 credits “including future credits that would accrue after he entered his plea” based on the court’s statement that defendant “*will not* receive 4019 credits because he’s being accepted into

the drug court program.” The argument is without merit. As provided above, the court’s words, “will not receive 4019 credits” specifically referenced the section 4019 credits defendant would not be receiving in relation to the 67 actual custody credits defendant accrued. Nothing in this statement referenced future section 4019 credits.

*Black, supra*, 176 Cal.App.4th 145, is instructive. In *Black*, the defendant executed a drug court application and agreement. In the agreement she waived “all 4019 credits as a condition of participating in the DRUG COURT TREATMENT PROGRAM.” (*Id.* at p. 152.) On appeal, unlike defendant in this case, the defendant in *Black* challenged the waiver as to all section 4019 credits. She contended that her waiver of section 4019 credits was not knowing and intelligent because her attorney failed to discuss the implications of her waiver with her before she entered into the agreement. (*Black*, at p. 152.) We rejected the defendant’s argument. However, we agreed with “[t]he People’s position . . . that the waiver applies to all section 4019 credits accrued prior to . . . the date defendant signed the Agreement. The People concede[d] defendant should have been awarded section 4019 credits for any time spent in custody after [she signed the agreement].” (*Id.* at p. 155.) We, therefore, remanded the case for a proper calculation of credits. (*Ibid.*)

As in *Black, supra*, because no effective waiver was in place regarding conduct credits earned after defendant signed the plea agreement, the trial court erred in refusing to assign any conduct credits for the time, if any, that defendant spent in local custody with qualifying good conduct after he signed the plea agreement on March 25, 2013. (Cf.

*Black, supra*, 176 Cal.App.4th at p. 155.) We will remand for the trial court to calculate any conduct credits that defendant may have earned after March 25, 2013.

**DISPOSITION**

The trial court is directed to make a determination and award of any conduct credits to which defendant is entitled for defendant’s time spent in local custody after March 25, 2013, and to forward a certified copy of any amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MILLER  
J.

We concur:

KING  
Acting P. J.

CODRINGTON  
J.