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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KAI WALTER WILLIAMS,

Defendant and Appellant.

F062186

(Super. Ct. No. BF134890A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

J. Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, William K. Kim, and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Franson, J.

In February 2011, pursuant to a plea agreement, appellant, Kai Walter Williams, pled no contest to carrying a loaded firearm while being an active participant in a criminal street gang, as a felony (Former Pen. Code, § 12031, subd. (a)(2)(C)).¹ In March 2011, the court imposed the 16-month lower term and awarded appellant presentence custody credit of 183 days, consisting of 123 days of actual time credit and 60 days of conduct credit.

On appeal, appellant's sole contention is that he is entitled to an additional 63 days of conduct credit because the court erred in failing to calculate his conduct credit under the one-for-one credit scheme of former section 2933, subdivision (e) (section 2933(e)). We affirm.

DISCUSSION

Section 12031(a)(2)(C) is a Serious Felony

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing, including time imposed as condition of probation, served in county jail and other settings. (§ 2900.5, subd. (a).) Generally, a defendant may earn, in addition to section 2900.5 actual time presentence custody credit, what is commonly called conduct credit: presentence credit awarded for willingness to perform assigned labor and compliance with rules and regulations. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 (*Dieck*).)

¹ All statutory references are to the Penal Code. Former section 12031 was repealed, with the repeal operative January 1, 2012 (Stats. 2010, ch. 711, § 4, p. 4036), but the provisions of former section 12031, subdivision (a)(2) are continued without substantive change in section 25850, subdivision (c). All references to section 12031 are to the repealed statute, which was in effect at all times relevant here. We refer to section 12031, subdivision (a)(2)(C) as section 12031(a)(2)(C).

The Legislature amended section 2933(e), effective September 28, 2010, to provide for an enhanced credit of one day of conduct credit for each day a defendant spends in custody prior to incarceration in state prison. (Stats. 2010, ch. 426, § 1, p. 2087, eff. Sept. 28, 2010; § 2933(e)(1) [prisoner shall have one day deducted from his or her period of confinement for every day he or she served in a county jail].)² However, defendants falling into certain categories were not eligible for the enhanced section 2933(e) one-for-one credit scheme, viz., those defendants who were required to register as sex offenders, *were committed for a serious felony as defined in section 1192.7*, or had a prior conviction for a serious or violent felony. (Stats. 2010, ch. 426, § 1, p. 2087.)

As indicated above, appellant contends his conduct credit should have been calculated under section 2933(e)'s one-for-one scheme. The People counter that section 2933(e) is not applicable to appellant because the offense of which he stands convicted and for which he was committed to prison—a felony violation of section 12031, subdivision (a)(1), where the defendant is subject to the sentencing provision of section 12031(a)(2)(C)—is a serious felony under section 1192.7. Specifically, the People argue, the instant offense qualifies as a serious felony under subdivision (c)(28) of section 1192.7 (section 1192.7(c)(28)). As we explain below, the People are correct.³

² Section 2933 has been amended again. (Stats. 2011–2012, 1st Ex. Sess., ch. 12, § 16, pp. 5962-5963, eff. Sept. 21, 2011.) In this decision, references to section 2933 are to the version of the statute made effective on September 28, 2010.

³ The People also make two other arguments. First, they argue that the instant appeal should be dismissed because appellant failed to make a motion in the trial court for the “recalculation” of his conduct credits. The People base this contention on section 1237.1, which provides: “No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.” Second, the People argue

The list of serious felonies in section 1192.7 includes “any felony offense, which would ... constitute a felony violation of Section 186.22[.]” (§ 1192.7(c)(28), emphasis added.) Section 12031, subdivision (a) provides, in relevant part, as follows: “A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.” Generally, the offense is a misdemeanor (§ 12031, subd. (a)(2)(G)), but it becomes a felony when, as provided in 12031(a)(2)(C), it is committed by “[a] person [who is] an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22” (§ 12031(a)(2)(C).)⁴

Thus, to determine whether a violation of section 12031(a)(2)(C) is a serious felony, we must answer the question: Does carrying a loaded firearm in violation of section 12031, subdivision (a) by a person who is “an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22” (§ 12031(a)(2)(C)), constitute a “felony offense[] which would ... constitute a felony violation of Section 186.22” within the meaning of section 1192.7(c)(28)? *People v. Robles* (2000) 23 Cal.4th 1106 (*Robles*), concludes that it does.

In *Robles*, as in the instant case, the defendant was charged with a violation of section 12031(a)(2)(C). At the preliminary hearing, the prosecution sought to establish

that section 2933(e) is “inapplicable to this case because the trial court is not responsible for calculating or granting credits pursuant to this provision.” Under section 2933(e), the People argue, the California Department of Corrections and Rehabilitation calculates and grants custody credit. We assume without deciding that these claims are without merit.

⁴ As indicated above, the section 12031 substantive offense is defined in subdivision (a)(1) of section 12031, and punishment for the offense, under various circumstances, is specified in subdivision (a)(2) of section 12031. For the sake of brevity, we refer to a violation of subdivision (a)(1) of section 12031 by a person subject to the punishment provision of section 12031(a)(2)(C) as a violation of section 12031(a)(2)(C).

the “active participation in a criminal street gang” element of that offense by showing that the defendant committed the substantive gang offense defined in section 186.22, subdivision (a) (section 186.22(a)). The substantive section 186.22 (a) consists of three elements: “Any person who [1] actively participates in any criminal street gang [2] with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who [3] willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang....” (Section 186.22(a).)

In *Robles*, the prosecution presented evidence the defendant was an active participant in a criminal street gang, but did not present evidence of the other two elements of the section 186.22(a) offense, viz., knowledge that gang members engage in or have engaged in a pattern of criminal activity and the willful promoting, assisting or furthering of felonious criminal conduct by the members. On the defendant’s motion, the magistrate reduced the charge to a misdemeanor, and the trial court denied the prosecution’s motion to reinstate the felony complaint.

Our Supreme Court held the prosecution’s motion was properly denied. The task confronting the court was the interpretation of the phrase “active participant in a criminal street gang, *as defined in subdivision (a) of Section 186.22*” in section 12031(a)(2)(C). (Italics added.) However, the phrase “active participant in a criminal street gang” was not defined in section 186.22(a). Moreover, the court reasoned that the phrase was susceptible to more than one reasonable interpretation. (*Robles, supra*, 23 Cal.4th at p. 1111.) One such interpretation, urged by the prosecution in *Robles*, is that a violation of section 12031(a)(2)(C) requires proof of carrying a gun in public (§ 12031, subd. (a)(1)) and only the first element of section 186.22(a)—active participation in a gang. The second reasonable interpretation is that the statute requires proof of the gun-carrying element and *all three elements* of section 186.22(a).

The court adopted the second interpretation, “constru[ing] section 12031(a)(2)(C)’s phrase ‘active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22’ as referring to the substantive gang offense defined in section 186.22(a).” (*Robles, supra*, 23 Cal.4th at p. 1115.)⁵ The *Robles* court held that because the prosecution failed to prove all elements of that offense, the defendant could not be held to answer under section 12031(a)(2)(C). (*Robles, supra*, at p. 1115.)

Thus, under *Robles*, a violation of section 12031(a)(2)(C) includes a substantive violation of section 186.22(a). Therefore, a plea to, and conviction of, violating section 12031(a)(2)(C) constitutes a conviction of a “felony offense[] which would ... constitute a felony violation of Section 186.22” within the meaning of section 1192.7(c)(28), i.e., a serious felony. And because appellant stands convicted of a serious felony, he is ineligible for the one-for-one custody credit provisions of section 2933(a).

Appellant contends the conviction that resulted from his plea of no contest to the charge of violating section 12031(a)(2)(C) did not constitute a serious felony conviction under section 1192.7. He bases this claim on the interpretation of section 12031(a)(2)(C) rejected in *Robles*. Specifically, he argues as follows: Although section 186.22(a) consists of three elements, section 12031(a)(2)(C) mentions only the first—active participation in a criminal street gang; appellant’s plea therefore admits only that element; and because he has admitted only one element of section 186.22(a), his plea

⁵ In reaching this conclusion, the court applied the principal commonly known as the “rule of lenity” (see *People v. Avery* (2002) 27 Cal.4th 49, 58), i.e., the rule of statutory construction that provides: “[w]hen ... the language of a penal law is reasonably susceptible of two interpretations, [a reviewing court] construe[s] the law ‘as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law at issue.’” (*Robles, supra*, at p. 1115.) The second construction of the statute is more favorable to defendants, of course, because it requires that the prosecution, in order to establish a violation of section 12031(a)(2)(C), prove not just one, but all three elements of section 186.22(a).

does not constitute an admission that he committed, and cannot result in a conviction of, a “felony offense[] which would ... constitute a felony violation of subdivision (a) of Section 186.22” within the meaning of section 1192.7(c)(28). Therefore, he argues further, he does not stand convicted of a serious felony which would disqualify him from receiving the benefit of the section 2933(a) conduct credit provision.

Appellant acknowledges that the *Robles* court rejected his interpretation of section 12031(a)(2)(C). He argues, however, that the *Robles* interpretation does not apply in the context of the instant case. He points to the fact that *Robles* relied on the rule of lenity, the operation of which in *Robles* led to the conclusion that proof of a violation of section 12031(a)(2)(C) requires proof of all three elements of section 186.22(a). As indicated in footnote 5, *ante*, that interpretation was more favorable to the defendant in *Robles* because it placed a greater burden on the prosecution than the interpretation that required proof of only one element of the offense. Here, on the other hand, interpreting the statute to mean that a conviction of violating section 12031(a)(2)(C) establishes only one element of section 186.22(a) would be more favorable to appellant, because if only one element of section 186.22(a) is established by his plea, it cannot be said that a conviction of violating section 12031(a)(2)(C) is a conviction of a substantive “felony offense[] which would ... constitute a felony violation of Section 186.22” within the meaning of section 1192.7(c)(28). Thus, although he agrees with *Robles* that the rule of lenity should apply in the interpretation of section 12031(a)(2)(C), he argues that operation of that rule in the context of his case leads to the conclusion that section 12031(a)(2)(C) is not a serious felony.

Appellant’s argument is without merit. We do not apply the rule of lenity at this late date—more than 11 years after *Robles* was decided—because the phrase “active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22” is no longer susceptible to two reasonable interpretations. *Robles* interpreted the language in

question, and the meaning does not change because in some other context some other criminal defendant may benefit from a different interpretation. As the *Robles* court noted, the rule of lenity is rooted in due process notice concerns; it “protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.” (*Robles, supra*, 23 Cal.4th at p. 1115.) Because of the decision in *Robles*, appellant was on notice that a plea of no contest to a charge of violating section 12031(a)(2)(C) admits all three elements of section 186.22(a) and thus results in a conviction of a “felony offense[] which would ... constitute a felony violation of Section 186.22” within the meaning of section 1192.7(c)(28). (*People v. Ward* (1967) 66 Cal.2d 571, 574 [guilty plea amounts to an admission of every element of the crime]; § 1016 [no contest plea the functional equivalent of guilty plea].) And having been put on notice of the meaning of 12031(a)(2)(C) by our Supreme Court’s decision in *Robles*, he cannot now complain that the statute is ambiguous and that the interpretation rejected by *Robles* applies here.

Pleading and Proof Requirement

Appellant also argues that disqualification from section 2933(e)’s one-for-one formula for conduct credit was equivalent to an increase in punishment, which requires the prosecution to plead and prove the disqualifying fact. The prosecution did not comply with this pleading and proof requirement here, appellant argues, because although the instant offense was “originally pled as a serious felony, the prosecution never proved that count one was a serious felony, and [appellant] was not convicted of a serious felony offense.” Appellant relies chiefly on *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*), where the court held that “before a defendant can properly be sentenced to suffer the *increased penalties* flowing from ... [a] finding ... [of a prior conviction] the fact of the prior conviction ... must be charged in the accusatory

pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.” (*Id.* at pp. 1192-1193, italics added.) The People counter that “*Lo Cicero* is not controlling here because conduct credits are not a matter of punishment[,]” and therefore it is not required that facts disqualifying appellant from the section 2933(e) credit scheme be pled and proved. We need not resolve this dispute.⁶ The purported punishment-increasing fact here is not a prior conviction, as in *Lo Cicero*, but the instant offense. The fact of that offense was pled and, by appellant’s plea, admitted. Because, as demonstrated above, section 12031(a)(2)(C) is a serious felony, appellant’s plea to committing that offense satisfied any proof requirement.

Due Process

Finally, appellant contends his constitutional due process rights were violated because the court’s failure to calculate his conduct credit under section 2933 was based on the “unproven assertion that his conviction was for a serious felony.” This claim too is without merit. Its major premise is that the offense set forth in section 12031(a)(2)(C) does not qualify as a serious felony under section 1192.7(c)(28). Again, as demonstrated above, this premise is false. Appellant was convicted of a serious felony, and therefore section 2933(e) is inapplicable. The remaining question is: Given that appellant is not eligible for section 2933(e) one-for-one conduct credit, how is his conduct credit to be calculated?

⁶ The issue of whether a prior serious felony conviction that disqualifies a defendant from a former version of section 4019 that provided for enhanced credit must be pled and proved because such disqualification is the equivalent of an increase in punishment is currently before the California Supreme Court. (See, e.g., *People v. Jones* (2010) 188 Cal.App.4th 165, 183, review granted Dec. 15, 2010, S187135 [prior conviction increases punishment; must be pled and proved], contra, *People v. James* (2011) 196 Cal.App.4th 1102, review granted Aug. 31, 2011, S195512.)

Former Section 4019

At all times relevant here, both section 2933(e) and section 4019 provided for conduct credit. Section 4019 has undergone a series of revisions in recent years, but the version that became effective September 28, 2010, to which we refer as former section 4019, is applicable here.⁷ (Stats. 2010, ch. 426, § 2, p. 2088.) Former section 4019 applies to persons confined for a crime, like the instant offense, committed after September 28, 2010, (former § 4019, subd. (g)),⁸ and provides for two days of conduct credit for every four-day incarceration period (former § 4019, subd. (f)). Under that scheme, the court's award of 60 days of conduct credit, based on 123 days of actual time in custody, was correct.

DISPOSITION

The judgment is affirmed.

⁷ Section 4019 has been amended three times subsequent to the September 28, 2010, amendments. Each of these amendments became effective after appellant was sentenced, however, and therefore are not applicable here. (Stats. 2011, ch. 15, § 482, pp. 497-498, eff. April 4, 2011, operative Oct. 1, 2011; Stats. 2011, ch. 39, § 53, pp. 1730-1731, eff. June 30, 2011, operative Oct. 1, 2011; Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35, pp. 5976-5977, eff. Sept. 21, 2011, operative Oct. 1, 2011.)

⁸ It was alleged in the information, and appellant admitted by his plea, that the instant offense occurred on November 28, 2010.