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

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTORIANO MEJIA,

Defendant and Appellant.

F063236

(Super. Ct. No. VCF005473-99)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Patrick O'Hara, Judge.

Richard A. Levy, 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, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Kane, J., and Poochigian, J.

Appellant, Victoriano Mejia, stands convicted of multiple felonies. In January 2010, the trial court imposed sentence and awarded custody credits.<sup>1</sup> Appellant appealed, and on appeal this court held, inter alia, that the trial court erred in determining appellant's actual time credits and remanded the matter to the trial court with directions to recalculate those credits.<sup>2</sup> Thereafter, the trial court issued an ex parte order and abstract of judgment indicating, inter alia, that appellant was awarded custody credits of 4,905 days, consisting of 4,681 days of actual time credits and 224 days of conduct credits. The instant appeal followed.

On appeal, appellant contends (1) the court erred in modifying appellant's sentence without a notice and hearing and in appellant's absence, and (2) the abstract of judgment contains other errors that should be corrected. The People concede the latter point. We assume without deciding that appellant's first argument has merit, but conclude any error was harmless. We conclude further that the court's award of custody credits was erroneous. We modify the judgment, order that the trial court issue a new abstract of judgment, and affirm the judgment as modified.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 1999, a jury convicted appellant of multiple felonies, including five counts of forcible rape (§ 261, subd. (a)(2)), and found true a number of enhancement allegations. On November 16, 1999, the court imposed sentence. On appellant's first appeal, in 2002, this court modified the judgment by striking one of the enhancements.

In 2006, the United States District Court for the Eastern District of California granted appellant's petition for a writ of habeas corpus on the five forcible rape counts. After the People expressed their intention to retry the case, in 2009, appellant pled guilty

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<sup>1</sup> We use the term "custody credits" to denote, collectively, actual time credits (Pen. Code, § 2900.5) and conduct credits (Pen. Code, § 4019). Except as otherwise indicated, all further statutory references are to the Penal Code.

<sup>2</sup> We take judicial notice of this court's records in appellant's earlier appeal, *People v. Mejia*, F059546. (Evid. Code, §§ 452, subd. (d), 459.)

to the rape counts. On January 12, 2010, the court imposed a prison term, which erroneously included a three-year term for the previously stricken enhancement, and awarded custody credits of 662 days based on the court's conclusion that appellant was entitled to 448 days of actual time credits and 224 days of conduct credits.<sup>3</sup> The court stated, "Those were the original time credits," and that the Department of Corrections and Rehabilitation (DCR) would calculate "[a]ny additional time credits." It appears the court awarded actual time credits only through December 2, 1999; the report of the probation officer prepared in advance of the January 2010 sentencing (RPO) indicates appellant had served 448 days in local custody from his earliest day in custody, September 11, 1998, through December 2, 1999, and that his state prison incarceration began on December 3, 1999.

Appellant appealed from the January 2010 judgment, and in April 2011, this court, in *People v. Mejia*, case No. F059546 (second appeal), held that the trial court erred in (1) imposing sentence on the previously stricken enhancement and (2) in failing to award appellant credits for *all* days in custody, including his time in state prison, i.e., from September 11, 1998, when he was initially taken into custody, through the date of resentencing, January 12, 2010. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 37 [when felony sentence modified on appellate remand during term of imprisonment, trial court must calculate and credits defendant with all actual days spent in custody, whether in jail or prison, up to time of resentencing].) This court ordered: "The case is remanded to the trial court for the limited purposes of (1) striking [the previously stricken enhancement] ...; and (2) recalculating the number of actual days appellant has been in custody up to the date of resentencing on this remand ...."<sup>4</sup>

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<sup>3</sup> There is an arithmetic error in this calculation. The sum of 448 and 224 is 672, not 662.

<sup>4</sup> There were additional errors in the award of custody credits that were not corrected in appellant's second appeal. As indicated above, the trial court awarded 448 days of actual time credits (§ 2900.5) and 224 days of conduct credits (§ 4019) and the

On July 8, 2011, after the remittitur was issued, the trial court set a hearing for July 21, 2011, “which requires the appearance of Counsel and defendant.” However, on July 11, 2011, the court issued an ex parte minute order striking the enhancement as directed and “order[ing] that defendant receive credits for 4681 actual days [in custody] served up through July 11, 2011.” That same day an abstract of judgment was filed that showed 448 days of actual time credits and 224 days of conduct credits. A new abstract was filed on July 14, 2011, showing total presentence custody credits of 4,905 days, consisting of 4,681 days of actual time credits and 224 days of conduct credits. On September 19, 2011, the court issued an ex parte minute order vacating the July 21, 2011 hearing date.

## DISCUSSION

### *Due Process and Claims*

As indicated above, appellant contends his right to due process of law under the United States and California Constitutions was violated because the trial court, on remand, modified his sentence without providing notice and a hearing at which appellant was present. Representative of the authorities upon which appellant relies in support of

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court apparently based its award of actual time credits on the RPO, which indicated that from appellant’s earliest day in custody, September 11, 1998, through December 2, 1999, he had served 448 days in local custody. However, appellant was sentenced on November 16, 1999, and presentence custody credits are awarded at the time of sentencing. (§ 2900.5, subd. (d).) On the date of sentencing, appellant had served 432 days in local custody, and therefore he was entitled to 432 days of *presentence* actual time credits, not 448 days. Moreover, under section 4019, 432 days of actual time credits entitled appellant to 216 days of conduct credits, not 224 days. These errors apparently arose from the indication in the RPO that appellant remained in custody in Tulare County Jail after he was sentenced on November 16, 1999, through December 2, 1999, before he was delivered to the DCR. However, the Director of DCR, not the trial court, had the duty of determining *postsentence* custody credits, and therefore had the duty of determining custody credits for that period. (*People v. Mendoza* (1986) 187 Cal.App.3d 948, 954.)

these claims are *In re Daniel M. Williams* (2000) 83 Cal.App.4th 936 (*Williams*) and *People v. McGahuey* (1981) 121 Cal.App.3d 524 (*McGahuey*).

In *Williams*, a habeas corpus proceeding, the petitioner pled guilty to escape (§ 4530, subd. (c)) pursuant to a plea agreement, which included a provision for presentence credits. (*Williams, supra*, 83 Cal.App.4th at p. 938.) The court imposed the agreed upon sentence and awarded presentence credits. (*Id.* at p. 940.) Some 11 months later, the DCR sent a letter to the trial court advising that the petitioner was not entitled to presentence credits, based on the “premise” that the petitioner “was not entitled to presentence credits pursuant to section 2900.5 if he was serving a prison term for another offense at the time he was sentenced in the present matter.” (*Id.* at pp. 940, 942.) Shortly thereafter, the trial court entered an order modifying its sentencing minute order, “pursuant to the ‘request’ of the [DCR],” striking the award of presentence credits. (*Id.* at p. 940.) The appellate court held: “Before the trial court could correct the sentence in accordance with the department’s suggestion, the matter should have been returned for a hearing with petitioner present. Striking the presentence credits materially changes the plea bargain and thus involves a liberty interest. [Citation.] Therefore, fundamental due process entitled petitioner to an opportunity to be heard before he could be deprived of the presentence credits he received when sentenced ...” (*Id.* at p. 942.)

In *McGahuey*, the trial court imposed sentence of four and one-third years consecutive to a life term for the defendant’s multiple felony convictions. (*McGahuey, supra*, 121 Cal.App.3d at p. 527.) Thereafter, the DCR sent a letter to the trial court requesting that appellant’s sentence be modified so as to make one of the determinate counts, for which a subordinate term had been imposed, the basis for the principal term. (*Id.* at pp. 527-528.) The Attorney General joined in the request and the court “filed an amended judgment-commitment and an amended abstract of judgment-commitment,” indicating that appellant’s sentence consisted of the determinate term of 10 and one-half years consecutive to the life sentence. (*Id.* at p. 528.) The appellate court held “the trial

court's attempted modification of ... [the defendant's] sentence" was error. (*Id.* at p. 530.) "To be effective, a sentence must be pronounced orally on the record and in defendant's presence. [Citations.] Any later attempt to modify the sentence in writing is invalid. [Citation.] The only exception is where the error sought to be corrected is a clerical one [citation]; pronouncement of sentence is, however, a judicial act. [Citations.]" (*Ibid.*)

The People do not dispute that generally, as the court stated in *People v. Wilen* (2008) 165 Cal.App.4th 270, "A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the federal constitution and the state constitution. [Citations.] California has also guaranteed the right by statute: 'In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and *at the time of imposition of sentence*. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present....' (Pen. Code, § 977, subd. (b)(1); [citation].)" (*Id.* at pp. 286-287, italics added.) The People, pointing to the clerical error exception articulated in *McGahuey*, argue that the court's task on remand—recalculating the number of actual days appellant had been in custody up through the date of resentencing—"appears to be a matter of simple arithmetic" and "basically clerical in nature," and therefore the court did not err, on due process grounds or on any other basis, in dispensing with notice, a hearing and appellant's presence. Appellant counters that the determination of custody credits is a judicial determination, not a clerical one, and that therefore his due process rights were violated.

We need not resolve this dispute. We assume for the sake of argument that (1) the court erred in modifying appellant's award of custody credits by failing to provide notice and a hearing at which appellant was present, and (2) that such error is of constitutional

dimension under both state and federal law. State law error, including state constitutional error is reviewable under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, which provides that error is not prejudicial unless the defendant demonstrates a reasonable probability that he would have obtained a more favorable result in the absence of the error. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1190 [*Watson* standard applies to all error under state law].) Federal constitutional error is generally reviewable under the more stringent test announced in *Chapman v. California* (1967) 386 U.S. 18, 24. Under *Chapman*, federal constitutional error requires reversal, unless the prosecution demonstrates the error was harmless beyond a reasonable doubt. (*Ibid.*) “[W]hile there are some errors to which *Chapman* does not apply, they are the exception and not the rule.” (*Rose v. Clark* (1986) 478 U.S. 570, 578.) Here, if appellant’s claims that he was denied a noticed hearing with him present amount to claims of federal due process error, the *Chapman* standard applies. (Cf. *In re Becker* (1975) 48 Cal.App.3d 288, 295 [failure to hold constitutionally mandated parole prerevocation hearing reviewed under *Chapman* standard].) As we explain below, under the unique facts of this case, even under the more stringent *Chapman* standard, any error was harmless because the court awarded appellant *more* custody credits than he was entitled to.

The record, beginning with the January 2010 RPO, indicates—and there is nothing in the record to indicate otherwise—that appellant was initially taken into custody on September 11, 1998, at which time he was incarcerated in Owyhee County in Idaho, and that he remained in custody continuously, either there, in Tulare County Jail, or in state prison, through July 11, 2011, the date as of which the court, on remand, recalculated appellant’s actual time credits. That time period—September 11, 1998, through July 11, 2011—encompasses 4,687 days, not 4,681, as determined by the court. Thus, admittedly, the court awarded appellant *fewer* days of actual time credits than he was entitled to.

However, the court awarded appellant *more* days of presentence conduct credits than he was entitled to, resulting in an award of total custody credits that was too high.

The abstract of judgment issued by the court on July 11, 2011, showed an award of 224 days of presentence conduct credits. Apparently, the court based its calculation of presentence custody credits on the earlier determination that appellant had spent 448 days in presentence custody. In fact, as indicated *ante* in footnote 4, appellant had been incarcerated for 432 days up to and including the date of his original sentencing on November 16, 1999, and under section 4019, appellant's presentence custody credits should have been 216 days, not the 224 days determined by the court. Thus, although the latest abstract of judgment shows appellant was awarded 4,905 total custody credits (4,681 days of actual time credits plus 224 days of presentence conduct credits) he was actually entitled to only 4,903 days of total credits (4,687 days of actual time credits plus 216 days of presentence custody credits).

Appellant suggests the error in failing to hold a noticed hearing with him present cannot be considered harmless because “[h]e might have relevant information that his attorney did not have or that was not in the official jail records” that he could have presented at a hearing. Specifically, appellant makes reference to the following information in this court’s opinion in appellant’s 2002 appeal: In March 1990 a police detective investigating appellant’s offenses received information that appellant was in Oregon. The detective contacted authorities in Oregon and told them of appellant’s “possible location,” but “Authorities in Oregon were unable to locate appellant there.”<sup>5</sup> Appellant speculates that appellant might have been in custody in Oregon for some period of time not reflected in the record.

However, as indicated above, the January 2010 RPO indicates appellant was not taken into custody until September 11, 1998, in Idaho, more than eight years after he might have been seen in Oregon. Appellant did not challenge the dates of custody in his last appeal, nor does he do so now. He offers only speculation. There is nothing in the

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<sup>5</sup> This opinion is part of the record in appellant’s second appeal, of which we have already taken judicial notice. (See footnote 1.)

record that even remotely suggests that the dates of custody set forth in the RPO are incorrect, or that appellant, who has been serving a prison sentence since 1999, was not continuously incarcerated from the date he was taken into custody in 1998 through July 11, 2011. On this record, we can say beyond a reasonable doubt that, as indicated above, appellant is entitled to 4,903 days of total custody credits up to and including July 11, 2011, not 4,905 days as determined by the court and set forth in its ex parte order and the latest abstract of judgment. Therefore, the errors appellant complains of cannot be considered prejudicial.

The question remains as to the proper disposition, given that the court's judgment, as set forth in the July 2011 ex parte order and the most recent abstract of judgment, are incorrect as to appellant's custody credits. An incorrect award of custody credits is an unauthorized sentence that we may correct on appeal. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647, [sentence failing "to award legally mandated custody credits is unauthorized and may be corrected whenever discovered"]; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764 ["correction should be made even if it results in less credits (and hence a longer term in custody) for the defendant"].) The following is clear from the record: Appellant was taken into custody on September 11, 1998, and remained in custody continuously through the date of the court's order, July 11, 2011. That period consists of 4,687 days. For the portion of this period that constitutes presentence custody, he is entitled to 232 days of conduct credits. (§ 4019.) We will modify the judgment accordingly, and direct the trial court to issue a new abstract of judgment indicating this modification.

#### ***Other Corrections to Abstract of Judgment***

Appellant contends, and the People concede, that the July 14, 2011 abstract of judgment contains two errors: First, although the initial post-remand abstract of judgment, filed July 11, 2011, contained a third page showing four of appellant's convictions not shown on the first page, the July 14, 2011 abstract did not contain this

additional information. Second, the July 14, 2011 abstract indicates that an enhancement was imposed under section 12022.3, subdivision (a) in connection with appellant's count 6 conviction of kidnapping. In fact, the court imposed a two-year enhancement under former section 12022.5, subdivision (a) in connection with count 6. We will direct the trial court to correct these errors in the new abstract of judgment.

### **DISPOSITION**

The judgment is modified as follows: As of July 11, 2011, appellant is awarded 4,687 days of actual time credits and 216 days of custody credits. As modified the judgment is affirmed. The trial court is directed to issue a new abstract of judgment indicating this modification and, in addition, the following: (1) In connection with appellant's count 6 kidnapping conviction, the imposition of a two-year enhancement under former Penal Code section 12022.5, subdivision (a), and (2) all convictions suffered by appellant in the instant case, as indicated on the first *and* third pages of the abstract of judgment filed July 11, 2011. Appellant need not be present. The trial court is directed to forward a certified copy of the new abstract of judgment to the Director of the Department of Corrections and Rehabilitation.