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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILBERTO LOPEZ,

Defendant and Appellant.

F063278

(Super. Ct. No. CRM016960)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Merced County. Donald J. Proietti, Judge.

John L. Staley, 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 and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Levy, J. and Poochigian, J.

On April 13, 2011, a complaint was filed, charging defendant Wilberto Lopez with offenses arising out of a vehicle pursuit that occurred on April 10, 2011.<sup>1</sup> On July 7, 2011, defendant entered into a plea agreement pursuant to which he pleaded no contest to driving with a blood-alcohol content of 0.08 percent or more within 10 years of three prior driving-under-the-influence convictions (Veh. Code, §§ 23152, subd. (b), 23550, subd. (a); count 2), admitted having suffered a prior conviction that constituted a “strike” under the “Three Strikes” law (Pen. Code,<sup>2</sup> §§ 667, subds. (b)-(i), 1170.12), and conditionally admitted (pending proof he did not remain free of confinement for five years) having served two prior prison terms (§ 667.5, subd. (b)). In return, the remaining count and enhancement allegations were dismissed upon the People’s motion.

On August 26, 2011, defendant was sentenced to six years in prison (the upper term of three years, doubled for the strike), and was ordered to pay various fees, fines, and assessments.<sup>3</sup> He was awarded 138 days of actual credit, plus 20 days of conduct credit, for a total of 158 days.

Defendant now says he is entitled to additional custody credits under the amendment to section 4019 that became operative on October 1, 2011. The Attorney General argues the appeal should be dismissed pursuant to section 1237.1. We reject both arguments, but agree with the Attorney General that defendant is entitled to

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<sup>1</sup> The facts of the offenses are not pertinent to this appeal.

<sup>2</sup> Further statutory references are to the Penal Code.

<sup>3</sup> Defendant’s conditional admission of the prior prison term enhancements was withdrawn, and those enhancements stricken, due to the People’s inability to prove the allegations.

The legislative and initiative versions of the Three Strikes law were both amended by voter initiative, effective November 7, 2012. As the amendments affect only those individuals with two or more prior serious and/or violent felony convictions (see §§ 667, subd. (e)(2)(A) & (C), 1170.12, subd. (c)(2)(A) & (C), 1170.126, subd. (a)), they do not impact defendant.

additional credit under the amendments to sections 2933 and 4019 that became effective on September 28, 2010.

## DISCUSSION

### I

#### **SECTION 1237.1 DOES NOT REQUIRE DISMISSAL OF THE APPEAL.**

“There is no constitutional right of appeal from a judgment or order in criminal cases; rather the right of appeal is statutory. [Citations.]” (*People v. Connor* (2004) 115 Cal.App.4th 669, 677.) Section 1237, subdivision (a) permits a defendant to appeal “[f]rom a final judgment of conviction except as provided in Section 1237.1 ....” Section 1237.1 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.” The statute “does not require defense counsel to file [a] motion to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal”; if there are no other issues, however, “the filing of a motion in the trial court is a prerequisite to raising a presentence credit issue on appeal.” (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428, fn. omitted.)

The Attorney General says defendant’s appeal must be dismissed, because defendant failed to file the requisite motion in the trial court and the sole issue raised on appeal is whether he is entitled to recalculation of his custody credits pursuant to the amended version of section 4019. Defendant says section 1237.1 does not apply, because the issue on appeal is not whether custody credits were miscalculated, but under which version of section 4019 those credits should have been calculated.

In *People v. Delgado* (2012) 210 Cal.App.4th 761 (*Delgado*), we recently rejected the Attorney General’s argument. A review of the legislative history of the statute

convinced us section 1237.1 was aimed at minor sentencing errors such as mathematical miscalculations or oversights in awarding credits, and not at determinations of which version of a credit statute applies. (*Delgado, supra*, 210 Cal.App.4th at pp. 764-766.) We concluded such an interpretation of the statute furthers “the clear legislative intention that principles of judicial economy be advanced by” the statute’s enactment (*Id.* at p. 767), explaining: “A determination of which version of a statute applies (which, as in the instant case, may require interpretation and application of principles of statutory construction and constitutional law) is much different than a mere mathematical calculation. Whichever way a trial court rules on the former question, the losing party almost certainly will appeal. [Citations.] This is especially true with respect to substantive interpretation of the custody credit statutes, which of late have been subject to numerous amendments, all of which have resulted in seemingly endless litigation. [Citation.] By contrast, a mere mathematical error or oversight is easily corrected and much less likely to engender a serious disagreement between the parties that must be resolved by an appellate court.” (*Ibid.*)

In light of *Delgado*, we conclude defendant’s appeal should not be dismissed, despite the fact the sole issue it raises concerns presentence custody credits.<sup>4</sup>

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<sup>4</sup> If the sole issue raised by defendant concerned the propriety of applying the credit-earning limitation contained in section 2933.1 to him — a matter raised instead by the Attorney General — we might well reach the opposite conclusion. The case would then be much more like *People v. Fares* (1993) 16 Cal.App.4th 954, which was cited in the legislative materials concerning section 1237.1 as demonstrating a need for the statute. (See Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 354 (1995-1996 Reg. Sess.) as introduced, p. 2.) In *Fares*, the defendant was awarded actual custody credits, but no section 4019 credits. The failure to award those credits — which both parties agreed should have been awarded — was the sole issue raised on appeal. (*People v. Fares, supra*, 16 Cal.App.4th at p. 956.)

## II

### **DEFENDANT IS ENTITLED TO ADDITIONAL CREDITS, BUT NOT AT THE RATE PROVIDED BY THE OCTOBER 1, 2011, AMENDMENT TO SECTION 4019.**

Defendant's prior strike conviction was for first degree burglary; hence, it constituted a serious felony pursuant to section 1192.7, subdivision (c)(18), but, there being no indication it was pleaded and proved a person other than an accomplice was present in the residence at the time of the crime, not a violent felony pursuant to section 667.5, subdivision (c)(21). Accordingly, at both the time defendant's current crime was committed and the date he was sentenced, he was entitled to presentence custody credits in an amount such that six days were deemed to have been served for every four days he spent in actual custody. (§ 4019, former subs. (b), (c) & (f), as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010; see also § 2933, former subd. (e)(1), (3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.)

Inexplicably, however, defendant was subjected to the 15 percent limitation contained in section 2933.1, subdivisions (a) and (c), which applies when a defendant's *current* conviction is for a violent felony listed in section 667.5, subdivision (c). Defendant's current offense not being so listed, calculation of his custody credits pursuant to section 2933.1 was error. (See, e.g., *People v. Thomas* (1999) 21 Cal.4th 1122, 1129; *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2; *People v. Kimbell* (2008) 168 Cal.App.4th 904, 908.)<sup>5</sup> Instead, defendant should have been awarded custody credits under the version of section 4019 that took effect on September 28, 2010. As he spent 138 days in actual custody, he was entitled to 68 days of conduct credits, for

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<sup>5</sup> Although defendant was advised of the 15 percent limitation prior to his change of plea, nothing in the record suggests the limitation was a term of his plea bargain. Rather, it appears the trial court and parties were simply mistaken about section 2933.1's application.

a total award of 206 days of presentence credit. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26.)

After defendant was sentenced, but while his appeal was pending, section 4019 was amended. Subdivision (f) now provides: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.” (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011, & Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011.)<sup>6</sup> Thus, section 4019 now provides for day-for-day credits for all defendants — including those with prior strike convictions — who serve presentence time in county jail. The only exceptions are defendants with current violent felony or murder convictions. (§§ 2933.1, 2933.2; see *People v. Nunez* (2008) 167 Cal.App.4th 761, 765.)<sup>7</sup>

Defendant now contends he is entitled to presentence custody credits calculated pursuant to current section 4019. He recognizes the statutory changes from which he seeks to benefit expressly “apply prospectively and ... to prisoners who are confined to a county jail ... for a crime committed on or after October 1, 2011,” while “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).) He argues, however, that prospective-only application violates his right to equal protection under the federal and state Constitutions.

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<sup>6</sup> Section 2933 was also amended, and no longer refers to section 4019 or calculation of presentence credits. (§ 2933, as amended by Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.)

<sup>7</sup> Both the legislative and initiative versions of the Three Strikes law contain credit-limiting provisions. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) These limits are “inapposite to precommitment credits, i.e., credits awarded prior to commitment to prison. [Citation.]” (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

In *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), we held the amendment to section 4019 that became operative October 1, 2011 (hereafter the October 1, 2011, amendment) applies only to eligible prisoners whose crimes were committed on or after that date, and such prospective-only application neither runs afoul of rules of statutory construction nor violates principles of equal protection. (*Ellis, supra*, at p. 1548.) In reaching that conclusion, we relied heavily on *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), in which the California Supreme Court held the amendment to section 4019 that became effective January 25, 2010 (hereafter the January 25, 2010, amendment) applied prospectively only. (*Brown, supra*, at p. 318; *Ellis, supra*, at p. 1550.)

*Brown* first examined rules of statutory construction. It observed that “[w]hether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent.” (*Brown, supra*, 54 Cal.4th at p. 319.) Where the Legislature’s intent is unclear, section 3 and cases construing its provisions require prospective-only application, unless it is ““very clear from extrinsic sources”” that the Legislature intended retroactive application. (*Brown, supra*, at p. 319.) The high court found no cause to apply the January 25, 2010, amendment retroactively as a matter of statutory construction. (*Id.* at pp. 320-322.)

*Brown* also examined *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which held that when the Legislature amends a statute to reduce punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date. (*Brown, supra*, 54 Cal.4th at p. 323; *Estrada, supra*, at pp. 742-748.)<sup>8</sup> *Brown* concluded *Estrada* did not apply; former section 4019, as amended

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<sup>8</sup> Because defendant’s case is still pending on direct appeal, the judgment therein is not yet final. Generally speaking, ““for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.

effective January 25, 2010, did not alter the penalty for any particular crime. (*Brown, supra*, at pp. 323-325, 328.) Rather than addressing punishment for past criminal conduct, *Brown* explained, section 4019 “addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.” (*Brown, supra*, at p. 325.)

In *Ellis*, we determined *Brown*’s reasoning and conclusions apply equally to current section 4019. Accordingly, we held the October 1, 2011, amendment does not apply retroactively as a matter of statutory construction or pursuant to *Estrada*. (*Ellis, supra*, 207 Cal.App.4th at pp. 1550, 1551.)

We next turned to the equal protection issue. (*Ellis, supra*, 207 Cal.App.4th at p. 1551.) In that regard, *Brown* held prospective-only application of the January 25, 2010, amendment did not violate either the federal or the state Constitution. (*Brown, supra*, 54 Cal.4th at p. 328.) *Brown* explained:

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] “This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” [Citation.]

“... [T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. *That prisoners who served*

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[Citations.]’ [Citation.]” (*People v. Vieira* (2005) 35 Cal.4th 264, 306; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230.) *Bennett v. Procunier* (1968) 262 Cal.App.2d 799, an opinion from this court, is not to the contrary; that case was not a direct appeal from a criminal conviction, but rather an appeal from a denial of a petition for writ of mandate that sought to compel prison officials to give credit on a sentence for time spent in a diagnostic facility. (*Id.* at pp. 799-800.) The judgment of conviction became final upon imposition of sentence (prior to amendment of the statute) because no appeal was taken therefrom. (*Id.* at p. 800.)

*time before and after former section 4019 took effect are not similarly situated necessarily follows.” (Brown, supra, 54 Cal.4th at pp. 328-329, second italics added.)*

The state high court rejected the argument that its decision in *People v. Sage* (1980) 26 Cal.3d 498 compelled a contrary conclusion, declining to read that case as authority for more than it expressly held, namely that authorizing presentence conduct credit for misdemeanants who later served their sentences in county jail, but not for felons who ultimately were sentenced to state prison, violated equal protection. (*Brown, supra, 54 Cal.4th at pp. 329-330; see People v. Sage, supra, 26 Cal.3d at p. 508.*) It further refused to find the case before it controlled by *In re Kapperman* (1974) 11 Cal.3d 542, a case that, because it dealt with a statute granting credit for time served, not good conduct, was distinguishable. (*Brown, supra, at p. 330.*)

Once again, we found no reason in *Ellis* why “*Brown*’s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.]” (*Ellis, supra, 207 Cal.App.4th at p. 1552.*) Accordingly, we rejected the defendant’s equal protection argument.

*Ellis* is dispositive of defendant’s claim of entitlement to credits calculated pursuant to the October 1, 2011, amendment to section 4019.

### **DISPOSITION**

The judgment is modified to reflect an award of 138 days of actual credit, plus 68 days of presentence credit calculated pursuant to Penal Code section 4019, for a total award of 206 days of credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modification, and to forward a certified copy to the appropriate authorities.