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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DENNIS CHESHIER,

Defendant and Appellant.

F063596

(Super. Ct. No. BF136212A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Deborah Prucha, 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, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J. and Kane, J.

On June 23, 2011, an information was filed in Kern County Superior Court, charging defendant Michael Dennis Cheshier with unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a); count 1) and buying or receiving a stolen vehicle (Pen. Code, § 496d, subd. (a); count 2) on or about January 26, 2011.¹ It was further alleged defendant had served three prior prison terms (§ 667.5, subd. (b)). On August 22, 2011, defendant entered into a plea agreement pursuant to which he pleaded no contest to count 1 and admitted the special allegations, on the condition that he serve two years in custody, without probation or parole, pursuant to “new AB 109.”² In return for his plea, count 2 was dismissed upon the People’s motion.

On October 13, 2011, the court struck the three prior convictions, sentenced defendant to county jail for two years, and ordered him to pay restitution and various fees, fines, and assessments. Over defendant’s objection that he was entitled to one-for-one credits because that is what he would have received if sentenced to prison, the court awarded 157 days of actual credit, plus 78 days of conduct credit, for a total of 235 days.

Defendant now contends that, “[b]ecause the statute governing the calculation of presentence conduct credits in effect as of the date of [defendant’s] initial arrest provided

¹ Further statutory references are to the Penal Code unless otherwise stated.

The facts of the offenses are not pertinent to this appeal.

² Assembly Bill No. 109 (2011-2012 Reg. Sess.) enacted “the ‘2011 Realignment Legislation addressing public safety’ [citation; hereafter Realignment] which, together with subsequent related legislation, significantly changed the sentencing and supervision of persons convicted of felony offenses.” (*People v. Cruz* (2012) 207 Cal.App.4th 664, 668, fn. omitted.) Under Realignment, if a penal statute calls for punishment pursuant to section 1170, subdivision (h), the offense is punishable (with exceptions not applicable here) by imprisonment in a county jail. (*Id.*, subd. (h)(1), (2).) A violation of Vehicle Code section 10851, subdivision (a) is now so punishable. (Veh. Code, § 10851, subd. (a), as amended by Stats. 2011, ch. 15, § 606, eff. Apr. 4, 2011, operative Oct. 1, 2011.) A defendant sentenced under section 1170, subdivision (h) is not subject to a state parole period after the sentence is completed. (*Cruz, supra*, at pp. 671-672.) These changes apply to persons sentenced on or after October 1, 2011. (§ 1170, subd. (h)(6).)

for day-for-day presentence conduct credits, the court erred in failing to award” such credits. The Attorney General concedes defendant is entitled to an additional 79 days of conduct credit. We accept the concession.

DISCUSSION

“Defendants sentenced to prison for criminal conduct are entitled to credit against their terms for all actual days of presentence and postsentence custody [citations].’ [Citation.]

“There are, however, ‘separate and independent credit schemes for presentence and postsentence custody.’ [Citation.] For custody before a sentence is imposed, persons detained in a county jail ... may be eligible to receive, in addition to actual time credits under Penal Code section 2900.5, presentence good behavior or worktime credits. (Pen. Code, § 4019.)³ The trial court must calculate the exact number of days the defendant has been in custody before sentencing, ‘add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. [Citations.]’ [Citation.]

“Once a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration. Such credits can be earned, if at all, only for time served “in the custody of the Director [of the Department of Corrections and Rehabilitation (CDCR)].” [Citations.]” (*People v. Donan* (2004) 117 Cal.App.4th 784, 789-790; see also *People v. Cooper* (2002) 27 Cal.4th 38, 40; *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-31.)

Prior to January 25, 2010, section 2933 dealt solely with postsentence worktime credit. At the same time, section 4019 provided for accrual of presentence conduct credit at a rate such that, if all days were earned under the statute, six days would be deemed served for every four days spent in actual custody. (§ 4019, former subs. (b), (c) & (f).)

Effective January 25, 2010, subdivision (e) was added to section 2933. It provided that a prisoner sentenced to state prison under section 1170 would receive one day of

³ Section 4019, subdivision (b) prescribes worktime credit, while section 4019, subdivision (c) prescribes good behavior credit. The two types of credit are referred to, collectively, as “[c]onduct credit.” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

credit for every day served in a county jail “after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019.” (§ 2933, former subd. (e), as added by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 38, eff. Jan. 25, 2010.) At the same time, section 4019 was amended to provide that if all days of presentence credit were earned under section 4019, four days would be deemed served for every two days spent in actual custody, except that six days would be deemed served for every four days spent in actual custody for persons 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 as defined in section 1192.7 or section 667.5, respectively. (§ 4019, former subds. (b), (c) & (f), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010.)

The January 25, 2010, amendments did not remain in effect for long. Effective September 28, 2010, section 2933, subdivision (e) was again amended, this time to provide that, absent a refusal to satisfactorily perform assigned labor or to comply with the rules and regulations of the place of incarceration, “[n]otwithstanding Section 4019 ..., 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 ... from the date of arrest until state prison credits ... are applicable to the prisoner.” (§ 2933, former subd. (e)(1) & (2), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) If, however, the person was required to register as a sex offender, was committed for a serious felony as defined in section 1192.7, or had a prior conviction for a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, then section 4019 and not subdivision (e) of section 2933 applied. (§ 2933, former subd. (e)(3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) At the same time, section 4019 was amended to provide that if all days of presentence credit were earned under section 4019, six days would be deemed served for every four days spent in actual custody. (§ 4019, former subds. (b), (c) & (f),

as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.) In addition, subdivision (g) was added to section 4019 to clarify that the changes applied to prisoners who were confined to county jail for crimes committed on or after September 28, 2010. (§ 4019, subd. (g), as added by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.)

Realignment became operative on October 1, 2011. Pursuant to that legislation, former subdivision (e) of section 2933 was repealed, and the statute now again deals only with postsentence worktime credits. (§ 2933, as amended by Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Section 4019 now applies when a prisoner is confined to a county jail as a result, inter alia, of a sentence imposed pursuant to section 1170, subdivision (h). (§ 4019, subd. (a)(6), as added by Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Section 4019 provides for accrual of credit at a rate such that four days are deemed served for every two days spent in actual custody. (§ 4019, subsd. (b), (c) & (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.) Subdivision (h) of the statute specifies the changes apply prospectively, to prisoners confined to county jail for crimes committed on or after October 1, 2011.

Defendant's crime was committed after September 28, 2010, but before October 1, 2011. Under the September 28, 2010, version of sections 2933 and 4019, defendants sentenced to local custody were *only* eligible for the six-for-four credits awarded by section 4019, and were not afforded the beneficial one-for-one credit accrual rate granted by section 2933 to defendants ultimately sentenced to prison. Had defendant been sentenced to prison —as he would have been, but for Realignment — he would have been entitled to day-for-day presentence credits, as specified in former subdivision (e)(1) of section 2933. Apparently because he was ordered to serve his sentence in county jail pursuant to section 1170, subdivision (h), however, the trial court awarded credits

calculated under the reduced rate set out in the September 28, 2010, version of section 4019.

In addition to specifying prospective-only application, subdivision (h) of section 4019 provides: “Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” The Attorney General says this language “appears to indicate the Legislature intended defendants would remain eligible for the conduct credits they earned prior to the [October 1, 2011,] change in the law. While [section] 2933 credits were awarded after sentencing, they were earned for behavior which occurred prior to sentencing, and thus, [defendant] had already earned them at the time he was sentenced. The language of [section 4019,] subdivision (h), supports an interpretation that [defendant] is entitled to the credits he earned under section 2933.”

We agree. We further agree with the Attorney General’s concession that denial of section 2933, former subdivision (e) credits to defendant would violate the constitutional prohibition against ex post facto laws, since application of Realignment to defendant (i.e., having him serve his sentence in county jail instead of state prison) effectively altered the consequences of his actions that were completed prior to the change in the law. (See *Weaver v. Graham* (1981) 450 U.S. 24, 26-27, 33-36, overruled on another ground in *California Dept. of Corrections v. Morales* (1995) 514 U.S. 499, 506, fn. 3; cf. *Lynce v. Mathis* (1997) 519 U.S. 433, 445-447; *In re Ramirez* (1985) 39 Cal.3d 931, 936-937; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1315-1316.)

It is true that, for the most part, we do not concern ourselves with section 2933 credits on direct appeal. The CDCR is the entity charged with calculating a prisoner’s credit under that statute. (*In re Pope* (2010) 50 Cal.4th 777, 780, 781; see *People v. Brown* (2012) 54 Cal.4th 314, 321, fn. 8, 322-323, fn. 11; *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1441; *In re Tate* (2006) 135 Cal.App.4th 756, 759-760.) An assertion the CDCR violated section 2933 by failing to award additional credits does not usually identify an error in the judgment on review; rather, “[s]uch a claim must logically be

brought in a petition for habeas corpus against the official empowered to award such credits, namely the Director of the CDCR.” (*Brown, supra*, at p. 322, fn. 11.) Since defendant was sentenced to serve his term in county jail pursuant to section 1170, subdivision (h), however, it does not appear he is under CDCR’s jurisdiction or that CDCR has authority to award him credits. Nor are we aware of any provision in the law granting the county sheriff authority to award credits under section 2933.

“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.) Defendant’s sentence was unauthorized, and the Attorney General agrees we have the authority to correct it. Accordingly, we will award defendant an additional 79 days of conduct credit.⁴

DISPOSITION

The judgment is modified to reflect an award of 157 days of actual credit, plus 157 days of conduct credit, for a total award of 314 days of credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting said modification, and to forward a certified copy of same to the appropriate authorities.

⁴ That the trial court awarded defendant 78 days of conduct credit, while we award an additional 79 days, is a function of the calculation undertaken when six days are deemed served for every four days spent in actual custody. In defendant’s case, the number of actual custody days was 157. This number was divided by 4, leaving 39.25, and the remainder discarded, leaving 39. The 39 was then multiplied by 2, resulting in a total of 78 days of conduct credit. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26.) Because defendant is entitled to day-for-day credits, we award him 79 additional days, since 78 plus 79 equals 157.