

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIE ALVAREZ GARCIA,

Defendant and Appellant.

F063864

(Super. Ct. No. BF133698A)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Robert L. S. Angres, 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, Charles A. French and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

After he was convicted of transporting methamphetamine, possessing methamphetamine and resisting arrest, Louie Alvarez Garcia received a state prison

sentence. He now argues that under the the 2011 Realignment Legislation,<sup>1</sup> he should have been sentenced to a term in county jail instead. Garcia also argues that, because of a change in the law that took place while he was in presentence custody, a portion of his presentence custody credits should be recalculated. Finally, the parties agree that we should review the record of the in camera proceedings that were held pursuant to Garcia's motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and determine whether any discoverable material was withheld.

We conclude that Garcia was properly sentenced to state prison and that his custody credits were calculated correctly. On the *Pitchess* motion, we have reviewed the sealed materials and we conclude that the trial court did not abuse its discretion. The judgment is affirmed.

### **FACTUAL AND PROCEDURAL HISTORIES**

Police came to a house in Bakersfield just after midnight on September 6, 2010, in response to a report of a disturbance of the peace. The residents of the house told the officers that Garcia, who was their neighbor, had come to their door and made aggressive statements. The residents pointed out Garcia, who was walking in the street when the officers arrived. When the officers approached Garcia and asked for his name, Garcia ran away. He ignored orders to stop and show his hands. As he ran, he reached into his pants pocket, withdrew something, and threw it on the ground. The officers pursued. An officer tackled Garcia. Garcia struggled, managing to get on top of the officer. Another officer punched Garcia a number of times. The officers finally subdued Garcia and handcuffed him. The object Garcia threw was recovered and found to be a baggie containing methamphetamine.

---

<sup>1</sup>This is the act's official name. (Stats. 2011, ch. 15, § 1; Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 1.)

The district attorney filed an information charging Garcia with (1) transportation of methamphetamine (Health & Saf. Code, § 11379); (2) possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); and (3) misdemeanor obstruction of a peace officer (Pen. Code, § 148, subd. (a)(1)).<sup>2</sup> For sentence-enhancement purposes, the information alleged that Garcia had a prior strike conviction within the meaning of the Three Strikes Law (§§ 667, subds. (a)-(e), 1170.12) and had served four prior prison terms within the meaning of section 667.5.

A jury found Garcia guilty of all counts. After a bench trial, the court found all the prior conviction allegations true.

For count 1, the court imposed a state prison sentence of 11 years, consisting of the four-year upper term, doubled for the prior strike, plus three consecutive one-year terms for each of the prior prison terms. For count 2, the court imposed a prison sentence and stayed it pursuant to section 654. For count 3, the court imposed a concurrent sentence of 180 days.

### **DISCUSSION**

#### ***I. A state prison sentence was required because of Garcia's prior juvenile strike***

Garcia's Three Strikes prior was a juvenile adjudication. He maintains this means the 2011 Realignment Legislation mandates his imprisonment in a county jail, not state prison. This is because the offenses of conviction are county jail offenses under the legislation, and only an adult conviction of a strike offense would have the effect of subjecting him to state prison. As we will explain, we agree with the People's view that, although the Realignment Legislation would call for a county jail term in this case, the Three Strikes Law requires a state prison sentence. Because the Three Strikes Law was enacted by voter initiative, the Realignment Legislation cannot supersede it.

---

<sup>2</sup>Subsequent statutory references are to the Penal Code unless otherwise noted.

The Realignment Legislation amended numerous criminal statutes to provide that the offenses are punishable pursuant to section 1170, subdivision (h). That subdivision provides that offenses punishable pursuant to it get a sentence in county jail for the term specified in the underlying statute or for a term of 16 months, two years, or three years if no term is specified. (§ 1170, subd. (h)(1), (2).) The offenses for which Garcia was convicted are punishable pursuant to section 1170, subdivision (h). (Health & Saf. Code, §§ 11379, 11377, subd. (a).)

Section 1170, subdivision (h), has exceptions, including an exception for defendants with prior convictions of serious or violent felonies as defined in sections 667.5, subdivision (c) or 1192.7, subdivision (c). (§ 1170, subd. (h)(3).) Garcia's prior strike was a juvenile adjudication of second degree robbery (§ 212.5, subd. (c)), a violent felony within the meaning of section 667.5. (§ 667.5, subd. (c)(9).) As the People concede, however, a juvenile adjudication is not a *conviction* within the meaning of section 1170, subdivision (h). (*People v. Pacheco* (2011) 194 Cal.App.4th 343, 346; Welf. & Inst. Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding"].) It follows that the exception for prior violent or serious felonies does not apply.

Yet this does not end the analysis. The Three Strikes Law provides that, in the case of a person convicted of a felony while having one or more prior convictions for serious or violent felonies, "[t]here shall not be a commitment to any other facility other than the state prison." (§§ 667, subd. (c)(4), 1170.12, subd. (a)(4).) Further, a prior juvenile adjudication constitutes a prior *conviction* for purposes of the Three Strikes Law if the minor was 16 years or older at the time of the prior offense and the offense is listed as a serious or violent felony. (§ 1170.12, subd. (b)(3).) The Three Strikes Law therefore mandates that, because Garcia has a prior juvenile robbery adjudication, he cannot be imprisoned in "any other facility other than the state prison" for his current

offenses. Since a county jail is a facility other than the state prison, a county jail sentence is barred.

It might be thought that, because the Realignment Legislation and the Three Strikes Law point to opposite results and the Realignment Legislation is more recent, a county jail sentence should have been imposed because it is consistent with the Legislature's latest pronouncement. This is incorrect because the Realignment Legislation cannot be construed as modifying the Three Strikes Law. The Three Strikes Law can be amended only by another voter initiative or by a two-thirds vote of the Legislature. (§ 667, subd. (j).) An initiative statute cannot be amended without voter approval unless the initiative statute provides that it can. (Cal. Const., art. 2, § 10, subd. (c).) The Three Strikes Law allows amendment by the Legislature, but only by a two-thirds vote. The Realignment Legislation was passed by a simple majority in the Legislature.<sup>3</sup>

Our conclusion is consistent with *People v. Delgado* (2013) 214 Cal.App.4th 914, which was issued after briefing was completed in this case. *Delgado* held: “[W]hatever the Legislature’s intention when it adopted [the Realignment Legislation], it had no power to amend the Three Strikes law without voter approval or two-thirds vote of the Legislature.” (*Id.* at p. 918.) As a result, the Realignment Legislation “does not permit felons with prior juvenile strike convictions to be housed in any facility other than state prison.” (*Id.* at p. 919.) The *Delgado* court pointed out that if “justice requires housing such an offender in county jail, the trial court retains discretion to strike prior juvenile adjudications.” (*Ibid.*)

Garcia argues that the phrase “any other facility other than the state prison” in the Three Strikes Law should not be interpreted as referring to facilities. Instead, he argues,

---

<sup>3</sup>The legislation passed the Assembly by a vote of 51 to 27, a majority of 65 percent. ([http://leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0101-0150/ab\\_109\\_vote\\_20110317\\_0532PM\\_asm\\_floor.html](http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_109_vote_20110317_0532PM_asm_floor.html) [as of Aug. 16, 2013].)

“the term ‘state prison’ in [the Three Strikes Law] should be read to refer to the extended periods of incarceration [imposed by Three Strikes] and not in the physical sense of where an inmate is housed.”

This argument is unpersuasive. The voters were confronted with language referring to *facilities*, and there is no reason to think they or the authors of the initiative understood this word to be a roundabout reference to periods of time. Garcia says the reference to the state prison should not be read literally because, at the time of the passage of the Three Strikes Law, prisoners were never held in county jails for long periods, so there could be no intention to prevent that result. In our view, however, the statutory language is clear and a nonliteral interpretation is unwarranted.

## ***II. Presentence custody credit***

The court awarded presentence custody credit according to the formula mandated by section 4019 as it read when Garcia committed the crimes, September 6, 2010: two days of conduct credit for every four days actually served, or, stated differently, a total of six days of credit for each four days of custody. (Former § 4019, subd. (f).) Garcia served 271 days before sentencing, and the court awarded 134 days of conduct credit, for a total of 405 days of credit.

After Garcia committed the crimes, the Legislature amended section 4019 to provide two days of conduct credit for each two days actually served, or stated differently, a total of four days of credit for each two days in custody. (§ 4019, subd. (f).)

The Legislature specified that the amendment “shall apply prospectively and shall apply to prisoners who are confined ... for a crime committed on or after October 1, 2011.” (§ 4019, subd. (h).) The Legislature also provided that “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (*Ibid.*)

The People argue that the first of these sentences means the old formula applies to all presentence custody served for crimes that, like Garcia’s, were committed before

October 1, 2011. Garcia argues that the second sentence implies that the new formula applies to all presentence time served on or after October 1, 2011, even in the case of crimes committed before then. Garcia was sentenced on November 2, 2011, so he served a portion of his presentence time on and after October 1, 2011. He asks us to order a recalculation of his credits for that portion.

In *People v. Ellis* (2012) 207 Cal.App.4th 1546, we addressed the same argument Garcia makes here. We said: “In our view, the Legislature’s clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.] The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits.” (*Id.* at p. 1553.) In so holding, we disagreed with *People v. Olague* (2012) 205 Cal.App.4th 1126, 1131-1132, which concluded that the second sentence was “meaningless unless the liberalized credit scheme applies to crimes committed before the stated date.”<sup>4</sup>

We adhere to *Ellis*. The first sentence of subdivision (h) of section 4019 admits of only one interpretation: The additional credits apply *prospectively* to *crimes committed* on or after October 1, 2011. This is not consistent with an interpretation of the second sentence according to which the new scheme also applies retrospectively to crimes committed before October 1, 2011, if the prisoner remains in presentence custody after that date. The second sentence can be interpreted instead as making the simple point that time not subject to the new law is subject to the old law. This interpretation may render the second sentence unnecessary (because it states the obvious), but that result is preferable to an interpretation according to which the two sentences contradict each

---

<sup>4</sup>Our Supreme Court granted review in *Olague* on August 8, 2012. On March 20, 2013, the court dismissed review in light of *People v. Brown* (2012) 54 Cal.4th 314, which held that there was no retroactive application of an earlier amendment to section 4019.

other. It also is preferable to imputing to the Legislature an intent to create by implication a complex scheme under which some prisoners would earn credits at two different rates. We conclude that the trial court calculated Garcia's credits correctly.

### ***III. Pitchess motion***

Before trial, the defense moved for discovery pursuant to *People v. Pitchess*, *supra*, 11 Cal.3d 531. The motion requested discovery of records of citizen and inmate complaints against the two officers present at Garcia's arrest. The records sought involved alleged complaints of threats and excessive force by both officers and dishonesty and false statements by one of them. The court held an in camera hearing and found discoverable evidence. The discoverable evidence is not described in the court's minute order.

In deciding a *Pitchess* motion, a court must first determine whether the motion shows good cause for production of an officer's confidential personnel records. If it does, the court must obtain potentially relevant personnel records from their custodian and review them for relevance at a hearing in camera. The court is then to order disclosure to the moving party of any information relevant to the pending litigation. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.)

Garcia requests that we examine the record of the in camera hearing to determine whether the court failed to order disclosure of any relevant information or otherwise failed to follow the *Pitchess* procedure. The People join in the request. We review the trial court's ruling for abuse of discretion. (*People v. Mooc, supra*, 26 Cal.4th at p. 1228.)

At the in camera hearing, the court stated that the People had conceded there was good cause for production of the officers' records with respect to both excessive force and dishonesty. A custodian of records for the Bakersfield Police Department testified at the hearing that he had collected all documents responsive to the motion. The court reviewed five complaints against the officers and both officers' personnel files. It found

that two of the complaints were required to be disclosed. It found that nothing in the personnel files was required to be disclosed.

We have reviewed the five complaints and the two personnel files. The three complaints the court did not order disclosed did not involve allegations against the officers of excessive force or dishonesty. There is nothing involving excessive force or dishonesty in the personnel files. The trial court did not abuse its discretion.

**DISPOSITION**

The judgment is affirmed.

---

Wiseman, Acting P.J.

WE CONCUR:

---

Gomes, J.

---

Kane, J.