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

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR LASALE KOUWASTICA,

Defendant and Appellant.

F066751

(Super. Ct. No. CRL006637)

**OPINION**

**THE COURT**\*

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

John K. Cotter, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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\* Before Cornell, Acting P.J., Kane, J. and Oliver, J.†

† Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Appellant Omar Lasale Kouwastica admitted violating his probation and was sentenced to a previously suspended sentence of six years. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

On September 24, 2011, Kouwastica was a passenger in car that was stopped by police. During a parole search of Kouwastica, an officer found a bindle containing a small amount of methamphetamine.

On October 21, 2011, Kouwastica pled no contest to transportation of methamphetamine (Health & Saf. Code, § 11379) and admitted two prior prison term enhancements (Pen. Code, § 667.5, subd. (b))<sup>1</sup> and allegations that he had a prior conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)). In exchange for Kouwastica's plea the court struck the prior strike conviction and sentenced him to a suspended aggregate six-year term, the aggravated term of four years on the transportation conviction and two one-year prior prison term enhancements. The court also ordered Kouwastica to complete a minimum year-long residential program at a Salvation Army treatment facility.

On May 1, 2012, the probation department filed an affidavit of probation violation alleging Kouwastica violated his probation by failing to: (1) enroll and complete the Teen Challenge residential treatment program; (2) keep an appointment with his probation officer; (3) complete the Salvations Army's residential treatment program; and (4) report to his probation officer after failing to enroll in the Salvation Army Program.

On August 17, 2012, the court found true the first three alleged probation violations noted above.

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<sup>1</sup> All further statutory references are to the Penal Code unless noted otherwise.

On January 8, 2013, the court imposed the previously suspended six-year sentence.

Kouwastica's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) Kouwastica has not responded to this court's invitation to submit additional briefing.

However, our review of the record disclosed that the court erred in its award of presentence custody credit. The court awarded appellant 537 days of presentence custody credit consisting of 269 days of presentence actual custody credit and 268 days of presentence conduct credit. This amount included two for two presentence conduct credit. However, on September 24, 2011, when appellant committed the underlying transportation of methamphetamine offense section 4019 provided for two for four presentence conduct credit.<sup>2</sup> (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.) Section 4019 was amended effective October 1, 2011, to provide for two for two presentence conduct credit. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35, eff. Sept. 21, 2011, operative Oct. 1, 2011.) However, the statute also provides:

“The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).)

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<sup>2</sup> Kouwastica's prior strike conviction made him ineligible for one for one presentence conduct credit available to many defendants who received an executed prison sentence for offenses committed at any time from September 28, 2010, through September 30, 2011. (Former section 2933, subd. (e)(1) & (3); Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010; Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.)

Therefore, the trial court should have awarded appellant two for four presentence conduct credit pursuant to the version of section 4019 in effect when appellant committed the underlying offense. (Cf. *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [the Legislature did not violate equal protection by making its 2011 amendment of section 4019 expressly prospective].) Based on this formula appellant was entitled to only 134 days of presentence conduct credit ( $269 \text{ days} / 4 = 67.25 \text{ days}$ ;  $67 \text{ days} \times 2 = 134 \text{ days}$ ) and a total of only 403 days of presentence custody credit ( $269 \text{ days} + 134 \text{ days} = 403 \text{ days}$ ).

Further, following an independent review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, we find that with the exception of the credit issue discussed above, no reasonably arguable factual or legal issues exist.

#### **DISPOSITION**

The judgment is modified to reduce Kouwastica's award of presentence custody credit from 537 days to 403 days as calculated above. The trial court is directed to file an amended abstract of judgment that is consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.