

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ARMOND OMARA,

Defendant and Appellant.

G044820

(Super. Ct. No. 05WF3313)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,
Craig E. Robison, Judge. Reversed and remanded.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and
Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Michael Armond Omara appeals from the trial court's order denying his postconviction "Motion to Strike Priors and to Correct Presentence Custody Credits" (the Motion to Strike Priors). By that motion, Omara sought additional presentence custody credit under an amended version of Penal Code section 4019 in effect between January 25 and September 28, 2010 (Amended Section 4019), to which he would be entitled only if the trial court struck his prior serious or violent felony convictions pursuant to Penal Code section 1385, subdivision (a) (section 1385(a)).

Omara's appeal raises these two issues:

1. Did Amended Section 4019 apply retroactively?¹
2. Does a trial court have discretion under section 1385(a) to strike a prior serious or violent felony conviction in order to award additional presentence custody credit under Amended Section 4019?²

We resolve both issues in the affirmative. Accordingly, we reverse and remand the matter for the trial court to reconsider the Motion to Strike Priors and decide

¹ The Supreme Court has granted review of the issue and will have the final say on the matter. (See, e.g., *People v. Jones* (2010) 188 Cal.App.4th 165, review granted Dec. 15, 2010, S187135; *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, S184957; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963.)

² The California Supreme Court has granted review of this issue too. (*People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted Aug. 31, 2011, S195672; *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784; *People v. Koontz* (2011) 193 Cal.App.4th 151, review granted May 18, 2011, S192116; *People v. Jones, supra*, 188 Cal.App.4th 165, review granted Dec. 15, 2010, S187135.)

whether to exercise its discretion to strike the prior serious or violent felony convictions for purposes of Amended Section 4019.

BACKGROUND

In 2007, Omara was convicted of one count of receiving stolen property (Pen. Code, § 496d, subd. (a) [count 1]) and one count of possession of controlled substance paraphernalia (Health & Saf. Code, § 11364 [count 2]). In January 2009, the trial court conducted a bifurcated hearing on the allegation Omara previously had suffered prior serious and violent felony convictions. (Pen. Code, §§ 667, subds. (d) & (e)(2)(A), 1170.12, subds. (b) & (c)(2)(A).) On the prosecution's motion, the court dismissed one of the prison prior offenses and, on the defense's motion, struck one of the two prior strike convictions. The court found the remaining two prior conviction allegations to be true.

The trial court pronounced judgment on the same day as the hearing. The court sentenced Omara to eight years in prison, comprised of the upper term of six years on count 1 and a consecutive one-year sentence on each prison prior offense, and suspended sentence on count 2. The court awarded Omara 820 actual days of presentence custody credit and 410 days of presentence conduct credit for a total of 1,230 days of presentence credit. Later, the parties stipulated to correcting the presentence custody credit to award Omara 1,025 actual days and 512 conduct days of custody credit for a total of 1,537 days of presentence custody credit.

Omara appealed from the judgment, and a panel of this court affirmed.

In December 2010, Omara brought, on an ex parte basis, the Motion to Strike Priors. He argued that the trial court had discretion to strike his prior serious or violent felony convictions for the purpose of calculating his custody credits and that he was entitled to additional credit pursuant to Amended Section 4019. The trial court denied the motion. Citing *People v. Barraza* (1994) 30 Cal.App.4th 114, 121, footnote 8,

the trial court concluded it did not have the power to strike a prior conviction under Penal Code section 1385 “once a state prison sentence is carried out.” Because Omara had suffered a prior conviction involving a serious or violent felony, he was ineligible for the additional presentence custody credit under Amended Section 4019.

Omara timely appealed. The appeal is authorized because Omara first presented his claim for additional presentence custody credit to the trial court (Pen. Code, § 1237.1) and because the trial court’s order affected his substantial rights (*id.*, § 1237, subd. (b); *People v. Gainer* (1982) 133 Cal.App.3d 636, 642).

DISCUSSION

I.

Amended Section 4019 Applies Retroactively.

Under Penal Code section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (Pen. Code, § 2900.5, subd. (a).) In addition, Penal Code section 4019 provides that a criminal defendant may earn additional presentence custody credit against his or her sentence for willingness to perform assigned labor (*id.*, § 4019, subd. (b)) and compliance with rules and regulations (*id.*, § 4019, subd. (c)). These forms of presentence custody credit are called, collectively, custody credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Before January 25, 2010, former subdivisions (b) and (c) of Penal Code section 4019 provided that “for each six-day period in which a prisoner is confined in or committed to” a local facility, one day is deducted from the period of confinement for performing assigned labor and one day is deducted from the period of confinement for satisfactorily complying with the rules and regulations of the facility.” (Pen. Code, § 4019, former subs. (b) & (c); Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Former subdivision (f) of section 4019 provided that “if all days are earned under this section, a

term of six days will be deemed to have been served for every four days spent in actual custody.” (Stats. 1982, ch. 1234, § 7, pp. 4553, 4554.)

In October 2009, the Legislature enacted Amended Section 4019, effective January 25, 2010, to provide for the accrual of presentence custody credit at twice the previous rate for all prisoners who are not required to register as sex offenders and for all prisoners who are not being committed for, and had not suffered a prior conviction of, a serious or violent felony. (Amended § 4019, subd. (b)(2); see also Amended § 4019, subd. (c)(2); Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Amended Section 4019, subdivisions (b)(1) and (c)(1) provided that one day of work credit and one day of custody credit may be deducted for each four-day period of confinement or commitment. Amended Section 4019, subdivision (f) provided, “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.” (Amended § 4019, subd. (f); see also Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.)

Effective September 28, 2010, Penal Code section 4019 was amended again to restore the presentence custody credit formula in effect before January 25, 2010. (Stats. 2010, ch. 426, § 2.) This amendment expressly applies only to offenses committed after its adoption. (Pen. Code, § 4019, subd. (g).)

We conclude Amended Section 4019 should be applied retroactively in this case. Generally, amendatory statutes are presumed to apply prospectively, not retroactively unless they contain an express declaration to the contrary. (Pen. Code, § 3.) *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) created an exception to Penal Code section 3. In *Estrada*, the California Supreme Court stated that “where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.” (*Estrada, supra*, at p. 748.) The Supreme Court explained the reason for the exception: “It is an inevitable inference that the Legislature must have intended that the new statute imposing the new

lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.” (*Id.* at p. 745.)

Courts have traditionally deemed legislative enactments that increase the number of days of custody or conduct credit a defendant may accrue as statutes that mitigate punishment for purposes of the *Estrada* rule. (See, e.g., *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [statute involving conduct credit]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [statute involving custody credit].) Following these decisions, we likewise conclude Amended Section 4019 falls within the *Estrada* rule because it effectively reduces the amount of time eligible defendants must spend in prison.

II.

A Trial Court Has Discretion to Strike Prior Serious or Violent Felony Convictions for Purposes of Amended Section 4019.

A defendant who has a prior conviction for a serious or violent felony was ineligible for the additional presentence custody credit under Amended Section 4019. (Amended § 4019, subs. (b)(2) & (c)(2).) Omara has such prior convictions.

Section 1385(a) authorizes the trial court to “order an action to be dismissed” in the furtherance of justice. “[T]his power includes the ability to strike prior conviction allegations that would otherwise increase a defendant’s sentence.” (*People v. Garcia* (1999) 20 Cal.4th 490, 496.)

We have concluded Amended Section 4019 reduces punishment for those who are eligible; therefore, having a prior serious or violent felony conviction is a condition that effectively increases punishment. (See *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*).) In *Lo Cicero*, the court held ineligibility for probation based

on a prior conviction “is equivalent to an increase in penalty” (*Id.* at p. 1193.) If ineligibility for probation due to a prior conviction is increased punishment, then ineligibility of additional presentence custody credit is also increased punishment.

Citing *In re Varnell* (2003) 30 Cal.4th 1132, 1137 (*Varnell*), the Attorney General argues a prior serious or violent felony conviction is a sentencing factor that cannot be stricken under section 1385(a). In *Varnell*, the California Supreme court held a trial court may not strike a prior serious or violent felony conviction to make a defendant eligible for probation and drug treatment under Proposition 36 because there is no pleading and proof requirement. (*Varnell, supra*, at p. 1135.) The Supreme Court stated that “trial courts may not use [Penal Code] section 1385 to disregard ‘sentencing factors’ that are not themselves required to be a charge or allegation in an indictment or information.” (*Ibid.*)

A prior serious or violent felony conviction eliminates the possibility of receiving the additional credit and, therefore, is not a sentencing factor for purposes of Amended Section 4019 that falls within the exception to the pleading and proof requirement discussed in *Varnell*. The *Varnell* court made this distinction clear in its discussion of *Lo Cicero*: “There is authority for finding an implied pleading and proof requirement in criminal statutes. In . . . *Lo Cicero* [, *supra*,] 71 Cal.2d 1186 . . . , we recognized an implied pleading and proof requirement in the predecessor to Health and Safety Code section 11370, which prohibited probation for any defendant convicted of certain narcotics offenses if the defendant had previously been convicted of a narcotics offense. The statute did not expressly require the prior conviction establishing the defendant’s ineligibility be pleaded and proved, but we recognized an implied pleading and proof requirement We concluded that ‘[t]he denial of opportunity for probation involved here is equivalent to an increase in penalty’ (*Lo Cicero, supra*, at p. 1193; [citations].) [¶] However, this case [(*Varnell*)] differs from *Lo Cicero* in one key respect: petitioner’s prior conviction and the resulting prison term did not eliminate his

opportunity to be granted probation. Although petitioner was ineligible for probation under the terms of [Penal Code] section 1210.1, he *was* eligible for probation under [Penal Code] section 1203, subdivision (e). Thus, unlike *Lo Cicero*, this is not a case where the prior conviction absolutely denied a defendant the opportunity for probation.” (*Varnell, supra*, 30 Cal.4th at p. 1140, fn. omitted.)

In this case, Omara’s prior serious or violent felony convictions eliminated the opportunity for Omara to earn additional presentence custody credit under Amended Section 4019. The reasoning of *Varnell* thus supports granting the trial court discretion to strike Omara’s prior serious or violent felony convictions for purposes of Amended Section 4019.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518, the California Supreme Court explained the Legislature may eliminate the judicial power to reduce a defendant’s sentence by striking a sentencing allegation in furtherance of justice. However, the court stated, “we will not interpret a statute as eliminating courts’ power under [Penal Code] section 1385 ‘absent a clear legislative direction to the contrary.’” (*Ibid.*) The Legislature gave no such clear direction when it enacted Amended Section 4019. In enacting Amended Section 4019, the Legislature presumably was aware that section 1385(a) vests sentencing courts with the discretion to strike a prior serious or violent felony conviction to afford maximum presentence custody credit. The Legislature knows how to limit a trial court’s ability to strike prior convictions under Penal Code section 1385. (See Pen. Code, §§ 1385, subd. (b), 1385.1.)

We conclude only that a trial court has discretion to strike a prior serious or violent felony conviction in order to award presentence custody credit under Amended Section 4019. We remand for the trial court to determine whether to exercise that discretion in reconsidering the Motion to Strike Priors.

DISPOSITION

The order denying the Motion to Strike Priors is reversed and the matter is remanded for further proceedings.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.