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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PITER ALBERT AMBROSY,

Defendant and Appellant.

G046757

(Super. Ct. No. 11NF2303)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gary Brozio and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Piter Albert Ambrosy appeals the court's calculation of custody credits at a probation reinstatement hearing. We affirm.

## FACTS

On July 17, 2011, defendant "unlawfully took the property of another [and] withheld said property, knowing the property was stolen and obtained by theft, without the owner's consent." A felony complaint was filed against defendant on July 28, 2011, pursuant to which defendant was charged with burglary (Pen. Code, §§ 459-460),<sup>1</sup> receiving stolen property (§ 496, subd. (a)), and grand theft (§ 487, subd. (c)). Defendant was arraigned on July 29, 2011.

On August 10, 2011, defendant pleaded guilty to receiving stolen property and grand theft. The court dismissed the burglary count. The court advised defendant that the maximum sentence he faced was three years eight months in state prison. But pursuant to the plea bargain reached with the prosecutor, the court placed defendant on formal probation for three years, subject to various terms and conditions, including 180 days in county jail. The court awarded credit to defendant for time served, including 16 actual credits and eight conduct credits for a total of 24 credits. Defendant apparently served his remaining time in custody and was released.

Defendant was arrested for petty theft on December 6, 2011. On February 2, 2012, defendant's probation officer filed a petition for arraignment on probation violation. The court revoked probation at a hearing held on February 6, 2012, based on the existence of a pending criminal case (i.e., the Dec. 2011 theft); the record from this other case is not before us. A formal hearing was set for March 5, 2012.

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<sup>1</sup>

All statutory references are to the Penal Code.

On March 5, 2012, defendant admitted the probation violation and the court reinstated probation. The court also modified the grant of probation to add a condition that defendant serve an *additional* 90 days in county jail. With regard to defendant's stay in custody in February and March of 2012, the court awarded defendant 34 actual credits and 16 conduct credits. Thus, the court's intent was clearly that defendant would serve 40 *additional* days in county jail after March 5, 2012.

Defendant argued at the March 5, 2012 hearing and in a subsequent August 2012 motion that he was entitled to additional conduct credits. The court rejected defendant's argument on both occasions.

## DISCUSSION

Defendant claims he was provided with insufficient credits under sections 2900.5 and 4019.

### *Section 2900.5*

Defendant's first contention is both confusing and wrong. Defendant asserts he was entitled under section 2900.5 to 19 additional credits at the March 5, 2012 probation reinstatement hearing, at which he was ordered to serve an additional 90 days in county jail (subject to 50 credits resulting from time in custody in Feb. and Mar. 2012). Defendant points to his initial arrest and pre-plea detention in July and early August 2011 as the source of the alleged missing 19 days of credit.<sup>2</sup> But as explained above,

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<sup>2</sup> Oddly, defendant claims only 13 days of actual credit and six days of conduct credit, even though the court, on August 10, 2011, calculated defendant's actual credits at 16 and conduct credits at eight. Indeed, defendant actually served 180 days in county jail (including the 24 credits awarded on Aug. 10 and additional credits earned thereafter) as a condition of his probation before being released into the community and thereafter violating his probation. It is unclear why defendant is not claiming he can

defendant's pre-plea jail time was already credited against the 180 days in county jail imposed as a condition of formal probation on August 10, 2011. The court subsequently revoked and then reinstated probation, a legitimate procedure not contested on appeal. (See *People v. Arnold* (2004) 33 Cal.4th 294, 298-301 (*Arnold*)).) The court modified (§ 1203.2, subd. (b)(1)) its initial probation terms and conditions by including an *additional* 90 days in county jail as a condition of the reinstatement of probation. Defendant does not challenge the legitimacy of this order.

Nonetheless, defendant contends section 2900.5 requires double counting of defendant's initial jail time. Section 2900.5, subdivision (a), states in relevant part that “[i]n all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, . . . *all days of custody of the defendant*, including days served as a condition of probation in compliance with a court order, credited to the period of confinement pursuant to Section 4019, and days served in home detention pursuant to Section 1203.018, *shall be credited upon his or her term of imprisonment . . . .* If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served.” (Italics added.)

“Prior to 1972, persons convicted of a felony were not entitled to credit against their state prison sentences for ‘back time,’ i.e., periods of incarceration in county jail awaiting trial and judgment. In 1971, . . . section 2900.5 was enacted to grant credit for back time.” (*People v. Hunter* (1977) 68 Cal.App.3d 389, 391.) “The history of section 2900.5 points to the Legislature’s intent. When this section was first enacted the original wording provided that all the days a defendant spent in jail from the date of arrest to the day on which sentence was imposed should be credited upon the defendant’s sentence. The legislative purpose appears to have been to eliminate the unequal

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double count all 180 days of credit rather than the arbitrary 19 days he selected.

treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts.” (*In re Rojas* (1979) 23 Cal.3d 152, 156; see also *People v. Kunath* (2012) 203 Cal.App.4th 906, 910 [“The purpose of section 2900.5 is to equalize the total time in custody between those who suffered presentence custody on unproven charges and those who did not”].)

Had defendant been sentenced to prison in March 2012 after his probation revocation, it is clear section 2900.5 would require the court to credit defendant’s time served (180 days served on the initial probation condition including all credits applied in lieu of actual time in custody, 34 additional actual days in early 2012, and 16 conduct credits in early 2012) against his prison sentence. (See *People v. Brasley* (1974) 41 Cal.App.3d 311, 317 [a defendant whose probation was revoked would “be entitled to a credit on the state prison sentence of both the period of presentence detention and the days served in the county jail as a condition of probation”]; but see *Arnold, supra*, 33 Cal.4th at pp. 307-310 [defendant can prospectively waive credits for time served in local jail against possible future prison term].)

Obviously, defendant has not been sentenced to *state prison* as a result of his probation violation. But defendant points to section 2900.5, subdivision (c), which defines ““term of imprisonment”” to include “any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence . . . .” (*Ibid.*) Since January 1, 1977, section 2900.5 provides for credits against a ““period of imprisonment imposed as a condition of probation . . . .”” (*People v. Hunter, supra*, 68 Cal.App.3d at p. 392.) Section 2900.5, subdivision (c), makes clear that defendant was entitled to credits for his time in custody in July and August 2011 with regard to the 180 days in county jail imposed in August 2011. For that matter, this subdivision also makes clear defendant was entitled to credits for his time in custody in February and March 2012 with regard to the 90 days in county jail imposed in March 2012. Defendant claims the statute also requires that *all* previous days in custody

(even though he claims only 19 of the credits from 2011) shall be credited to his March 2012 “term of imprisonment,” i.e., his additional 90 days in county jail to be served as a condition of probation.

The absurdity of the result advocated by defendant is avoided by treating the court’s March 2012 order as, in effect, ordering 270 total days of county jail time (i.e., the initial 180 days plus the 90 subsequent days ordered in Mar. 2012). It was clearly the court’s intent to require defendant to serve additional time in county jail for a grand total of 270 total days, not to reduce defendant’s probation condition to 90 total days in county jail. If defendant were right in his characterization of the court’s order and interpretation of section 2900.5, defendant would be entitled to 180 credits (as a result of his initial stay in custody) against his 90 day term of imprisonment, not merely 19 credits.

Defendant’s treatment by the court was in line with the statutory purpose of section 2900.5. Section 2900.5 equalizes treatment for those unable to meet bail prior to their conviction and sentence. Section 2900.5 does not set a trap for a trial court judge seeking to extend a probationer’s time in county jail (up to a total of one year) as a result of a probation violation. (See § 19.2 [probationer may be confined in county jail for up to one year as a condition of probation]; see also *People v. Johnson* (1978) 82 Cal.App.3d 183, 184-185 [“a defendant who has served one year in jail as a condition of probation and who thereafter violates probation may be sentenced to an additional period of up to one year in jail if he knowingly and intelligently waives the provisions of . . . section 2900.5”].)

#### *Section 4019*

Next, defendant argues he was entitled to additional conduct credits at the March 2012 hearing pursuant to section 4019. At the time of defendant’s commission of his underlying offenses in July 2011, section 4019 entitled defendants to “one-for-two

conduct credits, which is two days for every four days of actual time served in presentence custody.” (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 (*Rajanayagam*)).) But the Legislature amended section 4019, effective October 1, 2011, to allow defendants to earn conduct credit at the rate of one-for-one. (*Rajanayagam*, at pp. 48-49; § 4019, subd. (f) [“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”].) Defendant concedes that the one-for-two formula applied to any conduct credits he received prior to October 1, 2011.

The question presented is whether defendant should have earned conduct credits in February and March 2012 at the old “one-for-two” ratio or at the new “one-for-one” ratio.<sup>3</sup> At the March 5, 2012 hearing, the court applied the old ratio and awarded defendant 34 actual and 16 conduct credits. Defendant claims the court erred by doing so, and should have instead awarded 34 conduct credits.

We disagree. The new ratio “shall apply to prisoners who are confined to a county jail . . . for a crime committed on or after the effective date” of October 1, 2011. (§ 4019, subd. (g); *Rajanayagam*, *supra*, 211 Cal.App.4th at p. 49.) Defendant’s crimes for which he is on probation and serving jail time were committed in July 2011. As this court recently held, “those defendants who committed an offense before October 1, 2011, are to earn credit under the prior law.” (*Rajanayagam*, at p. 52.) The different treatment accorded prisoners who committed their crimes before October 1, 2011 does not amount to an equal protection violation. (*Id.* at pp. 53-56; see also *People v. Verba* (2012) 210 Cal.App.4th 991, 994-997; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 397-400; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1548.)

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<sup>3</sup> This issue may be addressed by our Supreme Court in *People v. Olague*, review granted August 8, 2012, S203298, and *People v. Borg*, review granted July 18, 2012, S202328.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.