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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DIETRICH FOOTE SMALL,

Defendant and Appellant.

H036556

(Santa Cruz County

Super. Ct. No. WF01036)

Effective January 25, 2010, the Legislature amended Penal Code section 4019 to increase the rate at which certain prisoners could earn presentence conduct credits. (hereafter the January 2010 amendment) Instead of accruing six days for every four days actually served, it permitted qualifying defendants to earn credit at a rate of four days for every two actually served. (Pen. Code, former, § 4019, subds. (b)(1), (c)(1), (f), as amended by Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50 (hereafter the January 2010 version of Penal Code section 4019).)<sup>1</sup>

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<sup>1</sup> Effective September 28, 2010, again, the Legislature amended Penal Code section 4019 to restore the conduct credit accrual rate as it existed before January 25, 2010. (Stats. 2010, ch. 426, § 2.) However, this amendment applied only to prisoners who committed crimes after September 28, 2010. (Stats. 2010, ch. 426, § 2.) Similarly, effective October 1, 2011, the Legislature amended Penal Code section 4019. (Stats. 2011, ch 15, § 482) This amendment applies prospectively to crimes committed on or after its effective date. (*People v. Brown* (2012) 54 Cal.4th 313, 322, fn. 11.)

In this case, it is undisputed that appellant committed his offenses on or about March 3, 2010, several weeks after January 25, 2010; and was in custody during the period of time when the January 2010 version of Penal Code section 4019 was in effect. However, when appellant was sentenced on January 24, 2011, the trial court believed that the issue of the retroactive application of the January 2010 amendment to Penal Code section 4019 was applicable to appellant's case. Thus, the court concluded that appellant was "entitled to one third of the actual time for his good-time/work-time credits." In essence, on appeal, appellant contends that this conclusion was erroneous.

For reasons that follow, we affirm.

*Facts and Proceedings Below*

The facts underlying appellant's convictions are not relevant to the sentencing issue raised in this appeal. However, we set forth in some detail the proceedings below.

On May 17, 2010, the Santa Cruz County District Attorney charged appellant with four offenses alleged to have been committed on March 3, 2010. Specifically, appellant was charged with evading a police officer causing injury (Veh. Code, § 2800.3, subd. (a), count one), driving under the influence of alcohol or drugs (Veh. Code, § 23153, count two), leaving the scene of an injury accident (Veh. Code, § 20001, subd. (a), count three) and driving on a suspended license (Veh. Code, § 14601.2, count four). The district attorney alleged that appellant had suffered a prior prison term (Pen. Code, § 667.5, subd. (b)) and had two prior strike convictions out of Los Angeles County (Pen. Code, § 667, subds. (b)-(i)) — one for robbery (Pen. Code, § 211) and one for assault with a deadly weapon (Pen. Code, § 245, subd. (a)).

On November 9, 2010, pursuant to a negotiated disposition, appellant pleaded no contest to a reduced charge on count one of reckless evasion of the police (Veh. Code, § 2800.2); and to count two as charged. Appellant admitted having served a prior prison term. In exchange for his no contests pleas, it was agreed that the court would impose, but suspend, a five-year prison term and appellant would be granted probation and enter

the Delancey Street program. However, if he was not accepted into the program, a five-year prison sentence would be imposed. Before appellant entered his plea it was determined that one of the strikes that had been pleaded was not in fact a strike and that in order to get to the agreed upon disposition the remaining strike would have to be dismissed. Accordingly, on motion of the prosecutor the court dismissed the prior strike allegation.

It appears that appellant was not accepted into the Delancey Street program, but the court gave appellant the opportunity to see if there was an equivalent program providing the same degree of structure and of equivalent length. The court continued sentencing, but noted that in looking at the two counts to which appellant had pleaded, the court was unable to come up with a five-year sentence. However, without objection from the prosecutor, the court proposed that appellant serve only four years and eight months.

Subsequently, at the continued sentencing hearing, the court stated that appellant had not been accepted into the Delancey Street program and that the agreement had been that if he was not, then the prison sentence would be imposed. Accordingly, the court sentenced appellant to four years eight months in state prison. The court awarded appellant 327 actual days of custody credits, plus 163 days of conduct credits for a total of 490 days. The probation report prepared for the continued sentencing hearing indicated that appellant had several prior convictions, including a conviction for robbery (Pen. Code, § 211) that occurred in 2007.

#### *Discussion*

As noted, appellant's contention is that his custody credits were incorrectly calculated. Respondent concedes that the January 2010 version of Penal Code section 4019 was in effect during the time that appellant was in custody. However, respondent points out that because appellant has a prior strike conviction he is not entitled to two days of conduct credits for every two days actually served (one-for-one credit).

Certainly, the January 2010 amendment to Penal Code section 4019 contained exclusions to the one-for-one credit award. Specifically, some prisoners continued to accrue custody credits at the previous rate—six days credit for every four days actually served. (January 2010 version Pen. Code, § 4019, subds. (b)(2), (c)(2), (f); Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50.) This includes any prisoner who has a prior conviction for a serious felony, as defined in Penal Code section 1192.7 or a violent felony as defined in Penal Code section 667.5 (January 2010 version Pen. Code, § 4019, subds. (b)(2), (c)(2).)

Here, initially, appellant was charged with two serious/violent felony priors within the meaning of Penal Code section 667.5. However, both of them were dismissed by the court on motion of the prosecutor—one prior to the entry of appellant's plea—based on the prosecutor's acknowledgement that it was not a serious felony conviction; and the second in order to effectuate the plea bargain.<sup>2</sup> Thus, appellant did not admit that he had a prior serious or violent felony conviction.

Accordingly, the crux of this case is whether there is an implied "pleading and proof" requirement with respect to the existence of serious felony prior convictions for purposes of conduct credits. If so, as appellant argues, in this case he would not be subject to disqualifying provisions found in subdivisions (b)(2) and (c)(2) of the January 2010 version of Penal Code section 4019, because the prior serious felony conviction allegations were dismissed by the court on motion of the prosecutor.

While this case was pending, the California Supreme Court in *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*) held the trial court does not have discretion under Penal Code Section 1385 to "strike" or disregard the historical facts that disqualify a local prisoner from earning one-for-one conduct credits under the January 2010 version of

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<sup>2</sup> It was not until after appellant entered his plea that the court actually struck the second prior conviction allegation.

Penal Code section 4019; and there is no implicit pleading and proof requirement as to those facts. (*Lara, supra*, 54 Cal.4th at pp. 900, 902, 906.)

The Supreme Court reasoned that Penal Code "[s]ection 1385 permits a court, 'in furtherance of justice, [to] order an action to be dismissed.' (*Id.*, subd. (a).) Although the statute literally authorizes a court to dismiss only an entire criminal action, we have held it also permits courts to dismiss, or 'strike,' factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence. (E.g., *People v. Superior Court (Romero)* [1996] 13 Cal.4th 497, 504 [prior serious or violent convictions alleged in order to invoke the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12)]; *People v. Burke* [(1956)] 47 Cal.2d 45, 50-51 [prior narcotics conviction alleged in order to invoke former statute requiring state prison term].) However, the court's power under section 1385 is not unlimited; it reaches only the 'individual charges and allegations in a criminal action.' (*People v. Thomas* (2005) 35 Cal.4th 635, 644.) Thus, a court may not strike facts that need not be charged or alleged, such as the sentencing factors that guide the court's decisions whether to grant probation (see Cal. Rules of Court, rule 4.414) or to select the upper, middle or lower term for an offense (*id.*, rules 4.421, 4.423). (See generally *In re Varnell* (2003) 30 Cal.4th 1132, 1137, 1139.)" (*Lara, supra*, 54 Cal.4th at pp. 900-901.)

Further, "The historical facts that limit a defendant's ability to earn conduct credits do not form part of the charges and allegations in a criminal action. Certainly a court must afford a defendant due process — notice and a fair hearing — in determining the amount of conduct credit to which he or she is entitled. (*People v. Duesler* (1988) 203 Cal.App.3d 273, 276-277.) But the courts of this state have rejected the argument that the People must allege credit disabilities in the accusatory pleading or prove the disabling facts to the trier of fact. Concerning notice, the court in *People v. Fitzgerald* (1997) 59 Cal.App.4th 932 (*Fitzgerald*), held that an information charging the defendant with violent felonies gave him sufficient notice that, if convicted, section 2933.1 would restrict

his presentence conduct credits to 15 percent of the maximum otherwise permitted. The People were not required to plead the effect that a conviction would have on credits. (*Fitzgerald*, at pp. 936-937.) Concerning proof, the court in *People v. Garcia* (2004) 121 Cal.App.4th 271 (*Garcia*) concluded that the question whether a defendant's current felony offenses were 'violent' (§ 667.5), and thus limited his credits under section 2933.1, was 'part of the trial court's traditional sentencing function' (*Garcia*, at p. 274), rather than a question that had to be decided by the jury. Although the federal Constitution requires that any fact, ' "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory maximum . . . be submitted to a jury, and proved beyond a reasonable doubt" ' (*Garcia*, at p. 277, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 . . . ), facts invoked to limit conduct credits do not increase the penalty for a crime beyond the statutory maximum (*Garcia*, at p. 277)." (*Lara, supra*, 54 Cal.4th at p. 901.)

The *Lara* court refused to imply a pleading and proofing requirement in the January 2010 version of Penal Code section 4019 finding that "because conduct credits are a matter in which courts traditionally exercise very limited discretion, to adopt a pleading and proof requirement for credit disabilities, for no reason other than to bring them within the court's discretionary power to strike allegations [citation], seems unwise." (*Lara, supra*, 54 Cal.4th at p. 903.)

In this case, the historical fact that limits appellant's presentence conduct credits under the January 2010 version of Penal Code section 4019 is his prior conviction for robbery in Los Angeles County (Pen. Code, § 211) because it is both a serious felony and violent felony (see Pen. Code, §§ 1192.7, subd. (c)(1)(19) & 667.5, subd. (c)(9)). The People pleaded the prior conviction for the different purpose of triggering Penal Code section 667. Nevertheless, as the Supreme Court explained in *Lara*, this pleading was sufficient to inform appellant that his presentence conduct credits might be limited. (*Lara, supra*, 54 Cal.4th at p. 906.) The trial court struck the allegation under Penal Code

section 1385 in order to effectuate the plea bargain. However," 'when a court has struck a prior conviction allegation it has not "wipe[d] out" that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history' and available for other sentencing purposes. [Citations.]" (*Id.* at pp. 906-907.)

Faced with the probation report's assertion that a prior serious/violent felony conviction did exist, and having the duty to make an offer of proof to preserve for appeal any claim of error in the report (*Lara, supra*, at p. 907), appellant raised no factual objection and made no offer of proof. Appellant's only argument for the enhanced one-for-one credits was that he had not admitted the strike in open court.

Although the trial court was operating under the misapprehension that appellant committed his crime before January 25, 2010, the court would have been entitled to reasonably rely on the probation report in determining appellant's presentence conduct credits. (*Lara, supra*, at p. 907.) As the report shows, appellant has a disqualifying conviction; accordingly, he is not entitled to the one-for-one credits under the January 2010 version of Penal Code section 4019.

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.