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

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN FLOYD RUSSO,

Defendant and Appellant.

H036873

(Santa Clara County

Super. Ct. No. CR1001692)

Defendant Kevin Floyd Russo appeals from the trial court's order denying his post-sentence request for additional conduct credits. For the reasons that follow, we reverse the order and direct modification of the judgment to reflect an award of 268 days of pre-sentence credit, consisting of 134 days of actual credit and 134 days of conduct credit under the version of Penal Code section 4019 in effect on September 2, 2010, when defendant committed his crime of unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a).<sup>1</sup>

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

## STATEMENT OF THE CASE<sup>2</sup>

On September 2, 2010, at approximately 7:00 a.m., defendant Kevin Floyd Russo saw that a Ford Explorer parked outside an apartment complex in Seaside “had its dome light on with the door partially open, and the key was lying on the driver’s seat.” He took the vehicle and drove it to San Juan Bautista, where he was arrested later that same day. Russo admitted to police that he had taken the car.

Defendant was charged by complaint filed September 7, 2010, with the unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a). The complaint also alleged, under section 667.5, subdivision (b), that Russo had suffered five prior felony convictions resulting in prison terms. The complaint did not allege that the prior convictions were either serious or violent within the meaning of sections 1192.7 and 667.5, respectively.

On October 22, 2010, Russo waived his right to a preliminary hearing and the parties stipulated that the complaint would be deemed the information. On January 13, 2011, he pleaded no contest to the vehicle-theft charge and admitted two prison priors, one a burglary and one a drug violation, under a negotiated disposition. The court committed Russo to the agreed-upon five-year term, composed of the upper term of three years for the vehicle theft plus two additional years for the two prior strikes. On the People’s motion, the court dismissed the remaining three prior prison term allegations. The court continued the case for consideration of a “postsentence probation report” and “for receipt of credits.”

Defendant was in pre-sentence custody from September 2, 2010 to January 13, 2011. The probation report accordingly calculated actual custody credits at 134 days. With respect to conduct credits, the report calculated that Russo should be

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<sup>2</sup> We take the underlying facts and procedure regarding the crime from the appellate record in *People v. Russo*, H036640, of which we have already taken judicial notice by separate order. That appeal from the judgment was abandoned.

awarded 26 days for the period September 2, 2010 to September 27, 2010, under the version of section 4019 then in effect providing for a conduct-credit rate of one-for-one. But for the period September 28, 2010 to January 13, 2011, the report calculated 54 days conduct credit for 108 actual days at the rate of one-for-two, reflecting legislative changes to section 4019 effective September 28, 2010. The court then awarded a total of 214 days custody credit, consisting of 134 actual days and 80 days of conduct credit, calculated consistently with the probation report.

The case again came before the court on April 21, 2011, at Russo's request for a "review of credits." Russo's appellate attorney had written a letter to the court requesting that his conduct credits be recalculated at the rate of one-for-one so that the total award of pre-sentence credit would be 268 days, consisting of 134 actual days plus 134 days of conduct credit.<sup>3</sup> The court denied the request, with "credits to remain as previously stated."

Russo timely appealed from the court's order denying his request for additional pre-sentence credits. The order is appealable under section 1237, subdivision (b), as an order made after judgment.

## DISCUSSION

### I. *The Parties' Contentions*

Russo contends that he is entitled to 268 days of pre-sentence credit, 134 days of actual custody credit plus 134 days of conduct credit. His contention is two-fold. First, he contends that the version of section 4019 then in effect entitled him to 26 days of conduct credit for the period September 2, 2010 to September 27, 2010, and that legislative changes to section 4019 and 2933, effective September 28, 2010, entitle him to this same one-for-one rate for the remaining period September 28 to January 13, 2011. He alternatively claims that he is entitled to the same additional number of conduct

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<sup>3</sup> We have taken judicial notice of the letter by separate order.

credits based on later legislative changes to sections 4019 and 2933, operative October 1, 2011.

Respondent concedes that defendant may be right about the amount of conduct credit he is entitled to. But this concession is based on the contention that the version of section 4019 that was in effect on September 2, 2010, when defendant committed the crime, applies to the entire period of his pre-sentence confinement because the legislative changes to this section effective September 28, 2010, were expressly declared to be prospective only. This contention is conditioned, according to respondent, on defendant's admitted prior conviction for burglary not qualifying as a serious felony under section 1192.7. Respondent accordingly requests that the case be remanded to the trial court for a recalculation of conduct credits with a foundational determination by that court of the character of Russo's admitted prior burglary conviction.

Defendant retorts that as a matter of law, his prior burglary conviction does not qualify as a serious felony under sections 1192.7, because it did not involve a residence but, instead, a storage locker, and that remand to correct the amount of conduct credits is accordingly not necessary.<sup>4</sup> He requests instead that we modify the judgment to provide for his claimed additional conduct credits.

## II. *Russo is Entitled to Additional Conduct Credits*

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good

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<sup>4</sup> By separate order, we have taken judicial notice of documents pertaining to this prior burglary conviction in *People v. Russo*, Monterey County Superior Court Case No. SC941352. These documents include the information showing the charge in count two as burglary of "a storage locker" in violation of section 459; court minutes showing Russo's guilty plea to this count; amended minutes reflecting his guilty plea to "burglary second degree;" and the abstract of judgment reflecting his conviction for the same.

behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants who were required to register as a sex offender, those committed for a serious felony, and those with a prior conviction for a serious or violent felony (as defined in sections 1192.7 and 667.5, respectively.<sup>5</sup> (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subs. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (former § 4019, subs. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010, did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, rev. granted June 9, 2010, S181963, and related cases.)<sup>6</sup>

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<sup>5</sup> This version of section 4019, effective January 29, 2010, was in effect when Russo committed his crime on September 2, 2010.

<sup>6</sup> Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426, § 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, and those committed for a serious felony or with a prior conviction for a violent or serious felony were also eliminated. (*Ibid.*) At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass pre-sentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).] In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with an exception pertinent here. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates required to register as sex offenders and those committed for a serious felony or with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to Russo's alternative equal protection challenge. These statutory changes,

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granted Jun. 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown, supra*].)

among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that was in place from September 28, 2010 to September 27, 2011 only, and reinstated one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subds. (b), (c) & (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.<sup>7</sup> (§ 4019, subds. (b), (c), & (h).)

As respondent contends, it is clear from this legislative evolution of sections 4019 and 2933 that the calculation of Russo's conduct credits is governed by the version of section 4019 in effect when he committed his crime on September 2, 2010, and that the trial court erred by calculating conduct credits accrued from September 28, 2010 to January 13, 2011 at the less generous rate provided in legislative changes effective September 28, 2010. This is because those changes were expressly stated to be prospective only, applicable to crimes committed on or after the effective date of the legislation—26 days after Russo's crime. (Stats. 2010, ch. 426, § 2.)

Respondent is also correct that the calculation of Russo's conduct credits under the version of section 4019 in effect when he committed his crime on September 2, 2010, would be affected by whether his admitted prior prison term for burglary qualified as a serious felony for purposes of conduct-credit calculations. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, § 50.) Russo responds that the prior prison term allegation was not pleaded or proven to be violent or serious, and that this is required in order for the enhancement allegation to affect conduct credits. We acknowledge that whether this is true is an issue that is currently pending before the California Supreme Court. (*People v.*

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<sup>7</sup> These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

*Jones* (2010) 188 Cal.App.4th 165, 185-186, review granted Dec. 15, 2010, S187135; see also *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784.)

But we need not wade into this thicket in order to resolve the issue of the proper calculation of Russo's conduct credits. As noted, we have already taken judicial notice of documents relating to his prior burglary conviction. From these, it is apparent that even if the character of a prior serious felony conviction is not required to be pleaded and proven as such for purposes of conduct-credit calculations, Russo's prior conviction for second degree burglary of a storage locker would not, as a matter of law, qualify as a serious felony within the meaning of section 1192.7. (§ 1192.7, subd. (c)(18) [any burglary of *first* degree is a serious felony]; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1421-1432 [second degree burglary of a *residence* qualifies as a serious felony]. Accordingly, under the applicable version of section 4019, i.e., that in effect on September 2, 2010, Russo is entitled to conduct credits at the rate of one-for-one for the entirety of his pre-sentence confinement—134 days. This results in a total award of pre-sentence credits of 268 days, consisting of 134 days actual credit plus 134 days of conduct credit under former section 4019.<sup>8</sup> As a matter of judicial economy, we will modify the award of pre-sentence credits rather than remand for the trial court to determine this.

#### DISPOSITION

The trial court's order denying additional conduct credit is reversed. We direct modification of the judgment to reflect that defendant is entitled to a total of 268 days of pre-sentence credit, 134 days of actual credit and 134 days of conduct credit under former section 4019. We further direct the clerk of the superior court to prepare an amended

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<sup>8</sup> This conclusion moots Russo's alternative and additional arguments.

abstract of judgment in accordance with this determination, and to forward that amended abstract of judgment to the Department of Corrections and Rehabilitation.

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Duffy, J.\*

WE CONCUR:

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Bamattre-Manoukian, Acting, P.J.

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Mihara, J.

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.