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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DREW ROY YOUNG,

Defendant and Appellant.

H036922

(Monterey County

Super. Ct. Nos. SS110534A

& SS091912A)

Defendant Drew Roy Young stole various items from a home where his father and sister lived, and from the home of his brother's landlord. He later sold these items to a pawn shop to pay debts incurred for drugs. He was charged with numerous crimes in two separate cases, but eventually pleaded no contest to two counts of grand theft (Pen. Code, § 487, subd. (c))<sup>1</sup> and one count of commercial burglary (§ 459). He also admitted to a probation violation in one of the cases. The trial court suspended imposition of sentence and placed defendant on three years felony probation, after which he filed a timely notice of appeal.

On appeal, defendant contends that several of his probation conditions are unconstitutionally vague and require modification. He also argues that insufficient evidence supported the trial court's order that he pay certain probation-related fees. And he claims that he is entitled to additional presentence conduct credit under the January

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

2010 version of section 4019. In the alternative, he argues that principles of equal protection compel the retroactive application of the October 2011 version of section 4019 to grant him additional conduct credits.

For the reasons set forth below, we modify several of the challenged probation conditions, remand to the trial court to determine defendant's ability to pay probation-related fees, and modify the judgment to grant defendant 188 days of conduct credit under the January 2010 version of section 4019.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### ***Case No. SS091912A***

Defendant pleaded no contest to the charges against him in case number SS091912A, so the following factual summary is taken from the probation officer's report, which is based on a Monterey Police Department report. On July 26, 2009, defendant stole a laptop computer valued at \$800, a digital camera valued at \$400, and approximately \$150 in coins from a home where his father and sister lived. Defendant initially told his father that someone kidnapped him and drove him to his father and sister's home, and that his kidnapper stole the missing items. After an investigation, police officers concluded there was no kidnapping and that defendant himself stole the items in order to repay a drug debt.

On August 13, 2009, the district attorney charged defendant with residential burglary (§ 459; count 1) and false report of a crime (§ 148.5, subd. (a); count 2). The district attorney amended the complaint on March 24, 2010, and added a count of grand theft. Defendant entered a plea of no contest to the count of grand theft (§ 487, subd. (a); count 3) on March 24, 2010. On April 30, 2010, the court sentenced defendant to three years felony probation subject to various terms and conditions. The court dismissed the remaining charges and ordered defendant to pay \$864 for the cost of preparing the probation report and an additional \$81 per month for the cost of supervised probation in accordance with his ability to pay.

***Case No. SS110534A and the Probation Violation in Case No. SS091912A***

Defendant also pleaded no contest to the charges against him in case number SS110534A, so the following factual summary is similarly taken from the probation officer's report, which is based on a Monterey County Sheriff's Office report. At some point between December 3, 2010, and December 10, 2010, investigators determined that defendant entered the home of his brother's landlords, Dee and Fred Macdonald, and stole a guitar valued at \$800, a guitar case valued at \$200, a ruby ring with a gold band valued at \$1,000, and a gold bracelet valued at \$350. The Macdonalds told deputies that they rented out an apartment next door to their home, so they kept their kitchen door unlocked to allow the tenants access to a shared electric breaker box. Defendant lived in the apartment adjacent to the Macdonalds' home. Deputies determined that defendant pawned the items stolen from the Macdonalds' home at Seaside Trading Post, a local pawn shop. Defendant initially told investigators that he pawned the items for a friend named "Joey," though officers believed "Joey" was fictional.

On January 13, 2011, defendant's probation officer filed a probation revocation petition in case number SS091912A pursuant to section 1203.2, alleging that defendant violated his probation by failing to report the offense that would eventually be charged in case number SS110534A. The trial court revoked defendant's probation in case number SS091912A on January 27, 2011.

On March 16, 2011, the district attorney charged defendant with residential burglary (§ 459; count 1) and commercial burglary (§ 459; count 2) in case number SS110534A. Defendant thereafter entered a plea on March 29, 2011, for both cases SS110534A and SS091912A.<sup>2</sup> As part of this plea, case number SS110534A would be

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<sup>2</sup> This plea bargain also included a misdemeanor case (case no. MS293716A) for resisting public or peace officers or emergency medical technicians in discharge of their duties (§ 148, subd. (a)(1)) in February 2011. That misdemeanor is not part of this current appeal.

deemed a violation of probation for case number SS091912A, with the understanding that probation would be reinstated in that case. During the same hearing, the trial court, on motion by the district attorney, amended count 1 in case number SS110534A to allege grand theft (§ 487, subd. (c); count 1). Defendant agreed to the terms of the plea bargain, and pleaded no contest to both grand theft (§ 487, subd. (c); count 1) and commercial burglary (§ 459; count 2) in case number SS110534A.<sup>3</sup> Pursuant to the agreement, defendant admitted the probation violation in case number SS091912A.

***The Sentencing Hearing on the Consolidated Cases***

On May 3, 2011, the trial court suspended imposition of sentence and placed defendant on probation for three years in case number SS110534A, subject to various terms and conditions including that he serve 30 days in county jail. The court also revoked and reinstated defendant's probation in case number SS091912A, with the condition that he serve 308 days in county jail. The trial court granted defendant credit for time served of 206 days actual custody credit and 102 days conduct credit, for a total of 308 days, in case number SS091912A. No credit was granted in case number SS110534A. Defendant's trial counsel objected to the assignment of credit at the sentencing hearing. The trial court further imposed a separate order of fines and fees, including \$864 for the preparation of the probation report and \$81 a month for the cost of supervised probation.

Defendant filed a timely notice of appeal in case number SS110534A on May 4, 2011. He subsequently filed an amended notice of appeal over both case numbers SS091912A and SS110534A on June 9, 2011.

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<sup>3</sup> Defendant entered his plea pursuant to *People v. West* (1970) 3 Cal.3d 595, meaning that though he agreed to the punishment, he did not admit a factual basis for the plea. (*In re Alvernaz* (1992) 2 Cal.4th 924, 932.)

## DISCUSSION

Defendant raises several contentions on appeal. First, he requests that this court modify several of his probation conditions to include an express knowledge requirement. Second, he argues insufficient evidence supported the trial court's order to pay several probation-related fees imposed during the sentencing hearing. And third, he asserts he is entitled to additional conduct credit under the January 2010 version of section 4019 under principles of statutory construction, and that in the alternative he is entitled to additional conduct credit under the October 2011 version of section 4019.

### 1. Challenges to Probation Conditions

#### A. *Legal Principles and Standard of Review*

When granting probation, a trial court possesses the power to impose as conditions of probation any “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . .” (§ 1203.1, subd. (j).) “The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

Objections to the reasonableness of a probation condition are forfeited if not raised below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 883, fn. 4 (*Sheena K.*)). However, facial challenges to the constitutionality of probation conditions may be raised on appeal without prior objection in the trial court. (*Id.* at pp. 887-889.) The reason is that “an appellate claim—amounting to a ‘facial challenge’—that phrasing or language of a probation condition is unconstitutionally vague and overbroad . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court.” (*Id.* at p. 885.) It follows that a constitutional challenge to a probation condition

based upon vagueness or overbreadth presents a pure question of law where the term or condition is “capable of correction without reference to the particular sentencing record developed in the trial court . . . .” (*Id.* at p. 887.)

A vagueness challenge to a probation condition is supported by the due process concept of “ ‘fair warning.’ ” (*Id.* at p. 890.) “The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. (U.S. Const. Amends V, XIV; Cal. Const., art. I, § 7.)’ [Citations.]” (*Ibid.*) Therefore, “[a] probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated, if it is to withstand a challenge on the ground of vagueness. [Citation.]’ ” (*Sheena K., supra*, 40 Cal.4th at p. 890.) Probation conditions that place limitations on an individual’s constitutional rights must “closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Ibid.*; *In re White* (1979) 97 Cal.App.3d 141, 149- 50.)

We review defendant’s claims that his probation conditions are vague and overbroad under a de novo standard of review. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

*B. Discrepancies Between Oral Pronouncement of Probation Conditions and Minute Order*

Preliminarily, we note that the clerk’s minute order granting probation and imposing various terms and conditions of probation contain several inconsistencies from the court’s oral pronouncement. As this court stated in *People v. Gabriel* (2010) 189 Cal.App.4th 1070 (*Gabriel*), “[w]hen there is a discrepancy between the minute order and the oral pronouncement of judgment, the oral pronouncement controls.” (*Id.* at p. 1073;

*People v. Farrell* (2002) 28 Cal.4th 381, 384; but see *People v. Smith* (1983) 33 Cal.3d 596, 599.)<sup>4</sup>

*C. Condition 10: Use, Possession, and Traffic of Controlled Substances*

Condition 10, as pronounced by the court, provides: “You’re not to use or possess narcotics, intoxicants, drugs or other controlled substances without the prescription of a physician. [¶] You’re not to traffic in or associate with persons known to you to traffic—who use or traffic in narcotics or other controlled substances.”

Defendant argues that both parts of condition 10 are unconstitutionally vague because they lack a specific scienter requirement. Defendant contends that this court should modify condition 10 to read: “You are not to *knowingly* use or possess narcotics, intoxicants, illegal drugs, or other controlled substances without the prescription of a physician. You are not to *knowingly* traffic in narcotics or other controlled substances, or associate with individuals you know to be trafficking in narcotics or other controlled substances.” (Emphasis added.)

The People do not challenge defendant’s assertion that condition 10 in its current state lacks a specific scienter requirement and is thus vague. Instead, the People urge this court to adopt the approach set forth by the Third Appellate District in *People v. Patel* (2011) 196 Cal.App.4th 956 (*Patel*), and “construe every probation condition proscribing a probationer’s presence, possession, association, or similar action to require the action

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<sup>4</sup> Consistent with our conclusion in *Gabriel*, the California Supreme Court has held that in the event of a discrepancy between an oral pronouncement of a judgment and the minute order, the oral pronouncement controls. (See *Farrell, supra*, 28 Cal.4th 381, 384.) However, it has also said that the correct approach when a discrepancy exists is to rely upon whichever part of the record will, due to its “ ‘origin and nature or otherwise, [be] entitled to greater credence.’ ” (*Smith, supra*, 33 Cal.3d 596, 599.) Regardless of the apparent discrepancy between the holdings in *Farrell* and *Smith*, we find that in this case the court’s more inclusive oral pronouncement is entitled to greater credence given its nature and controls here in any event.

be undertaken knowingly.” (*Id.* at p. 960.) For the reasons set forth below, we decline to adopt the holding in *Patel*.

In *Patel*, the Third District voiced its concern over the impact on both fiscal and judicial economy due to the repetitive and frequent nature of appeals over probation conditions lacking explicit knowledge requirements.<sup>5</sup> (*Patel, supra*, 196 Cal.App.4th at p. 960.) The court explained that “[s]ince at least 1993, appellate courts have issued opinions consistently holding that conditions of probation must include scienter requirements to prevent the conditions from being overbroad.” (*Ibid.*) Nonetheless, with “dismaying regularity,” courts “must revisit the issue in orders of probation, either at the request of counsel or on our own initiative. The latter in particular is a drain on the public fisc that could be avoided if probation departments at fault would take greater care in drafting proposed probation orders.” (*Ibid.*) The Third District concluded that since there now existed a “substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter” (*ibid.*), the court gave notice of its “intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative” (*ibid.*). The court then made a blanket order that it would henceforth “construe every probation condition proscribing a probationer’s presence, association, or similar action to require the action be undertaken knowingly” (*ibid.*) and that it would “no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement” (*id.* at p. 961).

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<sup>5</sup> *Patel* involved a defendant who filed a brief raising no issues pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). (*Patel, supra*, 196 Cal.App.4th at pp. 958.) In its *Wende* review of the case, the Third District found a potential issue relating to *Patel*’s probation condition that prohibited him from drinking, possessing, or being in any place where alcohol is the chief item of sale, as this condition lacked a knowledge requirement. (*Id.* at pp. 958-959.)

The Third District's concern over the repetitive and frequent nature of these appeals and their drain on judicial resources highlights a significant problem. Nonetheless, we respectfully decline to follow the Third District's approach.<sup>6</sup> Our Supreme Court held in *Sheena K.* that "modification to impose an explicit knowledge requirement is necessary to render [a probation] condition constitutional." (*Sheena K.*, *supra*, 40 Cal.4th at p. 892.) We must follow the Supreme Court's holding on this point unless and until it holds differently. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, in the future, we urge the trial court to include explicit knowledge requirements in probation conditions, as appropriate.

Defendant requests modification of condition 10 by inserting a scienter requirement into both parts of the condition: (1) the prohibition on the use and possession of controlled substances, drugs, and other intoxicants, and (2) the prohibition on trafficking or associating with those that use controlled substances, drugs, and other intoxicants.

We agree that absent an explicit scienter requirement, defendant could unwittingly violate probation if he is unaware of either the presence or character of certain prohibited items. In certain circumstances, for a probation condition to be sufficiently specific as to not offend a criminal defendant's constitutional rights, an express knowledge requirement should be included in the condition and should not be left to implication. (See *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) We will therefore modify the first and second sentence of condition 10 to include a knowledge requirement.

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<sup>6</sup> In *People v. Moses* (2011) 199 Cal.App.4th 374, 380-381, the Fourth District declined to follow the approach in *Patel*, choosing instead to modify probation conditions to include a knowledge requirement. Furthermore, we are unaware of any case law that would allow us to modify orders not presently before us on appeal. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 666 [appellate jurisdiction is confined to context of appeal or writ].)

Defendant further seeks to modify condition 10 by requesting that the word “drugs” in the first sentence be replaced with “illegal drugs.” Defendant contends this would prevent the condition from being overbroadly applied to nonprescription medications such as aspirin. The People argue that the context of the condition and the inclusion of the phrase “without the prescription of a physician” lends to the conclusion that the condition “does not prohibit the use or possession of every conceivable drug, but only those that are illegal.”

We find that with its current phrasing, condition 10’s reference to “drugs” is unclear and can refer to any number of nonprescription medications such as Tylenol or aspirin. However, defendant’s request that we modify the condition by adding the adjective “illegal” before “drugs” renders the condition illogical, as it would then read that defendant is prohibited from using, dealing, or possessing “illegal drugs” without a prescription from a physician. By their very nature, physicians cannot legally prescribe “illegal drugs.” Inasmuch as the trial court intended “drugs” to encompass controlled substances, the reference is superfluous as the condition already bars using, dealing, or possessing controlled substances. We will therefore further modify the condition to delete the unnecessary reference to “drugs.”

*D. Condition 13: Possession, Receipt, and Transport of Firearms*

Condition 13, as pronounced by the court, provides that: “You’re not to possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. ¶ Upon release from custody you’re to immediately surrender any firearms or ammunition you possess to law enforcement.”

In the court’s signed minute order, condition 13 reads: “Not possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Immediately surrender any firearms or ammunition you own or possess to law enforcement (P.C. § 12021).” Former section 12021, which was repealed effective January 1, 2012 (Stats.

2010, ch. 711, § 4, operative Jan. 1, 2012), prohibited convicted felons from possessing firearms and required willfulness and knowledge on the part of the defendant.<sup>7</sup>

Defendant argues that condition 13 in its present state is unconstitutionally vague as it lacks a specific scienter requirement, and that the condition should be modified to read: “You are not to *knowingly* possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon.” (Emphasis added.)

Defendant acknowledges this court’s decision in *People v. Kim* (2011) 193 Cal.App.4th 836, 846 (*Kim*), where we held that a probation condition barring possession of firearms did not need modification to include a specific scienter requirement since the condition specifically referenced former sections 12021 and 12316.<sup>8</sup> In *Kim*, we found that “[i]mplicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm.” (*Kim, supra*, at p. 846.) This court then concluded that “[w]e believe the same is true of a probation condition prohibiting possession of a firearm” (*ibid.*) and since the probation condition simply implemented a statute no express scienter requirement was necessary. (*Id.* at p. 843.)

Defendant distinguishes this case from *Kim* by asserting that the trial court’s oral pronouncement of condition 13 omitted the reference to section 12021, though defendant acknowledges the court included the reference in its signed minute order. While defendant’s assertion that the oral pronouncement fails to reference section 12021 is true,

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<sup>7</sup> The elements of former section 12021 included a “conviction of a felony and ownership, possession, custody or control of a firearm. [Citations.] Knowledge is also an element of the offense. [Citation.]” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) Additionally, “[w]rongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm.” (*People v. Snyder* (1982) 32 Cal.3d 590, 598.) In sum, both knowledge and willfulness is a requirement of former section 12021.

<sup>8</sup> Former section 12316, subdivision (b) (since repealed) provided that a person prohibited from owning or possessing a firearm by section 12021 may not own, possess, or have in his or her custody, any ammunition or reloaded ammunition.

it still implements and tracks the language of the statute by the very nature of its contents—to prohibit those convicted of felonies from possessing firearms. This obviates the need for an explicit knowledge requirement in the condition itself. (*Kim, supra*, 193 Cal.App.4th at p. 847.)

However, to avoid any unnecessary confusion we will modify the condition to include a reference to section 29800, as requested by the People. As explained *ante*, the Legislature repealed former section 12021 effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) Section 29800 now contains the provisions previously located in former section 12021 that forbid felons from possessing or owning firearms . (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

We additionally modify the language of the condition to include an express scienter requirement. Section 29800 and our holding in *Kim* eliminates the need for an express knowledge requirement in a probation condition barring a felon from possessing a firearm. However, section 29800 and *Kim* do not address the need of an express knowledge requirement for the other elements of condition 13 that prohibit defendant from receiving or transporting a firearm, which he could violate without his knowledge. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892.)

*E. Condition 16: Stay Away from Victims*

Condition 16, as pronounced by the court during the sentencing hearing, provides: “You’re to stay at least 100-yards away from the victims, Steve McDonald and Seaside Trading Post, their residence, vehicle, place of employment and business.”

Notably, the court’s signed minute order omits any reference to condition 16. Neither party mentions this omission in their briefs, but it is a clerical error that this court may correct without request by either party. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 (*Mitchell*).) Thus, we will amend the minute order to include condition 16 that was pronounced by the court, subject to certain modifications as described below.

Defendant contends that condition 16 is unconstitutionally vague because it fails to include a knowledge requirement. Defendant argues that he cannot know the location of the victims, their vehicles, and their residences at any given moment, and that he might unwittingly violate the condition if any of the victims move. The People claim that such a knowledge requirement is redundant, given that defendant knows the location of Seaside Trading Post and the Macdonalds' home. We disagree that a modification is redundant, as the current condition requires that defendant stay away from the individual victim's vehicle, residence, and place of employment. One or more of these may change without prior knowledge of the defendant. We therefore modify condition 16 to include an express scienter requirement. (See *People v. Garcia* (1993) 19 Cal.App.4th 97, 102.)

The People also request that this court amend the condition to include a reference to Dee Macdonald since she was a victim of defendant's burglary. The trial court's oral pronouncement of condition 16 currently only references a "Steve Macdonald." There is no record of a victim named "Steve Macdonald" in the clerk's transcript. A review of the record indicates that defendant burglarized the home of Dee and Fred Macdonald, whose names are clearly stated in the complaint and in the probation report. Neither defendant nor the People reference this clerical error, but we will correct this mistake to avoid any confusion that may arise from a probation condition directing defendant to stay away from a nonexistent victim, and will replace the condition's reference from "Steve Macdonald" to "Dee Macdonald." (*Mitchell, supra*, 26 Cal.4th at pp. 186-187.)

*F. Condition 17: Possession of Burglary Tools*

Condition 17, as pronounced orally by the court, reads: "You're not to possess tools used for the express purpose of facilitating burglaries or theft such as pry bars, screwdrivers, pick lock devices, universal keys or implements or other such devices without the express permission of your supervising probation officer."

Defendant contends this condition, like conditions 10, 13, and 16, is vague because it lacks an express knowledge requirement. We agree. Without an express

knowledge requirement condition 17 is vague as defendant could unwittingly violate the condition. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.) We therefore modify condition 17 to include an express scienter requirement.

## **2. Probation Fees Supported by Insufficient Evidence**

Defendant next argues that insufficient evidence supported the trial court's order that he pay \$864 for the preparation of the probation report and \$81 per month for the cost of supervised probation.<sup>9</sup> Though the trial court did not indicate in its oral pronouncement under which statute it imposed the fees, we assume that the court imposed the fee pursuant to section 1203.1b, as that is the statute that discusses fees for the cost of supervised probation and the preparation of the probation report.

The People initially contend that defendant forfeited his probation-related fee claims because he failed to raise them below in the trial court. However, this court held in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*) that claims based on insufficiency of the evidence to support an order or judgment, such as a claim regarding insufficient evidence to support a determination of an individual's ability to pay fees and fines, need not be raised in the court below to be preserved on appeal. (*Id.* at p. 1397.) We are aware that other appellate courts have held otherwise in similar cases.<sup>10</sup> (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072 [First District held that claim regarding insufficient evidence to support probation supervision fee forfeited on appeal].)

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<sup>9</sup> Fees imposed for the cost of preparation of probation reports and for the cost of supervised probation are separate orders, are enforceable as a civil judgment, and cannot be made a condition of probation. (§ 1203.1b, subd. (d); *People v. Washington* (2002) 100 Cal.App.4th 590, 592-593.) The trial court distinguished these fees from the probation conditions both orally during the sentencing hearing and in the written minute order.

<sup>10</sup> The California Supreme Court has granted review in a case that may resolve the issue of whether or not a defendant's failure to raise an objection to a booking fee in the trial court below based on insufficient evidence results in the claim's forfeiture on appeal. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.)

Nonetheless, we will adhere to our conclusion in *Pacheco* and will reach the merits of defendant's claims.

Section 1203.1b sets forth a process that must be followed before the trial court may impose a fee for the cost of supervised probation or for the cost of preparation of a probation report. First, the court must order the defendant to report to the probation officer, who will then make a determination of the defendant's ability to pay. (§1203.1b, subd. (a).) After the probation officer determines the amount the defendant may be able to pay, the probation officer must inform the defendant that he or she is entitled to a hearing, during which the court will make a determination of the defendant's ability to pay and the payment amount. (§ 1203.1b, subd. (a).) Defendant is entitled to representation by counsel during this hearing. (§ 1203.1b, subd. (a).) A defendant may waive his or her right to a hearing, but this waiver must be made knowingly and intelligently. (§ 1203.1b, subd. (a).) If no waiver is given, the probation officer must refer the matter back to the trial court, and the trial court will make a determination of defendant's ability to pay.<sup>11</sup> (§ 1203.1b, subd. (b).)

In defendant's case, the trial court orally ordered defendant to pay \$864 for the cost of preparation of the probation report and \$81 per month for the cost of supervised probation.<sup>12</sup> The court did not indicate any findings it may have made as to defendant's ability to pay.

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<sup>11</sup> A defendant's ability to pay is determined by consideration of the defendant's present financial position, reasonably discernible future financial position, his or her likelihood to obtain employment within a year of the hearing, and any other factors that may impact his or her ability to pay the fees. (§ 1203.1b, subd. (e).)

<sup>12</sup> The court's signed minute order elaborated that "defendant is ordered to pay \$864.00 for the cost of preparation of the probation report, plus \$81.00 per month for the cost of supervised probation in accordance with his/her ability to pay. The defendant is ordered to provide the Probation Officer with financial information for evaluation of his/her ability to pay, and is ordered to pay the amount Probation determines he/she can afford."

In *Pacheco, supra*, 187 Cal.App.4th 1392, the trial court ordered Pacheco to pay \$64 a month as a probation supervision fee. (*Id.* at p. 1400.) After review of the record, this court determined that there was no evidence indicating that the probation officer or the court ever “made a determination of Pacheco’s ability to pay the \$64 per month probation supervision fee.” (*Id.* at p. 1401.) Nor was there “any evidence that probation advised him of his right to have the court make this determination or that he waived this right.” (*Ibid.*) We found that “[i]n short, it appears that the statutory procedure provided at section 1203.1b for a determination of Pacheco’s ability to pay probation related costs was not followed” and concluded that the monthly probation fee could not stand. (*Ibid.*)

Here, as in *Pacheco*, nothing in the record indicates that defendant was ever advised of his right to a hearing on his ability to pay, or that he ever waived his right to a hearing. The People argue that given that the probation report indicated the probation officer was recommending to the court that defendant be ordered to pay the probation-related fees, defendant was given sufficient notice of the proposed probation fees. But we are not aware of any legal authority—and the People do not cite to any such authority—that supports the argument that the requirements of section 1203.1b can be circumvented if a defendant has sufficient notice of the fees. There is also nothing in the record to substantiate the source of probation-related fees. The only reference to defendant’s ability to pay in the prepared probation report is that the probation officer rated defendant’s financial capability as “[m]inimal,” though the report noted that “it is anticipated that the defendant will be able to pay any victim restitution, fines, or fees, associated with these cases.”

It is possible the court intended that its order set a “ceiling” for the amount of fees defendant would be required to pay, pending a determination of his ability to pay by the probation department, but this procedure does not comport with the statutory requirements set forth in section 1203.1b. The statute contemplates that the court must first refer the defendant to the probation department for an analysis of his or her ability to

pay prior to the imposition of an order to pay fees. (§ 1203.1b, subd. (a).) The probation department is then obliged to inform the defendant of his right to contest the probation department's evaluation at a court hearing. (*Ibid.*) Here, there is no evidence that any analysis into defendant's ability to pay was made prior to the court's fee order.

We therefore find that the fees of \$864 for the cost of preparing the report and \$81 per month for supervised probation cannot stand, and remand the imposition of these fees to the trial court with directions that it comply with section 1203.1b by ordering a determination be made of defendant's ability to pay such fees. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068; see also *Pacheco, supra*, 187 Cal.App.4th at pp. 1401, 1404.)

### **3. Conduct Credit Under Section 4019**

Defendant also argues that he is entitled to additional conduct credit under the January 2010 version of section 4019. He contends that the trial court erroneously calculated his conduct credit under the September 2010 version of section 4019.

Defendant was incarcerated twice in case number SS091912A, which is the only case in which he was awarded conduct credit and custody credit. He was first incarcerated from December 22, 2009, through May 3, 2010, after he committed the initial offense.<sup>13</sup> He was incarcerated a second time from February 20, 2011, through May 3, 2011, after his violation of probation due to his failure to report the offense in

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<sup>13</sup> The probation report initially recommended credits for a first period of incarceration for case number SS091912A between January 9, 2010 and May 3, 2010. During defendant's sentencing, defendant's trial counsel added additional dates of custody to this first period of incarceration from December 22, 2009 to January 8, 2010. Accordingly, the correct dates for defendant's first period of incarceration for case number SS091912A was from December 22, 2009 to May 3, 2010, a total of 133 days in actual custody.

case number SS110534A.<sup>14</sup> In total, defendant served 206 days in custody for case number SS091912A, and the court awarded him 102 days of conduct credit.

Before we address the merits of defendant's claims, we briefly review the statutory history of section 4019.

*A. Overview of Conduct Credit and Section 4019*

Section 4019 provides for presentence credits, consisting of worktime and good behavior. (§ 4019, subs. (b) & (c).) Collectively, these presentence credits are referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 (*Dieck*).) Criminal defendants earn conduct credit prior to the imposition of a sentence and also earn conduct credit when a jail sentence is a term or condition of probation. (*People v. Daniels* (2003) 106 Cal.App.4th 736, 740.)

Defendant committed his initial offense in case number SS091912A in July 2009. At the time he committed the offense, former section 4019 allowed defendants to earn conduct credit at a rate of two days for every four days of actual custody. (Stats.1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].)

Effective January 25, 2010, the Legislature amended section 4019 to allow defendants to earn conduct credit at a rate of two days for every two days of actual custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch.28, § 50, eff. Jan. 25, 2010 [January 2010 version of § 4019, subs. (b)(1), (c)(1) & (f)].) However, if a defendant had a prior serious felony conviction as defined in section 1192.7, the defendant would earn conduct credit at the less favorable rate of two days for every four days of actual custody. (Stats.

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<sup>14</sup> The probation report also incorrectly reflected that defendant's second period of incarceration for case number SS091912A was from February 20, 2011 to April 26, 2011. This probation report was signed on April 18, 2011, when defendant's sentencing hearing was still scheduled for April 26, 2011. Sentencing was continued to May 3, 2011, so the correct dates for defendant's second period of incarceration was from February 20, 2011 to May 3, 2011, a total of 73 actual days.

2009, *supra*, ch.28, § 50 [former section 4019, subds. (b)(2) & (c)(2)].) Defendant's offense of grand theft is not a serious or violent felony under section 1192.7.

Effective September 28, 2010, section 4019 was amended again to allow defendants to earn conduct credit at a rate of two days for every four days of actual custody. (Stats. 2010, ch. 426, §§ 2, 5 [September 2010 version of § 4019].) And the provision of section 4019 that treated defendants differently due to their prior serious felony conviction was eliminated. (Stats. 2010, ch. 426, § 2.) At the same time, the Legislature amended section 2933. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].) The amendment to section 2933 allowed defendants who were sentenced to prison and for whom the sentence was executed to earn presentence conduct credit at the rate of one day for every day of actual custody. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(1)].) Defendants with a prior serious felony conviction were excluded from this more favorable calculation under former section 2933, and instead earned conduct credit under section 4019. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(3)].) But the September 2010 version of section 4019 expressly applied only to defendants who committed their crime on or after the statute's effective date of September 28, 2010. (Stats. 2010, ch. 426, § 2.)

Section 4019 was amended once more, operative October 1, 2011, and now provides that defendants earn conduct credit at a rate of two days for every two days of actual custody. (§ 4019, subds. (b), (c), & (f); Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) The October 2011 version of section 4019 does not disqualify defendants with prior serious felony convictions from this rate. (§ 4019, subds. (b), (c), & (f).) The October 2011 version of section 4019 applies only to those defendants who commit a crime on or after October 1, 2011, and the statute specifically provides that any days earned by defendants prior to that date will be calculated according to "the rate required by the prior law." (§ 4019, subd. (h).) Section 2933 was also amended, operative

October 1, 2011, and it no longer provides for presentence conduct credit. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16.)

*B. Waiver of Presentence Conduct Credit*

Preliminarily, the People argue that defendant waived his right to additional presentence conduct credit because he accepted probation on the condition that he serve a jail term of 308 days. Accordingly, they contend, we should not reach the merits of defendant's claims. We find no merit to this argument.

The People rely on *People v. Johnson* (2002) 28 Cal.4th 1050 (*Johnson*), where the California Supreme Court allowed a defendant to waive actual custody credit (§ 2900.5) when agreeing to probation terms. (*Id.* at p. 1058-1059.) In addition to waiver of actual custody credit, a defendant may also waive conduct credits as part of a negotiated disposition. (*People v. Arnold* (2004) 33 Cal.4th 294, 302.) As with waiver of "any significant right by a criminal defendant, a defendant's waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent." (*Johnson, supra*, at p. 1055.)

Despite the People's contentions, nothing in the record indicates that a knowing or intelligent waiver of presentence conduct credit took place. Although defendant agreed to the terms and conditions of probation during the sentencing hearing, he did not expressly waive his right to any further conduct credit. In fact, defendant's counsel objected to the trial court's calculation of credits at the time of sentencing. Since there appears to be no knowing or intelligent waiver of credits, we turn to the merits of defendant's claim.

*C. Prospective Application of the January 2010 Version of Section 4019*

In his reply brief, defendant concedes that under the California Supreme Court's holding in *People v. Brown* (2012) 54 Cal.4th 314 the trial court correctly calculated his presentence conduct credits at a rate of two days for every four days of actual custody for the time defendant spent in jail prior to January 25, 2010, the operative date of the

January 2010 version of section 4019. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch.28, § 50, eff. Jan. 25, 2010.) However, defendant argues that under *Brown*, he is still entitled to additional conduct credit for the time he spent in jail after January 25, 2010.

In *Brown*, our Supreme Court concluded that “former section 4019 [the January 2010 version of section 4019] applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute’s operative date.” (*Brown, supra*, 54 Cal.4th at p. 318.) Thus, defendant first became eligible to earn increased conduct credit after the statute’s operative date of January 25, 2010, through his release from custody on May 3, 2010.

Defendant additionally argues he is entitled to increased conduct credit for his second period of incarceration between February 20, 2011 and May 3, 2011, for case number SS091912A. During the sentencing hearing, the court made clear that all of the conduct credit it awarded was for defendant’s violation of probation in case number SS091912A, including the credit awarded for defendant’s period of incarceration between February 20, 2011 and May 3, 2011. Defendant committed the initial offense in case number SS091912A in July of 2009, well before the September 2010 version of section 4019 came into effect. All conduct credit awarded to defendant for time he spent incarcerated for case number SS091912A should therefore be calculated in two tiers, with all conduct credit for time served prior to January 25, 2010, calculated at a rate of two days for every four days of actual custody, and all time served on and after that date calculated at a rate of two days for every two days of actual custody.

Broken down, defendant’s period of custody between December 22, 2009 and January 24, 2010 (34 actual days) should be subject to the pre-January 2010 version of section 4019, meaning that defendant earned two days of conduct credit for every four days of actual custody, for a total of 16 days of conduct credit. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Defendant’s period of custody between January 25, 2010 and May 3, 2010 (99 actual days), and the period of custody between February 20,

2011 and May 3, 2011 (73 actual days), should be subject to the January 2010 version of section 4019, meaning that defendant earned two days of conduct credit for every two days of actual custody, for a total of 172 days conduct credit. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, eff. Jan. 25, 2010 [January 2010 version of § 4019, subds. (b)(1), (c)(1) & (f)].) The judgment should therefore be modified to award defendant a total of 188 days of conduct credit for case number SS091912A.

*D. Equal Protection Does Not Compel Application of the October 2011 Version of Section 4019*

In the alternative, defendant argues that equal protection compels the retroactive application of the October 2011 version of section 4019 to both periods of incarceration in case number SS091912A. We determined that the January 2010 version of section 4019 applies to defendant's time spent in custody after January 25, 2010, but not to his time spent in custody prior to January 25, 2010. If the October 2011 version of section 4019 was to retroactively apply under the principles of equal protection, the entirety of defendant's sentence, including the time he spent in custody prior to January 25, 2010, would be subject to an increased conduct credit accrual rate. We conclude that equal protection does not compel the application of the October 2011 version of section 4019.

In order to succeed on a claim of equal protection, a defendant needs to demonstrate that there are two similarly situated groups that are unequally treated. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*).) There are different levels of scrutiny afforded to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) In cases where the disparate statutory treatment does not touch upon "fundamental interests," and is not rooted in gender, the analysis must be whether or not the classification " 'bears a rational relationship to a legitimate state purpose.' " (*Hofsheier*, at p. 1200.) If any " 'plausible reasons' " for the classification at issue exist, there is no equal protection violation. (*Id.* at pp. 1200-1201.)

The October 2011 version of section 4019 expressly includes a provision that states the statute only applies to inmates who committed offenses on or after October 1, 2011. (§ 4019, subd. (h).) Defendant contends that the October 2011 version of section 4019 creates two similarly situated groups that are treated unequally under the statutory scheme: (1) those who will receive conduct credit at a reduced rate because they committed an offense before October 1, 2011, and (2) those who will receive conduct credit at an increased rate because they committed an offense after October 1, 2011. This argument lacks merit.

Our Supreme Court held in *Brown, supra*, 54 Cal.4th 314 that a prospective application of the January 2010 version of section 4019 does not violate the principles of equal protection because the statute did not create two similarly situated groups. The court noted that the “important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response.” (*Brown, supra*, 54 Cal.4th 314, pp. 328-329.) As a result, “prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Id.* at p. 329.) We recently held in *People v. Kennedy* (2012) 209 Cal.App.4th 385 (*Kennedy*) that there is no reason why the reasoning and holding in *Brown* does not also apply to the October 1, 2011 amendment to section 4019.

Defendant contends that the decision in *People v. Sage* (1980) 26 Cal.3d 498 implicitly held that felons are similarly situated to other inmates “regardless of their lack of awareness of the right to earn conduct credits.” Defendant further contends that the reasoning of *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*) was not only wrongly decided but refuted by *Sage*. The appellate court in *Strick* denied a defendant’s equal protection claim over the prospective application of a statute that gave additional custody credit to those inmates participating in a work program, finding that the two groups (the

group deprived of additional credit and the group granted additional credit) were not similarly situated. (*Strick*, at pp. 912-913.)

Defendant's argument on this point fails as the court in *Brown* rejected a similar argument, finding *Strick* to be "persuasive." (*Brown, supra*, 54 Cal.4th at p. 329.) In *Brown*, the Supreme Court noted that the *Strick* court found that prospective application of a statute effecting conduct credit was appropriate as the " 'obvious purpose of the new section' " was to " 'affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' " (*Id.* at pp. 329-330.)

Defendant's claim that there is no rational reason for the disparate treatment is also refuted by the reasoning in *Brown*. In support of his argument on this point, defendant relies on *In re Kapperman* (1974) 11 Cal.3d 542 and *Sage*. But both *Kapperman* and *Sage* were discussed and distinguished by the Supreme Court in *Brown*. (*Brown, supra*, 54 Cal.4th at pp. 328-330.)

*Kapperman* concerned a statute that awarded custody credit only to those inmates delivered to the Director of Corrections by the statute's effective date, which date did not bear a rational relationship to a legitimate state purpose. (*Id.* at p. 545.) In its decision, the court ordered the statute applied retroactively to all felons who were incarcerated or on parole, including those excluded from the scope of the original statute. (*Id.* at p. 550.) The *Brown* court distinguished *Kapperman* since *Kapperman* dealt with actual custody credit, not conduct credit. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*Brown, supra*, 54 Cal.4th at p. 330, emphasis in original.)

The *Brown* court also distinguished *Sage*, finding that *Sage* did not address the issue of retroactivity. (*Brown, supra*, 54 Cal.4th at pp. 329-330.) In *Sage*, the court held that a provision that awarded presentence conduct credit to those convicted of misdemeanors but not felonies violated principles of equal protection, finding that there was no rational basis for the varying treatment. (*Sage, supra*, 26 Cal.3d at p. 508.) The *Brown* court reasoned that “[t]he unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion [citation] went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds.” (*Brown, supra*, 54 Cal.4th at p. 330.)

We conclude that the prospective application of the October 2011 version of section 4019 does not violate the principles of equal protection, and therefore find no merit to defendant’s claim for additional conduct credit under this theory.

#### **DISPOSITION**

Probation conditions 10, 13, and 17 are modified as follows:

Condition 10: “You are not to knowingly use or possess narcotics, intoxicants, or other controlled substances without the prescription of a physician. You are not to knowingly traffic in narcotics or other controlled substances, or associate with individuals you know to be trafficking in narcotics or other controlled substances.”

Condition 13: “You are not to knowingly possess, receive or transport any firearm, ammunition or any deadly or dangerous weapon. Upon release from custody you are to immediately surrender any firearms or ammunition you possess to law enforcement.”

Condition 17: “You are not to knowingly possess tools used for the express purpose of facilitating burglaries or theft such as pry bars, screwdrivers, pick lock

devices, universal keys or implements or other such devices without the express permission of your supervising probation officer.”

Condition 16 is added to the minute order and is modified as follows: “You are to stay at least 100-yards away from those you know to be the victims, Dee Macdonald and Seaside Trading Post, and places you know to be their residence, vehicle, place of employment and business.”

The order directing defendant to pay \$864 for the cost of preparation of the probation report and \$81 per month for the cost of supervised probation is remanded to the trial court for a determination of defendant’s ability to pay under section 1203.1b.

The judgment granting defendant conduct credit in case number SS091912A is modified. Defendant is granted a total of 188 days conduct credit in addition to his 206 days of custody credit, for a total of 394 days of presentence credit.

In all other respects, the judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Premo, Acting P.J.

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Mihara, J.