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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LISA MARIE RODRIGUEZ, Defendant and Appellant.	H037085 (Monterey County Super. Ct. No. SS101030A)

I. INTRODUCTION

Defendant Lisa Marie Rodriguez pleaded no contest to possession of a controlled substance for sale (Health & Saf. Code, § 11378) and admitted having suffered one prior conviction that qualified as a strike (Pen. Code, § 1170.12, subd. (c)(1)).[1] The trial court granted defendant's *Romero* motion,[2] and placed her on probation for three years with various terms and conditions, including that she serve 365 days in jail. The court granted defendant 307 actual days credit and defendant waived 152 days conduct credit. Defendant subsequently violated the terms of her probation, and the court sentenced her

[1] All further unspecified statutory references are to the Penal Code.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

to an aggravated three-year prison term. The trial court granted defendant 401 actual days credit and 48 days conduct credit.

On appeal, defendant contends that the trial court erred in the calculation of her conduct credit. She claims that her conduct credit should not be calculated under the less favorable rate provided by the January 2010 version of section 4019 because the trial court struck her prior serious felony conviction, and as a result she is entitled to an additional 200 days conduct credit. Alternatively, she seeks to have the matter remanded so the trial court may exercise its discretion under section 1385 to strike her prior serious felony conviction for the purpose of calculating her presentence conduct credit. She also contends that she is entitled to the additional conduct credit under the October 2011 amendments to section 4019 based on equal protection principles. Lastly, she argues that her initial waiver of 152 days conduct credit does not preclude her from being awarded additional conduct credit.

For reasons that we will explain, we will affirm the trial court's judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Initial Offense

Since defendant pleaded no contest, the following factual summary is taken from the probation report, which was based on a report by the Seaside Police Department. On April 1, 2010, Seaside police officers encountered a vehicle driven by defendant. A passenger inside the car was a known parolee. The officers had earlier received information that the parolee and defendant were involved in methamphetamine sales. Police conducted a traffic stop and searched the car, defendant's purse, and a small red pouch she was holding. They discovered the red pouch contained two 3.6 gram bags of methamphetamine and arrested both defendant and her passenger.

The Information and Defendant's Plea

On April 19, 2010, the defendant was charged by information with transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a); count 1) and

possession of a controlled substance for sale (*id.*, § 11378; count 2). The information further alleged an enhancement for a prior drug-related conviction (*id.*, § 11370.2) and a prior strike conviction for first degree robbery (§ 1170.12, subd. (c)(1)).

In December 2010, defendant entered a no contest plea to possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 2) and admitted the prior strike (§ 1170.12, subd. (c)(1)).

Sentencing

Defendant filed a written *Romero* motion, which the trial court granted in February 2011. The court then suspended defendant's sentence and placed her on probation for three years subject to various terms and conditions, including that defendant stay away from drugs and alcohol and submit to narcotics and field sobriety tests when required by a probation or peace officer. The court also ordered defendant to serve 365 days in jail, with credit for 307 actual days and 152 days conduct credit. Defendant entered a *Johnson* waiver[3] and waived 152 days of conduct credit. The court dismissed the remaining count and enhancement.

The Probation Violation and Subsequent Sentencing

In May 2011, the probation department filed a probation violation petition. The petition alleged that defendant violated the terms of her probation by testing positive for methamphetamine on April 22 and April 29, 2011. Defendant was taken into custody at the Monterey County jail. She admitted the probation violation. In June 2011, the trial court revoked defendant's probation and imposed the upper term of three years for her initial offense of possession of a controlled substance for sale. Defendant's trial counsel raised the issue of additional conduct credit at the sentencing hearing. The trial court granted defendant 401 actual days credit and 48 days conduct credit for a total of 449

[3] *People v. Johnson* (2002) 28 Cal.4th 1050.

days. In so doing, the court noted that she "waived some credits at the initial sentencing."

III. DISCUSSION

The trial court granted defendant 307 actual days credit and defendant waived 152 days conduct credit at her initial sentencing. After defendant violated her probation, the trial court granted her 401 actual days credit and 48 days conduct credit. Defendant argues on appeal that since the trial court struck her prior serious felony conviction, she is entitled to an additional 200 days of conduct credit under the more favorable rate provided in the January 2010 version of section 4019. Alternatively, she seeks to have her case remanded so the trial court may determine whether to exercise its discretion to strike her prior serious felony conviction under section 1385 for purposes of calculating her presentence conduct credit. Defendant further contends that she is entitled to the additional conduct credit under the October 2011 version of section 4019 because of equal protection principles. Lastly, she asserts that she did not waive additional conduct credit above the 152 days during her initial sentencing.

The Attorney General contends that defendant is not entitled to additional conduct credit since "[f]ormer section 4019 contained no pleading and proof requirement" with regards to defendant's prior serious felony conviction. The Attorney General further claims that the October 2011 amendments to section 4019 need not be applied retroactively since their prospective application does not violate equal protection principles. Finally, the Attorney General argues that the defendant waived *all* conduct credit and is thus not entitled to receive additional days.

We will set forth the current and former iterations of section 4019 and section 2933 before we address defendant's claims.

Presentence Conduct Credit

Section 4019 provides for presentence credits, consisting of worktime and good behavior. (§ 4019, subds. (b) & (c).) These presentence credits are collectively referred

to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 (*Dieck*).) Defendants can earn conduct credit prior to the imposition of a sentence and may 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.)

The January 2010 version of section 4019 was in effect at the time of defendant's initial offense. At that time, section 4019 allowed defendants to earn conduct credit at a rate of four days for every four days of actual custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, eff. Jan. 25, 2010 [former section 4019, subds. (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 a less favorable rate of two days for every four days of actual custody. (Stats. 2009, *supra*, ch. 28, § 50 [former section 4019, subds. (b)(2) & (c)(2)].)

Effective September 28, 2010, section 4019 was amended 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.) The provision that treated defendants differently due to their prior serious felony conviction was eliminated. (Stats. 2010, ch. 426, § 2.) At the same time, the Legislature also amended section 2933. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].) The amendment to section 2933 allowed defendants who were sentenced to prison to earn presentence conduct credit 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)].) The September 2010 version of section 4019 expressly applied only to defendants who committed their crime on or after the effective date of September 28, 2010.[4] (Stats. 2010, ch. 426, § 2.)

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[4] The September 2010 versions of section 4019 and section 2933 were in effect when defendant was sentenced in June 2011. However, by noting this we do not mean to

Section 4019 was amended again, operative October 1, 2011, and now provides that defendants earn conduct credit at a rate of four days for every four 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 in contrast to the January 2010 version. (§ 4019, subds. (b), (c), & (f).) However, the October 2011 version of section 4019 applies only to those defendants who are confined for 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.)

Section 1385

Defendant seeks to have this matter remanded so the trial court may apply the more favorable conduct credit calculation under the January 2010 version of section 4019. She asserts that her prior serious felony conviction may be stricken by the trial court pursuant to section 1385. We will assume that the January 2010 version of section 4019 applies to the calculation of defendant's presentence conduct credit. Whether or not trial courts have the discretion to strike a prior serious felony conviction under section 1385 in order to award defendants additional presentence conduct credit under former section 4019 is currently pending review before the California Supreme Court.[5] The

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imply that these versions of the statutes necessarily applied to defendant. To the extent defendant contends that the September 2010 version of section 2933 applied to her, her prior serious felony conviction would have disqualified her from the presentence conduct credit provided by that section. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(3)].)

[5] *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784.

issue has divided numerous appellate courts.[6] For the reasons set forth below, we determine that section 1385 does not authorize a trial court to strike a prior serious felony conviction for the purpose of calculating presentence credits under former section 4019.

The precedent set in *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*) is instructive on this issue. The defendant in *Varnell* had a prior serious felony conviction and failed to remain free from custody for the five years prior to his current drug possession offense, which disqualified him from probation under Proposition 36. (*Id.* at pp. 1135, 1136-1137; § 1210.1, subd. (b)(1).) The trial court struck the defendant's prior strike under section 1385 but refused to disregard the prior in determining eligibility for Proposition 36. (*Varnell*, *supra*, at p. 1135.) Upon review, the California Supreme Court determined that the trial court could not use section 1385 "to disregard . . . historical facts" so that the defendant could qualify for the benefits of Proposition 36. (*Varnell*, *supra*, at p. 1137.) The California Supreme Court stated that the historical facts were " 'sentencing factors' " and "trial courts may not use section 1385 to disregard 'sentencing factors' that are not themselves required to be a charge or allegation in an indictment or information." (*Id.* at p. 1135.)

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[6] Some appellate courts have concluded that prior serious felony convictions may be stricken pursuant to section 1385 for the purpose of calculating presentence conduct credit. (*People v. Jones* (2010) 188 Cal.App.4th 165 [Third App. Dist.], review granted December 15, 2010, S187135; *People v. Koontz* (2011) 193 Cal.App.4th 151 [Second App. Dist., Div. Six], review granted May 18, 2011, S192116; *People v. Lara*, *supra*, 193 Cal. App.4th 1393 [Sixth App. Dist.], review granted May 18, 2011, S192784.

However, other appellate courts have concluded that prior serious felony convictions need not be subject to the "pleading and proof" requirement in order to disqualify defendants from the more favorable conduct credit calculation provided by former section 4019, and at least one appellate court has further determined that the prior serious felony conviction may *not* be stricken by a trial court pursuant to section 1385 for the purpose of calculating presentence conduct credit. (*People v. James* (2011) 196 Cal.App.4th 1102 [Fourth App. Dist., Div. One], review granted August 31, 2011, S195512; *People v. Varovongsa* (2011) 197 Cal.App.4th 657 [First App. Dist., Div. One], review granted August 31, 2011, S195672.)

The *Varnell* court further explained that " '[t]he *only* action that may be dismissed under Penal Code section 1385, subdivision (a), is a criminal action or a part thereof.' [Citation.]" (*Varnell*, *supra*, 30 Cal.4th at p. 1137.) The court defined "action" to include the " 'individual charges and allegations in a criminal action' [citations] and [had] never extended it to include mere sentencing factors." (*Ibid.*) The court thus concluded that ruling that section 1385 could allow a court to disregard sentencing factors would be unprecedented. (*Ibid.*)

The *Varnell* court also explained that it would also "be inconsistent with [the court's prior] description of the *effect* of a section 1385 dismissal." (*Varnell*, *supra*, 30 Cal.4th at p. 1138.) "[D]ismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.' [Citations.] 'When a court strikes prior felony conviction allegations in this way, it " 'does not wipe out such prior convictions or prevent them from being considered in connection with later convictions.' " ' [Citations.] Thus, while a dismissal under section 1385 ameliorates the effect of the dismissed charge or allegation, the underlying facts remain available for the court to use. Hence, the trial court's dismissal of the 'strike' allegation [under the Three Strikes law] in this case did not wipe out the fact of the prior conviction and the resulting prison term that made petitioner ineligible [for Proposition 36 probation] under subdivision (b)(1) of section 1210.1." (*Id.*, fn. omitted.)

The *Varnell* court further reasoned that the eligibility provisions of section 1210.1 are comparable to the deferred entry of judgment provisions (§ 1000 et seq.) that allow a defendant charged with specific drug offenses to participate in a drug education and treatment program in lieu of criminal prosecution. (*Varnell*, *supra*, 30 Cal.4th at pp. 1138-1139.)

The *Varnell* court held that "a trial court's power to dismiss an 'action' under section 1385 extends only to charges or allegations and not to *uncharged* sentencing factors, such as those that are relevant to the decision to grant or deny probation (e.g.,

Cal. Rules of Court, rule 4.414(b)(1)) or to select among the aggravated, middle, or mitigated terms (e.g., *id.*, rule 4.421(b)(1)). Section 1210.1, like the deferred entry of judgment statutes, does not require that the basis for a defendant's ineligibility be alleged in the accusatory pleading. In the absence of a charge or allegation, there is nothing to order dismissed under section 1385." (*Varnell*, *supra*, 30 Cal.4th at p. 1139.)

The *Varnell* court also rejected a contention that section 1210.1 contains an *implied* pleading and proof requirement, distinguishing *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*). The California Supreme Court in *Lo Cicero* "recognized an implied pleading and proof requirement in the predecessor to Health and Safety Code section 11370, which prohibited probation for any defendant convicted of certain narcotics offenses if the defendant had previously been convicted of a narcotics offense. The statute did not expressly require the prior conviction establishing the defendant's ineligibility be pleaded and proved . . . ." (*Varnell*, *supra*, 30 Cal.4th at p. 1140.) However, as explained by the *Varnell* court, *Lo Cicero* recognized an implicit pleading and proof requirement for a prior conviction because " ' "increased penalties" ' " flowed from the prior conviction. (*Ibid*.) The *Lo Cicero* court concluded that the statutory prohibition of probation based on a prior conviction was " 'equivalent to an increase in penalty,' " and thus the prior conviction must be pleaded and proved. (*Ibid.*, quoting *Lo Cicero*, *supra*, at p. 1193.) The *Varnell* court distinguished *Lo Cicero* on the ground that in the case presently before it, the defendant's "prior conviction and the resulting prison term did not eliminate his opportunity to be granted probation. Although [the defendant] was ineligible for probation under the terms of section 1210.1, he *was* eligible for probation under section 1203, subdivision (e). Thus, unlike *Lo Cicero*, this is not a case where the prior conviction absolutely denied a defendant the opportunity for probation." (*Varnell*, *supra*, at p. 1140, fn. omitted.)

The *Varnell* court concluded that "an accusatory pleading need not allege [the defendant's] ineligibility for mandatory probation and treatment under section 1210.1 nor

the facts underlying that ineligibility. [¶] In the absence of a charge or allegation concerning [the defendant's] ineligibility under subdivision (b) of section 1210.1, there was nothing for a court, acting under section 1385, to dismiss . . . ." (*Varnell*, *supra*, 30 Cal. 4th at p. 1143.) The court believed that its holding was in accord with the intent of the voters in enacting Proposition 36, where the voting materials had assured voters that defendants with prior convictions for violent or serious felonies would not be eligible unless they had served their time and committed no felonies for five years. (*Id.*, at pp. 1143-1144.)

In the present case, former section 4019 (Stats. 2009, *supra*, ch. 28, § 50), also did not contain an express "pleading and proof requirement." This is similar to section 1210.1 as discussed in *Varnell*. We also find that there is no implicit "pleading and proof" requirement under former section 4019. Former section 4019 may not be regarded as increasing punishment for defendants with prior serious felony convictions simply by virtue of calculating their conduct credit at a reduced rate, as defendant claims.

In fact, the California Supreme Court addressed a similar issue in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*). There, the Supreme Court considered the issue of whether or not the prospective application of section 2900.5[7] based on the date of the defendant's delivery to the Director of Corrections violated equal protection principles. (*Kapperman*, *supra*, at pp. 544-545.) The Supreme Court ultimately decided that it was unconstitutional because it was "not reasonably related to a legitimate public purpose" (*id*. at p. 545), but noted that the case was "not governed by cases [citation] involving the application to previously convicted offenders of statutes lessening the *punishment* for a particular offense" (*id.* at p. 546). It seems apparent that the California

[7] Section 2900.5, subdivision (a) provides for one day of credit for each day spent in presentence custody regardless of behavior. Former subdivision (c) of section 2900.5 stated that the section would be applicable only to individuals delivered into the custody of the Director of Corrections on or after the effective date of the statute. (*Kapperman*, *supra*, 11 Cal.3d at p. 544, fn. 1.)

Supreme Court in *Kapperman* did not view the award of presentence custody credit under section 2900.5 as lessening punishment. We believe this rationale applies equally to conduct credit.

Former section 4019 does not appear to have been intended to increase punishment for crimes. (Stats. 2009, *supra*, ch. 28, § 50.) The statute did not define crimes, nor did it specify any punishment for crimes. The statute had a different purpose, which was to encourage good behavior by defendants in custody before sentencing. (See *Dieck*, *supra*, 46 Cal.4th at p. 939.) Further, the legislative history of the amendment to section 4019 effective January 2010, also indicates the Legislature's intent to reduce the prison population in response to California's fiscal emergency. (See Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 62.) The statute rewarded good behavior by defendants and allowed them to accrue conduct credit at an accelerated rate, resulting in a reduction in the prison population as a consequence. Defendant argues that the prior serious felony conviction results in an increase of the "effective sentence" of criminal defendants, and is thus an increase in punishment. However, the statute did not levy additional punishment against those who misbehaved or were uncooperative. Defendants did not suffer additional penalties beyond their actual sentence even if they failed to complete work or failed to comply with prison rules. Thus, though the January 2010 version of section 4019 offered a reduced reward for defendants with a prior serious felony conviction, in no way was it an increase in punishment as defendant alleges.

The cases defendant cites are not convincing. Defendant points to *Weaver v. Graham* (1981) 450 U.S. 24, where the United States Supreme Court determined that retroactively applying a statute that decreased the amount of conduct credit available for an inmate's good behavior to an inmate who committed an offense before the statute's effective date was an unconstitutional ex post facto law. Defendant also cites to *Lynce v. Mathis* (1997) 519 U.S. 433, which involved a retroactive cancellation of credits that was similarly found unconstitutional. However, defendant is not raising an ex post facto

claim, nor does her appeal concern the retroactive reduction or cancellation of conduct credit. The January 2010 version of section 4019 at issue was applied to defendant's case because it was the controlling law at the time. As a result, these opinions do not govern the resolution of her appeal.

Thus, our conclusion is that offering defendant reduced conduct credit pursuant to former section 4019 is not an increase in penalty under *Lo Cicero*. Furthermore, we conclude that former section 4019 did not implicitly require the pleading and proof of prior convictions. We also find that the trial court does *not* have the discretion under section 1385 to strike defendant's prior serious felony conviction for the purpose of calculating presentence conduct credit. Defendant is therefore not eligible for the additional conduct credit she now seeks on appeal.

Equal Protection Principles

Defendant alternatively argues that the October 2011 version of section 4019 should be retroactively applied in accordance with equal protection principles. For the reasons below, we find that the prospective application of the October 2011 version of section 4019 does not violate equal protection principles, and as such defendant is not entitled to additional conduct credit.

In order to prevail on an equal protection claim, 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*).) Furthermore, there are different levels of scrutiny afforded to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) In situations where the statutory distinction does not touch upon "fundamental interests," nor is it rooted in gender, the analysis must be whether or not the classification "bears a rational relationship to a legitimate state purpose." (*Hofsheier*, *supra*, at p. 1200.) There is no violation of equal protection principles if there are " 'plausible reasons' " for the classification at issue. (*Id.* at pp. 1200-1201.)

The Legislature expressly mandated that the October 2011 version of section 4019 applies only to those inmates who committed offenses on or after October 1, 2011. (§ 4019, subd. (h).) Thus, defendant contends that the October 2011 version of section 4019 creates two similarly situated groups: (1) a group that will receive reduced conduct credit because they committed their offense before October 1, 2011, and (2) a group that will receive additional conduct credit because they committed their offense after October 1, 2011.

Defendant argues that our Supreme Court 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 also asserts that the appellate court wrongly decided *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*). The *Strick* court found that the inmate defendant failed to show that prospective application of a statute that gave additional credit for inmates participating in a work program disparately treated two groups of similarly situated individuals, and struck down the defendant's equal protection claim. (*Id.*, at pp. 912-913.) However, even if defendant's assertion that the October 2011 version of section 4019 creates two similarly situated groups who are treated unequally under the statute holds, her equal protection argument fails as long as there is a legitimate state purpose furthered by the prospective application of the statute. This is because defendant is challenging a classification that is not based on a "fundamental interest" or gender as defined in *Hofsheier*.

In her appeal, defendant contends that there is no rational reason for the prospective application of the October 2011 version of section 4019. Defendant claims *Kapperman* is controlling. The *Kapperman* court held that former section 2900.5, which awarded presentence custody credit only to those individuals delivered into the custody of the Director of Corrections by the statute's effective date, was unconstitutional as it bore no rational relationship to a legitimate state purpose. (*Kapperman*, *supra*, 11 Cal.3d. at p. 545.) The court ordered the retroactive application of the statute to all those

improperly excluded by the Legislature, which included all felons incarcerated or on parole regardless of their commitment date. (*Id.* at 550.)

Defendant's reliance on *Kapperman* is unwarranted. In fact, *Kapperman* is not binding in this case because it concerns actual custody credit. Actual custody credit is granted to defendants solely by virtue of their being in custody, and is not dependent on factors such as the defendant's behavior or work. Defendant's appeal concerns conduct credit, which serves a fundamentally different purpose.

Specifically, section 4019 is meant to encourage and motivate good behavior from defendants in local custody before sentencing. The statute awards defendants with additional conduct credit if they comply with rules and perform certain work functions. So unlike actual custody credit, conduct credit must be earned. Logically, a defendant cannot retroactively change his behavior, so it follows that the October 2011 version of section 4019 should *not* be retroactively applied. This serves as a rational basis for the Legislature's explicit intent to apply the October 2011 version prospectively. "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinette* (1979) 94 Cal.App.3d 800, 806 [upholding prospective application of Determinate Sentencing Act (§ 1170 et seq.) over equal protection claim].)

As such, we reject defendant's claim that the October 2011 version of section 4019 must be retroactively applied to satisfy equal protection principles. Contrary to her contentions, defendant is not entitled to additional conduct credit under the October 2011 version of section 4019.

Waiver

Lastly, defendant contends that her initial waiver of 152 days conduct credit does not preclude her from the additional conduct credit she claims she is entitled to on appeal. For the reasons discussed above, defendant is not entitled to more conduct credit under either of her arguments. Therefore, there is no need to address the issue of her waiver on its merits.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

_____
MIHARA, J.

I CONCUR IN THE JUDGMENT ONLY:

_____
DUFFY, J.*

*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.