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

THE PEOPLE,

Plaintiff and Respondent,

v.

KARL DOUGLAS ALLEN,

Defendant and Appellant.

H037301

(Santa Cruz County
Super. Ct. No. F20717)

I. INTRODUCTION

Defendant Karl Douglas Allen pleaded no contest to misdemeanor assault by means of force likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1))¹ and misdemeanor battery (§ 242). The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he “not possess any firearm or any other dangerous or deadly weapon”; that he submit his “person, residence, vehicle, and areas under [his] dominion and control to search and seizure at any time of the day or night with or without a warrant” for firearms and/or weapons; and that he serve 79 days in jail with 79 days of credit for “time served.” Defendant was also ordered to pay various fines and other amounts.

¹ Further unspecified statutory references are to the Penal Code.

On appeal, defendant first contends that the written probation order must be corrected with respect to the weapons condition to reflect the trial court's oral "exemption for carrying a fishing knife." Second, defendant argues that the court abused its discretion by imposing the warrantless search condition, that he was denied due process as a result, and that, to the extent the claim has been forfeited, his counsel rendered ineffective assistance. Third, defendant contends that the court erred by failing to award presentence conduct credit. Fourth, defendant argues that the credit in excess of the jail term imposed by the court as a condition of probation must be applied to offset his fines. For reasons that we will explain, we will order the judgment modified by 1) awarding defendant 38 days conduct credit under section 4019, and 2) reflecting that the \$100 restitution fine imposed on defendant under section 1202.4 has been satisfied in full by defendant's excess days spent in custody. As so modified, we will affirm the judgment.

Defendant has also filed a petition for writ of habeas corpus, which this court ordered considered with the appeal. The petition alleges trial counsel rendered ineffective assistance by failing to object to the warrantless search condition. We have disposed of the petition by separate order filed this date. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Information and Defendant's Plea

In May 2011, defendant was charged by information with one count of felony assault by means of force likely to produce great bodily injury (former § 245, subd. (a)(1); count 1) and three counts of misdemeanor battery (§§ 242, 243, subd. (a); counts 2 - 4). On June 28, 2011, on motion of the prosecutor, the information was amended to charge the assault as a misdemeanor. Defendant pleaded no contest to the assault count (count 1) and to one count of battery (count 3) with the understanding that

he would be placed on probation. Defendant was released from custody on his own recognizance that same day.

According to the probation report, which was based on a report by the Santa Cruz County Sheriff's Office, on April 11, 2011, sheriff deputies were dispatched to Dominican Hospital's Behavioral Health Unit for a report of a male fighting with staff. Staff members told the deputies that defendant had been brought to the unit on a "5150 hold," after he was found running on a highway and claiming he was being chased by vampires. At the unit, defendant "came out of nowhere behind the nurses station and kicked" a case worker in the face "from a straight on position." The force of defendant's kick knocked the case worker to the ground and moved him several feet. The attack was unprovoked according to two staff members. Others came to help the case worker. Defendant put the case worker in a headlock and kicked him in the face again. The case worker later complained of pain to his neck and back. Defendant also punched a nurse on the side of the face during the incident and hit another staff member in the face at least five times. This staff member was observed to have an abrasion on his right arm, and he complained of pain to his head, neck, and face. The staff member also later stated that he had a permanent scar on his left temple, he experienced headaches, dizzy spells, and numbness to his arms, and he suffered from "Post Concus[s]ion Syndrome." During the incident, defendant yelled, " 'You are all sucking the blood' " and " 'You are all vampires.' " Defendant tried unsuccessfully to escape from the unit by running into a glass door. He then came back towards the staff and "picked up a chair in the process." He was eventually restrained after hospital security arrived. Hospital staff sedated him, and sheriff deputies later arrested him. In his statement to the probation officer, defendant claimed that the hospital workers had "threatened to kill him" and that they "filed a false report." Defendant also stated that he was defending himself against the threats, that he had no intention of hurting anyone, and that his only intention was to get

out of the facility. In a written statement to the court, defendant requested the dismissal of all charges against him.

B. Sentencing

On August 23, 2011, the trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve 79 days in jail with 79 days of credit for “time served.” He was also ordered to pay various amounts, including \$80 pursuant to section 1465.8, a court facilities assessment of \$60 (Gov. Code, § 70373, subd. (a)(1)), a restitution fine of \$100 (§ 1202.4), a \$100 probation revocation restitution fine suspended pursuant to section 1202.44, and restitution to two victims. The terms and conditions of defendant’s probation included that he obey all laws; participate in an educational, vocational, and/or therapeutic program at the direction of the probation officer; stay away from the three individuals that he had struck at the hospital; “not possess any firearm or any other dangerous or deadly weapon”; and submit his “person, residence, vehicle, and areas under [his] dominion and control to search and seizure at any time of the day or night with or without a warrant” for firearms and/or weapons. The remaining counts against defendant were dismissed.

Defendant filed a notice of appeal and request for certificate of probable cause. The trial court granted the request for a certificate of probable cause.

III. DISCUSSION

A. Weapons Condition

At the August 2011 hearing, the trial court orally informed defendant that the terms and conditions of his probation prohibited him from possessing any firearm or dangerous or deadly weapon. At the end of the hearing, the following exchange took place between defendant and the court regarding the weapons condition:

“[Defendant]: Can I get clarification on the weapons issue? I do fish and I do spend time up in the mountains. As far as weapons would, like, say, a fishing knife --

“THE COURT: That wouldn’t be a problem.

“[Defendant]: Wouldn’t be a problem.

“THE COURT: It’s something that’s characterized and used as a dangerous or deadly weapon. Might be to the fish but not that.

“[Defendant]: All right. Just want to clarify.”

The minute order for the hearing, and the written order signed by the court and defendant concerning the terms and conditions of defendant’s probation, both state that defendant may not “possess any firearm or any other dangerous or deadly weapon.” Neither order explicitly refers to a fishing knife.

On appeal, defendant contends that the trial court made an oral “exemption for carrying a fishing knife,” and that the “written order setting forth the probation conditions must be corrected as a clerical error.” The Attorney General “has no objection” to modification of the written probation conditions “to correspond to the trial court’s verbal exemption of carrying a fishing knife.”

We do not believe that either the minute order or the trial court’s written order, which defendant signed, requires modification to exclude a “fishing knife” as asserted by defendant. Although defendant does not describe the characteristics of a “fishing knife,” he acknowledges that such a knife is not deadly per se. (See *People v. McCoy* (1944) 25 Cal.2d 177, 188 [“a knife is not an inherently dangerous or deadly instrument as a matter of law”].) Further, citing *People v. Aguilar* (1997) 16 Cal.4th 1023, defendant acknowledges that some objects, “while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, . . . the nature of the object, the manner in which it is used, and all other facts relevant to the issue” must be considered. (*Id.* at p. 1029.)

In this case, in response to defendant’s inquiry about a fishing knife, the trial court explained that the weapons condition was addressed to instruments that are

“characterized and *used* as a dangerous or deadly weapon,” and that using a fishing knife in connection with *fishing* would not violate the weapons condition. (Italics added.) Possessing the fishing knife under different circumstances, to seriously injure a person for example, might violate the condition. We believe that the weapons condition, as written in the minute order and in the order that was signed by the court and defendant, would not be violated under the circumstances discussed by defendant and the court. Accordingly, the modification requested by defendant on appeal is unnecessary.

B. Warrantless Search Condition

As a condition of his probation, defendant was ordered to submit his person, residence, vehicle, and areas under his dominion and control to search and seizure at any time with or without a warrant for firearms and/or weapons. Defendant did not object to this condition in the trial court.

On appeal, defendant contends that the trial court abused its discretion by imposing the warrantless search condition and that he was denied due process as a result. Although he acknowledges that he did not raise an objection to the probation condition in the trial court, defendant argues that the claim may be considered on appeal because it does not involve any factual dispute. If this court determines that the claim has been forfeited, defendant asserts that his counsel rendered ineffective assistance.

The Attorney General contends that defendant has forfeited his challenge to the warrantless search condition, and that trial counsel did not render ineffective assistance by failing to object to the condition.

In general, a defendant who fails to object to the reasonableness of a probation condition in the trial court forfeits the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 230, 237.) However, “[a]n obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture. [Citations.]” (*In re Sheena K.* (2007) 40 Cal.4th 875, 887 (*Sheena K.*)) With respect to constitutional claims, the California Supreme

Court has stated: “we do not conclude that ‘all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present “pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.” [Citation.] In those circumstances, “[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court.” [Citation.]’ [Citation.]” (*Id.* at p. 889.)

In this case, defendant contends that the warrantless search condition has no relationship to the crime of which he was convicted, forbids conduct that is otherwise lawful, and is not reasonably related to future criminality. Defendant’s objection pertains to the reasonableness of the warrantless search condition and requires an analysis of the facts and circumstances of his individual case, rather than a “review of abstract and generalized legal concepts.” (*Sheena K., supra*, 40 Cal.4th at p. 885.) As the California Supreme Court has explained, “Applying the [forfeiture] rule to appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case. Generally, application of the forfeiture rule to such claims promotes greater procedural efficiency because of the likelihood that the case would have to be remanded to the trial court for resentencing or reconsideration of probation conditions.” (*Ibid.*) Accordingly, we determine in this case that defendant has forfeited his appellate claim concerning the warrantless search condition. Although the objection has been forfeited, we will address the substance of defendant’s claim in response to his contention that his counsel rendered ineffective assistance.

“In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it

‘fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] . . . If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746 (*Ledesma*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 (*Strickland*)). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

In this case, we determine that defendant has not shown prejudice from trial counsel’s failure to object to the warrantless search condition.

“ ‘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. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*)). We review the trial court’s imposition of probation conditions for abuse of discretion. (*Ibid.*) “Generally, ‘[a] condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality” [Citation.]’ [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.]” (*Ibid.*) Regarding search conditions, such conditions “ ‘aid in deterring further offenses . . . and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.’ [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, ‘reasonably related to future criminality.’ [Citations.]” (*Id.* at pp. 380-381.)

In this case, the probation report reflects the following. Defendant had been taken to the hospital's Behavioral Health on a "5150 hold" after he was found running on a highway and claiming he was being chased by vampires. At the unit, defendant engaged in a violent attack on a staff member, and witnesses reported that the attack was unprovoked. Defendant battered at least one other staff member. He unsuccessfully tried to escape from the unit by running into a glass door. He then came back towards the staff and "picked up a chair in the process." He was eventually restrained. Defendant later claimed that he was only defending himself against threats, that he had no intention of hurting anyone, and that his only intention was to get out of the facility.

The probation report referred to another Santa Cruz County Sheriff's Office report involving an incident that occurred one day prior to defendant's current offenses. Sheriff deputies were dispatched to a fight behind a bar. Defendant was contacted by deputies and identified as being involved in the fight. Defendant was wearing only pants, sweating profusely, and "talking about demons . . . and a death fog." "[D]efendant smelled like alcohol but displayed symptoms of being under the influence of a hallucinogenic. He was arrested for public intoxication" but no charges were filed.

At the time of the sentencing hearing on the current offenses, defendant was 32 years old. According to the probation report, defendant had been arrested twice as a juvenile. Specifically, in 1993, he was arrested for battery against a school employee (§ 243.6) and was ultimately released to a parent or guardian. In 1995, he was arrested for assault and petty theft (§§ 245, 484, 488, 490.5), and a petition was filed. "[D]ue to the age of the case and the file being destroyed," additional information regarding the latter case was not available to the probation officer.

Defendant could not remember whether he was placed on probation in the latter juvenile case. In a letter to the trial court in the instant case, he acknowledged that the latter juvenile case involved an assault outside of a Safeway store, but he claimed that he was acting in self-defense. Defendant admitted that he "was caught trying to steal a

bottle of liquor.” He further stated, “I did place a roundhouse kick to the head of one of the Safeway employees who had threatened to ‘beat the crap out of me’ once they had me inside their security office. That kick did cause that employee to fly several feet away from me, where he then landed on his head and slid on his back another several feet. He was knocked unconscious and hospitalized with severe injuries as a result of that single blow.” (Italics omitted.)

Defendant denied to the probation officer that he was “crazy or mentally unstable.” While in jail, he refused to take any medication, did not want to participate in any psychiatric care, and did not sign any medical release forms. Defendant denied having any alcohol or drug problem, and stated that he drank beer occasionally and used marijuana to “treat pain due to a diagnosis of degenerative arthritis in his back and joints.” Defendant had previously been employed in Hawaii, but he apparently had not worked since returning to California in April 2011. He was currently “trying to get his unemployment benefits reinstated.”

The probation officer stated that although defendant’s conduct in the instant case appeared to be an “isolated incident,” “there does seem to be a pattern of assaultive behavior stemming from the prior arrests as a [j]uvenile and the incident the day before his arrest for being involved in a fight behind a bar.” The probation officer further stated that defendant’s behavior in the instant case was “quite perplexing and perhaps there may be some underlying anger issues that the defendant could . . . address in the form of counseling.”

In the instant appeal, defendant suggests that the instant offenses occurred “during a period of presumably impaired mental state,” but offers no further explanation. He also maintains that he “used only his hands and feet.”

Under the circumstances, we do not believe that the trial court abused its discretion in imposing a warrantless search condition regarding firearms and weapons, because the condition was reasonably related to defendant’s future criminality. (*Olguin*,

supra, 45 Cal.4th at p. 379.) Defendant had a history of engaging in physical altercations with others. The most recent assault appeared to be unprovoked and quite violent, and occurred after defendant was found running on a highway and claiming he was being chased by vampires. Defendant attacked more than one staff member at the hospital and, after unsuccessfully attempting to escape, he picked up a chair as he came back towards the staff. Defendant's conduct appeared inexplicable and unpredictable. Defendant also continued to deny any wrongdoing. Under the circumstances, it would have been eminently reasonable for the court to be concerned that defendant's assaultive behavior might escalate even further. Defendant on appeal does not challenge the reasonableness of the probation condition prohibiting him possessing any firearm or other dangerous or deadly weapon. In view of the facts of this case, we conclude that the warrantless search condition concerning only firearms and weapons was reasonably related to defendant's future criminality. (*Id.* at pp. 379, 380-381.)

The cases cited by defendant are distinguishable. In *In re Martinez* (1978) 86 Cal.App.3d 577 (*Martinez*), a crowd of young people yelled obscenities and threw items at police officers who were attempting to impound an illegally parked vehicle. As the police were preparing to leave, the defendant threw a beer bottle at a patrol car. The bottle broke against the car, "shattering glass and spewing beer over the officer." (*Id.* at p. 579.) The defendant pleaded guilty to battery on a police officer (§§ 242, 243) and was sentenced as a misdemeanor. (*Martinez, supra*, at pp. 578-579.) The probation conditions imposed by the trial court prohibited defendant from possessing any dangerous or deadly weapon and required him to submit to warrantless searches of his person or property. (*Id.* at p. 579.) The Court of Appeal determined that the warrantless search condition should be stricken. The court explained that the facts in the case before it were "unique." (*Id.* at p. 582.) Among the facts described by the court were the following. The defendant had received an honorable discharge from the Marine Corps, he was married with three children, he was regularly employed, and his prior criminal

record consisted of one arrest that did not result in conviction. The defendant's involvement in the convicted offense had also been characterized as an " 'an isolated situation' " by the probation officer. (*Ibid.*) The Court of Appeal further observed that the offense was of "only misdemeanor gravity." (*Id.* at p. 583.) The court concluded that "nothing in the defendant's past history or in the circumstances of the offense indicate a propensity on the part of the defendant to resort to the use of concealed weapons in the future. To suggest that he might is a venture in speculation that could be applied to almost anyone." (*Ibid.*) In contrast to *Martinez*, the trial court in the present case had reason to be concerned about defendant's propensities based on the circumstances of his past behavior and current offenses.

The other case cited by defendant, *People v. Burton* (1981) 117 Cal.App.3d 382 (*Burton*), is similarly distinguishable. In *Burton*, the defendant had a "disagreement" with a coworker and "severely" beat the coworker with a lead pipe. (*Id.* at p. 385.) The defendant was convicted of assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 245, subd. (a)). The trial court granted probation with various terms and conditions, including that defendant submit to a search and seizure by law enforcement with or without a search warrant. (*Burton, supra*, at p. 389.) The Court of Appeal struck the probation condition. The court reasoned that there was no showing the defendant smuggled in the weapon or concealed it before committing the assault, and there was "nothing" in the defendant's past history or the circumstances of the current offense indicating a propensity to "resort to the use of concealed weapons in the future." (*Id.* at p. 391.) In the present case, as we have explained, the trial court could reasonably have been concerned about defendant's propensities based on the circumstances of his past behavior and current offenses.

Having determined that imposition of the warrantless search condition was not an abuse of discretion by the trial court, we accordingly conclude that defendant has not shown prejudice from trial counsel's failure to object to the condition. In the absence of

a showing of prejudice, defendant's claim of ineffective assistance of counsel necessarily fails. (*Strickland, supra*, 466 U.S. at pp. 687, 694, 697; see *Ledesma, supra*, 39 Cal.4th at p. 746.)

C. Conduct Credit

In granting probation, the trial court ordered defendant to serve 79 days in jail with 79 days of credit for "time served," which reflects defendant's actual time in presentence custody between the date of arrest in April 2011, and his release on his own recognizance after entering no contest pleas in June 2011. Neither the probation report nor the trial court explicitly referred to conduct credit, and the court did not award any conduct credit.

On appeal, defendant contends that the trial court erred by failing to award conduct credit, and he makes various arguments as to why he was entitled to either 38, 78, or 79 days conduct credit. The Attorney General concedes only that defendant is entitled to 38 days conduct credit. We first consider whether defendant may receive conduct credit under section 4019 before determining whether he is entitled to a particular amount.

1. Section 4019

Section 4019 provides for sentence credits for worktime and for good behavior. (§ 4019, subs. (b) & (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939 (*Dieck*); *People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) These credits are collectively referred to as "conduct credit." (*Dieck, supra*, at p. 939, fn. 3.) Subdivision (a) sets forth the types of confinement or commitment for which a defendant may receive conduct credit under section 4019.² In this case, the trial court did not award any section 4019 credits.

² Subdivision (a) of section 4019 states: "The provisions of this section shall apply in all of the following cases: [¶] (1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment, or a fine and imprisonment until the fine is paid in a criminal action or proceeding. [¶] (2) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or

Our interpretation of the language of section 4019, subdivision (a) to determine whether defendant may be entitled to section 4019 credits is governed by well established rules. “When construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” [Citations.] ‘[W]e begin with the words of a statute and give these words their ordinary meaning.’ [Citation.] ‘If the statutory language is clear and unambiguous, then we need go no further.’ [Citation.] If, however, the language supports more than one reasonable construction, we may consider ‘a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ [Citation.] Using these extrinsic aids, we ‘select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’” (*People v. Sinohui* (2002) 28 Cal.4th 205, 211-212.)

In this case, the Attorney General concedes that defendant is entitled to conduct credit under section 4019. In response to our request for supplemental briefing, both defendant and the Attorney General agree that subdivision (a)(2) of section 4019

any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence, in a criminal action or proceeding. [¶] (3) When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp for a definite period of time for contempt pursuant to a proceeding, other than a criminal action or proceeding. [¶] (4) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp following arrest and prior to the imposition of sentence for a felony conviction. [¶] (5) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as part of custodial sanction imposed following a violation of postrelease community supervision or parole. [¶] (6) When a prisoner is confined in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.”

authorizes an award of conduct credit to defendant for time spent in custody between the date of arrest and grant of probation.

Under subdivision (a)(2), the conduct credit provisions of section 4019 apply “When a prisoner is confined in or committed to the county jail, industrial farm, or road camp or any city jail, industrial farm, or road camp as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence, in a criminal action or proceeding.” The primary focus of section 4019 presentence credits is to encourage “ ‘ “minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed” ’ [Citations.]” (*Dieck, supra*, 46 Cal.4th at p. 939.) We observe that in *People v. Engquist* (1990) 218 Cal.App.3d 228 (*Engquist*), the Court of Appeal determined that, based on subdivision (a)(4), section 4019 credits may be awarded to a defendant *felon* for time spent in custody prior to a grant of probation. (*Engquist, supra*, at pp. 230-232.) We have found no indication that the Legislature intended to distinguish between pretrial felon and misdemeanant detainees with respect to encouraging cooperation and good behavior while in custody prior to a grant of probation. We therefore conclude that, based on subdivision (a)(2), defendant may receive conduct credit under section 4019 for time spent in custody between the date of arrest and the grant of probation.

We next consider the question of how much conduct credit the trial court should have awarded defendant.

2. The September 2010 version of section 4019

Defendant committed the instant offenses in April 2011. He entered no contest pleas in June 2011, and was placed on probation in August 2011. On appeal, defendant contends he was entitled to either 38, 78, or 79 days conduct credit, depending on whether the version of section 4019 effective September 28, 2010, the version of section 4019 operative October 1, 2011, or the version of section 2933 effective September 28, 2010, applies to him. As we will explain, the calculation of defendant’s

presentence conduct credit is governed only by the version of section 4019 effective September 28, 2010, and under this version, defendant is entitled to 38 days conduct credit.

At the time defendant committed the instant offenses in April 2011, and through the time that he was placed on probation in August 2011, the only version of section 4019 in effect was the version effective September 28, 2010. Under this version of section 4019, a defendant who was confined for a crime committed on or after that date may earn conduct credit at a rate of *two* days for every four-day period of actual presentence custody. (Former § 4019, subds. (b), (c), (f) & (g); Stats. 2010, ch. 426, §§ 2, 5.) In the present case, defendant, who was in actual presentence custody for 79 days, is thus entitled to 38 days conduct credit. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26 [explaining that under a prior version of section 4019 providing for conduct credit at a rate of two days for every four-day period of actual presentence custody, conduct credit is calculated by taking the number of actual custody days, dividing it by four, discarding any remainder, and multiplying the result by two].)

3. The October 2011 version of section 4019

Defendant contends that principles of equal protection require that the version of section 4019 operative October 1, 2011, be applied to him and that, under this version, he is entitled to a total of 78 days conduct credit. We disagree.

Operative October 1, 2011, the current version of section 4019 generally provides that a defendant may earn conduct credit at a rate of *four* days for every four-day period of actual presentence custody. (§ 4019, subds. (b), (c) & (f).) Section 4019 provides that this rate “shall apply prospectively” and that the rate applies to defendants who are confined in local custody “for a crime committed on or after October 1, 2011.” (§ 4019, subd. (h).) In this case, defendant committed his crime and the trial court granted probation to defendant *prior* to October 1, 2011. Defendant contends, however, that the

equal protection clauses of the state and federal constitutions require that the October 2011 version of section 4019 be applied to him.

To prevail on an equal protection claim, a defendant must first establish that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*)). Further, in determining whether a statute violates equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837 (*Wilkinson*)). If, as in this case, the statutory distinction at issue does not “touch upon fundamental interests” and is not based on gender, no equal protection violation will be found “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*Hofsheier, supra*, at p. 1200; see *Wilkinson, supra*, at p. 838 [rational basis test applies where a defendant challenges a disparity in punishment for two battery offenses]; *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, “ ‘ ‘ ‘ a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ [Citations.]” (*Hofsheier, supra*, at pp. 1200-1201, italics omitted.)

Defendant contends that he is similarly situated to those defendants who are entitled to conduct credit under the more generous provisions of the October 2011 version of section 4019. He further contends that a prospective-only application of section 4019 violates equal protection based on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 (*Carroll*), which was cited in *Kapperman*.

In *Kapperman*, the California Supreme Court considered the constitutionality of an express prospective limitation in former section 2900.5, which limited custody credit for time served in custody prior to the commencement of a prison sentence to those defendants delivered into the custody of the Director of Corrections on or after March 4, 1972, the effective date of the section. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) The *Kapperman* court concluded that this limitation violated equal protection because the legislative classification, the date of commitment to state prison, was not reasonably related to a legitimate public purpose. (*Id.* at p. 545.) *Kapperman* is not applicable in the present case, because the issue raised in *Kapperman* involved actual custody credit, not conduct credit. These two types of credit are distinguishable because custody credit is awarded automatically on the basis of time served (§ 2900.5), while conduct credit must be earned by a defendant (§ 4019). For the same reason, *Carroll, supra*, 35 Ill.2d 604, which addressed a statute granting prospective pretrial custody credit for actual time in custody prior to conviction, is not helpful to defendant in this case.

The primary focus of the presentence conduct credit scheme set forth in section 4019 is the encouragement of “ ‘minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed’ ” [Citations.]” (*Dieck, supra*, 46 Cal.4th at p. 939.) Since a defendant who committed a crime and was sentenced prior to the operative date of the amendment to section 4019 cannot be retroactively encouraged to behave well during presentence custody, there is a rational basis for the Legislature’s intent that the amendment to section 4019 apply prospectively, and prospective application furthers the primary focus of section 4019. This remains true even if a defendant has already earned the maximum amount of presentence conduct credit available under a prior version of the statute and is only claiming entitlement to additional conduct credit for the same good behavior that allowed the defendant to earn the credit in the first place. Therefore, we determine that

defendant is not entitled to additional presentence conduct credit under the October 2011 version of section 4019.

4. The September 2010 version of section 2933

Defendant also contends that principles of equal protection require that a former version of section 2933, effective September 28, 2010, be applied to him and that, under this statute, he is entitled to a total of 79 days conduct credit.

Effective September 28, 2010, section 2933, subdivision (e) was amended to state: “Notwithstanding Section 4019 and subject to the limitations of this subdivision, *a prisoner sentenced to the state prison . . . for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail . . . from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.*” (Former section 2933, subd. (e)(1), italics added; Stats. 2010, ch. 426, §§ 1, 5.) Section 2933 has since been amended and the provisions in subdivision (e) concerning presentence custody credits have been deleted. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.)

According to defendant, limiting application of the more generous conduct credit provisions of the September 2010 version of section 2933, subdivision (e) to defendants sentenced to prison would deny equal protection to defendants, such as him, who are granted probation.

Although this version of section 2933 was in effect at the time defendant committed the instant offenses in April 2011, and through the time that he was placed on probation in August 2011, defendant failed to raise this equal protection challenge below and consequently the trial court was not given the opportunity to rule on it. We requested supplemental briefing from the parties regarding whether defendant has forfeited the claim. Defendant contends that his claim involves an unauthorized sentence and therefore it has not been forfeited. He alternatively contends that this court may consider

his claim because it involves a pure question of law. The Attorney General argues that defendant has forfeited his claim. We agree with the Attorney General.

“ ‘ “No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” [Citation.]’ [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731.) The purpose of the forfeiture doctrine “ ‘is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .’ ” (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

The forfeiture doctrine has been applied to unpreserved equal protection claims. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 (*Alexander*) [claim that denial of motion to exclude testimony based upon possible hypnosis of witness violated equal protection forfeited]; *People v. Burgener* (2003) 29 Cal.4th 833, 860-861, fn. 3 (*Burgener*) [claim that practice of supplementing jury panels with additional minority prospective jurors violated equal protection forfeited]; *People v. Carpenter* (1997) 15 Cal.4th 312, 362, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 [claim that denial of severance motion violated equal protection forfeited]; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354, fn. 3 [claim that departmental practice of not recording sexually violent predator interviews violated equal protection forfeited]; *People v. Hall* (2002) 101 Cal.App.4th 1009, 1024 [claim that interpretation of statute authorizing HIV testing violated equal protection forfeited]; *People v. Pecci* (1999) 72 Cal.App.4th 1500, 1503 [claim that statute providing for probation ineligibility violated equal protection forfeited].)

Moreover, the forfeiture doctrine generally “applies in the context of sentencing as in other areas of criminal law.” (*Sheena K., supra*, 40 Cal.4th at p. 881.) For example, in *People v. Scott* (1994) 9 Cal.4th 331, the California Supreme Court held that a defendant

cannot complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice. (*Id.* at pp. 352-353.) The California Supreme Court explained that “[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” (*Id.* at p. 353; see also *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [unpreserved challenge to court’s failure to state reasons for not imposing restitution fine, a decision constituting discretionary sentencing choice, was forfeited].) Challenges to the reasonableness of probation conditions are likewise forfeited if the objection is not made in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

With respect to claims of sentencing error, there is a narrow exception to the forfeiture doctrine for sentences that are not authorized under the law. As the California Supreme Court explained in *People v. Smith* (2001) 24 Cal.4th 849 at page 852 (*Smith*), “We have . . . created a narrow exception to the waiver rule for ‘ “unauthorized sentences” or sentences entered in “excess of jurisdiction.” ’ [Citation.] Because these sentences ‘could not lawfully be imposed under any circumstance in the particular case’ [citation], they are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented ‘pure questions of law’ [citation], and were ‘ “clear and correctable” independent of any factual issues presented by the record at sentencing.’ [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.”

In this case, we determine that defendant has forfeited his equal protection claim that he is entitled to conduct credit calculated under the more generous former provision in section 2933, as he failed to raise the claim below. (*Alexander, supra*, 49 Cal.4th at p. 880, fn. 14; *Burgener, supra*, 29 Cal.4th at pp. 860-861, fn. 3.) Defendant’s claim is not one concerning the imposition of an unauthorized sentence that would fall within the

“narrow exception to the waiver rule” for unpreserved claims of sentencing error. (*Smith, supra*, 24 Cal.4th at p. 852.) As we have explained, an award of 38 days conduct credit is authorized under the version of section 4019 effective September 28, 2010.

Further, we are not persuaded by defendant’s argument that we should address his constitutional claim because it raises only an issue of law. In support of this argument, he primarily relies on *Sheena K., supra*, 40 Cal.4th 875. In *Sheena K.*, the California Supreme Court held that the failure to object at sentencing did not forfeit a defendant’s claim that a probation condition was unconstitutionally vague and overbroad where the claim presented “a pure question of law, easily remediable on appeal by modification of the condition.” (*Id.* at p. 888; see also *People v. Barajas* (2011) 198 Cal.App.4th 748, 753 [an appellate court may “review the constitutionality of a probation condition, even when it has not been challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record”].) In so holding, the California Supreme Court observed that such a constitutional challenge to a probation condition had some similarity to a “challenge to an unauthorized sentence that is not subject to the rule of forfeiture” because correction of errors in both instances “may ensue from a reviewing court’s unwillingness to ignore ‘correctable legal error.’ [Citation.]” (*Sheena K., supra*, at p. 887.) In this case, defendant’s constitutional claim does not involve a probation condition or an unauthorized sentence, and consequently we determine that *Sheena K.* does not afford defendant grounds for reviewing his forfeited claim here.

Accordingly, because defendant had the opportunity in the trial court to raise his equal protection claim concerning former section 2933 and failed to do so, we determine that defendant has forfeited the claim.

D. Monetary Credit

The trial court ordered defendant to serve 79 days in jail as a condition of probation. The court awarded 79 days of credit for “time served” but did not award any conduct credit. As we have explained, defendant was entitled to 38 days conduct credit

under the version of section 4019 effective September 28, 2010. On appeal, defendant argues that the credit in excess of the jail term imposed by the court must be applied to offset his fines. The Attorney General concedes that defendant is entitled to monetary credit for days of presentence credit in excess of the 79 days he was ordered to serve in jail. We agree with this concession by the Attorney General.

Section 2900.5, subdivision (a) provides: “In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, . . . *all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence.* If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or jail term of imprisonment and a fine, *any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines.*” (Italics added.) The phrase “term of imprisonment” is defined to include “any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence.” (§ 2900.5, subd. (c).)

In this case, defendant’s “remaining” 38 days of credit must be applied, “at a rate of not less than thirty dollars (\$30) per day,” to “any fine” imposed by the trial court. (§ 2900.5, subd. (a); see *People v. McGarry* (2002) 96 Cal.App.4th 644, 646-647 (*McGarry*).) The \$100 restitution fine imposed by the court is subject to the monetary credit provided by section 2900.5, subdivision (a). (*McGarry, supra*, at p. 650.)

However, section 2900.5, subdivision (a) makes no reference to a “charge” or “assessment,” such as those provided by former and current section 1465.8 (Stats. 2011, ch. 10, § 8, eff. Mar. 24, 2011; Stats. 2011, ch. 40, § 6, eff. June 30, 2011) and Government Code section 70373. Consequently, the amounts imposed by the court under these sections are not subject to the monetary credit provided by section 2900.5, subdivision (a). (See *People v. Kim* (2011) 193 Cal.App.4th 836, 842-843 [court security fee under former section 1465.8 and court facilities assessment under Government Code section 70373 are collateral to a defendant’s crime and punishment and are “not oriented toward a defendant’s rehabilitation but toward raising revenue for court operations”].)

The Attorney General suggests that this court should remand the matter to the trial court “to exercise its discretion to set the daily credit and calculate [defendant’s] total credit.” We see no reason to do so. Even if the trial court exercised its discretion and calculated defendant’s monetary credit at the minimum rate of \$30 per day, defendant’s monetary credit (\$30 multiplied by 38 days) is well in excess of the sole fine (the \$100 restitution fine under section 1202.4) against which the monetary credit may be applied. We will instead direct the trial court to modify the order of August 23, 2011, to reflect that the \$100 restitution fine has been satisfied in full.

IV. DISPOSITION

The judgment (August 23, 2011 order of probation) is ordered modified by 1) awarding defendant 38 days conduct credit under section 4019, and 2) reflecting that

the \$100 restitution fine imposed under section 1202.4 has been satisfied in full by defendant's excess days spent in custody. As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

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.