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

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL SUAREZ ALMANZA, JR.,

Defendant and Appellant.

H037462

(Monterey County

Super. Ct. No. SS092514A)

**I. INTRODUCTION**

The trial court found that defendant Miguel Suarez Almanza, Jr., violated his probation, and in September 2011 the court sentenced him to 12 years in prison. The court granted defendant 438 days of presentence custody credits, consisting of 289 actual days plus 149 days conduct credit under Penal Code section 4019.<sup>1</sup>

On appeal, defendant contends that he is entitled to additional conduct credit under the October 2011 version of section 4019. For reasons that we will explain, we conclude that defendant is not entitled to additional credit. In supplemental briefing, the parties agree that a probation revocation restitution fine and a suspended parole revocation restitution fine ordered by the trial court must be increased. We will order these fines increased and affirm the judgment as so modified. We will also order the correction of clerical errors in the abstract of judgment.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## II. FACTUAL AND PROCEDURAL BACKGROUND

In November 2009, defendant and Manuel Suarez, a codefendant who is not a party to this appeal, punched and kicked the victim at a gas station.<sup>2</sup> When the victim tried to escape by entering his vehicle, the car door was used to beat him. Witnesses heard the attackers claiming to be Norteño gang members and making comments about the victim being a Sureño. When defendant was later detained by police officers, he was uncooperative and aggressive towards them. Suarez was also contacted by police. Both admitted to being Norteño gang members. While being taken to jail, defendant threatened the transporting officer. Defendant's residence was subsequently searched after a search warrant was obtained. Gang related clothing and pictures were found, as well as a loaded handgun, methamphetamine, marijuana, cocaine, and "pay/owe lists."

In December 2009, defendant was charged by first amended complaint with assault with a deadly weapon (§ 245, subd. (a)(1); count 1), resisting an officer (former § 69; count 2), transportation of methamphetamine (former Health & Saf. Code, § 11379, subd. (a); count 3), possession for sale of cocaine (former Health & Saf. Code, § 11351; count 4), possession for sale of marijuana (former Health & Saf. Code, § 11359; count 5), and possession of methamphetamine and cocaine while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a); count 6). The complaint further alleged that all six counts were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that defendant was personally armed with a firearm in the commission of the offenses in counts 3 and 4 (former § 12022, subd. (c)).

In January 2010, defendant pleaded guilty to counts 1 (assault with a deadly weapon; § 245, subd. (a)(1)), 2 (resisting an officer; former § 69), and 4 (possession for

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<sup>2</sup> The facts underlying defendant's offenses are taken from the probation report, which was based on a report by the Marina Police Department.

sale of cocaine; former Health & Saf. Code, § 11351). He also admitted the gang allegation (§ 186.22, subd. (b)(1)) as to count 1, and the arming allegation (former § 12022, subd. (c)) as to count 4. Defendant entered his pleas and admissions on the condition that he receive probation.

In March 2010, the trial court sentenced defendant to 12 years in prison, suspended execution of the sentence, and placed defendant on probation for three years with various terms and conditions, including that he serve 365 days in jail and that he obey all laws. The court granted defendant 211 days of presentence custody credits. Defendant was ordered to pay a restitution fine of \$400 (§ 1202.4, subd. (b)), and a suspended probation revocation restitution fine of \$400 (§ 1202.44). The remaining counts and allegations were dismissed or stricken.<sup>3</sup>

In June 2011, a Monterey County sheriff's deputy initiated a traffic stop of defendant's vehicle.<sup>4</sup> Defendant admitted that he had three Vicodin pills in his possession and an "M-80" firecracker." He did not have a prescription for the pills. A petition and notice of violation of probation was filed in the trial court alleging that defendant failed to obey all laws by possessing three Vicodin pills and illegal fireworks. In July 2011, defendant admitted violating probation.

On September 28, 2011, the court terminated probation and sentenced defendant to prison for the previously suspended term of 12 years. The court granted defendant 438 days of presentence custody credits, consisting of 289 actual days plus 149 days conduct credit. The court also ordered that the "previously suspended" probation revocation restitution fine of "\$200 . . . be paid" and further ordered that defendant pay a suspended parole revocation restitution fine (§ 1202.45) of \$200.

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<sup>3</sup> Subsequently, in August 2010, a second amended complaint was filed adding a count and allegations against codefendant Suarez.

<sup>4</sup> These facts are taken from the supplemental probation report, which was based on a report by the Monterey County Sheriff's Office.

### III. DISCUSSION

#### A. Conduct Credit

Defendant contends that his conduct credit should be calculated pursuant to the current version of section 4019, which was operative after he was sentenced in September 2011, and that, under the current version, he is entitled 289 days conduct credit instead of the 149 days awarded by the court.<sup>5</sup>

The current version of section 4019 generally provides that a defendant may earn conduct credit at a rate of two days for every two-day period of actual custody. (§ 4019, subds. (b), (c) & (f).) However, the current version of section 4019 states that the conduct credit rate “shall apply prospectively and shall apply to prisoners who are confined to a county jail [or other local facility] for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).) In this case, defendant committed his crimes, violated probation, and was sentenced *prior* to October 1, 2011. Thus the October 2011 version of section 4019, which provides for prospective application, does not apply to defendant. (§ 4019, subd. (h); *People v. Brown* (2012) 54 Cal.4th 314, 322, fn. 11 (*Brown*); *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 (*Lara*.)

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

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<sup>5</sup> We note that section 1237.1, which generally precludes a defendant from raising a purported error in the calculation of presentence custody credits for the first time on appeal, does not apply here, as defendant’s claim of error is not based on a purported clerical or mathematical error by the trial court. (*People v. Delgado* (2012) 210 Cal.App.4th 761.)

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, ‘ “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ ” [Citation.] ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citation.]” (*Brown, supra*, 54 Cal.4th at p. 328.)

We find *Brown* instructive on the equal protection issue raised by defendant in this case. In *Brown*, the California Supreme Court held that a former version of section 4019, effective January 25, 2010, applied prospectively, and that the equal protection clauses of the federal and state Constitutions did not require retroactive application. (*Brown, supra*, 54 Cal.4th at p. 318.) In addressing the equal protection issue, the court determined that “prisoners who served time before and after [the January 2010 version of] section 4019 took effect are not similarly situated . . . .” (*Brown, supra*, at p. 329.) On this point, the California Supreme Court found *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), “persuasive” and quoted from that decision as follows: “ ‘The obvious purpose of the new section,’ . . . ‘is 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.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’ [Citation.] ‘Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ [Citation.]” (*Brown, supra*, at p. 329.) The California Supreme Court also disagreed with the defendant’s contention that its decision in *People v. Sage* (1980) 26 Cal.3d 498 “implicitly rejected the conclusion” that the Court of Appeal reached in

*Strick*, namely “that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated.” (*Brown, supra*, at p. 329.)

Defendant argues that his case is analogous to *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), where the California Supreme Court concluded that equal protection required the retroactive application of a statute granting credit for time served in local custody before sentencing and commitment to state prison. In *Brown*, however, the California Supreme Court explained that “*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.)

Lastly, we observe that in a footnote in *Lara*, the California Supreme Court rejected the contention, similar to the one made by defendant in this case, that the prospective application of the October 2011 version of section 4019 denied the defendant equal protection. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) Citing *Brown*, the California Supreme Court in *Lara* explained that prisoners who serve their pretrial detention before the effective date of a law increasing conduct credits, and those who serve their detention thereafter, “are not similarly situated with respect to the law’s purpose.” (*Lara, supra*, at p. 906, fn. 9; but see *People v. Verba* (2012) 210 Cal.App.4th 991, 995-996, petn. for review pending, petn. filed Dec. 7, 2012, S207193.)

Following *Brown* and *Lara*, we determine that defendant is not entitled to additional conduct credit under the October 2011 version of section 4019. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### **B. Restitution Fines**

In response to our request for supplemental briefing, the parties agree that at the March 2010 sentencing hearing when defendant was placed on probation, the trial court ordered defendant to pay a restitution fine of \$400 (§ 1202.4, subd. (b)). As the abstract of judgment reflects a restitution fine of only \$200, we will order it corrected to reflect the court’s oral pronouncement.

The parties also agree that at the March 2010 sentencing hearing, the trial court ordered defendant to pay a suspended probation revocation restitution fine of \$400 (§ 1202.44). The parties further agree that at the subsequent September 2011 sentencing hearing, when defendant was sentenced to prison following his violation of probation and the termination of probation, the court incorrectly stated that the “previously suspended” probation revocation restitution fine to be paid was \$200 when, as previously ordered by the court at the March 2010 sentencing hearing, it was actually \$400. The parties agree that the court did not state or find “compelling and extraordinary reasons” (§ 1202.44) for reducing the probation revocation restitution fine to \$200. As the previously stayed probation revocation restitution fine of \$400 became effective upon the revocation of defendant’s probation, we will modify the judgment to increase the probation revocation restitution fine from \$200 to \$400. (§ 1202.44; *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434-435.)

The parties also agree that, because the trial court imposed a restitution fine in the amount of \$400 (§ 1202.4, subd. (b)), the suspended parole revocation restitution fine (§ 1202.45) that was ordered by the court at the September 2011 sentencing hearing should be increased from \$200 to \$400. We will modify the judgment accordingly. (§ 1202.45 [suspended parole revocation restitution fine shall be “in the same amount” as the restitution fine imposed under section 1202.4, subdivision (b)].)

In his supplemental brief, defendant contends that the trial court improperly imposed a second restitution fine under section 1202.4, subdivision (b) at the September 2011 sentencing hearing, and that this second restitution fine should be stricken. The Attorney General disagrees that a second restitution fine was imposed at the hearing.

We also disagree with defendant’s characterization of the record. At the September 2011 sentencing hearing, the trial court stated, “Pay the balance of any fines and fees.” Further, as we have noted, the court ordered defendant to pay the

previously suspended probation revocation restitution fine (§ 1202.44), as well as a suspended parole revocation restitution fine (§ 1202.45). During this hearing, the court did *not* order defendant to pay a *second* restitution fine under section 1202.4, subdivision (b). Consistent with the court’s oral pronouncements, the minute order for the September 2011 sentencing hearing states: “Pay balance of restitution fine . . . . (PC 1202.4(b)). [¶] Pay additional restitution fine in same amount assessed pursuant to PC 1202.4(b). This restitution fine shall be suspended unless parole is revoked (PC 1202.45). [¶] Pay . . . previously suspended probation revocation restitution fine pursuant to PC 1202.44.” The abstract of judgment similarly indicates that defendant was ordered to pay *one* restitution fine under section 1202.4, subdivision (b), *one* probation revocation restitution fine under section 1202.44 that “is now due, probation having been revoked”; and *one* suspended parole revocation restitution fine under section 1202.45. In sum, the record reflects that the court imposed only one restitution fine under section 1202.4, subdivision (b).

### ***C. Other Clerical Error***

We observe that the abstract of judgment refers to defendant’s conviction on count 1 under section 245, subdivision (a)(1) as “Assault: GBI.” However, defendant was charged with, and pleaded guilty to, assault with a deadly weapon. We will order the abstract corrected accordingly.

## **IV. DISPOSITION**

The judgment is ordered modified by increasing the amount of the probation revocation restitution fine under Penal Code section 1202.44 to \$400, and by increasing the amount of the suspended parole revocation restitution fine under Penal Code section 1202.45 to \$400. As so modified, the judgment is affirmed. The abstract of judgment is ordered corrected to state that the restitution fine under Penal Code section 1202.4, subdivision (b) is \$400, and that defendant was convicted in count 1 of assault with a deadly weapon, and not “Assault: GBI.” The clerk of the superior court is

ordered to send a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.