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

THE PEOPLE,

Plaintiff and Respondent,

v.

VILLEBALDO BRAVO GARCIA,

Defendant and Appellant.

H037518

(Monterey County  
Super. Ct. No. SS082967)

Defendant Villebaldo Bravo Garcia appeals a judgment entered following his no contest plea to inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)).<sup>1</sup> On appeal, defendant asserts the court erred in imposing a second restitution fund fine and in calculating his presentence conduct credits pursuant to section 4019.

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

As a result of incidents that occurred in November 2008, defendant was charged with inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)), criminal threats (§ 422), aggravated assault (§ 245, subd. (a)(1)), and unlawful sex with a minor (§ 261.5,

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

<sup>2</sup> The underlying facts of this case are not relevant to the issues on appeal.

subd. (b)). Defendant pled no contest to inflicting corporal injury on a cohabitant in exchange for a grant of felony probation and dismissal of the remaining charges.

In April 2009, defendant was placed on probation for three years, with a condition that he serve 160 days in the county jail. The court also imposed a restitution fund fine in the amount of \$200.

Subsequently, defendant was found in violation of his probation three separate times. On August 24, 2011, defendant was charged in a new complaint with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Defendant plead guilty to the new charge, and based on that plea, the court found defendant in violation of his probation for a fourth time.

On October 20, 2011, the court ordered the previously suspended three-year term executed, and imposed a two-year concurrent term on the new drug charge. The court also imposed \$600 restitution fine on the original case, and a \$400 restitution fine on the new case. On the original case, defendant was awarded a total of 452 days of presentence credit, based on 302 days of actual and 150 days of conduct credit pursuant to section 4019.

## **DISCUSSION**

On appeal, defendant asserts the court erred in imposing a second restitution fund fine of \$600 in the original case, because it already imposed a \$200 fine when it placed defendant on probation. In addition, defendant argues the court erred in calculating his presentence conduct credits pursuant to section 4019.

### ***Restitution Fund Fine***

Defendant asserts the court erred in imposing a second restitution fund fine in the original case, and the Attorney General concedes the issue. Here, the court ordered a restitution fund fine of \$600. Defendant argues this was done in error, because the court

had previously imposed a \$200 restitution fund fine when it ordered probation, and the fine cannot be imposed a second time as a consequence of a probation revocation.

When a defendant comes before the court on a probation revocation, the court should lift the original stay on the restitution fund fine, rather than impose a second fine. (See *People v. Guiffre* (2008) 167 Cal.App.4th 430, 433-435.)

Here, the court should not have ordered a second \$600 restitution fund fine. As a result, the abstract of judgment should be amended to show the second restitution fund fine imposed on October 20, 2011 is stricken.

### ***Presentence Conduct Credit***

Defendant asserts he is entitled to additional presentence conduct credit pursuant to the January 2010 amendment to section 4019. Specifically, defendant argues he should be awarded two-for-two presentence conduct credits rather than the two-for-four presentence credits he received.

The Attorney General concedes the judgment should be modified to award defendant additional credits using a two-for-two formula, but only for the portion of presentence incarceration that occurred *after* January 25, 2011.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4554 [former § 4019, subd. (f)].) Effective

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

Section 4019 was amended two more times subsequent to January 2010. However, these amendments, which were effective in September 2010 and October 2011 respectively, contain specific provisions declaring they only apply *prospectively* to crimes committed after their effective dates. (See Sept. 2010 amend to § 4019, subd. (g); current § 4019, subd. (h)). Defendant's crime was committed on November 9, 2008. As a result, neither the September 2010 amendment to section 4019, nor the current version of section 4019 is applicable to defendant's case.

With regard to the January 2010 amendment to section 4019, the issue of whether the new formula should be applied prospectively was finally resolved by California Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). In *Brown*, the court held that "former section 4019 [January 2010 amendment] applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Id.* at p. 318.)

In addition to the statutory construction argument that he should be entitled to additional conduct credit, defendant also asserts the statute should be applied retroactively under principles of equal protection, citing *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*).

However, in *Brown*, the California Supreme Court expressly determined that neither *Kapperman* nor *Sage* supports an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 329-330.) In rejecting the inmate's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra*, 54 Cal.4th at pp. 329-330.)

Addressing the inmate's equal protection claims, the California Supreme Court distinguished *Kapperman* on the grounds that it addressed custody credits, rather than conduct credits. (*Brown, supra*, 54 Cal.4th at p. 330.) Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*Ibid.*)

With respect to *Sage*, the California Supreme Court acknowledged that "one practical effect of [that decision] was to extend presentence conduct credits retroactively

to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them.” (*Brown, supra*, 54 Cal.4th at p. 330.) However, the California Supreme Court declined to read *Sage* as implicitly holding that prisoners serving time before and after a conduct credit statute takes effect are similarly situated for purposes of equal protection, because that proposition was not considered in the case. (*Id.* at p. 330)

The *Brown* court finally resolved the equal protection issue, stating, “the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) do not require retroactive application[]” of section 4019. (*Brown, supra*, 54 Cal.4th at p. 330.)

Given that a retroactive application of section 4019 is not available to defendant, he argues alternatively that he should be entitled to a two-tiered application of section 4019. The Attorney General concedes this point. For the time period before January 25, 2010, defendant should be awarded presentence conduct credit based on a two-for-four formula, and for the period after January 25, 2010, defendant should be awarded presentence conduct credit based on a two-for-two formula. The abstract of judgment should be modified to reflect this additional award of credit.

#### **DISPOSITION**

The judgment is modified to: (1) strike the second restitution fund fine in the amount of \$600; and (2) award defendant credits for the period of time he was in custody prior to January 25, 2010 in the amount of 103 actual days, and 50 days of conduct credit, and for the period of time he was in custody after January 25, 2010 in the amount of 199 actual days, and 198 days of conduct credit, for a grand total of 550 days. As modified, the judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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MÁRQUEZ, J.