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

THE PEOPLE,

Plaintiff and Respondent,

v.

IVAN COLIN,

Defendant and Appellant.

H037593

(Monterey County

Super. Ct. No. SS110704A)

After his Penal Code section 1538.5 motion to suppress evidence was denied by the trial court, Ivan Colin (appellant) entered no contest pleas to one count of possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, count two) and one misdemeanor count of street terrorism (Pen. Code, § 186.22, subd. (a), count three). In exchange for his no contest pleas, appellant was promised felony probation.

On October 26, 2011, the court suspended imposition of sentence and placed appellant on probation for three years, and ordered that he serve a 270 day county jail term. The court imposed various conditions of probation and awarded appellant credit for time served of two days.

Appellant filed a notice of appeal on November 2, 2011. On appeal, appellant challenges the denial of his suppression motion, asserts that he received ineffective

assistance of counsel at his suppression hearing, asserts that on equal protection grounds he is entitled to an amendment to Penal Code section 4019 that became operative October 1, 2011, and finally challenges one of the conditions of his probation.

For reasons that follow, we modify the probation condition that appellant challenges, but as so modified we affirm the judgment.

*Facts and Proceedings Below*

Evidence adduced at the preliminary examination, which was held on June 10, 2011, showed that during a search of appellant's residence, police discovered a safe under the bed in the master bedroom. Using a key they took from appellant, officers opened the safe. Inside the safe they discovered a loaded .22 caliber Ruger handgun, 2.2 grams of cocaine, and a photograph of appellant with a gang member. In the photograph appellant had a red bandana hanging over his left shoulder.

Since appellant challenges the denial of his suppression motion we set forth in detail the evidence adduced at the suppression hearing, which was held on August 19, 2011.

On April 1, 2011, Salinas Police Officer Juan Cruz-Gonzalez stopped a 2003 GMC Yukon that was backing into a parking stall because it had an expired license plate tag. Appellant was the driver of the vehicle. The officer recognized appellant from a previous vehicle stop that he had made. While checking appellant's background information Officer Cruz-Gonzalez discovered that appellant was on misdemeanor probation and there were misdemeanor warrants for his arrest.

At some point during the traffic stop appellant tried to hand his wallet to a bystander. According to Officer Cruz-Gonzalez appellant asked the bystander to give the wallet and a key to a safe to appellant's wife. Having had experience with appellant in the past, Officer Cruz-Gonzalez was suspicious that appellant was trying to hide something from the police. Accordingly, the officer decided that he would conduct a search of appellant's residence based on a probation search clause.

Officer Cruz-Gonzalez was informed by the Salinas Police Department Records Division that appellant had a "search and seizure waiver for his person, vehicle, and anything under his control or possession." Accordingly, without telling appellant, Officer Cruz-Gonzalez went to appellant's residence. Appellant's wife insisted that the officer needed a warrant to search the residence, but did not produce anything to substantiate this claim.

During the search, appellant was in a police car outside the residence with another officer. According to appellant, he told the officer several times, "[Y]ou guys can't search. I have a paper at my house." However, appellant did not have any court papers with him.

No evidence was adduced at the hearing as to what the officers discovered in the search of appellant's residence.

Judge Scott took judicial notice of the record in appellant's previous case and noted that a document showed that the appellant's search condition had "place of residence" struck through.<sup>1</sup> However, on the court minutes, the search condition read as follows—" 'Voluntarily submit person, vehicle, or area over which you have control. The search and seizure at any time day or night with or without a search warrant, with or without probable cause as directed by any probation officer or peace officer.' "

Judge Scott denied appellant's motion to suppress the evidence that was found during the search. Judge Scott reasoned that the "courtroom clerk's minute order . . . really doesn't articulate precisely what the Judge stated, which was to make an exception of the residence, not just to eliminate the language of referring to residence in the

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<sup>1</sup> It appears that the court and defense counsel listened to a recording of the sentencing hearing in the previous case. According to Judge Scott, the recording indicated that a "[t]ypical search and seizure waiver was imposed. Then there was a request that the home be excluded from the waiver." Thereafter, the sentencing judge indicated that the residence would not be included in the search and seizure waiver. The prosecution indicated that the court's description of what was on the tape was an "accurate representation" of the recording.

condition. [¶] [W]e all understood the clerk put it down, it's accurate the way the clerk put it down, but it also [in]cludes any area under the control of the defendant which would include his residence, which was not how the Judge expected it to turn out . . . . But that is the language [as] it was put into the official record . . . , ultimately communicated to the officer who acted and relied upon it. And . . . he should be able to rely on official channels, and he should not be sanctioned for it."

### *Discussion*

#### *Denial of the Suppression Motion*

Appellant asserts that the lower court's denial of his suppression motion is reversible error because the prosecution did not present substantial evidence that the good faith exception to the Fourth Amendment warrant requirement applied to the warrantless search of his residence.

" 'In reviewing a suppression ruling, "we defer to the superior court's express and implied factual findings if they are supported by substantial evidence, [but] we exercise our independent judgment in determining the legality of a search on the facts so found." ' [Citation.] [¶] Thus, while we ultimately exercise our independent judgment to determine the constitutional propriety of a search or seizure, we do so within the context of historical facts determined by the trial court. 'As the finder of fact . . . the superior court is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable.' [Citation.] We review its factual findings ' " 'under the deferential substantial-evidence standard.' " ' [Citation.] Accordingly, '[w]e view the evidence in a light most favorable to the order denying the motion to suppress' [citation] and '[a]ny conflicts in the evidence are resolved in favor of the superior court's ruling.' [Citation.] Moreover, the reviewing court 'must accept the trial court's resolution of disputed facts and its assessment of credibility.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 979.) We review issues relating to the suppression of evidence derived

from police searches and seizures under federal constitutional standards. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1291.)

In relevant part, the Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (*Mapp v. Ohio* (1961) 367 U.S. 643, 646, fn. 4.) The purpose of this provision is to protect people from unreasonable search and seizure, and it applies to the states through the Fourteenth Amendment. (*Id.* at p. 650.) The remedy for a violation of the Fourth Amendment is to render inadmissible any evidence seized during the illegal search. (*Id.* at pp. 654–655.)

"In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation. [Citations.]" (*People v. Robles* (2000) 23 Cal.4th 789, 795.) Nonetheless, the scope of a permissible probation search is determined by reference to the probation order. (*People v. Bravo* (1987) 43 Cal.3d 600, 606.)

The "Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." (*Arizona v. Evans* (1995) 514 U.S. 1, 10 (*Evans*)). However, "[t]he exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect. [Citations.]" (*Id.* at pp. 10-11.)

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' [Citations.]" (*Evans, supra* 514 U.S. at p. 10.) "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served. [Citations.] Where 'the exclusionary

rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.' [Citation.]" (*Id.* at p. 11.)

The United States Supreme Court had applied these principles in *United States v. Leon* (1984) 468 U.S. 897 (*Leon*) to the context of a police search in which the officers had acted in objectively reasonable reliance on a search warrant, issued by a neutral and detached Magistrate, which later was determined to be invalid. (*Id.* at p. 905.) The court determined that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants. (*Id.* at pp. 916-917.) The *Leon* court noted that the exclusionary rule was historically designed "to deter police misconduct rather than to punish the errors of judges and magistrates." (*Id.* at p. 916.) Further, there was "no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors require[d] the application of the extreme sanction of exclusion." (*Ibid.*) Finally, and of greatest importance, the *Leon* court found that there was no basis for believing that "exclusion of evidence seized pursuant to a warrant [would] have a significant deterrent effect on the issuing judge or magistrate." (*Ibid.*)

The *Leon* Court went on to examine whether application of the exclusionary rule could be expected to alter the behavior of the law enforcement officers. (*Leon, supra*, 468 U.S. at pp. 919-920.) The *Leon* court concluded: "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.' [Citation.]" (*Id.* at pp. 919-920.) Thus, the *Leon* court concluded that the "marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant [could not] justify the substantial costs of exclusion." (*Id.* at p. 922.)

In *Massachusetts v. Sheppard* (1984) 468 U.S. 981 (*Sheppard*) the high court applied the rules articulated in *Leon, supra*, 468 U.S. 897, to a situation in which police officers seized items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge. (*Sheppard, supra*, 468 U.S. at pp. 983-984.) Having decided in *Leon* that the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid (*Sheppard*, at pp. 987-988), the court noted that the sole issue before the court was whether the officers reasonably believed that the search they conducted was authorized by a valid warrant. Specifically, the only question was whether there was an objectively reasonable basis for the officers' mistaken belief. (*Id.* at p. 988.)

The *Sheppard* court noted that the officers in this case took every step that could reasonably be expected of them. A detective prepared an affidavit which was reviewed and approved by the District Attorney. He presented that affidavit to a neutral judge. The judge concluded that the affidavit established probable cause to search Sheppard's residence, and informed the officer that he would authorize the search as requested. The officer then produced the warrant form and informed the judge that it might need to be changed. He was told by the judge that the necessary changes would be made. He then observed the judge make some changes and received the warrant and the affidavit. The *Sheppard* court concluded that at this point, a reasonable police officer would have concluded, as the officer did, that the warrant authorized a search for the materials outlined in the affidavit. (*Sheppard, supra*, at p. 989.)

The defendant in *Sheppard* argued that that since the officer knew the warrant form was defective he should have examined it to make sure that the necessary changes had been made. (*Sheppard, supra*, at p. 989.) The *Sheppard* court rejected this argument stating that the argument was based on the premise that the detective had a duty to disregard the judge's assurances that the requested search would be authorized and the

necessary changes would be made. The *Sheppard* court refused "to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." (*Id.* at pp. 989-990.)

The *Sheppard* court concluded, "Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." (*Sheppard, supra*, at pp. 990-991.)

In *Evans, supra*, 514 U.S. 1, the high court faced the question of whether evidence seized in violation of the Fourth Amendment by an officer who acted in reliance on a police record indicating the existence of an outstanding arrest warrant—a record that is later determined to be erroneous—had to be suppressed by virtue of the exclusionary rule regardless of the source of the error. The Supreme Court of Arizona had held that the exclusionary rule required suppression of evidence even though the erroneous information resulted from an error committed by an employee of the office of the clerk of the lower court. (*Id.* at pp. 3-4.) The high court disagreed. (*Id.* at p. 4.)

Applying the principles articulated in *Leon, supra*, 468 U.S. 897 the high court concluded that the decision of the Arizona Supreme Court had to be reversed. (*Evans, supra*, 514 U.S. at pp. 11-12.) The high court reasoned, "If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. [Citations.] Second, respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. [Citations.] To the contrary, the Chief Clerk of the Justice Court testified at the suppression hearing that this type of error occurred once every three or

four years. [Citation.] ¶ Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, see *Johnson v. United States*, 333 U.S. 10, 14, . . . (1948), they have no stake in the outcome of particular criminal prosecutions. [Citations.] The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed. [Citations.] ¶ If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer. As the trial court in this case stated: 'I think the police officer [was] bound to arrest. I think he would [have been] derelict in his duty if he failed to arrest.' App. 51. Cf. *Leon*, *supra*, 468 U.S., at 920, 104 S.Ct., at 3419 ('Excluding the evidence can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty.' ' quoting *Stone*, 428 U.S., at 540, 96 S.Ct., at 3073 (White, J., dissenting)). The Chief Clerk of the Justice Court testified that this type of error occurred 'on[c]e every three or four years.' App. 37. In fact, once the court clerks discovered the error, they immediately corrected it, [citation], and then proceeded to search their files to make sure that no similar mistakes had occurred, [citation]. There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record. Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees. [Citations.]" (*Evans*, *supra*, at pp. 14-16.)

"Although *Leon* examined and assessed the applicability of the exclusionary rule in the context of cases in which evidence had been seized by police officers pursuant to a search warrant, just as its reasoning has been applied to searches and seizures based upon statutory authority later declared unconstitutional (see *Illinois v. Krull* (1986) 480 U.S.

340, 349 . . . , 107 S.Ct. 1160, 1166–1167) and upon arrest warrants later found to be invalid (*People v. Palmer* (1989) 207 Cal.App.3d 663, 668–670 . . . ) so too its rationale applies to cases such as this where a recognized exception to a warrant is the basis for the search and seizure of the evidence sought to be suppressed. (See *People v. Barbarick* (1985) 168 Cal.App.3d 731, 739–740 . . . ) Generally, in each type of case, the justification for the search and seizure, although later found invalid, is reviewed anew to determine whether the exclusionary rule should apply. Since the rule's primary purpose is to 'deter future unlawful police conduct' [citation], such examination necessarily focuses on whether police misconduct was in fact involved in providing the basis for the search and seizure. [Citation.] To determine such, a court must generally ascertain and evaluate the facts about the police investigation, 'measured against a standard of objective reasonableness' [citation], and analyze such in light of the purposes of the exclusionary rule." (*People v. Downing* (1995) 33 Cal.App.4th 1641, 1651-1652.)

As the court below found, there is no doubt that a prior judge had specifically exempted appellant's residence from the search and seizure waiver and the cause of the Fourth Amendment violation was the failure of the court clerk to specifically note in the court's minute order that appellant's residence was exempted from the search and seizure waiver.<sup>2</sup> Since the source of the error here was the court clerk's minute order, the rule articulated in *Evans* that a categorical exception to the exclusionary rule for clerical errors of court employees must be applied. (*Evans, supra*, 514 U.S. at p. 16.)

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<sup>2</sup> The court below took judicial notice that the minute order "is available through J-Call or viewing by dispatch if one was to look." The court concluded that because the minute order language was similar to the language communicated to the officer by dispatch, the source of the error was the minute order. Defense counsel did not challenge this conclusion. We reject appellant's assertion that there was no evidence presented that the source of the error was the clerk's minute order. Given the fact that the language in the clerk's minute order was, in essence, nearly identical to the language that Officer Cruz-Gonzalez received from dispatch, we have no doubt there was sufficient evidence to support the conclusion that it was the clerk's minute order that was the source of the error.

Thus, the crux of this case is whether it was objectively reasonable for the officer to search appellant's residence in reliance on a court record that indicated the existence of a search and seizure waiver, which included any area over which appellant had "control." Applying the principles articulated in the foregoing cases, we conclude that it was.

The high court cases teach that "the standard of reasonableness" for determining an officer's good faith "is an objective one" that is, whether " 'the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional . . . .' " (*Leon, supra*, 468 U.S. at p. 919 & fn. 20.)

Similar to Judge Scott's conclusion, a common sense reading of—any area over which appellant had control—would include appellant's residence. Thus, there is no indication that Officer Cruz-Gonzalez was not acting objectively reasonably when he relied on the erroneous record to conclude that he could search appellant's residence without a warrant.

Even if we were to impute to Officer Cruz-Gonzalez the knowledge that appellant was maintaining that a warrant was needed to search his residence and he had the paper to show it, having been informed by official channels that the situation was to the contrary, the question under *Leon* is not whether further investigation should have been made, but whether a reasonable officer in the situation presented here would have believed that the probation and search waiver was in error. The question is whether the officer's reliance on court-generated data was objectively reasonable; the answer has to be yes. It would be too onerous on law enforcement to require that an officer faced with a facially valid probation search condition generated by the court exhaust all avenues of investigation and corroboration before conducting a search.

Whether evidence should be suppressed "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." (*Herring v. United States* (2009) 555 U.S. 135, 137 (*Herring*)). Accordingly, "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be

charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' [Citations.]" (*Illinois v. Krull, supra*, 480 U.S. at pp. 348–349.) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring, supra*, at p. 144.)

The conduct in this case does not rise to the level of deliberate, reckless, or grossly negligent conduct required by *Herring, supra*, 555 U.S. at page 144. Thus, as was the circumstance in *Leon*, "Penalizing the officer for the [court clerk's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." (*Leon, supra*, 468 U.S. at p. 921.)

In sum, the good faith exception to the exclusionary rule applies. Thus, we find no error in the trial court's denial of appellant's suppression motion.

#### *Alleged Ineffective Assistance of Counsel*

In addition to challenging the propriety of the search, appellant claims that his counsel was ineffective in failing to introduce any evidence at the suppression hearing that officers had in fact seized items from his apartment namely the firearm, cocaine and gang paraphernalia.

An ineffective assistance of counsel claim requires a showing that "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial." (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Since we have concluded that the court did not err in its denial of the suppression motion, even were we to assume that trial counsel's representation fell below an objective standard of reasonableness such assumed deficient performance was not prejudicial. It is therefore unnecessary to detail or address the arguments regarding the ineffective assistance claim. (See *In re Cox* (2003) 30 Cal.4th

974, 1019–1020 [court may dispose of ineffective assistance claim without addressing whether counsel's performance was deficient if no prejudice is established].)

*Penal Code Section 4019 Credits*

A criminal defendant is entitled to accrue both actual presentence custody credits under Penal Code section 2900.5 and conduct credits under Penal Code section 4019 for the period of incarceration prior to sentencing. Credits may be earned under Penal Code section 4019 by performing additional labor (Pen. Code, § 4019, subd. (b)) and by an inmate's good behavior. (Pen. Code, § 4019, subd. (c).) In both instances, the Penal Code 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. (Pen. Code, § 2900.5, subd. (a).)

After being arrested on April 1, 2011, appellant served two days in the Monterey County jail. When Judge Scott sentenced appellant on October 6, 2011, to 270 days in the county jail, he awarded appellant "two actual plus zero good time/work time, at 33 percent."

At the time appellant committed his crimes and was in custody Penal Code section 4019 provided: " (a) 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 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. [¶] (b) Subject to the provisions of subdivision (d), for each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶]

(c) For each six-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (d) Nothing in this section shall be construed to require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp. [¶] (e) No deduction may be made under this section unless the person is committed for a period of six days or longer. [¶] (f) It is the intent of the Legislature that if all days are earned under this section, a term of *six days* will be deemed to have been served for every *four days* spent in actual custody. [¶] (g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act."

(Italics added, Stats.2010, ch. 426, § 2, effective September. 28, 2010.)

Subsequently, Penal Code section 4019 was amended to provide, as relevant to this discussion that "(b) Subject to the provisions of subdivision (d), for each four-day

period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶]

(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (d) Nothing in this section shall be construed to require the sheriff, chief of police, or superintendent of an industrial farm or road camp to assign labor to a prisoner if it appears from the record that the prisoner has refused to satisfactorily perform labor as assigned or that the prisoner has not satisfactorily complied with the reasonable rules and regulations of the sheriff, chief of police, or superintendent of any industrial farm or road camp. [¶] (e) No deduction may be made under this section unless the person is committed for a period of four days or longer. [¶] (f) It is the intent of the Legislature that if all days are earned under this section, a term of *four days* will be deemed to have been served for every *two days* spent in actual custody. [¶] (g) The changes in this section as enacted by the act that added this subdivision shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after the effective date of that act. [¶] (h) The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp 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." (Italics added, Stats.2011-2012, 1st Ex.Sess., ch. 12, § 35, effective September 21, 2011, operative October 1, 2011, hereafter the October 1, 2011 amendment.)

With this background in mind, we turn to appellant's contention. Appellant contends that the prospective application of the October 1, 2011 amendment to Penal Code section 4019 to prisoners who committed crimes after that date violates the equal protection clause of United States and California Constitutions because there is no rational basis to treat the two similarly situated groups differently.

Appellant seeks the benefit of this amendment because he asserts that although under the version of Penal Code section 4019 that was in effect at the time he committed his crime he was not entitled to any conduct credit, the version of Penal Code section 4019 in effect at the time he was sentenced entitled him to two days of conduct credit for the two days of actual presentence custody that he served.

Citing *People v. Walkkein* (1993) 14 Cal.App.4th 1401 (*Walkkein*), respondent counters that appellant is not entitled to any conduct credits under either version of Penal Code section 4019. In *Walkkein*, the Attorney General had pointed out that both defendants were granted more conduct credit than they were entitled to. The abstract of judgment indicated each defendant spent 90 days in actual custody and each was granted 45 days of local conduct credit. (*Id.* at p. 1411.)

Applying subdivision (f) of the version of Penal Code section 4019 then in effect, the *Walkkein* court agreed with the Attorney General stating, "Section 4019 plainly provides that conduct credits are to be given in increments of four days and that no credit is awarded for anything less. (§ 4019, subd. (f), *People v. Bravo* (1990) 219 Cal.App.3d 729, 735 . . . ; *People v. Smith* (1989) 211 Cal.App.3d 523, 527 . . . .) Here each defendant was in actual custody for 90 days, that is, 22 periods of 4 days with 2 days left over. For each of these twenty-two periods of four days, each defendant was entitled to two days of conduct credit—one day for work and one day for compliance with rules and regulations. The total good time-work time credit to which each defendant was entitled under the statute was thus 22 days multiplied by 2, or 44 days." (*Walkkein, supra*, 14 Cal.App.4th at p. 1411.)

In his rely brief, citing *People v. Dieck, supra*, 46 Cal.4th 934 appellant maintains that respondent misconstrues the law with regard to Penal Code 4019.

In *Dieck*, the defendant was arrested on December 15, 2005, and spent five days in county jail before being released on his own recognizance on December 19, 2005. After a complaint was filed against the defendant alleging a variety of crimes, on February 8, 2006, the defendant pleaded no contest to felony receipt of stolen property in violation of Penal Code section 496, subdivision (a), and possession of concentrated cannabis in violation of Health and Safety Code section 11357, subdivision (a). Thereafter the defendant was sentenced to state prison for the midterm of two years for receiving stolen property in violation of section 496, subdivision (a), and to a consecutive term of one-third of the midterm, or eight months, for possession of concentrated cannabis in violation of Health and Safety Code section 11357, subdivision (a). Execution of the defendant's two year and eight month sentence was suspended, and he was placed on probation for five years, on condition that he serve 365 days in county jail, " 'with credit for time served of five days, based on actual time of five days, and no conduct credits.' " (*Dieck, supra*, 46 Cal.4th at p. 938.) Dieck appealed contending that under Penal Code section 4019, subdivision (f), he should have received a credit of seven days—two days of conduct credit in addition to the five days he actually served.<sup>3</sup> (*Ibid.*)

Our Supreme Court granted review to determine whether the defendant was entitled to conduct credit under Penal Code section 4019 based upon the five days he spent in custody prior to being committed to county jail for 365 days as a condition of probation. (*Dieck, supra*, at p. 938.) The Court of Appeal had concluded that Penal Code section 4019, subdivision (e) [which then provided that no deduction may be made

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<sup>3</sup> For purposes of the discussion in *Dieck* the version of Penal Code section 4019 then in effect was the version enacted before January 25, 2010. Under that version conduct credits could be accrued at the rate of two days for every four days of actual time served in presentence custody. (Stats.1982, ch. 1234, § 7, p. 4554 [Penal Code, former § 4019, subd. (f)].)

under this section unless the person is committed for a period of six days or longer], precluded the defendant from receiving conduct credit for the five days he had served because he had not spent six days in presentence custody. (*Id.* pp. 938-939.)

The *Dieck* court disagreed, reasoning, "While we agree that section 4019 is susceptible of only one reasonable interpretation, we conclude, contrary to the Court of Appeal's construction, that section 4019, subdivision (e) sets forth a minimum duration of ordered commitment, not a minimum term of presentence incarceration. A defendant who spends at least four days in presentence custody is entitled to conduct credit under section 4019 if that defendant is sentenced or otherwise 'committed' (as described below) for a period of at least six days, assuming he or she satisfies the eligibility criteria set forth in the statute. [¶] Proper interpretation of section 4019 rests on the difference between the terms 'committed' and 'confined.' A defendant is not entitled to conduct credit unless he or she 'is committed for a period of six days or longer.' (§ 4019, subd. (e).) 'Committed,' as relevant here, means a judicial officer's order sending a defendant to jail, prison, or other form of qualifying confinement. [Citations.] Thus, a defendant is not entitled to conduct credit unless his or her *total commitment* (be it a sentence, probation condition, judgment of imprisonment, or other enumerated form of commitment set forth in section 4019 subdivision (a)(1)-(4)) is at least six days. In contrast, the term 'confinement' is defined as 'the state of being imprisoned or restrained.' [Citation.] Subdivision (e), which uses the word 'committed' but not the word 'confined,' requires only that a person be *ordered to spend* at least six days in custody before the statute is applicable, not that a person must actually spend a full six days in custody prior to sentencing." (*Dieck, supra*, at p. 940.)

As can be seen, *Dieck* and *Walkkein* were interpreting two different sections of Penal Code section 4019—*Dieck* subdivision (e) and *Walkkein* subdivision (f). However, in *Dieck*, the Supreme Court impliedly agreed with *Walkkein* when the court stated, "A defendant who spends at least four days [i.e. a minimum of four days] in presentence

custody is entitled to conduct credit under section 4019 . . . ." (*Dieck, supra*, at p. 940.) Of course, at the time *Dieck* and *Walkkein* were decided Penal Code section 4019, subdivision (f) provided "It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Added by Stats.1976, ch. 286, § 4, p. 595. Amended by Stats.1978, ch. 1218, § 1, p. 3941; Stats.1982, ch. 1234, § 7, p. 4553.)

However, if appellant were entitled to have the October 1, 2011 amendment to Penal Code section 4019 applied to him he would be entitled to two days of conduct credit for every two days spent in presentence custody based on the Legislature's intent "that if all days are earned under this section, a term of four days will be deemed to have been served for every *two days* spent in actual custody." (October 1, 2011 amendment to Penal Code section 4019, subd. (e).)

Accordingly, we turn to appellant's equal protection argument.

Preliminarily, we note that to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837.)

In *In re Kapperman* (1994) 11 Cal.3d 542 (*Kapperman*), the Supreme Court reviewed a provision (then-new Penal Code section 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Id.* at pp. 544–545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.)

Appellant argues that even though *Kapperman* addressed the application of actual custody credits, *Kapperman's* "reasoning is commanding" because its "rationale captures the heart of the matter . . . ."

In our view, *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

Our Supreme Court recently confirmed, "[c]redit 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." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).

Although the Supreme Court in *Brown* was concerned with the January 2010 amendment to section 4019 (*Brown, supra*, 54 Cal.4th at p. 318), the reasoning of *Brown* applies with equal force to the prospective-only application of the October 1, 2011 version of section 4019.

In *Brown*, the California Supreme Court expressly determined that *Kapperman* does not support an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 328–330.) In rejecting the defendant'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*, at pp. 328–329.)

More importantly, in *Brown*, the Supreme Court affirmed that the October 2011 amendment to Penal Code section 4019 have prospective application only. The court noted that the defendant had filed a supplemental brief in which he contended that he was

entitled to retroactive presentence conduct credits under the 2011 amendment to Penal Code section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply *prospectively* . . . to prisoners who are confined to a county jail [or other local facility] *for a crime committed [on] or after October 1, 2011.*' (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn 11.) Similarly, here, appellant committed his offense before October 1, 2011.<sup>4</sup>

Accordingly, we reject appellant's equal protection challenge to the October 1, 2011 amendment to Penal Code section 4019.

#### *Probation Condition*

Appellant contends that the lower court erred when it imposed an unconstitutionally vague probation condition. Specifically, appellant argues that the condition that states that he must "not use or possess alcohol/narcotics, intoxicants, drugs, or controlled substances without the prescription of a physician" is unconstitutionally vague because it lacks a knowledge requirement. Although the court did not designate a number to this condition, it was given the number seven in both the probation officer's report and the minute order from the sentencing hearing.

At the outset, we point out that the condition as announced by the court was as follows: "Not use or possess narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances." Appellant does not

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<sup>4</sup> Respondent cites to *People v. Borg* (2012) 204 Cal.App.4th 1528 and *People v. Olague* (2012) 205 Cal.App.4th 1126 to argue that the October 1, 2011 amendment to Penal Code section 4019 does not violate equal protection. The Supreme Court has granted review in *Olague* (review granted Aug. 8, 2012, S203298) and *Borg* (S202328, review granted July 18, 2012). An opinion is no longer considered published if the Supreme Court grants review (Cal. Rules of Court, rule 8.1105(e)(1)) and may not be relied on or cited. (Cal. Rules of Court, rule 8.1115(a).)

challenge the second half of this condition regarding trafficking in controlled substances. Further, as announced by the court there is no restriction on appellant possessing or using alcohol. Although the minute order from the sentencing hearing indicates in condition seven that appellant must "Not use or possess alcohol/narcotics . . . without the prescription of a physician" that is not what the court ordered. The minute order does not control. Any discrepancy is deemed to be the result of clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Price* (2004) 120 Cal.App.4th 224, 242.) "[T]he clerk's minutes must accurately reflect what occurred at the hearing." (*People v. Zachary* (2007) 147 Cal.App.4th 380, 388.) "The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment. [Citation.]" (*Id.* at pp. 387-388.)

Even though appellant did not object to the condition at issue when it was imposed, the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 888–889 (*Sheena K.*).

While recognizing this general rule, respondent asserts that the exception should not be extended to cases where the challenged probation condition does not implicate First Amendment rights. Alternatively, respondent invites this court to adopt the approach of the Third District Court of Appeal in *People v. Patel* (2011) 196 Cal.App.4th 956, 960-961, wherein the court concluded that it will no longer entertain challenges to probation conditions lacking an explicit knowledge requirement and will simply " 'construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly.' "

We decline respondent's invitation on both counts. Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and the remedy it

mandated was unequivocal: "[W]e agree with the Court of Appeal *that modification to impose an explicit knowledge requirement is necessary to render the condition constitutional.*" (*Sheena K., supra*, 40 Cal.4th at p. 892, italics added.) Until our Supreme Court rules differently, we will follow its lead on this point. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Since probation conditions that implicate constitutional rights must be narrowly drawn, the knowledge requirement in some probation conditions "should not be left to implication." (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) Absent a requirement that appellant know he is disobeying the condition, he is vulnerable, and unfairly so, to punishment for unwitting violations of it. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628–629.) An appellate court is empowered to modify a probation condition in order to render it constitutional. (*Sheena K., supra*, 40 Cal.4th at p. 892.)

In this case, we will modify probation condition seven to include a knowledge requirement. As announced by the court, condition seven prohibits appellant from using or possessing "narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician." Further, unless we assume the trial court used the word "drugs" as a synonym for controlled substances, the condition as announced can be understood to include within its ambit legal nonprescription medications such as aspirin. There is no indication in the record that the trial court intended any such result. Inserting the adjective "unlawful" before "drugs" renders the probation condition unintelligible because it would forbid appellant from using, or possessing unlawful drugs unless he had a prescription from a physician. The reference to "drugs" as a synonym for controlled substances adds nothing to the probation condition. Therefore, for the sake of clarity, in addition to adding a knowledge requirement we will modify the condition to delete the superfluous reference to "drugs."

*Disposition*

Probation condition number seven is modified to read as follows. Not knowingly use or possess narcotics, intoxicants, or other controlled substances without the prescription of a physician. As so modified the judgment (order of probation) is affirmed. The clerk of the court is directed to amend the sentencing minutes to reflect the modification.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MÁRQUEZ, J.