

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

THEODORE JOHNSON,

Defendant and Appellant.

H037643

(Monterey County
Super. Ct. No. SS092170A)

Defendant Theodore Johnson appeals after conviction of discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3, subd. (a)),¹ threatening an executive officer (§ 69), and unlawful firearm activity (former § 12021, subd. (c)(1)). He was placed on probation for three years.

On appeal, defendant contends: (1) the trial court erred by terminating his self-representation on the day that his trial was scheduled to begin; (2) the trial court erred by denying his motion to quash the search warrant; (3) there was insufficient evidence to support his conviction of discharging a firearm in a grossly negligent manner; (4) the trial court erred by imposing a condition of probation that precludes him from associating with people that he knows or “reasonably should know” to be on probation or parole; and (5) he is entitled to additional custody credits under the October 1, 2011 version of section 4019.

¹ Unspecified section references are to the Penal Code.

For reasons that we will explain, we will affirm the judgment.

BACKGROUND

A. The August 26, 2009 Incident

On August 26, 2009, defendant's daughter Chantea Johnson² and her boyfriend Marque Bullock were living at defendant's home on Larkin Street in Salinas. Chantea and Bullock stayed in a room that was detached from the main house.

Between 11 a.m. and noon, Bullock went into the main house. He walked through the garage, where defendant was smoking with a friend. Bullock said, "What's up," to defendant but did not really "acknowledge him." Defendant apparently felt disrespected.

Defendant came out to the detached room, carrying a gun. He was cursing at Bullock and "really mad." He told Chantea and Bullock that they had to leave that day. While speaking, he was swinging the gun back and forth, pointing it at Chantea and Bullock. He then fired it into the ceiling. The bullet left a hole in the ceiling.

Chantea and Bullock packed up some belongings and left. Chantea later called 911, reporting that defendant had "pulled a gun on [her] and [her] boyfriend" and that he had "shot it off."

Salinas Police Sergeant Sheldon Bryan was dispatched to defendant's house. When he arrived at about 12:45 p.m., he first made contact with a woman in the house. He asked her to have defendant step outside, but defendant did not. The officers then entered the house and found defendant lying on a bed in his bedroom. Only one of defendant's hands was visible, so Sergeant Bryan ordered him to show his other hand. Defendant did not comply until Sergeant Bryan threatened to use his Taser.

After defendant was handcuffed, he was "extremely agitated" and hostile. Sergeant Bryan placed defendant in a patrol car and attempted to read him the *Miranda*

² Since defendant and Chantea Johnson have the same surname, we will refer to Chantea by her first name for purposes of clarity and not out of disrespect.

advisements,³ but defendant “continuously interrupted.” He also threatened Sergeant Bryan, saying, “I’m going to get you, I’m going to get you and your family.”

Sergeant Bryan took defendant to the police station, then got a search warrant for the residence. He returned to the house, which had been “frozen,” with officers stationed to prevent anyone from entering it. He found a .357-caliber pistol in defendant’s bedroom and a rifle inside the garage. The pistol was fully loaded. One bullet had been expended.⁴

Inside the detached room, Sergeant Bryan saw drywall dust on the ground directly beneath the bullet hole. Another officer who had been in charge of photographing evidence did not observe any drywall dust. Sergeant Bryan did not make any effort to retrieve the bullet for comparison with the gun, because the damage caused to the home would have outweighed any evidentiary value of the bullet.

B. Charges, Trials, and Sentencing

Defendant was charged by amended information with assault with a firearm (counts 1 and 2; § 245, subd. (a)(2)), discharging a firearm in a grossly negligent manner (count 3; § 246.3, subd. (a)), resisting an executive officer (count 4; § 69), and unlawful firearm activity (count 5; former § 12021, subd. (c)(1)).

At a first jury trial, the jury failed to reach a verdict on counts 1 through 3 (the two assaults and discharging a firearm in a grossly negligent manner), but it found defendant guilty of counts 4 and 5 (resisting an executive officer and unlawful firearm activity).⁵ At a second jury trial, the jury failed to reach a verdict on counts 1 and 2 (the two assaults),

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ A second cylinder, which preceded the one with the expended bullet, had a “primer strike,” indicating an unsuccessful attempt to fire it. However, Chantea and Bullock only saw defendant pull the trigger one time.

⁵ To prove defendant guilty of unlawful firearm activity (count 5; former § 12021, subd. (c)(1)), the prosecution introduced evidence that defendant had a misdemeanor battery conviction.

but it found defendant guilty of count 3 (discharging a firearm in a grossly negligent manner).

At the sentencing hearing held on October 26, 2011, the trial court dismissed counts 1 and 2. It suspended imposition of sentence and placed defendant on probation for three years. As a condition of probation, defendant was ordered to serve 200 days in county jail.

DISCUSSION

A. Termination of Self-Representation

Defendant contends the trial court erred by terminating his right to self-representation on the day set for trial.

1. Proceedings Below

At the March 18, 2010 pretrial conference, defendant moved to represent himself. (See *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)). The trial court granted defendant's motion, and defendant represented himself at the next few hearings.

On November 8, 2010, the day set for jury trial, defendant continued to represent himself. However, he rambled on about extraneous issues and talked over the judge and prosecutor. The trial court warned defendant that at trial, he would not be able to "stand up and make speeches" whenever he wanted to.

After a recess, the trial court commented, "Mr. Johnson, I understand you've been doing a little drinking this morning." Defendant responded, "Yes, sir, I have." Defendant denied drinking every morning, stating he had done so that morning because he was "stressing." At that point, defendant also informed the trial court that he had a "condition." He also told the trial court that he was disabled and that he took "plenty" of medications on a daily basis, including sleeping pills, Trazodone, Hydrocodone, and Oxycodone.

The trial court found it was not “appropriate” for defendant to continue representing himself. Defendant agreed, commenting, “Yeah, I know – I know what you’re saying” The trial court told him, “[Y]ou’re intoxicated. I can’t proceed with the trial.” Defendant noted there was “no jury here” anyway, but the trial court informed him that a jury could be brought in. Defendant then indicated he was “satisfied” with the trial court’s decision.

The trial court specified, “Given your medical situation, combined with your use of alcohol, the Court doesn’t feel you’re competent to represent yourself.” The trial court noted, “[T]his could recur at any time.”

After the trial court reappointed the Public Defender, it reiterated its finding that defendant was not competent to represent himself, noting, “certainly, today you’re not.” Defendant asked, “Well, how about in [the] future?” The trial court told defendant, “No.” The trial court explained, “[I]f you decide you’re stressed on the morning of trial, you’re going to drink alcohol or take some medication or do something else” Defendant later told the trial court he had intended to come to court sober, “but being stressed out is not a good idea.”

2. *Faretta* Standards

Under the Sixth Amendment of the United States Constitution, a criminal defendant has the right to self-representation at trial. (*Faretta, supra*, 422 U.S. at p. 819; *People v. Marshall* (1997) 15 Cal.4th 1, 20.) Generally, “[a] trial court must grant a defendant’s request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his [or her] request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he [or she] must make his [or her] request unequivocally. [Citations.] Third, he [or she] must make his [or her] request within a reasonable time before trial. [Citations.]” (*People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*).

Although a defendant may initially be granted the right to self-representation, that right may be terminated by the trial court if the defendant “engages in serious and obstructionist misconduct.” (*Faretta, supra*, 422 U.S. at p. 834, fn. 46.) *Faretta* stated: “The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.” (*Ibid.*) A defendant is entitled to self-representation only if he or she “is able and willing to abide by rules of procedure and courtroom protocol.” (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173.) In determining whether to terminate a defendant’s self-representation, “a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant’s right to self-representation and the exercise of that discretion ‘will not be disturbed in the absence of a strong showing of clear abuse.’ [Citations.]” (*Welch, supra*, 20 Cal.4th at p. 735.)

3. Acquiescence

The Attorney General argues that defendant acquiesced in the trial court’s ruling and that he is therefore barred from raising this claim on appeal. The Attorney General cites *People v. Rudd* (1998) 63 Cal.App.4th 620 (*Rudd*), where the court noted that “the Sixth Amendment self-representation right does not exist when a defendant prior to or during trial acquiesces in the assignment or participation of counsel in the defense. [Citation.]” (*Id.* at p. 631.) In *Rudd*, the trial court revoked the defendant’s pro per status due to his unpreparedness on the day of trial. The appellate court found that by saying nothing, the defendant had acquiesced in the trial court’s ruling, observing that “under certain circumstances waiver or forfeiture of the self-representation right can occur simply when no objection is interposed. [Citation.]” (*Ibid.*)

In this case, defendant did not say nothing, as in *Rudd*. Initially, he appeared to acquiesce in the trial court's ruling, by commenting, "Yeah, I know – I know what you're saying" and indicating he was "satisfied" with the trial court's decision. However, defendant later asked whether he would be permitted to represent himself "in [the] future." Under the circumstances, we decline to find that defendant acquiesced in the trial court's decision to revoke his pro per status for the rest of the trial.

4. Analysis

Defendant contends that one instance of being intoxicated in court was not grounds for terminating his right of self-representation. He argues that the trial court was only entitled to terminate his right of self-representation if it found defendant had engaged in a pattern of disruptiveness or misconduct.

Defendant notes that "a number of instances" of disruptive conduct led the court to deny a *Faretta* motion in *Welch, supra*, 20 Cal.4th at page 735. He notes the same was true in *United States v. Brock* (7th Cir. 1998) 159 F.3d 1077 (*Brock*). But neither case states that a trial court may not terminate a defendant's right to self-representation based on one instance of disruptive conduct.

In *Welch*, the court upheld the denial of a *Faretta* motion where the defendant had engaged in disruptive behavior on a number of occasions. The court commented, "[W]hile no single one of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive." (*Welch, supra*, 20 Cal.4th at p. 735.) In *Brock, supra*, 159 F.3d at page 1078, the trial court terminated the defendant's right of self-representation because the defendant had engaged in "obstreperous conduct" on several occasions, even after being cited for contempt. The *Brock* court upheld the trial court's ruling, explaining that a defendant may lose the right of self-representation at any

time, if the trial court finds that his or her “obstreperous behavior is so disruptive that the trial cannot move forward.” (*Id.* at p. 1079.) The *Brock* court further explained that a trial court is entitled to terminate a defendant’s self-representation if, based on the defendant’s past behavior, there is “a strong indication” that the defendant will continue to be disruptive. (*Id.* at p. 1080.)

Here, defendant was so intoxicated on the day of trial that he was disruptive, talking over the judge and rambling on about irrelevant matters. His intoxication and behavior precluded the trial court from calling in the jury to start trial. Defendant also informed the trial court that he typically drinks alcohol when he is stressed out. Based on this information, the trial court could reasonably decide that the stress of a trial would likely cause defendant to become intoxicated again, and thus that he would “remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation.” (*Welch, supra*, 20 Cal.4th at p. 735.) The record provides a basis for the trial court to find “a strong indication” that defendant would continue to be disruptive if permitted to continue representing himself. (*Brock, supra*, 159 F.3d at p. 1080.) Under the circumstances, the trial court was well within its discretion in terminating defendant’s right of self-representation.

B. Motion to Quash Search Warrant

Defendant contends the trial court erred by failing to quash the search warrant, which was issued without a magistrate’s signature, and by failing to suppress the evidence obtained pursuant to the warrant. Respondent contends the magistrate’s failure to sign the warrant was a technical defect, and that the search was conducted in good faith.

1. Proceedings Below

At the March 18, 2010 pretrial conference where defendant first began representing himself, he moved to quash the search warrant. (See § 1538.5.) He argued

that the warrant was invalid because the magistrate failed to sign the warrant. The People filed a response to defendant's motion to quash, and the trial court held a hearing on June 17, 2010.

At the hearing on the motion, Judge Mark Hood testified. He had been the magistrate at the time Sergeant Bryan applied for the warrant. He remembered the warrant because it was for a home on Larkin Street, and Judge Hood had once lived near Larkin Street in San Francisco. Judge Hood also recognized his own handwriting on the warrant and saw his initials in the lower left-hand corner of each page. His practice was to initial every page to ensure he had read each one.

Judge Hood recalled that he had verbally "informed the deputy that [he] did find in fact there was probable cause to issue the warrant." He had reviewed the application, sworn the deputy in, then handed the warrant back to the deputy so he could sign the affidavit. Pursuant to his regular practice, Judge Hood had next looked for his initials and the deputy's signature, then filled out the date and time. At that point, he may have gotten distracted by a question or phone call, because he intended to sign the warrant but failed to do so. If he had not intended to sign it, he would not have dated it or sworn the deputy in.

Deputy Bryan also testified at the hearing on the motion to quash. He had prepared the search warrant and affidavit and brought it to Judge Hood. He had been sworn in and questioned by the judge, then signed the affidavit in the judge's presence. He left with what he thought was a signed search warrant.

After the search, Deputy Bryan returned to the police department to process evidence. While filling out the search warrant return, he noticed that Judge Hood had not signed the warrant. He called the judge's chambers and the court clerk to notify them of the omission, and he noted it in his report.

After hearing the testimony of Judge Hood and Deputy Bryan, the trial court denied the motion to quash. The trial court found that "it was an oversight by the judge."

The trial court further found that even if the warrant was invalid, the search had been conducted in good faith. It therefore declined to suppress the evidence obtained during the search.

2. Standard of Review

In determining whether the trial court properly denied a motion to quash a search warrant and suppress evidence, we apply a well-established standard of review: “We defer to the trial court’s express and implied factual findings if supported by substantial evidence, but we independently determine the legality of the search under the Fourth Amendment. [Citation.]” (*People v. Eubanks* (2011) 53 Cal.4th 110, 133.)

3. Analysis

The Fourth Amendment to the Constitution of the United States provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Although the Fourth Amendment does not specifically require that a warrant be signed by a magistrate (*People v. Superior Court (Robinson)* (1977) 75 Cal.App.3d 76, 80), defendant points out that a number of California statutes do set forth such a requirement. Section 1523 defines a search warrant as “an order in writing, in the name of the people, signed by a magistrate” Section 1528, subdivision (a) provides that a magistrate must issue a warrant “signed by him or her with his or her name of office,” upon finding probable cause to issue the warrant. Under section 1526, subdivision (b)(2)(C)(i), when an officer presents a search warrant affidavit by electronic method, the magistrate is required to “[s]ign the warrant.” These same statutes, however, provide that a magistrate’s personally written signature is not required in every case. Under section 1528, subdivision (b), the magistrate may “orally authorize a peace officer to sign the magistrate’s name on a duplicate original warrant.” Section 1526,

subdivision (b)(2)(C)(i) permits the magistrate's signature to "be in the form of a digital signature or electronic signature."

Generally, the procedures outlined in these statutory enactments are "ministerial in nature." (*People v. Guillebeau* (1980) 107 Cal.App.3d 531, 555.) While "[c]ompliance with the requisites of the statute must be adhered to in order to insure adequate judicial supervision and control to preserve the constitutional guarantees [citation]," a search is not invalidated by "[t]echnical defects in the procedure." (*People v. Sanchez* (1982) 131 Cal.App.3d 323, 329.) Based on this principle, cases from this state and other jurisdictions have found that a magistrate's inadvertent failure to sign a search warrant, after finding probable cause for its issuance, does not invalidate a subsequent search conducted pursuant to the warrant.

In *Sternberg v. Superior Court* (1974) 41 Cal.App.3d 281 (*Sternberg*), the facts were nearly identical to those in this case. The officer prepared a search warrant affidavit, swore to its content, and signed it in the presence of the magistrate. The magistrate read and signed the affidavit, and he orally authorized the issuance of a search warrant, but he failed to sign the warrant itself. The magistrate's failure to sign the warrant was due to his "shock and surprise" at noticing that a barber shop he frequented was one of the premises mentioned in the affidavit. (*Id.* at p. 284.) As in this case, the officers "took the search warrant, fully believing it had been signed," and executed it, but later discovered the missing signature. (*Id.* at p. 285.)

The *Sternberg* court found that the search conducted pursuant to the unsigned warrant was in "compliance with the constitutional requirements," since the magistrate had reviewed the affidavit and found probable cause for issuance of the search warrant. (*Sternberg, supra*, 41 Cal.App.3d at p. 289.) The court further noted that if the residents had challenged the warrant at the time it was being executed, the police could have quickly remedied the deficiency by securing the magistrate's signature at that time, or by

securing “authorization to insert his name under the duplicate original warrant procedure authorized by subdivision (b) of section 1528.” (*Id.* at p. 290.)

California cases have followed *Sternberg*, and cases from other jurisdictions are in accord. (See, e.g., *People v. Superior Court (Robinson)*, *supra*, 75 Cal.App.3d at p. 79; *State v. Huguenin* (1995) 662 A.2d 708, 711 [“A warrant, that is supported by probable cause and otherwise valid is not void merely because of an inadvertent failure to sign it.”]; *Commonwealth v. Pellegrini* (1989) 539 N.E.2d 514, 517.)

The *Sternberg* court further concluded that even if the warrant was “insufficient on its face,” the defendant’s motion would still have been properly denied, since the officers “acted in good faith without actual knowledge of the defect.” (*Sternberg, supra*, 41 Cal.App.3d at p. 292.) The court held that under the circumstances, “the purposes of the exclusionary rule will not be served by its application to the technically defective search which was effected in this case.” (*Id.* at p. 294.)

Defendant acknowledges that the trial court’s ruling in this case is consistent with *Sternberg*, but argues that *Sternberg* was wrongly decided. He points out that in *United States v. Leon* (1984) 468 U.S. 897 (*Leon*), the high court held that the good faith exception to the exclusionary rule does not apply when the warrant is “so facially deficient” that “the executing officers cannot reasonably presume it to be valid.” (*Id.* at p. 923.)

Although *Sternberg* predated the United States Supreme Court’s decision in *Leon*, its conclusion is consistent with the results reached in post-*Leon* cases. For instance, in *United States v. Kelley* (5th Cir. 1998) 140 F.3d 596, the court upheld the denial of a motion to suppress based on the magistrate’s failure to sign the warrant: “Because the objective criteria for the search warrant—probable cause—existed and the warrant was flawed only due to the inadvertence of the magistrate, we hold that the good-faith exception to the exclusionary rule applies.” (*Id.* at p. 603.)

In this case, the magistrate found probable cause to issue the search warrant and so informed Deputy Bryan. The record supports the trial court’s finding that the magistrate’s failure to sign the warrant was due to inadvertence and that Deputy Bryan conducted a search in good faith reliance on the warrant, without knowledge or reckless disregard for the fact that it lacked the magistrate’s signature. Under the circumstances and based on the case law discussed above, the trial court properly denied defendant’s motion to quash.

C. Sufficiency of the Evidence – Negligent Discharge of Firearm

Defendant contends there is insufficient evidence to support his conviction of count 3, discharging a firearm in a grossly negligent manner. (§ 246.3, subd. (a).) Specifically, defendant argues that there is no substantial evidence that he acted with gross negligence.

1. Standard of Review

In reviewing a claim of insufficiency of the evidence on appeal, “ ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) “An appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.)

2. Analysis

“[T]he elements of section 246.3(a) are: ‘(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person.’ [Citations.]” (*People v. Ramirez* (2009) 45 Cal.4th 980, 986 (*Ramirez*), quoting *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538 (*Alonzo*).)

In *Ramirez*, the court explained that the Legislature enacted section 246.3 to criminalize “celebratory gunfire in an urban setting,” which “could cause injury or death.” (*Ramirez, supra*, 45 Cal.4th at p. 990.) The court rejected the argument that the statute requires “proof that a given person was actually so endangered,” since “[n]o one knows where shots fired recklessly into the air are likely to land.” (*Ibid.*)

In *Alonzo*, the defendant pointed a gun straight up into the air outside of a 7-Eleven store, firing it two times. The store was located in a busy area and there had been a lot of pedestrian traffic going in and out of the store. The Court of Appeal affirmed the denial of the defendant’s section 995 motion, finding that his “grossly negligent behavior could have resulted in injury or death to a person.” (*Alonzo, supra*, 13 Cal.App.4th at p. 540.)

Defendant contends that in this case, there is no substantial evidence to support the jury’s finding that his act of shooting the gun into the ceiling had the potential for injuring anyone. He claims that *Alonzo* is distinguishable, because “[u]nlike shooting a gun into the sky, where the bullet will again fall and might injure someone, Johnson’s act was unlikely to result in a stray bullet.”

We disagree that defendant’s act of shooting at a ceiling did not have the potential for injuring anyone. The California Supreme Court has found that shooting into an inhabited dwelling house is *inherently* dangerous and does not depend on evidence that persons were present. (*People v. Hansen* (1994) 9 Cal.4th 300, 310, overruled on other grounds by *People v. Chun* (2009) 45 Cal.4th 1172, 1199.) Likewise, “shooting at an occupied motor vehicle involves a clear danger to human life,” even if the shots are “fired at portions of a car, such as the wheels, in a manner that presents no risk to the car’s occupants.” (*People v. Tabios* (1998) 67 Cal.App.4th 1, 10, disapproved on other grounds by *People v. Chun, supra*, 45 Cal.4th at p. 1199.) And, as noted above, in *Ramirez, supra*, 45 Cal.4th at page 990, the court confirmed that section 246.3 does not

require proof that a given person was actually endangered or proof of where shots fired will end up.

In this case, we determine there is sufficient evidence to uphold the jury's finding that defendant's act of shooting into the ceiling "could have resulted in injury or death to a person." (*Alonzo, supra*, 13 Cal.App.4th at p. 540.) The prosecution was not required to prove exactly how firing the gun into the ceiling could have caused injury. Based on the evidence introduced at trial, it would not be speculative to find, for instance, that a bullet could have ricocheted off the ceiling or dislodged a fixture. Thus, the jury reasonably found that defendant's act of firing the gun was grossly negligent and "could have resulted in injury or death to a person." (*Ibid.*)

D. Probation Condition

As a condition of probation, the trial court ordered that defendant "not associate with any individual you know, reasonably should know or are told by probation to be on any form of probation or parole supervision." Defendant contends this condition is unconstitutionally vague.⁶

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.]" (*Sheena K., supra*, 40 Cal.4th at p. 890.)

In *Sheena K.*, the California Supreme Court considered a probation condition that ordered the defendant not to associate with anyone " 'disapproved of by probation.' "

⁶ Both parties note that defendant did not object to the probation condition in the trial court, but that no objection was required to preserve defendant's vagueness challenge to the probation condition. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); *People v. Leon* (2010) 181 Cal.App.4th 943, 949.)

(*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The court found that “in the absence of an express requirement of knowledge,” the probation condition was unconstitutionally vague. (*Id.* at p. 891.) This court reached a similar result in *People v. Leon*, where the challenged probation condition ordered: “ ‘No association with gang members.’ ” (*People v. Leon*, *supra*, 181 Cal.App.4th at p. 949.) This court found the probation condition constitutionally defective because it “lack[ed] an explicit knowledge requirement.” (*Id.* at p. 950.) Without the knowledge qualification, the condition rendered the defendant “vulnerable to criminal punishment for ‘associating with persons not known to him to be gang members.’ [Citation.]” (*Ibid.*) Therefore, this court ordered the probation condition modified to read as follows: “ ‘You are not to associate with any person you know to be or the probation officer informs you is a member of a criminal street gang.’ ” (*Ibid.*, fn. omitted.)

In this case, the issue is not the absence of an express knowledge requirement, but the insertion of a constructive knowledge requirement. Defendant contends the inclusion of the phrase “reasonably should know” fails to provide him with fair warning. He argues that as worded, the condition does not tell him how certain he must be of a person’s probation or parole status.

The use of the phrase “suspect” rendered a probation condition invalid in *People v. Gabriel* (2010) 189 Cal.App.4th 1070 (*Gabriel*). The probation condition ordered the defendant not to “ ‘be present in any area you know, suspect, or are told by the [p]robation [o]fficer to be a gang-gathering area’ ” and not to “ ‘associate with any individuals you know or suspect to be gang members, drug users, or on any form of probation or parole supervision.’ ” (*Id.* at p. 1073.) This court ordered the condition modified to delete the phrase “suspect,” noting that “suspect” means “ ‘to imagine (one) to be guilty or culpable on slight evidence or without proof’ or ‘to imagine to exist or be true, likely, or probable.’ [Citation.]” (*Ibid.*) This court found that the word “suspect” failed to provide the defendant “with adequate notice of what is expected of him when he

lacks actual knowledge that a person is a gang member, drug user, or on probation or parole,” and it also rendered the condition “insufficiently precise for a court to determine whether a violation has occurred.” (*Ibid.*)

In contrast to the term “suspect” (*Gabriel, supra*, 189 Cal.App.4th at p. 1073), the phrase “reasonably should know” imposes an objective standard and requires a minimal level of objective justification. The word “reasonable” means “being in accordance with reason.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1999) p. 974 (Webster’s).) The word “should” has the function of “express[ing] obligation.” (Webster’s at p. 1085.) Thus, in the probation condition at issue, the phrase “reasonably should know” requires defendant to stay away from an individual who he has a rational ground to know has a certain status – i.e., that of being on probation or parole.

The phrase used here – “reasonably should know” – was ordered included in a probation condition in *People v. Turner* (2007) 155 Cal.App.4th 1432 (*Turner*). The original probation condition ordered that the defendant “ ‘[n]ot associate with persons under the age of 18 unless accompanied by an unrelated responsible adult.’ ” (*Id.* at p. 1435.) The *Turner* court held that as phrased, the condition did “not pass constitutional muster under the vagueness doctrine.” (*Ibid.*) The court explained, “A person may reasonably not know whether he or she is associating with someone under the age of 18. Fair notice, as described in *Sheena K.*, is not possible unless the probation condition is modified to require that defendant must either know *or reasonably should know* that persons are under 18 before he is prohibited from associating with them.” (*Id.* at p. 1436, italics added.)

Respondent points out that the *Turner* court included the phrase “ ‘reasonably should know’ ” to ensure that probation condition passed constitutional muster. (*Turner, supra*, 155 Cal.App.4th at p. 1436.) Defendant, however, argues that *Turner* is distinguishable: “A person can look like a minor, or sound like a minor, or act like a minor: a person’s skin, height, voice, and manner may all help someone reasonably

guess whether they are over or under 18 years old. But there is no way to look at or hear a person, and know whether they are on probation or parole.”

In the context of penal statutes, courts have determined that culpability based on the “reasonably should know” constructive knowledge standard is not vague. For instance, in *In re Jorge M.* (2000) 23 Cal.4th 866, the California Supreme Court determined that proving a violation of the Assault Weapons Control Act (AWCA) required showing “that a defendant charged with possessing an unregistered assault weapon *knew or reasonably should have known* the characteristics of the weapon bringing it within the registration requirements of the AWCA.” (*Id.* at pp. 869-870.) Courts have likewise upheld the constitutionality of penal statutes that refer to a person who the defendant reasonably should know to be a peace officer. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 779-782 [finding constitutional special circumstance of peace officer murder under section 190.2, subdivision (a)(7), which applies to a defendant who has intentionally killed another who the defendant “reasonably should have known” was a peace officer engaged in the performance of official duty]; *People v. Mathews* (1994) 25 Cal.App.4th 89, 97-98 [finding constitutional former section 417, subdivision (b), which prohibited a defendant from exhibiting a firearm in the presence of another when the defendant “reasonably should know” the person is a peace officer engaged in the performance of official duty].)

We conclude that the probation condition here is not rendered unconstitutionally vague by the fact it contains an element of constructive knowledge. A probation condition, like a penal statute, gives rise to criminal culpability for its violation. A probation condition that prohibits association with persons the defendant knows are within a certain class, therefore, may also prohibit association with persons the defendant reasonably should know are within that class. Although it may not be immediately obvious based on appearance whether someone is on probation or parole, the constructive knowledge standard will prevent defendant from being penalized for violating the court’s

order when he did not know, and could not reasonably have known, that the person was on probation or parole.

Accordingly, we determine that the probation condition prohibiting defendant from associating with individuals who he knows or “reasonably should know” to be on any form of probation or parole supervision is not unconstitutionally vague.

E. Custody Credits

At the sentencing hearing, the trial court awarded defendant 66 days of actual custody credit and 32 days of conduct credit, for a total of 98 days of credit. Thus, the trial court awarded him conduct credits at a rate of two days for every four days of actual custody. Defendant contends he is entitled to custody credits at a rate of two days for every two days of actual custody, under the version of section 4019 that became operative on October 1, 2011.

1. Statutory Background

Section 4019 specifies the rate at which a prisoner can earn conduct credit while in local custody.⁷ When defendant committed his crimes in 2009, section 4019 allowed prisoners to earn two days of presentence conduct credit for every four days of actual local custody: a two-for-four rate. (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7; see *People v. Brown* (2012) 54 Cal.4th 314, 318 (*Brown*).)

Effective January 25, 2010, section 4019 was amended to allow certain eligible prisoners to earn two days of conduct credit for every two days of actual local custody: a two-for-two rate. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50; see *Brown, supra*, 54 Cal.4th at p. 318.) The amendment maintained the two-for-four rate for prisoners who were required to register as a sex offender, prisoners were committed for a serious felony (see § 1192.7, subd. (c)), and prisoners who had a prior conviction for a serious or violent

⁷ Conduct credits include credit for performing assigned labor and for complying with applicable rules and regulations. (See § 4019, subsd. (b), (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

felony. (Former § 4019, subds. (b)(2) & (c)(2), as amended by Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50; see *Brown, supra*, at p. 319, fn. 5.)

Effective September 28, 2010, section 4019 was amended again. (Stats. 2010, ch. 426, § 2; see *Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) The Legislature restored the less favorable two-for-four presentence conduct credit rate for prisoners who committed crimes after September 28, 2010. (Stats. 2010, ch. 426, § 2.)

The current version of section 4019 became operative on October 1, 2011. This version provides for two days of conduct credit for every two days of actual custody, and it does not exclude from its ambit a defendant with a current or prior serious felony conviction, nor a defendant required to register as a sex offender. (§ 4019, subds. (b) & (c); see Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35.) However, the October 1, 2011 amendment to section 4019 provided that it was prospective only: “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 . . . 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).)

2. Analysis

Defendant committed the offenses on August 26, 2009, before any of the recent changes to section 4019. He served two days in actual custody from August 26, 2009 to August 27, 2009. He then served another 64 days in actual custody from August 24, 2011 to October 26, 2011, the date of sentencing.

Defendant’s offenses included the crime of discharging a firearm in a grossly negligent manner. (§ 246.3, subd. (a).) Since the evidence established that defendant personally used the firearm, this was a “felony in which the defendant personally used a dangerous or deadly weapon” and thus a serious felony under section 1192.7, subdivision (c)(23). (See *People v. Golde* (2008) 163 Cal.App.4th 101, 111 [violation of section 246.3 is a serious felony if the defendant personally used the firearm].)

Therefore, defendant was not eligible for two-for-two credits under the January 25, 2010 version of section 4019.

Defendant contends he is entitled to two-for-two credits under the October 1, 2011 version of section 4019 despite two facts: (1) his offense was committed prior to the statute's operative date and (2) section 4019, subdivision (h) specifies that the only new credit scheme applies only to prisoners who are confined to a local custodial facility "for a crime committed on or after October 1, 2011." Defendant presents this argument even though it has been rejected in footnotes in two recent California Supreme Court opinions. (See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; *Brown, supra*, 54 Cal.4th at p. 322, fn. 11.)

Defendant claims section 4019, subdivision (h) contains a "potential conflict." He points out that while it states that the changes are to "apply prospectively . . . to prisoners who are confined to a county jail . . . for a crime committed on or after October 1, 2011," it also states that "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) Defendant reasons that since a person cannot be earning credits prior to the commission of a crime, the latter provision must mean that all persons confined after October 1, 2011 earn conduct credits at the two-for-two rate.

In the opening brief, defendant based his argument on dicta from this court's decision in *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted Aug. 8, 2012, S203298. "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))." (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 400 (*Kennedy*).)

In his reply brief, defendant acknowledges that his argument was rejected in *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*). In *Ellis*, the court held that the October 1, 2011 amendment to section 4019 "applies only to eligible prisoners whose

crimes were committed on or after that date.” (*Id.* at p. 1548.) The *Ellis* court rejected the statutory interpretation argument that defendant makes here. The court held that because the Legislature specified that the amendment applied “prospectively” (§ 4019, subd. (h)), its “clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. [Citation.]” (*Ellis, supra*, at p. 1553.) The *Ellis* court declined to find that the second sentence of section 4019, subdivision (h) extends “the enhanced rate to any other group.” (*Ibid.*) Rather, that sentence “merely specifies the rate at which all others are to earn conduct credits.” (*Ibid.*) This court’s decision in *Kennedy, supra*, 209 Cal.App.4th 385 is in accord. (*Id.* at p. 399 [“according to the explicit language of the statute, the 2011 amendment to Penal Code section 4019 applies only to crimes that were ‘committed on or after October 1, 2011’ ”].)

For the first time in his reply brief, defendant contends that he is entitled to two-for-two conduct credits under the equal protection clauses of the state and federal constitutions. He acknowledges that in *Brown*, the California Supreme Court rejected an equal protection challenge to prospective-only application of the January 25, 2010 amendment to section 4019. (*Brown, supra*, 54 Cal.4th at p. 330.) Defendant argues for a different result, pointing out that the October 1, 2011 version of section 4019 distinguishes between prisoners based on their date of offense rather than their date of custody.

We normally do not consider arguments presented for the first time in a reply brief. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29 [“a point raised for the first time therein is deemed waived and will not be considered, unless good reason is shown for failure to present it before”].) However, we do note that we have previously rejected the same equal protection challenge that defendant makes in this case. (*Kennedy, supra*, 209 Cal.App.4th at p. 399 [“the Legislature could rationally have believed that by making the 2011 amendment to section 4019 have application determined by the date of the

offense, they were preserving the deterrent effect of the criminal law as to those crimes committed before that date”]; see also *Ellis, supra*, 207 Cal.App.4th at p. 1552.)

In sum, defendant is not entitled to any additional conduct credits.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.