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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO RAMIREZ,

Defendant and Appellant.

H037799

(Monterey County

Super. Ct. Nos. SS110070, SS110741)

After being placed on formal probation in two separate cases,<sup>1</sup> defendant Ignacio Ramirez violated probation, which was duly revoked. He was sentenced to a total term of five years and four months in prison. In case No. 070A, he was awarded 120 days of custody credit and 60 days of conduct credits for a total of 180 days. In case No. 741A, he was awarded 171 days of custody credit and 80 days of conduct credits for a total of 251 days.

On appeal, Ramirez argues that he is entitled to additional conduct credits under Penal Code section 4019.<sup>2</sup> He also contends he is entitled to additional conduct credits in case No. 741A due to a miscalculation by the trial court, a position partially conceded by

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<sup>1</sup> Monterey County Superior Court case Nos. SS110070A (case No. 070A) and SS110741A (case No. 741A). Case No. 070A was the subject of a separate appeal by Ramirez (*People v. Ramirez* (June 6, 2012, H037264) [nonpub. opn.]) and, by order dated April 6, 2012, we granted Ramirez's request to take judicial notice of the record filed in connection with that appeal.

<sup>2</sup> Further unspecified statutory references are to the Penal Code.

the Attorney General. We reject his equal protection argument, but agree that he is entitled to four additional days of conduct credits in case No. 741A. Accordingly, we shall affirm the judgment as modified.

**I. FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>**

*A. Case No. 070A*

On or about January 9, 2011, Ramirez “was driving a stolen vehicle and fled from a pursuing patrol vehicle. During the pursuit, [he] ran red lights, traveled approximately 75 miles per hour over main streets in Salinas, and failed to stop at stop signs in order to elude officers. The pursuit ended only when [Ramirez] lost control of the vehicle and collided into a telephone pole and fire hydrant. [Ramirez] and one of the passengers ran from the accident and had to be apprehended in a foot pursuit. Both passengers in the stolen vehicle were juveniles and one of the juveniles had a loaded firearm in his possession.”

Ramirez was charged by information with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1), evading an officer (*id.*, § 2800.2, subd. (a), count 2), hit and run resulting in injury (*id.*, § 20001, subd. (a), count 3), permitting loaded firearm in a vehicle (§ 12034, subd. (a), count 4), active participation in a criminal street gang (§ 186.22, subd. (a), count 5) and misdemeanor driving with a suspended license (Veh. Code, § 14601.2, subd. (a), count 6). The information further alleged criminal street gang enhancements under section 186.22, subdivision (b)(1) in connection with counts 1 and 2, and a criminal street gang enhancement under section 186.22, subdivision (d) in connection with count 4.

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<sup>3</sup> Because Ramirez pleaded no contest to the underlying charges, the facts are taken from the supplemental probation report prepared in connection with his probation revocation hearing.

*B. Case No. 741A*

On April 15, 2011, while Ramirez was out on bail in case No. 070A, “officers observed [Ramirez] and two juvenile males walking on the sidewalk in an area known for a high amount of gang related activity. The officer recognized [Ramirez] and knew that he was on bail in [case No. 070A] and that he was on probation with gang conditions and a search and seizure waiver. Officers contacted one of the juveniles and noticed he had a bright red piece of clothing sticking out of his pocket. During a pat search of the juvenile, the officer discovered a loaded firearm in his pants pocket as well as wearing gang related clothing and possessing photographs of gang related paraphernalia on his cell phone [*sic*].”

Ramirez was charged in an amended complaint with criminal contempt for violating an order issued in case No. 070A (§ 166, subd. (a)(4)). The information further alleged both a criminal street gang enhancement (§ 186.22, subd. (d)) and an enhancement based on the offense being committed while on bail (§ 12022.1).

*C. Entry of plea and sentencing in Case Nos. 070A and 741A*

On April 19, 2011, in case No. 070A, Ramirez pleaded no contest to counts 1, 2, 4 and 5 and admitted the gang enhancement allegation on count 4, on condition that he receive felony probation and the remaining charges be dismissed. On that same day, in case No. 741A, Ramirez pleaded no contest to count 1 and admitted the special allegations, also on the condition that he be sentenced to felony probation.

At the May 17, 2011 sentencing hearing on both cases, the trial court suspended imposition of sentencing and placed Ramirez on three years of formal probation. He was ordered to serve concurrent sentences of 180 days in county jail on counts 4 and 5. The remaining charges were dismissed.

*D. Ramirez’s violation of probation and revocation*

On November 1, 2011, at about 11:43 p.m., Salinas Police Officer Robert Miller was in an industrial area where he heard the sounds of a party inside a building located at

1072 Industrial Street. No one responded when he knocked on the door, but he remained in the area. There were a number of vehicles in the area, and Miller began issuing parking citations for those vehicles parked illegally. As he did so, he observed several people entering and leaving the building, and more cars arriving and leaving the area. A number of the people were wearing red colored clothing, as well as “a lot of black T-shirts with Norcal written on the front and red colors and stuff like that.” Over the next few hours, Miller contacted about 15 or 20 of the people in the area, but never observed Ramirez enter or leave the building.

Miller was still in the area around 2:00 a.m. when he noticed three young men, one of whom was later identified as Ramirez, standing outside 1072 Industrial Street. The men appeared to be trying to hide from Miller. Miller saw one of the young men, later identified as Robert, a minor, turn toward a nearby van and reach into his waistband. Miller told the three men to put their hands up. Ramirez and the third man complied, but Robert began walking away with his hands still in his waistband. Robert then turned towards Miller and threw a gun down on the ground.

When Miller spoke to Ramirez, he noticed the odor of an alcoholic beverage on Ramirez’s breath. Ramirez’s eyes were red and watery and his speech was a bit slurred.

According to Miller, none of the three men was wearing any red clothing or anything he would consider gang-related.

Salinas Police Officer Masahiro Yoneda, of the violence suppression unit, testified that a shirt with “Nor Cal” on it signifies gang membership when it is worn by someone associating with gang members or their associates in known gang gathering areas. Yoneda also saw a report that an officer on the scene of the gathering at 1072 Industrial Street reported hearing someone call out “Norteno big shit” over a microphone inside the building. In Yoneda’s opinion, the people at the party were most likely affiliated with a Norteno gang.

Yoneda also opined that Robert is an active member of a Norteño gang, based on his numerous contacts with Norteño gang members and associates, as well as the fact that Robert has been frequently contacted by officers in known Norteño gang gathering areas and while wearing Norteño gang attire. In Yoneda's opinion, Robert's possession of a firearm on the night of the party at 1072 Industrial Street would enhance his status with the gang as it could be used to commit crimes and intimidate members of the general public.

Based on the officers' testimony, Ramirez was found in violation of his probation in both case No. 070A and case No. 741A based on his use of alcoholic beverages and on his associating with gang members.

On December 22, 2011, the trial court revoked probation in both cases and sentenced Ramirez to a total term of five years and four months in prison. In case No. 070A, Ramirez was sentenced to the middle term of two years on count 1 and eight months (one-third the middle term of two years) on count 4.<sup>4</sup> Ramirez was awarded 120 days custody credits and 60 days conduct credits for a total of 180 days credit.

In case No. 741A, the trial court imposed a total sentence of two years and eight months, consisting of eight months (one-third the middle term of two years) on count 1 with an enhancement of two years pursuant to section 12022.1, to be served consecutive to his sentence in case No. 070A. Ramirez was awarded custody credits of 171 days and conduct credits of 80 days, for total credits of 251 days.

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<sup>4</sup> The trial court imposed the middle term of two years on count 2, but stayed that sentence pursuant to section 654.7. The court also imposed a concurrent two year sentence on count 5.

## II. DISCUSSION

### A. *Equal protection does not mandate additional conduct credits*

Ramirez argues that, under equal protection principles, he is entitled to additional conduct credits in both cases pursuant to section 4019, even though his offenses were committed prior to October 1, 2011. His contention is that the statutory changes to section 4019 and section 2933 expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two credits he was awarded in each case. We disagree.

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

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in presentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)] (January 2010 amendments).) For these persons, conduct credit under section 4019 accrued at the same

rate as before despite the January 2010 amendments. (Former § 4019, subs. (b)(2) & (c)(2).) The Legislature did not specify whether the January 2010 amendments were to have retroactive application.<sup>5</sup>

Section 4019 was amended again, effective September 28, 2010, to restore the less generous presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits from section 4019. (Stats. 2010, ch. 426, § 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, and those committed for a serious felony or with a prior conviction for a violent or serious felony, were also eliminated from section 4019. (§ 4019.) At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass presentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].)

In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of presentence conduct credits for those defendants sentenced to a prison term, with an exception. This amendment to section 2933 provided for one-for-one presentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates required to register as sex offenders and those committed for a serious felony or those with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of presentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (Former § 2933, subd. (e).) By its express terms, the newly created section 4019, subdivision (g), declared these September

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<sup>5</sup> The California Supreme Court recently determined the amendments to section 4019 effective January 2010 do not apply retroactively. (*People v. Brown* (2012) 54 Cal.4th 314 (*Brown*).) In *Brown*, the court also rejected an equal protection challenge to the January 2010 amendments. (*Id.* at p. 330.)



Ramirez argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 held that a new statute that provides for presentence credits for prison inmates was fully retroactive to all prisoners by virtue of the equal protection clause. He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it implicitly held that felons were similarly situated to all other jail inmates and that the then version of section 4019 violated equal protection because it denied conduct credit to felons who were sentenced to prison while making such credits available to other jail inmates.

In *Brown*, the California Supreme Court expressly determined that neither *Kapperman* nor *Sage* supports an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 328-330.) In rejecting the inmate's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra*, at pp. 328-329.)

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

With respect to *Sage*, the California Supreme Court acknowledged that “one practical effect of [that decision] . . . was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them.” (*Brown, supra*, 54 Cal.4th at p. 330.) However, the California Supreme Court declined to read *Sage* as implicitly holding that prisoners serving time before and after a conduct credit statute takes effect are similarly situated for purposes of equal protection, because that proposition was not considered in the case.<sup>6</sup> (*Ibid.*)

Ramirez committed the crimes in case No. 070A on January 9, 2011, and in case No. 741A on April 15, 2011. After pleading no contest in both cases on April 19, 2011, imposition of sentence was suspended and Ramirez was placed on formal probation on May 17, 2011. Under the version of section 4019 in effect on any of these dates, he was properly awarded conduct credits on a one-for-two basis. We accordingly reject Ramirez’s contention that he is entitled to additional conduct credits based on the amendments to section 4019, operative October 1, 2011.

*B. Miscalculation of conduct credits in case No. 741A*

In his opening brief, Ramirez claims he is entitled to an additional five days of conduct credits in case No. 741A because those credits were miscalculated by the trial court. He had earned 171 days of custody credits, but was mistakenly awarded only 80, rather than 85, days of conduct credits.

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<sup>6</sup> “The unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion (see *Sage, supra*, [26 Cal.3d] at p. 510 (conc. & dis. opn. of Clark, J.)) went unacknowledged and unanswered in the lead opinion.” (*Brown, supra*, 54 Cal.4th at p. 330.)

The Attorney General concedes that the conduct credits were miscalculated, but asserts that Ramirez is entitled only to four additional days of conduct credit, rather than five. In his reply, Ramirez agrees with the Attorney General's calculation.

We find the concessions appropriate and will direct the trial court to correct the clerical error.

**III. DISPOSITION**

We direct modification of the judgment to reflect that, in case No. SS110741A, Ramirez is entitled to a total of 255 days of presentence credit, consisting of 171 days of custody credit and 84 days of conduct credit under Penal Code section 4019. We further direct the clerk of the superior court to prepare an amended abstract of judgment in accordance with this determination, and to forward that amended abstract of judgment to the Department of Corrections and Rehabilitation.

The judgment is affirmed as modified.

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Premo, Acting P.J.

WE CONCUR:

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Mihara, J.

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Duffy, J.\*

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.