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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE REFUGIO ALVAREZ,

Defendant and Appellant.

H037822  
(Monterey County  
Super. Ct. Nos. SS060090A,  
SS060287A, SS100577A, SS102624A)

In this appeal, Jose Alvarez (appellant) raises issues concerning presentence custody credits and clerical errors related to the abstract of judgment. For reasons that follow, we modify the judgment to include an additional seven days of presentence credits; as so modified we affirm the judgment.

Between 2006 and 2011, appellant was convicted on charges in four different cases.<sup>1</sup> The facts underlying the convictions are not relevant to this appeal. However, we set forth in detail the chronology of events in the four different cases.

**Case No. SS060090A**

On March 30, 2006, appellant was charged by complaint with possession of a controlled substance—methamphetamine (Health & Saf. Code, § 11377, subd. (a)). The

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<sup>1</sup> We have taken judicial notice of the record in a prior appeal, H036851, which appellant abandoned.

complaint contained an allegation that appellant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b). Thereafter, on May 22, 2006, appellant entered a plea of guilty to the charge and admitted the prison prior. Appellant entered his plea on the condition that he would be sentenced pursuant Proposition 36. (Pen. Code, § 1210.1 et seq.) The court suspended imposition of sentence and placed appellant on Proposition 36 probation for 18 months; the court imposed various conditions of probation. The court awarded appellant 97 days of presentence custody credits consisting of 65 actual days and 32 days conduct credit. Subsequently, appellant violated his probation by, among other things, failing to report to his probation officer. At the hearing on the probation violation, appellant failed to appear and a bench warrant for his arrest issued. He was arrested on October 9, 2006. On October 10, 2006, appellant was arraigned on the probation violation and his probation was revoked.<sup>2</sup> Appellant was ordered to remain in custody. On February 1, 2007, defense counsel made a motion to have his client released on his own recognizance (OR), which the court granted.

**Case No. SS060287A**

On October 10, 2006, appellant was charged by complaint with one count of transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a)), and one count of possession of a controlled substance—methamphetamine (Health & Saf. Code, § 11377, subd. (a)). This time, the complaint contained an allegation that in 2002 appellant was convicted of burglary (Pen. Code, § 459) within the meaning of Penal Code section 1170.12. Appellant was arraigned on these new charges at the same time he was arraigned on his probation violation. Appellant was released from custody on this case on OR on February 1, 2007.

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<sup>2</sup> The court revoked appellant's probation in order to retain jurisdiction.

On May 2, 2007, appellant failed to appear on both the probation violation in SS060090A and the new case, SS060287A, and the court "revoked" his probation and OR release.<sup>3</sup> Again a bench warrant issued for his arrest. Appellant was arrested on the warrant on June 8, 2007.

On June 12, 2007, defense counsel made another motion for OR release, which the court granted.

On July 5, 2007, again, appellant failed to appear on the probation violation in SS060090A and the new case, SS060287A. Again, a bench warrant issued for his arrest. Appellant was arrested on the warrant on November 2, 2007.

On April 16, 2008, appellant entered a plea of guilty to the possession charge in SS060287A; and admitted the allegation that he had a prior conviction for burglary. A motion by the prosecutor to dismiss the transportation charge was taken under submission. At the same time, appellant admitted he violated his probation in SS060090A. The court revoked his probation. Again, appellant was released on OR.

On June 19, 2008, appellant failed to appear on both cases, but remained on OR release. On July 9, 2008, appellant appeared for sentencing on the probation violation in SS060090A and the possession charge in SS060287A. A notation in the minute orders from both cases indicates that appellant was in "custody other-parole hold." Both matters were continued.

On December 30, 2008, again defense counsel made a motion for release on OR; again, the court granted the motion. On April 28, 2009, the time set for sentencing on both cases neither appellant nor his attorney appeared, but appellant was allowed to remain on OR release. The next day, appellant's attorney appeared, but appellant did not. The court issued a bench warrant, but held it until May 26, 2009.

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<sup>3</sup> There is nothing in the record to indicate that appellant's probation was reinstated between October 10, 2006 and May 2, 2007. Therefore, technically, appellant's probation was not revoked, rather it remained revoked.

On May 26, 2009, appellant failed to appear and the court released the warrant. Appellant was arrested on the warrant on June 6, 2009. On June 9, 2009, appellant was arraigned on the warrant and the case was continued for two days for sentencing. Finally, on June 11, 2009, the court terminated appellant's Proposition 36 probation in SS060090A and reinstated criminal proceedings. Both matters were continued. On August 13, 2009, the court granted appellant formal probation in SS060090A, as well as in SS060287A. The court ordered that appellant serve 711 days in SS060090A with credit for time served. In SS060287A, the court ordered that appellant serve 240 days, no credit for time served.

Thereafter, on August 19, 2009, the court rescinded the sentence imposed in both cases. Appellant was released on OR on November 20, 2009, after he executed a document entitled "RELEASE CONDITIONS OWN RECOGNIZANCE" in which he was notified, among other things, that if he failed to appear again his sentence would be doubled and be deemed a violation of an agreement regarding testimony in another case, which would subject him to a maximum sentence of seven years eight months in prison or prosecution on the original charges. Both cases were continued to March 24, 2010, for sentencing.

**Case No. SS100577A**

On January 28, 2010, appellant was charged by complaint with one count of transportation of a controlled substance (methamphetamine) (Health & Saf. Code, § 11379, subd. (a)), and one count of possession for sale of a controlled substance (methamphetamine) (Health & Saf. Code, § 11378). The complaint contained the same allegation of a prior conviction for burglary. Appellant remained on OR release.

On February 22, 2010, appellant failed to appear in all three cases. The court ordered that a bench warrant issue. On February 24, 2010, appellant appeared for arraignment on the bench warrant; the court rescinded the warrant. In SS100577A,

appellant entered a plea of no contest to the possession for sale charge with no promises made as to disposition. Appellant remained on OR release.

On May 5, 2010, appellant failed to appear for sentencing in all three cases. The court revoked his OR release and a bench warrant issued. On November 24, 2010, appellant was arrested on the warrant.

**Case No. SS102624A**

On November 29, 2010, appellant was charged by complaint with possession of a controlled substance by a prisoner (Pen. Code, § 4573.6), which was alleged to have occurred on November 25, 2010. The offense was alleged to have occurred on November 25, 2010.<sup>4</sup> Again, the complaint contained the same allegation of a prior burglary conviction. A notice of violation of probation in SS060090A was filed the same day. Appellant was arraigned on the new complaint and the probation violation.

On February 9, 2011, in SS060090A, the court found appellant had violated his probation, revoked his probation and sentenced him to eight months consecutive to the sentences in his three other cases. In SS060287A the court sentenced appellant to one year four months (one-third the midterm doubled) consecutive to all other cases. In SS100577A the court continued the matter for a presentence report. In SS102624A appellant entered a plea of no contest to possession of drugs by a prisoner in exchange, pursuant to a stipulation, for a six-year sentence (three years doubled). Appellant admitted that he had previously been convicted of a strike—first degree residential burglary.

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<sup>4</sup> The probation officer's report prepared for sentencing in this case indicates that on November 25, 2010, at approximately 3:00 a.m., a deputy at the Monterey County jail was conducting a pre-housing strip search of appellant. The deputy asked appellant to remove his clothes; as the deputy conducted the strip search he asked appellant to bend over at the waist and spread the cheeks of his buttocks. When appellant complied, the deputy observed a wad of toilet paper between the cheeks of appellant's buttocks, which contained marijuana.

Eventually, after the court denied his motion to withdraw his pleas in all four cases, on April 8, 2011, appellant was sentenced in SS060090A to eight months (one-third the midterm), in SS060287A to eight months (one-third the midterm), in SS100577A to eight months (one-third the midterm), and in SS102624A to three years. In the latter three cases the sentences were doubled pursuant to Penal Code section 1170.12.

The court awarded the following custody credits:

SS060090A—240 days—160 actual days plus 80 days of conduct credits.

SS060287A—751 days—501 actual days plus 250 days of conduct credits.

SS100577A—no credits.

SS1026242A—195 days—131 actual plus 64 days of conduct credits.

Appellant filed a notice of appeal in all four cases the same day he was sentenced. As noted, appellant abandoned that appeal.

Subsequently, on October 31, 2011, appellant brought a motion in the trial court to have his conduct credits recalculated under an amendment to Penal Code section 4019 that became operative on October 1, 2011. Appellant argued that under equal protection principles, this amendment had to be applied retroactively to all his presentence custody. The court denied the motion on December 7, 2011. This timely appeal followed.

#### *Discussion*

##### *Penal Code Section 4019 Credits*

On appeal, appellant raises the same argument that he made in the trial court: that the October 1, 2011, amendment to Penal Code section 4019 must be applied to his case by virtue of the equal protection clauses of the California and federal Constitutions.

As can be seen appellant was in custody as far back as 2006, but all his presentence custody occurred before October 1, 2011 and all his crimes and violations of probation occurred before that date.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

Before January 25, 2010, conduct credits under Penal Code section 4019 could be accrued at the rate of two days for every four days of actual time served in presentence custody (sometimes referred to as one-third time or credits calculated at 33 percent). (Stats. 1982, ch. 1234, § 7, p. 4553 [former Pen. Code, § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [Pen. Code, § 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in Pen. Code, § 1192.7), or those who had a prior conviction for a violent or serious felony such as appellant. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to Pen. Code, § 4019, subds. (b), (c), & (f)].)<sup>5</sup>

Effective September 28, 2010, Penal Code section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime

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<sup>5</sup> For those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony, conduct credits continued to be calculated at two days for every four days of actual custody. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

committed on or after that date, expressing legislative intent that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to Penal Code section 4019 in 2011 as relevant to appellant's equal protection challenge. These statutory changes, among other things, reinstated one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.<sup>6</sup> (Pen. Code, § 4019, subds. (b), (c), & (h).)

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011 (hereafter the October 2011 amendment) are to have prospective application only—i.e. to crimes committed on or after the operative date of the statute, appellant contends that the equal protection clause requires that this amendment be applied retroactively to all his presentence custody.

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.)

Appellant contends that his case is analogous to in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*).

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new Pen. Code, § 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

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<sup>6</sup> These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.)

Appellant argues that *Kapperman* applies to his case. Respectfully, we disagree. 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 current version of section 4019.

As can be seen, 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 confirmed that the October 2011 amendments 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 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 offenses in 2006, 2009 and in 2010.

Accordingly, we must reject appellant's argument that we must apply the October 2011 amendment to Penal Code section 4019 to all his presentence custody in this case.<sup>7</sup>

#### *Errors in the Abstract of Judgment*

Appellant argues that there are two errors in the abstract of judgment that must be corrected. Appellant is correct.

First, the abstract of judgment reflects that appellant's total credits in SS060287A are 501. In fact the court awarded him 751 days of presentence credit—501 actual days and 250 days of conduct credits. We will order the abstract of judgment corrected as this appears to be clerical error. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [the abstract of judgment is not the judgment of conviction. By its very nature, definition and terms it cannot add to or modify the judgment which it purports to digest or summarize]; *People*

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<sup>7</sup> In his reply brief, appellant acknowledges that the Supreme Court's decision in *Brown, supra*, 54 Cal.4th 314 that equal protection principles do not require the retroactive application of amendments to Penal Code section 4019 is applicable to his case and that this court is bound by that decision.

*v. Mitchell* (2001) 26 Cal.4th 181, 186-187, [a court of appeal may correct errors in the abstract of judgment on its own motion or upon the application of the parties].)

Similarly, although the abstract of judgment reflects a total prison term of nine years four months for all four cases, the sentence on count 1A should be six years (not three years), and on counts 2B and 1C should be one year four months (not eight months) as ordered by the court. We will order that the abstract of judgment be corrected accordingly.

In reviewing this issue we found another error in the abstract of judgment. Count 2-D should be 1-D as appellant pleaded guilty to count one in case SS060090A.<sup>8</sup>

*Credit for Time Served Between November 24 and November 28, 2010*

The record shows that appellant was apprehended on a bench warrant on November 24, 2010. We know that he was in the Monterey County jail at least from November 25, because that is when the marijuana was discovered that formed the basis of his possession of a controlled substance by a prisoner charge in SS102624A. He appeared in court on November 29, 2010 and remained in custody until final sentencing on April 8, 2011. However, the probation officer's report credits appellant with presentence custody from only November 29, 2010.

Appellant argues that this period of five days (November 24-November 28) plus conduct credits should be credited to SS100577A.<sup>9</sup> Respondent concedes the issue, but

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<sup>8</sup> The four different cases were designated by the letters A through D. SS102624A was designated case A. SS100577A was designated case B. SS060287A was designated case C. SS060090A was designated case D. It appears the numbers attached to the letter designation in the count column on the abstract of judgment corresponded to the number of the count to which appellant pleaded in the particular case. In SS060090A there was only one count alleged. Accordingly, in the count column 2-D should be 1-D.

<sup>9</sup> Although appellant's last period of custody was for his first three cases and his new case, because he was sentenced to consecutive terms in all his cases, pursuant to Penal Code section 2900.5, appellant received credit only once for that period of time and it was awarded in SS102624A. However, it was awarded only from November 29, 2010, the day he was arraigned in that case. On none of appellant's cases did the court award

contends that appellant is entitled to only two days of conduct credits. We accept the concession and agree that appellant is entitled to two days conduct credit.

Appellant committed his crime in SS100577A in 2009. At that time he was subject to conduct credits calculated under the pre-January 2010 amendment to Penal Code section 4019—two days of conduct credits for every four days of actual custody. (Stats. 1982, ch. 1234, § 7, p. 4553.) However, the period of custody at issue here occurred in November 2010, after the September 2010 amendment to Penal Code section 4019, became operative. However, by its express terms, this amendment declared the September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date. (Stats. 2010, ch. 426, § 2.) The January 2010 amendment to Penal Code section 4019 cannot be applied to appellant because of his prior strike conviction. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to Pen. Code, § 4019, subs. (b), (c), & (f)].) As discussed *ante*, appellant is not entitled to have his conduct credits calculated under the October 1, 2011 amendment to Penal Code section 4019, nor under a short-lived amendment to Penal Code section 2933.<sup>10</sup>

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him credit for the five days between and including November 24 up to and including November 28. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645 [a defendant is entitled to credit for all days in custody commencing with the day of arrest].)

<sup>10</sup> At the time appellant was in custody during November 2010, Penal Code section 2933, subdivision (e)(1) provided "Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." Nevertheless, subdivision (e)(3) of the same section provided, "Section 4019, and not this subdivision, shall apply if the prisoner is required to register as a sex offender, pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667. 5." (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010, repealed by Stats. 2011, 1st Ex Sess., ch. 12, § 16, eff. Sept. 21, 2011.)

Accordingly, applying the pre-January 2010 statutory formula, appellant is entitled to two days of conduct credits. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26, [credits are given in increments of four days. No credit is awarded for anything less; under the statutory scheme, rounding up is not permitted].)

In sum, appellant is entitled to seven days of presentence custody credit in SS100577A.

*Disposition*

Appellant is entitled to seven days of presentence custody credit in SS100577A.

The clerk of the court is directed to modify the abstract of judgment to reflect that appellant has 751 days of presentence credit in SS060287A, five actual days credit plus two days of conduct credit in SS100577A and the sentence on count 1-A is six years and on both counts 2-B and 1-C is one year four months. Further, count 2-D should be modified to read 1-D. As so modified the judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MÁRQUEZ, J.