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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY GLEN ELLIS,

Defendant and Appellant.

H037958

(Monterey County

Super. Ct. No. SS111413A)

After his *Romero* motion<sup>1</sup> was denied, pursuant to a negotiated disposition, Anthony Ellis (defendant) pleaded no contest to one count of infliction of corporal injury on a spouse or cohabitant (Pen. Code, § 273.5); defendant admitted that he had a prior strike conviction within the meaning of Penal Code section 1170.12, subdivision (a)(1). In exchange for his no contest plea, defendant was promised that he would receive a maximum sentence of six years in state prison and the dismissal of two remaining charges—assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1))<sup>2</sup> and false imprisonment by violence (§§ 236, 237).

On February 14, 2012, the court sentenced defendant to three years in state prison doubled due to the prior felony conviction. The court awarded defendant 203 actual days

<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

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

of custody credit and 100 conduct credits for a total of 303 days. Defendant filed a timely notice of appeal based on the sentence of other matters occurring after the plea.

Defendant's appointed counsel has filed an opening brief in which no issues are raised and asks this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel has declared that defendant was notified that no issues were being raised by counsel on appeal and that an independent review under *Wende* was being requested.

On August 10, 2012, we notified defendant of his right to submit written argument on his own behalf within 30 days. That time has passed and we have not received a response from defendant.

However, defendant's counsel has suggested the following points to aid our review. (1) The trial court abused its discretion in denying defendant's *Romero* motion. (2) On equal protection grounds, the trial court erroneously denied defendant conduct credits under an amendment to section 4019 effective October 1, 2011, for the time he spent in custody between October 1, 2011 and the time he was sentenced on February 14, 2012.

Pursuant to *Wende, supra*, 25 Cal.3d 436, we have reviewed the entire record and, with the exception of the amount of the restitution fine that is reflected in the abstract of judgment, have concluded there is no arguable issue on appeal, including the issues that defendant's counsel has suggested to guide our review. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.)

### *Facts*<sup>3</sup>

Defendant's wife Rhonda Ellis testified that on July 27, 2011, defendant telephoned her from the hotel in which they were staying while she was out; they argued. Ms. Ellis returned to the hotel room and began to pack her belongings. As she was so doing, defendant came up behind her, grabbed her arm, choked her and covered her mouth.

Ms. Ellis escaped to the bathroom, but defendant came to the bathroom doorway. Ms. Ellis attempted to leave, but defendant blocked her exit; he said he wanted to talk. After five or six minutes, Ms. Ellis was able to move past defendant, but he blocked the front door. When Ms. Ellis tried to open the door defendant pushed it shut. Finally, however, she was able to open the door and ran toward the hotel office. Defendant followed Ms. Ellis so she ran back to the hotel room and locked the door; she telephoned the hotel manager for help.

Ms. Ellis explained that she has asthma and when defendant choked her she experienced shortness of breath. The defendant left scratches on her face when he tried to cover her mouth.

### *Proceedings Below*

After a preliminary hearing, defendant was charged by information filed by the Monterey County District Attorney's Office, with one count of inflicting corporal injury on a spouse or cohabitant (§ 273.5, count one), one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1), count two) and one count of false imprisonment by violence (§§ 236, 237, count three). The information contained an allegation that defendant had a prior conviction (robbery) within the meaning of section 1170.12.

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<sup>3</sup> The facts are taken from the preliminary hearing in this case

Defendant filed a *Romero* motion requesting that the court strike his prior conviction. Defendant argued that although his prior conviction was a violent/serious felony, his current domestic violence charge was a non-strike offense. Further, he argued among other things that his robbery conviction was 31 years old; he had been crime free for 12 years and had completed three separate parole periods with only one parole violation. The prosecution opposed the motion and summarized defendant's lengthy criminal history for the court, which started when defendant was 20 years old and consisted of at least six felony convictions, several misdemeanor convictions and several violations of parole.

In denying the *Romero* motion the court found that although defendant's prior strike conviction was old and committed when defendant was 23 years old, between then and his current charges, which occurred when defendant was 54 years old, defendant had been involved in the criminal justice system on a "regular basis." The court pointed out that any time defendant was out of custody he was involved in committing crimes. The court noted that defendant was 54 and still involved in violent and criminal behavior. The court stated that although it was a "close case," the court could not strike the strike conviction because of defendant's "continued involvement" in the criminal justice system.

After the court denied defendant's *Romero* motion, defendant entered into the negotiated disposition as outlined *ante*. Defendant executed a form entitled "Waiver of Rights Plea of Guilty/No Contest" in which he was advised of the maximum penalty for the crimes to which he would be pleading, advised of—and waived his constitutional rights—and advised of the collateral consequences of his plea including immigration consequences. Before he entered his plea, defendant confirmed that he understood and signed and initialed the form. Thereafter, defendant entered his no contest plea as noted *ante*.

### *Discussion*

As to counsel's suggestion that the court erred in denying defendant's *Romero* motion, the refusal to grant defendant's *Romero* motion was consistent with applicable law, supported by substantial evidence, and well within the discretion of the trial court.

As to counsel's suggestion that the court erred in denying defendant the enhanced conduct credits of the October 1, 2011 amendment to section 4019, defendant committed his crime before that amendment took effect. (*People v. Brown* (2012) 54 Cal.4th 314, 322, fn. 11 [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].)

Further, for equal protection purposes, even if we were to agree that the time that defendant spent in county jail between October 1, 2011 and the time he was sentenced in February 2012, defendant was similarly situated to other defendants who committed their crimes after October 1, and were in presentence custody, where, as here, the statutory distinction at issue neither "touch[es] upon fundamental interests" nor is based on gender, there is no equal protection violation "if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].)

We perceive such a plausible reason in this case as to the period of time defendant was in custody after October 1, 2011.

As our Supreme Court has acknowledged "statutes lessening the *punishment* for a particular offense" may be made prospective only without offending equal protection principles. (*In re Kapperman* (1974) 11 Cal.3d 542, 546 (*Kapperman*.) In *Kapperman*, the court wrote that the Legislature may rationally adopt such an approach, "to assure that

penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*Ibid.*)<sup>4</sup>

In *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), the defendant sought to invalidate a provision of Proposition 36 barring retroactive application of its provisions for diversion of nonviolent drug offenders. (*Id.* at pp. 183-184.) The court reiterated that the Legislature may preserve the penalties for existing offenses while ameliorating punishment for future offenders in order to " 'assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' " (*Id.* at p. 190.) The statute before the court came within this rationale because it "lessen[ed] punishment for particular offenses." (*Ibid.*) As the *Floyd* court noted, " '[t]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*Id.* at p. 191.)

"The very purpose of conduct credits is to foster constructive behavior in prison by reducing punishment." (*People v. Lara* (2012) 54 Cal.4th 896, 906.) As our Supreme Court accepted in *Brown, supra*, 54 Cal.4th 314, "to increase credits reduces punishment." (*Id.* at p. 325, fn. 15.)

We gather that the rule acknowledged in *Kapperman* and *Floyd* is that a statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.

Defendant committed his crime in July 2011. At that time, his ability to earn conduct credit was limited to two days for every four days of actual time served in presentence custody. (Stats. 2010, ch. 426, § 2, September 2010 amendment to § 4019.)<sup>5</sup>

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<sup>4</sup> In *Kapperman*, the court found that rationale inapplicable to the issue before the court. (*Kapperman, supra*, 11 Cal.3d at p. 546.)

Although the statute at issue here does not ameliorate punishment for a particular offense, it does, in effect, ameliorate punishment for all offenses committed after a particular date. By parity of reasoning to the rule acknowledged by both the *Kapperman* and *Floyd* courts, 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. To reward appellant with the enhanced credits of the October 2011 amendment to section 4019, even for time he spent in custody after October 1, 2011, weakens the deterrent effect of the law as it stood when appellant committed his crimes. We see nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards (conduct credits) in effect at the time an offense was committed.

*The Restitution Fine Imposed*

The abstract of judgment reflects a restitution fund fine pursuant to section 1202.4 of \$1440 plus penalty assessment. Similarly, it reflects a parole revocation fine (§ 1202.45) in the same amount.

However, in sentencing defendant the court imposed a restitution fund fine of \$240. Specifically, the court stated that a "mandatory restitution fine in the amount of \$240 is imposed." The clerk's minute order from the sentencing hearing reflects that the court ordered that defendant "[p]ay a state restitution fine of \$240 multiplied by the

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<sup>5</sup> Two other amendments to section 4019 were made in 2011. (Stats. 2011, ch. 15, § 482, eff. April 4, 2011, operative Oct. 1, 2011; Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011.) However, neither of these amendments assist defendant because they were not operative until October 1, 2011. At that time they were amended by the current version of section 4019. "An enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process; the rights of individuals under its provisions are not substantially affected until the provision operates as law." (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488.)

number of years of imprisonment, multiplied by the number of convicted Felony counts. (PC 1202.4(b)(2))."<sup>6</sup> However, that is not what the court ordered.

The probation officer's report recommended that "defendant be required to pay a restitution fine of \$240.00 times the number of years, times the number of felony counts for a total restitution fine of \$240.00 (PC§ 1202.4(b)(2))." (Italics added.) It appears that this is where the confusion as to the amount of the restitution fine arises. As can be seen, this calculation is internally inconsistent because if the fine were truly \$240 times the number of felony counts times the number of years of imprisonment defendant would be subject to a fine of \$1440 (240x1x6). Nevertheless, that calculation does not equal a total fine of \$240 as the probation officer's report asserts.

Faced with an inconsistent record, we note that where a minute order or abstract of judgment differs from the court's oral pronouncements, 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.) Errors in the abstract of judgment may be corrected by this court on appeal. (*People v. Mitchell, supra*, 26 Cal.4th at p. 185; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1.) Accordingly, we order that the abstract of judgment be corrected to reflect a restitution fine of \$240 and a parole revocation fine in the same amount. (§ 1202.45

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<sup>6</sup> We do note that the clerk's minute order from the sentencing hearing was signed by Judge Culver. Nevertheless, we cannot assume that subsequently Judge Culver corrected the judgment. With certain exceptions not applicable here, section 1193, requires that judgment be pronounced orally in the presence of the defendant. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [rendition of judgment is an oral pronouncement.]) "A judgment includes a fine. A restitution fine is a fine." (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1080.)

[parole revocation fine must be assessed in the same amount as that imposed pursuant to subdivision (b) of section 1202.4].)

Upon our independent review of the record we conclude there are no meritorious issues to be argued, or that require further briefing on appeal. The sentence imposed was consistent with the plea bargain. The remaining fees and assessments imposed were supported by the law and facts. At all times, defendant was represented by competent counsel.

*Disposition*

The judgment is modified to reflect a restitution fine in the amount of \$240 and a parole revocation fine in the same amount (suspended unless parole is revoked). As so modified, the judgment is affirmed. The clerk of the court is to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

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ELIA, Acting P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MÁRQUEZ, J.