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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SANDOVAL,

Defendant and Appellant.

H042448

(Santa Clara County

Super. Ct. No. C1484506)

After entering a plea of no contest to first degree burglary (Pen. Code, §§ 459, 460, subd. (a))¹ pursuant to a plea agreement, defendant Jose Sandoval was sentenced to a two-year prison term. (§ 461.) Due to the length of his presentence custody, defendant’s prison sentence was a “paper commitment only.” Defendant was ordered to report to the parole office within 48 hours of sentencing.

On appeal from the judgment of conviction, defendant contends that the trial court exceeded its authority by issuing stay-away orders protecting the residents of the burglarized home and ordering him not to knowingly own or possess firearms or ammunition. He also asserts that the trial court failed to properly apply his excess custody credits to his outstanding fines and that the trial court erred by failing to dismiss the prior prison term allegation (§ 667.5, subd. (b)) pursuant to the plea bargain.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

I

Facts

The facts are taken from the probation report.

On or about May 28, 2014, San Jose police officers responded to a residence pursuant to a report of a family disturbance. The officers determined that there was an outstanding misdemeanor warrant to arrest defendant, who resided there. After taking defendant into custody and obtaining his consent to search his bedroom, officers found a laptop and a laptop case in the bedroom. Those items were determined to have been stolen from a neighboring home about one month prior to the search. Nothing else was taken, and nothing in the victims' home was damaged.

Defendant identified himself to the officers as a "Northerner" gang member. When he subsequently spoke to the probation officer, however, he claimed to have dropped out of the gang a few weeks before the interview. Defendant had multiple tattoos, including but not limited to a "408" tattoo on his chest, a "San Jo" tattoo across his stomach, and a tear drop tattoo beneath his left eye.

II

Procedural History

An amended felony complaint alleged that, on or about May 28, 2014, defendant violated section 496, subdivision (a), by concealing and withholding property known to be stolen (count 1) and that on or about April 28, 2014, defendant committed first degree burglary (§§ 459-460, subd. (a)) (count 2). It further alleged a prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12) and a prior prison term enhancement (§ 667.5, subd. (b)).

At a hearing on July 15, 2014, a plea agreement was placed on the record. In exchange for "a lower term top," defendant would plead guilty or no contest to residential burglary. The lower term would be two years if the evidence failed to establish that defendant's prior assault conviction was a "strike" under the Three Strikes law, in which

case the prosecution would move to dismiss the strike allegation, and the sentence would be four years (double the lower term) if the conviction was a “strike.” The plea agreement provided for count 1 to be dismissed. The court confirmed that defendant had initialed and signed the waiver of rights form, which was filed. After the plea colloquy, defendant pleaded no contest to first degree burglary. The prosecutor indicated that count 1 and the prior prison term allegation were submitted for dismissal at sentencing.

At a hearing on August 13, 2014, the People conceded that the prior conviction was not a strike within the meaning of the Three Strikes laws and the strike allegation was dismissed.

At the sentencing hearing on June 1, 2015, the trial court imposed a two-year sentence. The court noted defendant’s early plea and the fact that there was no violence in this case. The court indicated that the sentence was “a paper commitment only” because defendant had a total of 740 days of presentence credit. (See § 1170, subd. (a)(3).) It ordered defendant to report to the parole office within 48 hours. The court informed defendant that he would be on parole for a period of three years pursuant to section 3000, subdivision (b)(2). The court advised defendant that he was “not to own, knowingly possess or have within [his] custody or control any firearm or ammunition for the rest of [his] life pursuant to Penal Code section[s] 29800 and 30305.”

Also at the sentencing hearing on June 1, 2015, the court orally imposed the following fines or fees: a restitution fine of \$300 (§ 1202.4); a parole revocation restitution fine of \$300, suspended unless parole was revoked (§ 1202.45); a \$40 fee referred to as a court security fee, but now referred to as a court operations assessment (§ 1465.8); a \$30 criminal conviction assessment (Gov. Code, § 70373 [to fund court facilities]); a criminal justice administration fee of \$129.75 payable to the City of San Jose (Gov. Code, § 29550.1); and a \$10 fine plus penalty assessment (§ 1202.5, subd. (b)(2) [additional \$10 fine for burglary]). The minute order reflects a penalty

assessment of \$31. (See §§ 1464, subd. (a), 1465.8, subd. (b), Gov. Code, § 70373, subd. (b).)

At the request of the prosecutor, the trial court ordered defendant to stay at least 200 feet away from the property address of the burglarized home and at least 200 feet away from the two victims.

The court dismissed count 1 of the amended complaint pursuant to the plea agreement.

III

Discussion

A. Stay-Away Orders and Firearms and Ammunition Restrictions

Defendant contends that stay-away orders and firearm and ammunition restrictions were unauthorized because the California Department of Corrections and Rehabilitation (CDCR) and the Board of Parole Hearings (BPH) retain the exclusive right to set such conditions, and the trial court lacked nonstatutory authority to make such orders. He maintains that this court must strike those orders.

At the time of sentencing, the court indicated that, consistent with a brief off-the-record conversation, it intended to impose “certain parole conditions” requested by the prosecutor. The court told defendant that it intended to impose a protective order and a stay-away order.

Defense counsel objected, indicating that the home of defendant’s grandparents, with whom defendant lived, was across the street from the victim’s home. He pointed out that, if the court imposed a 400 yard stay away order, defendant would violate the order by living in his own home. He objected to the imposition of a stay-away order in the event that the court sentenced defendant to prison.

The prosecutor asked the court to issue protective orders protecting the burglarized home and the victims. She pointed out that when interviewed by the probation officer, the male victim had expressed fear that defendant would retaliate or seek revenge or

defendant would burglarize the house again or hurt his family, given that defendant lived close to them. The prosecutor suggested that perhaps the stay-away orders could be parole conditions and come from the parole authority rather than from the trial court.

The trial court stated that it could impose conditions of parole, and it indicated that any parole condition would be required to meet the *Lent* test.² The trial court stated that “in light of the offense involved in this case, it makes sense to impose a stay away condition from the residence where the offense took place.”

First, as to the firearm and ammunition restrictions, they are imposed by statute.³ It appears that the trial court was merely advising defendant of the applicable law, and was not imposing any independent requirement on defendant.

Second, as to the protective orders, we conclude that they were improperly issued. We agree that if the court intended the orders to be parole conditions, it exceeded its authority.

By statute, the CDCR is required to “provide, under guidelines specified by the parole authority or the department, whichever is applicable, the conditions of parole and the length of parole up to the maximum period of time provided by law.” (§ 3000, subd. (b)(7).) Subdivision (b)(8) of section 3000 provides: “For purposes of this chapter,

² *People v. Lent* (1975) 15 Cal.3d 481 held that “a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Id.* at p. 486.) “The validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions. [Citations.]” (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.)

³ Section 29800, subdivision (a)(1), provides: “Any person who has been convicted of a felony under the laws of . . . the State of California . . . , and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.” Section 30305, subdivision (a)(1), provides: “No person prohibited from owning or possessing a firearm under Chapter 2 (commencing with Section 29800) . . . , shall own, possess, or have under custody or control, any ammunition or reloaded ammunition.”

and except as otherwise described in this section, the board shall be considered the parole authority.” (See Cal. Code Regs., tit. 15, § 2000, subd. (b)(8) [defining “Board” as the BPH].) Statute establishes that the BPH has “the power to establish and enforce rules and regulations under which inmates committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.” (§ 3052.) The BPH “upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper.”⁴ (§ 3053, subd. (a).)

The BPH is defined by administrative regulation as “[t]he administrative board responsible for setting parole dates, *establishing parole length and conditions*, discharging sentences for certain prisoners and parolees; granting, rescinding, suspending, postponing, or revoking paroles; conducting disparate sentence reviews; advising on clemency matters; and handling miscellaneous other statutory duties.” (Cal. Code Regs., tit. 15, § 2000, subd. (b)(10), italics added.) The administrative regulations specify that “[t]he parole conditions are not a contract but are the specific rules governing all parolees whether or not the parolee has signed the form containing the parole conditions.” (*Id.*, § 2512, subd. (a).) An administrative regulation establishes the general conditions of parole. (*Ibid.*) “Under guidelines specified by the board the department shall establish and impose the special conditions of parole and the length of parole within the statutory maximum for all DSL prisoners The department shall impose any special conditions recommended by the board for DSL prisoners” (*Id.*, § 2510.) “Special conditions may be established and imposed by the department or the board as provided in [California Code of Regulations, title 15, section] 2510, and are in addition to the general conditions of parole.” (*Id.*, § 2513.) In addition to the standard

⁴ “Commencing July 1, 2005, there is hereby created the Board of Parole Hearings. As of July 1, 2005, any reference to the Board of Prison Terms in this or any other code refers to the Board of Parole Hearings. As of that date, the Board of Prison Terms is abolished.” (§ 5075, subd. (a); see Gov. Code, § 12838.4.)

special conditions set forth in the administrative regulations, special conditions include “[a]ny other condition deemed necessary by the Board or the Department due to unusual circumstances.” (*Id.*, § 2513, subd. (g).) Such special condition “shall be imposed whenever warranted by unusual circumstances” and “[t]he reasons for its imposition shall be sufficiently documented in the parolee’s case records to explain the need for imposition.” (*Ibid.*)

Thus, an existing body of statutory and regulatory law governs the imposition of parole conditions. If the challenged stay-away orders were intended to function as parole conditions, they would potentially conflict with that existing law. “ ‘[I]nherent [judicial] powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy.’ [Citations.]” (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 528, italics omitted.)

The People do not seek to uphold the stay-away orders as parole conditions, however. Rather, the People assert that the orders were a valid exercise of inherent judicial authority. Citing *Townsel v. Superior Court* (1999) 20 Cal.4th 1084 (*Townsel*), the People argue that trial courts have “inherent authority to issue appropriate protective orders to protect trial participants,” “independent of statute.” They also assert that “trial courts have inherent authority to issue post-sentencing ‘no-contact’ orders,” citing *People v. Ponce* (2009) 173 Cal.App.4th 378 (*Ponce*).

In *Townsel*, the petitioner, who had been sentenced to death in 1991 and whose automatic appeal was pending before the California Supreme Court, sought “relief from an order of respondent superior court, entered sua sponte, prohibiting his appellate counsel from contacting trial jurors without first obtaining that court’s approval.” (*Townsel, supra*, 20 Cal.4th at pp. 1086-1087.) The challenged order was issued many years after the jury’s verdict, and it “arose out of proceedings to correct and augment the record in petitioner’s automatic appeal.” (*Id.* at p. 1088.)

The California Supreme Court confirmed in *Townsel* that, despite statutes enacted or amended “to protect the safety and privacy of jurors,” “trial courts retain inherent power to protect both juror safety and juror privacy.” (*Townsel, supra*, 20 Cal.4th at p. 1091.) The Supreme Court concluded that the trial court “possessed the inherent judicial power to limit the parties’ ability to contact jurors following completion of the trial.” (*Id.* at p. 1094, fn. omitted.) The Supreme Court determined that the trial court had acted within its discretion in issuing the no-contact order. (*Id.* at p. 1096.) It stated: “[T]his was a capital trial, and defendant was found guilty and sentenced to suffer the death penalty. Further, it appears that defendant was convicted of murdering one victim because she was a witness to a previous crime (Pen. Code, § 190.2, subd. (a)(10) [witness-killing special circumstance]), and that he was also convicted of attempting to prevent or dissuade a witness. Each of these circumstances raises serious concerns about juror safety.” (*Id.* at p. 1097, fn. omitted.) The court observed that, “[f]or [the trial court] to ensure that any attorney contact with the jurors, so long after their discharge from jury service, is both fully consensual and conducted with proper solicitude for their privacy is not unreasonable.” (*Ibid.*) It stated that “respondent court did not abuse its discretion by acting as a neutral intermediary to ensure any posttrial juror contact was consensual and reasonable.” (*Id.* at p. 1098.)

In *Ponce*, the trial court issued a three-year protective order against the defendant, who had pleaded no contest to second degree robbery (§ 211) and had admitted that he committed the offense for the benefit of a street gang (§ 186.22, subd. (b)(1)(C)), to protect the victim of the offense. (*Ponce, supra*, 173 Cal.App.4th at pp. 380-381.) The appellate court concluded that the three-year protective order was not authorized by section 136.2 because “[t]he trial court ha[d] jurisdiction to issue [such an order] only

during ‘ “the pendency of [a] criminal action” ’ before it. [Citation.]”⁵ (*Ponce, supra*, at p. 382.)

The appellate court rejected the argument that the challenged protective order was valid as an exercise of the trial court’s inherent authority: “Even had the court relied on ‘inherent judicial authority’ to issue its order, the result would not change. An existing body of statutory law regulates restraining orders. ‘ “[I]nherent powers should never be exercised in such a manner as to nullify existing legislation” ’ (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 528, italics omitted.) Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.)” (*Ponce, supra*, 173 Cal.App.4th at p. 384.)

The appellate court further found that, in any event, “there was no evidence that after being charged Ponce had threatened, or had tried to dissuade any witness, or had tried to unlawfully interfere with the criminal proceedings.” (*Ponce, supra*, 173 Cal.App.4th at p. 384.) “[E]ven where a court has inherent authority over an area where the Legislature has not acted, this does not authorize its issuing orders against defendants

⁵ In 2011, section 136.2 (generally authorizing the issuance of protective orders by a court with jurisdiction over a criminal matter) was amended to add subdivision (i) (Stats. 2011, ch. 155, § 1, p. 2222). At the time defendant was sentenced in 2015, section 136.2, subdivision (i)(1), required as it still does today, a trial court at the time of sentencing a defendant convicted of domestic violence or other specified crimes, to consider issuing an order restraining the defendant from any contact with the victim for a period of up to 10 years. (Stats. 2014, ch. 673, § 1.3, pp. 4444-4445.) The requirement applies “regardless of whether the defendant is sentenced to the state prison or a county jail” (§136.2, subd. (i).) Subdivision (i)(1) of section 136.2 states: “It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.”

by fiat or without any valid showing to justify the need for the order. (*Bitter v. United States* (1967) 389 U.S. 15, 16.)” (*Ibid.*) The prosecutor in *Ponce* “did not make an offer of proof or any argument to justify the need for a protective order.” (*Ibid.*)

The appellate court in *Ponce* also considered the decision in *Wheeler v. United States* (9th Cir. 1981) 640 F.2d 1116, which recognized that trial courts have inherent power to protect witnesses. (*Ponce, supra*, 173 Cal.App.4th at p. 385.) The court stated: “*Wheeler* does not assist the Attorney General. There a trial judge issued a no-contact order against a defendant. The court found that during trial the defendant ‘was trying to force [a witness] to commit perjury.’ (*Wheeler*, at p. 1118, fn. 2.) The Ninth Circuit said that, using its inherent power, ‘It is possible, in a particular situation, that a [federal] trial court would be warranted in issuing an order to protect a witness . . . even though the trial was over.’ (*Id.* at p. 1124.) But the [federal] court stressed that ‘post-trial orders to protect witnesses are extraordinary in character *and to be issued only in rare instances.*’ (*Id.* at p. 1124, fn. 15, italics added.) Even where a defendant has previously harassed a witness at trial, to issue a posttrial witness protection order, the trial court must still determine ‘the necessity of protecting [the witness] under the facts as they presently exist.’ (*Id.* at p. 1126.) To obtain such an order, the prosecution must make a strong showing of a ‘“clear and present danger or a serious and imminent threat,” ’ and must demonstrate that there are no other available alternatives. (*Id.* at p. 1124.)” (*Ibid.*) The appellate court in *Ponce* determined that the *Wheeler* standard for exercising inherent judicial power to protect a witness had not been satisfied. (*Ibid.*)

In considering whether the court had inherent power to issue stay-away orders, we observe that, for certain crimes, courts must, at the time of sentencing, consider issuing a protective order prohibiting a defendant from contacting a victim. (See e.g., §§ 136.2,

subdivision (i)(1), 273.5, 646.9, subd. (k).)⁶ If it is mandatory to consider issuing such protective orders when a defendant is convicted of particular crimes, it is arguably permissible for courts, in the sound exercise of their discretion, to consider issuing such protective orders when a defendant is convicted of other offenses.

We assume *arguendo* that the trial court may, in the sound exercise of its inherent authority, issue a protective order at the time of sentencing to safeguard a victim when the defendant is receiving only a “paper commitment” and that the abuse of discretion standard of review applies to such order. “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) The standard is differential but not empty. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) It takes into consideration the applicable law and the relevant facts. (*Ibid.*)

In this case, we conclude that the trial court exceeded the bounds of reason even if it had inherent, nonstatutory authority to issue protective orders in favor of crime victims. There was no evidence whatsoever that defendant had ever sought to threaten the victims,

⁶ Section 273.5, subdivision (j), provides: “Upon conviction under subdivision (a) [willful infliction of corporal injury], the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. This protective order may be issued by the court whether the defendant is sentenced to state prison or county jail, or if imposition of sentence is suspended and the defendant is placed on probation.” Section 646.9, subdivision (k), provides: “(1) The sentencing court also shall consider issuing an order restraining the defendant [convicted of stalking] from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. [¶] (2) This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation.”

dissuade a witness, or interfere with the criminal proceedings. Rather, the record indicates that the crime involved no violence or property damage, nothing else was taken besides the laptop and its case, and defendant admitted his guilt early in the criminal proceedings.

The People assert on appeal that defendant has a psychotic disorder, but in asking for the stay-away orders, the prosecutor did not mention or present any evidence of a mental disorder suffered by defendant. Although a deputy public defender had stated in a declaration in support of an earlier request for an appointment of a doctor that he had heard from defendant's father that defendant had been diagnosed with some kind of psychotic disorder, the appellate record does not establish that defendant was actually suffering from a mental disorder during the criminal proceedings, including at the time of sentencing. Defendant had been found mentally competent to stand trial.

The victims' fear of defendant was understandable given the proximity of the victims' home to defendant's residence, but there was simply no concrete evidence that defendant continued to pose a risk of danger to the victims or their residence. Thus, even assuming that trial courts have inherent authority to issue protective orders to safeguard a victim, especially when a defendant is released due to "a paper commitment," the prosecutor presented insufficient evidence to justify such orders in this case.⁷

⁷ Defendant was ordered to report to the parole office within 48 hours of sentencing, and presumably he is currently under parole supervision. Standard parole conditions include a requirement that the parolee not engage in criminal conduct. (See Cal. Code Regs., tit. 15, § 2512.) They also include prohibitions concerning weapons and ammunition. (*Id.*, subd. (a)(5); see Form CDCR 1515 ["Notice and Conditions of Parole"].) If victims' concerns have persisted, it might be possible for them to request a special condition of parole restricting defendant's contact with them. (See Form CDCR 1707.)

B. *Excess Custody Credits*

Defendant asserts that the trial court erred by not applying his excess custody credits to his outstanding, eligible fines and to the period of his parole, and, accordingly, the matter must be remanded to the trial court. He recognizes that excess custody may not be credited against nonpunitive assessments. (See *People v. Robinson* (2012) 209 Cal.App.4th 401, 407 [excess custody not credited against court operations assessment (§ 1465.8, subd. (a)(1)) or court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) because they are not punitive].)

Defendant originally argued on appeal that he was entitled to not less than \$30 credit for each day of excess custody credit. In light of section 2900.5's recent amendment, he now argues that he is entitled to not less than \$125 credit for each day of excess custody credit.

At the time of defendant's offense and at the time of sentencing, section 2900.5, subdivision (a), provided for excess custody credit to be applied, "on a proportional basis," to fines "at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence."⁸ (Stats. 2014, ch. 612, § 5, p. 4165; Stats. 2013, ch. 59, § 7, pp. 1430-1431.) In 2015, the Legislature passed a bill amending section 2900.5 to increase the rate of credit for a day of custody from not less than \$30 to

⁸ In 2013, the Legislature amended section 2900.5, subdivision (a), to eliminate restitution fines from the fines to which excess custody credits may be applied. (Compare Stats. 2013, ch. 59, § 7, pp. 1430-1431 with Stats. 2011, ch. 15, § 466, p. 480; see *People v. Morris* (2015) 242 Cal.App.4th 94, 100 (*Morris*.) *Morris* held that the ex post facto clause applied to the defendant's \$200 restitution fine and that, therefore, defendant's excess custody credits applied to that fine under the former version of section 2900.5, subdivision (a), in effect at the time of his 2013 offense. (*Morris, supra*, 242 Cal.App.4th at p. 102.)

not less than \$125 per day, and the amendment went into effect on January 1, 2016.⁹ (Stats. 2015, ch. 209, § 2, pp. 2040-2041; Gov. Code, § 9600, subd. (a).)

The People agree that defendant was entitled to not less than \$30 credit for each day of custody exceeding the term of imprisonment imposed and that the credit must be proportionally applied. They argue that the increased rate of \$125 does not apply because there was no evidence that the Legislature intended that change to be retroactive, consequently prospective operation is presumed (§ 3), and defendant was sentenced before the effective date of the amendment raising that rate. The People further contend that the monetary credit will not eliminate all amounts due and that, consequently, the excess credits cannot serve to reduce defendant's parole term. The People agree that this court should remand the matter to allow the trial court to apply the credit.

⁹ As amended effective January 1, 2016, section 2900.5, subdivision (a), provides for excess custody credit to be applied to fines on a proportional basis "at the rate of not less than one hundred twenty five dollars (\$125) per day, or more, in the discretion of the court imposing the sentence." According to the author of the bill amending the section, " 'AB 1375 will bring equity to an unfair situation that has been getting worse with each passing year, by making the first increase in the dollar amount of credit incarcerated prisoners receive against fines imposed since the law was enacted in 1976. In that time, the minimum wage has increased by over 600% and the total fines, with penalties and assessments, of typical infractions has increased similarly - to over 475% for running a red light and more than 800% for travelling 15 miles over the speed limit. The failure to adjust the rate of credit hurts poor defendants far more than better-off defendants, increasing anger and resentment at the inequity. The inability of an increasing number of defendants to pay the fine outright also increases jail overcrowding and adds to the burden on the taxpayers, since the costs of incarceration are substantially more than the value of the fines imposed.' " (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 1375 (2015-2016 Reg. Sess.) as introduced Feb. 27, 2015, pp. 1-2; Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1375 (2015-2016 Reg. Sess.) as introduced Feb. 27, 2015, p. 1; see Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1375 (2015-2016 Reg. Sess.) as introduced Feb. 27, 2015; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1375 (2015-2016 Reg. Sess.) as introduced Feb. 27, 2015.)

Defendant maintains that, on remand, the trial court must apply the procedural law currently in effect, which includes statutory requirement that the court apply his excess custody credit against eligible fines at the rate of at least \$125 per day pursuant to section 2900.5, subdivision (a). He asserts that such application is prospective.

“New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*); *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 (*Aetna Casualty*)). However, this rule does not preclude the application of new procedural or evidentiary statutes to trials occurring after enactment, even though such trials may involve the evaluation of civil or criminal conduct occurring before enactment. (*Tapia*, at pp. 288-289.)” (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936 (*Elsner*)). “[C]hanges to rules governing *pending litigation*, for example, frequently have been designated as prospective, because they affect the future; that is, the future proceedings in a trial.” (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 956.)

“Criminal statutes presumptively apply only prospectively. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287; § 3 [‘No part of [the Penal Code] is retroactive, unless expressly so declared.’].) . . . A change in substantive criminal law is retroactive if applied to cases in which the crime occurred before its enactment, but a change in procedural law is not retroactive when applied to proceedings that take place after its enactment. (*Tapia v. Superior Court, supra*, 53 Cal.3d 282 at p. 289 [‘a law governing the conduct of trials is being applied “prospectively” when it is applied to a trial occurring after the law’s effective date, regardless of when the underlying crime was committed’].)” (*People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

“In deciding whether the application of a law is prospective or retroactive, we look to function, not form. (*Tapia, supra*, 53 Cal.3d at p. 289; *Aetna Casualty, supra*, 30 Cal.2d at p. 394.) We consider the effect of a law on a party’s rights and liabilities, not

whether a procedural or substantive label best applies.” (*Elsner, supra*, 34 Cal.4th at pp. 936-937.)

We are not convinced that application of the current section 2900.5, subdivision (a), on remand would be prospective even if it were considered a procedural change. In this case, the defendant was sentenced on June 1, 2015 before the 2015 bill amending section 2900.5 was even chaptered and before the new law went into effect on January 1, 2016. (See Stats. 2015, ch. 209, § 2, pp. 2040-2041; Gov. Code, § 9600, subd. (a).) On remand, the trial court would be applying the law to an event, namely sentencing, that occurred before its amendment, i.e., a retroactive application of the law.

In any event, the right to have excess custody credited against eligible fines at a certain rate must be regarded as a substantive right protected by the ex post facto clause. The prohibition against ex post facto laws “forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred.” (*Weaver v. Graham* (1981) 450 U.S. 24, 30; see *California Department of Corrections v. Morales* (1995) 514 U.S. 499, 506, fn. 3.) “Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.” *Dobbert v. Florida* (1977) 432 U.S. 282, 293, italics omitted.) A procedural law “simply alter[s] the methods employed in determining” whether the punishment is “to be imposed” rather than “chang[ing] . . . the quantum of punishment attached to the crime.” (*Id.* at 293-294.) If the Legislature were to amend section 2900.5 by decreasing the rate of credit attributed to each excess day of custody to a rate of less than at least \$125 per day and apply it to a defendant whose offense was committed when the current version of section 2900.5 was in effect, such amendment could change the “quantum of punishment.” Consequently, it could not be considered a mere procedural change, rather than an impermissible ex post facto law. (See *Morris, supra*, 242 Cal.App.4th at p. 102 [“ex post facto clause applies to defendant’s \$200 restitution fine, and therefore the restitution fine is governed by the statutes in effect at the time of his offense”]; *People v. Souza* (2012) 54 Cal.4th 90, 143

[“imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions”].)

Application of section 2900.5 as amended effective January 1, 2016 on remand would constitute retroactive application of the law. Appellant has advanced no argument that the current section 2900.5 should be applied retroactively.

At the time of sentencing, the trial court determined that defendant was entitled to a total of 740 days, which consisted of 370 actual days and 370 days of conduct credit pursuant to section 4019. A period of two years is equal to 730 days (365 x 2). Since the total number of days of custody credit exceeded the number of days of the two-year term of imprisonment, the trial court should have applied defendant’s excess custody credits to defendant’s eligible fines on a proportional basis at a rate of not less than \$30 per day. (Former § 2900.5, subd. (a).) The matter must be remanded to allow the trial court to rectify this oversight.¹⁰

In the event that the trial court opts to use a rate exceeding \$30 per day, it is conceivable that there could be remaining days of custody to be credited against a period of parole. (§ 2900.5, subs. (a), (c).) It is a “long-established rule that, in the ordinary situation of original sentencing, excess presentence credits can reduce any period of parole. (See *In re Sosa* (1980) 102 Cal.App.3d 1002.)” (*People v. Morales* (2016) 63 Cal.4th 399, 405.)

C. Prior Prison Term Allegation

The amended felony complaint contained a prior prison term allegation (§ 667.5, subd. (b)). The plea agreement provided for dismissal of count 1 and the prior prison

¹⁰ Since we agree that the trial court erred by failing to apply the excess custody credits to the fines on a proportional basis and that the matter must be remanded to allow the court to do so, we find it unnecessary to reach defendant’s alternative argument that defense counsel provided ineffective assistance of counsel by failing to raise the issue of excess custody credits in the trial court.

term allegation. At the sentencing hearing on June 1, 2015, the court dismissed count 1 pursuant to the plea agreement, but it neglected to dismiss the prior prison term allegation. Defendant argues that the matter must be remanded to implement the agreement by dismissal of that enhancement allegation. The People agree that the prior prison term allegation should have been dismissed.

“Specific enforcement [of a plea bargain] is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that [the judge] considers unsuitable under all the circumstances.” (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) In this case, the court’s failure to fully implement the plea bargain appears to be a mere oversight. We shall remand the matter for dismissal of the prior prison term allegation.

DISPOSITION

The judgment is reversed for limited purposes. Upon remand, the trial court shall strike its stay-away orders, apply defendant’s excess custody credits, and dismiss the prior prison term allegation.

ELIA, ACTING P.J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.