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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM VALENTIN BITO,

Defendant and Appellant.

H036375

(Monterey County

Super. Ct. Nos. SS102156A,

MS282481A)

In this case we are asked to decide if several sentencing errors occurred with respect to the judgment entered following appellant's conviction by plea in Monterey County Superior Court case No. SS102156.

For reasons that follow, we modify several probation conditions that were imposed by the court and order the correction of an arithmetical error in appellant's custody credits. With those modifications the judgment (order of probation) is affirmed.

Proceedings Below

On December 18, 2009, appellant was charged by complaint in Monterey County Superior Court case No. MS282481A (hereafter MS282481A) with one misdemeanor count of petty theft. (Pen. Code, § 484, subd. (a).) Subsequently, appellant pleaded guilty to the charge. The trial court suspended imposition of sentence, placed appellant on probation on various terms and conditions, one of which was that he obey all laws,

and imposed but suspended a 30 day county jail term with credit for time served of eight days.

Thereafter, on May 11, 2010, appellant admitted violating the terms of probation. The court reinstated appellant's probation but modified the terms and conditions. On September 16, 2010, the trial court found appellant in violation of his probation, but again reinstated him on probation on the same terms and conditions.

On September 20, 2010, by way of a complaint in case No. SS102156A (hereafter SS102156A), the Monterey County District Attorney charged appellant with second degree robbery (§ 211, count one),¹ assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1), count two) and street terrorism (§ 186.22, subd.(a), count three). With respect to counts one and two, the complaint contained an allegation that the crimes were committed for the benefit of, at the direction of, or in association with a Norteño criminal street gang. On October 27, 2010, pursuant to a negotiated disposition, appellant pleaded no contest to counts two and three on the understanding that he would be granted felony probation.

In MS282481A, the court found appellant in violation of his probation and the court revoked appellant's probation in that case.

On December 1, 2010, the trial court suspended imposition of sentence in SS102156A and placed appellant on probation on various terms and conditions. The court ordered that appellant serve 180 days in county jail, with credit for time served of 112 days (76 actual days plus 36 good time/work time credits calculated at 33 percent). On motion of the prosecution, count one (the robbery charge) was dismissed.

In MS282481A, the court reinstated appellant's probation and modified it. The court ordered that appellant serve 45 days in county jail and awarded him credit for time served of 12 days.

¹ All unspecified statutory references are to the Penal Code.

Relevant here, in SS102156A, the court ordered the following probation conditions:

"8." "You are to totally abstain from the use of alcoholic beverages. Do not purchase or possess any alcoholic beverages, stay out of places where alcohol is the main item for sale."

"9" "Do not use or possess any alcohol, narcotics, intoxicants, drugs or other controlled substances without the prescription of a physician. Do not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances."

"13" "Do not possess, receive or transport any firearms, ammunition or any deadly or dangerous weapons. Immediately surrender any firearms or ammunition that you possess or own to law enforcement."

"16" "Have no contact with the victim Jose Fierro, including telephone, written or second-party contacts or via computer."

"17" " Stay 100 yards away from the victim Jose Fierro, his vehicle, residence or place of employment."

"19" "Do not be present in any area you know or reasonably should know or are told by the probation officer to be a gang-gathering area."

"20" "Do not associate with any individuals you know or reasonably should know to be gang members, drug users or who are on any form of probation or parole supervision."

"21" "Do not remain in any vehicle, either as a passenger or driver, that you know or reasonably should know to be stolen or to contain any firearms or illegal weapons."

"23" "Do not possess, use or wear or display any item you know or reasonably should know or have been told by your probation officer to be associated with membership or affiliation in a criminal street gang, including but not limited to any insignia, emblem, button, badge, cap, hat, scarf, bandanna or any article of clothing, hand sign or paraphernalia, to include the color red."

"24" "Do not obtain any new gang-related tattooing upon your person while on probation supervision."

Appellant filed a timely appeal in both the misdemeanor and felony cases. On May 11, 2011, this court granted appellant's motion to have the appeal in the misdemeanor case transferred and consolidated with the felony appeal.

Facts Underlying the Felony Case²

On September 17, 2010, at approximately 8:03 p.m. police officers were dispatched to the area of the Burger King on South Main Street on a report of four male gang members fighting. Dispatch told the officers that the males were fighting at the rear of the Herald Newspaper office located at 929 South Main Street. One of the males got into a midsize sedan and the other males were banging on the vehicle. The main aggressor was described as an Hispanic male adult in a white 49er jersey with a red number on it.

Upon arriving at the scene, an officer saw a male matching the description of the main aggressor walking from the parking lot directly to the rear of 921 South Main Street in the direction of the Burger King parking lot. The officer activated the emergency lights and siren on his patrol car and attempted to contact this male, who was later identified as William Bito. As the officer approached, Bito removed something from his right front pocket in his pants and then turned his body as if to conceal what he was doing and shoved the item in the bushes. Bito turned and faced the officer.

The officer believed that Bito was trying to conceal a weapon in the bushes and ordered him at gunpoint to place his arms in the air and get down on his knees; Bito complied. When additional officers arrived, Bito was placed in handcuffs and searched. Bito stated that he did not have any weapons; he was just placing his pipe in the bushes. Bito was placed in the back of a patrol car.

² The facts are taken from the probation officer's report.

Thereafter, the officer made contact with the victim Jose Fierro. Fierro stated that he believed that the males were trying to rob him. He said the man that had been placed in handcuffs was the main person attacking him; this man had on a white 49er jersey with a red 85 on it. Fierro said that there were two other males with Bito and he provided the officer their descriptions.

Fierro explained that he was leaving the Santa Cruz Market on Pajaro Street and was walking through the parking lot when Bito came up to him. Bito began to ask him " 'Where are you from?' " Bito also said " ' Norte' " and " 'Westside.' " Fierro did not want any trouble and told Bito that he did not belong to any gangs. Bito hit Fierro on the back of the head, which dazed him.

At that moment, two other males ran over from the bushes and began to position themselves so Fierro was surrounded. The other males stood still while Bito jumped up and down and challenged Fierro to a fight. Fierro attempted to leave and he realized that his phone had been taken from him. Fierro walked back to the area where he had been hit and Bito came at him again. Fierro saw Bito break a glass bottle on the cement.

Fierro tried to run away from Bito and Bito attempted to hit him in the back with the bottle. Fierro turned to defend himself and suffered a cut to his palm. Fierro went to the Burger King parking lot and officers arrived on the scene. Fierro told the officers he thought his cellular telephone had been taken during the initial fight.

An officer talked to Martha Hernandez, who stated that she was Fierro's girlfriend. She told the officer that after she left the Santa Cruz Market with Fierro they had walked to their vehicle. She got into the vehicle and saw Bito walking toward them. Bito was shouting gang slogans at them; she heard him say " 'Where are you from?' " Also, she heard " 'Norte.' " Hernandez said that Bito and Fierro got into a "verbal argument." Hernandez got out of the vehicle and told Bito to leave them alone. Two other males came toward the vehicle.

Hernandez saw Fierro go around the vehicle to where she was standing; Bito hit him. Fierro attempted to defend himself, but the two other males began hitting and kicking Fierro. Hernandez yelled out that she was going to call the police and two males fled, but Bito remained in the parking lot area. Hernandez and Fierro got into their vehicle and drove across the street to the Burger King parking lot where they called for help; officers arrived.

The officers spoke with two witnesses both of whom gave similar stories to those of Hernandez and Fierro. Both witnesses described Bito as the aggressor, but could not provide detailed descriptions of the other two males.

Fierro told an officer that he had pain in the back of his head where he had been hit and he could feel a bump on his head. Fierro had a one inch cut on his right palm. Fierro was evaluated at the scene by American Medical Response, but declined medical aid.

Bito informed an officer that he had been housed in K pod in the county jail, which is a unit for Norteño gang members.

Discussion

I. Challenge to Probation Conditions

Appellant challenges probation conditions 8, 9, 13, 16, 17 and 24 as being vague because none of the conditions "provide adequate notice" as they lack a scienter requirement. In addition, appellant asserts that condition 19 is unconstitutional because it prevents him from merely passing through an area on the way to work or school. As such, he argues it is overbroad and infringes on his right to loiter and travel.

Finally, appellant complains that the sentencing minutes deviate from the scienter language the trial court used in probation conditions 20, 21, and 23. Accordingly, he contends that the minute order must be corrected to conform to the court's oral pronouncement of judgment.

Respondent does not dispute that the conditions in question are invalid because they lack a knowledge requirement, but urges this court to follow the approach adopted by the Third District Court of Appeal in *People v. Patel* (2011) 196 Cal.App.4th 956 (*Patel*). In *Patel*, the Third District considered whether a probation condition ordering that the defendant not drink alcohol, possess it, or be in a place where it was the chief item of sale was invalid because it lacked a knowledge requirement. (*Id.* at p. 959.) The *Patel* court expressed its frustration with routine challenges to probation conditions lacking a knowledge requirement. Accordingly, in the interests of "fiscal and judicial economy," the court adopted a new procedure noting, "there is now a substantial uncontradicted body of case law establishing, as a matter of law, that a probationer cannot be punished for presence, possession, association, or other actions absent proof of scienter. As with contracts generally, this should be considered a part of the conditions of probation 'just as if [this was] expressly referred to and incorporated.'" [Citations.] We also do not discern how addressing this *specific* issue on a repetitive case-by-case basis is likely to dissuade a probation officer inclined to act in bad faith from finding some *other* basis for harassing an innocent probationer. As a result, we . . . now give notice of our intent to henceforth no longer entertain this issue on appeal, whether at the request of counsel or on our own initiative. We construe every probation condition proscribing a probationer's presence, possession, association, or similar action to require the action be undertaken knowingly. It will no longer be necessary to seek a modification of a probation order that fails to expressly include such a scienter requirement." (*Id.* at p. 960.)

In *People v. Moses* (2011) 199 Cal.App.4th 374, 380–381, the Fourth District declined to follow the *Patel* approach, choosing instead to modify probation conditions to include a knowledge requirement.

Similar to several of our sister courts, we too are frustrated by how frequently this issue arises, and in these days of strained budgets, we agree that the interests of fiscal and

judicial economy are critical. However, respectfully, we decline to follow the lead of the *Patel* court. Our Supreme Court faced the issue of the lack of a knowledge requirement in a probation condition and the remedy it mandated was unequivocal: "we agree with the Court of Appeal *that modification to impose an explicit knowledge requirement is necessary to render the condition constitutional.*" (*In re Sheena K.* (2007) 40 Cal.4th 875, 892, italics added.) Until our Supreme Court rules differently, we will follow its lead on this point. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)³

That being said, we take this opportunity to direct that the Superior Court of the State of California for the County of Monterey should take steps to ensure that its probation conditions both as announced by the court and in the court's minute order meet constitutional requirements by including "know or reasonably should know" in probation conditions.

We recognize that in order to be sufficiently precise for a probationer to know what is required of him or her, a requirement of knowledge should be included in some probation conditions prohibiting the possession of specified items. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752.)

However, we also recognize that as one of the objectives of probation conditions is to prevent future criminality, it is common for probation conditions to reference, restate, echo, or parallel criminal statutes. When the underlying criminal statute, such as prohibiting possession of guns and ammunition, has been judicially construed as including an implicit knowledge requirement, we believe that the parallel probation condition should be given the same construction. Due process does not require greater

³ This court is unaware of any authority that would allow an appellate court to amend trial court orders in cases not before the court. Appellate jurisdiction is confined to those decisions of the trial court that have been put before the appellate court by way of appeal or writ. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 666 [appellate jurisdiction is limited to the procedural context of a direct appeal or writ petition].)

precision of the probation conditions implementing criminal statutes than it does of the statutes themselves. Accordingly, we will order modifications to some, but not all, of the conditions challenged by appellant.

In this case, we will modify probation condition 8, which prohibits the possession of alcohol to include a knowledge requirement.

Similarly, as to condition 24, which prohibits appellant from obtaining any gang related tattooing while on probation, we shall modify the condition to include a knowledge requirement because the condition could easily be violated by appellant obtaining a tattoo that he does not know is gang related.

As to conditions 16 and 17, we shall modify these conditions because appellant could unknowingly violate the condition that he stay 100 yards away from the victim and the victim's residence or place of employment.⁴ For example, if unbeknownst to appellant Fierro were a clerk at a grocery store, appellant could violate the probation condition merely by walking within 100 yards of the store. The same would be true of the probation condition prohibiting appellant from contacting Fierro, since appellant could violate the condition by engaging in an on line chat with a person identified only by a user name if that person turned out to be Fierro or by engaging in door to door or telephone sales.

As to probation condition 13, which prohibits appellant from possessing firearms and ammunition, we note that in *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*), a case from this court, a condition of probation prohibited the defendant from owning, possessing, or having within his custody or control any firearm or ammunition under sections 12021 and 12316, subdivision (b)(1). (*Id.* at p. 840.) On appeal, the defendant contended the probation condition lacked a scienter requirement. This court concluded

⁴ We note that as defense counsel pointed out appellant did not know where Fierro worked or lived and given that this appears to be a random encounter it is probable that he would not recognize him again either.

"where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it is not necessary to include in the condition an express scienter requirement which is necessarily implied in the statute." (*Id.* at p. 843.)

"Implicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm. We believe the same is true of a probation condition prohibiting possession of a firearm, and, by logical extension, possession of ammunition." (*Kim, supra*, 193 Cal.App.4th at p. 846.) Similar to *Kim*, the probation condition in this case is the same as the statutory provision in section 12021 prohibiting a person convicted of a felony from possessing a firearm. Since the firearms prohibition in this case implements a statutory provision, it does not require the addition of a knowledge requirement. (*Ibid.*) As this knowledge requirement is implicit, due process does not require making it explicit.

As to probation condition 9, which prohibits appellant from using and possessing narcotics and controlled substances without a prescription, we note that a significant amount of the behavior described in this condition has already been criminalized. The California Uniform Controlled Substances Act (Health & Saf. Code, § 11000 et seq.; sometimes "the Act") regulates the use of controlled substances in California. Five sections of the Act each contain a numbered schedule (I-V) listing a variety of controlled substances. (Health & Saf. Code, §§ 11054–11058.) For example, marijuana is listed in Schedule I as a controlled hallucinogenic substance. (Health & Saf. Code, § 11054, subd. (d)(13).) The Act provides a definition of "narcotic drug" (Health & Saf. Code, § 11019) and it defines "narcotics" in other statutes as listed controlled substances (Health & Saf. Code, § 11032). Various narcotic drugs are listed in Schedules II (Health & Saf. Code, § 11055, subd. (b)), III (Health & Saf. Code, § 11056, subd. (e)), IV (Health & Saf. Code, § 11057, subd. (c)), and V (Health & Saf. Code, § 11058, subd. (c)). The Act provides no

definition or description of "intoxicant," although many of the controlled substances may be said to induce an intoxicated state.⁵

Health and Safety Code section 11350, subdivision (a) of the Controlled Substances Act makes it a felony to possess certain controlled substances listed in all Schedules except II without a written prescription. Health and Safety Code section 11377 makes it either a felony or a misdemeanor to possess yet other controlled substances listed in all Schedules without a prescription. Unlawful possession of "not more than 28.5 grams of marijuana" is a misdemeanor offense. (Health & Saf. Code, § 11357, subd. (b).)

"[A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue ([Health & Saf. Code,] §§ 11350–11352, 11357–11360, 11377–11379), such a requirement has been implied by the courts." (*People v. Coria* (1999) 21 Cal.4th 868, 878.) "The essential elements of unlawful possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.'" (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.)

Nevertheless, condition 9 goes further than just prohibiting the possession of controlled substances. It prohibits the *use* of controlled substances, narcotics, intoxicants, and drugs without a physician's prescription.⁶

We note that pursuant to Health & Safety Code section 11550, subdivision (a), it is unlawful to use or be under the influence of any of the following controlled substances: From Schedule I, opiates (Health & Saf. Code, § 11054 subd. (b)); opium derivatives

⁵ In fact, the only definition of "intoxicant" we find in a current California statute explains that " 'Intoxicant' means any form of alcohol, drug, or combination thereof." (Harb. & Nav. Code, § 651, subd. (j).)

⁶ We are assuming, because appellant has not challenged it, that the court used the word "drugs" as a synonym for controlled substances.

(Health & Saf. Code, § 11054, subd. (c)); the depressants mecloqualone and methaqualone (Health & Saf. Code, § 11054, subd. (e)); cocaine base (Health & Saf. Code, 11054 subd. (f)(1)); mescaline (Health & Saf. Code, § 11054, subd. (d)(14)); peyote (Health & Saf. Code, § 11054, subd. (d)(15)); and the hallucinogenic phencyclidines, including PCE and TCP (Health & Saf. Code, § 11054, subds. (d)(21), (d)(22), (d)(23)). From Schedule II, opium and its derivatives, coca leaves, cocaine, and ecgonine (Health & Saf. Code, § 11055, subd. (b)); opiates (Health & Saf. Code, § 11055, subd. (c)); amphetamine and methamphetamine (Health & Saf. Code, § 11055, subds. (d)(1), (d)(2)); and the depressant phencyclidines, including PCP (Health & Saf. Code, § 11055, subd. (e)(3)). From Schedules III, IV, and V, narcotic drugs. (Health & Saf. Code, § 11056 et seq.) Of course, the prohibition does not apply when the drug has been "administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances." However, although the defendant need only raise a reasonable doubt about whether his or her use was lawful because of a valid prescription (see *People v. Mower* (2002) 28 Cal.4th 457, 479), "[i]t shall be the burden of the defense to show that it comes within the exception." (Health & Saf. Code, § 11550, subd. (a).)

As can be seen, the statutory scheme governing the use and possession of guns and ammunition is more straightforward and far less complex than the statutory scheme governing the use and possession of controlled substances. There are a myriad of substances that qualify as controlled substances. On the other hand, even taking into consideration different calibers and types of gun or ammunition, guns and ammunition are much more easily recognizable. Given this difference, in an abundance of caution we will modify probation condition 9 to include a knowledge requirement.

As to probation condition 19, which forbids appellant from being present in any gang-gathering area, appellant contends that the condition is overbroad because it

impinges on his right to travel and loiter. Further, appellant argues that the phrase "gang gathering area" is vague and overbroad.

Although "[t]he word 'travel' is not found in the text of the [federal] Constitution," "the 'constitutional right to travel from one State to another' is firmly embedded in [the United States Supreme Court] jurisprudence." (*Saenz v. Roe* (1999) 526 U.S. 489, 498.) "The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments." (*Jones v. Helms* (1981) 452 U.S. 412, 418–419, fn. omitted; see *Attorney General of N.Y. v. Soto-Lopez* (1986) 476 U.S. 898, 902 (plur. opn. of Brennan, J.) [textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration has been variously assigned to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause, to the Privileges and Immunities Clause of the Fourteenth Amendment, and has also been inferred from the federal structure of government adopted by our Constitution].) "The 'right to travel' discussed in [the United States Supreme Court] cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." (*Saenz v. Roe, supra*, at p. 500.) In addition, "[t]he right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1100; see *In re White* (1979) 97 Cal.App.3d 141, 148 [the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole].) Furthermore, a plurality of the United States Supreme Court has recognized that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth

Amendment." (*City of Chicago v. Morales* (1999) 527 U.S. 41, 53, fn. omitted (plur. opn. of Stevens, J.).)

In *In re H.C.* (2009) 175 Cal.App.4th 1067 (*H.C.*) we discussed the propriety of a condition that a probationer " 'not frequent any areas of gang related activity and not participate in any gang activity.' " (*Id* at p. 1072.) We found the word " 'frequent' " to be "obscure" and the phrase " 'areas of gang-related activity' " to be overbroad in that it "might be, in some instances, an entire district or town." (*Ibid.*) We gleaned that the point of the probation condition was to prohibit the minor from visiting areas known to him to be a place of gang-related activity. Although we considered it "preferable" for such a condition "to name the actual geographic area that would be prohibited to the minor and then to except from that certain kinds of travel, that is, to school or to work," we concluded that "[a]t the very least the condition . . . should be revised to say that the minor not visit any area known to him to be a place of gang-related activity." (*Ibid.*)

Although we do not find the concept "not be present" to be vague or obscure, we find the concept to be constitutionally problematic. Applied literally, the prohibition against being "present" in gang areas would render appellant subject to arrest for a probation violation for merely passing through gang-gathering areas while traveling by bus or in a friend's car on his way to school, work, home, or the court. Such an application, however, implicates appellant's constitutional right to travel and is not narrowly tailored to prevent appellant's involvement in gang-related activity and achieve the rehabilitative and reformatory purposes of probation. (See *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373 [observing that a restriction on travel to gang territory might be proper for a minor living outside the gang's territory but overbroad for a minor who lives, works, or attends school within that area]; *In re White, supra*, 97 Cal.App.3d at pp. 149–151 [probation condition forbidding travel within designated areas having significant prostitution activities violated the defendant's constitutional right to travel].)

As to appellant's argument that the phrase "gang gathering area" is vague and overbroad, we do not find the concept "gang-gathering area" to be vague. It is well known that modern criminal street gangs frequent particular geographical areas to carry out their activities. "No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them." (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056.)

As to whether the term "gang gathering area" is overbroad, appellant asserts that it would be preferable to name the actual geographic area or require that he know a location is an area of criminal street gang related activity. We recognize that, if considered out of context, the phrase "gang gathering area" suffers from both geographical and temporal imprecision. Although we find it "preferable" to name the actual geographic area (*In re H.C., supra*, 175 Cal.App.4th at p. 1071), we also recognize that a gang-gathering area may change over time and these areas are not necessarily static geographical places.

In his briefs, appellant merely asserted the conclusion of overbreadth without identifying any specific constitutional right that was impaired by the condition. (See *People v. Olguin* (2008) 45 Cal.4th 375, 387 [when the defendant asserted overbreadth without identifying any constitutional right affected by a condition of probation, his challenge was not subject to exacting scrutiny for overbreadth].) Nevertheless, we will assume for the sake of argument that he is asserting that the condition as written impinges on his constitutional right to travel.⁷

"[T]he overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully and reasonably related to the compelling

⁷ As we explained in *People v. Barajas* (2011) 198 Cal.App.4th 748, the constitutional overbreadth doctrine applied to probation conditions is not the same as applied to criminal statutes. The federal overbreadth doctrine is concerned with the statute's restriction on the free speech rights of third parties. The state's overbreadth concern about probation conditions is undue restriction of the probationer's constitutional rights and is not limited to free speech. (*Id.* at p. 755, fn. 4.)

state interest in reformation and rehabilitation. [Citations.]" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

We remind appellant that "[i]nherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*U.S. v. Knights* (2001) 534 U.S. 112, 119.)

There can be no doubt that condition 19 was imposed to prevent appellant from meeting with fellow gang members and being dragged back to a gang lifestyle. Although the condition does impose a limitation on appellant's constitutional right to travel, it is closely tailored to the purpose of the condition. As the probation officer's report notes, police reports indicate that appellant was yelling gang slogans at the victim during the assault and numerous witnesses heard appellant yelling " 'Norte.' " Thus, the condition is carefully tailored to foster appellant's rehabilitation and to protect public safety. Accordingly, it is not overbroad. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

That being said, we shall modify the condition to prohibit appellant from visiting or remaining in any area he knows, reasonably should know, or is told by his probation officer to be a gang-gathering area.

Finally, as to probation conditions 20, 21 and 23, the minute order language deviates from the language as orally announced by the court.⁸ When there is a discrepancy between the minute order and the oral pronouncement of judgment, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) Thus,

⁸ In conditions 20, 21 and 23, the written minute order uses the language "know or suspect" condemned by this court in *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.

conditions 20, 21 and 23 as written in the minute order must be modified to reflect the conditions orally imposed by the court.

II. Custody Credits in MS282481A

In his opening brief, appellant asserted that since his presentence custody was due solely to the new felony charges and not for any other misconduct or probation violation, the time he spent in custody before sentencing on both the misdemeanor and felony case should have resulted in custody credits in both cases.

However, in a supplemental opening brief appellant has informed this court that he is withdrawing this argument.

III. Miscalculation of 4019 Credits

Appellant argues that the trial court miscalculated his section 4019 credits in SS102156A when it awarded him only 36 days of conduct credits. Respondent concedes the issue and asks this court to order the clerk of the court to amend the judgment noting that appellant is due 114 days of credit in the case.

In this case, as noted, the court awarded appellant 76 actual days credit for time served and 36 days of conduct credit. According to the probation officer's report he was arrested on September 17, 2010, and his sentencing took place on December 1, 2010. Thus, he was in custody for 76 days. Applying the formula for conduct credits that was in effect during the time appellant was in custody, he is entitled to 38 days conduct credit.⁹ We will order the clerk to amend the minute order from the sentencing hearing in the felony case.¹⁰

⁹ Since appellant was being sentenced on a serious felony, street terrorism (§ 1192.7, subd, (c)), he is not entitled to the enhanced credits of the January 25, 2010 amendment to Penal Code section 4019.

¹⁰ The minute order in SS102056A actually shows an award of 152 days (76 actual days plus 76 days of conduct credits). This is incorrect.

IV. *Insufficient Evidence of Ability to Pay Probation Costs*

Appellant was ordered to pay probation supervision cost of \$81 per month and a presentence investigation fee of \$864. Appellant contends that before making any orders of reimbursement, the trial court was required to refer him to the probation department so that the probation department could analyze his ability to pay and inform him he was entitled to a court hearing on his ability to pay.

Section 1203.1b, subdivision (b) states in pertinent part: "The court shall order the defendant to pay the reasonable costs [of probation supervision and any presentence investigation and report] if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." The statute describes the procedure the trial court must follow before making such an order. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400–1401 (*Pacheco*).) The court shall first order the defendant to appear before "the probation officer, or his or her authorized representative" so that the officer may ascertain the defendant's ability to pay any part of these costs, and to propose a payment schedule. (§ 1203.1b, subd. (a).) Unless the defendant waives the right, before the court orders payment of these costs the defendant is entitled to a court hearing on his or her ability to pay them. (§ 1203.1b, subds.(a) & (b).) Because the statutory procedure provided by section 1203.1b for the determination of the defendant's ability to pay the ordered probation supervision fee was not followed in *Pacheco* (*Pacheco, supra*, at p. 1401), this court directed the superior court to determine in accordance with the statute the defendant's ability to pay the fee on remand before imposing it. (*Id.* at p. 1404.)

Here, in ordering appellant to pay the cost of probation supervision and any presentence investigation and report, the court specifically stated that it was to be "in accordance with [appellant]'s ability to pay." Further, the court ordered appellant to

report to the Department of Revenue to make arrangements to pay all fines, fees, and restitution.

Subdivision (a) of section 1203.1b provides as follows: "In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. *The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay.* The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right

to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (Italics added.)

By ordering appellant to go to the Department of Revenue to make arrangements to pay fees, the trial court did no more than comply with the statutory obligation imposed upon it by subdivision (a) of section 1203.1b. The Department of Revenue will inquire into defendant's ability to pay, but no determination of ability to pay has yet been made. We observe that under Penal Code section 1203.1b an order to report for an inquiry into defendant's ability to pay is not itself contingent on the trial court first making a determination of ability to pay. Instead, it is a mandatory order that the court "shall" make.

By making appellant's probation cost order "in accordance with [appellant's] ability to pay," the order for probation costs imposes no current financial obligation on appellant. It simply sets a maximum financial obligation and leaves open what portion of that maximum defendant will pay. By ordering defendant to report to the Department of Revenue for an evaluation, the trial court complied with the procedure that must be followed before a defendant can be required to pay probation supervision costs. Once ability to pay has been determined by the Department of Revenue, defendant will have the right to an ability-to-pay hearing before the trial court.

Thus, appellant's case is distinguishable from the situation in *Pacheco*. There, the trial court imposed a probation supervision fee and "the statutory procedure provided at section 1203.1b for a determination of . . . ability to pay probation-related costs was not followed." (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.)

V. *The Restitution Fine*

The trial court imposed a \$200 restitution fund fine pursuant to section 1202.4, subdivision (b) "as to each count" for a total of \$400. Appellant argues that only \$200 of the fine was authorized because under section 654 he cannot be punished for the second count of street terrorism.

Respondent contends that the challenge to the restitution fund fine is premature because the trial court suspended imposition of sentence and placed appellant on probation, suspending the challenged fine " 'pending successful completion of probation.' " However, because any violation of probation will result in an automatic imposition of the restitution fund fine, we will address this issue.

In essence, appellant asserts that the record supports the conclusion that only one criminal act occurred; the physical contact between him and the victim that resulted in the assault with force likely to produce great bodily injury, which was also the basis for the street terrorism conviction.

Under section 1202.4, where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, and under the version of section 1202.4 that was in effect when appellant was sentenced, "[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (Former § 1202.4, subd. (b)(2).) Case law has recognized restitution fines, including a fine imposed under section 1202.4, subdivision (b) constitute a form of punishment. (*People v. Hanson* (2000) 23 Cal.4th 355, 361; *People v. Le* (2006) 136 Cal.App.4th 925, 933.)

Section 654 provides in relevant part, "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 applies not only where one act in the ordinary sense is involved but also where there is a course of conduct that violates more than one statute and comprises an indivisible transaction. (*People v. Davis* (1966) 241 Cal.App.2d 51, 55.)

Thus, if a defendant is convicted of several offenses that were incident to one objective, the defendant may be punished for any one of such offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

Whether a course of conduct is divisible and thus gives rise to more than one act under section 654 depends on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If all of a defendant's offenses were incident to one objective, he or she may be punished for any one of the offenses, but not more than one. (*Ibid.*) However, if a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he or she may be punished for the independent violations committed in pursuit of each objective even though the violations were part of an otherwise indivisible course of conduct. (*People v. Perez, supra*, 23 Cal.3d at p. 551.)

Appellant's argument rests on the premise that there was only one act in this case that gave rise to both crimes.

The earliest case dealing with the application of section 654 in the context of a gang participation charge is *People v. Herrera* (1999) 70 Cal.App.4th 1456 (*Herrera*), a case from Division Three of the Fourth District Court of Appeal.

In *Herrera*, two gangs engaged in a series of retaliatory shootings. In one of the shootings, shots were fired at a house occupied by members of the defendant's gang. One of the members of defendant's gang then drove and picked up the defendant, who explained to his girlfriend that "his 'home boys were after the guys.'" (*People v. Herrera, supra*, 70 Cal.App.4th at p. 1461, fn. omitted.) The defendant and his cohort then drove by a house identified with the rival gang, made a U-turn, and drove by again, firing shots both times. On the first pass, two people were hit. (*Ibid.*)

As a result, among other things, the defendant was convicted of one count of gang participation and two counts of attempted murder. (*Herrera, supra*, at p. 1462.) The court held that section 654 did not require the trial court to stay the gang participation term. The *Herrera* court explained: "[M]ultiple punishment . . . may be imposed where

the defendant commits two crimes in pursuit of two independent, even if simultaneous, objectives. [Citations.]' [Citation.]" (*Herrera, supra*, at p. 1466.)

The *Herrera* court went on to explain that "The characteristics of attempted murder and street terrorism are distinguishable In the attempted murders, Herrera's objective was simply a desire to kill. For these convictions, the identities (or gang affiliations) of his intended victims were irrelevant." (*Herrera, supra*, at pp. 1466–1467.) At this point, the court noted that there was "sufficient [evidence] to establish the specific intent to kill required for both counts of attempted murder. [Citations.]" (*Id.* at p. 1467.)

The *Herrera* court continued, "under section 186.22, subdivision (a) the defendant must necessarily have the intent and objective to actively participate in a criminal street gang. However, he does not need to have the intent to personally commit the particular felony (e.g., murder, robbery or assault) because the focus of the street terrorism statute is upon the defendant's objective to promote, further or assist the gang in its felonious conduct, irrespective of who actually commits the offense. For example, this subdivision would allow convictions against both the person who pulls the trigger in a drive-by murder *and* the gang member who later conceals the weapon, even though the latter member never had the specific intent to kill. Hence, section 186.22, subdivision (a) requires a separate intent and objective from the underlying felony committed on behalf of the gang. The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,] thereby precluding application of section 654. [Citation.]" (*Herrera, supra*, 70 Cal.App.4th at pp. 1467–1468, fns. omitted.) At this point, the court found sufficient evidence that the defendant "intended to aid his gang in felonious conduct, irrespective of his independent objective to murder." (*Id.* at p. 1468.)

Finally, the court added: "[I]f section 654 were held applicable here, it would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his

culpability." [Citation.]' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*Herrera, supra*, at p. 1468, fn. omitted.)

Herrera was followed by the Fourth District, Division Three in *People v. Ferraez* (2003) 112 Cal.App.4th 925, and by this court in *In re Jose P.* (2003) 106 Cal.App.4th 458 (*Jose P.*). Both cases indicate that multiple punishment for gang participation and for the underlying offense is permissible as long as the underlying offense requires a different specific intent. (*Ferraez, supra*, 112 Cal.App.4th at p. 935, [possession of drugs with the intent to sell]; *Jose P., supra*, 106 Cal.App.4th at pp. 470–471, [robbery].)

In *Jose P., supra*, 106 Cal.App.4th 458, the juvenile court found that the minor had committed a home invasion robbery, false imprisonment, first degree burglary, and street terrorism. The juvenile court found true the allegation he had committed these crimes for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) The juvenile court committed the minor to the youth authority and calculated the maximum period of confinement as nine years for the robbery, 10 years for the gang enhancement, and eight months for the street terrorism offense. (*Jose P., supra*, 106 Cal.App.4th at p. 458.) The minor argued section 654 prohibited the imposition of a separate term of confinement on the street terrorism offense. This court noted the robbery was not the only felonious act upon which the court could have based its finding that minor had committed street terrorism because minor had also been found guilty of attempted robbery in a prior proceeding. (*Id.* at p. 470.) Relying on *Herrera*, we indicated that even if the minor's criminal liability for the street terrorism offense depended upon his participation in the robbery, the record supported a finding he harbored the separate intent and objective to participate in the gang. Accordingly, section 654 did not preclude separate punishment. (*Jose P. supra*, 106 Cal.App.4th at p. 470.)

We note that this issue is currently pending before the California Supreme Court in *People v. Mesa* (2010) 186 Cal.App.4th 773, review granted October 27, 2010,

S185688 and *People v. Duarte* (2010) 190 Cal.App.4th 82, review granted February 23, 2011, S189174.) The Supreme Court in the case summary framed the issue as follows: "Does Penal Code section 654 bar the imposition of separate sentences for the offense of active participation in a criminal street gang in violation of Penal Code section 186.22, subdivision (a), and for the crimes used to prove one element of that offense—that the defendant ha[s] promoted, furthered, and assisted felonious criminal conduct by members of the gang?" (<http://www.courts.ca.gov>, case information S185688)

Appellant argues that *Herrera, supra*, 70 Cal.App.4th 1456 and by extension this court's opinion in *Jose P., supra*, 106 Cal.App.4th 458 were wrongly decided.

Until we receive further guidance from the Supreme Court we adhere to our decision in *Jose P., supra*, 106 Cal.App.4th 458. Here, even if appellant's criminal liability for the street terrorism offense depended upon his participation in the assault the record supports a finding he harbored the separate intent and objective to participate in the gang; he was claiming allegiance to a gang while he was assaulting Fierro, and he was assaulting Fierro in order to take his property (the cellular telephone). Accordingly, we reject appellant's challenge to the restitution fine as imposed.

VI. Equal Protection Challenge to the October 2011 Amendment to Penal Code Section 4019

In a supplemental opening brief, appellant argues that he is entitled to additional presentence conduct credits in both cases because effective October 1, 2011, criminal defendants serving time in county jail are entitled to one for one credit. Appellant contends that the 2011 amendment to Penal Code sections 2933 and 4019 must be applied to his case by virtue of the equal protection clauses of the state and federal Constitutions. Respectfully, we disagree.

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. (Pen.

Code, § 4019, subs. (b) & (c).) Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

A brief overview of the history of section 4019 will help to put the facts of this case into the context of the statutory scheme.

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 pre-sentence 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 states ongoing fiscal crisis (hereafter the January 2010 amendment). 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, except 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. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subs. (b), (c), & (f)].) These amendments to section 4019 effective January 25, 2010 did not state whether they were to have retroactive application.

We note that a split arose in the appellate courts regarding whether the amendments to Penal Code section 4019 were available to inmates who had already been sentenced at the time the amendments went into effect but whose convictions were not yet final. Our Supreme Court has granted review in several cases raising this issue, including *People v. Brown* (2010) 182 Cal.App.4th 1354, 1363-1365, review granted June 9, 2010, S181963, in which the Third Appellate District held the amendments are retroactive and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 13-14, review granted June 9, 2010, S181808, in which the Fifth Appellate District reached the opposite result. The Supreme Court has also granted review in *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724, in which this court held that the amendments are not retroactive.

Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See, *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted July 28, 2010, S183724 [briefing deferred pending decision in *People v. Brown*, *supra*].)

Effective September 28, 2010, section 4019 was amended again to restore the pre-sentence 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 committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

Thereafter, effective October 1, 2011, again the Legislature amended Penal Code sections 4019 and 2933. In so doing, the amendment to section 4019 deleted conduct credit restrictions imposed on defendants with prior serious or violent felony convictions, those committed for serious felonies, and persons required to register as sex offenders. (Stats. 2011, ch. 15 § 482, Stats 2011-2012, ch.12, § 35.) These statutory changes reinstated one-for-one conduct credits (i.e. two days conduct credit for every two days actually served.) (§ 4019, subs. (b), (c).) However, the new statute applies only to crimes that were "committed on or after October 1, 2011." (§ 4019, subd. (h).)

Appellant committed his crimes on September 17, 2010, and was sentenced on December 1, 2010, approximately 11 months before the most recent amendment. Notwithstanding the express legislative intent that the October 1, 2011 amendment to section 4019, is to have only prospective application, appellant contends, on equal protection grounds, that he is retroactively entitled to the reinstated one-for-one conduct credits implemented by those changes.

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. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) 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].) Under the rational relationship test, " ' ' ' a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' ' ' " (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201, italics omitted.)

Appellant relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) in support of his argument that he is entitled to the enhanced credit provisions of the October 1, 2011 amendment to section 4019.

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new § 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 already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) Nevertheless, *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.

Sage, supra, 26 Cal.3d 498, involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants, but not felons. (*Id.* at p. 508.) The high court found that there was neither a "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Ibid.*) Here, however, the purported equal protection violation is temporal, rather than based on defendant's status as a misdemeanor or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [punishment lessening statutes given prospective application on a certain date do not violate equal protection].)

One of section 4019's principal purposes is to motivate or reward good behavior while in presentence custody, and it is impossible to influence behavior after it has occurred. The fact that a defendant's conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively. (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*) [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge] ; *In re Strick* (1983) 148 Cal.App.3d 906, 912-913 (*Strick*) [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].)

In *Stinnette*, the First District Court of Appeal considered a portion of the Determinate Sentencing Law that added provisions that allowed prisoners to earn conduct credit in prison. (*Stinnette, supra*, 94 Cal.App.3d at pp. 804-805.) By the express terms of the statute, the credits were to be awarded prospectively only. (*Id.* at p. 804.) The *Stinnette* court considered whether or not the prospective application of the conduct credit statute would violate equal protection. (*Id.* at pp. 804-805.) The *Stinnette* court

determined that the statute at issue, similar to the amendment to section 4019, did not involve a "suspect classification" or a "fundamental interest," and therefore, "the distinction drawn by a challenged statute [need only bear] some rational relationship to a conceivable legitimate state purpose." (*Id.* at p. 805.) The *Stinnette* court held that because the Legislature had the legitimate purpose of "motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security," equal protection was not violated where the distinction drawn amongst prisoners reasonably and rationally served to effectuate that purpose. Specifically, the court found, "[r]eason dictates that it is impossible to influence behavior after it occurred." (*Id.* at p. 806.) As such, affording conduct credits as of the effective date of the statute was rationally related to a legitimate state interest and no equal protection violation occurred. (*Ibid.*)¹¹ Since the most recent revision to section 4019 was aimed, at least in part, at further encouraging good conduct, there is a rational reason supporting the Legislature's intent to apply the amendment prospectively only.

Appellant and those similarly situated to him whose sentencing occurred prior to the effective date of the 2011 amendment cannot be further enticed to behave themselves during presentence custody that ended months before.

¹¹ A similar result was reached in *Strick, supra*, 148 Cal.App.3d 906. In 1982, the Legislature passed Assembly Bill 2954, which amended sections 2930, 2931, 2932, and 4019, and added sections 2933, 2934, 2935. (*Id.* at p. 909.) The *Strick* court found the "obvious" purpose of these legislative amendments was to "affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison. Under the new statutory scheme, a prisoner will no longer receive credit only for good behavior; he must work." (*Id.* at p. 913.) Accordingly, relying on *Stinnette, supra*, 94 Cal.App.3d 800, the *Strick* court found the prospective application of those provisions did not violate equal protection guarantees. The *Strick* court never applied rational basis review because it concluded that the appellant had not even met his first burden of demonstrating that he was similarly situated to other prisoners who did stand to receive the benefit of the new provisions. (*Strick, supra*, at p. 914.)

Accordingly, we reject appellant's contention that he is entitled to additional conduct credits in the misdemeanor case and the felony case based on the amendments to section 4019, operative October 1, 2011.

Disposition

Probation conditions 8, 9, 16, 17 and 24 are modified as follows:

8. Do not knowingly use alcoholic beverages. Do not knowingly purchase or possess any alcoholic beverages, stay out of places where you know alcohol is the main item for sale.
9. Do not knowingly use or possess any narcotics, intoxicants, drugs or other controlled substances without the prescription of a physician. Do not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances.¹²
16. Do not have contact with anyone known to you to be Jose Fierro, including telephone, written or second-party contacts or via computer.
17. Stay 100 yards away from any person you recognize to be Jose Fierro. Do not go within 100 yards of any vehicle you know to belong to Jose Fierro. Do not go within 100 yards of any place you know to be Jose Fierro's residence or place of employment.
24. Do not obtain any new tattoo that you know or your probation officer informs you is related to a criminal street gang.

Probation condition 19 is modified as follows:

- 19 Do not visit or remain in any area you know, reasonably should know or are told by the probation officer to be a gang-gathering area.

The clerk of the court is directed to amend appellant's custody credit award to reflect that he has 76 actual days of credit plus 38 days of conduct credits for a total of 114 days credit. Further, the clerk of the court is directed to amend probation conditions

¹² Originally, probation condition 9 covered possession of alcohol. Since probation condition 8 covers alcohol possession, it appears to this court that inclusion in probation condition 9 is redundant. Accordingly, we remove it from condition 9.

20, 21, and 23 in the minute order of December 21, 2010, to conform to the court's oral pronouncements.

As so modified, the court's probation order of December 21, 2010, is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.