Filed 10/30/01

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ORDAZ, Defendant and Appellant.	F034923 (Super. Ct. No. 39568) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hare, Judge.

James H. Dippery, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Stephen G. Herndon and Shirley A. Nelson, Deputy Attorneys General for Plaintiff and Respondent.

-ooOoo-

FACTUAL AND PROCEDURAL HISTORIES

On September 23, 1997, a jury convicted defendant of corporal injury on a spouse. (Pen. Code,[1] § 273.5, subd. (a).) Because of prior convictions for residential burglary and robbery, defendant was sentenced to an indeterminate term of 25 years to life.

On August 16, 1999, in an unpublished opinion, we reversed defendant's conviction and the matter was remanded for retrial. (*People v. Ordaz,* F030078, *In re Robert Ordaz on Habeas Corpus*, F031325.)

Upon return, defendant pled guilty to spousal abuse, admitted the prior robbery conviction and admitted serving a prison term on that conviction. In exchange, the court struck defendant's prior burglary conviction and sentenced him to a total prison term of nine years.

In this appeal, defendant raises two contentions concerning the credits the court awarded him against his new sentence. First, he contends the court miscalculated his presentence conduct credits for the periods he spent in county jail awaiting his original sentence, and following reversal of his conviction and prior to his new sentence. Second, he contends the court should have awarded him presentence credit under section 4019 for the period he spent in prison serving his original sentence.

On July 18, 2001, we sent a letter to the parties requesting supplemental letter briefing on presentence credits discussed in California Supreme Court case of *People v. Buckhalter* (2001) 26 Cal.4th 20. Supplemental briefs were filed.

Since this appeal raises only two sentencing issues and the facts of the underlying offense are not relevant to their resolution, we forego a recitation of the facts.

---

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

DISCUSSION

The abstract of judgment indicates the court awarded defendant credit for time spent in custody of 979 days "actual time," and 280 days of "conduct credit" for a total of 1,259 days "awaiting service." For clarification we provide the following chart, which reflects how these credits were distributed.

Dates	Actual Time Served		Section 4019 Credits		Section 667(c)(5) Credits	
5/1/97 -12/31/97 (local custody)	244 days		122 days			
1/1/98-11/23/99 (prison custody)	692 days		None		138	
11/24/99/-1/6/2000 (local custody)	43 days		20			
Totals:	979	+	142	+	138	= 1,259

I. Miscalculation of local custody credits

Defendant contends and the People agree the court erred in calculating his presentence credits for the time he spent in the county jail awaiting his sentences. It is undisputed defendant was actually in local custody 245 days from May 1, 1997 to December 31, 1997, and 44 days from November 24, 1999 to January 6, 2000, for a total of 289 days. Thus, the court should have awarded defendant a total of 981 days of actual custody credits (289 + 692) and a total of 144 days of section 4019 credits (289/4 x 2). Although presentence credits are generally addressed in the trial court, they may be determined by an appellate court where the matter is undisputed and involves simple arithmetic. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764-765; see *People v. Wrice* (1995) 38 Cal.App.4th 767, 773.)

II. Section 4019 credits applicable to prison custody

Defendant next contends his right to equal protection was violated when he did not receive section 4019 credits for the time he spent in prison serving his original sentence. He bases this contention on the fact the conviction upon which that sentence was based was subsequently reversed. We reject defendant's position.

A. Statutory background

Presentence credits are governed by sections 2900.5 and 4019. Section 4019 provides that a defendant "confined in a county jail … following arrest and prior to the imposition of sentence for a felony conviction" is entitled to receive presentence credits calculated pursuant to a formula set forth in the statute. Those credits "shall be deducted from his or her period of confinement . . . ."

Section 2900.5, subdivision (a) provides: "In all felony . . . convictions, . . . all days of custody of the defendant, . . . including days credited to the period of confinement pursuant to section 4019, shall be credited upon his or her term of imprisonment . . . ." For purposes of section 2900.5, " 'term of imprisonment' includes . . . any period of imprisonment and parole, prior to discharge, whether established or fixed by statute, by any court, or by any duly authorized administrative agency." (§ 2900.5, subd. (c).)

Under section 2900.1, "[w]here a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."

B. Analysis

As can be seen, the requirements of section 4019 are not literally met in this case. During the period at issue, defendant was confined in a *prison* facility *after* the imposition of sentence for a felony conviction. (See § 4019, subd. (a)(4).)

Defendant acknowledges he was not confined in a section 4019 facility. However, he points to cases where persons confined in nonpenal institutions not enumerated in

section 4019 were still entitled to section 4019 credits under equal protection, where the circumstances of the confinement were essentially penal in nature. (See, e.g., *People v. Guzman* (1995) 40 Cal.App.4th 691, 693-695 [person diverted prior to sentencing for treatment at the California Rehabilitation Center (CRC), but later excluded from CRC as unsuitable, is entitled to § 4019 credits while still confined at CRC pending sentencing]; see also *People v. Nubla* (1999) 74 Cal.App.4th 719, 731.) These cases are factually and legally inapposite. Unlike defendant, the defendants in *Guzman* and *Nubla* had yet to be sentenced and delivered to prison custody to begin service of their sentences.

Defendant cites no authority supporting his position that time spent in prison on a sentence which is subsequently reversed is "presentence" detention, and therefore results in defendant being similarly situated to presentence detainees in local custody. Recent Supreme Court authority contradicts defendant's position. In *People v. Buckhalter* (2001) 26 Cal.4th 20, at pages 32-33 (*Buckhalter)*,[2] the court explained how section 2900.1 (which defendant recognizes as applicable) differs from the statutes governing presentence detention:

> "The sentence-credit statutes make only one express reference to a sentence modified while in progress. Section 2900.1 provides simply that '[w]here a defendant has served *any portion of his sentence* under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified *during the term of imprisonment, such time* shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.' (Italics added.)

---

[2] *Buckhalter* held in part that "a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors" and "[t]hus ... cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility, or under equivalent circumstances elsewhere, 'prior to the imposition of sentence' for a felony [§ 4019].…" (*Buckhalter, supra*, 26 Cal.4th at p. 23.) Although *Buckhalter* does not address the issue raised in this case, the high court's interpretation of the relevant credit statutes is highly persuasive and provides guidance in resolving defendant's claim in this appeal.

> "The sentence-credit statutes do not define the phrases 'prior to sentencing' (§ 2900.5, subd. (d)) and 'prior to the imposition of sentence' (§ 4019, subd. (a)(4)), nor do they expressly exclude the possibility that time in custody pending a sentence remand might be presentence time. Nonetheless, it appears clear in context that the quoted language refers to confinement prior to the time the defendant *was originally sentenced and placed in the custody of the Director to commence service of his term*. The statutory scheme, read as a whole, plainly contemplates that once sentenced, committed to prison, and delivered to the Director's custody, a felon remains in that status, serving a term of imprisonment, until lawfully released, and earns credits against the sentence, if at all, only pursuant to the laws specifically applicable to persons serving terms in prison. (But see fn. 10, *post*.)
>
> "In particular, we note the manner in which **the credit statutes treat modification of a sentence already commenced, as distinct from presentence detention.** [Emphasis added.] On the one hand, section 2900.5 provides that when the defendant 'has been in custody' (*id.*, subd. (a)) 'prior to sentencing' (*id.*, subd. (d)), the trial court must calculate and award, in the abstract of judgment (*ibid*.), 'all [such] days of custody, … *including days credited to the period of confinement pursuant to [s]ection 4019'* (*id.*, subd. (a), italics added). On the other hand, section 2900.1 provides that when, after the defendant has already been committed and begun to serve his sentence, the judgment is modified 'during the term of imprisonment,' 'such time' already served must be credited against the subsequent sentence.
>
> "**Section 2900.1 thus speaks in terms of a prison sentence already in progress, and, in contrast with section 2900.5, it omits reference to presentence good behavior credits under section 4019.** [Emphasis added.] The implication is that once the defendant is committed to prison, his custody is thereafter considered service of his sentence, and a remand with respect to a sentence the defendant is already serving does not render him eligible for credits of the presentence kind." (*Buckhalter*, *supra*, 26 Cal.4th at pp. 32-33; fns. omitted.)

Applying this statutory analysis, we reject defendant's equal protection claim that while he was in prison custody, he was "similarly situated to presentence inmates in a county jail or other section 4019 facility" and thus entitled to presentence credits. *Buckhalter* makes clear that a defendant whose prison confinement falls within the scope of section 2900.1 is treated by the credit statutes as being distinct from a presentence detainee who falls within the scope of sections 4019 and 2900.5. *Buckhalter* further

notes, "the pre- and postsentence credit systems serve disparate goals and target persons who are not similarly situated." (*Buckhalter*, *supra*, 26 Cal.4th at p. 36.) Accordingly, we conclude the court did not violate defendant's right to equal protection by refusing to award the requested section 4019 credits. The court properly awarded him credit for the actual days he was confined in prison serving his original sentence.

However, the court was without authority to award defendant 138 days of conduct credit under section 667, subdivision (c)(2) for the time he spent in prison. "[P]rison time credits other than those for actual days of prison custody should be initially determined by the responsible administrative agency, not the sentencing court." (*People v. Chew* (1985) 172 Cal.App.3d 45, 47, disapproved on other grounds in *Buckhalter*, *supra*, 26 Cal.4th at pp. 38-40.) Section 2900.5 requires the sentencing court to make a finding of the actual days of prison confinement served. (*Chew, supra,* 172 Cal.App.3d at p. 52.) In this case, it is undisputed that defendant's prison confinement is a total of 692 days. Sections 2930 through 2935 assign the Department of Corrections the duty of determining prison behavior and worktime credits. (*Chew, supra,* at pp. 50-51.) "Because it is the duty of the Director of Corrections to determine prison behavior and worktime credits, judicial intervention, if ever needed, will be postponed until defendant has exhausted available administrative remedies. [Citation.]" (*Id.* at p. 52; accord *People v. Mendoza* (1986) 187 Cal.App.3d 948, 954-955.)

DISPOSITION

The abstract of judgment shall be modified to reflect 981 days of actual custody credits and 144 days of presentence conduct credits, without prejudice to defendant's right to have the Department of Corrections determine appropriate behavior and worktime credits earned for the entire period of his prison confinement. The award of 138 days of conduct credit shall be stricken. Thus, the abstract of judgment shall reflect a total credit of 1,125 days.

WE CONCUR:

_____
WISEMAN, J.

_____

VARTABEDIAN, Acting P.J.

_____
HARRIS, J.