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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SALVADOR BRICENO ZARATE,

Defendant and Appellant.

D056837

(Super. Ct. No. JCF24760)

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APPEAL from a judgment of the Superior Court of Imperial County, Christopher W. Yeager, Judge. Affirmed as modified.

Michelle Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Salvador Briceno Zarate appeals a judgment following his plea of no contest to one count of sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). On appeal, he contends the trial court erred at his February 2010 sentencing by awarding him conduct credit for local custody time served before January 25, 2010, in accordance with a former version of Penal Code section 4019<sup>1</sup> rather than the amended version in effect on the date of his sentencing. We conclude the trial court erred by not applying the amended version of section 4019 to all of the days served by Zarate in presentence local custody.

#### FACTUAL AND PROCEDURAL BACKGROUND

On or about November 2, 2009, Zarate transported marijuana in Imperial County. On January 28, 2010, an information charged him with one count of sale or transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)) and one count of possession of marijuana for sale (Health & Saf. Code, § 11359).

On February 18, 2010, pursuant to a plea agreement, Zarate pleaded no contest to the Health and Safety Code section 11360, subdivision (a), count with a stipulated sentence of two years in state prison; the other count was then dismissed. At that hearing, the trial court sentenced Zarate to two years in state prison and awarded him a total of 115 days of presentence custody credit. The court awarded Zarate 22 days of conduct credit for 44 days in actual custody before January 25 and 24 days of conduct credit for

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

25 days in actual custody on and after that date. The court denied Zarate's request for "day for day" conduct credit for all of his days in custody pursuant to the "new law" (i.e., amended § 4019), including his days served in custody prior to January 25. Zarate timely filed a notice of appeal.

## DISCUSSION

### I

#### *Actual Custody and Conduct Credits Generally*

A defendant "sentenced to prison for criminal conduct is entitled to credit against his [or her] term for all actual days of [presentence] confinement solely attributable to the same conduct. [Citations.]" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30 (*Buckhalter*)). That confinement or custody includes days spent in jail before sentencing. (§ 2900.5, subd. (a).) Pursuant to section 4019, a defendant may also earn "conduct credit" for good behavior (i.e., compliance with rules and regulations) and satisfactory performance of any labor assigned him or her during presentence custody. (§ 4019, subs. (b), (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3; *Buckhalter*, at p. 30.)

Section 2900.5, subdivision (a), provides:

"In all felony and misdemeanor convictions, either by plea or verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail . . . , 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 . . . ." (Italics added.)

Section 2900.5, subdivision (d), provides:

*"It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section. The total number of days to be credited shall be contained in the abstract of judgment provided for in Section 1213."* (Italics added.)

The California Supreme Court has stated that when a trial court imposes a sentence, it "has responsibility to calculate the exact number of days the defendant has been in custody 'prior to sentencing,' add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment." (*Buckhalter, supra*, 26 Cal.4th at p. 30.)

Prior to January 25, 2010, a former version of section 4019 (1982 version) provided that a defendant earned two days of conduct credit for every four actual days in local custody. (Stats. 1982, ch. 1224, § 7, pp. 4553-4554.) However, section 4019 was amended, effective January 25, 2010, to provide qualifying defendants with increased conduct credit of two days for every two actual days in local custody.<sup>2</sup> (Stats. 2009, 3d Ex.Sess. 2009-2010, ch. 28X, § 50.) That amended version of section 4019 provided: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody . . . ."

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<sup>2</sup> Pursuant to the January 25, 2010, version of section 4019, defendants can qualify for such conduct credit unless they have current or prior convictions for serious or violent felony offenses or are required to register as sex offenders. (§ 4019, former subds. (b)(1), (c)(1), as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28X, § 50.)

(§ 4019, subd. (f).)<sup>3</sup> The provisions of section 4019 apply to those defendants confined in a county jail for time served, "including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment" or, alternatively, for time served "following arrest and prior to the imposition of sentence of a felony conviction." (§ 4019, subds. (a)(1), (a)(4).)

## II

### *Trial Court's Calculation of Section 4019 Conduct Credit*

Zarate contends the trial court erred in sentencing him by applying the 1982 version of section 4019 to time he was in local custody prior to January 25, 2010, and thereby awarding him only 22 days of conduct credit for the 44 actual days he was in custody during that period. He asserts the court was required to apply the January 25 amended version of section 4019 in effect on the date of his sentencing (February 18, 2010) to *all* time he was in local custody, whether before or after January 25, 2010. He argues he should have received 44 days of conduct credit for the 44 actual days he was in custody prior to January 25, 2010, for a total of 68 days of conduct credit for all 69 actual days in custody prior to his February 18 sentencing.

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<sup>3</sup> Section 4019 was amended again, effective September 28, 2010, to reinstate the conduct credit provisions that applied before the January 25, 2010, amendment, but that version applies only to local custody served by defendants for crimes committed on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.) The most recent amendment to section 4019 is inapplicable to Zarate's case because his crime was committed in November 2009. Unless otherwise specified, all references to section 4019 or its amendments refer to section 4019, as amended effective January 25, 2010, pursuant to Statutes 2009, 3d Extraordinary Session 2009-2010, chapter 28X, section 50.

We conclude the trial court erred in sentencing Zarate on February 18, 2010, by applying a *former* version of section 4019 to the time he served in local custody prior to January 25, 2010. At the time of his sentencing on February 18, the trial court was required to calculate the exact number of days Zarate had been in custody prior to sentencing, add applicable conduct credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. (§ 2900.5, subs. (a), (d); *Buckhalter, supra*, 26 Cal.4th at p. 30.) At the time of Zarate's sentencing on February 18, there was only one version of section 4019 in existence (i.e., the amended version of § 4019 effective January 25). The trial court was required to calculate Zarate's presentence conduct credit pursuant to that version of section 4019.

There is nothing in the January 25 amended version of section 4019 that authorized the trial court to apply both the 1982 and January 25 amended versions of section 4019 and use a two-part approach in calculating Zarate's conduct credit based on whether his presentence custody was served before or after January 25, 2010. Because the 1982 version of section 4019 was no longer valid at the time of Zarate's sentencing on February 18, the trial court erred in applying the 1982 version of section 4019 in calculating his conduct credit for presentence custody served before January 25. The court's sentence was unauthorized to the extent the court applied the 1982 version of section 4019 to calculate, in part, Zarate's presentence conduct credit. "A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered." (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) Therefore,

we award Zarate an additional 22 days of presentence custody credit, for a total of 137 days of presentence custody credit. (*Ibid.*)

Although the People argue the January 25 amended version of section 4019 should be applied prospectively and not retroactively, we do not consider the issue to involve retroactivity.<sup>4</sup> The January 25 amended version of section 4019 applies to any sentencing of a defendant by a trial court on or after January 25, 2010.<sup>5</sup> Therefore, based on our discussion above, the January 25 amended version of section 4019 *is* being applied *prospectively* in Zarate's case because that version was effective January 25, 2010 (and he was sentenced on February 18, 2010), and therefore was the only version of section 4019 in existence on the date of his sentencing.

#### DISPOSITION

The judgment is modified to award Zarate an additional 22 days of presentence conduct credit, for a total of 137 days of presentence custody credit. As so modified, the judgment is affirmed. The trial court is directed to amend its abstract of judgment to

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<sup>4</sup> Because Zarate was sentenced on February 18, 2010, we conclude the issue of whether the amended version of section 4019 should be applied prospectively or retroactively to those judgments appealed and not final as of January 25, 2010, which issue is currently before the California Supreme Court, is irrelevant to his case. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [holding amended § 4019 applies retroactively to judgments not yet final]; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808 [holding amended § 4019 does not apply retroactively to judgments not yet final].)

<sup>5</sup> However, as noted above, the present version of section 4019 will apply to sentencing of those defendants who committed their crimes on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.)

reflect this modification and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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McDONALD, J.

I CONCUR:

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AARON, J.

BENKE, J., dissenting.

I respectfully dissent.

Although it attempts to avoid the issue of retroactivity, the majority gives Zarate the benefit of additional good conduct credits which were not in effect during most of his presentence incarceration. My colleagues afford Zarate the additional credits because, although the amendment providing the additional credits was not in effect during the bulk of Zarate's presentencing incarceration, the amendment did become effective shortly before he was sentenced.

The chief vice in their rationale is the failure to consider the underlying purposes of the good conduct credits provided by the statute. "The presentence credit scheme, [Penal Code] section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges.'" (*People v. Brown* (2004) 33 Cal.4th 382, 405.) As another court observed in rejecting a claim to credit for time served before credits were available: "Reason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806.) Given the self-evident proposition that it is not possible to influence behavior after it has occurred, any consideration of the purpose of the statute requires a construction which

applies Penal Code<sup>1</sup> section 4019 credits based on the law in effect during the period of incarceration, rather than at the time of sentencing.

Such a construction is also required by section 3 which provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." Indeed, any new statute "is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise." (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274, italics added.)

Here, there is no express declaration of retroactivity and given that the manifest purpose of providing goodtime credit is to influence future conduct, there is only a clear and compelling implication of *prospective application*. While it is true section 2900.5 expressly requires credits be calculated at the time of sentencing, section 2900.5 does not speak to the method by which such calculation should be made. By their terms, section 4019 and section 2900.5 both permit a court to provide a prisoner credits based on the law in effect during any particular period of incarceration. Plainly, a trial court is quite capable of making such calculation at the time of sentencing, as it did in this case.

In addition to ignoring the underlying purposes of good conduct credits, the majority opinion mandates an unfair application of the statute. Under the majority's interpretation, a prisoner who was incarcerated on the same day as Zarate, but sentenced before January 25, 2010, would receive no additional credit, while by virtue of a lengthier pretrial proceeding Zarate would receive additional credits calculated on the entire period

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<sup>1</sup> All further statutory references are to the Penal Code.

of his incarceration. I find nothing in the history of the statute or logic which would support such disparate treatment of similarly situated defendants.

Finally, any doubt as to the Legislature's intention with respect to application of the additional credits was definitely resolved when on September 28, 2010, the Legislature again amended section 4019 and eliminated the additional credits which Zarate seeks. Importantly in eliminating the additional credits, the Legislature expressly provided that the changes it made would apply to prisoners who are confined for a crime committed after the effective date of the change. (§ 4019, subd. (g).) The Legislature's latest amendment makes it clear not only that we should narrowly apply the credits it has decided to eliminate, but also that the Legislature recognizes that good conduct credits are matters which have only prospective impact.

I would affirm the trial court's judgment without modification.

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BENKE, Acting P. J.