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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	
Plaintiff and Respondent,	F061374
v.	(Super. Ct. No. 1258050)
BRIAN KEITH FOREST,	**OPINION**
Defendant and Appellant.	

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Elaine Forrester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Kane, J.

In March 2008, appellant, Brian Keith Forest, pled no contest to one felony, possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)),[1] and two misdemeanors, battery on a spouse or co-habitant (§ 243, subd. (e)) and driving while his driver's license was suspended (Veh. Code, § 14601.1, subd. (a)), and admitted allegations that he had served three separate prison terms for prior felony convictions (§ 667.5, subd. (b)). The court suspended imposition of sentence and placed appellant on five years' probation on his felony conviction and three years' probation on the misdemeanor convictions. The terms of his probation included that he serve 360 days in county jail and that he participate in a "treatment program."

In September 2009, the Stanislaus County Probation Department filed a violation of probation report which stated that appellant violated the treatment program condition. In July 2010, appellant admitted the probation violation allegation, and in October 2010, the court imposed a prison term of three years consisting of two years on the felony conviction and one year on one of the prior prison term enhancements. The court struck the other two enhancements, imposed concurrent 30-day terms on each of the misdemeanor convictions, and awarded appellant 348 days of presentence credit, consisting of 232 days of actual time credit and 116 days of conduct credit under section 4019.

On appeal, appellant's sole contention is that the court erred in failing to calculate his conduct credit under a former version of section 2933 that was in effect at the time of sentencing, and which provided that qualifying defendants could earn one day of conduct credit for each day of actual time in custody. The People counter that the court correctly utilized a former version of section 4019, one that was in effect at the time of appellant's presentence custody and which contains a less generous formula for calculating conduct

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1 Except as otherwise indicated, all statutory references are to the Penal Code.

credit. We will agree with appellant. We will modify the judgment accordingly, and otherwise affirm.

DISCUSSION[2]

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing, including time imposed as condition of probation, served in county jail and other settings. (§ 2900.5, subd. (a).) Appellant served a total of 232 days in custody from 2007 through 2009, and during that time, as now, section 4019 provided that a criminal defendant could earn conduct credit, i.e., additional presentence credit against his or her sentence for willingness to perform assigned labor and compliance with rules and regulations. Specifically, the version of section 4019 in effect during the time appellant was in presentence custody—which statute, the People contend, the court correctly applied here—provided for "two days [of conduct credit] for every four days the defendant is in actual presentence custody." (*People v. Duff* (2010) 50 Cal.4th 787, 793.)[3]

However, no version of section 4019 was applicable to appellant. As indicated above, appellant was sentenced in October 2010. Section 2933 was amended effective September 28, 2010 (Stats. 2009-2010, ch. 426, § 1, p. 2087) to provide as follows: "*Notwithstanding Section 4019* … a prisoner sentenced to the state prison … for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or

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[2] Because the facts of the instant offenses are not relevant to the issues raised on appeal, we will forgo recitation of those facts.

[3] Section 4019 was amended effective January 25, 2010, and has been amended multiple times since then. Because the People argue that the applicable conduct credit statute was the pre-January 25, 2010 version of section 4019, the subsequent versions of the statute are not relevant to the issues before us.

road camp from the date of arrest until state prison credits … are applicable to the prisoner." (§ 2933, subd. (e)(1), italics added.)[4] Section 2933 also provides that a person shall not receive such credit "if it appears by the record that [he or she] has refused to satisfactorily perform labor … or has not satisfactorily complied with the reasonable rules and regulations .…" (§ 2933, subd. (e)(2).) Lastly, section 2933, subdivision (e)(3) provides, "[s]ection 4019, and not this subdivision, shall apply" to persons required to comply with sex offender registration requirements, those committed for a serious felony (§ 1192.7, subd. (c)), and those with a prior conviction for a serious or violent felony (§ 667.5, subd. (c)). (§ 2933, subd. (e)(3).)

The People argue that section 2933, though it was in effect at the time appellant was sentenced, does not apply to the trial court's determination of presentence custody credits. Presentence custody credits under that statute, the People argue, are to be awarded only by the Department of Corrections and Rehabilitation (DCR), not the trial court, once appellant is in the custody of the DCR. We disagree.

We recognize that "[o]nce a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31); the Director of the DCR has the duty of determining postsentence custody credits (*People v. Mendoza* (1986) 187 Cal.App.3d 948, 954); and subdivisions (a) through (d) of section 2933 deal with the postsentence credit scheme. However, nothing in section 2933 compels the conclusion that presentence custody credits under subdivisions (d) and (e) of section 2933 are also to be determined by the Director of the DCR. Section 2933, subdivision (e)

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4 Section 2933 was amended again, this year. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) That version of the statute is not implicated in the instant case. All further references to section 2933 are to the version that became effective September 28, 2010. There is no dispute this version was in effect at the time of appellant's sentencing in October 2010.

provides that qualifying defendants "shall have one day deducted" for every day from the date of arrest until the defendant is delivered to the custody of the DCR, but the statute is silent on the question of what entity performs the task of calculating such credits.

Section 2900.5, subdivision (d), on the other hand, requires a sentencing court "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." Section 2900.5, subdivision (a), states: "[W]hen the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment …." Section 2900.5, subdivision (e), states: "It shall be the duty of any agency to which a person is committed to apply the credit provided for in this section for the period between the date of sentencing and the date the person is delivered to the agency."

While section 2900.5 does not refer to section 2933, it also does not preclude a trial court's application of section 2933 pursuant to its duties under section 2900.5. Furthermore, the recently established local custody conduct credits of section 2933, subdivision (e) are the same kind of credits, and are in lieu of, the section 4019 conduct credits that are expressly referred to in section 2900.5. While section 2933 otherwise deals with postsentence credits awarded by the DCR, subdivision (e) of section 2933 applies in place of section 4019, which provides for presentence credits that must be determined by the trial court at sentencing. As indicated in subdivisions (d) and (e) of section 2900.5, execution of sentence is the appropriate dividing line between a trial court's responsibility for determining conduct credits and that of the prison authorities.

Accordingly, we hold that a trial court's duties under section 2900.5 include calculating and awarding section 2933, subdivision (e) local custody conduct credits, when those credits are in lieu of section 4019 credits.

The People also argue that because section 4019, not section 2933, was in effect at the time appellant was serving his presentence custody, appellant's presentence custody credit should be calculated under section 4019. We disagree.

Section 4019 presentence conduct credits are neither earned per segment, e.g., per four- or two-day period, nor available """all or nothing.""" (*People v. Johnson* (1981) 120 Cal.App.3d 808, 813-814.) Instead, they are "credited to the defendant's term of imprisonment 'in the discretion of the court imposing the sentence.' [Citation.] It is the duty of the sentencing court to determine 'the total number of days to be credited ...' for presentence custody. [Citations.] [¶] Although the sheriff is authorized to deduct conduct credits for inmates jailed under a misdemeanor sentence or as a condition of probation, his role with respect to presentence custody credit is to provide the sentencing court with information, records and recommendations. [Citations.] The sheriff or the People have the burden to show that a defendant is not entitled to Penal Code section 4019 credits. [Citation.]" (*People v. Duesler* (1988) 203 Cal.App.3d 273, 276.) "If the record fails to show that defendant is not entitled to such credits … he shall be granted them." (*Johnson*, *supra*, at p. 815.) Thus, section 4019 credits are either withheld or granted at sentencing. It follows then, that the calculation of such credits is based upon the law in effect at the time of sentencing. And, as indicated above, at the time of sentencing section 2933, which expressly applies "notwithstanding" section 4019, was in effect. (§ 2933, subd. (e)(1).) Moreover, the record contains no indication appellant failed to perform assigned labor or follow rules, or that any of the section 2933,

subdivision (e)(3) disqualifying factors apply.[5] Therefore, the trial court erred in failing to award appellant, in addition to actual time of credit of 232 days, 232 days of section 2933, subdivision (e) conduct credit. (§ 2933, subd. (e)(1).)

DISPOSITION

The judgment is modified to provide that appellant is awarded at total of 464 days of presentence credit (232 days of actual time credit plus 232 days of section 2933, subdivision (e) conduct credit). The trial court is directed to amend the abstract of judgment and to forward the amended abstract to the California Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

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[5] The record indicates appellant is not required to register as a sex offender and that he has suffered convictions of 11 different offenses, none of which are serious or violent felonies under sections 1192.7, subdivision (c) and 667.5, subdivision (c), respectively.