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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OLIVER WENDELL JAMES,

Defendant and Appellant.

B235670

(Los Angeles County  
Super. Ct. Nos. MA040891,  
MA053143)

APPEAL from judgments of the Superior Court of Los Angeles County.

Thomas R. White, Judge. Affirmed as modified.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Oliver Wendell James appeals following a plea of no contest, arguing that he is entitled to additional presentence custody credits according to the statutory scheme in effect at the time of his sentencing. The People concede the error. We affirm the judgment, but modify the abstract of judgment to reflect the additional credits.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

On February 25, 2008, the Los Angeles County District Attorney filed an information in Los Angeles Superior Court case number MA040891 (first case) that charged appellant in count 1 with felony piracy (Pen. Code, § 653h, subd. (a)(1)),<sup>2</sup> in counts 2 and 3 with felony conspiracy (§ 182, subd. (a)(1)) and in count 4 with misdemeanor possession of less than one ounce of marijuana (Health & Saf. Code, § 11357, subd. (b)). Appellant pled no contest to count 1. The trial court dismissed the remaining counts, imposed and suspended a three-year prison sentence and placed appellant on formal probation for five years. Among the terms and conditions of probation, the trial court ordered appellant to refrain from owning, using, selling or being in possession of pirated videotapes, CD's or DVD's.

On June 17, 2011, the Los Angeles County District Attorney filed a complaint in Los Angeles Superior Court case number MA053143 (second case) that charged appellant in count 1 with the failure to disclose the origin of a recording (§ 653w, subd. (a)) and in count 2 with appropriating stolen property (§ 485). The People also moved for an order revoking appellant's probation in the first case. In the second case, appellant pled no contest to count 1 and entered a *Harvey* waiver to count 2. (See *People v. Harvey* (1979) 25 Cal.3d 754.)

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<sup>1</sup> Because the issue on appeal involves only presentence custody credit, the facts of appellant's underlying offenses and probation violation are omitted. (*People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.)

<sup>2</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

Appellant admitted to violating his probation in the first case. The trial court revoked probation and imposed the previously-suspended three-year sentence. Appellant received a total of 62 days of presentence custody credit, comprised of 42 days of actual local time and 20 days of local conduct credit.

In the second case, the trial court denied probation and imposed a two-year prison sentence to run concurrently with the three years imposed in the first case. The trial court also imposed a number of statutory fees and fines, and ordered victim restitution. Appellant received 66 days of presentence custody credit, comprised of 44 days of actual local time and 22 days of local conduct credit.

Appellant filed separate notices of appeal following the imposition of sentence in both the first case and the second case.

## **DISCUSSION**

Appellant challenges only the presentence custody credit awards, arguing that he should have received conduct credit in an amount equal to the actual days he served in custody prior to sentencing. The People agree.<sup>3</sup>

Appellant was arrested on June 15, 2011 and remained in custody for 44 days prior to his July 28, 2011 sentencing. A criminal defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) Moreover, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

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<sup>3</sup> The People previously moved to dismiss the appeal on the ground that appellant did not raise this issue in the trial court and again seek dismissal of the appeal on the same ground. (See § 1237.1.) We denied the prior motion and find no basis to revisit that ruling.

Under the version of section 4019 in effect at the time of appellant’s sentencing, criminal defendants without current or prior serious or violent felony convictions and who were not required to register as sex offenders earned two days of conduct credit for every two days in custody. (Former § 4019, subds. (b)(1) & (c)(1), as amended by Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.)<sup>4</sup> But effective September 28, 2010, Senate Bill No. 76 amended section 2933 “to award day-for-day conduct credit to certain prisoners in local presentence custody who were sentenced to prison. (Former § 2933, subd. (e)(1), as amended by Stats. 2010, ch. 426 [(Sen. Bill No. 76)], § 1, eff. Sept. 28, 2010.)” (*People v. Garcia* (2012) 209 Cal.App.4th 530, 538.) Senate Bill No. 76 was urgency legislation that took effect immediately, and its amendments to section 2933 remained in effect until October 1, 2011.<sup>5</sup> (*People v. Garcia, supra*, at p. 538.)

Former section 2933 provided in relevant part: “(e)(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 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 [local custody] from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” Section 2933, subdivision (e)(3) provided exceptions to the day-for-day conduct credits scheme: “Section 4019, and not this subdivision, shall apply if the prisoner is required to register as a sex offender, . . . was committed for a serious felony, . . . or has a prior conviction for a serious felony, . . . or a violent felony . . . .”

Because appellant was arrested in June 2011 and sentenced in July 2011, the version of section 2933 in effect between September 2010 and October 2011 applied to his sentence. There is nothing in the record to suggest that any of the exceptions to

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<sup>4</sup> Section 4019 was amended after appellant’s sentencing. (See generally Stats. 2011, ch. 15 (A.B. 109), eff. April 4, 2011, operative Oct. 1, 2011.) The current version of section 4019 is not implicated here.

<sup>5</sup> Section 2933 has also been amended again; the statute’s current version is not involved here. (See Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2001, operative Oct. 1, 2011.)

section 2933 applied to render section 4019 applicable. Accordingly, appellant should have received a total of 88 days presentence custody credit in both the first case and the second case—calculated as 44 days of actual local time and 44 days of conduct credit.<sup>6</sup> Though we could remand the matter to the trial court for recalculation, we may order the abstract of judgment corrected where the error is computational in nature and does not involve the resolution of any factual dispute. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) Accordingly, we shall modify the judgment in each case to reflect 44 days of presentence custody credit and 44 days of presentence conduct credit, for a total credit of 88 days.

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<sup>6</sup> Though appellant is entitled to 88 days of presentence custody credit for the sentence in each case, he is entitled to a total of 88 days credit on his concurrent sentences. (See § 2900.5, subd. (b).)

## **DISPOSITION**

The judgments are modified in the first case (Los Angeles Superior Court case No. MA040891) and the second case (Los Angeles Superior Court case No. MA053143) to reflect 44 days of presentence custody credit and 44 days of presentence conduct credit, for a total credit of 88 days. A certified copy of the corrected abstracts of judgment shall be sent to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

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\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, P. J.

BOREN

\_\_\_\_\_, J.

CHAVEZ