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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN MARTINEZ,

Defendant and Appellant.

B281803

(Los Angeles County  
Super. Ct. No. TA132641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed as modified.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant Fabian Martinez appeals the trial court's calculation of his presentence custody credits. The parties dispute the appropriate inferences to be made from the minimal record before the court. Appellant asserts the trial court abused its discretion in failing to award 70 days of conduct credit, arguing there was insufficient evidence to find that he was committed to a state hospital as mentally incompetent for that amount of time. We find no error apparent from the record before us in the trial court's calculation of conduct credits. Appellant also asserts that he is entitled to one additional day of actual custody credit. We agree that the record suggests the trial court erred in awarding 394 days of actual custody credit, rather than 395.

## BACKGROUND

### I. *Procedural background*

On September 30, 2014, appellant was charged by information with one count of arson of property of another (Pen. Code, § 451, subd. (d)).<sup>1</sup> Appellant pled not guilty. Appellant later withdrew his plea and entered a plea of guilty. The court accepted appellant's plea and set a sentencing hearing.

On June 24, 2015, the court suspended the imposition of sentence and placed appellant on formal probation for five years. Appellant violated probation in September 2015. The court revoked his probation, but ultimately reinstated it under the same terms and conditions. Appellant violated probation a second time and was taken into custody on January 30, 2017.

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

The court terminated probation and imposed a sentence of three years in state prison on the previously suspended sentence.

II. *Facts relevant to calculation of credits*

Appellant was arrested on March 17, 2014. According to a probation report, he was sent to Patton State Hospital on June 2, 2014, with the notation “1370 PC (mentally incompetent).”<sup>2</sup> The record does not contain the date of his return to jail or a finding that he was no longer mentally incompetent. Appellant contends that he posted bail on October 16, 2014. Respondent does not dispute this assertion.

Appellant remained out of custody until April 22, 2015. On that date, defense counsel declared a doubt as to appellant’s mental competency pursuant to section 1368. The court adjourned criminal proceedings, remanded appellant to custody, and appointed Dr. Kory Knapke to examine appellant. On June 5, 2015, the court stated it had reviewed the report from Dr. Knapke and found appellant competent to stand trial.

On June 24, 2015, the court placed appellant on probation. The court ordered appellant to be conditionally released to the Fresh Start Recovery Home, noting that he would be released to that program as soon as a bed was available. The court awarded presentence custody credits totaling 475 days. The court calculated the credits as 203 days actual custody credit, 202 days of conduct credit, “plus 70 from Patton,” for a “total of 475.”

According to a letter from the Fresh Start program, appellant was released from jail to the program on July 9, 2015. He remained in the program until leaving on July 21, 2015, in

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<sup>2</sup> Section 1370 sets forth, among other things, the requirements for commitment of a mentally incompetent defendant.

violation of his probation. He was at large until his arrest on September 16, 2015.

Appellant's probation was revoked on September 16, 2015 and he was remanded to custody. The court reinstated probation on October 14, 2015 and again ordered appellant released to the Fresh Start program. He reentered the program on November 24, 2015.

Appellant remained out of jail and in the Fresh Start program until sometime in late April or early May 2016. After leaving the program, he remained at large until January 30, 2017, when he surrendered on a bench warrant and was remanded to custody. He remained in custody until he was sentenced on March 2, 2017.

At the sentencing hearing, the court noted that appellant "went to Patton for a period of time." The court also stated that appellant "has significant credits in this matter." The court then asked defense counsel if he knew how much time appellant "actually spent in Patton, the actual days? Because he does not get good time/work time while he's in Patton." The court stated it saw documents indicating appellant was "ordered to be committed to Patton," but did not know "if it actually happened." The court indicated it would "recalculate" appellant's custody credits, "because it looks like he may have been sent to Patton." As reflected in the minute order and the abstract of judgment, the court ultimately awarded 394 days of actual custody credit and 324 days of conduct credit, for a total of 718 days of credit.

Appellant timely appealed.

### **DISCUSSION**

The sole issue raised on appeal is the court's calculation of presentence custody credits. Appellant contends he was entitled

to one additional day of actual custody and 70 additional days of conduct credit, for a total of 789 days instead of the 718 awarded by the court.

I. *Standard of review*

Appellant argues that this issue involves application of sections 2900.5, subdivision (a) and 4019 to “undisputed facts of presentence credits” and is therefore a question of law subject to our independent review. We disagree. In the cases cited by appellant, the issue before the court was the legal application of a statute to undisputed facts. (See *People v. Anaya* (2007) 158 Cal.App.4th 608, 611 [applying de novo review to question of whether defendant was “in custody” within the meaning of the statute while he wore an electronic home monitor]; see also *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919 (*Ravaux*) [“Whether a defendant is in ‘custody’ for the purposes of section 2900.5 while detained by the police prior to being booked into jail is a matter of statutory interpretation, a question of law we review de novo.”].)

By contrast, the issue here is the trial court’s factual determination of the amount of time appellant spent in custody and corresponding award of presentence credits. Indeed, the parties dispute the factual inferences that can be drawn from the record. We review the trial court’s factual determination for substantial evidence. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) That standard is deferential: “When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination. . . .”

(*Ibid.*) Further, “[t]he very settled rule of appellate review is a trial court’s order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record.” (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

II. *Award of actual custody credits*

A defendant convicted of a felony is entitled to credit against his or her term of imprisonment for time spent in custody prior to sentencing. (§ 2900.5, subd. (a); *Ravaux, supra*, 142 Cal.App.4th at p. 919.) He or she is also entitled to earn conduct credits under section 4019, which accrue “at a rate of two days for every two days in presentence custody.” (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 588.)

Starting from the date of his arrest, the record reflects that appellant spent the following days in custody up to and including the day of sentencing: March 17, 2014 to October 16, 2014 (214 days); April 22, 2015 to July 9, 2015 (79 days); September 16, 2015 to November 24, 2015 (70 days), and January 30, 2017 to March 2, 2017 (32 days). This totals 395 days, one more than the 394 days of actual custody credit awarded by the trial court.

Respondent notes that presentence custody credits begin to accrue when the defendant is booked into custody, rather than at the time of his arrest. (See *Ravaux, supra*, 142 Cal.App.4th at p. 919; section 2900.5, subd. (a).) Here, because the crime occurred in the evening, “it is entirely possible that [appellant] was not booked until the following day.” There is nothing in the record to support the speculation that appellant’s booking date was different than his arrest date. As such, we conclude appellant is entitled to 395 days of presentence custody credit.

### III. *Award of conduct credits*

Appellant also asserts that he was entitled to an additional 70 days of conduct credit. It appears that the trial court awarded 70 days of custody credit, but withheld a corresponding amount of conduct credit, based on an implied finding that appellant was incompetent *and* committed to Patton for 70 days some time after his arrest. Appellant counters that the record lacks substantial evidence to support that conclusion. We disagree.

“Typically, an accused awaiting trial is not statutorily entitled to conduct credits for time spent in a state hospital while subject to a finding of incompetency.” (*People v. Bryant* (2009) 174 Cal.App.4th 175, 182 (*Bryant*), citing *People v. Waterman* (1986) 42 Cal.3d 565, 569; *People v. Sage* (1980) 26 Cal.3d 498, 502–503.) However, “equal protection requires application of section 4019 credits to presentence confinement in a state facility if the circumstances of the confinement are essentially penal.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30, fn. 6; see also *Bryant, supra*, 174 Cal.App.4th at pp. 182–183.) Thus, in *Bryant*, the court granted conduct credits for the time after defendant was declared competent but before he was transferred from the state hospital to the county jail. (*Id.* at p. 184; see also *People v. Guzman* (1995) 40 Cal.App.4th 691, 693–695 [person entitled to section 4019 credits for time confined at treatment facility but excluded from treatment as unsuitable].) Similarly, here, if appellant spent time at the state hospital after he was declared competent, he would be entitled to conduct credits for those days.

Although the record on appeal is sparse, we find that substantial evidence supports the trial court’s conclusion that appellant was committed to Patton State Hospital for 70 days as mentally incompetent. The probation report reflected appellant’s

commitment to the hospital on June 2, 2014 pursuant to section 1370, the section dealing with commitments based on mental incompetence. A commitment of 70 days would have resulted in the transfer of appellant back to jail in mid-August, 2014. That result is not inconsistent with the record before us, which shows appellant in custody as of the date of his preliminary hearing on September 16, 2014. The trial court referred to appellant having spent 70 days at Patton when calculating custody credits at the hearing on June 24, 2015; then, when calculating credits for a second time on March 2, 2017, the court again referred to seeing documents ordering appellant's commitment to Patton. Notably, no objection or correction was raised by defense counsel in response to either of these statements by the court. The court indicated it would review the documents and calculate the conduct credits accordingly. Subsequently, the court awarded 324 days of conduct credit, 70 less than the full amount available if appellant had spent the entire time in jail.

Further, the record also contains several other references to questions regarding appellant's mental competency. First, according to the probation report prepared on September 29, 2014, the victim (appellant's wife) stated that appellant "was previously hospitalized at Patton State Hospital for approximately 2-1/2 weeks." Second, defense counsel declared a doubt as to appellant's mental competency in April 2015, resulting in suspension of criminal proceedings and appellant's evaluation by a medical expert. While there is no indication in the record that either of these references corresponds to the 70-day commitment relied upon by the court, the record suggests recurring competency issues consistent with the court's finding.



Moreover, appellant has not carried his burden on appeal to demonstrate error. He suggests contrary inferences that might be drawn, such as that the only time appellant spent at the state hospital occurred prior to his arrest, or that commitment might not have resulted in a finding of incompetence. But these suggestions are not supported by the record and do not affirmatively demonstrate error. We therefore conclude that the trial court did not err in its award of 324 days of conduct credits.

### **DISPOSITION**

The judgment is modified to award appellant one additional day of custody credit, for a total of 719 days of credit. The judgment is affirmed in all other respects. The clerk is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.