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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ROMERO,

Defendant and Appellant.

B249033

(Los Angeles County Super. Ct.
No. PA076514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lloyd M. Nash, Judge. Affirmed in part as modified and reversed in part.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Richard B. Lennon, Staff Attorney, under appointments 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, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Daniel Romero pleaded no contest to possession of a controlled substance for sale (Health & Saf. Code, § 11378)¹ in count 1 and to sale of a controlled substance (§ 11370.2, subd. (a)) in count 2. The trial court imposed the agreed upon sentence of three years eight months in state prison. The court also imposed a restitution fine of \$280, a crime lab fee of \$50, a drug program fee of \$150, a court security fee, and a criminal conviction fee. The court awarded defendant 30 days of presentence custody credits, based on 15 days of actual presentence custody.

Defendant contends a sentencing error is reflected in the abstract of judgment. This court requested additional briefing regarding restitution, imposition of fines and fees, and the award of presentence conduct credit, which the parties also addressed.

We reverse the order for the \$150 drug program fee and remand to allow the trial court to determine whether to impose the fee together with the required penalty assessments and surcharge, in light of defendant's ability to pay. Additionally, we direct the trial court to correct the errors in the abstract of judgment in conformance with our opinion. In all other respects, the judgment is affirmed.

DISCUSSION

Sentencing

Although the trial court imposed the agreed upon sentence, it incorrectly stated the three-year sentence on count 2 was the upper term, when, in fact, it is the middle term. The abstract of judgment indicates the sentence is the upper term and must be corrected to reflect that it is the middle term.

¹ Unless otherwise indicated, all statutory references are to the Health and Safety Code.

Fines and Fees

At sentencing, the trial court ordered defendant to pay a \$280 restitution fine, a \$50 lab fee, a \$150 drug program fee, and undesignated court security and criminal assessment fees. The trial court made no determination with respect to defendant's ability to pay the drug program fee.

In contrast to the oral pronouncement, the abstract of judgment reflects a restitution fine of \$560 and an "administrative screening fee" of \$25, along with the \$50 lab fee, \$150 drug program fee, court security fee, and criminal assessment fee that the trial court imposed.

The \$25 administrative screening fee must be stricken because defendant was never released on his own recognizance, which is a prerequisite for imposition of the fee (Pen. Code, § 1463.07), and because it was not imposed by the trial court at the sentencing hearing. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*) ["An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment"].)

With respect to the restitution fine, the trial court pronounced only one fine of \$280. There was no indication by the court that the amount would apply separately to each count for a total of \$560. The court's pronouncement controls, and the abstract of judgment must be corrected to reflect the single \$280 restitution fine. (See *Mitchell*, *supra*, 26 Cal.4th at p. 185.)

The trial court failed to impose the following penalties and surcharge to which the \$50 laboratory analysis fee (§ 11372.5) is subject: "a \$50 state penalty under Penal Code section 1464, subdivision (a)(1); a \$35 county penalty pursuant to Government Code section 76000, subdivision (a)(1); a \$10 Penal Code section 1465.7, subdivision (a) state surcharge; a \$15 Government Code section 70372, subdivision (a)(1) state court construction penalty; a \$10 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a \$5 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a \$5 Government Code section 76104.7,

subdivision (a) state-only deoxyribonucleic acid penalty. [Citations.]” (*People v. Sharret* (2011) 191 Cal.App.4th 859, 863-864.) Accordingly, the abstract of judgment must be corrected to reflect the imposition of the penalties and surcharge.

The trial court also failed to impose the following penalties and surcharge to which the \$150 drug program fee (§ 11372.7) is subject: “a \$150 state penalty (Pen. Code, § 1464, subd. (a)(1)); a \$105 county penalty (Gov. Code, § 76000, subd. (a)(1)); a \$30 state surcharge (Pen. Code, § 1465.7, subd. (a)); a \$45 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a \$15 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a \$15 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)); and a \$30 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)).” (*People v. Corrales* (2013) 213 Cal.App.4th 696, 702.) However, the court also neglected to make a determination of defendant’s ability to pay prior to imposing the drug program fee, as is required. (*Ibid.*; § 11372.7, subd. (b).) The ability to pay finding must be made before the fee and any penalties or surcharge may be imposed. (*Ibid.*) Upon issuance of the remittitur, the trial court must conduct a hearing to determine defendant’s ability to pay the drug program fee and attendant penalties and surcharge in light of his other financial obligations. (*People v. Corrales, supra*, at p. 702.)

Conduct Credit

The trial court determined defendant’s presentence custody credits to be 30 days, based on 15 days in actual custody. The parties agree defendant spent 15 days in actual custody before sentencing. The only issue to resolve is the method of calculating conduct credits. We agree with the Attorney General that the trial court erred in awarding 15 days of presentence conduct credit and should have instead awarded 14 days, for a total of 29 days of presentence credit.

Penal Code section 4019, subdivisions (e) and (f), provides that persons who commit a crime after October 1, 2011, be awarded four days of custody credit for every

two days of actual custody, after the person has been confined for a minimum of four days. Although current Penal Code section 4019 grants additional conduct credit for actual custody served in comparison to the previous version of the provision, there are no changes in the language of the statute that would justify a departure from the traditional method of calculating such credits, as articulated in *In re Marquez* (2003) 30 Cal.4th 14, 26, nor does defendant argue the language of the current provision is not subject to analogous interpretation. Under the approach in *Marquez*, defendant's days of actual custody (15 days) are divided by 2 (7.5 days), discarding any remainder (0.5 days). The result (7 days) is then doubled to give the total conduct credits earned, in this case 14 days, for a total of 29 days presentence custody credit.

Defendant's argument that equal protection requires that defendants awarded presentence custody credits under Penal Code section 4019 be treated identically to prisoners who receive post-sentence conduct credits under Penal Code section 2933 does not persuade us otherwise.

“The constitutional guaranty of equal protection of the laws has been judicially defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness. [Citations.] The concept recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not . . . require absolute equality. [Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination. [Citations.]’ (*People v. Romo* (1975) 14 Cal.3d 189, 196.)” (*People v. Heard* (1993) 18 Cal.App.4th 1025, 1029 (*Heard*).)

As we discussed above, Penal Code section 4019 awards four credits for every two days served. In contrast, Penal Code section 2933 awards two credits for every one day served. The only difference between the two provisions results when a detainee serves an odd number of days in actual presentence custody, as was the case here. Under that circumstance, the credit earned is for one fewer day.

Here, as in *Heard, supra*, we conclude that even if we treat the two classifications as worthy of equal protection analysis, the “slightly less favorable” credit formula, which yields at most one fewer day of conduct credit, does not constitute a denial of equal protection. (See *Heard, supra*, 18 Cal.App.4th at p. 1030 [holding three fewer days of conduct credit *de minimus*].) The abstract of judgment must be amended to reflect presentence conduct credit of 14 days.

DISPOSITION

We reverse the order for the \$150 drug program fee and remand to allow the trial court to determine whether to impose the fee together with the required penalties and surcharge, in light of defendant’s ability to pay. Additionally, the trial court is instructed to correct the abstract of judgment to properly reflect that:

- 1) the three-year term imposed in count 2 is for the middle, and not the upper term;
- 2) the \$25 administrative screening fee (§ 1463.07) is stricken;
- 3) the restitution fine imposed is \$280, and not \$560;
- 4) the following penalties and surcharge to which the laboratory analysis fee (§ 11372.5) is subject are imposed: a \$50 state penalty under Penal Code section 1464, subdivision (a)(1); a \$35 county penalty pursuant to Government Code section 76000, subdivision (a)(1); a \$10 Penal Code section 1465.7, subdivision (a) state surcharge; a \$15 Government Code section 70372, subdivision (a)(1) state court construction penalty; a \$10 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a \$5 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a \$5 Government Code section 76104.7, subdivision (a) state-only deoxyribonucleic acid penalty; and
- 5) defendant is granted 14 days of presentence conduct credit, for a total of 29 days of presentence credit.

The clerk of the superior court shall send a copy of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.