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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL JAMES FLETCHER,

Defendant and Appellant.

2d Crim. No. B239669  
(Super. Ct. Nos. 2011000981 &  
2011019596)  
(Ventura County)

Daniel James Fletcher appeals from the judgments entered after he pled guilty to entering a custodial facility as an ex-convict (Pen. Code, § 4571)<sup>1</sup> and possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11378). He admitted having a prior drug-related conviction (Health & Saf. Code, § 11370.2) and having served two prior prison terms (§ 667.5, subd. (b)). The trial court struck the prior prison term allegations and sentenced appellant to four years four months in county jail. It awarded him presentence custody credits, and ordered him to pay various fines and fees, including a \$1,664 presentence investigation fee.

Appellant contends that the trial court violated his equal protection rights by failing to grant him additional conduct credits based on a 2011 amendment to section 4019 which provides one-for-one conduct credits to certain defendants for crimes committed after October 1, 2011. (Stats. 2011, ch. 15, § 482, operative Oct. 1, 2011.) He

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

further contends that the court erred by finding that he had the financial ability to pay a \$1,664 presentence investigation fee. (§ 1203.1b, subds. (b) & (e).) We reject his first contention, but agree that there is not substantial evidence to support the finding that he had the ability to pay a resentence investigation fee. We remand the matter to the trial court with directions to strike the presentence investigation fee, and modify the judgments' provisions regarding fees, and assessments. We otherwise affirm the judgments.

### BACKGROUND

On January 25, 2011, appellant pled guilty to entering a custodial facility as an ex-convict, in case No. 2011000981. On February 24, 2011, the trial court suspended imposition of sentence, and placed appellant on formal probation for three years, with the condition that he serve 45 days in county jail. It struck the prior prison term allegations, and awarded him 15 days of presentence credit. The court also assessed various fees and fines but issued a stay through May 25, 2011, for making payments because appellant lacked the ability to make payments at the time of sentencing. It ordered him to make payment arrangements through the court's collection department or work furlough program, or request a hearing date. (§ 1203.1b, subds. (a) & (b).)<sup>2</sup>

On May 31, 2011, appellant was arrested for possession of methamphetamine, a controlled substance, and other offenses in case No. 2011019596. On June 6, 2011, the trial court revoked his probation in case No. 2011000981.

On July 25, 2011, the prosecution filed an information in case No. 2011019596 charging appellant with possession for sale of a controlled substance (methamphetamine) (Health & Saf. Code, § 11378), transportation of a controlled substance (methamphetamine) (Health & Saf. Code, § 11379, subd. (a)), and possession

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<sup>2</sup> Three different judicial officers conducted the proceedings below: The Honorable David W. Long (on January 25 and February 24, 2011); the Honorable Edward F. Brodie (on June 6, 2011); and the Honorable James P. Cloninger (on November 21, 2011 and January 10, 2012).

of a deadly weapon (former § 12020, subd. (a)(1).)<sup>3</sup> The information further alleged that he served two prior prison terms (§ 667.5, subd. (b)) and had a prior drug-related felony conviction (Health & Saf. Code, § 11370.2).

On November 21, 2011, in case No. 2011019596, appellant pled guilty to possession for sale of a controlled substance and admitted the prior drug-related felony conviction and prior prison term allegations. On January 10, 2012, during consolidated proceedings, the court sentenced him to serve a four-year, four-month term, including a sixteen-month low term for possession of methamphetamine, and a three-year enhancement for a prior drug-related conviction in Case No. 2011019596, with a concurrent two-year middle term for entering a custodial facility as an ex-convict in case No. 2011000981. The court also struck appellant's section 667.5, subdivision (b) prior prison terms for purposes of sentencing, dismissed the transportation of methamphetamine and possession of a deadly weapon charge in case No. 2011019596, and granted him 337 days of presentence custody credits (225 days of actual custody and 112 days of conduct credits).

## DISCUSSION

### *Section 4019 Conduct Credits*

Appellant contends that the trial court violated his equal protection rights by failing to grant him additional conduct credits based upon a 2011 amendment to section 4019 which provides that certain defendants may earn one-for-one conduct credits for crimes committed after October 1, 2011. We disagree.

When section 4019 was originally enacted in 1976, it offered prisoners the opportunity to earn conduct credit for their good behavior at the rate of two days for every four days spent in actual custody. Under that version of the statute, prisoners were considered to have served six days for every four days they were incarcerated. (See, e.g., *People v. Fares* (1993) 16 Cal.App.4th 954.) Effective January 25, 2010, section 4019 was amended to allow conduct credits to be earned (with exceptions not relevant here) at

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<sup>3</sup> Former section 12020 was repealed effective Jan. 1, 2012. (Stats. 2010, ch. 711, § 4.)

a "two-for-two" rate, such that prisoners were deemed to have served four days for every two days spent in presentence custody. (Stats. 2009-2010, 3d Ex. Sess., ch. 2, § 50.) Effective September 28, 2010, the Legislature amended the statute again to restore the original formula. (Stats. 2010, ch. 426, § 2.) Effective October 1, 2011, the statute was amended yet again to restore "two-for-two" conduct credits for all prisoners. (§ 4019, subds. (b) & (h), as amended by Stats., 2011-2012, 1st Ex. Sess., ch. 12, § 34.) The statute further provides: "The changes to this section enacted by the act[] that added this subdivision shall apply prospectively and shall apply to prisoners who are confined . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h), as amended by Stats. 2011, ch. 15, § 482, eff. Oct. 1, 2011).)

Although appellant's crimes were committed before October 1, 2011 (on January 9, and May 31, 2011), he claims that the current version of section 4019 must be applied to him retroactively in order to avoid an equal protection violation. A similar argument was rejected by our Supreme Court with respect to a superseded version of section 4019 providing for one-for-one presentence conduct credits from January 25, 2010 to September 20, 2011. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; see also *People v. Brown* (2012) 54 Cal.4th 314, 329.) Because we are bound to follow our Supreme Court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we must reject appellant's equal protection claim, as the other courts who addressed this issue have done. (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553 [defendants who commit crimes prior to the October 1, 2011, amendment to section 4019 are not entitled to enhanced credits for time served after that date]; accord, *People v. Kennedy* (2012) 209 Cal.App.4th 385, and *People v. Verba* (2012) 210 Cal.App.4th 991, 993.)

#### *Presentence Investigation Fee*

Appellant argues that the trial court erred by finding that he had the financial ability to pay a \$1,664 presentence investigation fee. (§ 1203.1b, subds. (b) & (e).) Because there is not substantial evidence to support that finding, we agree.

Before a court imposes a presentence investigation fee, it must provide the defendant with the opportunity for a hearing and determine his or her "ability to pay" the fee. (§ 1203.1b, subd. (a).) The court is required to make findings, and "any finding of ability to pay must be supported by substantial evidence." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.)

The probation officer reported that she interviewed appellant on December 16, 2011, "via video conference, while [he was] in custody at the Main Jail." Appellant had been in custody since May 31, 2011. The probation officer submitted a financial statement form which shows that appellant was unemployed. The spaces on the financial statement for assets and liabilities have "denied" written across them. In her report, the probation officer recommended that the court find that appellant had the ability to pay the presentence investigation fee.

During the January 10, 2012 sentencing hearing, the trial court stated that it was inclined to find that appellant had the "ability to pay for the cost of the presentence report, . . . mostly because [he] refused to provide any information to the probation officer," and that his financial statement just said, "girlfriend covered expenses and then denied, deny, deny, denied is written in the spaces [for assets and liabilities]." The court concluded that appellant did not cooperate in providing information because he "declined to tell [the court] whether he [had] any assets that he could sell to pay for the costs of the presentence report." Counsel indicated that appellant had been unemployed and was incarcerated. The court noted that "[t]here are lots of people who are unemployed who have a lot of assets." The court added that if it had to speculate whether appellant was one of them, the court "would say it seems unlikely, but [the court didn't] know why [appellant] would not do that." The court questioned how it could find that appellant lacked the ability to pay when he did not "cooperate in providing that information." Counsel proposed that if the court needed further information regarding appellant's assets and liabilities, appellant could testify at the hearing. The court declined to hear his testimony, and found that appellant had the ability to pay the presentence investigation fee.

The probation report does not state that appellant refused to speak with, or refused to provide information to, the probation officer. The probation officer did not testify during the sentencing proceedings. It appears that appellant denied that he had any assets or liabilities, and the probation officer wrote "denied" in the corresponding sections of the financial form.

The record lacks evidence to support the trial court's finding that appellant had the ability to pay the \$1,664 resentencing investigation fee. Appellant had been unemployed, and in custody for more than six months when the court made that finding. There is no evidence that he had any assets.<sup>4</sup> (See *People v. Pacheco*, *supra*, 187 Cal.App.4th at p. 1398; see also *People v. Flores* (2003) 30 Cal.4th 1059, 1068 [unless the trial court finds unusual circumstances, a defendant sentenced to state prison is presumed not to have the future financial ability to reimburse the costs of his defense]; accord, *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 [express finding of unusual circumstances is necessary to order defendant to reimburse cost of his or her defense per § 987.8, subd. (g)(2)(B)].)

The judgment in case No. 2011019596 includes an incorrect "administrative" fee, and the judgments in both cases lack certain mandatory fees and penalties. We remand the judgments to the superior court with directions to strike the incorrect investigation fee, and add the missing fees and penalties.

#### DISPOSITION

On remand, the trial court shall modify the judgment in case No. 2011000981 as follows: (1) strike the \$400 restitution fine and the \$35 administrative fee; and (2) impose a \$200 probation revocation fine (§ 1202.44), a \$35 court facilities

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<sup>4</sup> The January 25, 2011, financial statement attached to the February 24, 2011 probation report in case No. 2011000981 indicates that appellant had "0" assets and "0" liabilities. On February 24th, the court imposed fines upon appellant, but stayed their payment through May 25, 2011, because he lacked the ability to pay. There is no evidence that appellant acquired any assets after February 24, 2011. As of his January 10, 2012 sentencing date, he had been in custody for more than six months. His December 16, 2011, financial statement indicates that he was unemployed and denied having assets.

fee (Gov. Code, § 70373, subd. (a)), and a \$40 court operations assessment (§ 1465.8, subd. (a)).

The trial court is further directed to modify the judgment in case No. 2011019596 as follows: (1) strike the \$1,664 presentence investigation fee; (2) impose a \$35 court facilities fee (Gov. Code, § 70373, subd. (a)), and a \$40 court operations assessment (§ 1465.8, subd. (a)); and (3) provide that the \$50 lab fee for appellant's drug-related offense (Health & Saf. Code, § 11372.5, subd. (a)) is subject to the following penalties and assessments: a \$50 state penalty (§ 1464 subd. (a)(1)); a \$35 county penalty (Gov. Code, § 76000, subd. (a)); a \$10 state surcharge (§ 1465.7, subd. (a)); a \$25 state court construction penalty (Gov. Code, § 70372, subd. (a)); and a \$10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James P. Cloninger, Judge  
Superior Court County of Ventura

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