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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY D. HORTON, Defendant and Appellant.	B234590 (Los Angeles County Super. Ct. Nos. MA051272, MA048072 & MA039939)

APPEAL from a judgment of the Superior Court for Los Angeles County, Charles A. Chung, Judge. Affirmed as modified.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Attorney General, and Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Johnny D. Horton has three cases at issue in this appeal. In 2007, he was placed on probation after pleading no contest to grand theft in the first case (case MA039939). In 2010, defendant pled no contest to making criminal threats in a second case, and was again placed on probation (case MA048072). In the third case, in 2011, a jury found defendant guilty of carrying a dirk or dagger (case MA051272). In these three cases, defendant's probation was revoked and reinstated a number of times, and he was in and out of custody. Ultimately, defendant was sentenced to serve prison time in all three cases. On appeal, defendant complains there are errors in the court's minute orders and abstracts of judgment. Defendant also contends he is entitled to additional conduct credits under Penal Code section 4019,[1] which was amended after he was sentenced. Lastly, defendant seeks an independent review of the trial court's in camera *Pitchess*[2] hearing.

We find the claimed errors in the minutes and abstracts of judgment have been corrected, although other errors exist. We also find defendant is not entitled to additional conduct credits under the amendments to section 4019. Lastly, our independent review of the trial court's in camera *Pitchess* proceedings reveals no errors. We therefore affirm the judgment, with modifications.

FACTS

In the first case, a September 28, 2007 information charged defendant with grand theft (§ 487, subd. (a), count 1) and petty theft (§ 484, subd. (a), count 2). He pled no contest to count 1 on October 11, 2007, and count 2 was dismissed. The court suspended imposition of sentence and placed defendant on probation for 36 months. Defendant was ordered to pay a $20 court security fee, a $10 crime prevention fine, and $24 penalty assessment, among other fines and fees. He also received custody credit.

Defendant's probation in his first case was preliminarily revoked on February 5, 2008, after defendant was arrested. The court later concluded that defendant was not in

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

violation of his probation, and probation was reinstated, with defendant receiving custody credit for time spent in jail.

A probation revocation hearing was held on April 10, 2008, and defendant admitted to violating his probation. Probation was revoked and reinstated, with the condition that defendant serve 90 days in jail.

Another probation revocation hearing was held on October 10, 2008, and defendant admitted that he violated his probation. Probation was revoked and reinstated, on the condition that defendant serve 50 days in jail and waive all accrued custody credit.

On January 25, 2010, defendant's probation in the first case was summarily revoked after he picked up a second case, for second degree robbery (§ 211, count 1), criminal threats (§ 422, count 2), assault with a deadly weapon (§ 245, subd. (a)(1), count 3), with serious felony allegations on all counts (§ 1192.7, subd. (c)), violent felony allegations on count 1 (§ 667.5), and gang allegations on counts 1 and 2 (§§ 186.22, subd. (b)(1)(C), count 1; 186.22, subd. (b)(1)(B), count 2). The crimes occurred on January 24, 2010.

On August 6, 2010, the trial court conducted a probation revocation hearing in defendant's first case, and a plea and sentencing hearing in the second case. Defendant admitted the probation violation in the first case, and pled no contest to count 2 in the second case. Defendant received a suspended sentence of three years in the second case. Defendant's probation in the first case was revoked and he was sentenced to one-third the midterm of two years on count 1, and was ordered to serve an additional 352 days in jail, which he was deemed to have already served (he received 352 days of custody credit). His sentence in the first case was to run consecutive to the sentence in the second case. The court suspended imposition of the sentences in both cases, and reinstated probation in the first case. In the second case, defendant was placed on four years of formal probation, with the condition that he serve 264 days in jail and perform 60 days of community service. He was also ordered to pay various fines and fees. Defendant was awarded 264 days of credit, consisting of 176 actual and 88 days conduct credit in the second case.

Another probation revocation hearing was held on November 24, 2010, in the first and second cases, after defendant failed to make any restitution payments and failed to

appear at a prior court hearing. Defendant admitted to violating his probation in both cases, probation was revoked and reinstated, and was extended for one year in both cases.

On December 14, 2010, defendant was pulled over by Sheriff's deputies and was found with a steak knife in his pocket. On December 16, 2010, defendant's probation in the first and second cases was summarily revoked when he picked up a third case, for carrying a dirk or dagger (former § 12020, subd. (a)(4), repealed by Stats. 2010, ch. 711, § 4, operative Jan. 1, 2012) with prior serious felony allegations (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

Defendant sought *Pitchess* discovery in the third case, for Sheriff's Deputies Welle and Izzo, who were involved in his arrest. The trial court found good cause to conduct an in camera hearing of Deputy Welle's personnel records for complaints of dishonesty, fabrication, and false reports. The trial court conducted the in camera hearing on April 14, 2011, and ordered disclosure of "two hits as to Deputy Welle."

Defendant went to trial in the third case and was convicted by jury on May 23, 2011, with the special allegations found true. On June 15, 2011, the court permanently revoked defendant's probation in the first and second cases, and sentenced defendant in all three cases. In the first case, the previously suspended sentence of eight months was executed. Defendant was not awarded any custody credits in the first case. In the second case, the previously suspended sentence of three years was executed, and defendant was awarded 264 days of custody credit. In the third case, defendant received a sentence of 32 months in state prison, consisting of 16 months doubled under the Three Strikes law. In the third case, defendant was also ordered to pay various fines and fees. Defendant was awarded an additional 276 days of custody credit, consisting of 184 actual days plus 92 conduct credits. The sentence in the first case was ordered to run consecutive with the second case, with the sentence in the third case running concurrent with the sentences in the first two cases.

Defendant filed timely notices of appeal.

DISCUSSION

1. Minutes and Abstracts of Judgment

Defendant contends there are errors in the court's minutes and abstracts of judgment, as they deviate from the court's oral pronouncement of judgment. The judgment was as follows: "On the case ending in -39939 [first case] and -48072 [second case,] I am going to impose the sentence that was suspended. [¶] On the case ending in -48072 [second case] it will be count [2], which was the [section] 422. Three years, which is the high term. [¶] On the case ending in -39939 [first case] I am going to impose one-third the mid term, which is eight months. That will run consecutive. [¶] On the case ending in -272 [third case], I will select the low term of 16 months and double that for a total of 32 months. That will run concurrent with the other sentence."

Both parties acknowledge that the minute orders in the first and third cases, and the abstracts of judgment in all three cases, inaccurately reflected the court's oral pronouncement of judgment. These errors have since been corrected by the trial court's March 15, 2012 and March 27, 2012 nunc pro tunc orders, and amended abstracts of judgment.[3] Defendant's reply brief does not challenge the accuracy of the nunc pro tunc orders or amended abstracts of judgment, and we conclude the orders and abstracts accurately reflect the trial court's oral pronouncement of judgment. Therefore, defendant's claims of error are now moot. (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 227-228.)

However, respondent observes that there are some new errors that require this court's attention. An appellate court has jurisdiction to modify and correct a sentencing error as a matter of law, without the need for preservation of the issue for appeal, or a cross-appeal. (See *People v. Smith* (2001) 24 Cal.4th 849, 852-854; *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Stone* (1999) 75 Cal.App.4th 707, 717.)

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[3] We granted respondent's motion to augment the record, which included the orders and abstracts of judgment in the second and third cases, issued on March 27, 2012. The errors concerning the first case were corrected by a nunc pro tunc order and amended abstract of judgment issued on March 15, 2012, attached to defendant's opening brief. We take judicial notice of these documents on our own motion. (Evid. Code, § 459.)

The first case. The March 15, 2012 amended abstract of judgment must be amended to include the $20 court security fee imposed by the trial court. Both the March 15 amended abstract and nunc pro tunc minute order correctly reflect the $10 fine imposed under section 1202.5, but must be amended to impose penalty assessments totaling $26, instead of $24, as required by statutes in effect at the time defendant's September 28, 2007 offense. (See § 1464, former subd. (a), Stats. 2000, ch. 248, § 1 [$10 state penalty]; § 1465.7, subd. (a) [$2 state surcharge]; Gov. Code, § 76000, former subd. (a), Stats. 2002, ch. 1082, § 5 [$7 county penalty]; Gov. Code, § 70372, former subd. (a), Stats. 2002, ch. 1082, § 4 [$3 court construction penalty][4]; former Gov. Code, § 76000.5, subd. (a), Stats. 2006, ch. 841, § 1 [$2 penalty]; former Gov. Code, § 76104.7, Stats. 2006, ch. 69, § 18 [$1 state penalty]; Gov. Code, § 76104.6, former subd. (a), 2004 West's Cal. Legis. Service, Prop. 69, § IV.1, eff. Nov. 3, 2004 [$1 penalty].)

The second case. The March 27, 2012 amended abstract of judgment and nunc pro tunc minute order correctly reflect defendant received a total of 540 days of custody credit, but incorrectly broke them down into 448 days of actual custody and 92 days of conduct credit. The reporter's transcript of the June 15, 2011 sentencing hearing shows that defendant received 276 days of credit, consisting of 184 actual days and 92 days of conduct credit. The court combined those custody credits with the credits he received at the prior August 6, 2010 plea and sentencing hearing (i.e., 264 days, consisting of 176 actual and 88 conduct credits), giving defendant a total of 540 days of custody credits, consisting of 360 actual and 180 conduct credits. Therefore, the amended abstract of judgment and minute order for the second case must be amended to reflect 540 days of custody credit, consisting of 360 actual days and 180 days of conduct credit.

2. Conduct Credits

Defendant's second and third crimes, for which defendant challenges the number of conduct credits he received, were committed on January 24, 2010 and December 14, 2010. He was sentenced on June 15, 2011. Defendant does not contend the trial court's

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4 See also former Government Code section 70375 (Stats. 2005, ch. 410, § 4).

calculation of his conduct credit was incorrect under the version of section 4019 in effect at the time of his sentencing. (See Stats. 2011, ch. 15, § 482, eff. April 4, 2011 (former section 4019).) However, defendant maintains that equal protection requires the version of section 4019 that came into effect on October 1, 2011 (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35 (amended section 4019)), to be applied retroactively, entitling him to additional conduct credits. (See U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

Under former section 4019, subdivision (f), most defendants in local custody earned two days of conduct credit for every two days in local custody. Others, such as defendant, who had a current or prior conviction for a serious or violent felony, earned two days of conduct credit for every four days served. (See Stats. 1982, ch. 1234, § 7; Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010; Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010; see also former § 2933, subd. (d), Stats. 1996, ch. 868, § 1.5; Stats. 2009-2010 3d Ex. Sess., ch. 28, § 38; Stats. 2010, ch. 426, § 1.) The Legislature amended section 4019, effective October 1, 2011, to provide a higher rate of conduct credit without any exception for defendants whose present offense was a serious felony, or who have a prior conviction for a serious or violent felony. (See Stats. 2011, ch. 15, § 482; Stats. 2011-2012, 1st Ex.Sess., ch. 12, § 35.) However, by its terms, amended section 4019 applies only to prisoners confined for a crime committed on or after October 1, 2011, and any days earned before October 1, 2011, are "calculated at the rate required by the prior law." (§ 4019, subd. (h).) Therefore, amended section 4019 does not apply to prisoners, like defendant, serving time in local custody before October 1, 2011.

Defendant contends that limiting the application of amended section 4019 to defendants who committed crimes after October 1, 2011, violates equal protection. At the time defendant filed his opening brief, *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) had not been decided. In *Brown*, our Supreme Court rejected defendant's argument. Although *Brown* involved a different amendment of section 4019 than the one at issue in this case, defendants in both cases were awarded conduct credits under a superseded version of section 4019, amended after their sentencing to increase the rate at which conduct credits accrued.

Equal protection recognizes that similarly situated persons, with respect to a law's legitimate purposes, must be treated equally. (*Brown*, *supra*, 54 Cal.4th at p. 328.) In *Brown*, the Supreme Court decided that prospective application of the earlier version of section 4019 did not violate the equal protection clauses of the federal and state Constitutions. "[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown*, *supra*, 54 Cal.4th at pp. 328-329.)

Defendant contends that a different version of section 4019 was at issue in *Brown*, but does not otherwise attempt to distinguish it. We see no reason why the rationale of *Brown* should not apply to the newly amended section 4019. (See *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Accordingly, we reject defendant's claim that he is entitled to additional presentence custody credit.

3. *Pitchess* Review

Peace officer personnel records and records concerning citizen complaints made against peace officers are confidential and are subject to discovery only under limited circumstances. (§ 832.7.) A defendant requesting confidential personnel records and complaints must make a good cause showing by affidavit setting forth the materiality of the requested information to the pending litigation. (Evid. Code, § 1043, subd. (b)(3).) If a defendant shows good cause, the court must conduct an in camera hearing to determine what information sought, if any, must be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 179.) A criminal defendant is entitled to discovery of all relevant documents or information in the confidential records of the peace officers accused of misconduct against the defendant, provided it does not concern officer conduct occurring more than five years before the incident, the results of internal police investigations, or facts with no practical benefit to the defense. (*Id.* at pp. 179, 182; see also Evid. Code, § 1045, subd. (b).) This encompasses not only evidence that would be admissible at trial, but also evidence that may lead to admissible evidence or evidence that is pertinent to the defense. (*Richardson v.*

Superior Court (2008) 43 Cal.4th 1040, 1048-1049; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) We review the trial court's determination on the discoverability of material in peace officer personnel files for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

Defendant has requested that this court conduct an independent examination of the in camera *Pitchess* proceedings in his third case to determine whether any responsive documents were wrongly withheld. Such a review is authorized under *People v. Mooc*, *supra*, 26 Cal.4th at p. 1226. We have reviewed the record of the trial court proceedings, including a sealed reporter's transcript of the trial court's in camera review of Deputy Welle's records. Based upon our review of the record, we conclude the trial court's orders concerning the disclosure of *Pitchess* materials were correct.

DISPOSITION

The judgment is affirmed, as modified. The March 15, 2012 amended abstract of judgment in the first case (MA039939) must be amended to include the $20 court security fee imposed by the trial court, and to impose a $26 rather than a $24 penalty assessment. The corresponding minute order must also be corrected to reflect a $26 penalty assessment. The March 27, 2012 amended abstract of judgment and minute order for the second case (MA048072) must be corrected to reflect 540 days of custody credit, consisting of 360 actual and 180 days of conduct credit. The superior court is directed to prepare amended abstracts of judgment and forward certified copies of the same to the Department of Corrections.

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GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J. FLIER, J.