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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.

SIMON ZAMBRANO TRUJILLO,

Defendant and Appellant.

2d Crim. No. B238080  
(Super. Ct. No. 2011027132)  
(Ventura County)

Simon Zambrano Trujillo appeals the judgment entered after a jury convicted him of theft of property (Pen. Code,<sup>1</sup> § 666). In a bifurcated proceeding, the trial court found appellant had suffered a prior serious or violent felony conviction that qualifies as a strike (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)), and had served a prior prison term (§ 667.5, subd. (b)). Appellant was sentenced to seven years in state prison and was awarded 272 days of presentence custody credit. He was also ordered to pay \$71 in restitution. He contends the court erred in ordering him to pay restitution. He further claims that equal protection principles compel a retroactive application of the most recent amendments to section 4019. We shall strike the restitution order. Otherwise, we affirm.

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<sup>1</sup> All further statutory references are to the Penal Code.

## STATEMENT OF FACTS

Appellant entered a Vons store in Oxnard and placed several items in his pocket and waistband. When appellant left the store, he was detained by two security guards who recovered the stolen items.

## DISCUSSION

### *Restitution*

Appellant contends the court abused its discretion in ordering him to pay \$71 in victim restitution to Vons because the items he stole from the store were recovered and returned to the store. The People correctly concede the point.<sup>2</sup>

We review restitution orders for an abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) "A restitution order that is based on a demonstrable error of law constitutes an abuse of the trial court's discretion. [Citation.]" (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049.)

Victim restitution must be ordered "in every case in which a victim has suffered economic loss as a result of the defendant's conduct." (§ 1202.4, subd. (f).) The order must be "based on the amount of loss claimed by the victim . . . or any other showing to the court." (*Ibid.*) "[A] victim is not entitled to restitution for the value of property that was returned to him or her, except to the extent there is some loss of value to the property." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1180.)

Here, there was no showing that Vons suffered any economic loss as a result of appellant's conduct. The items appellant stole from the store were recovered at the time of his arrest. Moreover, there was no basis for the court to find that Vons suffered any loss of value in the returned items. Accordingly, the restitution order must be stricken. (*People v. Chappelone, supra*, 183 Cal.App.4th at p. 1180; see also *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1162 [court erred in awarding restitution for items taken in burglary that were returned to the victim].)

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<sup>2</sup> Although appellant did not object to the restitution order below, the People acknowledge that the issue can be raised for the first time on appeal because the court's order amounts to an unauthorized sentence. (*People v. Percelle* (2005) 126 Cal.App.4th 164, 179.)

### Section 4019

Appellant claims he is entitled to additional presentence conduct credits under the version of section 4019 in effect when he was sentenced in December 2011. He contends equal protection principles require us to apply the new law retroactively, notwithstanding the statute's express statement that it only applies prospectively to prisoners confined for crimes committed on or after its effective date of October 1, 2011.<sup>3</sup> Our Supreme Court recently rejected this very conclusion. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9; see also *People v. Brown* (2012) 54 Cal.4th 314, 329 [prospective application of the January 25, 2010, amendment to section 4019 does not violate equal protection].) We are bound to follow our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) To the extent appellant contends there is an ambiguity in the new law that compels us to conclude he is at least entitled to additional credit for the time he spent in presentence custody after October 1, 2011, we agree with our colleagues in the Fifth District that no such ambiguity exists. (*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].)

### DISPOSITION

The restitution order is stricken. The trial court is directed to prepare an amended abstract of judgment reflecting this change and forward it to the Department of

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<sup>3</sup> The current version of section 4019 offers prisoners the opportunity to earn conduct credit for their good behavior at the rate of two days for every two days spent in actual custody. Under this version of the statute, prisoners are considered to have served four days for every two days of incarceration. (§ 4019, subd. (f).) The statute further provides that it "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." (*Id.* at subd. (h).) Under the prior law, which went into effect on September 28, 2010, defendants with prior serious or violent felony convictions are only entitled to two days of presentence conduct credit for every *four* days spent in actual custody. (Stats. 2010, ch. 426, § 2.) This is the statute that applies to appellant, whose crime was committed on June 10, 2011.

Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Ryan Wright, Judge  
Superior Court County of Ventura

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Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

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