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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO GARCIA, Defendant and Appellant.	B227137 (Los Angeles County Super. Ct. No. BA373574)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alex Ricciardulli, Judge. Affirmed in part, reversed in part, and remanded.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Roberto Garcia appeals from the court's calculation of his presentence conduct credits. We reverse and remand for the court to reconsider his credits, but otherwise affirm.

FACTS AND PROCEEDINGS

Appellant Roberto Garcia was arrested in the summer of 2010 and charged with four counts of selling or offering to sell methamphetamine. It was also alleged he had a prior "serious or violent felony" under Penal Code sections 1170.12 and 667. Appellant initially pleaded not guilty. He later entered into a plea bargain admitting one count, and the trial court dismissed the three remaining counts. The court sentenced appellant to three years in state prison. In calculating appellant's presentence custody credits, defense counsel noted appellant had served 50 days in actual custody. Therefore, according to counsel, appellant was entitled to 50 days of good time/work time conduct credit under the version of Penal Code section 4019 (§ 4019) then in effect. That version awarded a prisoner two days of conduct credit for each two days served.[1]

The court disagreed. It ruled appellant was entitled to only "regular presentence credits" of two days conduct credit for every *four* days served because he had a prior serious felony conviction in 1989 for shooting at an inhabited dwelling. Appellant objected to the court's reduction of his conduct credits because appellant had not admitted, nor had the People proved, the prior conviction. The court carefully considered appellant's argument, wrote a lengthy order, and concluded it was inconsequential that the prior conviction had not been admitted or proved. The court awarded appellant only 24 days of conduct credit. Its minute order stated: "This court finds that the defendant is ineligible for increased pre-sentencing credits under newly-amended Penal Code section 4019. The defendant must receive regular pre-sentencing credits because of a

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[1] At the time of appellant's sentencing in August 2010, then-section 4019, subdivision (f) stated "a term of four days will be deemed to have been served for every two days spent in actual custody."

'serious felony' or 'violent felony' on the defendant's record, even though the prior conviction was not pled or proved in this court." This appeal followed.

DISCUSSION

When the court imposed sentence in August 2010, the version of section 4019, subdivisions (b)(1) and (c)(1) then in effect awarded a prisoner two days of presentence conduct credits for every two days actually served. Accordingly, absent appellant's prior conviction, it seems likely the court would have credited appellant with four days of custody for every two days of actual confinement. (Former § 4019, subd. (f); Stats. 2009-2010, 3d Ex. Sess. 2009-2010, ch. 28, § 50; *People v. Brewer* (2011) 192 Cal.App.4th 457, 461 [" 'Section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, "a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence." ' "].) Because of appellant's prior conviction, however, the court ruled that subdivisions (b)(2) and (c)(2) of then-section 4019 applied, which limited presentence conduct credits for a prisoner with a prior serious felony conviction to two days for each four days actually served. Thus, the court reduced appellant's conduct credits for the 50 days he actually served from 50 days to 24, meaning appellant received only 74 days of presentence custody credit instead of the 100 days to which he claims he is entitled.

Appellant contends the court erred because the People's charging information merely alleged his prior conviction; the People did not prove the allegation's truth and he did not admit it. We conclude that *People v. Lo Cicero* (1969) 71 Cal.2d 1186 (*Lo Cicero*) (disapproved on another point in *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301-1302, fn. 6), which held that the prosecution must plead and prove the validity of a prior conviction to use it to increase a defendant's punishment in the context of a denial of probation, shows appellant is correct. " '[B]efore a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant

pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.' " (*Id.* at pp. 1192-1193.) If two defendants spend the same amount of time in jail before sentencing, and one has no prior conviction while the second does, then under section 4019 as applied here by the trial court the second defendant will remain in prison after the first has been released. One more day in prison is one more day of punishment; the court's reduction of appellant's conduct credits meant 26 more days of punishment. Accordingly, the People were obligated to prove (or appellant needed to admit) the prior conviction before the court could use it to reduce appellant's credits.

Respondent notes that section 4019 does not state that a prior conviction must be pleaded and proved for the credit reduction to apply. Respondent also points out that not every fact a court uses in calculating a sentence must be pleaded and proved. Thus, respondent concludes, the court did not err in relying on appellant's prior conviction (the validity of which appellant has not directly challenged) to reduce his conduct credits. In support, respondent cites *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*). *Varnell* held that the absence of a pleading and proof requirement in Proposition 36 meant that a trial court could use an unpled and unproven prior conviction (assuming the court found the conviction actually occurred) to deny a drug offender probation for drug treatment. *Varnell* reasoned that the absence of a pleading and proof requirement made a prior conviction a sentencing factor (which need not be pleaded and proved) instead of a sentencing enhancement or allegation, which must be pleaded and proved. (*Varnell*, at pp. 1134-1135, 1137-1139.)

We find respondent's reliance on *Varnell* misplaced because it is distinguishable from *Lo Cicero*, a distinction *Varnell* itself drew. *Varnell* noted: "There is authority for finding an implied pleading and proof requirement in criminal statutes. In . . . *Lo Cicero*[, *supra*,] 71 Cal.2d 1186[], we recognized an implied pleading and proof requirement in [a narcotics statute], which prohibited probation for any defendant convicted of certain narcotics offenses if the defendant had previously been convicted of a narcotics offense. The statute did not expressly require the prior conviction establishing

the defendant's ineligibility be pleaded and proved, but we recognized an implied pleading and proof requirement under *People v. Ford* (1964) 60 Cal.2d 772 [(*Ford*)], in which 'we held that "before a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived." ' [Citation.]" (*Varnell, supra,* 30 Cal.4th at p. 1140.)

Varnell then drew the distinction which makes *Lo Cicero,* not *Varnell*, the governing authority here. *Varnell* stated: "[Defendant's] case differs from *Lo Cicero* in one key respect: [defendant's] prior conviction and the resulting prison term did not eliminate his opportunity to be granted probation [because he remained eligible for probation under another statute.] Thus, unlike *Lo Cicero*, this is not a case where the prior conviction absolutely denied a defendant the opportunity for probation." (*Varnell, supra,* 30 Cal.4th at p. 1140.)

In the present case, section 4019 is the only available avenue for appellant to receive presentence conduct credit, and the court's reduction of those credits leaves him no alternative means to regain them. *Lo Cicero,* rather than *Varnell*, thus applies.

We note that both *Lo Cicero* and *Varnell* involved a defendant's ineligibility for probation because of a prior conviction. In *Lo Cicero,* the prosecution asked the trial court to deny a defendant probation, which *Lo Cicero* found was "equivalent to an increase in penalty," based on the defendant's prior conviction. (*Lo Cicero, supra,* 71 Cal.2d at p. 1193.) Here, in contrast, appellant's prior conviction resulted not in denial of probation, but in reduction of his presentence custody credits. We do not see the different consequences as material to our analysis because both results involve a prisoner spending more time in custody than he otherwise would.[2]

Respondent cites *In re Pacheco* (2007) 155 Cal.App.4th 1439 (*Pacheco*), for the proposition that case law does not equate reduction in credits with punishment. In

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[2] *Ford, supra,* 60 Cal.2d 772 on which the *Lo Cicero* court relied was not a probation case but dealt with a weapons enhancement.

Pacheco, the defendant was convicted of domestic violence and admitted that he inflicted great bodily injury on his victim. At sentencing, the trial court struck the punishment for the great bodily injury enhancement. (*Pacheco*, at p. 1441.) State prison authorities thereafter relied on the enhancement's existence to limit the defendant's postsentence work credits. (*Id.* at p. 1442.) Defendant objected and sought judicial relief. On review, the appellate court found prison authorities lawfully used the enhancement to reduce defendant's credits. The appellate court held, "because the sentencing court struck only the *punishment* for the [great bodily injury] enhancement, and not the enhancement in its entirety, [prison authorities] properly limited his custody credits . . . ." (*Id.* at p. 1442, italics added.) After stating its holding, the *Pacheco* court offered the following observation which respondent cites: "A reduction in [prison] worktime credits . . . may feel like 'additional punishment' to a prisoner, a result seemingly inconsistent with the sentencing court's order in this case . . . . However, a reduction in credits is not considered 'punishment' under the law. Rather, such credits are benefits a prisoner earns based on good conduct and participation in qualifying programs." (*Id.* at p. 1445.)

Pacheco's observation leaves undisturbed our conclusion that reduction of appellant's presentence conduct credits increased his punishment. First, *Pacheco* did not cite any authority for its observation. Second, the observation must be understood in the context in which the court made it. When one follows the flow of *Pacheco*'s analysis, it appears the court's observation was its response to the defendant's argument that the trial court struck the punishment for the great bodily injury enhancement with the intent that he should suffer no punitive consequences for having inflicted great bodily injury on his victim. The *Pacheco* court characterized the defendant as arguing: "He adds that striking the enhancement for sentencing purposes means that he does not have to undergo any 'additional punishment' in connection with that enhancement and should not, therefore, be subject to limited worktime credits." The *Pacheco* court answered, "He is wrong." (*Pacheco, supra,* 155 Cal.App.4th at p. 1444.) The *Pacheco* court's assertion which respondent quotes – "reduction in credits is not considered 'punishment' under the law" – was that a difference exists between striking a punishment and an enhancement,

and that difference permitted prison authorities to rely on the *enhancement* to deny postsentence credits even though the trial court had struck the *punishment*, because reduction in credits was not "punishment" which the trial court had intended to prevent when it disregarded the enhancement in imposing sentence. We do not understand *Pacheco* to be making the broader point that respondent asserts, which is that reduction in credits is, as a general matter, not punishment. If *Pacheco* were to be read for the broader proposition that respondent suggests, we would respectfully disagree with *Pacheco*: Serving a longer term because credits are denied does not just "feel like additional punishment," it is the very definition of additional punishment.

People v. Garcia (2004) 121 Cal.App.4th 271 (*Garcia*), also cited by respondent, does not lead to a different result. *Garcia* involved *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny concerning a defendant's right to have a jury decide every fact a court uses in imposing punishment. (*Garcia*, at pp. 276-277.) The question in *Garcia* was whether the defendant had a right to have a jury decide facts used to reduce custody credits (as opposed to permitting the court to decide whether the facts were true). *Garcia* concluded that *Apprendi* did not create a right to a jury because reducing credits did not increase the defendant's maximum prison term. Because reducing credits at most enlarged a defendant's time in prison closer toward, but not beyond, the sentence the court imposed, the *Garcia* court noted "the provisions for presentence conduct credits function as a sentence 'reduction' mechanism outside the ambit of *Apprendi*." (*Garcia*, at p. 277.)

Respondent quotes *Garcia*'s "sentence 'reduction' mechanism" passage in support of respondent's contention that reducing credits does not increase punishment. We note, however, that an opinion's language must be understood in the context of the issues of the case. In *Garcia*, the issue was a right to have a jury decide (rather than a court determine) facts that reduced credits. *Garcia* did not dispute whether those facts must be pleaded and proved. Indeed, the sentencing enhancement at issue in *Garcia* (burglary of a residence with a victim present) required that the allegation be charged and proved. (*Garcia*, *supra*, 121 Cal.App.4th at p. 278.) And in fact, the charging information in

Garcia alleged the enhancement, but because of the trial court's error the allegation was not submitted to the jury for its determination; the question on appeal was whether proving the disqualifying facts to the court was good enough to authorize the court to reduce presentence credit. (*Id.* at pp. 275, 276, fn. 4.)

Two Court of Appeal cases filed on July 14, 2011, after the parties submitted their appellate briefs, conclude that a prior serious felony does not have to be pleaded and proved for section 4019 purposes. Those cases are: *People v. Voravongsa* (2011) 197 Cal.App.4th 657 (*Voravongsa*) and *People v. James* (2011) 196 Cal.App.4th 1102 (*James*). *Voravongsa* recognizes that the various appellate courts that have considered the issue have pretty much split on whether pleading and proof is required. (*Voravongsa*, at p. 661 & fn. 3.) The Supreme Court has granted review in the cases that preceded *Voravongsa* and *James* as well as in cases that address the retroactivity of section 4019 in general.

Voravongsa has a thorough discussion of the subject, reviewing thoughtfully more than 40 years of appellate authority. The court appears ultimately to conclude that *Varnell* in essence disapproved *Lo Cicero*, although *Varnell* does not so state. As we have already observed, *Lo Cicero* had found an "implied pleading and proof" requirement if the trial court were to deny probation because of a prior conviction. (*Lo Cicero, supra*, 71 Cal.2d at pp. 1192-1193.) Its conclusion was largely founded on its earlier opinion in *Ford, supra*, 60 Cal.2d at page 794, a case dealing with weapon enhancements. *Voravongsa* stated that the *Varnell* "court declined to find a statutorily 'implied pleading and proof requirement' as it had in *Lo Cicero*." (*Voravongsa, supra*, 197 Cal.App.4th at p. 670.) But the reason *Varnell* refused to apply *Lo Cicero* was that the defendant there had other avenues by which he could have been granted probation, a fact not present in *Lo Cicero*. The *Varnell* court, therefore, found *Lo Cicero* inapplicable. The *Varnell* court did not reject the rule expressed in *Lo Cicero* and *Ford.* Instead, it quoted from those two decisions, observing that they held that "before a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the

defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by [the fact finder].” ’ [Citation.]” (*Varnell*, *supra*, 30 Cal.4th at p. 1140.)

Because, as we have earlier stated, *Lo Cicero* and *Ford*, not *Varnell*, provide the relevant Supreme Court authority on the pleading and proof requirement, we find *Voravongsa*’s reliance on *Varnell* unpersuasive. We, therefore, respectfully disagree with *Voravongsa*.

The other recent case that concludes there is no serious felony pleading and proof requirement for section 4019 purposes is *James*, *supra*, 196 Cal.App.4th 1102. Although also well reasoned, we disagree with *James* for essentially the same reason we disagreed with the assumption in *Pacheco, supra*, 155 Cal.App.4th at page 1445 that “reduction in credits is not considered ‘punishment’ under the law.” The *James* court articulates a similar distinction with which we cannot agree: that while enhanced custody credits reduce the amount of time a defendant may spend in prison those credits do not reduce a defendant’s punishment. In the real world, it hardly matters whether someone’s credits are reduced or a term is increased by the same number of days.

DISPOSITION

We reverse and remand to the trial court to determine whether, pursuant to section 1385, the allegation of a prior serious felony conviction should be stricken for purposes of awarding section 4019 “one-for-one” presentence conduct credits. We express no opinion on whether the trial court should do so. If the prior serious felony conviction is stricken for section 4019 sentencing presentence credits, the trial court is directed to award additional presentence credits, and to prepare and send an amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RUBIN, ACTING P. J.

I CONCUR:

FLIER, J.

GRIMES, J., DISSENTING

Respectfully, and with brevity, I dissent.

I disagree with the conclusion of the majority that a prior serious felony conviction must be pled and proven to disqualify a defendant from receiving enhanced pre-sentence custody credit under the version of Penal Code section 4019 that was in effect when defendant was sentenced. I will be brief because, as the majority observed, the Courts of Appeal in previous opinions have thoroughly examined this question. The Supreme Court has granted review in some of those cases. (See, e.g., *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011, S192784.) It is unnecessary here to repeat the previously published, thorough discussions of the issue, and I will only summarize the basic reason why, in my view, section 4019 should not be construed to impliedly require pleading and proof of a prior serious felony conviction.

Due process does not require pleading and proof of defendant's prior serious felony conviction because the denial of enhanced conduct credits did not increase the penalty for defendant's crime beyond the prescribed statutory maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) Conduct credits *decrease* a defendant's time in custody; denying the enhanced conduct credits of Penal Code former section 4019 did not increase defendant's punishment; it simply did not decrease the punishment as much as it otherwise would have without the disqualifying prior serious felony conviction. Even if it were correct to construe section 4019 as a sentence enhancement, *Apprendi* does not apply to "sentence enhancement provisions that are based on a defendant's prior conviction." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; see also *Apprendi*, *supra*, 530 U.S. at p. 490.)

Moreover, in *In re Varnell* (2003) 30 Cal.4th 1132, the Supreme Court rejected the claim that a trial court may disregard "sentencing factors" (an aggravating or mitigating circumstance that supports a sentence within the range authorized by the jury's finding of

guilt) and found a prior offense barring a defendant from eligibility for Proposition 36 drug treatment need not be pled and proved. *Varnell* reasoned in part: "And even if petitioner's criminal history *were* to bar him automatically from probation, due process would not require that the facts supporting imposition of a mandatory prison term be pleaded and proved." (*Varnell,* at p. 1142, citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 87-88 and *Harris v. United States* (2002) 536 U.S. 545, 568.) With no due process basis for implying a pleading and proof requirement, I see no reason justifying the majority's conclusion. (See *Varnell,* at p. 1141 [Legislature knows how to specify a pleading and proof requirement, and none should be implied absent due process/fair procedure concerns].)

Neither the holding nor principle of *People v. Lo Cicero* (1969) 71 Cal.2d 1186 supports the implied imposition of a pleading and proof requirement under Penal Code former section 4019. That case implied a pleading and proof requirement for a prior conviction that barred the sentencing court from considering probation as an alternative to imposing a prison term. The *Lo Cicero* court concluded that denying the opportunity for probation was the same as an increase in punishment, so the prior conviction had to be pled and proven. (*Lo Cicero,* at p. 1193.) Barring probation removes a sentencing choice from the trial court and requires imposition of a prison (or, in some cases, jail) sentence for a convicted defendant. In contrast, former section 4019 does not impinge on the trial court's sentencing choices. The due process and fair procedure principles that apply to a trial court's sentencing choices do not apply to section 4019.

GRIMES, J.