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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TREVOR LEE KOONTZ, Defendant and Appellant.	2d Crim. No. B224697 2d Crim. No. B224701 (Super. Ct. No. 2009029278) (Super. Ct. No. 2009002554) (Ventura County)

In *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), our Supreme Court held that a sentencing court's failure to exercise discretion pursuant to Penal Code section 1385 is an abuse of discretion because it mistakenly believes it lacks authority to exercise such discretion. (*Id*., at p. 530, fn. 13.) [1] This is a similar case. We hold that section 1385 vests trial courts with the discretion to strike a prior serious felony conviction in order to afford the maximum allowable presentence conduct credits. We remand to the trial court to determine whether a defendant should be awarded such credits (§ 4019, subds. (b)(1) & (c)(1)).

In exchange for an indicated three-year sentence, Trevor Lee Koontz pled guilty to felony child endangerment (§ 273a, subd. (a)), and admitted a prior serious felony conviction (§§ 667, subds. (a)(1) & (e)(1); 1170.12, subds. (a)(1) & (c)(1)) and two prior prison terms (§ 667.5, subd. (b)). The trial court struck the prior serious felony conviction and a prior prison term. On March 16, 2010, it sentenced appellant to three years state

[1] All statutory references are to the Penal Code.

prison. The court awarded 219 days actual credit and 108 days conduct credit (§ 4019, subds. (b)(2) & (c)(2)) but ruled that appellant was not eligible to receive one-for-one conduct credits (an additional 108 days conduct credit) due to the prior serious felony strike conviction.

Appellant elected not to withdraw his plea but argued that the order striking the prior conviction entitled him to "one-for-one credits under PC 4019, as it's currently written." In denying the request, the trial court stated: "I did take a look at the Code section [§ 4019] again. If it satisfies you, I will confess . . . that it continues to be subject to interpretation . . . , but that's how I read the Code, sir."

Effective January 25, 2010, section 4019 was amended to provide that certain defendants may earn presentence credit at the rate of two days for every two days in custody, commonly referred to as "one-for-one credits." The Legislature said: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (a) of subdivision (b) or (c)." Thereafter on September 28, 2010, the Legislature deleted "one-for-one credits."

In our view, the January 25, 2010 version of section 4019 mitigates punishment by reducing the period of imprisonment. (See *In re Estrada* (1965) 63 Cal.2d 740, 748.) A prisoner released from prison one day sooner has been punished one day less in prison. (See *People v. Hunter* (1977) 68 Cal.App.3d 389, 392-393 [amendment to section 2900.5 allowing presentence custody credits lessens punishment within meaning of *Estrada*]; *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [same].)

The Attorney General argues that section 1385 only permits a trial court to strike the "additional punishment" aspect of a prior conviction enhancement and that the denial of presentence one-for-one conduct credits is not "additional punishment" because the sentence remains the same. We believe, however, that section 1385, subdivision (a), vests a trial court with the discretion to strike a prior serious felony conviction enhancement

for section 4019 sentencing purposes. (See *Romero, supra,* 13 Cal.4th at p. 508; *People Burke* (1956) 47 Cal.2d 45, 51.)

In *In re Pacheco* (2007), 155 Cal.App.4th 1439, defendant pled guilty to corporal injury on a cohabitant (§ 273.5, subd. (a)) and admitted a great bodily injury (GBI) enhancement (§ 12022.7). The trial court struck the GBI enhancement for additional punishment purposes (§ 1385, subd. (c)(1)) and sentenced defendant to three years state prison. Department of Corrections and Rehabilitation, in calculating defendant's release date, limited defendant's worktime credits to 15 percent based on section 2933.1 because the GBI elevated the conviction to a violent felony offense. Defendant filed a habeas petition. We denied writ relief on the ground that "the sentencing court struck only the punishment for the GBI enhancement, and not the enhancement in its entirety" pursuant to section 1385, subdivision (c)(1). (*Id*., at p. 1442.) "Having decided to afford leniency in this case, the sentencing court had two options. It could either strike the enhancement allegation it its entirety or strike the additional three-year punishment for the enhancement specified in section 12022.7, subdivision (a). Here, the trial court chose the latter option." (*Id*., at p. 1444.) Implicit in the *Pacheco* analysis is that section 1385 vests trial courts with the discretion to strike a prior conviction for different sentencing purposes. "The power to strike or dismiss the proceeding as to a prior conviction is within the power referred to in section 1385 of the Penal Code . . . . The authority to dismiss the whole includes, of course, the power to dismiss or 'strike out' a part. [Citation.]" (*People v. Burke, supra,* 47 Cal.2d at p. 51.)

Section 4019 eligibility factors do not trump a sentencing court's discretionary power to strike a prior serious felony conviction for a specific sentencing consideration, i.e. to afford presentence conduct credits. The Supreme Court's opinion in *People v. LoCicero* (1969) 71 Cal.2d 1186, compels this result. There the court held that ineligibility for probation based on a prior conviction "is equivalent to an increase in penalty . . . ." *Id.* at p. 1193.) Because ineligibility for probation is an increase in punishment, ineligibility for additional presentence custody credit is also an increase in punishment.

The trial court acknowledged that section 4019 is "not case-specific as to what we do with this [prior conviction]. So, even though we are striking this [prior conviction], the fact of the matter is he has a strike from 1997, which does not make him eligible for that." The plea agreement, however, did not include a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) permitting the trial court to consider facts relating to the prior serious felony conviction allegation.

Citing *In re Varnell* (2003) 30 Cal.4th 1132, 1137, the Attorney General argues that only an "action" – i.e., a fact that must be pled and proven – may be stricken pursuant to section 1385. Here, the prior serious felony conviction was pleaded and proved. The trial court struck the prior serious felony conviction based on a written plea agreement that lacked a *Harvey* waiver and made no mention of one-for-one presentence conduct credits. "Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed [prior conviction enhancement]." (*People v. Harvey*, *supra*, 25 Cal.3d at p. 758.).

The Legislature, in enacting the January 25, 2010 version of section 4019, presumably was aware that section 1385 vests sentencing courts with the discretion to strike a prior serious felony conviction to afford maximum presentence conduct credits. Our review is limited to determining whether the trial court abused its discretion by not exercising it. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.) It is for the trial court to decide whether, in the interests of justice, the prior conviction should be stricken for purposes of awarding section 4019 one-for-one conduct credits. If the Legislature disagrees, it may amend section 1385 to provide that it may not be utilized for this purpose. Nothing in the January 25, 2010 version shows a "clear legislating direction" that section 1385 may not be utilized to afford relief in the present case. (*People v. Romero, supra,*13 Cal.4th at p. 578.) The Legislature knows how to curtail trial court use of section 1385. (See § 1385 subd (b) and § 1385.1.)[2]

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[2] We publish this opinion for several reasons. First and foremost, it meets the standards for publication even though there are an abundance of credit cases extant. It is

We remand to the trial court to determine whether, pursuant to section 1385, the prior serious felony conviction should be stricken for purposes of awarding 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 purposes, 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.

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YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

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true that there will not be an extended "shelf life" for what sure to be called a "Koontz motion" because the Legislature largesse of "one-for-one credits" was superseded eight months later. But the trial courts need guidance for there is sure to be a flurry of defendants and petitioners seeking such credits for presentence time served between January 25, 2010 and September 25 2010. We leave the mathematical computations to the trial court.

We use this opinion as a message to the Legislature. (Witkin, Manual of Appellate Court Opinions, (1977) § 88, pp. 160-162.) Simply changing the text of the amended statute will not be deemed a "clear legislative direction" to remove section 1385 discretion without a concomitant amendment to section l385. There is a rational argument that the last sentence for former section 4019 subdivision (f) (*ante*, p. 2) declares legislative intent to deny maximum credits for a person who has suffered a prior serious felony conviction. But this section does not purport to remove section 1385 from the sentencing court's consideration. We do not shrink from our duty to decide this dispute but an appellate court should not have to "fill in the blanks" unless it has no other choice. We resolve this issue in favor of the grant of broad discretion to the sentencing courts. The Legislature knows, or should know, of the rule and rationale of *People v Romero, supra*, 13 Cal.4th 497, and how to remove section 1385 from consideration at probation and sentencing. We are ever hopeful that the Legislature will heed this respectful suggestion in the drafting of future statutes.

Bruce A. Young, Judge

Superior Court County of Ventura

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Kamala Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.