Filed 3/30/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ANTONIO LARA, Defendant and Appellant.	H036143 (Santa Clara County Super. Ct. No. E1007527)

The question presented here is whether a defendant's credit for presentence confinement can be reduced by virtue of a prior conviction when the allegations concerning that conviction are "struck" and "dismissed" as part of a plea bargain. We hold that where the plea bargain is silent concerning the extent to which such allegations are to be given effect, and the defendant does not contend that the bargain must be understood to categorically deny them any adverse effect, the question of their effect is vested in the discretion of the trial court, which may disregard them for purposes of presentence credit if it concludes that it would be in the interests of justice to do so. Here the court appeared to conclude that it was obligated to impose a reduction in presentence credits on the ground that defendant was not "really being punished" by the credit reduction. We reject this premise. We will therefore remand with directions to consider whether, in the trial court's discretion, defendant should be allowed credits calculated without regard to the prior conviction.

BACKGROUND

According to the probation report, defendant and a companion were involved in an altercation outside a Sunnyvale bar resulting in injuries to a third person. A complaint was filed charging defendant and his companion with assault by means of force likely to produce great bodily injury. It was alleged that defendant personally inflicted great bodily injury (Pen. Code, §§ 12022.7, subd. (a), 1203, subd. (e)(3)) and had previously been convicted of first degree burglary (Pen. Code, §§ 667, subds. (b)- (i), 1170.12, 667, subd. (a)). The probation report stated that defendant had sustained these convictions, and recounted his description of the underlying conduct.

Almost six months after his arrest in this matter, defendant entered a plea of no contest to the charged offense and admitted certain probation violations as part of a plea bargain. He was not asked to, and did not, admit the allegations concerning a prior conviction. The agreement was reflected in a "Plea Form, With Explanations and Waiver of Rights," which recited, as pertinent here, that defendant would receive a sentence of two years in prison and that the "GBI enhancement & Strike allegation will be struck." The prosecutor stated the latter provision slightly more broadly at the change-of-plea hearing: "the 12022.7 [great bodily injury enhancement] will be dismissed and the 667(a), Prop A [*sic*; "8"] prior, will be dismissed and the strike prior."

At sentencing the court alluded to an unreported "discussion about the credits," and asked defense counsel if she wished to "put something on the record." She replied, "My understanding is that you would not be giving him 50 percent credits pursuant to [former Penal Code section] 4019 [(§ 4019)], and we would object to that on the basis that my understanding is he would not be receiving 50 percent credits because of the strike prior, which was pled but never proven. It was dismissed and not pled and then

struck." The court asked, "How was it dismissed? Under what?" Defense counsel replied, "Motion of the district attorney," and the prosecutor added, "Plea bargain."[1]

The court and counsel then discussed the soundness and applicability of *People v. Jones* (2010) 188 Cal. App. 4th 165, review granted December 15, 2010, S187135, which had been decided some three weeks earlier. The Court of Appeal there held that when the trial court granted a motion to dismiss a strike prior under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, in order to effectuate a plea agreement as to maximum punishment, the court should exercise its discretion to determine whether to also disregard the strike for purposes of determining the defendant's entitlement to pre-sentence credits. Relying primarily on this decision, defense counsel urged the court below to disregard defendant's strike for purposes of presentence credits. The prosecutor countered that the case was wrongly decided, was likely to be challenged in the Supreme Court, and should not be followed. Stating that defendant "isn't really being punished," the trial court ruled in favor of the prosecution, allowing 348 days of credit, consisting of "232 actual days, plus 116 under 4019(b)(2) of the Penal Code."

This timely appeal followed.

DISCUSSION

A. *Introduction*

Prior to January 25, 2010, a defendant held in county jail prior to sentencing would typically earn six days' credit (i.e., reduce his remaining time by six days) for each

[1] In fact no formal motion to dismiss was ever made; nor did the court ever make an oral order of dismissal. Such an order is implicit, however, in the court's acceptance of the plea bargain. Moreover the minute order of the sentencing hearing appears to reflect an order striking the enhancement allegations, albeit under the heading "Plea Conditions." A checkbox entitled "Dismissal/Striking" is marked, with the word "Dismissal" lined out and this handwritten text inserted: "@ this time: Alleg: PC 667(a), PC 667 (b)-(i)/1170.12, PC 12022.8(A)." Similarly, the abstract of judgment recites, "Striking PC 12022.7(a), PC 667(b)-(i)/1170.12."

four days actually served—in effect, a three-to-two ratio of credits allowed for days served. (Former Pen. Code, § 4019, subds. (b), (c), (f); Stats. 1982, ch. 1234, § 7.) Effective January 25, 2010, the statute was amended to grant some prisoners four days' credit for every two days served—in effect, a two-to-one ratio. (Former Pen. Code, § 4019, subds. (b)(1), (c)(1), (f); Stats. 2009 3d Ext. Sess., ch. 28, § 50.) Some classes of prisoners, however, continued to accrue credits at the previous three-for-two rate. (*Id*., subds. (b)(2), (c)(2), (f).) These included any prisoner who "ha[d] a prior conviction for a serious felony, as defined in section 1192.7." (*Id*., subds. (b)(2), (c)(2).)[2]

Defendant contends that to deny him the presentence credits granted to other prisoners constitutes an increase in punishment which requires that the triggering cause—his having sustained a qualifying prior conviction—be pleaded and proved. This was the reasoning adopted in *Jones, supra*. However, between the filing of defendant's initial brief and the filing of the state's response, the Supreme Court granted review in that case, rendering the decision not citable as authority. (See Cal. Rules of Court, rule 8.1115(a).) Nonetheless, both parties continue to frame the issues before us in terms of the rationale on which that decision rested, which may be reduced to the following propositions: (1) to deny a defendant custody credits allowed to other prisoners, by virtue of a prior conviction, is to impose increased or additional punishment on account of that prior conviction; (2) when a statute imposes a additional punishment based upon a prior conviction, the prior conviction must be pleaded and proved before the increased punishment can be imposed; and (3) where the prior is pleaded and proved, the trial court

[2] Effective September 28, 2010, the statute was amended to restore the former three-for-two formula as to all prisoners. (Stats. 2010, ch. 426, § 2.) By its terms, however, the amendment applies only to offenses committed after its adoption. (*Id*., subd. (g).) This created a window of approximately eight months that would continue to be governed by the January 2010 version of the statute. This matter falls within that window.

has the discretionary power to strike it for purposes of calculating presentence confinement credits.

We now address these propositions without regard to the *Jones* decision.

B. *Increased Punishment*

The trial court refused to grant defendant the more favorable credit formula because it did not believe he was "really being punished" by the application of a less favorable one. But when the state relies on a prior conviction to allow a defendant fewer credits than he would other receive toward the completion of his sentence, it is necessarily increasing his punishment by virtue of that conviction. If two defendants spend the same amount of time in jail before sentencing, and one has no prior convictions while the other has a strike prior, then under the January 2010 version of section 4019 the second defendant will remain in prison after the first has been released. If that is not additional punishment, we don't know what is.

Respondent insists that defendant has suffered no increase in punishment by comparison to what would have happened *under the prior version* of section 4019.[3] But that is not a relevant comparison. The question is not the rate at which defendant might have earned credit under a prior state of the law, but the rate at which he would have earned credit, *without the prior conviction*, under the law in effect when he was sentenced. His objection is not that the amendment to the statute increased his punishment over that of past defendants in his position—that would not be true. His

[3] Respondent writes, "*Jones* erroneously conflated 'increased' punishment with the lack of ability for prisoners with prior serious or violent felonies to earn additional credits at a faster rate than they could have prior to the amendment. Appellant, and others like him who suffered from prior felony convictions, is in the same position after the amendment to section 4019 as before . . . . That the Legislature has seen fit to increase the rate that some prisoners could earn credit, but not including those prisoners with serious or violent felonies, does not show any increase in punishment as to the latter."

objection is that the amendment attached a new punitive consequence to his prior conviction so that he suffered punishment not inflicted on prisoners without such a prior. That seems inescapably true. The additional punishment can be easily and precisely quantified. If not for the prior conviction, the trial court would have been compelled to allow defendant credits of 232 actual days plus 232 conduct and work-time. Instead the court allowed "232 actual days, plus 116 under 4019(b)(2) of the Penal Code." The direct and inexorable effect of this decision was to imprison defendant for 116 additional days beyond the time he would have served without the strike prior. This was unquestionably an additional "punishment."

Respondent attempts to draw support for a contrary conclusion from *People v. Van Buren* (2001) 93 Cal.App.4th 875, 880 (*Van Buren*) (disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3), which was concerned not with presentence credit under section 4019 but post-sentence credits earned in prison under Penal Code section 2933.1 (§ 2933.1). In the paragraph quoted by respondent, the court stated that section 2933.1 "is not a sentencing statute" but a legislative attempt to "provide an incentive for some prisoners to work towards rehabilitation, while recognizing the need to protect society by delaying parole for violent or serious felons—those that by their past histories have exhibited the greatest current danger to the citizenry." (*Van Buren*, *supra*, 93 Cal.App.4th at p. 880.) Thus taken out of context, this statement posits a false exclusivity as between a rehabilitative or protective measure, on the one hand, and the infliction of punishment, on the other. Incarceration in a state prison may serve a rehabilitative and protective function, but it is no less "punishment" for that. And the *Van Buren* court apparently did not mean to suggest otherwise. In a paragraph following the one respondent quotes, the court acknowledged the punitive character of reduced credits, observing that section 2933.1 "complements the purpose of the Three Strikes law to ensure longer prison sentences and *greater punishment* for those

who commit serious or violent felonies." (*Van Buren*, *supra*, 93 Cal.App.4th at p. 880, italics added.)

Respondent also cites *In re Pacheco* (2007) 155 Cal.App.4th 1439, which held that despite the trial court's granting of a *Romero* motion and striking a prior, prison authorities properly allowed the defendant a reduced rate of credit under section 2933.1 because, as the reviewing court found, "the sentencing court struck only the punishment for the GBI enhancement, and not the enhancement in its entirety." (*Id.* at p. 1442.) The court noted that Penal Code section 1385 (§ 1385), subdivision (c)(1), provides that whenever a trial court has the power to " 'to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement.' " (See *Pacheco, supra*, 155 Cal.App.4th at p. 1442, fn. 2.) The court did not squarely address the question of how this distinction should be applied when more than one "additional punishment" flows from an enhancement. Nor need we attempt to parse the decision in that light because the court that rendered that decision has recently expressed agreement with our view that the January 2010 amendment to section 4019 "mitigates punishment by reducing the period of imprisonment. [Citation.] A prisoner released from prison one day sooner has been punished one day less in prison. [Citations.]" (*People v. Koontz* (Mar. 2, 2011, B224697, B224701) ___ Cal.App.4th ___ [p. 2] (*Koontz*).) It follows that the denial of credits at issue here constitutes additional punishment occasioned by defendant's prior conviction.

C. *Requirement of Pleading and Proof*

Defendant contends that if the trial court relied on the strike prior to impose additional punishment—as it obviously did—the prior had to be pleaded and proven, and that one or both of these requirements was not satisfied. The asserted requirement is drawn from *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1188 (*Lo Cicero*), which held that a trial court erred by finding a defendant categorically ineligible for probation based upon a prior conviction not charged in the accusatory pleading or formally found to have

been sustained. The court held that the "denial of opportunity for probation" was "equivalent to an increase in penalty," which triggered the following rule: " '[B]efore a defendant can properly be sentenced to suffer the increased penalties flowing from . . . [a] finding . . . [of 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, quoting *People v. Ford* (1964) 60 Cal.2d 772, 794, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28, 40-41.)

Respondent reads *Lo Cicero* as implying a pleading-and-proof requirement from the statute there at issue, which declared the defendant categorically ineligible for probation if he had sustained a qualifying prior. According to respondent, no similar construction can be placed upon the statute here. But none of respondent's arguments are peculiar to the present statute. They would apply equally to the statute at issue in *Lo Cicero*. Moreover the holding there was based less on the terms of the statute imposing the additional punishment than on the code's "detailed procedure for the charging, trying, and finding of previous felony convictions." (*Lo Cicero, supra*, 71 Cal.2d at p. 1192.) That rule of that case has now been in effect for over 40 years. If the Legislature wanted to *excuse* the prosecution from the burdens of that rule it was perfectly free to say so. In the meantime it is not for us to undermine a decision that seems entirely consistent not only with sound procedural principles but basic fairness.

Respondent contends that the more applicable authority is *In re Varnell* (2003) 30 Cal.4th 1132 (*Varnell*), which concerned the trial court's power, under section 1385, to disregard *sentencing factors* that would render a defendant ineligible for the mandatory probation and drug treatment prescribed by the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). The pleading there charged a drug offense and alleged two enhancements arising from a prior strike conviction. The defendant lodged a request to "dismiss the 'strike' allegation, so as to avoid the 'Three Strikes' law," and a separate

request to "disregard 'the prior or count being used to disqualify [him] from Proposition 36.' " (*Id.* at p. 1135.) The trial court granted the first request but "found that the *fact* of the prior conviction and resulting prison term rendered him 'ineligible in this court's opinion for Prop[osition] 36 treatment.' " (*Ibid*.; italics in original.) The Court of Appeal concluded that the trial court had the power under section 1385 "to disregard 'historical facts' in determining a defendant's eligibility under Proposition 36." (*Id.* at p. 1136.) On that basis, it issued a writ ordering the trial court to reconsider the sentence in light of the discretion thus afforded it. The Supreme Court reversed the judgment of the Court of Appeal. It reasoned that section 1385 empowers trial courts to dismiss only " 'a criminal action, or a part thereof.' " (*Id.* at p. 1137, quoting *People v. Hernandez* (1988) 46 Cal.3d 194, 524 (*Hernandez*).) "[A]ction" had been consistently interpreted to mean " 'individual charges and allegations in a criminal action.' " (*Ibid*., quoting *Hernandez, supra*, 46 Cal.3d at pp. 521-522, 523.) It had never been "extended . . . to include mere sentencing factors." (*Ibid*.)

The court also discussed the limited effect of an order dismissing allegations of prior convictions: "[D]ismissal of a prior conviction allegation under section 1385 'is not the equivalent of a determination that defendant did not in fact suffer the conviction.' [Citations.] 'When a court strikes prior felony conviction allegations in this way, it " 'does not wipe out such prior convictions or prevent them from being considered in connection with later convictions.' " ' [Citations.] Thus, while a dismissal under section 1385 ameliorates the effect of the dismissed charge or allegation, the underlying facts remain available for the court to use. Hence, the trial court's dismissal of the 'strike' allegation in this case did not wipe out the fact of the prior conviction and the resulting prison term that made petitioner ineligible under subdivision (b)(1) of [Penal Code] section 1210.1." (*Varnell, supra*, 30 Cal.4th at p. 1138, fn. omitted.)

The *Varnell* court distinguished *Lo Cicero* on the ground that it involved a statute imposing a *categorical ineligibility*, whereas the statute in *Varnell* rendered the defendant

ineligible only for probation under Proposition 36, while leaving him eligible for probation under another statute. (*Varnell, supra*, 30 Cal.4th at p. 1138.) The court impliedly limited *Lo Cicero* to cases "where the prior conviction absolutely denied a defendant the opportunity for probation." (*Id*. at p. 1140.) It drew support for this approach from *People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350 (*Dorsch*), which held *Lo Cicero* inapplicable—and the pleading of a prior conviction unnecessary—when the effect of the prior was to make the defendant *presumptively*, but not utterly, ineligible. The apparent rationale of the case is that a categorical disqualification from probation "eliminate[s] the alternative to imprisonment" whereas a presumptive ineligibility "merely ma[kes] probation less likely" and is thus " 'not the equivalent of an increase in penalty.' " (*Varnell, supra*, 30 Cal.4th at p. 1141, quoting *Dorsch, supra*, 3 Cal.App.4th at p. 1350.) Similarly, Proposition 36 "simply rendered [the defendant] unfit for probation under a particular provision," and as such was "not the equivalent of an increase in penalty." (*Id.* at p. 1141.)

Both *Varnell* and *Dorsch* rest on the premise that the measures under scrutiny there did not increase the "penalty," i.e., punishment, imposed on the defendant.[4] They increased the *likelihood* that the defendant would suffer a more severe penalty (imprisonment instead of probation), but they did not increase the severity itself. The same cannot be said here. As we have already observed, the direct consequence of the trial court's taking notice of defendant's strike prior was to increase the length of time he would in fact spend in prison. We therefore conclude that the case is governed by *Lo Cicero* and not by *Varnell* and *Dorsch*. It follows that the prior convictions had to be

[4] The *Dorsch* court also observed, in words the Supreme Court found "equally applicable here," that " 'when a pleading and proof requirement is intended, the Legislature knows how to specify the requirement.' " (*Varnell, supra*, 30 Cal.4th at p. 1141, quoting *Dorsch, supra*, 3 Cal.App.4th at p. 1350.) Of course, this reasoning would wholly abrogate *Lo Cicero*, which the Supreme Court exhibited no willingness to do.

pleaded and proved before they could operate to limit defendant's pre-sentence custody credits.

D. *Application*

This brings us to the question whether the strike prior was pleaded and proved for purposes of this requirement. In this respect the case differs from *Lo Cicero* in two crucial respects. The defendant there was convicted at a jury trial, and the prior conviction had never been mentioned in any accusatory pleading. (*Lo Cicero, supra*, 71 Cal.2d 1186, 1192.) Here the judgment was the product of a plea agreement specifying that the enhancement alleging the prior conviction would be dismissed or "struck." The question is what effect to give this provision of the plea bargain in determining credits under former section 4019. The code specifically contemplates that allegations making up an enhancement may be stricken *for some purposes and not others*. As the statute puts it, the court may strike or dismiss the enhancement, or it "may instead strike the additional punishment for that enhancement." (§ 1385, subd. (c)(1).) But, as illustrated by the cases discussed above, the allegations making up an enhancement may support various kinds of "additional punishment" beyond the additional term of imprisonment typically described in an enhancement. To strike the enhancement *in toto* would presumably eliminate *all* of these additional punishments, because it would require that the pleading be read as if the allegations supporting them were wholly absent. At the same time, the court's power to strike only the "additional punishment" presumably includes the power to strike some but not all of the punitive consequences flowing from those allegations.

In this context, the critical feature of this case is the ambiguity of the parties' plea agreement. Had they expressed an intent only to strike the additional prison term flowing from the strike prior, there would be no issue. Nor would there be much to debate if they had specified that they intended for defendant to receive presentence credit at the two-for-one rate rather than the three-for-two rate otherwise flowing from the prior, or that the

prior was stricken for all purposes. Alternatively, they could have agreed to reserve to the trial court the discretion it would have had, as to any or all of these effects, in the absence of any plea agreement. Instead they simply stated that the relevant allegations were "struck" or "dismissed."

In *Koontz, supra*, ___ Cal.App.4th at ___, the court dealt with this problem by invoking *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*), which held that where a plea bargain called for the dismissal of a prior conviction enhancement, it implicitly reflected an " '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].' " However the court then held that the trial court retained "the discretion to strike a prior serious felony conviction to afford maximum presentence conduct credits." (*Koontz, supra*, ___ Cal.App.4th ___ [p.4].) This conclusion is understandable, despite the invocation of *Harvey, supra*, 25 Cal.3d 754, on the following rationale: If the parties had explicitly agreed to strike the prior for purposes of maximizing the defendant's presentence credits, the trial court would have had to choose between honoring that agreement and giving the defendant an opportunity to withdraw his plea. The defendant there, however, had apparently not objected to the trial court's action as a violation of the plea bargain, and had not sought relief on that ground. This was an implied concession that, *Harvey* notwithstanding, the plea agreement allowed the trial court discretion to maximize or not maximize the presentence credits. Since the court had not believed it had any discretion, a remand was warranted for the limited purpose of allowing the court an opportunity to do so.

Here too the parties manifestly failed to reach any agreement on whether the stricken prior would affect defendant's presentence confinement credits. Under *Harvey* the agreement might be deemed to include a provision disregarding the prior for these purposes, but that argument was not presented to the trial court and has not been urged

upon us. We therefore conclude that the plea agreement vested the trial court with discretion to determine whether the prior should be taken into account, or instead disregarded, in the determination of presentence confinement credits. The matter will be remanded to permit the court to exercise that discretion.

DISPOSITION

The judgment is reversed with respect to the calculation of credits. On remand the trial court will exercise its discretion to decide whether its order striking enhancements should be applied so as to maximize defendant's presentence credits under the version of section 4019 applicable to this case. If it so decides, it shall modify the judgment accordingly and transmit an amended abstract of judgment to correctional authorities. In all other respects the judgment is affirmed.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Trial Court:	Santa Clara County Superior Court No.: E1007527
Trial Judge:	The Honorable Kenneth P. Barnum
Attorney for Defendant and Appellant Ricardo Antonio Lara:	William M. Robinson under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Edmund G. Brown, Jr., Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Laurence K. Sullivan, Supervising Deputy Attorney General Eric D. Share, Supervising Deputy Attorney General