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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLEN RAY WALTER YOCHUM,

Defendant and Appellant.

A132724

**(Humboldt County Super. Ct.
Nos. CR1100841 & CR1100934)**

After pleading guilty in case No. 1100841 to transportation of a controlled substance and in case No. 1100934 to possession of heroin for sale, defendant Allen Ray Walter Yochum (appellant) was sentenced to a stipulated 13-year term in state prison. He contends he is entitled to additional presentence conduct credits and his constitutional equal protection rights require retroactive application of Penal Code section 4019, as amended in October 2011. We conclude appellant is entitled to an additional two days of presentence conduct credit and otherwise affirm.

BACKGROUND¹

The information in case No. 1100841 charged appellant with the following offenses committed on February 22, 2011: transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) (count 1); possession of a controlled substance

¹ Since this appeal only raises claims of sentencing error, a recitation of the facts underlying appellant's offenses is unnecessary.

(*id.*, § 11351) (count 2); and transportation of marijuana (*id.*, § 11360, subd. (a)) (count 3). Counts 1 and 2 alleged, as an enhancement, appellant had a prior conviction for possession for sale of a controlled substance (*id.*, § 11370.2, subd. (a)). The information also alleged he was convicted in 1999 of a prior serious or violent felony, to wit, robbery (Pen. Code, §§ 211, 667, subds. (b)-(i)) and had served seven prior prison terms (*id.*, § 667.5, subd. (b)).

The information in case No. 1100934 charged appellant with the February 25, 2011 possession of illegal substances in jail (Pen. Code, § 4573.6)² and alleged his 1999 prior serious or violent robbery conviction and seven prior prison terms.

On May 9, 2011, pursuant to a negotiated plea agreement,³ appellant pled guilty in case No. 1100841 to transportation of a controlled substance, for which he would be receive a five-year sentence; admitted the prior conviction for possession of a controlled substance for sale enhancement, for which he would receive a three-year sentence; and admitted four prior prison terms, for which he would receive four 1-year terms. On the same day, in case No. 1100934, the prosecutor amended the information to allege possession of heroin for sale (§ 11351) and appellant pled guilty to that charge, for which he would receive a consecutive one-year term (one-third the midterm). The remaining charges and enhancement allegations in both informations were “dismissed or stricken.” Appellant waived preparation of a presentence probation report, but the court referred the matter to probation for calculation of custody credits.

At the July 11, 2011 sentencing hearing, the court imposed the agreed upon 13-year prison term and awarded appellant 141 days of credit for actual time served and 68 days of conduct credit for a total of 209 days of presentence credit. Because appellant was already in custody on case No. CR1100841 when he committed the offense in case No. 1100934, presentence credits were awarded only in case No. CR1100841.

Appellant filed a timely notice of appeal in each case.

² All undesignated section references are to the Penal Code.

³ The record before us does not contain a written plea agreement.

DISCUSSION

A. *Presentence Conduct Credits*

In awarding appellant presentence conduct credits, the trial court found, based on the information filed in case No. CR1100841, appellant had a prior robbery serious felony conviction and, therefore, was not entitled to “day-for-day”⁴ conduct credits. Appellant makes the following arguments regarding the court’s award of presentence conduct credits. First, the court erred in denying him day-for-day conduct credits because his prior serious felony conviction was not pleaded or proved by the prosecution. Second, the court’s refusal to award him day-for-day conduct credits as a result of the prior serious felony conviction allegation that was dismissed pursuant to the plea agreement constituted a violation of his plea agreement. Third, prospective application of section 4019, as amended operative October 1, 2011, denied him day-for-day conduct credits retroactively in violation of his equal protection rights. Finally, assuming he was only entitled to “one-for-two” days presentence conduct credits, he is entitled to two additional days of conduct credit.

B. *Legal Framework*

A criminal defendant is entitled to actual custody credit for “all days of custody” in county jail and residential treatment facilities, including partial days. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Calculation of presentence custody credit begins on the day of arrest and continues through the day of sentencing. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) Presentence custody credits are awarded at the time of sentencing. (See Cal. Rules of Court, rules 4.310, 4.472.)

Section 4019 provides that a prisoner may earn additional presentence credit against his or her sentence for being willing to perform assigned labor (§ 4019, subd. (b)) and for complying with applicable rules and regulations (§ 4019, subd. (c)). These additional presentence credits are collectively referred to as conduct credits. (See *People v. Dieck* (2009) 46 Cal.4th 934, 939.)

⁴ Day-for-day conduct credits are often also referred to herein as “one-for-one” credits.

Before January 25, 2010, under section 4019, prisoners were entitled to one-for-two conduct credits, which is two days for every four days of actual time served in custody. (Stats. 1982, ch. 1234, § 7, p. 4553.)

Effective January 25, 2010, the Legislature amended section 4019 (hereafter, former section 4019) to accelerate the accrual of conduct credit such that certain prisoners earned one-for-one conduct credits, which is two days of conduct credit for every two days in custody. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) However, prisoners who were required to register as sex offenders, prisoners committed for a serious felony, and prisoners who had a prior conviction for a serious or violent felony were specifically denied eligibility for the one-for-one credits. Instead, those prisoners were entitled to one-for-two conduct credits. (Former § 4019, subs. (b)(2), (c)(2) & (f).)

Effective September 28, 2010, the Legislature amended sections 4019 and 2933 (hereafter, amended section 4019 and amended section 2933). (Stats. 2010, ch. 426, §§ 1, 2, 5.) Amended section 4019, subdivisions (b) and (g) restored the less generous one-for-two conduct credit calculation that had been in effect prior to the January 25, 2010 amendment. Amended section 2933, subdivision (e)(1) contained the provision for accruing one-for-one conduct credit and stated, “Notwithstanding Section 4019 . . . , a prisoner sentenced to the state prison . . . for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits . . . are applicable to the prisoner.” Amended section 2933, subdivision (e)(2) provided that a prisoner shall not receive such conduct credit “if it appears by the record that [he or she] has refused to satisfactorily perform labor . . . or has not satisfactorily complied with the reasonable rules and regulations” Amended section 2933, subdivision (e)(3) provided, “[s]ection 4019, and not this subdivision, shall apply” to persons required to comply with sex offender registration requirements, those committed for a serious felony (§ 1192.7, subd. (c)), and those with a prior conviction for a serious or violent felony (§ 667.5, subd. (c)).

Operative October 1, 2011, sections 4019 and 2933 were again amended. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53 [regarding § 4019 only]; Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, §§ 16, 35, 46.) As a result of these amendments, subdivision (e) of amended section 2933 was deleted and section 4019 was again made applicable to all prisoners for purposes of awarding conduct credit. (§§ 2933, 4019, subs. (b), (c) & (f).) Currently, section 4019 enables prisoners with prior serious or violent felony convictions to obtain conduct credits previously unavailable to them under amended sections 2933 and 4019, and section 4019 reinstates day-for-day conduct credits for all prisoners. These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011 (§ 4019, subs. (b), (c) & (h)), and subdivision (h) of section 4019 states, in part: “Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.”

Since appellant’s offenses were committed in February 2011 and he was sentenced in July 2011 he is subject to amended sections 4019 and 2933. As we noted previously, amended section 2933, subdivision (e)(3) excluded from eligibility for one-for-one conduct credits prisoners who were required to register as sex offenders, prisoners committed for a serious felony, and prisoners who had a prior conviction for a serious or violent felony. With respect to those prisoners, conduct credit is calculated under amended section 4019, subdivision (f), which provides for the less generous one-for-two conduct credit calculation rate.

C. Pleading and Proof Required Under Amended Section 2933, Subdivision (e)(1)

Appellant contends the court erred in refusing to award him day-for-day presentence conduct credits under amended section 2933, subdivision (e)(1) on the ground that his prior serious felony conviction was not pleaded or proved by the prosecution. He argues the prosecution was required to do so because the denial of day-for-day credits resulted in an increase in punishment in violation of his rights to due process. Appellant relies on *People v. Lo Cicero* (1969) 71 Cal.2d 1186, which concluded that a prior conviction should be pled and proved when it is used to preclude eligibility for probation. (*Id.* at pp. 1192-1193.)

Recently, in *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*), our Supreme Court resolved this issue in a slightly different context, concluding that a trial court does not have authority under section 1385 to disregard the historical facts that disqualify a defendant from earning day-for-day credits under former section 4019. (*Lara*, at p. 900.) *Lara* rejected the argument that former section 4109 expressly or impliedly requires such credit-limiting facts to be formally pled and proved in order to bring them within the court’s discretionary power to strike prior serious felony conviction allegations under section 1385. (*Lara*, at pp. 902-903.) The court reasoned that the facts disqualifying a defendant from earning day-for-day conduct credits limit a defendant’s ability to earn credits against a sentence for good behavior; they do not guide the trial court in selecting a sentence from the range established by statute. Because a pleading and proof requirement is imposed only to facts that define the range of sentencing for an offense, the court rejected the argument that credit-limiting facts must be pled and proved because they increase punishment. (*Id.* at pp. 905-906.)

Lara’s reasoning in rejecting a pleading and proof requirement regarding accrual of presentence conduct credit at a reduced rate under former section 4019 is equally applicable to the reduced accrual of presentence conduct credit under amended section 2933, subdivision (e)(1).⁵ Consequently, the People did not need to plead or prove a prior serious felony conviction for the trial court to deny appellant day-for-day conduct credits under amended section 2933, subdivision (e)(1).

D. *Pleading and Proof Required by Due Process*

Though there is no requirement that the People plead and prove a prior serious felony conviction to deny appellant day-for-day conduct credits, appellant is entitled to due process in the award of such credits. Thus, he must be given “sufficient notice of the facts that restrict his ability to earn credits and, if he does not admit them, a reasonable

⁵ Like former section 4019, amended section 2933 does not contain an express pleading and proof requirement regarding a prior serious felony conviction which could disqualify a defendant from receiving additional conduct credits under that section.

opportunity to prepare and present a defense. [Citations.]” (*Lara, supra*, 54 Cal.4th at p. 906.)

Appellant received adequate notice that his presentence conduct credits might be limited because of his 1999 robbery conviction. The information in each of his two cases alleged this prior conviction and set forth the county, case number, and date of the conviction. Though pled for the purpose of triggering certain sentencing enhancements, the allegations were “sufficient to inform [appellant] that his presentence conduct credits might be limited.” (*Lara, supra*, 54 Cal.4th at p. 906.)

In *Lara*, the court concluded that the People must not only give notice but present sufficient proof of the prior conviction. (*Lara, supra*, 54 Cal.4th at p. 907.) Appellant argues there was no evidence presented to the trial court that supports a finding he had suffered a prior serious felony conviction. We disagree. As in *Lara*, we conclude in this case that “the People . . . proved it sufficiently through the probation report.” (*Ibid.*) Unlike the defendant in *Lara*, appellant waived a referral to probation, and no presentence report was prepared. While sentencing appellant, however, the court referred the matter to the probation department for a calculation of presentence credits. In separate reports received by the court, the department expressly relied on the one-for-two rate set out in amended section 4019 in calculating the presentence credits for each case and denied appellant the one-for-one rate required by amended section 2933, subdivision (e)(3). Though neither report recited the department’s basis for selecting the one-for-two rate, it is clear that the department’s calculation of sentencing credits is based on the existence of a prior serious felony conviction, and the colloquy on July 8, 2011, shows both the court and defense counsel understood that the department’s calculation rested on the 1999 robbery conviction. Thus, like the defendant in *Lara*, appellant was aware that the reports relied on the existence of a prior conviction, and he had “the duty to make an offer of proof to preserve for appeal any claim of error in the report,” but “raised no

factual objection and made no offer of proof.” (*Lara, supra*, 54 Cal.4th at p. 907.)⁶ The trial court reasonably relied on the probation reports in determining defendant’s presentence credits.

We conclude, accordingly, that adequate evidence of appellant’s prior serious felony conviction was introduced.

E. *Plea Bargain Violation*

Citing *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*) and *People v. Martin* (2010) 51 Cal.4th 75 (*Martin*), appellant next contends the court’s refusal to award him day-for-day presentence conduct credits based on the fact of his stricken prior serious or violent felony conviction violated the terms of his negotiated plea. In *Harvey*, pursuant to a plea agreement, the defendant pled guilty to two counts of robbery and the prosecution agreed to the dismissal of an unrelated third robbery count. At sentencing the trial court relied on the facts of the dismissed robbery count to enhance the defendant’s sentence. In reversing the sentence the Supreme Court stated, “In our view, under the circumstances of this case, it would be improper and unfair to permit the sentencing court to consider any of the facts underlying the dismissed count three for purposes of aggravating or enhancing defendant’s sentence. Count three was dismissed in consideration of defendant’s agreement to plead guilty to counts one and two. Implicit in such a plea bargain . . . 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 count.” (*Harvey*, at p. 758.) Pursuant to *Harvey*, a “trial court cannot use the facts of a dismissed charge to impose ‘adverse sentencing consequences’ unless the defendant consents or a transactional relationship exists between the admitted charge and the dismissed charge.” (*Martin*, at p. 77.)

⁶ As in *Lara*, defense counsel’s argument at the July 8 and 11, 2011 sentencing hearings focused on the failure to plead and prove the prior serious felony conviction. (See *Lara, supra*, 54 Cal.4th at p. 907 [defendant “presented the purely legal argument that credit-limiting facts must formally be pled and proved to the trier of fact”].)

Appellant argues that denying him the benefit of the more generous conduct credit calculation under amended section 2933, subdivision (e)(1) violated the implied term in his plea bargain that he would suffer no adverse sentencing consequences by reason of the facts underlying the dismissed enhancement allegation, i.e., his 1999 robbery conviction. We conclude *Harvey* is distinguishable. In that case, the sentencing court relied on the facts of the defendant's dismissed robbery count to enhance the defendant's sentence. Here, the court relied on the fact of appellant's dismissed prior serious felony to limit presentence conduct credits. The limitation on conduct credits in amended section 2933, subdivision (e)(3) "is not a sentencing enhancement" and the trial court did not use the fact of appellant's prior serious felony conviction to enhance his sentence. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 277.) In *In re Varnell* (2003) 30 Cal.4th 1132, 1138, the trial court's striking or dismissal of appellant's prior serious felony conviction did not " " "wipe out the fact of the prior conviction' " " " and it could be considered in calculating appellant's conduct credit.

F. *Equal Protection*

Appellant argues he is retroactively entitled to day-for-day conduct credits under current section 4019 (operative Oct. 1, 2011), because applying that section prospectively violates his rights under the equal protection clauses of the state and the federal Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) He requests that we modify his presentence credits to award him 141 days of conduct credit for a total of 284 days of presentence credits.

To prevail on an equal protection claim, a defendant must first establish the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) Where, as here, the statutory distinction neither "touch[es] upon fundamental interests" nor involves a suspect classification, equal protection is not violated "if the challenged classification bears a rational relationship to a legitimate state purpose." (*Id.* at p. 1200.)

Recently, in *People v. Brown* (2012) 54 Cal.4th 314, 328-330 (*Brown*), our Supreme Court held that equal protection did not require the retroactive application of

former section 4019. It concluded that the important correctional purposes of a statute creating incentives for good behavior are not served by rewarding prisoners who served time before the incentives took effect and, therefore, could not modify their behavior in response to those incentives. Thus, the court held that prisoners who served time before and after the effective date of the statute were not similarly situated.

The Supreme Court's reasoning in *Brown* applies in this case to the prospective application of current section 4019. Thus, we reject appellant's equal protection claim of error.

G. The Court's Calculation of Conduct Credits Was Erroneous

The court awarded appellant 141 days of actual custody credit and 68 days of conduct credit for a total of 209 days of presentence credit. Appellant argues, if amended section 4019 applies to him, he is entitled to two additional days of presentence conduct credit. The People agree.

Amended section 4019, subdivisions (b), (c), (f), and (g) allowed appellant to earn conduct credit at a rate of two days for every four-day period of actual presentence custody. Under that section, appellant, in actual presentence custody for 141 days, was entitled to 70 days of conduct credit. (See *In re Marquez* (2003) 30 Cal.4th 14, 25-26 [conduct credit is calculated by taking the number of actual custody days, dividing by four, discarding any remainder, and multiplying the result by two].)

DISPOSITION

The sentence imposed on July 11, 2011, is modified to award appellant an additional two days of presentence conduct credit. The judgment is otherwise affirmed. The court is directed to amend the abstract of judgment to reflect the modification and

transmit a copy of the amended abstract to the Department of Corrections and Rehabilitation.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.