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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LIJON M. McDONALD, Defendant and Appellant.	A132727 (Lake County Super. Ct. No. CR923038)

In a negotiated disposition of a consolidated information, Lijon M. McDonald pled no contest to first and second degree (residential and commercial) burglary (Pen. Code, §§ 459-460)[1] and admitted a prior felony (§ 667, subd. (a)(1)) in return for a nine-year eight-month prison term cap, and dismissal of three theft-related counts with a *Harvey* waiver allowing use of their facts at sentencing (*People v. Harvey* (1979) 25 Cal.3d 754). Sentenced to the maximum term, he claims (1) error in denying him a continuance and release from custody to be examined for a drug program at Delancey Street, and (2) equal protection error in denying him the benefit of increased conduct credits under a post-sentencing version of section 4019. We reject both contentions and affirm the judgment.

BACKGROUND

The crimes are described in a probation report. Count I was a residential burglary. Clearlake police officers, responding on April 1, 2010 to a reported burglary in progress, saw defendant leave through the front door of the house. He had a screwdriver, needle

[1] Undesignated further section references are to the Penal Code.

nose pliers and two bars of soap in his pants pocket, and the rear door lock was damaged. He claimed he was looking for food. (Dismissed counts II and III were for grand theft and possession of burglar tools, flowing from the same incident.)

Count IV was a commercial burglary committed two months later, while defendant was out on bail for the April burglary. A man flagged down a Clearlake police officer to report that a residence next door owned by an elderly woman, who used it as a storage unit, appeared to have been broken into. The officer found the garage and rear door physically forced open. The owner called two weeks later to report that her building had again been burglarized, and that she saw some of her property at an art and antique store where a friend of hers worked. The friend told her that defendant had come in and sold the items, and the store owner related that defendant had ridden up two weeks earlier on a bicycle, with an attached trailer, to sell the items. Defendant was apprehended the next day when, alerted that he was at the store again trying to sell more items, the residence owner identified him as having more of her belongings. Defendant's story to the officer was that he got the items from someone named Ashton, for helping him move, and his account to the store owner was that the items were from his deceased grandmother's estate. The property owner estimated her losses at over $15,000. (Dismissed count V was for possessing stolen property, based on the same conduct.)

Defendant entered his negotiated plea on March 21, 2011,[2] but continuances granted by Judge Blum, the sentencing judge, delayed sentencing until July 18. A continuance on May 9 came when an initial sentencing report erroneously stated that defendant was ineligible for probation, whereas he was eligible if unusual circumstances were found. A continuance on June 13 came when defense counsel Thomas Quinn represented that defendant was "trying to get into a program," had "some letters out to the programs," and had not "really gotten any responses yet." This may have overstated the extent of progress, for defendant later remarked, "And I'm going to send four letters

[2] All unspecified further dates are in 2011.

when I get back today." Judge Blum granted a continuance to July 18, stating: "He's in custody. He's not going anywhere. I'll give one continuance for this purpose."

On July 18, a Monday, defense counsel Quinn asked for more time. In a motion filed that day, he declared that his client had a serious methamphetamine addiction and that the charges filed in this case, while not entirely drug related, were, according to his client, "primarily driven" by the addiction. Quinn, adding that defendant was willing to waive presentence credits, explained that defendant would seek to convince the court that this was an unusual case meriting a grant of probation with a condition that he complete a two-year residential drug treatment program at Delancey Street in San Francisco. The program, Quinn explained, would not conduct an interview by phone or send personnel out to interview defendant, and so he sought a release for at least one day for defendant to have an interview in San Francisco. Defendant's mother, Quinn added, was willing to drive defendant to San Francisco that Thursday for an interview, and the program would make an admission decision within 24 hours or so. The People opposed the motion and asked that sentencing proceed because, even if defendant were accepted into the program, he was not a good candidate for probation.

The court denied the motion for continuance and release and proceeded to sentencing. The court first denied probation, finding no unusual circumstances to override statutory ineligibility created by defendant's residential burglary (§ 462, subd. (a)), and ruling that probation would be denied even if not restricted.[3] "[Defendant

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[3] Section 462 provides: "(a) Except in unusual circumstances where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of a burglary of an inhabited dwelling house . . . .

"(b) If the court grants probation under subdivision (a), it shall specify the reason or reasons for that order on the court record."

Rule 4.413(c) of the California Rules of Court (all further rule references are to that source) provides in pertinent part: "The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate

"(1) *Facts relating to basis for limitation on probation*

"A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, include:

is] only eligible for probation in an unusual case given the nature of the charges, including a first-degree burglary. Probation department . . . advises me that he is not suitable for probation. I agree. Probation will be denied.

"I do not find this to be an unusual case. The defendant did not participate in this crime because of great provocation, coercion or duress not amounting to a defense. Crime was not committed because of a mental condition not amounting to a defense. The defendant [(age 33)] is neither youthful nor aged. Even without any restriction on probation, probation would be denied." The court cited prior convictions that were "numerous and increasing in seriousness" and prior performance on probation that was "unsatisfactory."

Then, acknowledging that the plea agreement had a *middle* term cap for the residential burglary, the court articulated why an *upper* term would be its choice if available: "Circumstances in aggravation, the manner in which the crime was carried out indicates planning on the part of the defendant. The crime involved an actual taking of great monetary value, that's as to count four. His prior convictions as an adult are numerous. Defendant was on probation when the crime was committed. His prior performance on probation they say is mixed, I say it's poor, he was on probation when he

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"(A) The fact or circumstance . . . is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

" . . . . . .

"(2) *Facts limiting defendant's culpability*

"A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

committed this crime. He suffered violations of probation for his first-degree burglary in 1997 for which he went to prison.

"Circumstances in mitigation, he voluntarily acknowledged wrongdoing at an early stage of the criminal process.

"Because there are two counts there is an issue of concurrent versus consecutive sentencing. Consecutive appears to be appropriate, the crimes were committed at different times and separate places.

"Therefore, in my opinion the aggravating factors clearly outweigh the one in mitigation. And whether or not an agreement as to midterm, I would impose the upper term; but I will follow the agreement limiting this to a midterm."

The court imposed the indicated maximum term.

DISCUSSION

I. *Denial of Continuance*

We review a ruling on a continuance for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118; *People v. Jacobs* (2007) 156 Cal.App.4th 728, 736-737.) A denial is seldom successfully attacked, and "[a]n important factor for a trial court to consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) Another is "the defense's apparent lack of diligence as weighed against the length of time the case had been pending . . . ." (*People v. Alexander* (2010) 49 Cal.4th 846, 935.) Whether to release a defendant after his conviction of a felony, and during his pursuit of probation, also rests within the trial court's discretion. (§ 1272.)

Defendant claims abuse of discretion, citing the Delancey Street interview set for three days hence, and that this could probably be done with a single day's release, and that there was no showing that he was a flight risk or danger to the public. But the People observe that the defense had been saying since the plea change hearing on March 21 that defendant would seek admission to Delancey Street or another drug program, had been granted a continuance specifically for that purpose on June 13, where defendant stated that he had four letters not yet sent, and then, at the twice continued hearing of July 18, for the first time filed a motion seeking further time and a release. Defendant retorts that

there is no evidence that he was *personally* responsible for the delay, but we note that his 11th-hour motion failed to affirmatively show why it took so long to secure an interview at Delancey Street or to learn that they only interviewed in person. Defendant thus faces an uphill battle to show abuse on this record.

Nevertheless, we need not decide, for even if defendant could show abuse of discretion, he cannot show prejudice on this record. First, there was no indication at all that he had a reasonable chance of Delancey Street accepting him or what the responses had been from other programs, if any. He cites his counsel's remark that "Courts have tended to grant those even to individuals with more egregious record than the defendant has," but this went to his request for release, not Delancey Street's position toward him. In fact, a June 27 letter from a Delancey Street intake coordinator offered on the motion simply stated: "We get hundreds of letters from around the country and wish we could travel to see everyone, but of course we cannot. [¶] You should try to get your attorney to ask the judge if you could be transported to Delancey Street for an interview. [¶] If that does not work out, you are welcome to come see us after you are released." (Boldface in middle sentence deleted.) That reply does not indicate that the program had even screened defendant's request. Defendant claims that one cannot know, without an interview, how the program would have responded, but it his burden on this appeal to show not only abuse of discretion, but resulting prejudice. (*People v. Mungia*, *supra*, 44 Cal.4th at pp. 1118-1119.)

Second, defendant was presumptively ineligible for probation, and the court ruled that this was not an unusual case, tracking rule 4.413(c) in finding that defendant had not participated in his crimes because of great provocation, coercion or duress not amounting to a defense, had not committed them because of a mental condition not amounting to a defense, and was neither youthful nor aged. (Fn. 3, *ante*.)

Third, even if Delancey Street *had* accepted defendant and the court *had* found unusual circumstances, this did not necessarily render him appropriate for probation, which was a separate discretionary decision. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).) The court expressly found that defendant was *not* appropriate for

probation (and that a higher base term than the plea allowed was appropriate). The court ruled that it would deny probation, even without the unusual case limitation, and stated two rule 4.414 factors for its ruling—defendant's prior convictions being numerous and increasingly serious, and his prior performance on probation being unsatisfactory. (Rule 4.414(b)(1) & (b)(2).)

Defendant argues, unconvincingly, that an acceptance into Delancey Street would have changed the court's assessments of unusual circumstances and the general probation suitability. We see some merit in his broad policy idea that acceptance to a drug program would serve his needs while perhaps making him seem more appropriate for reintegration into society (§ 1202.7), but this does not explain how his acceptance would significantly alter the specific rule 4.414 criteria that the court found required a denial of probation.

Nor would defendant's acceptance into the program satisfy any of the unusual-case criteria under rule 4.413 (fn. 3, *ante*), so as to render him even *eligible* for probation. " '[M]ere suitability for probation does not overcome the presumptive bar . . . . [I]f the statutory limitations on probation are to have any substantial scope and effect, "unusual cases" and "interests of justice" must be narrowly construed,' and rule 4.413 'limited to those matters in which the crime is either atypical or the offender's moral blameworthiness is reduced.' [Citation.]" (*Stuart*, *supra*, 156 Cal.App.4th at p. 178.) Defendant feels that his acceptance would establish, in the language of rule 4.413(c)(2)(B), that: "The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation[.]" We see no basis for his argument. Calling drug addiction "a mental health condition" and drug treatment "mental health care" would be an exceptionally broad, not narrow, construction of the rule's language, and few experienced trial judges could say with a straight face that drug addiction as a motivation for burglary is *unusual*. Moreover, defendant's drug problem was clear from the file without waiting for Delancey Street to confirm it by implication.

Defendant's final argument is even less convincing, for he insists that Judge Blum's grant of a continuance on June 13 for the purpose of the defense exploring drug programs means that Judge Blum must have felt that acceptance into a drug *could* make this an unusual case; otherwise granting the continuance would have been "an idle act." We reject the notion. Yes, there was a May 27 probation report lodged with the court giving full case circumstances when the continuance was granted, but this does not mean the court had *prejudged* the matter. Nor would we fault any sentencing judge for allowing the parties to make as full a record as they can before hearing arguments and taking the matter under submission.

Defendant cannot show that, but for asserted abuse of discretion in denying his motion for continuance and release to be examined for the Delancey Street drug program, a more favorable sentencing result was reasonably probable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. *Equal Protection*

At the July 18 sentencing, the court granted defendant 565 days of presentence credit, consisting of 377 actual days served plus 188 days of conduct credit. In late November, pending this appeal, defendant brought a motion to recalculate custody credits based on two arguments. First, to avoid dual credits, the court and probation report had not counted 20 days in April 2010 during which defendant was in custody on a probation violation in another case. The motion noted without opposition, however, that the court had actually dismissed the other case at sentencing, meaning that there was no separate sentencing, and thus no dual credit. Second, conduct credit provisions had been amended effective October 1 to remove the disqualifying limitation in the sentencing version that one convicted of a serious felony, like residential burglary, could earn only two days of conduct credit for every four served (essentially one for two) rather than a more generous credit of one for one. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16.) The new version specified: "The changes to this section . . . that added this subdivision 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." (§ 4019, subd. (h).) The motion, however, urged that equal protection mandated retroactive application lest similarly situated groups be treated unequally and without a rational basis for doing so.

The court heard the matter on December 12 and, nunc pro tunc to the July 18 date of sentencing, granted the omitted 20 days of actual time (plus 10 for conduct under the former formula), raising the total presentence credits to 595 days. The court rejected the equal protection argument, citing *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*).

The equal protection claim is answered by our Supreme Court's post-briefing decision in *People v. Brown* (2012) Cal.4th 314 (*Brown*). *Brown* first addressed a common issue under the often-amended section 4019—whether a version that grants more generous conduct credits per day of actual local custody, but which does not mention retroactive/prospective application, applies to confinement that predates the amendment. On that point, the court examined a version amended for a fiscal emergency and in effect during eight months in 2010 (*Brown*, at p. 318 & fn. 2), and it held that the question was controlled by the general statutory rule of prospective-only application. (§ 3; *Brown*, at pp. 319-323.) A limited case law exception known as the *Estrada* rule (from *People v. Estrada* (1965) 63 Cal.2d 740), did not control because it would apply only to a reduction of punishment for *a particular offense* (*Brown*, at pp. 323-328).

There is no room for debate about legislative intent here, where the statute specifies prospective-only operation, but *Brown* also went on to reject the very equal protection argument defendant raises here. The answer under the federal and state constitutional protections (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) was this: "[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows. On this point we find the decision in *Strick*, *supra*, 148 Cal.App.3d 906, persuasive. In that case, . . . the Court of Appeal rejected the claim that an expressly prospective law increasing conduct credits violated equal protection

unless applied retroactively to prisoners who had previously earned conduct credits at a lower rate. 'The obvious purpose of the new section,' the court reasoned, 'is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' (*Strick*, at p. 913.) '[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.' (*Ibid*.)" (*Brown*, *supra*, 54 Cal.4th at pp. 328-329.)

That passage, of course, answers defendant's claim that *Strick* was "wrongly decided," and *Brown* also distinguished two cases on which he heavily relies. *People v. Sage* (1980) 26 Cal.3d 498, *Brown* explained, involved a different issue and had not considered the incentive rationale. (*Brown*, *supra*, 54 Cal.4th at pp. 329-330.) *In re Kapperman* (1974) 11 Cal.3d 542, had involved actual, not conduct, credits. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*Brown*, at p. 330.)

DISPOSITION

The challenged judgment of sentence is affirmed.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

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Richman, J.