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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.

JOHN MILO LOCKE,

Defendant and Appellant.

A133617

(Sonoma County
Super. Ct. Nos. SCR521924,
SCR564166)

I. INTRODUCTION

John Milo Locke appeals from a judgment revoking his probation and sentencing him to three years and eight months in prison. Appellant argues that 2011 amendments to Penal Code section 4019 which became effective after he was sentenced must be applied retroactively to his case and that denying him the benefits of these amendments violates the equal protection clauses in the state and federal Constitutions. We disagree and therefore affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In October 2007, appellant pled guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in case No. 521924 (the 2007 case). The court imposed a suspended sentence of three years in prison and placed appellant on three years' probation.

In June 2009, appellant pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) in case No. 564166 (the 2009 case). The court placed

appellant on five years probation for the 2009 case. It also found a probation violation in the 2007 case and reinstated and modified appellant's probation in that case.

In September 2010, appellant was arrested for resisting arrest. On January 21, 2011, appellant admitted his probation violation and the court reinstated and modified his probation for both the 2007 and the 2009 cases, extending his probation to five years. On September 1, 2011, appellant admitted to violating his probation again, and to having tested positive for methamphetamine.

Appellant was sentenced on September 14, 2011. The court ordered the unexecuted three-year sentence in the 2007 case to go into effect. A consecutive eight-month sentence was also imposed for the 2009 case.

The sentencing court also awarded appellant presentence credit for 395 days he was in actual custody and an additional 196 days of conduct credits. Appellant filed a timely appeal on October 27, 2011.

III. DISCUSSION

A. *Issue Presented*

The trial court calculated appellant's presentence conduct credits pursuant to the formula set forth in the versions of Penal Code sections 4019 and 2933 which were in effect on September 14, 2011.¹ Under those former provisions, individuals who sustained prior convictions for serious felonies, as appellant had, could earn two days of conduct credit for four days actually served (six days total credit for each four days served). (Former Pen. Code, §§ 2933, subd. (e); 4019, subd. (f); Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, §§ 38, 50.)

On October 1, 2011, a few weeks after appellant was sentenced in this case, amendments to sections 4019 and 2933 went into effect (the 2011 amendments). Pursuant to these amendments, individuals like appellant, who had prior serious felony convictions but were not presently being sentenced for a serious felony, could earn

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

presentence confinement credits at a higher one-for-one rate. (Pen. Code, §§ 2933, subd. (e), 4019, subd. (f); Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, §§ 16, 35.)

The 2011 amendments also added section 4019, subdivision (h) (section 4019(h)), which states: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp 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.”

Appellant’s crimes were committed in 2007 and 2009 and he acquired all of his presentence credits prior to October 1, 2011. Therefore, the new formula for calculating presentence credits for a prisoner in appellant’s situation expressly does not apply to appellant. (§ 4019(h).) Nevertheless, appellant contends that denying him the benefit of this more favorable ratio violates his federal and state equal protection rights by treating him differently than similarly situated prisoners with no rational basis for that disparate treatment.

B. Analysis

Both the state and the federal Constitutions guarantee equal protection of the law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (9).) When an equal protection violation is alleged, we follow a two-step analysis. The first step is to determine whether “ ‘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 (*Hofsheier*), quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.) The court must look at whether the classes in question are similarly situated with respect to the purpose of the law challenged. (*Hofsheier, supra*, 37 Cal.4th at pp. 1199-1200.) If the court does not find two similarly situated classes, then the court need not proceed to step two and there is no equal protection violation. (*People v. Johnson* (2004) 32 Cal.4th 260, 268.) If a court does find two similarly situated classes receiving disparate treatment, the court moves to the second step of the analysis and looks to see whether the classification “bears a

rational relationship to a legitimate state purpose.” (*Hofsheier, supra*, 37 Cal.4th at p. 1200.)

Appellant contends that section 4019(h) creates two classes of similarly situated prison inmates and parolees who are treated differently: “(1) those who receive additional conduct credits since they committed a crime on or after October 1, 2011; and (2) those who will not receive additional conduct credits since they committed a crime before October 1, 2011.” Appellant argues that the two classes are virtually identical because members of both classes are earning presentence conduct credits for the same reason, behaving properly while in county jail. Appellant also contends that the two classes are separated only by a date arbitrarily picked by the Legislature.

At least for purposes of this appeal, we define the two classes affected by section 4019(h) somewhat differently than appellant. It appears to us there is a potential ambiguity in section 4019(h). After declaring that the 2011 amendments apply prospectively, this provision states that the new amendments apply to prisoners whose crimes are committed “on or after October 1, 2011.” Of course, prisoners who commit crimes after that date would necessarily serve all of their presentence time after the effective date of the statute. However, section 4019(h) does not expressly limit application of the new amendments only to such individuals. Instead, it also provides that “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” This sentence, when read in conjunction with the unambiguous statutory directive that the 2011 amendments “shall apply prospectively,” supports the conclusion that the Legislature intended that the 2011 amendments apply to the calculation of presentence conduct credits earned after October 1, 2011, regardless of whether the prisoner earning those credits committed his crimes before or after that date. In other words, it seems clear that this provision establishes that the 2011 amendments apply prospectively to the calculation of presentence credits earned on or after October 1, 2011.

We acknowledge that at least one court has reached a different conclusion and found that the formula established by the 2011 amendments applies *only* to prisoners

whose crimes were committed after the effective date of the amendments and thus does not apply to the a presentence time that a prisoner served after October 1, 2011, if his offense was committed prior to that date. (See *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552-1554.) Although we are concerned that the *Ellis* court's interpretation of section 4019(h) may create analytical problems, we need not address those concerns here because, in this case, appellant did not serve any presentence time after October 1, 2011. Therefore, principles of standing dictate that, for purposes of this appeal, the two classes created by section 4019(h) are (1) prisoners like appellant who served their presentence time before October 1, 2011, and (2) prisoners who served presentence time after the effective date of the 2011 amendments.

Furthermore under our interpretation of section 4019(h), the two groups created by this provision are not similarly situated. The 2011 amendments to section 4019 created new and increased incentives for individuals who were in presentence custody after October 1, 2011, to exhibit good behavior while in county jail. For example, individuals with criminal histories similar to this defendant would be allowed to earn presentence conduct credit at twice the rate than they would have been able to before the 2011 amendments were enacted. Inmates who served their presentence time prior to October 1, 2011, did not know of the new and increased incentive, and so their behavior could not be affected. Therefore, the two classes are not similarly situated.

In re Strick (1983) 148 Cal.App.3d 906 (*Strick*), supports our conclusion. In *Strick*, the court considered a new statute that allowed prisoners to earn worktime credits “ [f]or every six months of full time performance in a credit qualifying program.” (*Id.* at p. 909.) The statute provided that the Director of the Department of Corrections would set the date in which the new scheme would go into effect. (*Id.* at p. 910.) The date was set at January 1, 1983, the same date that the statute became effective. The *Strick* court rejected a claim that the new statute violated the equal protection clauses because it did not apply retroactively. (*Ibid.*) The court found that the group who was not eligible for credits under the new statute was not similarly situated to the group who was subject to the statute because only the later group of inmates knew of the incentive prior to

participating in the work program. (*Id.* at p. 913.) The purpose of the new statute was to provide incentive to participate in the work program, and since one could not retroactively be incentivized, the groups were not similarly situated. (*Ibid.*)

Appellant contends that *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) compels the conclusion that the two groups affected by section 4019(h) are similarly situated. *Sage* addressed a prior version of section 4019 which allowed conduct credits to be earned by inmates who were eventually convicted of misdemeanors but not those who were eventually convicted of felonies. (*Id.* at p 507.) The *Sage* court found that this provision violated equal protection because there was no rational basis for treating prisoners differently solely based on whether they were eventually convicted of misdemeanors or felonies. (*Id.* at p. 508.)

Appellant argues that an “implicit holding” of *Sage* was that the two groups affected by the statute in that case were similarly situated for purposes of earning conduct credits. We agree. However, in contrast to *Sage*, the statute at issue in this case does not distinguish between groups on the basis of the type of crimes they committed. Section 4019(h) distinguishes between prisoners based on whether they are amenable to an incentive or not and those two groups are not similarly situated for purposes of earning conduct credits. The 2011 amendments to section 4019 provided increased incentives which could not have had an effect on the behavior of individuals like appellant who served their presentence time before the incentives became available. *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), a case our Supreme Court decided after this appeal was fully briefed, confirms our point.

Brown held that amendments to section 4019 which took effect in January 2010 operated prospectively, and thus applied only to prisoners who served their presentence time after the amendment took effect. (*Brown, supra*, 54 Cal.4th at p. 323.) In reaching this conclusion, the *Brown* court expressly found that applying section 4019 prospectively did not violate equal protection. The court reasoned that prisoners who serve time before and after a conduct credit statute takes effect are not similarly situated because “the 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.” (*Id.* at pp. 328-329.)

Although the *Brown* court addressed a 2010 amendment to section 4019, its holding undermines appellant’s equal protection claim in this case. *Brown* stands for the proposition that prisoners who serve their time before a statute incentivizing good conduct takes effect are not similarly situated to prisoners who have already served their time and thus cannot be subject to the incentive.

For all these reasons, we find that appellant is not similarly situated to individuals who served presentence time after the 2011 amendments went into effect and, therefore, section 4019(h) does not violate appellant’s equal protection rights.

IV. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.