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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

OFELIA CARRILLO MONDRAGON,

Defendant and Appellant.

A134048

(Sonoma County
Super. Ct. No. SCR-599471)

In this appeal we are presented with another equal protection challenge to the prospective application of 2011 amendments to Penal Code section 4019, which had the effect of removing the exclusion of certain specified classes of prisoners, including defendant, from the benefit of a more favorable formula for awarding presentence conduct credits. We again conclude that granting an increase in conduct credits only to prisoners confined for a crime committed on or after October 1, 2011, the effective date of the statute, does not offend equal protection principles, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to a negotiated disposition defendant entered a plea of guilty to commission of the offense of possession of cocaine for sale (Health & Saf. Code, § 11351) on March 17, 2011.¹ In accordance with the plea bargain, defendant was sentenced to the middle term of three years in Sonoma County jail. She received a total

¹ The facts related to the possession for sale of cocaine offense are not pertinent to this appeal, and will not be recited here.

of 315 days of presentence credit: 211 days of actual custody, and 104 days of conduct credit. Defendant's request for additional days of conduct credit based on the 2011 amendment of Penal Code section 4019, was denied.

DISCUSSION

The trial court awarded defendant two days of presentence conduct credit for every six days of actual custody, calculated according to the version of Penal Code section 4019 in effect when her crime was committed on March 17, 2011. She was thus denied additional days of credit under the amended version of the statute, operative on October 1, 2011. Defendant acknowledges that by its terms the amendment of section 4019 at issue here explicitly provides in subdivision (h) that "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." Defendant's current offense was committed well before the operative date of the amended statute, but she argues that "equal protection compels that the amendment to section 4019 effective October 1, 2011 be applied" to award her additional "one-for-one conduct credit" in the present case.

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 328 (*Brown*)). "The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose

of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.)

The California Supreme Court recently concluded in *Brown, supra*, 54 Cal.4th 314, 318, that “the equal protection clauses of the federal and state Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) do not require retroactive application” of a now superseded version of Penal Code section 4019 enacted in 2010 temporarily during a state fiscal emergency to increase the rate at which local prisoners could earn conduct credits. Reasoning that the important correctional purposes of a statute authorizing incentives for good behavior are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response, the court held that “that prisoners serving time before and after incentives are announced are not similarly situated.” (*Brown, supra*, at p. 330.)² We agree that a promised but unknown reward can hardly retroactively affect an actor’s behavior; it cannot alter conduct already completed. The court’s decision in *Brown* is equally persuasive in resolving defendant’s equal protection challenge to the version of section 4019 here under scrutiny. We therefore conclude that the trial court correctly calculated defendant’s presentence custody credits.

² The court in *Brown* found that neither *People v. Sage* (1980) 26 Cal.3d 498, 508, nor *In re Kapperman* (1974) 11 Cal.3d 542, 544–545, cases on which defendant relies in the present case, “suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated.” (*Brown, supra*, 54 Cal.4th 314, 330.) *Kapperman* is distinguishable from the instant case because it addressed actual custody credits, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. (*Kapperman, supra*, at pp. 544–545.) The *Sage* case is likewise inapposite, as it involved a prior version of Penal Code section 4019 that allowed presentence conduct credits to misdemeanants, but not felons, and did not address retroactivity. (*Sage, supra*, at p. 508.)

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.