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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.

DAVONTE BROOKS,

Defendant and Appellant.

A134103

(Solano County
Super. Ct. No. VCR208523)

In this appeal defendant invokes equal protection principles to seek additional presentence conduct credits under the 2011 amendments to Penal Code section 4019,¹ which granted credits in accordance with a more favorable formula to enumerated classes of prisoners – in this case, those with a prior conviction of a serious felony – who were previously denied those credits under former versions of the statute. We conclude, as we have in the past, that defendant has not been denied equal protection of the law by prospective operation of the 2011 amendments to section 4019. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY²

Pursuant to a negotiated disposition, on September 9, 2010, defendant entered a no contest plea to a charge of first degree residential burglary (§ 459). In accordance with

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² In light of the issue presented on appeal, we need not recite the facts pertinent to the underlying offense, but rather will focus on presentation of the evidence pertinent to the issue of conduct credits.

the plea bargain, imposition of sentence was suspended and defendant was placed on probation for three years.

Defendant's probation was summarily revoked on March 15, 2011, based on an allegation that he committed second degree robbery with use of a firearm. Following a formal contested probation revocation hearing in June of 2011, the trial court found that defendant "failed to obey all laws" by participating "in a robbery," and thus violated his probation.³

On October 28, 2011, defendant was sentenced to the middle term of four years in state prison. He was granted a total of 607 days of presentence credits: 405 days of actual custody, and 202 days of conduct credits. Pursuant to defendant's motion, the court corrected the award of presentence credits to reflect 413 days of actual custody and 206 days of conduct credits, for a total of 619 days. Defendant was not granted additional days of conduct credits under the current version of section 4019.

DISCUSSION

The trial court awarded defendant two days of conduct credit for every four days of actual presentence custody, calculated according to the version of Penal Code section 4019 in effect when his crime was committed on August 27, 2010. The court failed to award defendant two days of conduct credit for each day of actual presentence custody under the amended version of the statute, effective on October 1, 2011, and expressly made prospective only in application. Defendant argues that although his current offense was committed well before the operative date of the amended statute, "equal protection principles" compel an additional "day-for-day" award of conduct credits in the present case. He requests an award of 826 days of total presentence credit under the 2011 version of the statute: 413 days of actual custody and 413 days of conduct credits.

Section 4019 has been the subject of multiple amendments in recent years. Effective January 25, 2010, the Legislature amended section 4019 to increase the number of presentence conduct credits available to eligible defendants. (Stats. 2009, 3d Ex.

³ The People dismissed the robbery charge, but proceeded with the probation violation case on the basis of the dismissed robbery case.

Sess., 2009–2010, ch. 28, § 50.) Under the amended version of the law, a defendant earned credits at twice the previous rate, that is, four days of presentence credit for every two days of custody. (Former § 4019, subd. (f); Stats. 2009, ch. 28, § 50.) However, prisoners who were required to register as sex offenders, who were incarcerated for commission of a serious felonies, or who had suffered a prior conviction for a serious or violent felony, as defined in sections 667.5 and 1192.7, were ineligible for the enhanced credits and continued to accrue credits at the previously applicable rate. (Former § 4019, subds. (b)(2) & (c)(2).)

The Legislature again amended section 4019 in 2010 and 2011. (See Stats. 2010, ch. 426, § 2, Stats. 2011, ch. 15, § 482, Stats. 2011, 1st Ex. Sess., 2011–2012, ch. 12, § 35.) The most recent 2011 amendments of section 4019, as operative October 1, 2011, to add subdivision (a)(6), provide that the formula of four days of total presentence credit for every two days of custody applies to the classes of prisoners, including defendant, who were previously denied the benefits of the increase in the formula for awarding presentence conduct credits. According to subdivision (h) of the most current version of section 4019, however, 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.” Defendant acknowledges that the statute is, by its terms, prospective only in application, but maintains “this discrimination clearly violates equal-protection principles laid down by the Supreme Court of California in *In re Kapperman* (1974) 11 Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498.”

“ ‘Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. . . .’ [Citation.]” (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.) “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 analysis will not proceed beyond this stage if the groups at issue are not “similarly situated with respect to the legitimate purpose of the law,”’ or if they are similarly situated, but receive “like treatment.”’ Identical treatment is not required. [Citations.]” (*In re Jose Z.* (2004) 116 Cal.App.4th 953, 960.)

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 “prisoners serving time before and after incentives are announced are not similarly situated.” (*Brown, supra*, at p. 330.)

The court in *Brown* found that neither *People v. Sage, supra*, 26 Cal.3d 498, 508, nor *In re Kapperman, supra*, 11 Cal.3d 542, 544–545, cases on which defendant relies here, “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.)

In *Kapperman*, the Supreme Court resolved an equal protection challenge to a

provision in Penal Code section 2900.5 that granted actual custody credits prospectively only to persons delivered to the Department of Corrections after the effective date of the legislation. The Court found that no legitimate purpose was served by excluding those already sentenced from the benefits of the award of custody credits; therefore the statute violated equal protection principles. (*Kapperman, supra*, 11 Cal.3d 542, 544–545.) The factor that patently distinguishes *Kapperman* from the instant case is that 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. (*Ibid.*) The Supreme Court in *Brown* “confirmed, ‘[c]redit 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.’ (*People v. Brown* (2012) 54 Cal.4th 314, 330 [142 Cal.Rptr.3d 824, 278 P.3d 1182] (*Brown*)).” (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 396.)

The *Sage* case is on its face likewise inapposite, as it addressed not retroactivity, but rather a prior version of Penal Code section 4019 that created contemporaneous unequal treatment of misdemeanants and felons with respect to the award of conduct credits for presentence custody. (*Sage, supra*, 26 Cal.3d 498, 508.) The court in *Brown* “rejected the argument that its decision in [*Sage*] required a contrary conclusion. (*Brown, supra*, 54 Cal.4th [314,] 329–330.) The version of section 4019 at issue in *Sage* authorized presentence conduct credit for misdemeanants who later served their sentences in county jail, but not for felons who ultimately were sentenced to state prison. The *Sage* court found this unequal treatment violative of equal protection, as it found no ‘rational basis for, much less a compelling state interest in, denying presentence conduct credit to’ felons. (*Sage, supra*, at p. 508.) [¶] The *Brown* court acknowledged that one practical effect of *Sage* ‘was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them.’ (*Brown, supra*, 54 Cal.4th at p. 329.)

Nevertheless, it declined to read *Sage* in such a way as to foreclose a conclusion ‘that prisoners serving time before and after incentives are announced are not similarly situated.’ (*Brown, supra*, at p. 330.) The *Brown* court explained: ‘The unsigned lead opinion “by the Court” in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion [citation] went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds.’ (*Brown, supra*, at p. 330.)” (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551–1552 (*Ellis*).

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. Like the 2009 amendments at issue in *Brown*, the 2011 amendments changed the formula for awarding conduct credits, which have an inherently prospective effect by creating an incentive for future good behavior and work participation by inmates. Those who enjoy the benefits of the amendments while serving time in presentence custody on or after the operative date of the statute – who are affected by this incentive – are not similarly situated to those denied the benefits of the amendments for periods of time they served in presentence custody before the operative date of the statute – when the incentive was not present. (See *Brown, supra*, 54 Cal.4th 314, 329.)

Finally, for several reasons we reject defendant’s claim, based on dicta in *People v. Olague* (2012) 205 Cal.App.4th 1126 (*Olague*), that he is at least entitled to enhanced conduct credits for the 28 days he was confined in county jail between October 1, 2011, and October 28, 2011, the date he was sentenced.⁴ First, *Olague* not only antedated

⁴ In addressing the defendant’s equal protection argument in *Olague*, the court stated: “Defendant describes the two affected classes here as ‘those prison inmates who committed serious felonies who will receive additional conduct credits since they committed their crimes after October 1, 2011[,] and . . . those . . . inmates who committed serious felonies who will not receive additional conduct credits since they committed their crimes prior to October 1, 2011.’

Brown, but has been granted review, and thus is no longer authority for defendant's claim. Also, we agree with the more recent proclamation of the court in *Ellis*, *supra*, 207 Cal.App.4th 1546, 1553, that "the Legislature's clear intent was to have the enhanced rate apply only to those defendants who committed their crimes on or after October 1, 2011. (See *People v. Lara* [(2012)] 54 Cal.4th [896,] 906, fn. 9.) The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless, especially in light of the fact the October 1, 2011, amendment to section 4019, although part of the so-called realignment legislation, applies based on the date a defendant's crime is committed, whereas section 1170, subdivision (h), which sets out the basic sentencing scheme under realignment, applies based on the date a defendant is

Although the point may not be crucial to this appeal, we do not believe this accurately describes the effect of the statute as properly construed. It is true that after declaring itself to operate 'prospectively,' the October 2011 amendment declares that it will apply 'to prisoners who are confined . . . for a crime committed on or after October 1, 2011.' (§ 4019, subd. (h).) Standing alone this would indeed suggest a classification based upon the date of the offense. In the next sentence, however, the Legislature declared, '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).) Of course it would have been impossible to earn days in presentence confinement on an offense which had not yet been committed. This sentence is therefore meaningless unless the liberalized credit scheme applies to crimes committed before the stated date. While the statute may thus seem somewhat self-contradictory, the contradiction is only implied. The ambiguity is best resolved by giving effect to both sentences and concluding that the liberalized scheme applies both to prisoners confined for crimes committed after October 1, 2011, and to prisoners confined after that date for earlier crimes. In this view, the correct classification is between prisoners earning credit for presentence confinement prior to that date and prisoners earning such credit after that date." (*Olague*, *supra*, 205 Cal.App.4th 1126, 1131–1132.)

sentenced.” We conclude that the trial court correctly calculated defendant’s presentence custody credits.

Accordingly, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.