

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY BOWMAN,

Defendant and Appellant.

A135877

(Contra Costa County
Super. Ct. No. 5-111811-6)

Defendant Ricky Bowman was sentenced after a no contest plea to nine years in prison for attempted first degree burglary, awarded 398 days of presentence credit, and ordered to pay a probation report fee and criminal justice administrative fee. He appeals and contends he is entitled to additional days of presentence credit under the current version of Penal Code¹ section 4019. He further contends the trial court improperly imposed both fees. We disagree and affirm.

BACKGROUND

On September 30, 2011, Bowman and a codefendant were arrested for attempted first degree burglary. Officers detained the two as they attempted to flee a residential area where neighbors earlier reported three individuals suspiciously looking at a home and jumping over the backyard fence. A witness positively identified Bowman and Lacy as two of the men observed jumping the fence.

On January 30, 2012, Bowman pled no contest to attempted first degree residential burglary. The trial court sentenced him to nine years in prison, which

¹ All further undesignated statutory references are to the Penal Code.

included a two year midterm sentence for the attempted burglary, doubled on account of a prior serious felony, and one five-year enhancement under section 667, subdivision (a) for service of a prior prison term.

DISCUSSION

A. Conduct Credit Calculation for Presentence Time Served

The trial court awarded a total of 398 days of presentence credit consisting of 266 days of time served and 132 days of conduct credit under section 4019.² Bowman contends he is entitled to 132 days of additional conduct credit under section 4019 as currently in effect and amended in 2011. Specifically, Bowman argues the current version of section 4019 should be applied to his time in custody following the statute's effective date of October 1, 2011. He argues that section 4019's language regarding retroactivity is ambiguous, and that the ambiguity should be resolved in his favor under the rule of lenity.

(1) Background on Section 4019

Under section 4019, prisoners awaiting sentencing in county jails for nonviolent crimes can reduce their period of confinement with good conduct credit in addition to the credit they receive for the actual days spent in custody. (*People v. Brown* (2012) 54 Cal.4th 314, 317 (*Brown*)). In 2010, section 4019 was amended to allow two days of conduct credit for every four days of actual time served. (*People v. Garcia* (2012) 209 Cal.App.4th 530, 537 (*Garcia*)). As a result of this 2010 amendment, prisoners who served four days of actual time in custody were awarded credit for two additional days and thus deemed to have served a total of six. (*Ibid.*) This credit formula was in effect when Bowman committed his crime on September 30, 2011.

In 2011, section 4019 was amended into its current form to increase the conduct credit formula. (*Garcia, supra*, 209 Cal.App.4th at p. 540.) Under the current version of section 4019, prisoners earn two days of conduct credit for every two days of actual time

² Bowman filed his opening brief before the trial court corrected the abstract of judgment and modified the award of credits on February 13, 2013. The correction applied section 4019, not section 2933.1, for conduct credit.

served. (§ 4019, subd. (f).) The first sentence of section 4019, subdivision (h) provides: “The changes to this section . . . shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . for a crime committed on or after October 1, 2011.” The second sentence of subdivision (h) continues: “Any days earned by a prisoner prior to October 1, 2011 shall be calculated at the rate required by the prior law.” Bowman committed his crime just one day before the October 1, 2011 date specified in the statute.

(2) Application of Section 4019

Bowman argues the enhanced conduct credit formula in the current version of section 4019 should be applied for the time he served in county jail after the amendment’s effective date of October 1, 2011. He contends the trial court erred when it applied the 2010 version of section 4019. Bowman predicates his argument on a contention that the first and second sentences of subdivision (h) create an ambiguity about section 4019’s application and that the only reasonable interpretation requires awarding credit based on the dates the time was served and not the date an offense was committed. We disagree.

Section 3 provides that “[n]o part of [the Penal Code] is retroactive, unless expressly so declared.” Statutes without express retroactivity provisions are not to be applied prospectively “unless it is very clear from extrinsic sources that the Legislature. . . must have intended a retroactive application.” (*Brown, supra*, 54 Cal.4th at p. 319.) Further, retroactive intent should not be inferred from “vague phrases and broad, general language in statutes.” (*Ibid.*) “ “[A] statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.” ’ ” (*Ibid.*)

Brown, supra, 54 Cal. 4th at p. 320, 330 reversed a retroactive application of section 4019 and held that a former version of the statute was to apply prospectively. The defendant was sentenced on July 24, 2007, for selling methamphetamine and awarded 92 days of credit, which included 62 days of actual time served and 30 days of conduct credits based on the version of section 4019 in effect in 2007. (*Id.* at p. 318.) When section 4019 was amended in 2009, operative January 25, 2010, with a more

favorable credit formula of two days credit for every two days actually served, the defendant sought additional credits. (*Id.* at pp. 318–319.) The Court of Appeal vacated the initial sentence and retroactively applied the amended formula to the 62 days of time served before the operative date of the amended statute. (*Id.* at p. 319.) The Supreme Court reversed and rejected a statutory interpretation of section 4019 that applied it retroactively. (*Id.* at pp. 319, 330.)

Brown is persuasive here. Indeed, the Second, Fourth and Fifth Appellate Districts have followed *Brown*'s analysis to hold that the current version of section 4019 applies prospectively so that conduct credit awarded to defendants for time served should be based on the version of the law in effect on the date they committed their crime. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52 (*Rajanayagam*); *Garcia, supra*, 209 Cal.App.4th at 541; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552.)

As we have said, section 4019, subdivision (h) provides: “The changes to this section . . . shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . 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.” Like the defendant in *Rajanayagam*, Bowman urges we read the two sentences of subdivision (h) as creating an ambiguity, and that construing the second sentence to require increased credits for time served after October 1, 2011, is the only reasonable interpretation. However, we agree with *Rajanayagam*, which rejected that interpretation and concluded that the first sentence in subdivision (h) shows a clear legislative intent that the current version of section 4019 applies only to those who commit a crime on or after October 1, 2011, and that the second sentence “attempts to clarify that those defendants who committed an offense before October 1, 2011, are to earn credit under the prior law.” (*Rajanayagam, supra*, 211 Cal.App.4th at p. 52.) Thus, we conclude the 2011 changes to section 4019 are to be applied prospectively only, based on the date of the crime.

Bowman also contends in his reply brief that the alleged ambiguity in subdivision (h) should trigger application of the rule of lenity, which requires giving a “ ‘defendant

the benefit of every reasonable doubt on questions of interpretation.’ ” (*People v. Nuckles* (2013) 56 Cal.4th 601, 611.) We are not persuaded. As we have previously stated, subdivision (h) is not ambiguous and it is in fact clearly prospective. Even if subdivision (h) were ambiguous regarding retroactivity, resolving any doubt in favor of Bowman with the rule of lenity would run counter to both section 3’s default rule against retroactivity and the principle that “a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.” (*Brown, supra*, 54 Cal.4th at pp. 319–320.) Nevertheless, as subdivision (h) is not ambiguous, we need not consider application of the rule of lenity here.

In sum, subdivision (h) of section 4019 should be interpreted to apply changes in the credit formula prospectively only. Defendants and prisoners whose crimes occur on or after October 1, 2011, are to be awarded presentence conduct credit based upon the current formula. As Bowman was convicted of a crime that occurred on September 30, 2011, his award for presentence credit is unaffected by the 2011 amendments. Accordingly, we affirm the trial court’s award of presentence conduct credits.

B. Fees Imposed at Sentencing

Under section 1203.1b, subdivision (a), the court may impose a fee for the cost of preparing a presentence report. The amount of the fee is subject to the defendant’s ability to pay it. (*Ibid.*) Under Government Code sections 29550, 29550.1, and 29550.2, a “criminal justice administration fee,” also called a “booking” fee (*People v. McCullough* (2013) 56 Cal.4th 589, 592 (*McCullough*)), can be imposed for “reimbursement of county expenses incurred with respect to the booking or other processing of . . . arrested persons [who] are brought to the county jail for booking or detention” (Gov. Code, § 29550, subd. (a)). “Which section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail.” (*McCullough, supra*, 56 Cal.4th at p. 592.) Considerations that may apply in setting the amount of the fee include the defendant’s ability to pay (Gov. Code, §§ 29550, subd. (d)(2), 29550.2, subd. (a)) and the county’s “actual administrative costs” (Gov. Code, §§ 29550, subd. (a)(1), 29550.2, subd. (a)).

At sentencing, the court ordered Bowman to pay “a probation report fee in the amount of \$176,” and “a criminal justice administrative fee in the amount of \$564.” Bowman did not object to the imposition of either fee. The fees were listed on the abstract of judgment as “CJA: \$564.00; PROB REP \$176.00.” (See *People v. Eddards* (2008) 162 Cal.App.4th 712, 717, quoting *People v. High* (2004) 119 Cal.App.4th 1192, 1200 [all fines and fees must be set forth in the abstract of judgment].)

Bowman contends that both fees were improperly imposed because the trial court did not determine his ability to pay them. He argues that the criminal justice administrative fee must also be reversed because the trial court did not specify a statutory basis for the fee or identify the payee, and because the record does not establish the county’s actual administrative booking costs. These arguments are untenable under *McCullough*.³

The defendant in *McCullough*, like Bowman here, challenged his booking fee on the ground that the trial court failed to determine his ability to pay it, but the contention was forfeited. (*McCullough, supra*, 56 Cal.4th at pp 590–591.) “[B]ecause a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*Id.* at p. 597.) *McCullough* squarely refutes Bowman’s argument that the booking fee must be reversed for lack of substantial evidence of his ability to pay, and the court’s reasoning precludes his other arguments as well.

The court “distinguished between an alleged factual error that had necessarily not been addressed below or developed in the record because the defendant failed to object, and a claimed legal error, which ‘can be resolved without reference to the particular sentencing record developed in the trial court.’ [Citation.] . . . [W]e may review an asserted legal error in sentencing for the first time on appeal where we would not review an asserted factual error. [Citation.]” (*McCullough, supra*, 56 Cal.4th at p. 594.)

³ *McCullough* was filed after Bowman filed his opening brief.

“Defendant may not ‘transform . . . a factual claim into a legal one by asserting the record’s deficiency as a legal error.’ [Citation.] By ‘failing to object on the basis of his [ability] to pay,’ defendant forfeits both his claim of factual error and the dependent claim challenging ‘the adequacy of the record on that point.’ [Citation.]” (*Id.* at p. 597.)

Bowman’s argument about the lack of evidence of his ability to pay the probation report fee, like his ability to pay the booking fee, is “confined to factual determinations.” (*McCullough, supra*, 56 Cal.4th at p. 597; see *People v. Aguilar* (2013) 219 Cal.App.4th 1094, 1097-1098 [defendant prevented under *McCullough* from belatedly contesting probation supervision fees].) His argument about the lack of evidence of the actual administrative costs associated with his booking fee likewise concerns “above all a factual determination.” (*People v. Aguilar, supra*, 219 Cal.App.4th at p. 1099.) His arguments about the failure to specify the payee of his booking fee and the statute under which it was imposed also present purely factual issues because the answers depend on which governmental entity arrested him before transporting him to county jail (*McCullough, supra*, 56 Cal.4th at p. 592).

Accordingly, the arguments for reversal of the fees must be rejected.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.