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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TAYLEN WARREN HINKS, Defendant and Appellant.	A139128 (Sonoma County Super. Ct. No. SCR-619985)

The People appeal from a judgment upon defendant Taylen Warren Hinks's plea of no contest to felony grand theft (Pen. Code,[1] § 487, subd. (c)) awarding him conduct credits of two days for every four days spent in custody (four-two credits). The People contend that the trial court exceeded its authority in awarding defendant four-two conduct credits because former section 4019, in effect at the time of the offense, authorized conduct credits of six-two; two days of conduct credit for each six days of confinement. We agree, and remand for further proceedings.

I. FACTUAL BACKGROUND

On April 12, 2013, defendant pled no contest to grand theft. The underlying offense involved defendant's participation in an armed robbery in 2011 with two codefendants, Nicholas Olsen and Vincent Mathiesen. The trio agreed to steal marijuana from Michael Greenwood and planned the robbery. On February 3, 2011, Mathiesen, Greenwood's friend, drove Greenwood to his home, knowing that he would be in

[1] All subsequent statutory references are to the Penal Code.

possession of marijuana. Olsen, armed with a gun belonging to Mathiesen's father, together with defendant, waited in the bushes near Greenwood's house. When Greenwood and Mathiesen arrived, defendant and Olsen, both wearing bandanas on their faces, confronted Greenwood and demanded his wallet and cell phone. Greenwood initially thought it was a joke but Olsen brandished the gun. Defendant then rushed at Mathiesen, resulting in Greenwood running into the garage. Defendant and Olsen took two garbage bags from the car and fled. One of the bags contained clothing and a portable DVD player which they discarded on the street; the other bag contained the marijuana.

Over a year later, in May 2012, the police determined that a latent fingerprint found on the portable DVD player matched defendant's right index finger. Following an investigation in which defendant cooperated and named his codefendants, defendant, Mathiesen, and Olsen were arrested and charged with attempted robbery and conspiracy to commit robbery.

On July 18, 2012, the date set for the preliminary hearing, the deputy district attorney offered Mathiesen a plea bargain under which he would plead no contest to felony grand theft on conditions including that he be placed on three years of probation and serve 90 days in the county jail. The court accepted Mathiesen's plea. At the time, the deputy district attorney offered Olsen and defendant plea bargains which would have required a plea to robbery. On August 21, 2012, Olsen was offered the identical plea bargain that was offered to Mathiesen, and he accepted it.

The preliminary examination in the matter was held on August 29, 2012; defendant was held to answer to the charges of attempted robbery and conspiracy. Defendant thereafter moved to suppress his statements to the police on the ground that they were obtained in violation of his *Miranda*[2] rights. On December 27, 2012, the court denied the motion. On April 12, 2013, defendant accepted a plea bargain under which he

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

agreed to plead no contest to felony grand theft on the same conditions as his codefendants.

Defendant's sentencing hearing was held on June 6, 2013. Defendant argued that he was entitled to four-two conduct credits because his codefendants were given that award for the same offense. The deputy district attorney acknowledged that the plea agreements of the codefendants provided for four-two credits, but asked that the court follow section 1192.5 and award six-two credits.[3] The court granted defendant four-two credits, reasoning that defendant was the least culpable of the three defendants, and that he was entitled to the same deal as his codefendants. The People appeal.[4]

II. DISCUSSION

The People contend that the court's award of conduct credits based on a four-to-two ratio constituted an unauthorized sentence because defendant's offense was committed prior to the effective date of the enhanced conduct credit provisions of section 4019. This contention has merit.

Effective September 21, 2011, section 4019 was amended to provide that four days of presentence time would be deemed to have been served for every two days in custody. (§ 4019, subd. (f).) The statute, however, applies prospectively only "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." (§ 4019, subd. (h).) Under the prior law, local prisoners were deemed to have served six days for every four days of actual custody time. (Former § 4019, subds. (b)(2), (c)(2), & (f), Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.) Since defendant's offense was committed on February 3, 2011, he is ineligible for the enhanced conduct credits. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 51

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[3] A different deputy district attorney handled the plea agreements with the codefendants.

[4] The People may appeal from the sentence as an order made after judgment, an order reducing punishment, or an order imposing an unlawful sentence. (§ 1238, subds. (a)(5), (6), & (10); *People v. Perez* (1070) 23 Cal.3d 545, 549, fn. 2.)

[defendant not entitled to enhanced conduct credits for time served on or after October 1, 2011, because crime was committed before the effective date of the amendment to section 4019].) The court's sentence here, awarding defendant conduct credits on a four-two basis, thus was contrary to statute and unauthorized. (*People v. Scott* (1994) 9 Cal.4th 331, 354 [legal error resulting in unauthorized sentence occurs where the court violates mandatory provisions governing the length of confinement]; *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818–819 [sentence that awarded unauthorized presentence custody credits was an unauthorized sentence subject to correction at any time].)

Defendant also contends that his due process and equal protection rights under the Fourteenth Amendment would be violated if the matter is remanded to permit the court to correct the award of conduct credits because, as an African-American, he was singled out for harsher punishment than his Caucasian codefendants.[5]

In *People v. Brown* (2012) 54 Cal.4th 314, 328, our Supreme Court explained: "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) 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." ' (*Ibid.*) '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." ' (*Ibid.*)"

Defendant's equal protection claim fails. While he was convicted of the same offense as his codefendants, he has not shown that he was singled out for prosecution and punishment on the basis of his race. To the contrary, he received virtually the identical

[5] Defendant calculates that under the People's theory, he should have served 69 actual days of the 90-day sentence and been awarded total credits of 22 days (six days credit for the 21 days of actual presentence custody plus 16 days for 48 days of custody). Thus, defendant calculates that he would have to serve an additional 23 days in custody to serve his 90-day sentence.

plea bargain as his codefendants, with the exception of the rate of conduct credit accrual. He apparently negotiated his plea bargain after his codefendants because he chose to litigate a *Miranda* issue, and consequently a different deputy district attorney handled his case at the time his plea was taken and during his sentencing hearing. On the record before us, there is no evidence that this deputy district attorney harbored discrimination or vindictiveness in advocating that defendant receive six-two credits, but rather it appears that he simply argued that the court must follow the law under section 4019. (See *People v. Michaels* (2002) 28 Cal.4th 486, 515 [no presumption of vindictiveness when the prosecution increases the charges or potential sentence pretrial].) While we sympathize with defendant that he in essence is required to serve more days in the county jail than his codefendants, whom the trial court deemed more culpable, section 4019, subdivision (h), provides that the enhanced conduct credits do not apply where the offense was committed prior to October 1, 2011. We recommend that the trial court consider alternative means for defendant to serve his sentence that will not disrupt his employment or education.[6]

III. DISPOSITION

The matter is remanded to the trial court for a recalculation of credits in conformance with this opinion, and a determination as to the manner in which defendant may serve any additional days of local custody. In all other respects, the judgment is affirmed.

[6] The record shows that defendant was employed full-time and was endeavoring to complete his post-secondary education.

Rivera, J.

We concur:

Ruvolo, P. J.

Reardon, J.