

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN D. SHAW,

Defendant and Appellant.

B237318

(Los Angeles County
Super. Ct. No. MA053124)

APPEAL from a judgment of the Superior Court for Los Angeles County, Charles A. Chung, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant contends he is entitled to additional conduct credits under Penal Code section 4019, which was amended after he was sentenced. At the time defendant filed his opening brief, the dispositive case on this issue, *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), had not been decided. Defendant's reply brief acknowledges that *Brown* rejected his equal protection claim, and that we are bound by our Supreme Court's decision. Defendant seeks only to preserve the issue for federal review.

DISCUSSION

On May 12, 2011, defendant failed to register as a sex offender. On September 1, 2011, he pled no contest to failing to register (Pen. Code, § 290, subd. (b)) and admitted a 1997 serious felony conviction for continuous sexual abuse of a child (Pen. Code, §§ 288.5, 1170.12, subd. (a), 667, subd. (b)). That same day, he was sentenced to a total prison term of 32 months, for which he received 120 days of custody credit, consisting of 80 actual and 40 conduct credits.¹ Defendant filed a notice of appeal and obtained a certificate of probable cause.

Although the court's calculation of defendant's conduct credit was correct under the version of section 4019 in effect at the time of his sentencing, defendant's opening brief contends that equal protection (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) requires the version of section 4019 that came into effect on October 1, 2011, to be applied retroactively, entitling him to additional conduct credits. Under former section 4019, effective January 25, 2010, most defendants in local custody earned two days of conduct credit for every two days in local custody. Others, such as defendant, who must register as a sex offender or have a current or prior conviction for a serious or violent felony, earned two days of conduct credit for every four days served. (See Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50; Stats. 2010, ch. 426, § 2.)

¹ The September 1, 2011 minute order originally granted 117 days of custody credits, consisting of 79 actual and 38 conduct credits. This minute order was corrected nunc pro tunc on April 6, 2012, after defendant informed the court he had received an incorrect number of credits.

After defendant was sentenced, the Legislature amended former section 4019 to provide the higher rate of conduct credit without any exception for a defendant who must register as a sex offender, whose present offense was a serious felony, or who has a prior conviction for a serious or violent felony. (See Stats. 2011, ch. 15, § 482; Stats. 2011-2012, 1st Ex.Sess., ch. 12, § 35.) However, by its terms, the current version of section 4019 applies only to prisoners confined for a crime committed on or after October 1, 2011, and any days earned before October 1, 2011, are “calculated at the rate required by the prior law.” (Pen. Code, § 4019, subd. (h).) Therefore, the current version of section 4019 does not apply to prisoners, like defendant, serving time in local custody before October 1, 2011.

Defendant’s opening brief contends that limiting the application of the amendment to section 4019 to defendants who committed crimes after October 1, 2011, violates equal protection, because it treats those confined before October 1, 2011, differently than those confined after that date. Our Supreme Court rejected this argument in *Brown, supra*, 54 Cal.4th 314. Although *Brown* involved a different amendment of section 4019 than the one at issue in this case, defendants in both cases were awarded conduct credits under a version of section 4019 that was amended after they were sentenced to increase the rate at which conduct credits accrued. And, just like defendant here, *Brown* contended that equal protection required retroactive application of the amended statute. (*Brown, supra*, 54 Cal.4th at pp. 318-319.)

“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.]” (*Brown, supra*, 54 Cal.4th at p. 328.)

In *Brown*, the Supreme Court concluded that those serving time before the amendment to section 4019 went into effect were not similarly situated to those serving time after its effective date, 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.” (*Brown, supra*, 54 Cal.4th at pp. 328-329.) Therefore, the court found that equal protection does not require retroactive application of amendments to section 4019. (*Brown*, at p. 330.)

As defendant concedes, *Brown* requires us to limit the application of the most recent amendment of section 4019 to prisoners confined to local custody on or after October 1, 2011. As such, he is not entitled to additional conduct credits.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.