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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

LESTER MARK GEETING,

Defendant and Appellant.

C070501

(Super. Ct. No. CM034285)

Defendant Lester Mark Geeting appeals from the trial court's imposition of sentence following his plea pursuant to a plea agreement. He first contends the court erred by failing to accurately calculate his presentence conduct credit pursuant to Penal Code¹ section 4019, as amended effective October 1, 2011. He further contends he is entitled to specific performance of the plea agreement. We conclude that the trial court correctly calculated defendant's conduct credit, and the plea agreement did not specify a different calculation. Accordingly, we shall affirm.

¹ Further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

An amended information filed October 19, 2011, charged defendant with felony possession of oxycodone (count 1; Health & Saf. Code, § 11350, subd. (a)) and felony possession of methamphetamine (count 2; Health & Saf. Code, § 11377, subd. (a)) on or about April 14, 2011. It was alleged as to both counts that defendant had served two prior prison terms (§ 667.5, subd. (b)) and had incurred one strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It was also alleged that because of his strike, any executed sentence for a felony would be served in state prison. (§ 1170, subd. (h)(3).)

Defendant entered into a plea agreement on November 17, 2011. Under the written terms of the agreement, defendant pled no contest to count 2 and admitted the prior prison terms, and the trial court dismissed count 1 and the strike allegation. The agreement described an open plea under which defendant could receive a sentence of up to five years in state prison at 50 percent time (as compared to his maximum exposure of nine years four months at 80 percent time if convicted on all counts). After accepting defendant's plea, the court referred the matter to the probation department for a presentence report.

Neither the written plea agreement nor the trial court's oral exchange with defendant calculated any specific award of conduct credit or used the term "day for day" credit. Other than a fleeting reference to "five years at half time" and "nine years, four months, [at] only 20 percent credits," neither the trial court nor the attorneys mentioned "credits" or any related term. Near the end of the hearing, defendant asked the trial court: "If I do ultimately have to go to prison, will I get this time that I was in jail or will I get my credits?" The court answered: "Certainly." This was the extent of the mention of credits at the plea hearing; the written plea form contained no mention of conduct credit.

On January 4, 2012, at the first sentencing hearing, the probation officer stated that there were "a couple of inconsistencies" in the probation report. First, contrary to the report, defendant's term would be served in state prison because he had been convicted of

a prior serious and violent felony. Second, “due to the prior serious and violent felony conviction,” defendant’s “4019 PC credits are reduced to 132 days versus 266.”

The People agreed with the probation officer; the trial court continued the hearing for a week to give defense counsel time to research and brief the credit issue. Neither the People nor defense counsel filed anything.

On January 11, 2012, the trial court sentenced defendant to an aggregate term of four years in state prison (the two-year midterm plus two years for the prior prison terms). The probation officer calculated that under section 4019 defendant was entitled to 273 days of actual credit and 136 days of conduct credit and the trial court agreed.

Defendant himself then voiced a lengthy objection to the “dual use of the prior in this incident” and indicated that he wanted to appeal from as well as withdraw from his plea. He added: “Now I’m suffering a hundred and thirty-two days that I’m not going to get. And I asked you specifically when I took the plea, Your Honor, if I would in fact get that and you told me yes.”

The trial court ordered the preparation of a transcript of the change of plea hearing and continued the sentencing to “investigate” defendant’s claim of reliance to February 1, 2012 and then to March 14, 2012. At the continued hearing, defendant stated that he did not want to withdraw his plea. The probation officer calculated defendant’s updated credits as 336 days of custody credit and 168 days of conduct credit. The People concurred. Defense counsel objected and defendant himself added a specific objection to “those time credits in every bit.” The court awarded defendant the actual and conduct credit calculated by the probation officer. Defendant timely appeals.

DISCUSSION

I

Conduct Credit

Defendant first contends that the wording of the most recent amendment to section 4019 and principles of equal protection require that he receive conduct credit in an

amount equal to his actual credit (“day for day credit”), despite the fact that his crimes were committed before October 1, 2011. We disagree.

A. Statutory Construction

“Pursuant to the October 1, 2011, amendment (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35, eff. Sept. 21, 2011, operative Oct. 1, 2011), subdivision (h) of section 4019 presently states: ‘ “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.” ’ ” (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1549-1550 (*Ellis*)). Since the Legislature has expressly stated that this latest amendment applies prospectively only, “the October 1, 2011, amendment does not apply retroactively as a matter of statutory construction.” (*Ellis, supra*, 207 Cal.App.4th at p. 1550.)

B. Equal Protection

In *People v. Brown* (2012) 54 Cal.4th 314, 318-322 (*Brown*), our Supreme Court held that under general rules of statutory construction a prior amendment to section 4019 must be read prospectively only, even though the Legislature did not expressly so state, and even though this meant that “prisoners whose custody overlapped the statute’s operative date . . . earned credit at two different rates.” (*Brown, supra*, 54 Cal.4th at p. 322.) The court reasoned that “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. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Brown, supra*, at pp. 328-330; see *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.)

Three appellate courts, relying on *Brown*’s reasoning, have rejected the equal protection argument defendant raises as to the October 1, 2011, amendment to section

4019. (*Ellis, supra*, 207 Cal.App.4th at pp. 1551-1553; *People v. Garcia* (2012) 209 Cal.App.4th 530, 541 (*Garcia*); *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-399 (*Kennedy*).) We agree with these cases.

So far as defendant asserts *Brown, supra*, 54 Cal.4th 314, was wrongly decided, we are bound by the holdings of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) So far as he asserts *Brown* is distinguishable because it addressed a different amendment to section 4019, we disagree. (See *Ellis, supra*, 207 Cal.App.4th at p. 1552; *Kennedy, supra*, 209 Cal.App.4th at pp. 396-397; *Garcia, supra*, 209 Cal.App.4th at p. 541.)²

II

Specific Performance

Defendant contends he is entitled to specific performance of the plea agreement, which he argues provided for day for day conduct credit. We disagree.

As set forth *ante*, neither the written plea agreement nor the discussion between the trial court and the parties at the change of plea hearing specified or even suggested that any particular number of conduct credits were due to defendant pursuant to the plea agreement, let alone day for day conduct credit. Defendant's vague question about whether he would "get [his] credits" and the trial court's affirmative response did not express *any* agreement, much less explicit agreement, to a certain number of conduct credit days, nor did the trial court's response create any promise of day for day credit upon which defendant can credibly claim he relied. To the extent defendant argues that the probation officer revised the number of recommended credits after he had formed an

² Defendant relies on *People v. Olague* (2012), formerly at 205 Cal.App.4th 1126 (*Olague*), in support of his argument. The Supreme Court granted review of *Olague* 16 days *before* defendant filed his opening brief. (*Olague, supra*, review granted Aug. 8, 2012, S203298.) He agrees in his reply brief that *Olague* is "no longer citable."

expectation of “increased credits,” this point, even assuming it is accurate, does not assist defendant’s argument, as the probation report was not even ordered to be prepared until *after* defendant had entered his plea. His claim for specific performance of an agreement that never existed has no merit.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

BUTZ, J.