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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENT LOREN ADAMS,

Defendant and Appellant.

D060799

(Super. Ct. Nos. SCD232477,  
SCD227479 & SCD227499)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed as modified with directions.

In March 2011, in case No. SCD232477, Brent Loren Adams entered a negotiated guilty plea to possessing cocaine base for sale (Health & Saf. Code, § 11351.5), an offense that occurred in February. In April, the court suspended execution of a three-year lower term prison sentence and placed Adams on three years' probation. On September 7, Adams pleaded guilty in two new cases arising out of offenses committed in May and June. In case No. SCD227479, he entered a negotiated guilty plea to selling cocaine base

(Health & Saf. Code, § 11352, subd. (a); count 1) and two counts of possessing cocaine base for sale (Health & Saf. Code, § 11351.5; counts 2 and 4), with four prior Health and Safety Code convictions (Health & Saf. Code, § 11370.2, subd. (a)) as to each count, and admitted having served seven prior prison terms (Pen. Code, §§ 667.5, subd. (b), 668). In case No. SCD227499, Adams entered a negotiated guilty plea to selling cocaine base (Health & Saf. Code, § 11352, subd. (a); count 1) and possessing cocaine base for sale (Health & Saf. Code, § 11351.5; count 2), with four prior Health and Safety Code convictions (Health & Saf. Code, § 11370.2, subd. (a)) as to each count, and seven prior prison terms (Pen. Code, §§ 667.5, subd. (b), 668). The court formally revoked probation in case No. SCD232477.

In October 2011, the court dismissed counts 2 and 4 in case No. SCD227479; count 2 in case No. SCD227499; all Health and Safety Code section 11370.2, subdivision (a) enhancements and all prison priors. The court imposed a four-year sentence: the four-year middle term in case No. SCD227479, and concurrent four-year middle prison terms in the other two cases. In each case, pursuant to the Criminal Justice Realignment Act of 2011 (Realignment) (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1), the court ordered Adams committed to jail for three years, and suspended execution of one year of the sentence, during which Adams would be subject to mandatory supervision by the probation department (Pen. Code, § 1170, subd. (h)). The court awarded the following credits: in case Nos. SCD227479 and SCD227499, 81 actual days and 40 days' conduct credits, for a total of 121 days in each case; and in case No. SCD232477, 135 actual days and 66 days' conduct credits, for a total of 201.

Adams appeals, contending because he committed the offenses between September 28, 2010, and September 30, 2011, and was sentenced under Realignment, he was denied the day-for-day credit credits he would have received had he been sentenced to prison or had he committed the offenses before September 28, 2010, or after September 30, 2011. Adams argues this violates the proscription against ex post facto laws and his right to equal protection under the United States and California Constitutions. Respondent properly concedes there was an ex post facto violation.

### STATUTORY BACKGROUND

In October 2009, the Legislature passed Senate Bill No. 18 which, inter alia, amended section 4019 to allow certain eligible defendants to earn two days of conduct credit for every two days of actual custody. This change became effective January 25, 2010. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50.)

In September 2010, the Legislature passed Senate Bill No. 76 (SB 76), which again amended section 4019 and also amended section 2933. Under SB 76, defendants were eligible for conduct credits at a rate of two days for every six days of actual custody time. (Pen. Code, § 4019, subs. (b) & (c).) These decreased credits were applicable only to defendants who committed crimes on or after the statute's effective date of September 28, 2010. (*Id.*, subd. (g).) SB 76 also added Penal Code section 2933, subdivision (e)(1), which provided that "a prisoner sentenced to the state prison under Section 1170 . . . shall have one day deducted from his or her period of confinement for every day he or she served in county jail . . . from the date . . . of arrest until state prison credits pursuant to this article are applicable . . . ."

In April 2011, the Governor signed the Realignment legislation, again amending Penal Code sections 4019 and 2933. Defendants convicted after October 1, 2011, could once again earn two days of credit for every two days served in custody. (Pen. Code, § 4019, subs. (f) & (h).) The Legislature also amended Penal Code section 4019, subdivision (g), clarifying that the changes made by SB 76 still applied to defendants in custody for crimes committed after the September 28, 2010, the effective date of SB 76. (Pen. Code, § 4019, subd. (g).) Also, Penal Code section 4019, subdivision (h) states that "[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." Finally, Penal Code section 2933, subdivision (e)(1) was deleted.

Overall, these changes reduce conduct credits for defendants who committed their crimes between September 28, 2010 and October 1, 2011, and were sentenced to jail.

## DISCUSSION

In *Weaver v. Graham* (1981) 450 U.S. 24 (*Weaver*), the United States Supreme Court examined a Florida statutory amendment that changed the amount of "gain-time" credits an inmate could earn.<sup>1</sup> (*Id.* at p. 26.) Before the amendment, inmates could earn

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<sup>1</sup> "Gain-time" credits, which were available to Florida inmates based on satisfactory work and lack of disciplinary violations, are nearly identical to the conduct credits at issue here. (*Weaver, supra*, 450 U.S. at p. 35.) The Supreme Court concluded that, for inmates who committed crimes before the amendment's enactment, the change in the statute "substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] 'the quantum of punishment.'" (*Weaver*, at p. 33.) Because the amendment "constrict[ed] the inmate's opportunity to earn early release, and thereby [made] more onerous the punishment for crimes committed before its enactment," it violated the ex post facto clause. (*Id.* at pp. 35-36.)

five days per month for the first and second years of the sentence, 10 days for the third and fourth years and 15 days for the fifth and subsequent years. (*Ibid.*) Under the amendment, inmates could only earn three days per month for the first and second years, six days for the third and fourth years, and nine days for the fifth and subsequent years. (*Ibid.*) Florida applied the amendment to all inmates, including Weaver, whose offense took place before the enactment of the amendment. (*Id.* at pp. 27, 31.)

Here, Realignment precluded Adams from earning day-for-day credits under the law in effect at the time he committed the crimes (former Pen. Code, § 2933, subd. (e)(1)); instead he was awarded credits at a lower rate. "This result runs afoul of the prohibition against ex post facto laws." (*Weaver, supra*, 450 U.S. at p. 36; U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Accordingly, we agree with the parties that Adams is entitled to relief on ex post facto grounds.<sup>2</sup> We direct the superior court to recalculate Adams's credits in a manner consistent with this opinion. (*Weaver*, at p. 36, fn. 22.)

#### DISPOSITION

The judgment is modified by awarding Adams an additional 41 days' conduct credits in case No. SCD227479, an additional 41 days' conduct credits in case No. SCD227499 and an additional 69 days' conduct credits in case No. SCD232477. The judgment is affirmed as so modified. The case is remanded to the superior court with

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<sup>2</sup> In light of our conclusion that relief is warranted on ex post facto grounds, we decline to address Adams's contention that the denial of day-for-day credits also violates equal protection. (See *In re Martin* (1987) 44 Cal.3d 1, 52, fn. 12.)

directions to amend the abstract of judgment to reflect the additional credits and to forward a certified copy of the amended abstract of judgment to the San Diego County Sheriff's Department.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.