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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS ALLEN SCHAEFER,

Defendant and Appellant.

E053818

(Super.Ct.No. FMB800036)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Patrick McKenna, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kevin Vienna and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Thomas Allen Schaeffer seeks remand for calculation and award of conduct credits under Penal Code section 2933.¹ The People agree that defendant should receive conduct credits, but argue that section 4019, not 2933, is the provision under which they should be calculated.

We will find that, because of his validly-executed waiver, defendant is not entitled to any section 4019 credits and whatever section 2933 credits are due him must be calculated by the secretary of the California Department of Corrections and Rehabilitations (CDCR) from the date the relevant subdivision became effective until the date defendant was sentenced to prison.

FACTS AND PROCEDURAL HISTORY

Defendant was on probation for two earlier drug offenses² when, in an information filed January 29, 2008, he was charged with possession for sale of a controlled substance (Health & Saf. Code, § 11351, count 1), and maintaining a place for selling or using a controlled substance (heroin) (Health & Saf. Code § 11366, count 2).

On March 18, 2008, defendant pled guilty to count 2 in exchange for a promised grant of probation and a referral to the drug court treatment program. The plea agreement

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Those offenses are court case Nos. TMB024764 (2005) & MMB008849 (2003). According to the San Bernardino County Superior Court Database, of which we hereby take judicial notice (Evid. Code, § 452, subd. (d)(1)), defendant's record of drug possession and driving-under-the-influence offenses (totaling 19 excluding the present charges) goes back to 1998.

required defendant to serve a 140 day sentence for violating probation in one of his earlier offenses and a concurrent five days for violating probation in the other earlier offense. Also on March 18, 2008, defendant signed a “Drug court Application and Agreement.” One of the terms of the application stated: “I also waive all P.C. 4019 credits as a condition of participating in the DRUG COURT TREATMENT PROGRAM.” Defendant, his attorney, the district attorney, and the court signed the application. Sentencing on the current conviction was postponed to be done in drug court, and the application was not immediately filed.

Having served his terms for the earlier offenses, defendant appeared for sentencing on the current conviction on September 15, 2008. As it had promised, the court granted him 36 months of supervised probation and referred him to the drug court program. The court specified that defendant’s probation was scheduled to expire on September 15, 2011, and set a drug court review hearing for September 22, 2008. On September 22, 2008, defendant and the court signed a payment agreement which was filed on that date with the application defendant had signed on March 18, 2008. Neither a minute order nor a transcript of the September 22, 2008, hearing has been included in the record on appeal.

Over the next 34 months, defendant was arrested seven times. After each of the first six arrests, he served a few days in custody and was released. After the seventh, in a probation violation hearing on May 9, 2011, the trial court found defendant not amenable to treatment in drug court. The court said that defendant had failed to appear for a drug court appointment, that a bench warrant had been issued on January 18, 2011, and that he had been brought back into custody on May 2, 2011. The court sentenced defendant to

the upper term of three years in state prison and credited him with 68 days of actual time served, but no conduct credits. The minute order stated simply: “PC 4019 credits waived in order to participate in Drug Court.”

On November 8, 2011, defense counsel filed a motion asking the court to correct the calculation of presentence custody conduct credits, under section 2933, and to dismiss count 1 pursuant to section 1385. Defendant’s motion did not mention section 4019. On November 9, 2009, the court denied the motion, noting: “The defendant was terminated from drug court program on 5/9/11. All of the defendant’s custody time was served prior to being terminated from drug court. [Defendant] is not entitled to 4019 credits.”³ The court’s denial did not mention section 2933.

This appeal followed.

DISCUSSION

The parties agree that defendant is entitled to some number of conduct credits for time spent in custody after he entered the drug court program, but disagree about under what statute the credits were earned and by whom they should be calculated.

Defendant argues here, as he did in his motion below, that he is entitled to an additional 63 days of “presentence” 1:1 credits under former section 2933, subdivision (e)(1), which was in effect when he was sentenced to prison on May 9, 2011. Defendant suggests that the relevant period begins on March 18, 2008, the day he signed his drug

³ The minute order for November 9, 2011, contains what appears to be a typographical error. It states that defendant was terminated from drug court on 5/19/11 when in fact he was terminated on 5/9/11.

court application. In the alternative, defendant asserts that if we somehow find that he is instead entitled to section 4019 credits, they should all be calculated by the trial court under the version of the statute in effect when he was sentenced, not proportionately under the two different versions in effect when he was in custody.

The People argue that defendant is entitled only to section 4019 credits, and only for time he spent in custody after the date he entered the drug court program, September 22, 2008, for a total of 46 days. These credits, they assert, should be calculated separately under the versions of the statute in effect at different periods of time during defendant's confinement. In their view, defendant is not entitled to any section 2933 credits because those are post-sentence credits that must be calculated by CDCR, not the court.

The parties are each partially correct, and most of their points of difference can be resolved by a careful look at three cases: *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*); *People v. Arnold* (2004) 33 Cal.4th 294 (*Arnold*); and *People v. Black* (2009) 176 Cal.App.4th 145 (*Black*) [Fourth Dist., Div. Two].

Brown and Section 4019

We begin with *Brown*, where the California Supreme Court began the discussion section with a reminder that, under section 3, “No part of [the Penal Code] is retroactive unless expressly so declared.” (*Brown, supra*, 54 Cal.4th at pp. 319-320, quoting § 3.) The high court reviewed the history of section 4019, which provides for presentence conduct credits for prisoners held in local facilities before being sent to state prison. The court analyzed and rejected various theories of statutory construction and inferred

legislative intent proposed to support a claim that the statute operated retroactively despite the fact that the legislature had not expressly so declared. In a unanimous opinion, the court found that the section operated prospectively only. (*Brown* at pp. 318-323, 330.) “To apply section 4019 prospectively,” the court went on to explain, “necessarily means that prisoners whose custody overlapped the statute’s operative date (Jan. 25, 2010) earned credit at two different rates Credits are determined and added to the abstract of judgment at the time of sentencing, but they are *earned* day by day over the course of a defendant’s confinement as a predefined, expected reward for specified good behavior.” (*Brown* at p. 322.)

Thus, under *Brown*, if defendant were entitled to section 4019 credits, the People are correct that the calculation would have had to be bifurcated. The problem for defendant is that he is not entitled to those credits because, as the trial court correctly stated, he waived them in order to participate in the drug court program.

Waiver and Arnold

In *Arnold*, our state supreme court interpreted the scope and effect of a defendant’s waiver of custody credits and concluded, “[W]hen a defendant knowingly and intelligently waives jail time custody credits after violating probation in order to be reinstated on probation and thereby avoid a prison sentence, the waiver applies to any future use of such credits should probation ultimately be terminated and a state prison sentence imposed.” (*Arnold, supra*, 33 Cal.4th at pp. 297-298.) Such a rule, the court said, is “consistent with law, logic, and sound public policy” (*Id.* at p. 307.) Specifically, “A defendant entering a straightforward and unconditional waiver of section

2900.5 credits has no reason to believe that the waiver is anything other than a waiver of such credits for all purposes.” (*Id.* at p. 309.) Section 4019 credits are section 2900.5 credits to be calculated and awarded by the trial court. (§ 2900.5, subs. (a) & (d).)

There is no indication in this case that defendant’s straightforward and unconditional waiver was not knowing or intelligent, and he does not make such a claim. Nor does he argue, as did the defendant in *Black*, that his attorney failed to inform him that the waiver of pre-sentence section 4019 credits applied to the prison term he was being given the opportunity to avoid by attending the drug court program. (*Black, supra*, 176 Cal.App.4th at pp. 152-153.) We do not have a transcript of the drug court review hearing of September 22, 2008, but defendant also does not claim that the court misadvised him. In other words, there is no indication that defendant did not understand what he was doing. In her concurrence in *Arnold*, Justice Kennard emphasized that “there is no indication that defendant limited the scope of his custody credit waivers in any way.” (*Arnold, supra*, 33 Cal.4th at p. 311.) The same is true here.

Waiver and Black

Defendant relies on our decision in *Black* for two other arguments related to his waiver: (1) that the custody credits he seeks under section 2933 must be calculated from the date he signed the drug court application waiving section 4019 credits; and (2) that *Black* is “binding” upon this court because “the waiver at issue in *Black* and the waiver signed by [defendant] are identical [and] . . . no facts whatsoever exist to differentiate [defendant] from the defendant in *Black*.” We address these points in turn.

Date filed vs. date signed:

Defendant states that “According to [*Black*] . . . the date the agreement is signed—as opposed to filed—is what is pertinent for purposes of this appeal.” Defendant misreads *Black*. We did not address the date-signed vs. the date-filed question in *Black* because it was not at issue there. The defendant in *Black* signed her drug court application, filed it, and began her time in a rehabilitation drug court facility all on the same day, September 24, 2007. (*Black, supra*, 176 Cal.App.4th at pp. 149, 152, 155.) We remanded the case for a recalculation of section 4019 credits only because, on the record in *Black*, we could discern no basis on which to disagree with the People’s concession that her waiver applied only to credits earned before she signed the application. (*Black* at pp. 155, 156.) It is well settled that a case is not authority for an issue not actually considered and decided. (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) *Black* does not support defendant’s position and provides us with no reason to differ from the California Supreme Court’s ruling in *Arnold*.

Identical waivers:

Defendant is correct that the words of the waiver he signed are identical to those in the waiver signed by the defendant in *Black*. However, he is wrong in concluding that *Black* is binding upon us and that the disposition in this case must be the same as in *Black*. Firstly, only the decisions of our State Supreme Court and the United States Supreme Court are “binding” upon this court. (*Auto Equity Sales, Inc. v Superior Court* (1962) 57 Cal.2d 450, 455.) Secondly, defendant’s assertion that there are no facts which distinguish him from the *Black* defendant is inaccurate.

The *Black* defendant was admitted to the drug court program as a reinstatement of probation that had been granted for her original conviction. (*Black, supra*, 176 Cal.App.4th at pp. 148-149.) With the People’s concession, and the absence of any contrary evidence in the record, we could not find that the section 4019 credits she understood herself to be waiving could not have related to time she had already spent in custody during that probationary period.

Our defendant’s waiver was signed at a time when his sentencing for the current offense and the promised probation and referral to a drug program lay months away. The new probation period—for the new offense—did not begin until September 15, 2008, after he had completed sentences for probation violations related to his old convictions. And he was not accepted into the drug court program until a week after that, when his application and payment agreement were filed. Accordingly, at the time he signed the waiver, it could only have been applicable to future custody credits; there were none in the past related to that probation period or that offense. Finally, since defendant was not sentenced to prison until the day the trial court found him not amenable to the drug court program, his enrollment and his probation ended simultaneously. The trial court was thus correct when, on that date and later in denying his motion, it stated that he was not entitled to any section 4019 conduct credits.

Brown and Section 2933

Subdivision (e)(1) of former section 2933, in effect when defendant was sentenced on May 9, 2011, read: “Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the

sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.” (Former § 2933, subd. (e)(1), amended by Stats. 2010, ch. 426 (S.B. 76), § 1, eff. Sept. 28, 2010, and repealed by Stats. 2011, 1st Ex. Sess., 2011–2012, ch. 12, § 16, eff. Sept. 21, 2011.) Like the revised version of section 4019 analyzed in *Brown*, the former subdivision of section 2933 contained no express statement of retroactivity.⁴

The defendant in *Brown* made what appears to be our defendant’s argument. In footnote eight of the opinion, the court noted that, “While the CDCR does not determine and award *presentence* conduct credits, the CDCR does determine and award credits earned in local custody, if any, after sentencing and before delivery to state prison. (See § 2900.5, subd. (e).) . . . [¶] For a one-year period following the repeal of former section 4019 [i.e., when 2933, subd. (e)(1) and (e)(3) were operative], the CDCR did determine and award local conduct credits for persons eventually sentenced to state prison.” (*Brown, supra*, 54 Cal.4th at p. 321, fn. 8.) In footnote 11 the court further noted that, in an answer brief, the defendant had advanced “[a] new claim that a short-lived 2010

⁴ Subdivision (e)(3) of the now-repealed statute provided that presentence conduct credits were to be calculated under section 4019 only if the prisoner was required to register as a sex offender; was committed for a serious felony, as defined in section 1192.7; or had a prior conviction for a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5. None of the specified exceptions applies to defendant. (Former § 2933, subd. (e)(3).) Section 2933 credits were to be calculated by the California Department of Corrections and Rehabilitation (CDCR). (§ 2900.5, subd. (e).)

amendment to section 2933 entitles him to additional conduct credits for his time [served] in local custody, even if former section 4019 does not.” (*Brown* at p. 322, fn. 11, citing former § 2933, subd. (e)(1).) The *Brown* defendant was complaining that the CDCR violated the statute by not awarding him credits from the date the short-lived amendment became effective. (*Ibid.*) The high court declined to address the untimely new claim but added, “Such a claim must logically be brought in a petition for habeas corpus against the official empowered to award such credits, namely the Director of the CDCR.” (*Ibid.*)

Similarly here, because our defendant is claiming credits allegedly earned during the period those provisions were operative, his claim must be brought to the secretary of CDCR, not to the trial court or to this court. Moreover, in light of *Brown*’s extensive discussion of section 3, section 4019, section 2900.5, and the prospective nature of Penal Code provisions in general, defendant is only entitled to custody credits under former subdivisions (e)(1) from the time the amendment became effective, September 28, 2010, until the date he was delivered to prison after he was sentenced on May 9, 2011. Defendant is not entitled to any section 2933 credits for time he may have been in custody between September 15, 2008, and September 28, 2010. CDCR is the agency empowered to make the required calculation and award of section 2933 custody credits and it is to that agency that defendant must take his claim.

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

KING
J.