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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.

REGINALD CONWRIGHT,

Defendant and Appellant.

E054032

(Super.Ct.No. RIF10005561)

OPINION

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge.

Affirmed with directions.

Ava R. Stralla, 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, Barry Carlton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Reginald Conwright, is serving nine years in prison after a jury found him guilty of first degree burglary (Pen. Code, § 459),¹ receiving stolen property (§ 496) and misdemeanor resisting arrest (§ 148, subd. (a)) and the court found true several prior conviction allegations, including that he had been convicted of an attempted burglary that qualified as both a serious felony and a strike. Defendant argues in this appeal that he is entitled to additional presentence custody credits under the version of section 4019 that became effective October 1, 2011. As discussed below, defendant's contention on this point has no merit. However, we do order the abstract of judgment corrected to reflect the trial court's oral pronouncement in two other respects.

FACTS AND PROCEDURE

On October 29, 2010, a Riverside couple called 911 to report a burglary in progress at a neighbor's house. A police helicopter and several police officers were dispatched to the scene. Three men were observed running away from the house and the vehicle that the couple had observed in front of the house drove away. Defendant was taken into custody after a foot chase through the neighborhood. Defendant did not stop attempting to run away until he was tasered. Defendant had in his possession a necklace belonging to a resident of the house that was burglarized. A camera belonging to the resident was found on the ground near where defendant was taken into custody. The woman who drove the vehicle away from the house testified that defendant was one of the three men who had broken into the house.

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

On January 18, 2011, the People filed an amended information charging defendant with first degree burglary, receiving stolen property, and misdemeanor resisting arrest. The People also alleged defendant had suffered a prior prison term (§ 667.5, subd. (b)), and had both a serious felony prior and a strike prior (§§ 667, subd. (a), 667, subds. (c)-(e)(1) & 1170.12, subds. (c)(1).)

On May 9, 2011, a jury found defendant guilty on all three counts.

On July 14, 2011, the trial court found each of the alleged priors to be true and sentenced defendant to nine years as follows: the low term of two years for the burglary, doubled as a second strike, plus five years for the serious felony prior. The trial court stayed the sentence for receiving stolen property pursuant to section 654, imposed 180 concurrent days in jail for the resisting arrest, and imposed but then struck the one year enhancement for the prior prison term. The court awarded defendant 259 days of actual credit plus 128 days of conduct credit under section 4019, for a total of 387 days of pre-sentence custody credit. This appeal followed.

DISCUSSION

1. Section 4019 and Equal Protection

Defendant argues his presentence custody credits should be calculated under the more generous, one-for-one² version of section 4019 that became effective October 1, 2011, despite the statute's express language (at subd. (h)) that it applies only to

² The legislation (enacted at Stats. 2011-2012, 1st Ex.Sess., c. 12 (A.B. 17)) also provides that the one-for-one credits are available to defendants, like defendant in this case, who have a prior serious felony conviction or a "strike" conviction.

defendants who committed their current crimes on or after October 1, 2011. This is because, defendant contends, failing to apply the changes retroactively would violate his constitutional right to equal protection of the laws (U.S. Const., 14th Amend., Cal. Const., art. I, § 7).

“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.’” (*People v. Brown* (2012) 54 Cal.4th 314, 328 (*Brown*), citing *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

In support of his argument, defendant relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), and urges that we ignore or distinguish *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*). We disagree, as explained below.

Kapperman held that an express prospective limitation upon the statute creating presentence custody credits was a violation of equal protection because there was no legitimate purpose to be served by excluding those already sentenced. (*Kapperman*, *supra*, 11 Cal.3d at pp. 544-545.) However, *Kapperman* addressed actual custody credits under section 2900.5, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

Section 4019's primary purpose is to motivate good conduct. (*People v. Brown* (2004) 33 Cal.4th 382 at p. 405; *People v. Dieck* (2009) 46 Cal.4th 934, 939.) As our Supreme Court recently explained when it examined a prior amendment to section 4019 (that also increased conduct credits)³ for Equal Protection violations, prisoners who commit their crimes before and after this most recent amendment to section 4019 took effect are not similarly situated because they could not have changed their behavior in response to the changes. (See *Brown, supra*, 54 Cal.4th 314, 328-329.) Accordingly, because defendant is not similarly situated with prisoners who commit their crimes on or after October 1, 2011, the prospective application of section 4019 does not violate his right to equal protection of the laws.

Further, given our Supreme Court's explicit approval of prospective-only increases in and availability of conduct credits under section 4019, we are able to neither ignore nor distinguish *Strick, supra*, 148 Cal.App.3d 906, as defendant urges.

We also note that this conclusion that this most recent amendment to section 4019 does not violate equal protection is in accord with two recent decisions from other appellate courts, *People v. Ellis* (2012) 207 Cal.App.4th 1546 and *People v. Kennedy* (2012) 209 Cal.App.4th 385.

³ “For eight months during 2010, a now superseded version of section 4019 that was enacted during a state fiscal emergency temporarily increased the rate at which local prisoners could earn conduct credits.” (*Brown, supra*, 54 Cal.4th at pp. 317-318, fn. omitted.)

2. *Correcting the Abstract of Judgment*

Defendant contends, the People concede, and this court agrees, that the following changes should be made to the abstract of judgment to accurately reflect the trial court's judgment and sentence. First, the prior prison term enhancement pursuant to section 667.5, subdivision (b), should be deleted from the abstract of judgment because it was first imposed but then stricken by the trial court, and the Abstract of Judgment form itself directs "DO NOT LIST ANY STRICKEN ENHANCEMENTS." Second, section 14 of the abstract of judgment indicates defendant received 128 days of presentence conduct credit under section 2933.1. This should be changed to correctly reflect that defendant received these credits under section 4019. This court has the authority to order the abstract of judgment corrected to conform to the trial court's oral pronouncement of judgment. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386.)

DISPOSITION

The superior court clerk is directed to correct the abstract of judgment as follows: 1) delete from section 3 the reference to the section 667.5, subdivision (b) enhancement; and 2) change section 14 to reflect that defendant received the presentence custody credits under section 4019. The clerk is further directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. (§§ 1213 & 1216.) In all other respects the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.