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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.

SAEED TARIK JOHNSON,

Defendant and Appellant.

E054901

(Super.Ct.Nos. INF057967,
INF058786 & INF062665)

OPINION

APPEAL from the Superior Court of Riverside County. Victoria E. Cameron,
Judge. Affirmed.

Richard L. Schwartzberg, 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, Peter Quon, Jr. and Susan Miller,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from three orders of the trial court correcting previous orders
awarding credit for time defendant served in jail, plus credit under Penal Code section

4019¹ based on that time, against his three-year commitment to Patton State Hospital pursuant to Penal Code section 1368 et seq. We reject defendant's contention that the former orders were erroneous and affirm them.

PROCEEDINGS BELOW AND DISCUSSION

In case number INF057967, defendant was charged with petty theft after having suffered a conviction for petty theft with theft prior (Pen. Code, §§ 490.5 & 666). He pled guilty. In case number INF058786, defendant was charged with petty theft with a theft prior (§§ 484 & 666). He also pled guilty. In case number INF062665, defendant was charged with possessing cocaine (Health & Saf. Code, § 11350, subd. (a)). He pled guilty. After violating probation in all three cases at various times, and while awaiting trial in yet another set of violations of probation in all three cases, criminal proceedings were suspended in all three cases, defendant was found to be incompetent to stand trial and he was committed to Patton State Hospital on June 3, 2009. At the time of his commitment, the trial court awarded defendant credit toward his commitment to Patton in each case based on calculations provided as to defendant's actual jail time, plus section 4019 credits.² As the trial court correctly noted, each of the three charges carried a maximum term of three years. On October 4, 2011, the day before defendant's

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

² Each case had a different amount of actual time and section 4019 credits, contrary to defendant's assertion that the trial court awarded credits of 288 days, based on 192 actual days and 96 days of section 4019 credits. This was true as to case number INF062665, but not as to the other two.

commitment to Patton on case number INF057967 was set to expire, given the credits awarded at the time of commitment,³ defendant moved to have that case against him dismissed and to be released. The People opposed this, asserting that under this court's decision in *People v. Reynolds* (2011) 196 Cal.App.4th 801 (*Reynolds*) [Fourth Dist., Div. Two], defendant was not entitled to have his jail time plus section 4019 credits used to reduce the three-year commitment period under section 1370. The trial court agreed with the People that the previous order, crediting defendant's actual time in jail, plus his section 4019 credits for that time, against his three-year commitment to Patton in all three cases was in error and the court removed them and returned defendant to Patton. Defendant appealed from the trial court's order removing the award of credit for actual jail time and section 4019 credits in all three cases. We concluded that the trial court did not err in removing these credits.

Section 1370, subdivision (c)(1) provides, in pertinent part, "At the end of three years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for the most serious offense charged in the information . . . , whichever is shorter, a defendant who has not recovered mental competence shall be returned to the committing court."

³ The credits for this case were the lowest of the three cases. Defense counsel below represented to the trial court that she had been informed by the forensic technician at Patton that the October 5, 2011 release date was based on defendant being credited only for his actual jail time in case number INF057967, which was 162 days, and not his section 4019 credits for this time, which were 80 days. This is incorrect. The October 5, 2011 release date includes the section 4019 credits, as there is a difference of 242 days between October 5, 2011 and June 3, 2012. Defendant agrees with our interpretation of the record.

Two decisions from this court govern this case, *In re Banks* (1979) 88 Cal.App.3d 864 (*Banks*) [Fourth Dist., Div. Two] and *Reynolds*.

In *Banks*, the defendant was charged with a misdemeanor for which the maximum sentence was six months. (*Banks, supra*, 88 Cal.App.3d at pp. 866-867.) He had served over 60 days in jail, during which time he was found guilty of the charged offense and he was awaiting the sanity phase of his trial when he was committed to a state mental hospital under section 1368 et seq. (*Id.* at p. 866.) After he had been in the state mental hospital for such period that when added to his jail time equaled six months, he filed a petition for writ of habeas corpus to be released from the hospital. (*Ibid.*) This court agreed with the People that the period of commitment for purposes of the limit provided in section 1370 began not when defendant entered jail, but when he entered the state hospital. (*Id.* at p. 867) The second issue in the case was whether defendant was entitled to be credited against this six month state hospital commitment period for the time he had spent in jail. (*Ibid.*) This court concluded he was because if he was denied this credit, he would spend more total time confined in both jail and the hospital than someone charged with the same offense, who spent the same time in the hospital, but spent no time in jail because he had bailed himself out, which violated equal protection and due process. (*Ibid.*) This court noted that once the period of confinement to a state hospital ends under the provisions of section 1370, the criminal cases of most defendants are dismissed under section 1385, “[t]hus for all practical purposes[,] the expiration of the incompetency commitment is the end of the criminal proceeding.” (*Id.* at p. 869, fn. 2.) This court also noted that if the defendant recovered his competency and was sentenced for his

misdemeanor conviction, any sentence he received would be reduced by the time he spent in jail and in the hospital, therefore, he “became immune from post-sentence confinement” when he had been in both jail and the hospital for a total of six months, even though his six months in the hospital was not yet up. (*Id.* at p. 870.) This court concluded that, in this case,⁴ the state had no interest in continuing a criminal case against this defendant, who had acquired immunity to post-sentence punishment due to his time in jail and the hospital. (*Ibid.*)

Thus, this court covered both the contingency that the defendant would not be restored to competency, in which case it would violate equal protection and due process to not credit him for his jail time, and the contingency that the defendant would be restored to competency, in which case the state would have no legitimate interest in continuing to prosecute him beyond the maximum term for his offense because he was, at that point, immune to post-sentence punishment.

In *Reynolds*, the defendant had been charged with, inter alia, a crime whose maximum term was eight years. (*Reynolds, supra*, 196 Cal.App.4th at p. 805; section 451, subd. (b).) After spending about eight months in jail, he was declared incompetent and committed to Patton State Hospital, where he remained for almost 14 months. (*Id.* at p. 805.) After defendant spent almost another year in jail, he was again declared

⁴ This court allowed that in other cases, the state may have such an interest, for example, when the current offense serves as an enhancement for a later committed offense or when the current offense would require defendant to register as a sex offender or serve as the basis for revoking the defendant’s driver’s license or to prohibit the defendant from possessing a gun. (*Id.* at p. 870.) However, none of those situations applied to Banks.

incompetent and committed to Patton, over his objection that he had already spent longer than the three-year period provided by section 1370 at Patton, if he was credited under both section 2900.5 and 4019 for his time in jail. (*Ibid.*) We rejected his contention that he was entitled to these credits under *Banks*, reasoning, “[T]he *Banks* court concluded that . . . ‘principles of equal protection and due process mandate . . . credit’ [for precommitment custody.] [Citation.] *This was consistent with the legislative purpose of enacting . . . [the] section [governing the award of credit for presentence jail time] ‘to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts.’* [Citation.] [¶] . . . [¶] The instant case is distinguishable from *Banks* in that defendant’s maximum commitment term is not measured by his *maximum potential criminal sentence* of *nine years four months*,⁵ which is far in excess of the alternative three-year maximum for commitment under section 1370. . . . [¶] . . . The equal protection rationale relied on in *Banks* . . . is inapplicable here where the maximum competency term is the three-year limit, rather than the alternative limit based on the defendant’s maximum sentence term. . . . [¶] Unlike in *Banks*, . . . disregarding custody credits does not result in any disparity between commitment by those capable of posting bond and those incapable of doing so because of indigency, since a defendant’s commitment term is not based on the length of the defendant’s potential criminal

⁵ This is based not on the maximum potential sentence for the greatest offense charged, i.e., in that case, arson, but on the maximum potential sentence for *both* charged offenses, i.e., eight years for arson plus a consecutive one-third of the mid-term for assault on a firefighter.

sentence. Indigent defendants are not required to spend more time in [total] confinement than their wealthier counterparts since indigent defendants' custody credits would remain applicable to their criminal sentences in the event of rehabilitation. [¶] . . . [Where] *the sentence is longer than the maximum three-year commitment period, defendant's time in custody . . . [is] the same as that of a defendant who has posted bail and has no precommitment custody credits.* This is because defendant is entitled to apply his precommitment credits against his custody time serving his . . . sentence, if rehabilitated, tried and convicted. We thus conclude that nonapplication of precommitment custody credits to defendant's three-year commitment does not violate his equal protection rights." (*Id.* at p. 808-809, italics added.)

The holding in *Banks* and the holding in *Reynolds* can be reconciled in this case as follows: For a defendant whose competency is restored, if the potential *total* sentence he or she is facing is long enough to give him or her a benefit for any time spent in jail by having that time credited towards his or her sentence, then equal protection and due process principles do not require that the commitment to the state hospital be reduced by those credits, as they will be rewarded when defendant is finally sentenced, thus equalizing his standing with a similar defendant who avoided jail time by posting bail. For a defendant whose competency is not restored, the equal protection/due process compulsion to award credits does not exist because equality is necessary only in terms of the sentence imposed. Just as with a defendant who is eventually acquitted of a crime, but who served jail time and is therefore disadvantaged when compared with an acquitted counterpart who posted bail and served no jail time, a person whose competency is not

restored will have served jail time without any credit because the purpose of credits is actually to equalize sentences, not commitments to restore sanity.

Here, defendant faced a maximum sentence of four years and four months.⁶ Even in case number INF058786, for which the trial court had awarded credits for 307 actual days, and 152 days of section 4019 credits, for a total of 459 days, the three-year commitment plus this time would not exceed defendant's projected maximum sentence. Therefore, defendant would benefit from his jail time by being awarded credits for it when he was eventually sentenced, should his competency be restored. If it was not, under *Reynolds*, there would be no violation of due process or equal protection for him to not derive a benefit from his jail time.

Finally, we observe that, according to the record and defendant's representation to this and the trial court, his commitment to Patton was set to expire on June 3, 2012. Since we are past that date, and we presume that defendant is no longer being held at Patton pursuant to his commitment, the matter is actually moot. Defendant concedes this point in this reply brief, and informs us that, in fact, he has reached the end of his confinement at Patton and is "presently subject to a temporary conservatorship order which was signed on April 30, 2012." Although this matter is not part of the record

⁶ This is based on a three-year maximum term for any one of the charged offenses, combined with a consecutive one-third of the mid-term sentence for each of the two remaining charged offenses. We reject defendant's assertion that section 669's provision that when a court fails to determine how the imposition of terms on second or subsequent judgments will run, they are deemed to run concurrently should be applied to deem the total possible sentence here to be three years (the maximum term for one offense with the terms for the other two being run concurrently). Certainly, this court in *Reynolds* did not follow this rationale.

before us, we will accept defendant's representation. Defendant goes on to assert that despite the mooted nature of the case, "[t]he substantive issue remains whether th[is] court should . . . reconsider its decision in . . . *Reynolds*[" Defendant goes on to assert that in his opening brief, he "explained why the reasoning employed by the court in . . . *Banks* . . . should have been followed by this court in *Reynolds*." Actually, we find no such argument in defendant's opening brief or any criticism whatsoever of *Reynolds*. Rather, in his opening brief, defendant asserted that "[t]he [trial] court misread *Reynolds* which dealt with an entirely different issue than is presented here." Therein, defendant asserted that this case should be governed by *Banks* rather than *Reynolds* because here the longest potential term for the greatest offense with which defendant had been charged did not exceed the three-year period provided in section 1370, and in *Reynolds* it did.⁷ Defendant offers us no reason in either of his briefs to overturn *Reynolds*. Therefore, we decline the invitation in his reply brief to "reconsider" it.

⁷ In fact, defendant acknowledges that *Reynolds*'s total potential term, not just the greatest potential term for the most serious offense, exceeded the three-year period.

DISPOSITION

The orders of the trial court are affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.