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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.

EDGAR NUNEZ,

Defendant and Appellant.

E055034

(Super.Ct.Nos. INF10000212 &
INF1101571)

OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos,
Judge. Affirmed with directions.

Ron Boyer, 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, Melissa Mandel, and Meredith S.
White, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A. *Case No. INF10000212 (Case 1)*

On February 3, 2010, an information charged defendant and appellant Edgar Nunez with one count of possessing a controlled substance for sale, methamphetamine, under Health and Safety Code section 11378 (count 1); and possessing paraphernalia used for unlawfully injecting and smoking a controlled substance under Health and Safety Code section 11364 (count 2). With regard to count 1, the information further alleged that defendant possessed for sale a substance containing 28.5 grams or more of methamphetamine and 57 grams or more of a substance containing methamphetamine, within the meaning of Penal Code section 1203.073, subdivision (b)(2).

On June 4, 2010, defendant pled guilty to all counts.

The same day, defendant was sentenced to state prison for a total term of two years. The court selected count 1 as the principal count and imposed the middle term of two years. On count 2, the court imposed 180 days to run concurrent to count 1. The court suspended execution of the sentence and placed defendant on supervised probation for three years with 365 days in local custody. Defendant was awarded credit for time served for 16 actual days plus 16 days under Penal Code section 4019, for a total of 32 days credit.

B. Case No. INF1101571 (Case 2)

On August 10, 2011, an amended information charged defendant with one count of possessing a controlled substance for sale, methamphetamine, under Health and Safety Code section 11378 (count 1). With regard to this count, the information alleged that defendant was previously convicted of a felony violation of section 11378 of the Health and Safety Code, within the meaning of Health and Safety Code section 11370.2, subdivision (c). The information also alleged that defendant had one or more prior convictions for violating the Health and Safety Code, within the meaning of Penal Code section 1203.07, subdivision (a)(11).

On October 24, 2011, defendant pled guilty as charged and admitted the prior conviction enhancements.

C. Sentencing in Both Cases

1. *Case 1*

On October 24, 2011, because of defendant's guilty plea in Case 2, the court found defendant to be in violation of probation in Case 1 and executed the sentence of two years to be served in Riverside County jail and run concurrent with the sentence in Case 2. For the probation violation, defendant was awarded credit for time served of 292 actual days plus 163 days under Penal Code section 4019, for a total of 455 days credit. Counsel objected to this calculation; it was overruled.

2. Case 2

The court sentenced defendant to custody for a total term of five years, to be served at Riverside County jail under Penal Code section 1170, subdivision (h), and to run concurrent to the sentence in Case 1. The court imposed the middle term of two years on count 1, and three years to run consecutive for the enhancement. The court executed the two-year term for count 1, but suspended execution of the three-year term granting supervised release under Penal Code section 1170, subdivision (h)(5).

Therefore, defendant must serve two years in county jail on both cases, then complete his sentence on Case 2 with three years of supervised release.

In Case 2, defendant was awarded credit for time served of 109 actual days, plus 54 days under Penal Code section 4019, for a total of 163 days credit. Counsel objected to this calculation; it was overruled.

On November 16, 2011, defendant filed a notice of appeal in both cases. On appeal, defendant claims that the trial court erred in calculating his Penal Code section 4019 conduct credits. For the reasons set forth below, we modify defendant's conduct credits. Moreover, the People claim that the trial court miscalculated defendant's actual custody credit in Case 1. We affirm the trial court's award of custody credit in Case 1.

II.

STATEMENT OF FACTS

On January 5, 2010, defendant was searched by officers who found a glass pipe normally used to smoke methamphetamine, which contained burnt residue, and 5.1 ounces of methamphetamine.

On April 28, 2011, officers found 10.5 grams of methamphetamine, packaging, and a scale during a search of defendant's residence.

III.

ANALYSIS

Defendant contends that the trial court erred in calculating his Penal Code section 4019¹ conduct credits. Moreover, the People contend that the court erred in calculating the actual custody credit in Case 1.

A. Background

In Case 1, defendant was arrested on January 5, 2010. Defendant was released on his own recognizance on January 21, 2010; he spent 16 actual days in custody. Defendant did not serve any additional custody in this case prior to sentencing. On June 4, 2010, the court imposed a two-year sentence but stayed its execution on the condition that defendant be placed on formal probation and serve 365 days in county jail. Defendant was awarded 16 actual credits and 16 conduct credits, for a total of 32 credits.

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

Thereafter, defendant was remanded to the custody of the sheriff's department to serve the 365 days in jail. Defendant's custody credits were applied to his 365 days or ordered custody. Hence, defendant was to serve 333 days.

At the final sentencing hearing on October 24, 2011, defendant was given 292 actual credits and 163 conduct credits in Case 1.

In Case 2, defendant was arrested again on April 28, 2011. This was a violation of the probation terms of Case 1. It appears from the record that defendant was released after serving seven days of custody.² On July 15, 2011, after defendant was arraigned, he was remanded to the custody of the sheriff. He remained there until he was sentenced in both cases on October 24, 2011. Defendant was in custody for 102 actual days. In Case 2, defendant received 109 actual days in custody and 54 conduct credits.

B. Amendments to Section 4019

In October of 2009, the Legislature passed Senate Bill No. 18 (SB 18). Among other things, SB 18 revised the accrual rate for conduct credits under section 4019, effective January 25, 2010. Under the old version of section 4019, defendants earned two days of conduct credit for every four actual days served in local custody. Under SB 18, certain defendants were eligible to earn two days of conduct credit for every two days of actual custody.

² Defendant received a total of 109 actual days of custody in Case 2. From July 15, 2011, to October 24, 2011, defendant earned 102 of those credits. Therefore, it appears that he must have earned the additional seven credits when he was first arrested in Case 2. There is nothing in the record providing the exact dates that defendant was in custody.

In September of 2010, the Legislature amended section 4019 again in Senate Bill No. 76 (SB 76). SB 76 restored the old version of section 4019. Under SB 76, defendants serving presentence custody time were eligible for conduct credits at a rate of two days for every four days of actual custody time. (§ 4019, subd. (f).) SB 76 also added subdivision (g), which made the new decreased credits applicable only to defendants who committed crimes on or after the statute's effective date, September 28, 2010. (§ 4019, subd. (g).) Therefore, the change to section 4019 was explicitly prospective. SB 76 also added section 2933, subdivision (e)(1), which stated:

“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”

New subdivision (e)(2) to section 2933 reincorporated the same behavioral standards from section 4019. Effectively, the Legislature granted the beneficial credit accrual rate to any defendant ultimately sentenced to prison. Defendants sentenced to local custody, however, were only eligible for the section 4019 credits, and could not earn the more beneficial credits under section 2933, subdivision (e)(1).

In October of 2011, sections 4019 and 2933 were amended again. (See Stats. 2011, ch. 15, § 1 [Assem. Bill No. 109]; hereafter referred to as Realignment.) The Governor signed Assembly Bill No. 109 in April of 2011. Generally, Assembly Bill No.

109 shifted responsibility for both housing and supervising certain felons from the state to individual counties. With regards to the portions of the legislation that are relevant to his case, Realignment amended hundreds of felony offenses, including the offenses for which defendant was convicted, to be punishable by imprisonment in the county jail under section 1170, subdivision (h), instead of imprisonment in state prison. As a result, felons who were eligible to be sentenced under Realignment will serve their terms of imprisonment in local custody instead of state prison. (§ 1170, subd. (h)(3).)

With respect to custody credits, Realignment changed the accrual rate of section 4019 credits again. Defendants can now earn two days of credit for every two days served in custody. (§ 4019, subd. (f).) Section 2933, subdivision (e), was deleted. The new credits in section 4019 are expressly available only to defendants who committed their crimes after October 1, 2011. (§ 4019, subd. (h).) The Legislature also amended subdivision (g), to clarify that the changes made to section 4019 under SB 76 still apply to defendants committed to custody for “a crime committed on or after the effective date of that act,” which was September 28, 2010. (§ 4019, subd. (g).) Finally, section 4019, subdivision (h), states, in part: “Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.”

During the briefing stages of this case, the California Supreme Court decided *People v. Brown* (2012) 54 Cal.4th 314. *Brown* held that amendments to section 4019, which took effect in January 2010, operated prospectively, and thus applied to prisoners who served their presentence time after the amendment took effect. (*Brown, supra*, 54

Cal.4th at p. 323.) In reaching this conclusion, the *Brown* court expressly found that applying section 4019 prospectively did not violate equal protection. The court reasoned that prisoners who serve time before and after a conduct credit statute takes effect are not similarly situated because “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.” (*Brown*, at pp. 328-329.)

C. Actual Days in Custody in Case 1

The trial court found that defendant had served 292 days in actual custody on Case 1. The People contend that the trial court erred in awarding 109 days of the 292 days, because defendant served the 109 days concurrently for both Case 1 and Case 2. The People argue that the 109 days should have been awarded for days in actual custody *only* in Case 2. We disagree.

In this case, there is no dispute as to *when* defendant was in custody. As the People note, and defendant agrees, that defendant served a year as a condition of probation on Case 1.

“The version of section 4019 in effect for the duration of appellant’s post-sentence local custody time awarded two days of conduct credit for every two days of actual credit. Accordingly, when he was released from local custody, appellant should have had 365 days of credit comprised of half actual days, and half conduct credits. This would put appellant’s actual credits around 183 days.”

Moreover, there is no dispute as to the number of days that defendant was in custody after the filing of the complaint in Case 2 and petition to revoke probation on July 7, 2011.

“It seems the trial court (relying on the probation department recommendation) added appellant’s actual credits from Case 1 (183) to his presentence actual credits from Case 2 (109), and arrived at 292 actual credits.”

Defendant agrees that he spent 102 days in custody in both Case 1 and Case 2, which he served concurrently, after the filing of Case 2.³

The People, however, argue that the court erred in awarding, to Case 1 as well as to Case 2, the 109 days of actual credit that had been served after the filing of the complaint and petition to revoke probation. The People argue that credit is inappropriate on both cases because defendant served concurrent terms. The rule, however, is whether “the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” (§ 2900.5, subd. (b).)

Where probation has been revoked for exactly the same conduct that forms the basis of a new charge, then credit on both the new case and the case in which probation has been revoked is appropriate. (*People v. Johnson* (2007) 150 Cal.App.4th 1467, 1485.) For this rule to apply, the prisoner must be held on both the probation revocation and on the new case. (*People v. Pruitt* (2008) 161 Cal.App.4th 637, 642, 644, 648, 649,

³ As provided previously, defendant served 102 actual days concurrently for Case 1 and Case 2. The court awarded 109 days in Case 2 because he must have earned the seven credits when he was first arrested in Case 2.

citing *People v. Huff* (1990) 223 Cal.App.3d 1100, 1104, and *People v. Williams* (1992) 10 Cal.App.4th 827, 834.) Here, defendant was held on both Case 1 and Case 2 for the *same* conduct. Therefore, under section 2900.5, subdivision (b), the trial court properly awarded presentence actual custody credit for 109 days in both cases.

Notwithstanding, the People contend that “[b]ecause the time appellant spent in custody on Case 2 (109 days) was attributable to the second offense, and he received concurrent terms, those actual credits should not be counted on Case 1. California sentencing law applies a merger rule to *consecutive* sentences, but not to *concurrent* sentences.” In support, the People cite to *In re Reeves* (2005) 35 Cal.4th 765, *People v. Nunez* (2008) 167 Cal.App.4th 761, and *In re Rojas* (1979) 23 Cal.3d 152; the cases, however, do not apply.

Reeves addressed whether section 2933.1, subdivision (a) (limiting conduct credits to 15 percent for a person convicted of a violent felony), applied to a nonviolent felony when a prisoner was serving sentences on both a violent and a nonviolent felony. (*In re Reeves, supra*, 35 Cal.4th at p. 768.) The Supreme Court held that the limitation applies to a sentence for a nonviolent felony that is being served concurrently to a sentence for a violent felony, but only until the sentence on the violent felony was complete. (*Id.* at p. 780.) After that time, on the balance of the sentence on the nonviolent felony, the prisoner was no longer subject to that 15 percent limit on conduct credits. (*Id.* at pp. 780-781.) *Reeves* dealt with section 2933.1, not section 2900.5. *Reeves* does not apply because defendant does not make an argument that he should accrue credits at different

rates and that the sentences on his two cases are “merged,” as they would be for a consecutive sentence. *Reeves* does not support the People’s contention.

Similarly, *People v. Nunez* is also inapplicable because it too did not address whether the defendant in that case should have received presentence credit when held simultaneously on a probation violation and a new charge. Instead, *Nunez* addressed whether, when held simultaneously on a probation violation on a violent felony and on a new nonviolent offense, the presentence credits on both cases would be subject to the 15 percent limit in section 2933.1, subdivision (c). (*People v. Nunez, supra*, 167 Cal.App.4th at pp. 764-765.) Nothing in *Nunez* supports the People’s argument here.

Furthermore, the People’s reliance on *In re Rojas, supra*, 23 Cal.3d 152, is misplaced. In *Rojas*, the Supreme Court held that section 2900.5 applies to the award of presentence credit “‘only where’ custody is related to the ‘same conduct for which the defendant has been convicted.’” (*Rojas*, at p. 155.) The court did not award credits in *Rojas* because “the defendant was simultaneously serving a prison term for a prior *unrelated* offense.” (*Id.* at p. 154, emphasis added.) In this case, there is no dispute that the revocation of probation in Case 1 was for exactly the same conduct as the basis of the charge in Case 2. Moreover, defendant was held in custody in both Case 1 and Case 2 from July 15, 2011. On July 15, 2011, the court minutes show, as follows as to both Case 1 and Case 2: “Remanded to Custody of Riverside Sheriff.”

The period of time from July 15, 2011, until the sentencing date of October 24, 2011, represents a period of 102 days. The court awarded credits for a period of 109 days

actual custody.⁴ Under section 2900.5, subdivision (b) and *People v. Johnson, supra*, 150 Cal.App.4th 1467, the court properly awarded 109 days actual custody credit in both Case 1 and Case 2. Therefore, defendant's actual custody credit of 292 days is affirmed.

D. Conduct Credits Under People v. Brown in Case 1

Although both parties agree that defendant is entitled to day-for-day credits under section 4019, defendant's conduct credits must be recalculated under *People v. Brown, supra*, 54 Cal.4th 314. In *Brown*, the Supreme Court held that the amendment to section 4019 effective January 25, 2010, does not apply to days served in custody prior to that date. (*Brown*, at p. 322.) The court held "that prisoners whose custody overlapped the statute's operative date (Jan. 25, 2010) earned credit at two different rates." (*Ibid.*) And, because prisoners serving time prior to January 25, 2010, are not similarly situated with prisoners serving time after that date, the court rejected an equal protection challenge to the differential treatment of persons serving time prior to January 25, 2010. (*Ibid.*)

In Case 1, defendant was arrested on January 5, 2010, and was found at his sentencing on June 4, 2010, to have served 16 actual days in custody; these days were served prior to January 25, 2010. Those days of actual custody were prior to January 25, 2010, because defendant had been released on his own recognizance by January 21, 2010. Defendant remained out of custody until he was remanded on June 4, 2010.

Under *People v. Brown, supra*, 54 Cal.4th 314, the credits on 16 days of actual custody should be calculated under the version of section 4019 effective prior to January

⁴ See footnotes 2 and 3, *ante*.

25, 2010. Under that law, on 16 days, defendant would receive two days of conduct credit for every four actual days served in custody. Therefore, defendant would receive eight days of conduct credit.

For the days of custody after January 25, 2010, defendant would receive day-for-day credit. Subtracting the 16 days from the total of 292 days of actual custody, the balance is 276 days in actual custody subject to the post-January 25, 2010, rule.

Accordingly, defendant's judgment should be modified to reflect (1) 16 days of actual custody and eight days of conduct credit for days served prior to January 25, 2010; and (2) 276 days of actual custody and 276 days of conduct credit for the days served after January 25, 2010, for a total of 576 days.

E. Conduct Credits Under People v. Brown in Case 2

As provided in detail above, defendant was arrested on April 28, 2011 in Case 2. He was sentenced on October 24, 2011. The trial court awarded defendant 109 actual days in custody and 54 conduct credits. Defendant contends that he is entitled to additional conduct credits under section 4019. The People agree.

As discussed above, Realignment shifted responsibility for both housing and supervising certain felons from the state to individual counties. As a result, felons, like defendant, who are eligible to be sentenced under Realignment, will serve their terms of imprisonment in local custody, instead of state prison. Under the credits provision in effect at the time defendant committed his crime, defendant would have been entitled to both section 4019 credits (at a rate of two for four) and section 2933, subdivision (e)(1)

credits (bringing the total conduct credits up to a day for a day) because he received a prison sentence and does not appear to have a disqualifying prior conviction. However, because of Realignment, defendant was sentenced to a “prison” sentence, but to be served in county jail. Denying defendant the section 2933, subdivision (e)(1) credits that he otherwise would receive would violate ex post facto principles.

Section 4019, subdivision (h), states, in part: “Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” Moreover, denial of the credits would violate the constitutional prohibition against ex post facto laws. In *Weaver v. Graham* (1981) 450 U.S. 24, the United States Supreme Court found Florida’s application of a change in its conduct credit provisions was an unconstitutional ex post facto law because it effectively “chang[ed] the legal consequences of acts completed before its effective date.” (*Id.* at p. 31.)

In this case, the application of Realignment to defendant effectively altered the consequences of his actions completed prior to the change in the law. The change in the law meant that defendant was housed in a local custody facility instead of prison. Had defendant gone to prison, he would have been entitled to the additional credits under section 2933. Accordingly, under *Weaver v. Graham, supra*, 450 U.S. 24, defendant is entitled to an additional 55 days of conduct credit. The judgment in Case 2 should be modified to award a total of 218 credits (109 actual and 109 conduct).

IV.

DISPOSITION

In case No. INF10000212, the trial court is directed to correct the minute order dated October 24, 2011, to reflect an aggregate award of 576 days (consisting of 16 days of actual custody and eight days of conduct credit for days served prior to January 25, 2010; and 276 days of actual custody and 276 days of conduct credit for days served after January 25, 2010). Moreover, in case No. INF1101571, the trial court is directed to correct the minute order dated October 24, 2011, to reflect an aggregate award of 218 days (consisting of 109 days of actual custody and 109 days of conduct credit). The trial court is directed to deliver certified copies of the corrected minute orders and abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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MCKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.