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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.

DEANDRE LAMONT DERRITT,

Defendant and Appellant.

E055035

(Super.Ct.No. FWV903128)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

John F. Schuck, 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, and Annie Featherman Fraser and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Deandre Lamont Derritt pled no contest to a single felony charge of possessing methamphetamine, and admitted five prior strikes and two prison priors. The trial court denied his motion to withdraw the plea, and sentenced him to eight years in prison. Defendant appealed, and the trial court issued a certificate of probable cause.¹ Defendant claims the trial court abused its discretion in denying his motion to withdraw the plea and in refusing his request for advisory counsel while he was representing himself in the matter. He also claims he was erroneously denied additional presentence custody credits. We reject these claims and affirm the judgment.

II. BACKGROUND

A. *The Methamphetamine Possession Conviction*²

On January 25, 2009, Officers Eric Rivera and Alex Canchola were dispatched to a motel room in Montclair in response to a domestic violence report. Officer Rivera heard a man and woman arguing inside the room. The male voice was “escalated,” and the female’s voice was “low pitch.” Officer Rivera knocked on the door. Moments later, the door opened 8 to 10 inches.

¹ *People v. Johnson* (2009) 47 Cal.4th 668, 679 (“A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea . . .”).

² The facts described in this section are taken from the testimony given at the preliminary hearing on the methamphetamine possession charge. The parties agreed that the preliminary hearing transcript set forth a sufficient factual basis for the no contest plea.

Through the door opening, Officer Canchola saw a woman, later identified as Ms. Haras, lying on the bed. At the same time, he heard footsteps walking from the door to the back of the room. After defendant came into view in the back of the room, Officer Canchola ordered him to show his hands.

Defendant came to the door and stepped outside of the room. Haras appeared frightened and had tears on her face. She told Officer Rivera there had not been any physical contact between herself and defendant, and gave the officer her written consent to search the room. Officer Canchola went into the room to check on Haras while Officer Rivera stayed outside with defendant.

Upon entering the room, Officer Canchola saw a plastic baggie containing a crystalline substance near the foot of the bed.³ He also found a metal vial containing a crystalline substance on the top shelf of the kitchen area of the room.⁴ Haras told Officer Canchola that the vial belonged to defendant, but she said nothing about the baggie at the foot of the bed.

Analysis by the San Bernardino County crime lab showed that the baggie contained a net weight of .09 grams of methamphetamine, and the vial contained .28 grams of methamphetamine.

³ Due to the small size of the room, a person would have to walk by the bed in order to enter or exit the room.

⁴ Officer Canchola, who was six feet two inches tall, was able to reach the vial on the top shelf of the kitchen area. Defendant was also over six feet tall. The vial would not have been readily accessible to Haras, who was under five and one-half feet tall.

B. *The Charges*

On December 23, 2009, a complaint was filed charging defendant with one count of possessing a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 1), and false personation (Pen. Code, § 529, count 2).⁵ Two prior “strike” convictions and four prison priors were also alleged. On December 30, the court denied defendant’s *Marsden*⁶ motion to replace his appointed counsel, Attorney Nicole Wirick.

On January 8, 2010, defendant filed a motion to suppress evidence seized in the January 23, 2009, search of the Montclair motel room. (§ 1538.5.) An amended suppression motion was filed on January 12.

On January 26, defendant’s second *Marsden* motion to replace Attorney Wirick was denied, and the court considered the suppression motion in conjunction with the preliminary hearing. The suppression motion was denied, and defendant was held to answer on the methamphetamine possession charge. An original and first amended information were filed on January 29 and February 5, 2010, respectively.

On February 5, 2010, the court denied defendant’s third *Marsden* motion to replace Attorney Wirick, and also denied defendant’s request for self-representation with cocounsel. Then, on February 24, the public defender’s office declared a conflict and Attorney Wirick was relieved. On February 26, defendant appeared in court, represented

⁵ All further statutory references are to the Penal Code unless otherwise indicated.

⁶ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

by Attorney James Brown. On March 25, 2010, the operative second amended information was filed alleging the possession charge, five prior strike convictions, and five prison priors.

C. The Plea Agreement and Cruz⁷ Waiver

On March 29, 2010, defendant executed a plea form. Represented by Attorney Brown, defendant pled no contest to the possession charge and admitted the five prior strike convictions and prior prison terms. The parties agreed that the preliminary examination transcript provided a sufficient factual basis for the plea. In entering the plea, defendant waived his constitutional rights to a jury trial, to present a defense, and to confront witnesses. Pursuant to a *Cruz* waiver, the trial court released defendant on his own recognizance and ordered him to return for sentencing on May 28, 2010.

As part of the plea agreement, the parties and court agreed that upon defendant's return to court with no new offenses, the felony possession conviction would be reduced to a misdemeanor (§ 17, subd. (b)), and defendant would be sentenced to one year in jail. The prosecutor agreed that the possession conviction did not amount to "the crime of the century," particularly in view of its circumstances of the case, namely, that defendant did not possess the methamphetamine in a public place, and the small amount of drugs involved.

The plea agreement included a "*Cruz* waiver," providing that if defendant did not return to court for sentencing on May 28, 2010, or committed any new crimes before that

⁷ *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

date, he faced a prison sentence of at least 25 years to life. The court retained discretion to grant a *Romero*⁸ motion if defendant violated the *Cruz* waiver. The court repeatedly and clearly admonished defendant of the sentence he would be facing if he violated the *Cruz* waiver.

D. *The Cruz Waiver Violation*

On the evening of May 3, 2010, Officers Ramiro Martinez and Natalie Kopperud were dispatched to East Holt Boulevard in Ontario in response to a call from a woman, Sherri Dean, who claimed a man was harassing her. Dean told Officer Kopperud that she had been followed by a man who threatened her, told her he had just gotten out of jail, and lifted his shirt to show her a handgun in his waistband. Dean described the man as African-American, approximately six feet five inches tall and wearing a black jacket and black boots. The man was in a white, four-door sedan.

No person matching Dean's description was found in the area, and the officers left after escorting Dean back to her motel room. Approximately one hour later, the officers were dispatched back to the area in response to a second call from Dean claiming the suspect was harassing her again. This time they were unable to locate Dean.

Meanwhile, a white four-door sedan drove into the motel parking lot and parked in a space directly across from Dean's motel room. Defendant was seated in the front passenger seat, and an older African-American male was driving the car. Defendant's

⁸ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

seat was completely reclined back, and he was reaching between his legs toward the front passenger floorboard.

Officer Kopperud ordered defendant to show his hands. Defendant initially complied, but then put his hands back between his legs toward the floorboard. He appeared nervous and demanded to know why the officers were talking to him and his friend.

Officer Kopperud again ordered defendant to raise his hands, and Officer Martinez asked defendant and the driver to get out of the car. Defendant complied. He was wearing black boots, and a black jacket was found wadded up on the front passenger floorboard.⁹

Officer Kopperud conducted a patdown search of defendant. When asked whether he had anything sharp on him, defendant said: ““Wait. I have a box cutter, razor blade, in my pocket.”” No weapons or contraband were found on defendant’s person, but Officer Martinez found a box cutter and a broken methamphetamine pipe in the black jacket inside the car.

Directly under the seat where defendant was observed reaching toward the floorboard, Officer Martinez found a loaded revolver wrapped inside a sock. The gun was registered to defendant’s mother. While being advised of his constitutional rights, defendant said something to the effect of: ““If they’re going to charge me with this gun, I’m going to do life.””

⁹ Officer Martinez recalled the jacket lying on the front passenger seat.

E. *The Motion to Withdraw the Plea and Sentencing*

On May 28, 2010, defendant was in custody following his May 3 arrest in Ontario, and as a result failed to appear in court for sentencing on his possession conviction.

Attorney Brown was present.

On June 8, 2010, Attorney Brown was relieved as defendant's counsel, and on June 15 defendant appeared in court with Attorney Gina Kershaw. On June 24, the court denied defendant's *Marsden* motion to relieve Attorney Kershaw. Then, on August 13, Attorney Kershaw declared a conflict and was relieved as defendant's counsel.

On August 18, 2010, defendant appeared in court with Attorney C. Daniel Faulhaber, and on September 10, 2010, Attorney Faulhaber filed a motion to withdraw the no contest plea. Also on September 10, defendant filed a *Marsden* motion to relieve Attorney Faulhaber.

As he had done with Attorneys Brown and Kershaw, defendant filed a complaint with the State Bar regarding Attorney Faulhaber. As a result of defendant's State Bar complaint against Attorney Faulhaber, the court found that defendant had "establish[ed] another conflict with counsel," and relieved Attorney Faulhaber. The court instructed defendant not to report any other attorney to the State Bar until the case was concluded. On September 20, the court granted defendant's *Faretta*¹⁰ motion to represent himself.¹¹

¹⁰ *Faretta v. California* (1975) 422 U.S. 806.

¹¹ Defendant's section 170.1 and various "for cause" challenges to Judge Harrison were denied and stricken on September 20 and November 19, 2010.

While representing himself, defendant filed several motions, including a motion to appoint advisory counsel and a motion to withdraw his pro. per. status. On December 23, 2010, the court denied these motions. On February 9, 2011, defendant appeared in court represented by retained counsel, Attorney Houman Fakhimi, and the motion to withdraw the no contest plea, filed by Attorney Faulhaber, was withdrawn.

On June 23, 2011, Attorney Fakhimi filed another motion to withdraw defendant's no contest plea. The prosecution filed opposition. An amended plea withdrawal motion was filed on August 5, and on August 19 the motion was denied. Also on August 19 the court denied defendant's *Marsden* motion to relieve Attorney Fakhimi.

On September 30, 2011, Attorney Eric Davis replaced Attorney Fakhimi. On that date, the court conducted a hearing and determined that defendant violated the terms of his plea agreement, specifically, the terms of the *Cruz* waiver and release by possessing a loaded firearm in Ontario on May 6, 2010. Defendant was referred to the probation department.

Defendant filed a *Romero* motion and the prosecution filed an opposition. On October 14, the trial court partially granted the *Romero* motion by dismissing all but one of defendant's five prior strike convictions. The two prison priors that defendant admitted were not stricken.

At sentencing on November 21, 2011, defendant was sentenced to eight years in prison—the upper term of three years, doubled to six years, plus two years for the two prison priors. Defendant received 1,026 days of presentence custody credits. Defendant

filed a notice of appeal, and the trial court issued a certificate of probable cause, authorizing defendant to challenge his plea agreement on appeal.

III. DISCUSSION

A. *Defendant's Motion to Withdraw His No Contest Plea Was Properly Denied*

Defendant claims the trial court abused its discretion in denying his motion to withdraw his no contest plea to the possession charge, along with admissions of the prior strikes and prison priors. He claims he showed good cause to withdraw the plea because his prior counsel “failed to properly and adequately investigate” the case, and as a result he entered into the plea agreement based on ignorance or mistake of fact.¹² (§ 1018.) We find no abuse of discretion in the trial court’s denial of the motion.

1. Legal Principles

Under the federal and state Constitutions, a guilty plea must be based on the defendant’s awareness of the relevant circumstances of the crime and the likely consequences of entering the plea. (*United States v. Ruiz* (2002) 536 U.S. 622, 629 [“the Constitution insists . . . that the defendant enter a guilty plea . . . with sufficient awareness of the relevant circumstances and likely consequences”]; *People v. Lamb* (1999) 76 Cal.App.4th 664, 674 [“To be valid, a guilty plea must be based upon a defendant’s full awareness of the relevant circumstances”].)

¹² Defendant concedes that, in entering the no contest plea, he knowingly and intelligently waived his constitutional rights to a jury, to testify, confront witnesses, present witnesses, and to the assistance of counsel at trial.

Under California law, a plea of no contest to a felony charge has the same effect as a guilty plea. (See § 1016, cl. (3).) Section 1018 states, in part: “On application of the defendant at any time before judgment . . . , the court may . . . , for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.”

The defendant has the burden of showing good cause to withdraw the plea by clear and convincing evidence. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.) Good cause is shown if the defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress. (*Id.* at p. 1416.) “The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake.” (*Ibid.*) Thus, “[a] plea may not be withdrawn simply because the defendant has changed his [or her] mind.” (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456 [Fourth Dist., Div. Two].)

Defense counsel have a duty to render effective assistance of counsel in advising a defendant to enter into a plea agreement. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1133.) More specifically: “Defense counsel have the obligation to investigate all defenses, explore the factual bases for defenses [citation] and the applicable law. [Citation.]’ [Citation.] ‘The defendant can be expected to rely on counsel’s independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial. [Citations.]’ [Citation.] [¶] The entry of a plea must be a “voluntary

and intelligent choice among the alternative courses of action open to the defendant.”

[Citations.]’ [Citation.] The voluntariness of a plea depends on ‘whether counsel’s advice “was within the range of competence demanded of attorneys in criminal cases.” [Citation.]’ [Citation.]” (*Ibid.*)

We will not disturb a trial court’s denial of a motion to withdraw a plea unless a clear abuse of discretion is shown. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) “Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.” (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) In ruling on a motion to withdraw a plea, the trial court judges the credibility of witnesses and affiants, and resolves factual conflicts. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.) In determining the relevant facts, the court is not bound by the defendant’s uncontradicted statements. (*People v. Hunt, supra*, at p. 103.)

2. Analysis

In his amended motion to withdraw his plea and at the hearing on the motion, defendant claimed he accepted the no contest plea based on ignorance or mistake of fact due to the ineffective assistance of his counsel, Attorney Brown, and for this reason he demonstrated good cause to withdraw the plea. Essentially, he claimed that Attorney Brown failed to adequately investigate the case, and as a result he accepted the plea

without full awareness of its likely consequences, including the probable favorable outcome of a trial on the possession charge.¹³

More specifically, defendant claimed that Attorney Brown failed to consider that Haras did not in fact consent to the officers' search of the motel room, and later recanted her statement to the officers that the methamphetamine in the metal vial belonged to defendant. He also claimed counsel has raised a reasonable doubt that the substances seized from the motel room were not the same substances that were tested in the laboratory, given that there were discrepancies in the weights of items as recorded by the officers and as recorded by the crime laboratory.

As the People point out, these claims are contradicted by the officers' testimony at the preliminary hearing on the possession charge. According to the officers, Haras gave her written consent to search the motel room, told the officers that the metal vial containing the white substance belonged to defendant, and also stated that defendant had been in possession of the vial throughout the day. In addition, Officer Rivera testified to the chain of custody of the vial and the baggie seized from the motel room, contradicting defendant's theory that the substances in the vial and baggie were switched in the crime lab. Based on the officers' preliminary hearing testimony, the court could have reasonably resolved these disputed factual issues against defendant, and disregarded

¹³ Attorney Brown did not join in defendant's "plea to the sheet," including the *Cruz* waiver. Instead, he was willing to join in the plea if defendant agreed to be sentenced to one year in county jail *and remained in custody*, that is, if defendant agreed to serve the one-year jail sentence without being released, risking his violation of the *Cruz* waiver and exposure to a life prison sentence.

defendant's unsupported claims to the contrary. (*People v. Hunt, supra*, 174 Cal.App.3d at p. 103.)

Defendant also points out that when he accepted the plea agreement on March 29, 2011, Attorney Brown told the court he had only been appointed three weeks earlier, and had since been unable to contact Haras. Defendant complains that Attorney Brown was unaware on March 29 that Haras pled guilty to possessing the methamphetamine in the room, and that shortly thereafter Haras allegedly stated "that all the dope was hers," contradicting her earlier statement that at least some of the methamphetamine belonged to defendant.

In other words, defendant claims he accepted the plea without knowing that Haras recanted her statement that at least some of the drugs in the room belonged to defendant, and its impact on the prosecution's case. The record does not support this claim. In court on March 29, 2010, just before defendant accepted the plea agreement, Attorney Brown told the court he had been unable to locate Haras since his appointment three weeks earlier, and defendant was refusing to waive his speedy trial right so that the defense could locate Haras. Defendant expressly acknowledged he did not wish to "waive any time" to locate Haras. Thus, the record unequivocally shows that defendant accepted the plea agreement, fully aware that Haras had allegedly stated "that all the dope was hers."¹⁴

¹⁴ The prosecutor mentioned Haras's alleged inconsistent statement during the March 29, 2010, proceedings after the court asked him what evidence "[tied defendant] to the contraband," and before defendant accepted the plea agreement. As the court and prosecutor agreed, Haras's alleged statement that "all the dope was hers" was inadmissible hearsay if she did not testify, and was of questionable credibility in any

[footnote continued on next page]

Defendant also claims he entered into the plea agreement unaware that there were significant discrepancies between the weights of the substances as recorded by Officer Rivera and as later recorded by the crime laboratory. To be sure, at the hearing on the motion to withdraw the plea, the prosecutor indicated that the report from the crime laboratory was not available when defendant accepted the plea. Still, the prosecutor pointed out that such weight discrepancies were not unusual in controlled substance cases, and in this case the discrepancies could be explained by the weights of the packages in which the substances were found. The trial court agreed, and in denying the motion concluded that neither the discrepancies in the weights of the items tested nor the possibility that Haras recanted her statement that the drugs belonged to her would have made a difference in the outcome of the case.¹⁵

[footnote continued from previous page]

event given her earlier statement that the drugs belonged to defendant. Finally, at the August 19, 2011, hearing on the motion to withdraw the plea, defendant's then counsel, Attorney Fakhimi, acknowledged that he had been unable to locate any files or records indicating that Haras actually made the inconsistent statement. The prosecutor said he had given defendant "full discovery" at least two or three times.

¹⁵ In denying the motion, the court also said: "The motion . . . talks about the defendant's right to withdraw a plea if sentencing is anything other than the agreement, and that is not applicable in this case because there was clearly appropriate advisals and *Cruz* waiver, admonitions given at length in this case. [¶] [Defendant], had he lived up to the terms of his part of the plea bargain, would have been sentenced to a year in county [jail]. It was a felony that he pled to. The sentencing ultimately would have been misdemeanor-type sentencing, would have had the legal effect [of] reducing the matter to a misdemeanor. [¶] However, [defendant] did not live up to the terms and conditions in the matter. . . ."

In sum, substantial evidence shows that defendant accepted the plea agreement with full awareness of Haras's alleged inconsistent statement, and that defendant would have accepted the plea agreement even if he had known of the weight discrepancies in the items tested at the time he entered the plea. (*People v. Breslin, supra*, 205 Cal.App.4th at p. 1416 [“The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake.”].)

Indeed, the record shows that defendant developed a case of “buyer’s remorse” for entering into the plea agreement following his violation of the *Cruz* waiver, and none of his claims of ignorance of fact would have made any difference in his willingness to accept the plea agreement on March 29, 2011. The plea agreement was very favorable to defendant in that it required the court to sentence him to one year in local custody on the possession charge, and it spared defendant the risk of being sentenced to at least 25 years to life in prison if he were convicted of the charge following a jury trial, and the prior strike and prison prior allegations were found true.

Substantial evidence also shows that defendant was anxious to be released from custody when he accepted the plea on March 29, 2011, and for this reason he was unconcerned with further investigating or debating the strength of the prosecution’s possession case on March 29. Over one year earlier, on February 5, 2010, the court denied defendant’s request to be released on his own recognizance so that he could visit with and assist his mother, who was ill and lived in Colton. Then, on March 29, 2011, he accepted the plea agreement, along with its *Cruz* waiver, despite the court’s unequivocal

admonishment to him of the risk it entailed. Even though defendant maintained his innocence on March 29 and complained that Attorney Brown had not adequately communicated with him, he acknowledged he had had enough time to discuss the case with Attorney Brown, including “potential defenses, penalties, punishments, and future consequences.” Thus here, defendant has not demonstrated that the trial court clearly abused its discretion in denying his motion to withdraw the plea. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1254.)

Finally, defendant points out that, ““the withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty.” [Citations.]” (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1507.) Here, however, it is not in the least evident that defendant accepted the no contest plea based on any ignorance or mistake of fact. (§ 1018.)

B. Defendant’s Request for Appointment of Advisory Counsel Was Properly Denied

Defendant represented himself from September 20, 2010, through January 28, 2011. On December 2, 2010, he filed a motion asking the court to appoint advisory counsel to assist him in withdrawing his no contest plea, and on December 23 the court denied the motion. Defendant claims the judgment must be reversed because the trial

court abused its discretion and violated his federal and state due process rights in refusing to appoint advisory counsel. We disagree.

A defendant who has waived his or her right to be represented by counsel and competently elects to represent himself or herself, as defendant did here, has no Sixth Amendment right to the appointment of advisory counsel, or any other form of “hybrid” representation. (*People v. Goodwillie* (2007) 147 Cal.App.4th 695, 710-712.) Instead, the appointment of advisory counsel for a self-represented defendant is a discretionary matter for the trial court. (*Id.* at p. 710, citing *People v. Mattson* (1959) 51 Cal.2d 777, 795.) The court may appoint advisory counsel as part of its inherent power to control the proceedings and to “promote orderly, prompt and just disposition of the cause.” (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.)

In denying defendant’s request for advisory counsel, the court told defendant it believed he was making the request solely to delay the proceedings. The court said: “I’m not appointing advisory counsel because you’re not entitled to one. If you’re representing yourself, you’re not entitled to advisory counsel, and the Court is not going to appoint—I’m not appointing an investigator because you haven’t given me reasons that I accept that one is necessary for your motion to withdraw a plea. [¶] Your motion to have counsel appointed now, I feel, after this lengthy discussion this morning and we’ve been on the record a long time is merely designed to gain delay, and the Court’s denying your request.”

Defendant argues that the judgment must be reversed because the court abused its discretion in denying his request for advisory counsel to assist him in preparing his motion to withdraw the plea. Defendant is mistaken, simply because he has no right to complain on appeal that the court abused its discretion in failing to appoint advisory counsel to assist him for any reason while he continued to represent himself. (*People v. James* (2011) 202 Cal.App.4th 323, 339, citing *People v. Garcia, supra*, 78 Cal.App.4th at pp. 1428-1431.)

As explained in *People v. Garcia, supra*, 78 Cal.App.4th at pages 1428 to 1431, a trial court has the option to appoint advisory counsel in a noncapital case, but its ruling is not subject to appellate review. In other words, the court *cannot* abuse its discretion or commit reversible error in refusing to appoint advisory counsel in a noncapital case. A contrary rule would eviscerate the rule that a defendant who chooses to represent himself cannot later complain that the quality of his defense amounted to a denial of the effective assistance of counsel. (*Ibid.*, citing *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 & *Faretta v. California, supra*, 422 U.S. at pp. 834-835, fn. 46; cf. *People v. Bigelow* (1984) 37 Cal.3d 731, 743-746 [failure to exercise discretion to appoint advisory counsel in capital case requires reversal when the refusal to grant the request would be an abuse of discretion].)

C. *Defendant is Not Entitled to Additional Presentence Custody Credits (§ 4019)*

At sentencing on November 21, 2011, defendant was awarded one day of conduct credit for every two days he served in local custody (342 conduct plus 684 actual equals 1,026 total presentence custody credits).

Effective October 1, 2011, section 4019 was amended to provide that persons serving time in local custody for an offense committed on or after October 1, 2011, shall receive *four days* of custody credit for every *two days* of actual custody. (§ 4019, subds. (f), (g).) Because the methamphetamine possession offense was committed on January 25, 2009, or before October 1, 2011, defendant was ineligible to receive additional conduct credits under the current version of section 4019.

Defendant claims that the October 1, 2011, amendments to section 4019 (the 2011 amendments) must be retroactively applied to his case on equal protection grounds.¹⁶ In order to succeed on an equal protection claim, defendant must first show that the state has adopted a classification scheme that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) For purposes of the equal protection clause, we do not inquire “whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law

¹⁶ The state Supreme Court has granted review in two appellate court cases which have addressed this same equal protection claim defendant raises here, *People v. Borg* (2012) 204 Cal.App.4th 1528, review granted July 18, 2012, S202328 and *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted August 8, 2012, S203298. An opinion is no longer considered published if the Supreme Court grants review (Cal. Rules of Court, rule 8.1105(e)(1)) and may not be relied on or cited (Cal. Rules of Court, rule 8.1115(a)).

challenged.”” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, quoting *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1438.)

Even if we were to agree that defendant was similarly situated to other defendants who committed their crimes after October 1, 2011, when, as here, the statutory distinction in question neither “touch[es] upon fundamental interests” nor is based on gender, there is no equal protection violation “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1200; *People v. Wilkinson* (2004) 33 Cal.4th 821, 838 [the rational basis test applies to equal protection challenges based on sentencing disparities]; *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [same].)

The 2011 amendments were enacted as part of the legislation addressing the state’s fiscal emergency, by effectuating an earlier release of persons committing offenses on or after October 1, 2011, thus relieving the state of the cost of their continued incarceration and also alleviating overcrowding in county jails. (See Stats. 2011, ch. 12, § 35, pp. 5976-5977; Stats 2011, ch. 15, § 482, pp. 497-498.)

We perceive a legitimate legislative purpose for limiting the extension of additional conduct credits to persons in local custody for crimes committed on or after October 1, 2011, but not before. In short, the Legislature could have determined that the nature and scope of the state’s fiscal emergency required granting additional conduct credits only to persons in local custody for crimes committed on or after October 1, 2011, but not before, in order to strike a balance between the state’s fiscal and jail-

overcrowding problems, on the one hand, and public safety concerns, on the other. Thus, a rational basis exists for the prospective-only application of the 2011 amendments to section 4019, and the prospective-only application of the 2011 amendments does not violate equal protection principles.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RICHLI
Acting P. J.

MILLER
J.