

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTY ANNETTE GARDUNO,

Defendant and Appellant.

E055360

(Super.Ct.No. FSB1102517)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest,  
Judge. Affirmed.

Neil Auwarter, 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.

Defendant and appellant Christy Annette Garduno challenges her sentence following a guilty plea. She contends that the October 1, 2011 amendment to Penal Code section 4019,<sup>1</sup> which increased the rate at which presentence conduct credits accrue, violates equal protection principles unless it is applied retroactively. As we will discuss, this issue has been resolved by the California Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314.

### BACKGROUND<sup>2</sup>

On August 31, 2011, defendant pleaded guilty to one count of attempted robbery (§ 211/664) and one count of active participation in a criminal street gang (§ 186.22, subd. (a)) for an agreed-upon sentence of three years eight months. Pursuant to a *Vargas*<sup>3</sup> waiver, execution of the sentence was stayed until October 7, 2011, with the agreement that if defendant appeared on that date and had not violated any additional laws in the interim, the court would recall the sentence and sentence defendant instead to two years.

Defendant failed to appear on October 7. She was brought into custody later that month. On October 21, 2011, the court imposed the original sentence. The court

---

<sup>1</sup> All statutory citations refer to the Penal Code.

<sup>2</sup> Because of the limited nature of the sole issue on appeal, we omit any discussion of the facts underlying the conviction.

<sup>3</sup> *People v. Vargas* (1990) 223 Cal.App.3d 1170.

credited defendant with 99 days of presentence custody and 48 days of conduct credit pursuant to section 4019.

Defendant filed a timely notice of appeal from the sentence. (Her request for a certificate of probable cause to challenge other aspects of her conviction was denied.) After filing the notice of appeal, defendant filed a motion in the trial court seeking additional conduct credits for the entire period of her presentence confinement, the dates of which are not specified, but which largely predate October 1, 2011, the operative date of the current version of section 4019. The motion was denied.

### LEGAL ANALYSIS

#### PROSPECTIVE APPLICATION OF SECTION 4019 DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

A defendant is entitled to actual custody credit for “all days of custody” in county jail and residential treatment facilities, including partial days. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for performing assigned labor (§ 4019, subd. (b)), and for complying with applicable rules and regulations of the local facility (§ 4019, subd. (c)). These presentence credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939.)

Section 4019 has been amended multiple times. Before January 25, 2010, defendants were entitled to one-for-two conduct credits, which is two days for every four days of actual time served in presentence custody. (Former § 4019, subd. (f), as amended

by Stats. 1982, ch. 1234, § 7, pp. 4553, 4554.) Effective January 25, 2010, the Legislature amended section 4019 to provide that prisoners, with some exceptions, earned one-for-one conduct credits, which is two days of conduct credit for every two days in custody. (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.) Effective September 28, 2010, the Legislature again amended section 4019. (Stats. 2010, ch. 426, §§ 1, 2, 5.) Subdivisions (b) and (g) restored the one-for-two presentence conduct credit calculation that had been in effect prior to the January 25, 2010, amendment.

Most recently, the Legislature amended section 4019 to provide for up to two days credit for each four-day period of confinement in local custody. (§ 4019, subs. (b) & (c).) This scheme reflects the Legislature’s intent that if all days are earned under section 4019, a term of four days will be deemed to have been served for every two days spent in actual custody. (§ 4019, subd. (f).) This version of section 4019 became operative on October 1, 2011. (Stats. 2011, ch. 39, § 53.)

Although numerous appeals have been filed contending that section 4019’s current scheme for calculating conduct credits is intended to apply retroactively, i.e., to prisoners awaiting sentencing for crimes committed before the operative date,<sup>4</sup> defendant acknowledges that the statute’s language is prospective only. She contends only that

---

<sup>4</sup> The bone of contention in the prospective/retroactive controversy is section 4019, subdivision (h), which provides:

“The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.”

prospective application would result in impermissible disparate treatment of “similarly situated current prison inmates simply based on the dates of their offenses.” We disagree.

In *People v. Brown, supra*, 54 Cal.4th 314 (*Brown*), the California Supreme Court addressed contentions that the version of section 4019 effective on January 25, 2010, must be held to apply retroactively, in part because prospective application would violate the equal protection clauses of the state and federal Constitutions. The court stated:<sup>5</sup>

“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.” [Citation.] [¶] “. . . [T]he 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. *That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.*” (*Brown, supra*, 54 Cal.4th at pp. 328–329, italics added.)

---

<sup>5</sup> The discussion of *Brown* which follows is excerpted, with minor alterations, from *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551-1552.

The court rejected the argument that its decision in *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) required a contrary conclusion. (*Brown, supra*, 54 Cal.4th at pp. 329–330.) The version of section 4019 at issue in *Sage* authorized presentence conduct credit for misdemeanants who later served their sentence in county jail, but not for felons who ultimately were sentenced to state prison. The *Sage* court found this unequal treatment violative of equal protection, as it found no “rational basis for, much less a compelling state interest in, denying presentence conduct credit to” felons. (*Sage*, at p. 508.)

*Brown* acknowledged that one practical effect of *Sage* “was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them.” (*Brown, supra*, 54 Cal.4th at p. 329.) Nevertheless, it declined to read *Sage* in such a way as to foreclose a conclusion “that prisoners serving time before and after incentives are announced are not similarly situated.” (*Brown*, at p. 330.) *Brown* explained: “The unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion [citation] went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds.” (*Brown*, at p. 330.)

Finally, *Brown* rejected the notion the case before it was controlled by *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), the case on which defendant relies in

this case. In *Kapperman*, the court held that equal protection required retroactive application of a statute granting credit to felons for time served in local custody before sentencing and commitment to state prison, despite the fact that the statute was expressly prospective. (*Brown, supra*, 54 Cal.4th at p. 330.) *Brown* found *Kapperman* distinguishable: “Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated.” (*Brown, supra*, at p. 330.)

In *People v. Ellis, supra*, 207 Cal.App.4th 1546, the court found *Brown*’s equal protection reasoning applicable to the current version of section 4019.<sup>6</sup> (*People v. Ellis, supra*, at p. 1552.) We agree with that court’s analysis. Accordingly, we reject

---

<sup>6</sup> In *People v. Lara* (2012) 54 Cal.4th 896, the California Supreme Court noted in a footnote that the same equal protection analysis applies to the current version of section 4019. (*People v. Lara, supra*, at p. 906, fn. 9.) This statement is dictum, in that no equal protection claim under the current version of section 4019 was raised in that case.

defendant's claim that she is entitled to additional conduct credits at the rate provided for by current section 4019.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.