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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.

RENE MUNGUIA,

Defendant and Appellant.

E056833

(Super.Ct.No. FVI1002525)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed as modified.

Marc Robert Lewis, 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 Donald W. Ostertag and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Rene Munguia appeals from his conviction of possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a)) following his plea of guilty. His sole contention on appeal is that he is entitled to additional custody credits under the current version of Penal Code section 4019.

## II. FACTS AND PROCEDURAL BACKGROUND

Methamphetamine was found in defendant's apartment on October 27, 2010, and defendant admitted it belonged to him.

Under a plea agreement, defendant entered a plea of guilty on January 7, 2011, to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and admitted a prior strike (Pen. Code, §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)); three prison priors (Pen. Code, § 667.5, subd. (b)) were stricken. Defendant was sentenced to the low term of 16 months, doubled for the strike. The trial court awarded him 61 days of actual credit plus 30 days of conduct credit.

On June 26, 2012, defendant filed a motion to correct the abstract of judgment to have his custody credits increased under an amendment to Penal Code section 4019. The trial court denied the motion.

## III. DISCUSSION

When defendant was sentenced on January 7, 2011, he was properly credited with one day of conduct credit for every two days of actual custody under the then-current versions of the controlling statutes. (Pen. Code, former § 2933, subd. (e)(3), section 4019, subd. (f).) Effective October 1, 2011, statutory amendments (Stats. 2011, ch. 15,

§ 482, eff. Apr. 4, 2011, Stats. 2011, ch. 39, § 53, and Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 35.) provided that defendants convicted of nonviolent crimes committed on or after October 1, 2011, would receive two days of conduct credits for every two days of actual custody. (Pen. Code, § 4019, subds. (f), (h).) Defendant argues that equal protection principles require that he receive additional credits under the amendments. By its express terms, however, the amended statute applies only to defendants whose crimes were committed on or after October 1, 2011. (Pen. Code, § 4019, subd. (h).)

In *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), the California Supreme Court addressed contentions that the version of Penal Code section 4019 effective on January 25, 2010, must be applied retroactively, in part because prospective application would violate the equal protection clauses of the state and federal Constitutions. The court stated that because “[t]he concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally,” “[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, first italics in original, second italics added.)*

The *Brown* 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 Penal Code 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 violated equal protection, as it found no “rational basis for, much less a compelling state interest in, denying presentence conduct credit to” felons. (*Sage, supra, at p. 508.*)

The *Brown* court 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, the court 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, supra, at p. 330.*) The court 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, supra, at p. 330.*)

Defendant relies primarily on *In re Kapperman* (1974) 11 Cal.3d 542, in which our Supreme 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, even though the statute, by its express terms, was prospective. (*Id.* at p. 545.) The *Brown* court found *Kapperman* distinguishable. The court explained, “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*, 54 Cal.4th at p. 330.)

Recent appellate court decisions have applied the principles expressed in *Brown* to the current version of Penal Code section 4019 (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53-56; *People v. Verba* (2012) 210 Cal.App.4th 991, 994-997; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-399; *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1549-1553). We agree with those courts, and we reject defendant’s claim that he is entitled to additional conduct credits at the rate provided for by current Penal Code section 4019.

### **Abstract of Judgment**

On our own motion, we note that the minute order for the sentencing hearing and the abstract of judgment reflect that defendant’s conduct credits were awarded under Penal Code section 2933.1, which applies only to persons convicted of violent felonies and limits conduct credits to 15 percent of actual time in presentence confinement. By its

terms, the statute does not apply to defendant, who was convicted of possession of methamphetamine. We will order the minute order and abstract of judgment to be amended accordingly.

IV. DISPOSITION

The trial court is directed to prepare a new minute order for the sentencing hearing and an amended abstract of judgment deleting the reference to Penal Code section 2933.1 and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.