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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST DIXON, JR.,

Defendant and Appellant.

F061858

(Super. Ct. No. BF131596A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Raymond L. Brosterhous II, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J. and Detjen, J.

On April 29, 2010, an information was filed in Kern County Superior Court, charging defendant Ernest Dixon, Jr., with petty theft with multiple theft-related prior convictions (Pen. Code,¹ § 666; count 1) and second degree burglary (§ 460, subd. (b); count 2). It was further alleged defendant was previously convicted of first degree burglary (§ 460, subd. (a)), which constituted a serious or violent felony for purposes of the “Three Strikes” law (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and that he previously served five separate prison terms (§ 667.5, subd. (b)). On June 24, 2010, following a jury trial, defendant was convicted as charged. After a court trial, the strike and four prior prison term allegations were found to be true.²

On February 3, 2011, the trial court refused to dismiss the prior strike conviction, and sentenced defendant to a total of 10 years in prison, calculated as six years (the upper term, doubled for the strike) on count 1, plus one year for each of the prior prison term enhancements.³ Defendant was ordered to pay various fees, fines, and assessments. He was awarded 308 days of actual credit, plus 154 days of conduct credit, for a total of 462 days. He now challenges his sentence in general, and the award of custody credits in particular. We affirm.

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

² As the prosecutor acknowledged, two of the prior prison term allegations referred to offenses for which defendant was convicted on the same date and under the same case number. The two offenses resulted in service of a single term in prison.

³ A six-year term was imposed but stayed (§ 654) on count 2.

The legislative and initiative versions of the Three Strikes law were both amended by voter initiative, effective November 7, 2012. As the amendments affect only those individuals with two or more prior serious and/or violent felony convictions (see §§ 667, subd. (e)(2)(A) & (C), 1170.12, subd. (c)(2)(A) & (C), 1170.126, subd. (a)), they do not impact defendant.

FACTS

At about 2:00 p.m. on April 2, 2010, Benny Cathay, a loss prevention agent for Rite Aid, was on duty when he observed defendant in the store. Defendant was carrying an empty blue shopping basket and acting like a normal customer, except he was walking a bit fast and had something white sticking out of his pocket. As Cathay watched, defendant proceeded through the store and put several toiletry items in the basket. Defendant then stood by the hair care aisle for a moment, looked toward the front door, waited, and then pulled the white item, which turned out to be an opaque plastic bag, from his pocket. He moved the items from the blue basket into the plastic bag, set the basket on the ground, and proceeded toward the store exit. He looked over the end of the aisle toward the cashiers, then walked toward the exit doors without paying for the items.

Cathay confronted defendant as defendant went past the first of two sets of doors. When Cathay identified himself, asked for the items back, and asked defendant to come back in the store for processing, defendant tried to hand the bag to Cathay, then dropped it at Cathay's feet, and ran through the second set of doors and out of the store. Cathay alerted Officer Verion Coleman, who caught up to defendant and arrested him about four blocks away. After defendant was advised of and waived his rights, he explained that he had run because Cathay was going to call the police. When Coleman asked if he shoplifted from the Rite Aid, defendant said he had seen some items he needed, so he took them. Defendant also said he had purchased candy earlier in the day, and that was how he had obtained the white bag. A search of defendant turned up a wallet but no money.

Cathay subsequently recovered the items in the bag, which never actually left the store. They had a total price of just over \$27.

DISCUSSION

I

VALIDITY OF SENTENCE

Defendant contends his 10-year sentence constituted an abuse of discretion, because it punished him for exercising his constitutional right to a jury trial. He asks that we vacate his sentence and remand the matter “for a sentence that reflects the [trial] court’s indicated sentence and that does not punish [defendant] more harshly because of his decision to exercise his constitutional rights.”

A. Procedural History

At the April 16, 2010, prepreliminary hearing, defendant rejected the prosecution’s offer of a plea to count 1, with a strike prior, and a midterm sentence of four years. Defendant’s deputy public defender countered with an offer of dismissal. At the conclusion of the preliminary hearing, defense counsel argued the evidence showed defendant had no intent to commit a felony upon entering the store; moreover, there was no evidence of asportation. Defendant was held to answer. At the June 11, 2010, trial confirmation hearing, defendant — now represented by a different deputy public defender — rejected an offer of six years.

On June 23, 2010, the matter was discussed in chambers when the case was assigned to the trial court.⁴ Defense counsel asked the court to deem the offense a misdemeanor pursuant to section 17. Because defendant was on parole for a first degree burglary conviction suffered in 2006 or 2007, however, the trial court stated it would not be inclined to dismiss the strike conviction. In light of the small loss involved in the current case, the court said the lowest offer it would indicate would be 32 months, which would be the low term on either count, doubled for the strike.

⁴ What occurred at this time was recreated by means of a settled statement of facts. Our summary in this regard is drawn from the proceedings undertaken to settle the record.

As set out *ante*, defendant went to trial and, on June 24, 2010, was convicted. On June 28, 2010, prior to the court trial on the prior conviction allegations, defendant claimed ineffective assistance of trial counsel based on counsel's failure to inform him of the elements of the charged crimes. As a result, and at defendant's request, a *Marsden*⁵ hearing was held. During that hearing, defendant claimed his attorney had never given him specific information on the instructions regarding the elements of the crime, particularly intent and "mindset," and he asked for a retrial or at least "to entertain the possibility of the original plea offer" In response to the court's inquiry, defense counsel related that, although she had no specific recollection, it was her practice and custom to tell her clients of the charges, and usually also to go through the police report. Asked if she also went over the elements of the charges, counsel responded, "I go through the charges, Your Honor. For this case, I probably said 'petty theft with a prior.' I don't know. I don't recall specifically whether or not I went into the specific details of the offense or the elements of the offense." Counsel conceded that she had showed defendant the jury instruction, setting out the specific elements of a petty theft charge, during jury selection. Defendant asserted that had he been aware of the intent element, he would have taken the plea agreement: He had the bag of items, showing intent, and whether he stayed in the store was irrelevant. The court denied the request to remove trial counsel.

After trial, the court relieved the public defender's office and appointed a member of the Indigent Defense Program (IDP) to represent defendant. The court directed the IDP attorney to determine if filing a motion for a retrial or for a new trial was appropriate.

⁵ *People v. Marsden* (1970) 2 Cal.3d 118.

After several continuances, defendant was sentenced on February 3, 2011.⁶ Citing no circumstances in mitigation and several circumstances in aggravation (defendant's prior convictions as an adult were numerous, defendant was on parole when the crimes were committed, and defendant's prior performances on probation and parole were unsatisfactory), the probation officer's report (RPO) recommended imposition of the upper base term, doubled for the prior strike, plus four years for the prior prison term enhancements, for a total of 10 years in prison. Defendant claimed to be a longtime drug addict, and requested drug court or, alternatively, for the court to dismiss his prison priors in order to lower his sentence to six years and make him eligible for California Rehabilitation Center (CRC) consideration. The prosecutor opposed the request. She argued defendant had numerous prior convictions, with this case being his eighth conviction for violating section 666; he had a total of 15 theft convictions, including one for residential burglary (a strike); he was on parole for that conviction when he committed the present offenses; and he had violated probation at least three times and parole at least eight times. She further argued that despite a record extending back to the 1980's, only two convictions were drug-related. In response, defendant asked the court to dismiss his prior strike conviction and some of his prison priors, to give him an opportunity for CRC. The prosecutor again opposed the request.

In light of defendant's lengthy record and the fact he was on parole when the present offenses were committed, the trial court declined to dismiss defendant's prior strike conviction. The court also found defendant's statements to the probation officer, and at the time of his arrest, to be inconsistent with his requests for treatment for drug problems or the notion a drug problem had anything to do with the present offenses. The court found no circumstances in mitigation and three in aggravation (those listed in the

⁶ At the outset of the hearing, defendant made another unsuccessful *Marsden* motion, this time challenging his IDP attorney's failure to bring a motion for a new trial.

RPO), and imposed the upper base term of six years, enhanced by four years pursuant to section 667.5, subdivision (b).

B. Analysis

Defendant now contends imposition of a 10-year prison term constituted an abuse of discretion because it punished him for exercising his constitutional right to a jury trial. The Attorney General says the issue was forfeited by defendant's failure to raise it at sentencing and, in any event, it finds no support in the record.

“The forfeiture doctrine is a ‘well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been — but were not — raised in the trial court. [Citation.]’ [Citations.] Strong policy reasons support this rule: ‘It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided. [Citations.]’ [Citation.]” (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) The forfeiture doctrine applies to sentencing. (See *People v. Scott* (1994) 9 Cal.4th 331, 353, 356.)

In *People v. Williams* (1998) 61 Cal.App.4th 649, the defendant claimed the trial court violated his due process rights, as set out in *North Carolina v. Pearce* (1969) 395 U.S. 711, 723-726, by imposing a greater sentence following remand than was originally imposed. The appellate court found the issue forfeited by the defendant's failure to object when the greater sentence was imposed. (*People v. Williams, supra*, at pp. 654-657.)

By parity of reasoning, we conclude defendant's claim has also been forfeited by his failure to object, on the ground now raised, when the trial court imposed the 10-year term. “““The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would

stand the test of an appeal.”” [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) If defendant here had objected, the trial court could have articulated the basis for the difference in sentences, and obviated any concern defendant was being punished for exercising his right to a jury trial.

Nevertheless, we proceed to the merits of the claim (see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; *People v. Williams, supra*, 61 Cal.App.4th at p. 657) and find no cause for reversal.

As the California Supreme Court has explained,

“It is well settled that to punish a person for exercising a constitutional right is ‘a due process violation of the most basic sort.’ [Citation.] The constitutional right to trial by jury in criminal prosecutions is fundamental to our system of justice [citations]; thus, we have stated that ‘only the most compelling reasons can justify any interference, however slight, with an accused’s prerogative to *personally* decide whether to stand trial or to waive his rights by pleading guilty.’ [Citation.] ‘A court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.’ [Citation.]

“... [T]he refusal of an accused to negotiate a plea with the prosecution must not influence the sentence imposed by the court after trial. Appellate courts in California and in other jurisdictions have vacated sentences when the trial court has apparently used its sentencing power, either more severely or more leniently than the norm, in order to expedite the resolution of criminal matters. [Citations.]” (*In re Lewallen* (1979) 23 Cal.3d 274, 278-279.)

Nothing in the record, other than the fact the sentence imposed exceeded the sentence mentioned by the court prior to trial and rejected by defendant, even arguably gives rise to an inference defendant was being penalized for exercising his right to a jury trial. (Contrast, e.g., *In re Lewallen, supra*, 23 Cal.3d at pp. 279-280 & cases cited; *People v. Morales* (1967) 252 Cal.App.2d 537, 542-544 & fn. 4.)⁷ “The mere fact, if it

⁷ Although the trial court and parties below, and defendant on appeal, refer to the sentence “indicated” by the trial court, this case does not involve a true “indicated

be a fact, that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights.” (*People v. Szeto* (1981) 29 Cal.3d 20, 35.) Indeed, “it is clear that under appropriate circumstances a defendant may receive a more severe sentence following trial than he would have received had he pleaded guilty; the trial itself may reveal more adverse information about him than was previously known.” (*In re Lewallen, supra*, 23 Cal.3d at p. 281.)

Here, the RPO revealed defendant had a much more extensive criminal record than was apparent from the information.⁸ In addition, although the trial court knew before trial that defendant was on parole at the time of the present offenses, the RPO revealed numerous past probation and parole violations. Thus, even assuming the same number and kind of aggravating factors were known to the trial court when it discussed imposing a 32-month term as were known to it at the time of sentencing, the RPO

sentence,” because dismissal of enhancement allegations was contemplated. In an indicated sentence, “a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No ‘bargaining’ is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]” (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516; accord, *People v. Feyrer* (2010) 48 Cal.4th 426, 434-435, fn. 6; see *People v. Superior Court (Felman)* (1976) 59 Cal.App.3d 270, 276.) Where an indicated sentence is concerned, the trial court informs the defendant what sentence it will impose “‘if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.’ [Citations.] An accused retains the right to reject the proposed sentence and go to trial. The sentencing court may withdraw from the ‘indicated sentence’ if the factual predicate thereof is disproved. [Citation.]” (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.)

We assume the prosecutor did not oppose the 32-month proposed sentence, so that the trial court validly could have approved a plea agreement resulting in that sentence had defendant accepted the proposal. In any event, our analysis is the same whether we consider defendant to have rejected a proposed plea bargain or an indicated sentence.

⁸ By our calculation, the information alleged a total of nine separate prior convictions. The RPO listed a minimum of 22 separate prior convictions.

furnished information rendering those factors qualitatively different than originally realized.

“Judicial tribunals, proceeding within their proper jurisdiction, are deemed to have acted rightly, impartially, and honestly [citation].” (*People v. Hood* (1956) 141 Cal.App.2d 585, 591.) Moreover, “[i]t is presumed that official duty has been regularly performed.” (Evid. Code, § 664.) “As an aspect of the presumption that judicial duty is properly performed, we presume ... that the court knows and applies the correct statutory and case law [citation] and is able ... to recognize those facts which properly may be considered in the judicial decisionmaking process. [Citations.]” (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) These rules apply to sentencing issues. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.)

“Generally, determination of the appropriate term is within the trial court’s broad discretion [citation] and must be affirmed unless there is a clear showing the sentence choice was arbitrary or irrational [citation]. ‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.’ [Citation.] One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation].” (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) “‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

The record before us contains nothing to rebut the presumption the trial court acted properly in sentencing defendant to 10 years in prison. Rather, the increased

sentence is readily explained by the information concerning defendant's past conduct that came to light after trial. Accordingly, we reject defendant's claim he was punished for exercising his constitutional right to a jury trial.⁹

II

CUSTODY CREDITS

Because defendant had a prior strike conviction, at both the time his current crimes were committed and the date he was sentenced, he was entitled to presentence custody credits in an amount such that six days were deemed to have been served for every four days he spent in actual custody. (§ 4019, former subds. (b)(2), (c)(2) & (f), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010; see also § 2933, former subd. (e), added by Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 38, eff. Jan. 25, 2010.) Defendant was awarded credits calculated by means of this formula.¹⁰

⁹ In *United States v. Stockwell* (9th Cir. 1973) 472 F.2d 1186, 1187-1188, the Ninth Circuit Court of Appeals held: “[O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. [Citation.]” *Stockwell* is distinguishable from the present case because there, the trial court decided before trial that the defendant would receive a harsher sentence if he did not plead guilty. (*Id.* at p. 1187.) To the extent *Stockwell* can be read as holding that imposition of a harsher sentence always creates a presumption the court punished the defendant for electing to go to trial, we disagree with the opinion.

¹⁰ Sections 2933 and 4019 were amended, effective September 28, 2010, with respect to crimes committed on or after that date. Under these versions of the statutes, a defendant with a prior conviction for a serious or violent felony was still entitled only to have six days deemed served for every four days spent in actual custody. (§§ 2933, former subd. (e)(1) & (3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010; 4019, former subd. (f), as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010, & subd. (g), added by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.)

After defendant was sentenced, but while his appeal was pending, the relevant statutes were amended. References to section 4019 and calculation of presentence credits were deleted from section 2933. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Subdivision (f) of section 4019 was amended to provide: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody.” (§ 4019, subd. (f), as amended by Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011, & Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011.) Thus, section 4019 now provides for day-for-day credits for all defendants — including those with prior strike convictions — who serve presentence time in county jail. The only exceptions are defendants with current violent felony or murder convictions. (§§ 2933.1, 2933.2; see *People v. Nunez* (2008) 167 Cal.App.4th 761, 765.)¹¹

Defendant now contends he is entitled to presentence custody credits calculated pursuant to current sections 2933 and 4019. As an initial matter, we do not believe we can properly make any determination with respect to calculation under section 2933 at this juncture. The California Department of Corrections and Rehabilitation (CDCR) is the entity charged with calculating a prisoner’s credit under that statute. (*In re Pope* (2010) 50 Cal.4th 777, 780, 781; see *People v. Brown* (2012) 54 Cal.4th 314, 321, fn. 8, 322-323, fn. 11 (*Brown*); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1441; *In re Tate* (2006) 135 Cal.App.4th 756, 759-760.) An assertion the CDCR violated former section 2933 by failing to award additional credits does not identify an error in the judgment on review; rather, “[s]uch a claim must logically be brought in a petition for

¹¹ Both the legislative and initiative versions of the Three Strikes law contain credit-limiting provisions. (§§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) These limits are “inapposite to precommitment credits, i.e., credits awarded prior to commitment to prison. [Citation.]” (*People v. Caceres* (1997) 52 Cal.App.4th 106, 110.)

habeas corpus against the official empowered to award such credits, namely the Director of the CDCR.” (*Brown, supra*, 54 Cal.4th at p. 323, fn. 11.) In any event, the parties implicitly assume an analysis with respect to section 2933 would be the same as an analysis with respect to section 4019. Accordingly, we confine our discussion to the latter statute.

Defendant recognizes the statutory changes from which he seeks to benefit expressly “apply prospectively and ... to prisoners who are confined to a county jail ... for a crime committed on or after October 1, 2011,” while “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).) He argues, however, that prospective-only application violates his right to equal protection under the federal and state Constitutions.

In *People v. Ellis* (2012) 207 Cal.App.4th 1546 (*Ellis*), we held the amendment to section 4019 that became operative October 1, 2011 (hereafter the October 1, 2011, amendment) applies only to eligible prisoners whose crimes were committed on or after that date, and such prospective-only application neither runs afoul of rules of statutory construction nor violates principles of equal protection. (*Ellis, supra*, at p. 1548.) In reaching that conclusion, we relied heavily on *Brown, supra*, 54 Cal.4th 314, in which the California Supreme Court held the amendment to section 4019 that became effective January 25, 2010 (hereafter the January 25, 2010, amendment) applied prospectively only. (*Brown, supra*, at p. 318; *Ellis, supra*, at p. 1550.)

Brown first examined rules of statutory construction. It observed that “[w]hether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent.” (*Brown, supra*, 54 Cal.4th at p. 319.) Where the Legislature’s intent is unclear, section 3 and cases construing its provisions require prospective-only application, unless it is ““very clear from extrinsic sources”” that the Legislature intended retroactive application. (*Brown, supra*, at p. 319.) The high court found no cause to

apply the January 25, 2010, amendment retroactively as a matter of statutory construction. (*Id.* at pp. 320-322.)

Brown also examined *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), which held that when the Legislature amends a statute to reduce punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. (*Brown, supra*, 54 Cal.4th at p. 323; *Estrada, supra*, at pp. 742-748.) *Brown* concluded *Estrada* did not apply; former section 4019, as amended effective January 25, 2010, did not alter the penalty for any particular crime. (*Brown, supra*, at pp. 323-325, 328.) Rather than addressing punishment for past criminal conduct, *Brown* explained, section 4019 “addresses *future conduct* in a custodial setting by providing increased incentives for good behavior.” (*Brown, supra*, at p. 325.)

In *Ellis*, we determined *Brown*'s reasoning and conclusions apply equally to current section 4019. Accordingly, we held the October 1, 2011, amendment does not apply retroactively as a matter of statutory construction or pursuant to *Estrada*. (*Ellis, supra*, 207 Cal.App.4th at pp. 1550, 1551.)

We next turned to the equal protection issue. (*Ellis, supra*, 207 Cal.App.4th at p. 1551.) In that regard, *Brown* held prospective-only application of the January 25, 2010, amendment did not violate either the federal or the state Constitution. (*Brown, supra*, 54 Cal.4th at p. 328.) *Brown* explained:

“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, second italics added.)

The state high court rejected the argument that its decision in *People v. Sage* (1980) 26 Cal.3d 498 compelled a contrary conclusion, declining to read that case as authority for more than it expressly held, namely that authorizing presentence conduct credit for misdemeanants who later served their sentences in county jail, but not for felons who ultimately were sentenced to state prison, violated equal protection. (*Brown, supra*, 54 Cal.4th at pp. 329-330; see *People v. Sage, supra*, 26 Cal.3d at p. 508.) It further refused to find the case before it controlled by *In re Kapperman* (1974) 11 Cal.3d 542, a case that, because it dealt with a statute granting credit for time served, not good conduct, was distinguishable. (*Brown, supra*, at p. 330.)

Once again, we found no reason in *Ellis* why “*Brown*’s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.]” (*Ellis, supra*, 207 Cal.App.4th at p. 1552.) Accordingly, we rejected the defendant’s equal protection argument.

Ellis is dispositive of defendant’s claim of entitlement to enhanced credits. Defendant’s presentence credits were properly calculated.

DISPOSITION

The judgment is affirmed.