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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD C. FREITAS,

Defendant and Appellant.

F062323

(Super. Ct. No. 1244429)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

John P. Dwyer, 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, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

In June 2008, appellant, Richard C. Freitas, pled guilty to possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and committing petty theft after having suffered a prior conviction of a theft-related offense (Pen. Code, § 666),¹ and admitted enhancement allegations that he had served four separate prison terms for prior felony convictions (§ 667.5, subd. (b)). The court imposed a prison term of seven years eight months, suspended execution of sentence, and placed appellant on three years' probation.

In November 2008, appellant admitted allegations that he had violated his probation. The court revoked probation, imposed the previously suspended sentence, and awarded appellant presentence custody credit of 90 days, consisting of 60 days of actual time credit and 30 days of conduct credit.

In March 2011, appellant moved for an order granting him additional presentence custody credit. The court denied the motion, and the instant appeal followed.

On appeal, appellant contends the court erred in denying his motion for additional presentence custody credit. Specifically, he argues the court erred in (1) failing to award him credit for time spent in a rehabilitation facility and (2) failing to calculate his conduct credit under the one-for-one credit scheme of former section 2933, subdivision (e) (section 2933(e)). We reverse the order denying appellant's motion for additional presentence custody credit, and remand for further proceedings.

DISCUSSION

Presentence Custody Credit for Time in SRC

A defendant committed to state prison is ordinarily entitled to credit against the prison term for all days spent in custody prior to sentencing, including days spent in jail or in a residential drug treatment program as a condition of probation. (§ 2900.5

¹ All further statutory references are to the Penal Code.

[providing for presentence custody credit for “any time spent in a ... rehabilitation facility, ... including days served as a condition of probation”]; *People v. Johnson* (2002) 28 Cal.4th 1050, 1053; *People v. Jeffrey* (2004) 33 Cal.4th 312, 315.) Like other statutory rights, the right to receive presentence credit may be expressly waived “as long as the defendant’s waiver is ‘knowing and intelligent’ in the sense that it was made with awareness of its consequences.” (*People v. Thurman* (2005) 125 Cal.App.4th 1453, 1460.)

Appellant contends the court erred in rejecting his claim that he was entitled to presentence custody credit for time he spent at the Stanislaus Recovery Center (SRC), which he describes as “a county-run residential treatment facility.”² The People do not dispute that SRC is a “rehabilitation facility” within the meaning of section 2900.5, subdivision (a) or that appellant was confined there for some period of time. Rather, they argue that appellant made a “knowing and intelligent” waiver of his right to custody credit for time at SRC. Appellant counters that although he waived credit for time in the Solidarity House program, another residential drug treatment facility, his waiver did not extend to his time at SRC.

Procedural Background

On June 3, 2008, the date of the hearing at which he entered his plea, appellant executed a document entitled “Probation Order and Terms, Superior Court, County of Stanislaus.” (Unnecessary capitalization omitted.) Although designated an order, it is not signed by the court. Rather, it is a pre-printed form, signed and dated by appellant, consisting in large part of a series of statements, preceded by boxes to be marked to indicate which statements are applicable. One of the statements preceded by a marked

² The record contains numerous references to “SRC,” but nowhere in the record does it appear what those letters stand for. Appellant indicates in his opening brief that SRC stands for Stanislaus Recovery Center. The People do not indicate otherwise.

box is: “[Appellant] [s]hall participate in such ... controlled substance abuse residential treatment program at the discretion of and as directed by the Probation Officer.” Almost immediately thereafter, the box by the following statement is marked: “Defendant waives credits in program.” Immediately below that statement, the following is handwritten: “Solidarity House - John Long present.”

John Long appeared at the June 3, 2008, hearing and was identified on the record as the administrative director of Solidarity House.

At the outset of that hearing, the court summarized, and appellant confirmed, the terms of his plea agreement. Those terms, as stated by the court, included the following: appellant “would be required to complete a one-year residential program at the solidarity recovery community fellowship [*sic*]” Subsequently, after appellant entered his plea, the court announced the terms of probation, including the following: “[Appellant] shall participate in a controlled substance abuse residential treatment program. That would be the [S]olidarity [H]ouse.”

Later in the hearing, the following exchange occurred:

“THE COURT: ... when is he going to get into the program?”

“[Defense counsel]: He’ll go to Solidarity until a bed is available. He’ll do 30 days at SRC and back to Solidarity for 365 days.” Moments later, the court confirmed this arrangement.

At no time at the hearing was a waiver of custody credit mentioned.

A minute order dated July 31, 2008, states, “30 days SRC completed - [appellant] currently in Solidarity program.”

The court, in denying appellant’s motion, stated: “[appellant] is requesting tha[t] he be given credits for time spent in a residential treatment program. [Appellant] was informed that he would not receive custody credits for participation in a residential

treatment program on June 3, 2008, his original sentencing date. He is not entitled to credits as he was not in custody.”

Analysis

As indicated above, the only indication in the record of appellant’s waiver of section 2900.5 custody credit for time in a rehabilitation facility and the scope of that waiver is the statement in the form signed by appellant, “Defendant waives credits in program,” followed immediately by the words, “Solidarity House.” Despite the reference to “program” in the singular and the reference immediately following to the Solidarity House drug treatment program, the People argue that appellant’s waiver should be construed to include time not only in Solidarity House, but in SRC as well. We disagree.

“To determine whether a waiver [of custody credit] is knowing and intelligent, the inquiry should begin and end with deciding whether the defendant understood he was giving up custody credits to which he was otherwise entitled.” (*People v. Burks* (1998) 66 Cal.App.4th 232, 236, fn. 3.) “An awareness of the consequences of waiving any right should include an understanding of the impact of that waiver on the amount of time a defendant may be incarcerated.” (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1922-1923.) “The voluntariness of a waiver is a question of law which appellate courts review de novo.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

Appellant was ordered to participate in a one-year drug treatment program as a condition of probation. That condition was stated twice by the court at the June 3, 2008, hearing, first as the requirement that appellant “complete a *one-year residential program*” (italics added) at Solidarity House, and shortly thereafter, as the requirement that appellant “participate in a controlled substance abuse residential treatment program” identified specifically as Solidarity House. And, as indicated above, appellant’s signed waiver refers to a single program, viz., Solidarity House. The foregoing indicates that appellant was waiving credit for one year of custody that he would serve in the Solidarity

House program. Under the principles summarized above, the record cannot be fairly read as extending that waiver to an additional 30 days of custody in a different facility, viz., SRC. The court erred in determining that appellant had waived his right to receive custody credit for time at SRC.

We note, however, that the record tells us virtually nothing about SRC and whether it qualifies as a “rehabilitation facility” under section 2900.5. The record is also unclear as to how much time appellant spent there. A minute order indicates appellant completed 30 days at SRC, but appellant’s declaration in support of his motion states he was at that facility for 35 days. We will remand the matter to allow the court to resolve those questions. If, on remand, the court determines SRC is a section 2900.5 rehabilitation facility, it shall then determine and award the appropriate presentence custody credit.

Former Section 2933(e)

As indicated above, appellant also challenges the court’s denial of his claim that he was entitled to one-for-one conduct credit under former section 2933(e).

Preliminarily, we set forth the relevant statutory background.

Generally, a defendant may earn, in addition to section 2900.5 actual time presentence custody credit, what is commonly called conduct credit: credit against a prison sentence awarded for willingness to perform assigned labor and compliance with rules and regulations while in county jail and other forms of presentence custody. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 (*Dieck*)). When appellant was originally sentenced to prison in November 2008, sentencing courts determined conduct credit under section 4019. Section 4019 has been amended multiple times in recent years, but under the version of the statute in effect in 2008, conduct credit could be accrued at the rate of two days for every four days of actual time served in presentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *Dieck, supra*, 46

Cal.4th at p. 939 [former section 4019 provided a total of two days of conduct credit for every four-day period of incarceration].) In the instant case, the court based its award of presentence custody credit on this scheme.

The Legislature amended section 2933(e), effective September 28, 2010, to provide that “[n]otwithstanding Section 4019,” qualifying defendants—those defendants who were not required to register as sex offenders, were not committed for a serious felony as defined in section 1192.7, and did not have a prior conviction for a serious or violent felony—could earn conduct credit at the enhanced rate of one day for each day of presentence custody. (Stats. 2010, ch. 426, § 1, p. 2087; § 2933(e)(1) [prisoner shall have one day deducted from his or her period of confinement for every day he or she served in a county jail].)³

In his motion below, appellant argued he was entitled to one-for-one credit. Appellant repeats that argument on appeal. He argues that although he was sentenced before the September 28, 2010, effective date of section 2933(e), that statute must be applied retroactively, and therefore, the court erred in denying his motion for additional credit. The arguments appellant advances in support of this contention are, for the most part, similar to those this court has previously considered and rejected in connection with the claim that the amendments to section 4019 that became effective January 25, 2010, that also provided for enhanced conduct credit, should be applied retroactively to award additional conduct credits to defendants sentenced *before* the effective date. (See e.g., *People v. Rodriguez* (2010) 183 Cal.App.4th 1, rev. granted June 9, 2010, S181808

³ Section 2933 has been amended again. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, pp. 5962-5963, eff. Sept. 21, 2011.) In this decision, references to section 2933 are to the version of the statute made effective on September 28, 2010.

(*Rodriguez*.) We similarly reject appellant’s arguments concerning the amendment to section 2933.⁴

Under section 3, it is presumed that a statute does not operate retroactively “absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended [retroactive application].” (*People v. Alford* (2007) 42 Cal.4th 749, 753 (*Alford*.) The Legislature neither expressly declared, nor does it appear by “clear and compelling implication” from any other factor(s), that it intended the amendment to operate retroactively. (*Ibid.*) Therefore, the amendment applies prospectively only.

We recognize that in *In re Estrada* (1965) 63 Cal.2d 740, our Supreme Court held that the amendatory statute at issue in that case, which reduced the punishment for a particular offense, applied retroactively. However, the factors upon which the court based its conclusion that the section 3 presumption was rebutted in that case do not apply to the amendment to section 2933.

In an argument somewhat different than those we have previously considered and rejected in connection with the claim of the retroactivity of amendments to section 4019, appellant calls our attention to (1) section 59 of Senate Bill No. 18 (Stats. 2009, 3d Ex. Sess., ch. 28, p. 4432), which sets up a procedure to address delays by the *Department of Corrections and Rehabilitation* (DCR) in the calculation and implementation of additional credit allowed under the January 25, 2010, amendment to section 4019,⁵ and

⁴ The issue of whether the September 28, 2010, amendment to section 2933 is retroactive is currently before the California Supreme Court in *In re Kemp* (2011) 192 Cal.App.4th 252, review granted April 13, 2011, S191112. Also before our Supreme Court, in *Rodriguez* and a number of other cases, is the similar issue of whether the January 25, 2010, amendments to section 4019 are retroactive.

⁵ Section 59 of Senate Bill No. 18 states: “The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected

(2) uncodified section 3 of the legislation implementing the September 28, 2010, amendment to section 2933(e) (Senate Bill No. 76), which states, “The Legislature intends that nothing in this act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of 2009, and that this act be construed in a manner consistent with that section.” (Stats. 2010, ch. 426, § 3, p. 2088.) Appellant argues as follows: These provisions, read together, indicate the Legislature intended that DCR has a role to play in implementing the changes in the law relating to conduct credit under section 2933(e). And, appellant argues further, the involvement of DCR in the process of implementing those changes necessarily implies that the Legislature intended section 2933(e) to apply retroactively, because trial courts became responsible for determining conduct credit under section 2933(e) as soon as the amended statute became effective,⁶ and therefore there would be no need for DCR involvement unless section 2933(e) was retroactive.

However, while Senate Bill No. 76 may provide some support for the claim that the Legislature intended retroactive operation of section 2933(e), other factors indicate a contrary intent. For example, conduct credit provides an incentive for behavior, and “it is impossible to influence behavior after it has occurred.” (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806.) This factor militates in favor of the conclusion that retroactive operation of the statute is not intended. Given these contradictory indications, we cannot

that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable.”

⁶ “At the time of sentencing, credit for time served, including conduct credit, is calculated by the court.” (*People v. Duff* (2010) 50 Cal.4th 787, 793.)

discern a “clear and compelling implication” that the Legislature intended section 2933(e) to apply retroactively. (*Alford, supra*, 42 Cal.4th at p. 753.) Therefore, the section 3 presumption of prospective application is not rebutted.

Finally, we conclude that prospective-only application of the amendment does not violate appellant’s equal protection rights. We recognize that in *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*), the court held that a prior version of section 4019 violated the defendant’s equal protection rights because it allowed presentence conduct credits to misdemeanants, but not felons. (*Sage*, at p. 508.) The California Supreme Court found that there was neither “a rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid.*) *Sage*, however, is inapposite. The purported equal protection violation at issue here is temporal, rather than based on appellant’s status as misdemeanant or felon.

The fact that a defendant’s conduct cannot be influenced retroactively provides a rational basis for the Legislature’s implicit intent that section 2933(e) only apply prospectively. Because (1) section 2933(e) evinces a legislative intent to increase the incentive for good conduct during presentence confinement and (2) it is impossible for such an incentive to affect behavior that has already occurred, prospective-only application is reasonably related to a legitimate public purpose. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 [legislative classification not touching on suspect class or fundamental right does not violate equal protection guarantee if it bears a rational relationship to a legitimate public purpose].)

DISPOSITION

The order appealed from is reversed. The matter is remanded for further proceedings. On remand, if the court determines Stanislaus Recovery Center is a “rehabilitation facility” within the meaning of Penal Code section 2900.5, the court shall further determine the number of days appellant spent at Stanislaus Recovery Center, and

award presentence custody credit accordingly, with conduct credit to be determined under the version of Penal Code section 4019 in effect at the time of appellant's sentencing in 2008. (See former Pen. Code, § 4019, subd. (f) [providing] for a total of two days of conduct credit for every four-day period of incarceration].)