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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK PATTON,

Defendant and Appellant.

F062692

(Super. Ct. No. BF125818A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Patricia J. Ulibarri, 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, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J. and Franson, J.

On September 9, 2010, an amended information was filed in Kern County Superior Court, charging defendant Mark Patton with second degree murder and other offenses arising out of a fatal traffic collision that occurred on November 26, 2008.¹ On May 17, 2011, defendant entered into a plea agreement pursuant to which he pleaded no contest to gross vehicular manslaughter while intoxicated (Pen. Code,² § 191.5, subd. (a)) and admitted having fled the scene of the crime (Veh. Code, § 20001, subd. (c)), as charged in count 2. The parties agreed he would receive a 15-year determinate prison sentence with no 15 percent limitation on his ability to earn credits. In return for his plea, the remaining counts and special allegations were dismissed upon the People's motion.

On June 15, 2011, defendant was sentenced to a total term of 15 years in prison, and ordered to pay restitution along with various fees, fines, and assessments. Over his objection that he was entitled to earn one-for-one presentence credits, he was awarded 932 days of actual credit, plus 466 days of conduct credit, for a total of 1,398 days. He now says he is entitled, pursuant to the equal protection clauses of the federal and state Constitutions, to additional custody credits under the amendment to section 4019 that became operative October 1, 2011. We disagree.

DISCUSSION

Defendant's conviction for violating section 191.5, subdivision (a) constituted a serious felony (§ 1192.7, subd. (c)(8); *People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1688, 1694, called into doubt on another ground in *People v. Reed* (1996) 13 Cal.4th 217, 229), though not a violent one (§ 667.5, subd. (c)(8); *In re Pope* (2010) 50 Cal.4th 777, 780). Accordingly, at both the time his crime was committed and the date he was sentenced, he was entitled to presentence credits in an amount such that six days were deemed to have been served for every four days he spent in actual custody. (§ 4019,

¹ The facts of the offenses are not pertinent to this appeal.

² All statutory references are to the Penal Code unless otherwise stated.

former subds. (b), (c) & (f), as amended by Stats. 1982, ch. 1234, § 7, & 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.³

After defendant was sentenced, but while his appeal was pending, the statutes were amended yet again. Subdivision (e) of section 2933 now deals with forfeited credit. Subdivision (b) of that statute states, in pertinent part: “For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months.” (§ 2933, subd. (b), as amended by Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Section 4019 no longer distinguishes between those committed for serious felonies and those not so committed. Rather, subdivision (f) of the statute provides: “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.)

Defendant now contends he is entitled to presentence custody credits calculated pursuant to current section 4019.⁴ He 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

³ 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 committed for a serious felony was still entitled only to have six days deemed served for every four days 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.)

⁴ Defendant would be entitled to an additional 466 days of credit.

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 recently 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 *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), 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 sentence 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.⁵

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

Although not raised by either party, however, our review of the record shows an error in the abstract of judgment. In item 12, which sets out the award of custody credits, the box next to “2933.1” is checked instead of the box next to “4019.” Section 2933.1 limits, to 15 percent of the actual period of confinement, the amount of conduct credits that can be earned by a person convicted of a violent felony. (§ 2933.1, subs. (a) & (c).) Defendant was not convicted of a qualifying violent felony for purposes of the credit restrictions imposed by section 2933.1 (*In re Pope, supra*, 50 Cal.4th at p. 780); moreover, the terms of his plea agreement and the discussion at sentencing make it clear the court and parties contemplated his credit-earning ability would not be so limited. The abstract of judgment must be corrected to show the applicable custody credit statute is section 4019, *not* section 2933.1.

⁵ *Ellis* also addressed, and rejected, the additional argument that the defendant nonetheless was entitled to enhanced conduct credits for the period between October 1, 2011, and the date he subsequently was sentenced. (*Ellis, supra*, 207 Cal.App.4th at pp. 1552-1553.) This portion of *Ellis* does not apply to the present case, since defendant was sentenced before the operative date of the October 1, 2011, amendment.

DISPOSITION

The judgment is affirmed. The trial court is directed to cause to be prepared an amended abstract of judgment, showing, in item 12, a check in the box next to “4019” instead of “2933.1,” and to forward a certified copy of same to the appropriate authorities.