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

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM JAY WARD,

Defendant and Appellant.

F063791

(Super. Ct. No. F11902594)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, 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, Eric L. Christoffersen and Brook Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Kane, J. and Poochigian, J.

On July 27, 2011, an information was filed in Fresno County Superior Court, charging defendant William Jay Ward with two counts of possession of a deadly weapon (former Pen. Code, § 12020, subd. (a)) committed on or about May 8, 2011.¹ It was further alleged he had suffered a prior conviction for obstructing or resisting an executive officer in the performance of his or her duties with personal firearm use (§§ 69, 12022.5), which constituted a “strike” for purposes of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and for which he served a prison term (§ 667.5, subd. (b)). On September 29, 2011, following a jury trial, defendant was convicted as charged, and he admitted the truth of the special allegations.

On November 1, 2011, defendant was sentenced to a total of five years in prison, and ordered to pay various fines, fees, and assessments.² He was awarded 178 days of actual credit, plus 88 days of conduct credit, for a total of 266 days. He now says he is entitled, pursuant to the equal protection clauses of the federal and state Constitutions, to additional custody credits under sections 2933 and 4019, as amended operative October 1, 2011. We disagree.

¹ All statutory references are to the Penal Code.

Defendant was alleged to have possessed a “weapon of the kind commonly known as a blackjack, slungshot, billy.” As of January 1, 2012, former section 12020, subdivision (a) was repealed and the portion dealing with such instruments was reenacted as section 22210 without substantive change. (Stats. 2010, ch. 711, § 4 [repealed]; Stats. 2010, ch. 711, § 6 [reenacted].)

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

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.

DISCUSSION

Because defendant's personal use of a firearm was charged and found true as provided in section 12022.5, his prior conviction constituted a violent felony pursuant to section 667.5, subdivision (c)(8) and a serious felony pursuant to section 1192.7, subdivision (c)(8). At the time he committed, and was convicted of, his current offenses, section 2933 allowed a prisoner sentenced to state prison under section 1170 to have one day deducted from his or her sentence for every day he or she served in a county jail from the date of arrest until state prison credits became applicable, except that section 4019, and not section 2933, applied to a prisoner with a prior conviction for a violent or serious felony. (§ 2933, former subd. (e)(1), (3), as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) Under section 4019, prisoners were entitled to presentence credits in an amount such that six days were deemed to have been served for every four days spent in actual custody. (§ 4019, former subds. (b), (c) & (f), as amended by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010, & subd. (g).) Defendant was awarded credits calculated by means of this formula.

By the time defendant was sentenced, section 2933 had been amended to delete references to section 4019 and calculation of presentence credits. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Subdivision (b) of section 2933 now provides, 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." Subdivision (e) of the statute now deals with forfeited credit.

Section 4019 was also amended prior to sentencing. Subdivision (f) of that statute now 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.) 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.)³

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 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

³ 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.)

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 *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 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.⁴

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

DISPOSITION

The judgment is affirmed.

⁴ *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.) Were we to view defendant as making this same argument — which we do not — we would reject it for the reasons stated in *Ellis*.