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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFONSO GONZALEZ,

Defendant and Appellant.

G046064

(Super. Ct. No. 11HF2124)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Stephanie George, Judge. Affirmed.

Patrick J. Hennessey, Jr., 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, Barry Carlton and
Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Alfonso Gonzalez contends the court should have granted him additional conduct credits under the current version of Penal Code section 4019,¹ which applies to offenses “committed on or after October 1, 2011.” (*Id.*, subd. (h).) But he committed his crimes before then, and the statute is not retroactive. We affirm.

FACTS

In November 2011, defendant pleaded guilty to three counts arising from his driving under the influence of alcohol in August 2011. Under his plea, defendant received probation conditioned on serving 365 days in county jail. The court awarded him 14 days of actual custody credit and six days of conduct credit.

DISCUSSION

Defendant contends the current version of section 4019 must be applied retroactively to award him conduct credit at a one-to-one ratio. The statute applies to him, he claims, because he was sentenced after the version became effective, and because equal protection requires retroactivity. We disagree.

Section 4019 governs conduct credit. When the statute was originally enacted in 1976, it offered prisoners the opportunity to earn conduct credit for their good behavior at a one-to-two ratio. (Stats. 1976, ch. 286, § 4, p. 595.) Under this version of the statute, prisoners were considered to have served six days for every four days they were incarcerated. (*See, e.g. People v. Fares* (1993) 16 Cal.App.4th 954.) The statute was amended effective January 25, 2010. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28X § 50.) During this time, the Legislature increased the ability to earn conduct credits at a one-to-one ratio, meaning that prisoners were considered to have served four days for

¹ All further statutory references are to the Penal Code.

every two days they were incarcerated. (Stats. 2010, ch. 426, § 2, p. 2088.) But effective September 28, 2010, the Legislature amended the statute to return it to the original one-to-two ratio. (*Ibid.*) The current version of section 4019 now provides for a one-to-one ratio. (§ 4019, subd. (h).) The statute further provides: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined . . . for *a crime committed* on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (*Ibid.*, Italics added.)

Therefore, only those people who committed crimes within the January through September 2010 window or *after* October 1, 2011 accrue credits at the increased, one-to-one ratio.² And here, defendant committed his crimes in August 2011, after the January through September 2010 window closed but before the October 2011 effective date for the current version. The current version simply does not apply to him.

Defendant relies on *In re Estrada* (1965) 63 Cal.2d 740, in asserting the current version of section 4019 should be applied as of the date of sentencing – not the date of the offense. *Estrada* states: “The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies.” (*Estrada*, at p. 744).

² Defendant does not invoke an intervening amendment to section 4019. In April 2011, the Legislature amended the statute to return to the one-to-one ratio for “crime[s] committed on or after July 1, 2011.” (Stats. 2011, ch. 15, § 482, p. 498.) But that amendment became effective “only upon creation of a community corrections grant program . . . and upon an appropriation to fund the grant program.” (Stats. 2011, ch. 15, § 636, p. 622.) The record is silent on whether the required program was created and funded, and defendant does not assert it was. We will not apply the April 2011 amendment.

However, the California Supreme Court very recently held that *Estrada*'s retroactivity analysis does not apply to section 4019. (*People v. Brown* (June 18, 2012, S181963) __ Cal.4th __ [2012 Cal. Lexis 5263] (*Brown*)). *Brown* held the January through September 2010 amendment did not apply retroactively to persons who committed their offense before the amendment's effective date, but were sentenced after it became effective. (*Id.* at p. __ [2012 Cal. Lexis 5263 at p. *2].) The court distinguished *Estrada* as applying only when the Legislature mitigates ""the penalty for a particular crime,""" not when the Legislature simply increases the amount of conduct credit which can be earned. (*Id.* at p. __ [2012 Cal. Lexis 5263 at p. *20].) The court explained: "The holding in *Estrada* was founded on the premise that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" [Citation.] . . . In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*Id.* a p. __ [2012 Cal. Lexis 5263 at pp. *20-*21].) The court specifically declined to read a broad interpretation into *Estrada* which would incorporate both contexts. (*Id.* at p. __ [2012 Cal. Lexis 5263 at pp. *21-*22].) "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation, . . . but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*Id.* at p. __ [2012 Cal. Lexis 5263 at pp. *19-*20].)

Brown disposes of defendant's claim. Even though *Brown* considered the 2010 amendment rather than the current version of section 4019, its rationale applies equally here. It is the same situation transposed a year into the future. The current version still just "increase[es] the rate at which prisoners may earn credits for good

behavior” (*Brown, supra*, __ Cal.4th at p. __ [2012 Cal. Lexis 5263 at p. *20].) Its plain language provides for prospective application. Section 4019 is not a “legislative act mitigating the punishment for a particular offense,” and falls outside the “specific context” addressed in *Estrada*. (*Ibid.*)

Brown also squarely rejected an equal protection claim like defendant makes. ““[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.”” (*Brown, supra*, __ Cal.4th at p. __ [2012 Cal. Lexis 5263 at p. *29].) *Brown* explained that people who commit crimes “before and after the new law took effect” are not similarly situated. (*Id.* at p. __ [2012 Cal. Lexis 5263 at p. *26].) It stated: ““The obvious purpose of the new section’ . . . ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.”” (*Id.* at p. __ [2012 Cal. Lexis 5263 at p. *30].) Since we are not dealing with people who are similarly situated, there is no equal protection violation.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.