

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

YOLANDA NEVAREZ,

Defendant and Appellant.

H036727

(Monterey County

Super. Ct. No. SS052269)

Defendant Yolanda Nevarez admitted violating probation for a 2005 narcotics-offense conviction after testing positive for methamphetamine in 2011. The trial court revoked probation and then reinstated probation on condition that defendant serve 275 days in jail. It awarded defendant 137 days of actual custody credit and 68 days of conduct credit. On appeal, defendant contends that she is entitled to an additional 69 days of presentence custody credits under interim Penal Code section 4019, effective January 25, 2010.¹ The People concede the issue in part. And we agree with the People’s analysis. We therefore modify and affirm the judgment.

¹ Further unspecified statutory references are to the Penal Code. Section 4019 was amended again, effective September 28, 2010, to reinstate the conduct credit provisions that applied before the January 25, 2010 amendment. (§ 4019, as amended by Stats. 2010, ch. 426, § 2.) This latest statutory change applies only to crimes committed after September 28, 2010. Unless otherwise specified, all further references to “interim” section 4019 refer to the amendment effective January 25, 2010. (§ 4019, as amended by Stats. 2009-2010, ch. 28, § 50.) Any reference to “former” section 4019 refers to the (continued)

LEGAL BACKGROUND

Section 4019 provides for presentence credits for worktime and for good behavior. (§ 4019, subs. (b) & (c).) These presentence credits are collectively referred to as “conduct credit.” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) “Section 4019 provides that a defendant may earn conduct credits during custody in a county jail or a comparable local facility ‘prior to the imposition of sentence,’ including custody imposed ‘as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence.’ (§ 4019, subd. (a)(2) & (4).)” (*People v. Daniels* (2003) 106 Cal.App.4th 736, 740.)

Under former section 4019, conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019, subd. (f).) However, interim section 4019 provided for the accrual of two days of conduct credit for every two days of presentence custody for any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c). (Interim § 4019, subd. (f).)

FACTUAL BACKGROUND

Defendant served 17 days in custody before January 25, 2010, and 120 days in custody after January 25, 2010.

DISCUSSION

The parties agree that for the period of presentence custody after January 25, 2010, credit must be calculated under interim section 4019. They part company, however, on what version of section 4019 applies to the pre-January 25, 2010 portion of defendant’s custody. Defendant would apply interim section 4019 to the pre-January 25, 2010 period

version that was in effect before January 25, 2010. (§ 4019, as amended by Stats. 1982, ch. 1234, § 7.)

as well. The People, however, propose a two-tiered calculation. They argue that although interim section 4019 applies to the portion of defendant's presentence time in custody served after January 25, 2010, conduct credit for defendant's pre-January 25, 2010 presentence custody must be calculated under former section 4019. In other words, defendant contends that interim section 4019 is retroactive and the People contend that the statute is prospective.

There is a conflict among the courts of appeal concerning whether interim section 4019 is retroactive or prospective. The California Supreme Court has granted review to resolve the conflict. (See, e.g., *People v. Brown* (2010) 182 Cal.App.4th 1354, 1363-1365, review granted Jun. 9, 2010, S181963 [Third Appellate District--amendment was retroactive]; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 13-14, review granted Jun. 9, 2010, S181808 [Fifth Appellate District--amendment was prospective only]; *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted Jul. 28, 2010, S183724 [Sixth Appellate District--amendment was prospective only].)

Defendant makes the same arguments that have been made in the numerous cases before this court and the other courts of appeal.

We have previously rejected these arguments, and until we receive guidance from the Supreme Court, we adhere to our view that the Legislature did not intend interim section 4019 to apply retroactively.

Section 3 provides that no part of the Penal Code is "retroactive, unless expressly so declared." Section 3 thus reflects the general rule that legislative provisions are presumed to operate prospectively. "It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise. [Citations.]' [Citations.] 'We may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history. [Citation.]' [Citation.] Nonetheless, 'in the absence of an express retroactivity provision, a statute will *not* be applied

retroactively unless it is *very clear* from extrinsic sources that the Legislature or the voters must have intended a retroactive application.’ ” (*People v. Whaley* (2008) 160 Cal.App.4th 779, 793-794.)

The California Supreme Court has determined that an amendatory statute lessening punishment “ ‘represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law,’ ” and that, in such cases, the section 3 presumption of prospective application is rebutted. (*In re Estrada* (1965) 63 Cal.2d 740, 745.)

However, it is clear that interim section 4019 was not enacted to effectuate some legislative conclusion that a particular offense merited a lesser punishment. Rather, interim section 4019 was enacted in order to address the state’s (ongoing) fiscal emergency. (Stats. 2009, 3d Ex. Sess., ch. 28, § 62.) By increasing the amount of credits available to certain inmates, the prison population will decrease. A smaller prison population results in reduced costs to the state. While it is true that every inmate who earns the increased credits will serve his or her sentence more quickly, and thus arguably be punished less as a consequence, not every inmate will earn those credits.

We perceive no equal protection problem in giving interim section 4019 a prospective application. “ ‘[A] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.’ ” (*People v. Floyd* (2003) 31 Cal.4th 179, 189 [finding no equal protection violation in the expressly prospective application of Proposition 36 (§ 1210.1) providing for mandatory probation for some convicted of nonviolent drug possession offenses].) “ ‘[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.’ ” (*Id.* at p. 191, quoting *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505.) “ ‘In the context of equal protection, “[a] refusal to apply a statute retroactively does not violate the Fourteenth Amendment.’ ” (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806.)

In re Kapperman (1974) 11 Cal.3d 542 (*Kapperman*), and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*), on which defendant relies, are distinguishable.

Kapperman held that an express prospective limitation upon the statute creating presentence custody credits was a violation of equal protection because there was no legitimate purpose to be served by excluding those already sentenced. (*Kapperman, supra*, 11 Cal.3d at pp. 544-545.) Accordingly, *Kapperman* is inapposite because it addressed *custody* credits, not *conduct* credits. Custody credits are constitutionally required and awarded automatically on the basis of time served, whereas conduct credits must be *earned* by a defendant.

Sage involved a prior version of section 4019 which allowed presentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d 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.*) The purported equal protection violation at issue here is temporal, i.e., it is based on the dates on which the defendant is in custody, rather than based on the defendant’s status as a misdemeanor or felon.

Defendant also cites *People v. Doganiere* (1978) 86 Cal.App.3d 237 (*Doganiere*) for the proposition that “the equal protection clause commands retroactive application of an amendment increasing credits.” Defendant’s analysis is erroneous.

The issue in *Doganiere* was indeed whether a 1978 amendment to section 2900.5 authorizing “good time/work time credits” under section 4019 should be applied retroactively. (*Doganiere, supra*, 86 Cal.App.3d at p. 239.) However, the appellate court did not perform an equal protection analysis to reach its conclusion. Instead, the court sought to apply the teaching of *In re Estrada, supra*, 63 Cal.2d 740, “that laws granting amelioration in punishment should be held to be retroactive as to nonfinal judgments because it would be presumed the amelioration of the punishment was based on the legislative finding that the former punishment was too severe.” (*Doganiere, supra*, at p.

239.) That is a separate argument for retroactivity that we do not understand defendant to make here. In any event, we have observed that interim section 4019 was not enacted to effectuate some legislative conclusion that a particular offense merited a lesser punishment.

DISPOSITION

The judgment is modified to award presentence credit consisting of 137 days of actual custody time (17 before and 120 after interim section 4019), plus 128 days of presentence conduct credit (8 before and 120 after interim section 4019), for a total of 265 days of presentence credit.

Premo, J.

WE CONCUR:

Rushing, P.J.

Bamattre-Manoukian, J.