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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DIONDRE LAMON RODRIGUEZ,

Defendant and Appellant.

H036823 & H036997
(Monterey County
Super. Ct. Nos. SS110430 &
SS110772)

Defendant Diondre Leon Rodriguez appeals a judgment entered following his plea of no contest to felony vandalism (Pen. Code, § 594, subd. (b)(1)),¹ and petty theft with specified prior convictions (§§ 666/484, subd. (a)) in two separate cases consolidated for the purpose of appeal. On appeal, defendant asserts he is entitled to additional pre-sentence conduct credits pursuant to the post-conviction amendments to section 4019.

¹ All further statutory references are to the Penal Code.

STATEMENT OF THE CASE²

H036823

In March 2011, defendant was charged with felony vandalism (§ 594, subd. (b)(1)). The complaint also contained an allegation that defendant had suffered a strike prior (§ 1170.12), and two prior prison commitments (§ 667.5, subd. (b)).

Defendant pleaded no contest to the charge, and admitted the prior conviction and prison term in exchange for an agreed upon prison commitment of three years. In addition, the court represented that it would dismiss the strike conviction pursuant to section 1385.

At the sentencing hearing, the court dismissed the strike conviction, and imposed the three-year prison commitment. Defendant was awarded a total of 61 days pre-sentence conduct credit pursuant to section 4019, calculated as 41 days actual time served, and an additional 20 days of conduct credit.

H036997

In April 2011, defendant was charged with petty theft with specified prior convictions (§§ 666/484, subd. (a)), with an additional allegation that defendant served a prior prison term. Defendant pleaded no contest to the charge, in exchange for an agreement that the court would impose 16 months in state prison, to run concurrent to the sentence in H036823. At the sentencing hearing, the court imposed the agreed upon 16 months in state prison.

Defendant filed timely notices of appeal in both cases.

DISCUSSION

Defendant asserts that pursuant to the principals of equal protection, he is entitled to additional conduct credits following the recent amendments to section 4019. His

² The underlying facts of this case are omitted, because they are not relevant to the issue on appeal.

contention is that the statutory changes to section 4019 and section 2933, expressly operative October 1, 2011, apply retroactively, in effect, so as to entitle him to one-for-one conduct credits under the current version of section 4019 rather than the one-for-two he was awarded.

A criminal defendant is entitled to accrue both actual pre-sentence custody credits under section 2900.5 and conduct credits under section 4019 for the period of incarceration prior to sentencing. Additional conduct credits may be earned under section 4019 by performing additional labor (§ 4019, subd. (b)) and by a prisoner's good behavior. (§ 4019, subd. (c).) In both instances, the section 4019 credits are collectively referred to as conduct credits. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The court is charged with awarding such credits at sentencing. (§ 2900.5, subd. (a).)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in pre-sentence custody. (Stats. 1982, ch. 1234, § 7, p. 4554 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 in an extraordinary session to address the state's ongoing fiscal crisis. Among other things, Senate Bill No. 3X 18 amended section 4019 such that defendants could accrue custody credits at the rate of two days for every two days actually served, twice the rate as before except for those defendants who were required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), and those, like defendant, with a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) For these persons, conduct credit under section 4019 accrued at the same rate as before despite the January 25, 2010 amendments. (Former § 4019, subds. (b)(2) & (c)(2).) These amendments to section 4019 effective January 25, 2010 did not state whether they were to have retroactive application.

California courts subsequently divided on the retroactive application of the

amendments to section 4019, effective January 2010, and the issue currently remains pending with the California Supreme Court for resolution. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, rev. granted June 9, 2010, 5181963, and related cases.)

Then, effective September 28, 2010, section 4019 was amended again to restore the less generous pre-sentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits. (Stats. 2010, ch. 426, § 2.) The express provisions treating differently those defendants who are subject to sex-offender registration requirements, those committed for a serious felony or those, like defendant, with a prior conviction for a violent or serious felony were also eliminated. (*Ibid.*)

At the same time, and by the same legislative action, section 2933, previously applicable only to worktime credits earned while in state prison, was amended to encompass presentence conduct credits for those defendants ultimately sentenced to state prison (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e).) In other words, as of September 28, 2010, section 2933 instead of section 4019 applied to the calculation of pre-sentence conduct credits for those defendants sentenced to a prison term, with certain exceptions. This amendment to section 2933 provided for one-for-one pre-sentence conduct credits, more generous than those simultaneously provided under section 4019, but excluded those inmates required to register as sex offenders, those committed for a serious felony, or those, like defendant, with a prior serious or violent felony conviction. Under this version of section 2933, subdivisions (e)(1) and (e)(3), these prisoners remained subject to an award of pre-sentence conduct credits under section 4019, accruing at the less generous one-for-two rate. (*Ibid.*) By its express terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010,

ch. 426, § 2.)

This brings us to legislative changes made to sections 4019 and 2933 in 2011, as relevant to defendant's equal protection challenge. These statutory changes, among other things, effectively made section 4019 again applicable to all prisoners for purposes of the calculation of pre-sentence conduct credits, eliminating this element of section 2933 that was in place from September 28, 2010 to September 27, 2011 only, and reinstated one-for-one pre-sentence conduct credits for all prisoners. (§§ 2933 & 4019, subs. (b)(c) & (f).) These changes to section 4019 were made expressly applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only. (§ 4019, subs. (b), (c), & (h).)

As noted, defendant committed the crimes on February 2, 2011, and February 21, 2011 was sentenced on April 6, 2011. Under the law in effect on both dates, he was properly awarded conduct credits on a one-for-two basis (41 days actual credit and 20 days conduct credit).

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have *prospective* application only, defendant contends, on equal protection grounds, that he is entitled to the reinstated one-for-one conduct credits implemented by those changes (41 actual days and 41 days of conduct credit). He argues that *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) compels this result, contending that it held that a new statute that provides for pre-sentence credits for prison inmates was fully retroactive to all prisoners by virtue of the equal protection clause. He also cites *People v. Sage* (1980) 26 Cal.3d 498, 507-508 (*Sage*), and urges that it implicitly held that felons were similarly situated to all other jail inmates and that the then version of section 4019 was violative of equal protection, because it denied conduct credit to felons who were sentenced to prison while making such credits available to other jail inmates.

We considered the same arguments in the recent case of *People v. Olague* 205 Cal.App.4th 1126 [2012 WL 1571201] (*Olague*), wherein we concluded that prospective application of the recent amendments of section 4019 do not violate the principals of equal protection. We concluded in *Olague*, that neither the *Kapperman* nor *Sage* decisions necessitate a different result. *Kapperman* is distinguishable from the instant case because it addressed actual custody credits, not conduct credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. (*Kapperman, supra*, 11 Ca1.3d at pp. 544-545.) The *Sage* case is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons, and did not address retroactivity. (*Sage, supra*, 26 Ca1.3d at p. 508.)

In addition, in *Olague*, we noted that the First District Court of Appeal rejected a similar equal protection challenge on the rationale that the amendments of which defendant seeks to take advantage were adopted for a predominantly fiscal purpose and that the Legislature was entitled to balance that purpose against the “public safety interests” served by the preexisting credit regime. (*People v. Borg* (2012) 204 Cal.App.4th 1528, 1539.) “We adopt this rationale as an alternative basis for our conclusion that the statutory classification under scrutiny does not offend defendant’s right to the equal protection of the laws.” (*Olague, supra*, 205 Cal.App.4th at p. ____ [2012 WL 1571201, **6].)

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.