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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO SANCHEZ,

Defendant and Appellant.

H036856

(Monterey County

Super. Ct. No. SS100950A)

In this case, appellant Francisco Sanchez seeks additional presentence conduct credits under a 2011 amendment to Penal Code section 4019 for time he spent in custody prior to the effective date of that amendment. For reasons that follow, we determine that appellant is not entitled to additional credits.

Facts and Proceedings Below

Since this appeal raises no substantive issues related to the offense for which appellant was convicted the facts underlying his conviction are not relevant to the appeal.

In February 2011, a jury found appellant guilty of possession of a billy in violation of Penal Code, former section 12020, subdivision (a)(1).¹ The crime was alleged to have occurred on March 19, 2010. The jury found true the allegations that appellant had a

¹ Penal Code, former section 12020 was repealed effective January 1, 2012. (Stats. 2010, ch. 711, § 4.) As to the possession of a billy, the statute was reenacted as Penal Code section 22210. (Stats. 2010, ch. 711, § 6, operative January 1, 2012.)

prior felony conviction for robbery (Pen. Code, §§ 211, 212.5), a prior felony conviction for possession of a stolen vehicle (Pen. Code, § 496(d)), and a prior felony conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11378).

On March 3, 2011, the court sentenced appellant to four years eight months in state prison consisting of the low term of one year four months on the weapons possession charge, doubled pursuant to Penal Code section 1170.12, plus two years for two prior prison terms pursuant to Penal Code section 667.5.

Subsequently, after the court held a hearing on appellant's motion to recalculate his credits after a domestic violence charge was dismissed, the court calculated appellant's credit for time served as 92 actual days plus 46 days of conduct credits pursuant to the version of Penal Code section 4019 applicable to appellant's case. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62.)²

Appellant filed a timely notice of appeal.

Discussion

Penal Code Section 4019 Credits

Appellant argues that an amendment to Penal Code section 4019 effective October 1, 2011, must be applied to his case by virtue of the equal protection clauses of the California and federal Constitutions.

At the outset it is important to note that all of appellant's presentence custody occurred after January 25, 2010 and before October 1, 2011.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

² In compliance with section 1237.1, appellant filed another motion to have his custody credits recalculated raising his equal protection challenge. That motion was denied on February 28, 2012.

Before January 25, 2010, conduct credits under section 4019³ could be accrued at the rate of two days for every four days of actual time served in presentence custody (sometimes referred to as one-third time or credits calculated at 33 percent). (Stats.1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [section 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony such as appellant. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)⁴

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) 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 intent that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to section 4019 in 2011 as relevant to appellant's equal protection challenge. These statutory changes, among other things,

³ All unspecified statutory references are to the Penal Code.

⁴ For those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony, conduct credits continued to be calculated at two days for every four days of actual custody. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

reinstated one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.⁵ (§ 4019, subds. (b), (c), & (h).)

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, (hereafter the October 2011 amendment) are to have prospective application only —i.e. to crimes committed on or after the effective date of the statute, appellant contends that the October 2011 amendment to section 4019 violates the equal protection clauses of the federal and California Constitutions if it is not applied retroactively.

Preliminarily, we note that to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837.)

Appellant contends that the Supreme Court has already issued binding authority for equal protection purposes and the holding in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) applies to this case.

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new Penal Code section 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Id.* at pp. 544–545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) In our view, *Kapperman* is

⁵ These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

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.

Our Supreme Court recently confirmed, "[c]redit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).)

Although the Supreme Court in *Brown* was concerned with the January 2010 amendment to section 4019 (*Brown, supra*, 54 Cal.4th at p. 318), the reasoning of *Brown* applies with equal force to the prospective-only application of the current version of section 4019.

As can be seen, in *Brown*, the California Supreme Court expressly determined that *Kapperman* does not support an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 328–330.) In rejecting the defendant's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the 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*, at pp. 328–329.)

Similarly, we reject appellant's reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604, as cited in a footnote in *Kapperman*. (11 Cal.3d at p. 547, fn. 6.) This Illinois case, similar to *Kapperman*, dealt with actual custody, and not presentence conduct credits with which we are concerned here. Moreover, the date that was

considered potentially arbitrary or fortuitous in the equal protection analysis in *People ex rel. Carroll v. Frye* was the date of conviction, a date out of a defendant's control, and not the date the crime was committed. (*People ex rel. Carroll v. Frye, supra*, 35 Ill.2d at pp. 609–610.)

More importantly, in *Brown*, the Supreme Court confirmed that the October 2011 amendments to section 4019 have prospective application only. The court noted that the defendant had filed a supplemental brief in which he contended that he was entitled to retroactive presentence conduct credits under the 2011 amendment to section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply prospectively . . . to prisoners who are confined to a county jail [or other local facility] for a crime committed [on] or after October 1, 2011.'" (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, appellant committed his offense in 2010.

Accordingly, we must reject appellant's argument that we must apply the October 2011 amendment to section 4019 to all his presentence custody in this case.⁶

Disposition

The judgment is affirmed.

⁶ In his reply brief, appellant acknowledges that this court must follow the Supreme Court's recent equal protection decision in *Brown, supra*, 54 Cal.4th 314 as it relates to the October 2011 amendment to section 4019. He raises the issue to preserve it for federal review.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.