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

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIE EVARISTO ORTA, JR.,

Defendant and Appellant.

H037438

(Santa Clara County

Super. Ct. No. CC950008)

INTRODUCTION

Defendant Louie Evaristo Orta was sentenced to prison for nine years after pleading guilty to Count 1, assault with a deadly weapon with a gang enhancement (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)(1)(B)),¹ and Count 2, attempting to dissuade a witness from testifying with an on-bail enhancement (§§ 136.1, subd. (a)(2), 12022.1). The sole issue raised on appeal is whether October 2011 amendments to sections 4019 and 2933 must be applied retroactively to defendant's August 2011 sentence to comport with equal protection principles. Defendant contends he should receive 356 additional days conduct credit as to Count 1, and 13 additional days conduct credit as to Count 2. Finding no equal protection violation, we will affirm the judgment.

¹ Unspecified statutory references are to the Penal Code.

BACKGROUND²

On June 28, 2009, defendant and two others engaged in an altercation with the victim during which defendant stabbed the victim's hand and arm. The victim sought treatment at a hospital, and hospital staff alerted police. Defendant was arrested on July 24, 2009, and was released on bail two days later.

On August 24, 2009, defendant and several companions contacted a witness to the June 28 events at home and asked if the witness's son would be testifying in the case. The son later reported that he was assaulted at school by several young men he believed to be gang members. After the August incidents, a second arrest warrant was issued and served on August 28, 2009, and defendant remained in custody.

Two years later on August 1, 2011, the day of trial, the district attorney filed an amended information charging defendant in Count 1 with assault with a deadly weapon (§ 245, subd. (a)(1)) with a gang enhancement (§186.22, subd. (b)(1)(B)), and in Count 2 with attempting to dissuade a witness (§ 136.1, subd. (a)(2)) with an on-bail enhancement (§ 12022.1). Both crimes are serious felonies as defined in section 1192.7, subdivision (c). Defendant pled guilty to both counts and admitted the enhancements that day. On August 29, 2011, the trial court sentenced defendant to a stipulated prison term of nine years³, with presentence credits of 710 actual days plus 354 days conduct credit as to Count 1, and 25 actual days plus 12 days conduct credit as to Count 2.

² Since defendant pleaded guilty to both counts, the factual history is taken from the probation report in the record.

³ On Count 1, the court imposed the lower term of two years plus five years for the gang enhancement; on Count 2, the court imposed the middle term of two years fully consecutive under section 1170.15. The on-bail enhancement as to Count 2 was stricken pursuant to section 1385.

DISCUSSION

Defendant argues on appeal that October 2011 amendments to sections 4019 and 2933 must be applied retroactively to his sentence based on equal protection principles. Sections 4019 and 2933 create incentives for good behavior in custody by offering credit toward a defendant's total term of confinement according to prescribed formulas. Presentence credits are awarded at the time of sentencing (§ 2900.5, subd. (a)), and consist of actual days in custody, plus eligible work and good conduct credits under section 4019, subds. (b) & (c) (collectively, "conduct credit"). (See *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The version of section 4019 in effect at the time the offenses were committed in this case allowed defendants to earn conduct credit at the rate of two days for every four days of actual custody. (Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) The version of section 2933 in effect at the time of the offenses here did not provide for presentence conduct credit. (Stats. 1982, ch. 1234, § 4, p. 4551.)

The Legislature amended section 4019, effective January 2010, to allow some defendants to earn conduct credit at an increased rate of four days for every four days of actual custody. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010.) Under that amendment, conduct credits for defendants with a prior serious or violent felony conviction (as defined in §§ 1192.7, subd. (c) and 667.5(c), respectively), or whose commitment offense is a serious felony, or who are required to register as a sex offender (§ 290), are limited to the rate of two days for every four days in custody. (Stats. 2009-2010, 3d. Ex. Sess., ch. 28, § 50.)

The Legislature later amended section 4019, effective September 28, 2010, to return the rate of conduct credit accrual for all defendants to two days for every four days of actual custody. (Stats. 2010, ch. 426, §§ 2, 5.) At the same time, the Legislature amended section 2933 to allow certain defendants committed to prison to earn presentence conduct credit of one day for every day of actual custody. (Stats. 2010, ch. 426, § 1.) Individuals with a prior serious or violent felony conviction, or a serious

felony commitment offense, or a requirement to register as a sex offender were excluded from section 2933 and would instead earn conduct credit under section 4019. (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) The September 2010 versions of sections 4019 and 2933 expressly applied to crimes committed on or after September 28, 2010.⁴ (Stats. 2010, ch. 426, § 2.)

The Legislature further amended sections 4019 and 2933, effective October 2011 (hereafter, “the October 2011 amendment”). This most recent iteration of section 4019 applies to all crimes committed on or after October 1, 2011 and allows two days’ conduct credit to be earned for every two days of actual custody (§ 4019, subd. (f)), while section 2933 no longer provides a separate formula for presentence conduct credit. (Stats. 2011-2012, 1st. Ex. Sess., ch. 12, § 16.) With the October 2011 amendment, all defendants sentenced to jail or prison for crimes committed on or after October 1, 2011 may earn presentence conduct credit at that rate. (§ 4019, subds. (b), (c), & (f); Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.)

Defendant contends that he is entitled to benefit from the more generous conduct credit formula provided by the October 2011 amendment. We first observe that defendant’s argument is contrary to the express language of the October 2011 amendment, which states that it “shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011.” (§ 4019, subd. (h).) The amendment also specifies that “[a]ny days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (*Ibid.*) Defendant argues that the Legislature’s express directive for prospective application violates the constitutional guarantee of equal protection.

⁴ We note that the September 2010 versions of sections 4019 and 2933 were in effect at the time defendant was sentenced on August 29, 2011. We do not mean to suggest, however, that these versions of section 4019 or 2933 are applicable here.

To prevail on an equal protection claim, defendant must demonstrate that the state has adopted a classification that unequally affects similarly situated individuals without appropriate justification. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200 (*Hofsheier*)). Defendant argues that prospective application of the October 2011 amendment of section 4019 creates two similarly situated groups: (1) inmates who will earn conduct credit at an enhanced rate for serious felonies committed on or after October 1, 2011, and (2) inmates who will not earn conduct credit at an enhanced rate for serious felonies committed before October 1, 2011.

Our Supreme Court recently decided in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) that prospective application of the January 2010 amendment of section 4019 did not violate equal protection principles, as that amendment did not create two similarly situated groups. The Supreme Court noted that 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*, 54 Cal.4th 314, pp. 328-329.)

While the Supreme Court’s decision in *Brown* concerned only the January 2010 version of section 4019, this court recently extended the reasoning and holding of *Brown* to the October 2011 version in *People v. Kennedy* (September 14, 2012, H037668) ___ Cal.App.4th ___ [2012 LEXIS 982, *17-26] (*Kennedy*). The Fifth Appellate District reached the same conclusion in *People v. Ellis* (2012) 207 Cal.App.4th 1546.

Defendant relies on *In re Kapperman* (1975) 11 Cal.3d 542 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) to support his argument that prospective application of the October 2011 amendment violates equal protection. In *Kapperman*, the court held that former section 2900.5, which awarded presentence custody credit only to individuals delivered to the Director of Corrections by the statute’s effective date, bore no

rational relationship to a legitimate government purpose. (*Kapperman, supra*, 11 Cal.3d at p. 545.) The court in *Sage* held that a provision allowing presentence conduct credit for misdemeanants but not felons violated equal protection principles. (*Sage, supra*, 26 Cal.3d at p. 508.)

Kapperman and *Sage* were discussed and distinguished in *Brown*. (*Brown, supra*, 54 Cal.4th at pp. 328-330.) In *Brown*, the Supreme Court noted that *Kapperman* was concerned with actual custody credit, not conduct credit. “Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively 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.” (*Brown, supra*, 54 Cal.4th at p. 330, emphasis in original.)

Defendant argues that the *Kapperman* court’s favorable citation to *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 (*Carroll*) supports the conclusion that “the state has no legitimate interest in providing credit to one class of prisoner but not another.” We reject this contention as *Carroll*, like *Kapperman*, dealt only with actual custody, not presentence conduct credit. Further, “the date that was considered potentially arbitrary or fortuitous in the equal protection analysis in [*Carroll*] was the date of conviction, a date out of a defendant’s control, and not the date the crime was committed” as under the October 2011 version of section 4019. (*Kennedy, supra*, ___ Cal.App.4th ___ [2012 LEXIS 982, *22].)

The *Brown* court distinguished *Sage* as not addressing the issue of retroactivity. (*Brown, supra*, 54 Cal.4th at pp. 329-330.) The *Sage* court found no rational reason for the disparate treatment of misdemeanants and felons with regard to awarding presentence credit. (*Ibid.*) However, as the court noted in *Brown*, “[t]he unsigned lead opinion ‘by the Court’ in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in

a concurring and dissenting opinion [citation] went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds.” (*Brown, supra*, at p. 330.)

Defendant asserts that *Sage* implicitly held that felons are similarly situated to other inmates “regardless of their lack of awareness of the right to earn conduct credits.” Like the defendant in *Brown*, defendant argues here that *Sage* foreclosed the conclusion reached in *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*) that individuals serving time before and after incentives are announced are not similarly situated. (*Brown, supra*, 54 Cal.4th at p. 330.) In *Strick*, the court found no equal protection violation in the prospective application of statutory amendments which created the opportunity for prisoners to earn work credits. (*Strick, supra*, 148 Cal.App.3d at p. 914.)

The *Brown* court specifically rejected the argument that *Sage* refutes the outcome in *Strick*, finding *Strick*’s reasoning to be persuasive. (*Brown, supra*, 54 Cal.4th at p. 329.) The *Brown* court noted with approval the rationale under *Strick* that prospective application of a statute creating a new opportunity for conduct credit is appropriate, given the “ ‘obvious purpose’ ” of such an enactment 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.’ ” (*Brown, supra*, 54 Cal.4th at p. 329.)

Accordingly, we find no equal protection violation in the prospective application of the October 2011 amendment. We therefore reject defendant’s contention that he is entitled to additional conduct credit.

DISPOSITION

The judgment is affirmed.

GROVER, J.*

WE CONCUR:

RUSHING, P.J.

ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.