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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD DUANE TOOKER,

Defendant and Appellant.

H037441

(Santa Clara County

Super. Ct. No. B1046368)

Defendant Ronald Duane Tooker was convicted by plea of second degree burglary in violation of Penal Code section 459;<sup>1</sup> petty theft in violation of section 666; and possession of burglary tools in violation of section 466, a misdemeanor. Tooker also admitted to having two violent or serious prior felony convictions within the meaning of sections 667.5, subdivisions (b) through (i) and 1170.12. After the court granted in part his *Romero*<sup>2</sup> motion and dismissed the oldest prior strike in the interests of justice, he was sentenced to four years in prison. The court imposed various fines and fees and awarded Tooker actual custody credits of 543 days, plus conduct credits under section 4019, subdivision (f), of 270 days for a total of 813 days of pre-sentence credit.<sup>3</sup>

<sup>1</sup> Further unspecified statutory references are to the Penal Code.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>3</sup> The complaint alleged that the crimes were committed on March 5, 2010. Defendant pleaded no contest on August 25, 2010, and he was sentenced four days later, on August 29, 2010. As we will explain, section 4019 was amended effective January 25, 2010, and defendant's credits were properly calculated at the one-for-two total rate under this version of section 4019 in effect on the date he committed the crime, the date (continued)

On appeal, Tooker contends on equal protection grounds that he is entitled to additional conduct credit based on legislative changes to section 4019, expressly operative to crimes committed on or after October 1, 2011. We reject these contentions and affirm the judgment.

## STATEMENT OF THE CASE

### *I. Factual Background*<sup>4</sup>

On March 5, 2010, Tooker and his wife disagreed about whether they should move their 11-month old baby from a basinet to a crib in another room. Tooker's wife insisted that the baby could only be moved to another room if they used a monitor. Tooker was financially stressed and his ability to obtain or maintain work had been spotty. In addition, Tooker had relapsed after a period of sobriety and was using drugs. Because he did not have the money to buy a baby monitor in order to resolve the issue with his wife about where their baby should sleep, he went into Fry's Electronics that day to steal one, along with a headset for himself.

Once inside the store, a loss prevention officer who worked there observed Tooker walking in an aisle with a shopping cart. He saw Tooker "pick up a Q-See brand wireless camera kit, priced at \$79.99, and place it in his cart. [He then] saw . . . Tooker pick [up] a Logitech brand G330 Gaming Headset, priced at \$49.99, and place that item into his cart." The loss prevention officer then saw Tooker go down a different aisle, open the packaging of the wireless camera kit with a cutting tool, remove the contents, and place them inside his right front jacket pocket. Tooker discarded the packaging, left his cart inside the store, went to his car, and removed the camera kit from his jacket pocket, all

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he changed his plea, and the date he was sentenced, given his admitted prior serious felonies as defined in section 1192.7. (Stats. 1982, ch. 1234, § 7 [former § 4019, subd. (f), operative to Jan. 24, 2010]; Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, operative Jan. 25, 2010 to Sept. 27, 2010].)

<sup>4</sup> We take the underlying facts of the crime from the probation report and from papers filed in connection with defendant's *Romero* motion.

while being followed by the loss prevention officer. Tooker then re-entered the store and found his cart. The loss prevention officer watched as Tooker removed the headset from the cart and cut open the packaging. He placed various components inside different pockets of his jacket, discarded the packaging, and continued to walk around the store. The loss prevention officer called the police. Tooker got in line to pay for other items, went through check out, left the store, and got into his car. He was immediately detained by police and arrested. Tooker admitted to having stolen merchandise and police found the items on his person or inside his car, along with a razor blade inside his pocket.

## II. *Procedural Background*

Tooker was charged by complaint with second degree burglary in violation of section 459-460, subdivision (b) (count one); petty theft with a prior conviction of grand theft for which he had served a prior prison term, in violation of section 666 (count two); and possession of burglary tools in violation of section 466, a misdemeanor (count three). The complaint included allegations that he had two prior serious felony convictions, both for oral copulation of a child by force or fear in violation of section 288a.<sup>5</sup> (§§ 667.5, subd. (b); 667, subds. (b)-(i) & 1170.12.) In a negotiated plea bargain, Tooker pleaded no contest to all counts and admitted the enhancement allegations.

On August 29, 2010, the court granted, in part, defendant's *Romero* motion, striking the earlier of his two prior strikes, and sentenced him to four years in prison, consistently with the plea bargain. This sentence consisted of the midterm of two years on count one, doubled for the remaining prior strike; the same sentence on count two, stayed under section 654; and 10 days in county jail on count three, concurrent to count one. The court awarded 813 days of pre-sentence credits, of which 543 were actual days

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<sup>5</sup> It is undisputed that the two prior strikes were convictions involving adult, not child, victims. The complaint was to be amended to reflect this.

and the remaining 270 were conduct credits under the version of section 4019 then in effect. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62)

Tooker timely appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

## DISCUSSION

### I. *Defendant is Not Entitled to Additional Conduct Credits*

Tooker contends that principles of equal protection entitle him to additional conduct credits. His 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. 4553 [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 Tooker, 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.)<sup>6</sup> 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 Tooker, 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

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<sup>6</sup> Our own view is that the January 2010 amendments to section 4019 were not retroactive, even in the face of an equal protection challenge analytically akin to that mounted here. (See, *People v. Hopkins* (2010) 184 Cal.App.4th 615, 627-628, review granted June 21, 2010, S183724 [briefing deferred pending decision in *People v. Brown, supra*].)

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 Tooker, 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 Tooker'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.<sup>7</sup> (§ 4019, subs. (b), (c), & (h).)

As noted, Tooker committed the crime on March 5, 2010, and was sentenced on August 29, 2010. Under the law in effect on both dates, he was properly awarded

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<sup>7</sup> These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 482; 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.)

conduct credits on a one-for-two basis (543 days actual credit and 270 days conduct credit).<sup>8</sup>

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Tooker contends, on equal protection grounds, that he is entitled to the reinstated one-for-one conduct credits implemented by those changes (543 actual days and 543 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.

Preliminarily, 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. In considering whether state legislation is violative of equal protection, we apply different levels of scrutiny to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) Where, as here, the statutory distinction at issue neither “touch[es] upon fundamental interests” nor is based on gender, there is no equal protection violation “if the challenged classification bears a rational relationship to a legitimate state purpose. [Citations.]” (*People v. Hofsheier* (2006)

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<sup>8</sup> This is because as to the dates of the March 5, 2010 crime and August 29, 2010 sentencing, and as alleged in the complaint and admitted by Tooker, he fit into that category of persons with a prior violent or serious felony conviction, who were treated less generously under section 4019 as to an award of pre-sentence conduct credits. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, §§ 50, 62 [former § 4019, operative Jan. 25, 2010 to Sept. 27, 2010.]

37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities]; *People v. Richter* (2005) 128 Cal.App.4th 575, 584 [legislation creating sentencing disparity or altering treatment of custody credits does not affect fundamental right and is therefore subjected to rational basis review on equal protection challenge].) Under the rational relationship test, “ “ “ a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ ’ ” (*Hofsheier, supra*, at pp. 1200-1201, italics omitted.)

In *Kapperman*, the Supreme Court reviewed a provision (then-new § 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. (*Kapperman, supra*, 11 Cal.3d 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.) But *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. A further significant distinction may be drawn between *Kapperman* and this case, in that the liberalization of credit at issue in *Kapperman* applied to prisoners regardless of the offense for which they were imprisoned, whereas the change here affects three well defined sub-classes of offenders: those required to register as sex offenders; those committed for a serious felony as defined in section 1192.7; or those with a prior serious felony, as defined in section 1192.7, or a prior violent felony, as defined in section 667.5.

We likewise reject defendant'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, like *Kapperman*, was dealing with actual custody, and not conduct, pre-sentence credits, which we are concerned with 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 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.)

*Sage* is likewise inapposite, because it involved a prior version of section 4019 that allowed pre-sentence conduct credits to misdemeanants, but not felons. (*Sage, supra*, 26 Cal.3d at p. 508.) The high 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.*) But here, the purported equal protection violation is temporal, rather than based on defendant's status as a misdemeanor or felon. (*People v. Floyd* (2003) 31 Cal.4th 179, 189-191 [" 'punishment lessening statutes given prospective application' " on a certain date " 'do not violate equal protection' "].) Moreover, *Sage* is not dispositive because it did not address an issue of retroactivity, as defendant urges here.

One of section 4019's principal purposes is to motivate or reward good behavior while defendants are in pre-sentence custody. (See, *People v. Brown* (2004) 33 Cal.4th 382, 405 [primary focus of section 4019 is on encouraging minimal cooperation and good behavior by persons detained in local custody].) And it is impossible to influence behavior *after* it has occurred. The fact that a defendant's conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively only. (*In re Stinette* (1979) 94 Cal.App.3d 800, 806 [prospective only application of provisions of Determinate Sentencing Act (§ 1170 et seq.) upheld over equal protection challenge];

*In re Strick* (1983) 148 Cal.App.3d 906, 912-913 [prospective only application of statutory changes designed to incentivize productive work and good conduct of prison inmates upheld over equal protection challenge].) This is so even if an inmate has already earned the maximum amount of good conduct credits available under the applicable former version of the statute and is only claiming entitlement to *additional* conduct credits for the same good behavior that earned him those conduct credits in the first place. What illustrates this point is that unquantifiable and unidentifiable group of inmates who did not earn good conduct credits in the same period of time as defendant, but who might have behaved better given enhanced incentives.

We acknowledge that the specific purpose of the amendments to section 4019 that became operative October 1, 2011, was to address the “state’s fiscal emergency by effectuating an earlier release of a defined class of prisoners, thereby relieving the state of the cost of their continued incarceration and alleviating overcrowding in county jail facilities. [Citations.]” (*People v. Borg* (April 18, 2012, A129258) \_\_ Cal.App.4th\_\_ [2012 Cal.App. Lexis 439, \*29][amendments do treat similarly situated classes of persons disparately but the legislation nevertheless bears a rational relationship to a legitimate state purpose].) But we agree with our colleagues in Division One of the First Appellate District that “[r]educing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state’s fiscal concerns and its public safety interests.” (*Id.* at p. \*30.)

We accordingly reject Tooker’s contention that he is entitled to additional conduct credits based on amendments to section 4019, operative October 1, 2011.

#### DISPOSITION

The judgment is affirmed.

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Duffy, J.\*

WE CONCUR:

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Rushing, P.J.

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Premo, J.

People v. Tooker  
No. H037441

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.