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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CRUZ PATINO,

Defendant and Appellant.

H037445

(Santa Cruz County

Super. Ct. No. F21489)

Jose Cruz Patino was convicted by plea of assault with force likely to cause great bodily injury in violation of Penal Code section 245, subdivision (a)(1).¹ He was placed on probation for three years on the condition he serve 210 days in jail, with pre-sentence credits of 32 days. The portion of pre-sentence credit attributable to conduct credits under section 4019 was calculated under the version of the statute in effect on September 10, 2011, when defendant committed the crime. He contends that principles of equal protection compel an award of additional conduct credits under the current version of section 4019, which expressly applies only to defendants whose crimes were committed on or after October 1, 2011, the operative date of the statutory amendments. (§ 4019, subd. (h).) We reject this claim and affirm the judgment.

¹ Further unspecified statutory references are to the Penal Code.

STATEMENT OF THE CASE²

On September 10, 2011, Patino was involved in a fight near 32nd Avenue in Santa Cruz. The victim, accompanied by his wife and two-year old daughter, had walked past a group of three men, one of whom was Patino. One of the men said to the victim that he would “like to punch him in the face for smiling.” The victim told the men to leave but a fight ensued with all three men, including Patino, attacking the victim by punching him. Patino pulled out a knife and began to waive it at the victim and then shoved the knife near the victim’s face. Another of the men attempted to hit the victim with a skateboard. A bystander joined the melee in an effort to aid the victim, and he, too, was attacked. Eventually, another person broke up the fight by using a collapsible baton.

Patino was charged by information filed September 28, 2011, with assault by means of force likely to cause great bodily injury in violation of section 245, subdivision (a)(1). On October 11, 2011, he entered a no-contest plea under a negotiated disposition. The court suspended sentence and placed defendant on probation for three years, conditioned on service of 210 days in county jail. The court awarded a total of 32 days of pre-sentence credit. The court did not delineate the number of days of custody credit and those attributed to conduct credit under section 4019 but stated that this would be a “two-thirds sentence,” the crime occurring “pre-October 1,” meaning that the court was applying the former version of the statute to calculate conduct credits. Defendant’s counsel objected to the calculation of credits on equal protection grounds and argued that defendant was “entitled to the same benefit as anybody who committed a crime after October 1st and thus should be given 50 percent credits.” The court rejected that argument “based on the language of the statute.”

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

² We take the facts of the crime from the transcript of the preliminary hearing.

DISCUSSION

I. *Patino is Not Entitled to Additional Conduct Credits*

Patino contends that principles of equal protection entitle him to additional conduct credits because the statutory changes to section 4019, operative October 1, 2011, should apply so as to entitle him to one-for-one conduct credits rather than the one-for-two he was awarded under the prior version of section 4019.

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 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. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) 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, S181963, and related cases.)³

Then, effective September 28, 2010, section 4019 was amended again to restore the 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.) 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 section 4019 in 2011, as relevant to Patino's equal protection challenge. These statutory changes, among other things, 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.⁴ (§ 4019, subs. (b), (c), & (h).) Patino committed the crime in the instant case on September 10, 2011, and the trial court properly awarded him conduct credits on the basis of the law then in effect, i.e., that version of section 4019 operative after September 28, 2010 and before October 1, 2011.

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, are to have prospective application only, Patino contends, on equal protection grounds, that he is entitled to the reinstated one-for-one conduct credits

³ 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*].)

⁴ 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.)

implemented by those changes. 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 presentence credits for prison inmates must be retroactively applied to all prisoners. 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 Penal Code section 4019 violated 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) 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.

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. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis 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*, fn. omitted.) 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' "].) One of section 4019's principal purposes is to motivate or reward good behavior while in pre-sentence custody (*People v. Brown* (2004) 33 Cal.4th 382, 405), 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. (*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.

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 Patino'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.

Duffy, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

* 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.