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

THE PEOPLE,

Plaintiff and Respondent,

v.

EVARSITO NAVA CHECCHIN,

Defendant and Appellant.

H037567

(Santa Cruz County

Super. Ct. Nos. F20313 & F21353)

Defendant Avaristo Nava Checchin appeals a judgment by the trial court denying his request for additional conduct credit under the October 2011 version of Penal Code section 4019.¹ Defendant raises the sole argument that equal protection principles require the retroactive application of the statute to crimes committed before the statute's operative date of October 1, 2011. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53)

I. STATEMENT OF THE CASE²

On January 19, 2011, defendant was charged with possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and giving false information to a police officer (§ 148.9) in case number F20313. The district attorney also alleged defendant suffered five prior convictions. (§ 667.5, subd. (b).) In February 2011, defendant pled guilty to possession of cocaine and was granted probation. His remaining charges and enhancements were

¹ All further unspecified statutory references are to the Penal Code.

² The underlying facts of this case are not relevant to the issues on appeal.

subsequently dismissed. Defendant admitted a probation violation on July 25, 2011, and the trial court revoked and reinstated probation.

On August 22, 2011, defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in case number F21353. The district attorney also alleged that defendant suffered five prior convictions. (§ 667.5, subd. (b)). Defendant pled guilty to possession of methamphetamine. The trial court struck his prior convictions and granted probation. During the same proceeding, defendant admitted a probation violation for his earlier cocaine possession charge, and the trial court reinstated probation.

October 5, 2011, defendant admitted probation violations in both cases F20313 and F21353. The trial court revoked and reinstated probation in both cases, and ordered defendant to serve two consecutive 120-day sentences in county jail. The trial court granted defendant 52 days credit in case number F21353 and no days credit in case number F20313. Defendant's trial counsel filed a motion on October 7, 2011, arguing that defendant was entitled to the conduct credit calculation provided by the October 2011 version of section 4019 and 2933 under equal protection principles. The trial court denied the motion on October 25, 2011, and this timely appeal followed.

II. DISCUSSION

Defendant asserts that the October 2011 version of section 4019 should be applied retroactively under equal protection principles. On appeal, defendant seeks an additional 80 days credit, consisting of 40 days actual custody credit and 40 days conduct credit.

Conduct Credit and Section 4019

Section 4019 provides defendants the ability to earn presentence credit consisting of worktime and good behavior. (§ 4019, subds. (b) & (c).) Collectively, these presentence credits are called “[c]onduct credit.” (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) Defendants can earn conduct credit prior to the imposition of a sentence and

may also earn conduct credit when a jail sentence is a term or condition of probation. (*People v. Daniels* (2003) 106 Cal.App.4th 736, 740.)

The September 2010 version of section 4019 was in effect at the time defendant committed his probation violations and initial offenses. The September 2010 version of section 4019 allowed defendants to earn conduct credit at a rate of two days for every four days of actual custody. (Stats. 2010, ch. 426, §§ 2, 5.) At the same time they amended section 4019, the Legislature amended section 2933. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)].) The amendment to section 2933 allowed defendants who were sentenced to prison and for whom the sentence was executed to earn presentence conduct credit the rate of one day for every day of actual custody. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(1)].) Defendants with a prior serious felony conviction were excluded from former section 2933, and instead earned conduct credit under section 4019. (Stats. 2010, ch. 426, § 1 [former § 2933, subd. (e)(3)].) The September 2010 version of section 4019 expressly applied only to defendants who committed their crime on or after the effective date of September 28, 2010. (Stats. 2010, ch. 426, § 2.) Defendant committed his offenses after the effective date of the statute and has prior serious felony convictions. Therefore, the September 2010 version of section 4019 governs the amount of conduct credit he may earn.

The current version of section 4019, operative October 1, 2011, allows defendants to earn conduct credit at a rate of four days for every four days of actual custody. (§ 4019, subs. (b), (c), & (f); Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.) The October 2011 version of section 4019 applies only to those who are confined for a crime committed on or after October 1, 2011. (§ 4019, subd. (h).) The statute expressly states that any conduct credit earned by a defendant prior to the operative date will be calculated according to “the rate required by the prior law.” (§ 4019, subd. (h).) Operative October 1, 2011, section 2933 was also amended and no longer provides for presentence conduct credit. (Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 16.)

Equal Protection Principles

Defendant argues that the October 2011 version of section 4019 should be retroactively applied in accordance with the principles of equal protection. However, we find that the prospective application of the October 2011 version of section 4019 does not violate equal protection principles. Defendant is therefore not entitled to the additional conduct credit he seeks on appeal.

A defendant needs to demonstrate that there are two similarly situated groups that are unequally treated in order to prevail on an equal protection claim. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*)). There are different levels of scrutiny afforded to different types of classifications. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) In cases where the disparate statutory treatment does not touch upon “fundamental interests,” and is not rooted in gender, the analysis must be whether or not the classification “bears a rational relationship to a legitimate state purpose.” (*Hofsheier*, at p. 1200.) If there are any “ ‘plausible reasons’ ” for the classification at issue, then there is no equal protection violation. (*Id.* at pp. 1200-1201.)

Our Legislature amended the October 2011 version of section 4019 and expressly included a provision that states the current statute only applies to inmates who committed offenses on or after October 1, 2011. (§ 4019, subd. (h).) Defendant now contends that the October 2011 version of section 4019 creates two similarly situated groups who are treated unequally: (1) a group that will receive reduced conduct credit because they committed an offense before October 1, 2011, and (2) a group that will receive additional conduct credit because they committed an offense after October 1, 2011. However, defendant’s contention has no merit as our Supreme Court recently decided in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) that the prospective-only application of the January 2010 version of section 4019 is not violative of equal protection principles on the basis that the January 2010 amendments did not create two similarly situated groups.

The *Brown* court noted 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.” (*Brown, supra*, 54 Cal.4th 314, pp. 328-329.) In short, our high court concluded that “prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows.” (*Id.* at p. 329.) Though the *Brown* decision concerned the January 2010 version of section 4019, we recently held in *People v. Kennedy* (Sept. 14, 2012, H037668) ___ Cal.App.4th ___ [2012 LEXIS 982, *17-26] (*Kennedy*) that there is no reason why the reasoning and holding in *Brown* cannot be extended to the October 1, 2011 amendment to section 4019.

Defendant contends that the California Supreme Court decision in *People v. Sage* (1980) 26 Cal.3d 498 implicitly held that felons are similarly situated to other inmates “regardless of their lack of awareness of the right to earn conduct credits.” Defendant also cites to *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*), and contends that the appellate court’s decision was wrongly decided. The *Strick* court struck down the defendant’s equal protection claim over the prospective application of a statute that gave additional custody credit to those participating in a work program. (*Strick*, at pp. 912-913.) The court found that the defendants deprived of the additional credit were not similarly situated to those granted the additional credit. (*Ibid.*) Nonetheless, this argument fails as the *Brown* court actually rejected a similar argument and found *Strick* to be “persuasive.” (*Brown, supra*, 54 Cal.4th at p. 329.) The *Brown* court noted that the *Strick* court that that prospective application of a statute effecting conduct credit was appropriate as the “ ‘obvious purpose of the new section’ ” was 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.)

Defendant also refutes the existence of a rational reason for the classification in his appeal, and claims that the California Supreme Court’s decision in *In re Kapperman*,

(1974) 11 Cal.3d 542, is binding. The *Kapperman* court held that a statute that awarded custody credit only to those inmates delivered to the Director of Corrections by the statute's effective date did not bear a rational relationship to a legitimate state purpose, and was thus unconstitutional. (*Id.* at p. 545.) In its decision, the court ordered the statute applied retroactively to all felons that were incarcerated or on parole, including those excluded from the original statute. (*Id.* at p. 550.)

Neither of these arguments have merit, as both *Kapperman* and *Sage* were discussed and distinguished by the Supreme Court in *Brown*. (*Brown, supra*, 54 Cal.4th at pp. 328-330.) First, the *Brown* court concluded that *Kapperman* was concerned with actual custody credit, not conduct credit, in contrast to section 4019. "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.)

The *Brown* court further distinguished *Sage*, finding that *Sage* did not address the issue of retroactivity. (*Brown, supra*, 54 Cal.4th at pp. 329-330.) In *Sage*, the Supreme Court held that a provision that allowed presentence conduct credit to those convicted of misdemeanors but not felonies violated principles of equal protection, finding that there was no rational reason for the varying treatment. (*Sage, supra*, 26 Cal.3d at p. 508.) The *Brown* court reasoned that "[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*, 54 Cal.4th at p. 330.)

Lastly, in a supplemental brief, defendant additionally argues that under this court's decision in *People v. Olague* (2012) 205 Cal.App.4th 1126 (*Olague*), he is entitled to increased presentence conduct credits for the time in custody after September 30, 2011. However, the Supreme Court granted review in *Olague* (review granted Aug. 8, 2012, S203298), meaning it is no longer published (Cal. Rules of Court, rule 8.1105(e)(1)) and may not be relied on or cited (Cal. Rules of Court, rule 8.1115(a)).

Defendant's argument that the prospective application of the October 2011 version of section 4019 violates equal protection is unavailing. Defendant is not entitled to additional conduct credit.

III. DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.