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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE DIAZ,

Defendant and Appellant.

H037571

(Santa Clara County

Super. Ct. No. C1105414)

**I. INTRODUCTION**

In June 2011, defendant pleaded no contest to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> misdemeanor battery on a peace officer (§§ 242, 243, subd. (b)), and misdemeanor resisting an officer (§ 148, subd. (a)(1)). He also admitted that he personally used a knife in the commission of the assault. (§§ 667, 1192.7.) In September 2011, the trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve ten months in county jail. The court granted defendant 207 days of presentence custody credits, consisting of 139 actual days plus 68 days conduct credit.

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends that he is entitled to additional conduct credit under the October 2011 version of section 4019. As we will explain, defendant's appeal is untimely. Therefore, we will dismiss the appeal.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Defendant was charged by amended complaint with assault with a deadly weapon (§ 245, subd. (a)(1); count 1), misdemeanor battery on a peace officer (§§ 242, 243, subd. (b); count 2), making criminal threats (§ 422; count 3), and misdemeanor resisting an officer (§ 148, subd. (a)(1); count 4). The complaint further alleged that defendant personally used a knife in the commission of the assault. (§§ 667, 1192.7.) All the offenses allegedly took place on or about April 17, 2011.

In June 2011, defendant pleaded no contest to assault with a deadly weapon (count 1), misdemeanor battery on a peace officer (count 2), and misdemeanor resisting an officer (count 4). He also admitted that he personally used a knife in the commission of the assault. (§§ 667, 1192.7.) Defendant's pleas and admission were made with the understanding that he would serve ten months, "top/bottom," in county jail. The remaining count was taken under submission for dismissal at the time of sentencing. Defendant waived referral for a full probation report. The probation officer prepared a waived referral memorandum recommending gang conditions among other conditions of probation.

On September 2, 2011, the trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions, including that he serve ten months in county jail for assault with a deadly weapon (count 1), and concurrent five-month terms for battery (count 2) and resisting an officer (count 4). The remaining count was dismissed. The court granted defendant 207 days of presentence custody credits, consisting of 139 actual days plus 68 days conduct credit. The court also ordered defendant to pay certain amounts, and stated that other fines and fees would not

be imposed, based on a determination that defendant did not have the ability to pay.<sup>2</sup> The court set a further hearing to determine whether gang conditions should be added to the terms and conditions of defendant's probation.

On September 9, 2011, the court added gang conditions to the terms and conditions of defendant's probation.

Defendant filed a notice of appeal on November 2, 2011, identifying the September 9, 2011 order as the order from which he was appealing.

### III. DISCUSSION

#### *Timeliness of Appeal*

The trial court suspended imposition of sentence, granted probation, and awarded defendant presentence custody credits, including conduct credit, on September 2, 2011. Defendant's notice of appeal was filed 61 days later, on November 2, 2011. Defendant's sole issue on appeal is whether he is entitled to additional conduct credit.

We asked the parties to submit supplemental briefs addressing whether this court may entertain defendant's sole issue on appeal, in view of the fact that (a) the notice of appeal was filed 61 days after the trial court granted probation and calculated defendant's conduct credit on September 2, 2011, and (b) the notice of appeal identifies a September 9, 2011 order as the appealable order. We also asked the parties to address the applicability of *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), and *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*).

In supplemental briefing, defendant argues that the date of final judgment was September 9, 2011, and therefore the notice of appeal was timely filed. According to defendant, the "sentencing proceeding" was "continued" from September 2 to

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<sup>2</sup> Any amounts required to be imposed under section 1465.8 and Government Code sections 70373 and 29550.1 are not subject to a defendant's ability to pay. (See *People v. Kim* (2011) 193 Cal.App.4th 836, 842; *People v. Woods* (2010) 191 Cal.App.4th 269, 272.)

September 9, 2011 and thus “the pronouncement of judgment occurred on two days.” Defendant contends that “the ‘sentence’ of probation is not complete, and hence not a ‘final judgment’ under Penal Code section 1237, until the judge has completed its order specifying all of the terms and conditions of probation,” which did not occur in this case until September 9, 2011, when the court imposed gang conditions of probation. To the extent the appeal is untimely, defendant requests that this court, “in the interests of judicial economy, . . . construe the untimely appeal as a petition for writ of habeas corpus based on ineffective assistance of counsel and consider the credits issue on the merits.” Lastly, defendant states that “it does appear that [*Brown*] applies to this case.”

The Attorney General in supplemental briefing contends that defendant’s “sole issue on appeal concerns a custody credit judgment entered by the trial court on September 2, 2011,” that the court’s “subsequent September 9, 2011, order relates exclusively to modification of [defendant’s] probation conditions,” and that defendant’s notice of appeal is untimely. Regarding defendant’s substantive claim for additional conduct credit, the Attorney General contends that the decisions in *Brown* and *Lara* are “instructive” and that defendant is not entitled to additional conduct credit.

“[A]n order suspending imposition of sentence and granting probation is considered a final judgment (§ 1237, subd. (a)), with the consequence that orders made after the grant of probation are generally appealable by the defendant as ‘[f]rom any order made after judgment, affecting the substantial rights of the party.’ (§ 1237, subd. (b); see *In re Bine* (1957) 47 Cal. 2d 814, 817 [306 P.2d 445] [order modifying probation appealable] . . . .)” (*People v. Douglas* (1999) 20 Cal.4th 85, 91 (*Douglas*); see *People v. Richardson* (2007) 156 Cal.App.4th 574, 582, fn. 2 (*Richardson*)). “In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.]” (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

To be timely, a notice of appeal generally “must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.” (Cal. Rules of Court, rule 8.308(a).) “The question whether a notice of appeal has been filed in a timely manner presents a jurisdictional issue. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal. [Citations.]” (*In re Jordan* (1992) 4 Cal.4th 116, 121.)

In this case, the record reflects that the trial court suspended imposition of sentence, granted probation, and awarded defendant presentence custody credits on September 2, 2011. In suspending imposition of sentence and granting probation, the September 2, 2011 order was thus a final judgment from which an appeal could have been taken by defendant. (See § 1237, subd. (a); *Douglas, supra*, 20 Cal.4th at p. 91; *Richardson, supra*, 156 Cal.App.4th at p. 582, fn. 2.)

We are not persuaded by defendant’s argument that sentencing was “continued” from September 2 to September 9, 2011, and that a final judgment was not rendered until the later date.

The record reflects that at the September 2, 2011 hearing, defense counsel objected to the probation department’s recommendation of gang conditions of probation. The trial court eventually stated that it would “*make all orders except the gang orders, allow the district attorney’s office and or probation to provide more information and set it for a new date for review* of possible imposition of gang orders in this case, as we did on another case previously that we needed more time to assess.” (Italics added.) The court eventually stated, “Imposition of sentence is suspended. Defendant is placed on three years formal probation under the following terms and conditions . . . .” After setting forth the terms and conditions, the court again indicated that the case would be “put . . . back on calendar . . . for review” on September 9, 2011, at which time the court would rule “definitively” as to gang conditions of probation. Before the September 2, 2011 hearing

concluded, the court granted defendant presentence custody credits, including 68 days conduct credit. The clerk's minutes of the September 2, 2011 hearing reflect that imposition of sentence was suspended, that probation was granted with various terms and conditions, that presentence custody credits were awarded, and that defendant was "committed" that day.

At the subsequent September 9, 2011 hearing, the trial court stated at the outset: "I didn't have much information on [defendant] from our last court sentencing so I deferred on, did not order the gang conditions until I had an opportunity to review his police report which I read thoroughly in this case, probation report I read thoroughly and now a memo produced by the probation department." After hearing argument from counsel, the court ordered gang conditions of probation. The clerk's minutes of the September 9, 2011 hearing reflect that a review hearing was held on that date, that defendant's probation was modified to include gang conditions, and that defendant was already serving his sentence.

The record thus reflects that an order suspending imposition of sentence and granting probation was made by the trial court on September 2, 2011. In making this order, the court indicated that it would consider the issue of gang conditions at a subsequent *review* hearing on September 9, 2011. There was no statement by the court at the September 2, 2011 hearing that sentencing would be *continued* to a later date. Rather, the court explained at the September 2, 2011 hearing that it was going to "make all orders" at that time "except the gang orders." The September 2, 2011 order suspending imposition of sentence and granting probation was thus a final judgment from which an appeal could have been taken by defendant. (See § 1237, subd. (a); *Douglas, supra*, 20 Cal.4th at p. 91; *Richardson, supra*, 156 Cal.App.4th at p. 582, fn. 2.) As defendant's sole issue on appeal arises out of the appealable order of September 2, 2011, defendant's notice of appeal filed more than 60 days later on November 2, 2011, is untimely. (Cal. Rules of Court, rule 8.308(a).)

Defendant requests that this court construe his untimely appeal as a petition for writ of habeas corpus. We decline to do so. Defendant's briefs and the appellate record do not make out a prima facie showing of ineffective assistance of counsel so as to justify habeas relief.

In order to establish a claim of ineffective assistance of counsel, the defendant must establish that counsel's performance was deficient and that "counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Here, defendant cannot show prejudice from counsel's failure to file a timely appeal, as defendant is not entitled to the additional conduct credit that he seeks in this appeal.<sup>3</sup>

Defendant contends that his conduct credit should be calculated pursuant to the current version of section 4019, which was operative after he was placed on probation, and that, under the current version, he is entitled 138 days conduct credit instead of the 68 days awarded by the court.

The current version of section 4019 generally provides that a defendant may earn conduct credit at a rate of two days for every two-day period of actual custody. (§ 4019, subds. (b), (c) & (f).) However, the current version of section 4019 states that the conduct credit rate "shall apply prospectively and shall apply to prisoners who are confined . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) In this case, defendant committed his crimes and the trial court placed him on probation *prior* to October 1, 2011. Thus the October 2011 version of

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<sup>3</sup> We will assume, without deciding, that section 1237.1, which generally precludes a defendant from raising a purported error in the calculation of presentence custody credits for the first time on appeal, does not apply where, as here, the defendant's claim of error is not based on a purported clerical or mathematical error by the trial court.

section 4019, which provides for prospective application, does not apply to defendant. (§ 4019, subd. (h); *Brown, supra*, 54 Cal.4th at p. 322, fn. 11; *Lara, supra*, 54 Cal.4th at p. 906, fn. 9.)

Defendant contends that the equal protection clauses of the state and federal Constitutions require that the October 2011 version of section 4019 be retroactively applied to him.

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, ‘ “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ ” [Citation.] ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citation.]” (*Brown, supra*, 54 Cal.4th at p. 328.)

We find *Brown* instructive on the equal protection issue raised by defendant in this case. In *Brown*, the California Supreme Court held that a former version of section 4019, effective January 25, 2010, applied prospectively, and that the equal protection clauses of the federal and state Constitutions did not require retroactive application. (*Brown, supra*, 54 Cal.4th at p. 318.) In addressing the equal protection issue, the court determined that “prisoners who served time before and after [the January 2010 version of] section 4019 took effect are not similarly situated . . . .” (*Brown, supra*, at p. 329.) On this point, the California Supreme Court found *In re Strick* (1983) 148 Cal.App.3d 906, “persuasive” and quoted from that decision as follows: “ ‘The obvious purpose of the new section,’ . . . ‘is 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.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’ [Citation.] ‘Thus, inmates were only similarly

situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ [Citation.]” (*Brown, supra*, at p. 329.) The California Supreme Court also disagreed with the defendant’s contention that its decision in *People v. Sage* (1980) 26 Cal.3d 498 “implicitly rejected the conclusion” that the Court of Appeal reached in *Strick*, namely “that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated.” (*Brown, supra*, at p. 329.)

Defendant argues that his case is analogous to *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), where the California Supreme Court concluded that equal protection required the retroactive application of a statute granting credit for time served in local custody before sentencing and commitment to state prison. In *Brown*, however, the California Supreme Court explained that “*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.)

Lastly, we observe that in a footnote in *Lara*, the California Supreme Court rejected the contention, similar to the one made by defendant in this case, that the prospective application of the October 2011 version of section 4019 denied the defendant equal protection. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) Citing *Brown*, the California Supreme Court in *Lara* explained that prisoners who serve their pretrial detention before the effective date of a law increasing conduct credits, and those who serve their detention thereafter, “are not similarly situated with respect to the law’s purpose.” (*Lara, supra*, at p. 906, fn. 9.)

Following *Brown* and *Lara*, defendant is not entitled to additional conduct credit under the October 2011 version of section 4019. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As defendant is not entitled to the additional conduct credit he seeks in this appeal, he cannot show prejudice from counsel’s failure to file a

timely appeal. We decline to construe his untimely appeal as a petition for writ of habeas corpus.

#### **IV. DISPOSITION**

The appeal is dismissed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.