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

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD DALE MCALMOND,

Defendant and Appellant.

H037617

(Monterey County

Super. Ct. Nos. SS100996A &

SS110713A)

On April 5, 2010, defendant Ronald Dale McAlmond pleaded no contest to possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a); the methamphetamine case). He was initially placed on a Proposition 36 drug diversion program (Pen. Code, § 1210.1),<sup>1</sup> but after multiple probation violations, the trial court terminated his Proposition 36 probation and placed him on formal probation for three years. By the time he was placed on formal probation, defendant had earned 289 days of presentence credits; therefore, the court ordered him to serve a 289-day county jail term as a condition of his formal probation and he was released from custody for time served.

<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

Several months later, in a separate case, defendant was arrested on suspicion of committing a first-degree residential burglary (§ 459; the burglary case). Still on formal probation in the methamphetamine case, he also faced violation of probation proceedings.

A jury convicted defendant of first-degree residential burglary. The trial court also found that he violated his formal probation in the methamphetamine case and, for that reason, revoked and terminated his probation. He then received a four-year sentence for the burglary and a consecutive eight-month sentence in the methamphetamine case. He was awarded 307 days of presentence credits in the burglary case. Separately, in the methamphetamine case, he was awarded 43 days of presentence credits.

On appeal, defendant contends, on both constitutional and statutory grounds, that he is entitled to additional presentence conduct credit in the burglary case based on an amendment to section 4019 that took effect on October 1, 2011. He also claims that he is entitled to have the 289 days of county jail time that he previously served as a condition of probation in the methamphetamine case credited against his eight-month sentence arising from that case.

We conclude that defendant is not entitled to additional presentence conduct credit in the burglary case, but he is entitled to 289 days of presentence credits in the methamphetamine case. We will modify the judgment to include 289 days of presentence credits in the methamphetamine case such that defendant's eight-month sentence in that case is deemed served. As modified, the judgment is affirmed.

#### FACTS AND PROCEEDINGS BELOW

##### *I. Possession of Methamphetamine (Case Number SS100996A)*

Since the claims on appeal concern only presentence credits, it is not necessary to give a detailed recitation of the facts underlying defendant's convictions. Rather, we note

that on April 5, 2010, while on misdemeanor probation,<sup>2</sup> defendant pleaded no contest to possessing a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a)). He committed this crime on March 27, 2010. The trial court suspended the imposition of his sentence for a period of eighteen months and instead ordered him to complete a Proposition 36 drug diversion program (§ 1210.1).

On April 28, 2010, a probation violation petition pursuant to section 1203.2 was filed against him. On May 17, 2010, he admitted that he violated his Proposition 36 probation by failing to participate in substance abuse counseling and failing to report to probation. The court reinstated his Proposition 36 probation on the same terms and conditions originally set on April 5, 2010.

A second probation violation petition was filed in July 2010. On November 23, 2010, after having been convicted in a separate case of misdemeanor domestic violence, the court sustained the second probation violation petition. The court modified defendant's probation by terminating his Proposition 36 probation, placing him on formal probation for a period of three years, and ordering him to serve 289 days in county jail as a condition of probation. It was the court's intention "not to give any additional jail time on this particular case." Applying the January 25, 2010 version of section 4019 to calculate defendant's conduct credits, the court awarded 145 days of custody credits and 144 days of conduct credits, totaling 289 days of presentence credits. Defendant was released from custody for time served.

*II. Residential Burglary (Case Number SS110713A) and Sentencing in the Methamphetamine Case (Case Number SS100996A)*

While defendant was still on formal probation in the methamphetamine case, a new complaint was filed against him alleging that, on April 11, 2011, he committed first-degree residential burglary (§ 459). A trial was held and a jury convicted him of first-

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<sup>2</sup> Defendant also had three other cases pending in the superior court, two misdemeanor cases, and one felony case, none of which is before this court.

degree burglary. The court also found that he violated his probation in the methamphetamine case. He was sentenced in both cases on November 1, 2011.

In the burglary case, the trial court sentenced defendant to four years in state prison, the mid-term for first-degree residential burglary (§ 459). He was awarded 307 days of presentence credits against his sentence, consisting of 205 days of custody credits and 102 days of section 4019 conduct credits.

In the methamphetamine case, the trial court revoked and terminated defendant's probation and sentenced him to a consecutive eight-month term in state prison, which is one-third of the mid-term for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). Applying the pre-January 25, 2010 version of section 4019, defendant was awarded 29 days of custody credits and 14 days of section 4019 conduct credits, totaling 43 days of presentence credits against his eight-month sentence.

## DISCUSSION

### *I. Defendant is Not Entitled to Additional Presentence Conduct Credits in the Residential Burglary Case*

Defendant's primary argument is that federal and state equal protection principles require that the more favorable conduct credit scheme set forth in the amendment to section 4019 effective October 1, 2011, be applied to him in the burglary case notwithstanding that he committed the burglary prior to October 1, 2011. He argues, in the alternative, that he is entitled to additional conduct credits for time served after October 1, 2011, under the rationale of *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) and under a depublished case (which therefore may not be cited), *People v. Olague* (2012) 205 Cal.App.4th 1126, review granted August 8, 2012, S203298 (*Olague*). We conclude that neither of these arguments have merit.

#### *A. Background*

Presentence credits are awarded at the time of sentencing (§ 2900.5, subd. (a)), and consist of actual days in custody (custody credits) plus eligible work and good

behavior credits under section 4019, subdivisions (b) & (c) (collectively, conduct credits). (*People v. Cooper* (2002) 27 Cal.4th 38, 40.) In *People v. Kennedy* (2012) 209 Cal.App.4th 385, 395-396 (*Kennedy*), we explained the recent legislative changes to section 4019, noting that “[b]efore January 25, 2010, conduct credits under Penal Code 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. 4554 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended Penal Code 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 [Pen. Code, former § 4019, subds. (b), (c), & (f)].) [¶] Effective September 28, 2010, Penal Code section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating one-for-one credits (hereafter the September 2010 amendment, Stats. 2010, ch. 426, § 2). By its express terms, the newly created Penal Code section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to inmates confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.) [¶] Thereafter, again, the Legislature amended Penal Code section 4019. 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, expressing legislative intent for prospective application only. (Pen. Code, § 4019, subds. (b), (c), & (h).)”

It is the final amendment that took effect on October 1, 2011 (hereafter the 2011 amendment) that we are concerned with in this appeal.

*B. Equal Protection*

We were faced in *Kennedy* with an equal protection challenge to the prospective application of the 2011 amendment identical to the one raised here. Relying on *Brown, supra*, 54 Cal.4th 314, we concluded that applying the 2011 amendment to section 4019 (with its one-for-one conduct credit formula) to persons who committed crimes on or after October 1, 2011, did not violate principles of equal protection.

In *Kennedy*, we explained that “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. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.)” (*Kennedy, supra*, 209 Cal.App.4th at p. 396.) We concluded that defendants who committed crimes before October 1, 2011, and defendants who committed crimes on or after October 1, 2011, are not similarly situated for purposes of earning presentence conduct credits. (*Id.* at pp. 396-397; accord, *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551-1552, review den. October 31, 2012, S205334.)<sup>3</sup>

We noted that “[a]lthough the Supreme Court in *Brown* was concerned with the January 2010 amendment to section 4019 (*Brown, supra*, 54 Cal.4th at p. 318), the reasoning of *Brown* applies with equal force to the prospective-only application of the

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<sup>3</sup> Two other courts have reached a contrary conclusion on the question of whether these two classes of defendants are similarly situated. (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53-54, review den. February 13, 2013, S207285 (*Rajanayagam*); *People v. Verba* (2012) 210 Cal.App.4th 991, 995-996, review den. February 13, 2013, S207193 (*Verba*).) Although *Verba* and *Rajanayagam* concluded that the two classes of defendants created by the 2011 amendment were similarly situated for purposes of earning presentence conduct credits, both cases ultimately held that the 2011 amendment did not violate the equal protection clause because a rational basis existed to justify the differential treatment of the two classes. (*Rajanayagam*, at pp. 55-56; *Verba*, at pp. 996-997.)

current [October 1, 2011] version of section 4019.” (*Kennedy, supra*, 209 Cal.App.4th at pp. 396-397.) And we then explained that “[i]n rejecting the defendant’s argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained ‘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*, at pp. 328-329.)” (*Kennedy, supra*, at p. 397.) In accordance with our decision in *Kennedy*, we again conclude that defendants who committed crimes before October 1, 2011, and defendants who committed crimes on or after October 1, 2011, are not similarly situated for purposes of earning presentence conduct credits.

However, even if the two classes of defendants created by the 2011 amendment were similarly situated for purposes of earning presentence conduct credits, the 2011 amendment does not violate equal protection. (*Kennedy, supra*, 209 Cal.App.4th 397-399.) “[W]here, 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].)” (*Kennedy, supra*, at p. 397.) Pursuant to the rational relationship test, “ “ “ “a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where



Defendant's reliance on *In re Kapperman* (1974) 11 Cal.3d. 542 and its citation to *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 (*Frye*), is misplaced. As we held in *Kennedy*, relying on the Supreme Court's reasoning in *Brown, supra*, at page 326: "In *Kapperman*, the Supreme Court reviewed a provision (then new Penal Code § 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. [Citation] 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. [Citation]" (*Kennedy, supra*, 209 Cal.App.4th at p. 396.) Accordingly, "*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." (*Ibid.*)

*Frye, supra*, 35 Ill.2d 604—as cited in a footnote in *Kapperman* (*Kapperman, supra*, 11 Cal.3d at p. 547, fn. 6)—is also inapposite. *Frye* is an Illinois case which dealt with custody credits, not conduct credits with which we are concerned 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 a defendant's control, and not the date the crime was committed. [Citation]" (*Kennedy, supra*, 209 Cal.App.4th at p. 397.)

For all of these reasons, defendant's equal protection challenge is rejected. Defendant, who was convicted of a burglary committed in April 2011, is not entitled to one-for-one presentence conduct credit under the 2011 amendment because that amendment is expressly applicable only to defendants who commit crimes on or after October 1, 2011.

*C. Defendant May Not Rely on People v. Olague to Argue that He is Statutorily Entitled to Additional Presentence Conduct Credits*

Alternatively, defendant argues that pursuant to dicta in this court's opinion in *Olague, supra*, 205 Cal.App.4th 1126, he is statutorily entitled to the increased credits provided in the 2011 amendment for any time he spent in custody on and after October 1, 2011. As we did in *Kennedy*, we reject this argument. “The Supreme Court has granted review in *Olague* (review granted Aug. 8, 2012, S203298). An opinion is no longer considered published if the Supreme Court grants review (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).)” (*Kennedy, supra*, 209 Cal.App.4th at p. 400.)<sup>4</sup>

*II. Defendant is Entitled to 289 Days of Presentence Credits in the Methamphetamine Case (Case Number SS100996A)*

Initially, we note that ordinarily defendant's miscalculation of presentence credits claim would be barred pursuant to section 1237.1 for failing to first raise this claim in the trial court.<sup>5</sup> However, since this claim is raised in addition to an independently cognizable claim, judicial economy is best served by addressing it on appeal in the first instance. (*People v. Delgado* (2012) 210 Cal.App.4th 761, 7654-767 [a constitutional challenge to section 4019 is a claim that is cognizable on appeal in its own right]; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428 [a claim that would normally be barred pursuant to section 1237.1 may be properly considered on appeal in the first instance when other issues are properly before the court].)

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<sup>4</sup> The Attorney General also claims, in the alternative, that if defendant seeks conduct credits pursuant to former section 2933, subdivision (e)(1), then his claim should be dismissed for failure to first seek administrative relief. Since defendant does not seek conduct credit under section 2933, we need not reach this issue.

<sup>5</sup> Section 1237.1, provides “[n]o appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court.”

When defendant was sentenced to a consecutive eight-month term in the methamphetamine case, the probation report recommended awarding him 29 days of custody credits and 14 days of conduct credits, calculated by utilizing the pre-January 25, 2010 version of section 4019, for a total of 43 days of presentence credits. The trial court followed probation’s recommendation. As we will explain below, the probation report was erroneous.

Pursuant to “section 2900.5, a defendant sentenced either to county jail or to state prison is entitled to credit against the term of imprisonment for days spent in custody before sentencing as well as those served after sentencing as a condition of probation. [Citations].” (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053.) In calculating a defendant’s credits pursuant to section 2900.5, all actual days of custody plus conduct credits earned pursuant to section 4019 are included. (§ 2900.5, subd. (a).) “If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of imprisonment shall be deemed to have been served.” (§ 2900.5, subd. (a).)

Defendant committed the crime in the methamphetamine case on March 27, 2010. He later failed to comply with his Proposition 36 drug diversion program. Consequently, on November 23, 2010, he was placed on formal probation for three years with the condition that he serve 289 days in county jail. At that time, he was awarded 145 days of custody credits, which included: March 27, 2010 through April 5, 2010, June 30, 2010 through July 6, 2010, and July 19, 2010 through November 23, 2010. He was also awarded 144 days of conduct credits pursuant to the January 25, 2010 version of section 4019, for total presentence credits of 289 days.

As the California Supreme Court explained in *People v. Riolo* (1983) 33 Cal.3d 223, when a defendant serves time in custody as a condition of probation and probation is later revoked and terminated—as occurred here in the methamphetamine case—the

defendant retains his earned credits. “Probationers in this situation do not receive unearned ‘gifts’ of credits, but reductions in their [ultimate prison] sentences to reflect time which they have already served in custody. They have already been punished, at least in part.” (*Id.* at 230.)

In the burglary case, defendant was held in presentence custody from April 11, 2011, the date he was arrested for the burglary, through November 1, 2011, his sentencing date. This time period amounts to 205 actual days of custody; therefore, defendant was awarded 307 days of presentence credits in the burglary case, consisting of 205 days of custody credits and 102 days of conduct credits.

Although the court had previously calculated defendant’s presentence credits in the methamphetamine case on November 23, 2010, the probation officer’s report recalculated these credits. This was unnecessary because defendant did not spend any additional time in presentence custody attributable to the methamphetamine case after November 23, 2010. The time defendant spent in custody from April 11, 2011, to November 1, 2011, was all credited towards his sentence in the burglary case.

In any event, the probation officer’s recalculation report contains numerous errors, including inaccurately reporting dates of presentence custody and incorrectly performing mathematical calculations. For instance, in recalculating defendant’s custody credits, the report shows defendant’s arrest date as March 28, 2010. In fact, he was arrested on March 27, 2010. More importantly, the report fails to attribute 128 days of custody from July 19, 2010, through November 23, 2010, to any of defendant’s cases. This conflicts with the probation officer’s prior report to the court that was prepared for defendant’s November 23, 2010 violation probation proceedings, which attributed these same 128 days of custody to the methamphetamine case.

The Attorney General nonetheless argues that defendant would receive double credits if awarded the 289 days of presentence credits he claims he is entitled to receive.

Awarding defendant credits that were served as a condition of probation, however, does not amount to awarding double credits. The award of double credits, which is barred by section 2900.5, subdivision (b), occurs when a defendant receives consecutive sentences *and* is awarded credits for the same time period in two or more separate cases. (§ 2900.5, subd. (b).) Here, no single period of custody was attributed to more than one case.

Both custody and conduct credits earned by a defendant in any particular case remain attributable to that case throughout its duration, unless waived by the defendant. (§ 2900.5, subd. (a); *People v. Johnson* (1978) 82 Cal.App.3d 183, 188; *People v. Johnson, supra*, 28 Cal.4th at pp. 1053-1058; *People v. Arnold* (2004) 33 Cal.4th 294, 300-310.) Here, the record reveals no such waiver by defendant, nor does the Attorney General suggest that a waiver was ever made. Accordingly, the trial court should have awarded defendant 289 days of presentence credits against his eight-month sentence in the methamphetamine case, thereby deeming this sentence served pursuant to section 2900.5, subdivision (a).

#### DISPOSITION

The abstract of judgment is modified to reflect that (1) defendant shall receive presentence credits of 145 days of custody credits plus 144 days of conduct credits for total presentence credits of 289 days in the methamphetamine case, Case Number SS100996A, and (2) based upon the receipt of such credits, his eight-month sentence in that case is deemed served. As modified, the judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Premo, Acting P.J.

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Mihara, J.