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

THE PEOPLE,

Plaintiff and Respondent,

v.

CHENOA PINA,

Defendant and Appellant.

H037794

(Monterey County

Super. Ct. No. SS091358A)

On May 18, 2009, the Monterey County District Attorney charged appellant Chenoa Pina with one count of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) It was alleged that both crimes were committed on May 17, 2009, and that appellant had a prior strike conviction (robbery) within the meaning of Penal Code section 1170.12.

On May 26, 2009, appellant pleaded no contest to the possession charge and admitted the prior strike conviction, with the agreement that the transportation charge would be dismissed at sentencing.

After the court heard appellant's *Romero* motion,<sup>1</sup> the court struck the prior strike conviction and imposed, but suspended execution of a two year prison sentence. The

<sup>1</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

court placed appellant on probation for three years on conditions that included a one-year county jail term.

Thereafter, on November 15, 2011, the probation department filed a petition to revoke appellant's probation based on a positive drug test that occurred on November 8, 2011. Subsequently, appellant admitted that she had violated her probation.

On December 27, 2011, the court revoked appellant's probation and ordered execution of the previously imposed two year prison term. The court awarded appellant presentence credits totaling 439 days (293 actual days and 146 days of conduct credits under Penal Code section 4019). Appellant filed a notice of appeal the same day.

Appellant takes issue with the award of custody credits on various grounds, which we shall outline later. Having considered all the arguments, we affirm the judgment.

#### *Facts and Proceedings Below*

Since this appeal arises from a no contest plea and raises no substantive issues related to the offense for which appellant was convicted, we set forth an abbreviated version of the facts underlying this case as outlined in the probation report.

In May 2009, police stopped a car that was speeding and swerving. The officers recognized the driver (appellant) and after conducting a records check found she was on probation. After arresting appellant for violating an earlier grant of probation, the police found methamphetamine on her person during a search.

In November 2011, appellant tested positive for methamphetamine and admitted to her probation officer that she had used drugs.

As to the prior strike conviction, in June 2003, appellant drove the getaway car after three males robbed a man at gunpoint of his wallet and money.

#### *Discussion*

As noted appellant challenges the award of her presentence custody credits on various grounds. In order to address appellant's challenges it is necessary to set forth the statutory changes to Penal Code section 4019.

*Statutory Changes to Penal Code Section 4019*

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)<sup>2</sup>

Before 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 presentence custody sometimes called one third time or 33 percent credits. (Stats.1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [§ 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)<sup>3</sup>

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credits at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits) 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 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared the September 2010

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<sup>2</sup> There are four versions of Penal Code section 4019 involved in this appeal. For the sake of clarity and simplicity we refer to the pre-January 2010 version as former section 4019; the version that was amended effective January 25, 2010, as the January 2010 amendment; the version effective September 28, 2010, as the September 2010 amendment; and the version effective October 1, 2011 as the current version of section 4019 or the 2011 amendment to section 4019.

<sup>3</sup> All unspecified section references are to the Penal Code.

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 appellant'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.<sup>4</sup> (Current version § 4019, subds. (b), (c), & (h).) This amendment eliminated the restrictions on one-for-one credits based on a defendant having a current or prior serious felony conviction. (Stats. 2011, ch. 15, § 482.)

#### *Appellant's Credit Award*

The probation report prepared after appellant's probation was revoked in 2011 shows that appellant served 244 days in the Monterey County jail between May 17, 2009, and January 15, 2010; and a second period between November 9, 2011, and the date of sentencing December 27, 2011. The report recommended an award of 146 days of conduct credits pursuant to section 4019 "calculated at 33%" for a total of 439 days.

At the sentencing hearing, defense counsel argued that appellant was entitled to conduct credits calculated at 50 percent (the one-for-one credits). Counsel objected to the award of conduct credits calculated at 33 percent (the one-for-two credits) on equal protection and due process grounds; and based on defense counsel's assertion that the

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<sup>4</sup> These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; 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.)

court had the "ability" to strike the prior strike allegation under section 1385 for purposes of making appellant eligible for the one-for-one credits.<sup>5</sup>

The court indicated to counsel that the court understood the legal arguments, but disagreed with counsel. Accordingly, the court announced its intention to impose the credits recommended by the probation officer. As noted, the court awarded appellant 439 days of presentence credits (293 actual days and 146 days of conduct credits).

### *Equal Protection Challenge*

Notwithstanding the express legislative intent that the October 2011 amendments to section 4019 have prospective application only, appellant contends that she is entitled to the reinstated one-for-one credits for all her custody by virtue of the equal protection clauses of the state and federal Constitutions.

Preliminarily, we note 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.)

Appellant relies on the Supreme Court's holding in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) to support her equal protection argument. She asserts that *Kapperman* is binding on this case.

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new section 2900.5) that made actual custody credits prospective, applying only to defendants delivered to the Department of Corrections after the effective date of the legislation. (*Id.* 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

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<sup>5</sup> Counsel told the court that the issue of whether the court had discretion to strike the strike for purposes of section 4019 was pending before the Supreme Court in the "Lara case."

already sentenced. Accordingly, the *Kapperman* court extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.)

In our view, *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.

Our Supreme Court recently confirmed, "[c]redit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying 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." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).)

Although *Brown* was concerned with the January 2010 amendment to section 4019, the reasoning of *Brown* applies with equal force to the prospective-only application of the current version of section 4019. (*Brown, supra*, 54 Cal.4th at p. 318.)

In *Brown*, the California Supreme Court expressly determined that *Kapperman* does not support an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 328–330.) In 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.)

More importantly, in *Brown*, the Supreme Court affirmed that the 2011 amendments to section 4019 have prospective application only. The court noted that the

defendant had filed a supplemental brief in which he contended that he was entitled to retroactive presentence conduct credits under the 2011 amendment to section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply *prospectively* . . . to prisoners who are confined to a county jail [or other facility] *for a crime committed [on] or after October 1, 2011.*' (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, appellant committed her offense in 2009.

Even if this court were to agree that during the period of time that appellant was in presentence custody after October 1, 2011, she was similarly situated to other defendants who committed their crimes after October 1, had a prior serious felony conviction, and were in presentence custody, 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].) 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*, 37 Cal.4th at pp. 1200–1201, italics omitted.)

We perceive such a plausible reason in this case as to the period of time appellant was in custody after October 1, 2011.

As our Supreme Court has acknowledged "statutes lessening the *punishment* for a particular offense" may be made prospective only without offending equal protection

principles." (*Kapperman, supra*, 11 Cal.3d. at p. 546.) In *Kapperman*, the court wrote that the Legislature may rationally adopt such an approach, "to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*Ibid.*)<sup>6</sup>

In *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), the defendant sought to invalidate a provision of Proposition 36 barring retroactive application of its provisions for diversion of nonviolent drug offenders. (*Id.* at pp. 183-184.) The court reiterated that the Legislature may preserve the penalties for existing offenses while ameliorating punishment for future offenders in order to "assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written. [Citation.]" (*Id.* at p. 190.) The statute before the court came within this rationale because it "lessen[ed] punishment for particular offenses." (*Ibid.*) As the *Floyd* court noted, "[t]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*Id.* at p. 191.)

"The very purpose of conduct credits is to foster constructive behavior in prison by reducing punishment." (*People v. Lara* (2012) 54 Cal.4th 896, 906.) As our Supreme Court accepted in *Brown, supra*, 54 Cal.4th 314, "to increase credits reduces punishment." (*Id.* at p. 325, fn. 15.)

We gather that the rule acknowledged in *Kapperman* and *Floyd* is that a statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.

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<sup>6</sup> In *Kapperman*, the court found that rationale inapplicable to the issue before the court because the statute did not lessen punishment for a particular offense but rather applied across the board to all offenses. (*Kapperman, supra*, 11 Cal.3d at p. 546.)

When appellant committed her crime her ability to earn conduct credit was limited to two days for every four days of actual time served in presentence custody. (Former § 4019, Stats. 1982, ch. 1234, § 7, p. 4553.) When appellant served time on her current conviction before October 1, 2011, appellant's prior robbery conviction played no part in the calculation of her conduct credit. Under the current version of section 4019, again, appellant's prior robbery conviction plays no part in the calculation of her presentence conduct credit as to the time spent in custody after October 1, 2011.

Although the statute at issue here does not ameliorate punishment for a particular offense, it does in effect ameliorate punishment for all offenses committed after a particular date. By parity of reasoning to the rule acknowledged by both the *Kapperman* and *Floyd* courts, the Legislature could rationally have believed that by making the 2011 amendment to section 4019 have application determined by the date of the offense, they were preserving the deterrent effect of the criminal law as to those crimes committed before that date. To reward appellant with the enhanced credits of the October 2011 amendment to section 4019, even for time she spent in custody after October 1, 2011, weakens the deterrent effect of the law as it stood when appellant committed her crimes. We see nothing irrational or implausible in a legislative conclusion that individuals should be punished in accordance with the sanctions and given the rewards (conduct credits) in effect at the time an offense was committed.

Finally, over the past few years we have seen a series of incremental changes in conduct credit earning rates. Some of these changes have affected only those with serious felony priors and other disqualifications, some only providing a benefit to those defendants free from such burdens. Overall, the Legislature has tried to strike a delicate balance between reducing the prison population during the state's fiscal emergency and protecting public safety.<sup>7</sup> Although such an effort may have resulted in comparable

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<sup>7</sup> The January 2010 amendment to section 4019 was enacted during a state fiscal emergency. (*Brown, supra*, 54 Cal.4th 314, 318.)

groups obtaining different credit earning results, under the rational relationship test, the Legislature is permitted to engage in piecemeal approaches to statutory schemes addressing social ills and funding services to see what works and what does not. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 649 [reform measures can be implemented one step at a time].)

Accordingly, we must reject appellant's argument that we must apply the 2011 amendment to section 4019 to her case.

*The January 2010 Amendment to Section 4019*

As an alternative argument, appellant contends that she is entitled to one-for-one credits based on the court's authority to "strike" her prior serious felony conviction for purposes of awarding her conduct credits under the January 2010 amendment to section 4019. Appellant asserts that this amendment should apply for the entire period that she was in custody including time served prior to January 2010.

As to time spent in custody before the 2010 amendment to section 4019, appellant's argument is foreclosed by the Supreme Court's recent decision in *Brown*, *supra*, 54 Cal.4th 314. In *Brown*, as noted *ante*, the Supreme Court held that equal protection did not require the retroactive application of the January 2010 amendment to Penal Code section 4019. The two classes of inmates were not similarly situated for purposes of the challenged law. The important correctional goal of a statute creating incentives for good behavior is not served by rewarding prisoners who served time before those incentives took effect. These prisoners could not have modified their behavior in response to the later-created incentive. For this reason, the court held that prisoners who served time before and after the effective date of the statute were not similarly situated. (*Id.* at pp. 318, 328-330.)

The *Brown* court stated that this meant that "qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date." (*Brown, supra*, 54 Cal.4th at p. 318.) In this case, as to

appellant's first period of custody, appellant was released from custody on January 15, 2010, 10 days before the operative date of the January 2010 amendment to section 4019.

However, appellant argues that we must apply a two-tiered analysis to her conduct credit award and allow one-for-one credit under the 2010 amendment to section 4019 for all time served on or after January 25, 2010. That is, to the time she spent in custody from November 9, 2011, until the date she was sentenced December 27, 2011.

Since appellant has a prior robbery conviction, appellant's entitlement to the one-for-one credits turns on the resolution of the question whether trial courts are authorized by section 1385 to strike a prior strike conviction for purposes of awarding the one-for-one credits under the January 2010 amendment to section 4019.

While this case was pending, the California Supreme Court in *People v. Lara*, *supra*, 54 Cal.4th 896 (*Lara*) held the trial court does not have discretion under section 1385 to "strike" or disregard the historical facts that disqualify a local prisoner from earning one-for-one conduct credits under the January 2010 amendment to section 4019; and there is no implicit pleading and proof requirement as to those facts. (*Id.* at pp. 899, 900.)

The Supreme Court reasoned that "[s]ection 1385 permits a court, 'in furtherance of justice, [to] order an action to be dismissed.' (*Id.*, subd. (a).) Although the statute literally authorizes a court to dismiss only an entire criminal action, we have held it also permits courts to dismiss, or 'strike,' factual allegations relevant to sentencing, such as those that expose the defendant to an increased sentence. (E.g., *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497, 504 [prior serious or violent convictions alleged in order to invoke the Three Strikes Law (§§ 667, subds. (b)-(i), 1170.12)]; *People v. Burke* [(1956)] 47 Cal.2d 45, 50-51 [prior narcotics conviction alleged in order to invoke former statute requiring state prison term].) However, the court's power under section 1385 is not unlimited; it reaches only the 'individual charges and allegations in a criminal action.' (*People v. Thomas* (2005) 35 Cal.4th 635, 644.) Thus, a court may not strike facts that

need not be charged or alleged, such as the sentencing factors that guide the court's decisions whether to grant probation (see Cal. Rules of Court, rule 4.414) or to select the upper, middle or lower term for an offense (*id.*, rules 4.421, 4.423). (See generally *In re Varnell* (2003) 30 Cal.4th 1132, 1137, 1139.)" (*Lara, supra*, 54 Cal. 4th at pp. 900-901.)

Further, "The historical facts that limit a defendant's ability to earn conduct credits do not form part of the charges and allegations in a criminal action. Certainly a court must afford a defendant due process — notice and a fair hearing — in determining the amount of conduct credit to which he or she is entitled. (*People v. Duesler* (1988) 203 Cal.App.3d 273, 276-277.) But the courts of this state have rejected the argument that the People must allege credit disabilities in the accusatory pleading or prove the disabling facts to the trier of fact. Concerning notice, the court in *People v. Fitzgerald* (1997) 59 Cal.App.4th 932 (*Fitzgerald*), held that an information charging the defendant with violent felonies gave him sufficient notice that, if convicted, section 2933.1 would restrict his presentence conduct credits to 15 percent of the maximum otherwise permitted. The People were not required to plead the effect that a conviction would have on credits. (*Fitzgerald*, at pp. 936-937.) Concerning proof, the court in *People v. Garcia* (2004) 121 Cal.App.4th 271 (*Garcia*) concluded that the question whether a defendant's current felony offenses were 'violent' (§ 667.5), and thus limited his credits under section 2933.1, was 'part of the trial court's traditional sentencing function' (*Garcia*, at p. 274), rather than a question that had to be decided by the jury. Although the federal Constitution requires that any fact, ' "[o]ther than the fact of a prior conviction, . . . that increases the penalty for a crime beyond the prescribed statutory maximum . . . be submitted to a jury, and proved beyond a reasonable doubt" ' (*Garcia*, at p. 277, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490), facts invoked to limit conduct credits do not increase the penalty for a crime beyond the statutory maximum (*Garcia*, at p. 277)." (*Lara, supra*, 54 Cal.4th at p. 901.)

The *Lara* court refused to imply a pleading and proofing requirement in the January 2010 version of section 4019 finding that "because conduct credits are a matter in which courts traditionally exercise very limited discretion, to adopt a pleading and proof requirement for credit disabilities, for no reason other than to bring them within the court's discretionary power to strike allegations [citation], seems unwise." (*Lara, supra*, 54 Cal.4th at p. 903.)

In this case, the historical fact that limits appellant's presentence conduct credits under the January 2010 amendment to section 4019 is her prior conviction for robbery (§ 211) because it is both a serious felony and violent felony (see, §§ 1192.7, subd. (c)(1)(19) & 667.5, subd. (c)(9)). The People pleaded the prior conviction for the different purpose of triggering section 1170.12. Nevertheless, as the Supreme Court explained in *Lara*, this pleading was sufficient to inform appellant that her presentence conduct credits might be limited. (*Lara, supra*, 54 Cal.4th at p. 906.) The trial court struck the allegation under section 1385 in order to avoid doubling appellant's prison sentence (§ 1170.12, subd. (c)(1)). Nevertheless, "when a court has struck a prior conviction allegation it has not "wipe[d] out" that conviction as though the defendant had never suffered it; rather, the conviction remains a part of the defendant's personal history' and available for other sentencing purposes. [Citations.]" (*Ibid.*)

The People gave sufficient notice of the prior conviction to satisfy appellant's due process rights; and appellant admitted the allegation when she pleaded no contest to the charge of possession of methamphetamine. Accordingly, since the court could not "strike" or disregard the historical facts of appellant's robbery conviction, the trial court correctly calculated appellant's conduct credits at 33 percent. Appellant is not eligible for the additional conduct credit she now seeks on appeal.

#### *Disposition*

The judgment is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.