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

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS MALCOLM ALLISON,

Defendant and Appellant.

H037840

(Santa Clara County
Super. Ct. No. C1100439)

Defendant Dennis Malcolm Allison pled no contest to a charge of failing to register as a sex offender. On appeal, he contends that he is entitled to additional credit for presentence confinement by virtue of amendments to the governing statute which took effect on October 1, 2011, 30 days before defendant was sentenced. He contends that despite the statute's declaration that it applies to crimes occurring after its effective date, it must be construed to apply to all confinement occurring after that date, whenever the underlying crime occurred. Respondent, on the other hand, contends that the trial court overstated defendant's credits by including time during which defendant was at large on his own recognizance. We reject both contentions and affirm the judgment.

BACKGROUND

Evidence at the preliminary hearing indicated that defendant had previously sustained a conviction for a felony violation of Penal Code section 314 (lewd conduct), as

a result of which he was required to register as a sex offender. (See Pen. Code, § 290, subd. (c).) He was released from state prison on January 22, 2011, triggering a duty to register within five working days. (See Pen. Code, §§ 290.015, subd. (a), 290, subd. (b).) On February 6, 2011, he was stopped by a deputy sheriff for riding his bicycle on a sidewalk. The deputy took him into custody on a warrant based on an alleged parole violation. At the preliminary hearing on June 29, 2011, a witness testified from a printout of a state database that defendant had never, as of that date, registered as a sex offender.

On July 7, 2011, an information was filed charging defendant with failure to register under Penal Code section 290.015, subdivision (a). It was further alleged under Penal Code section 667.5, subdivision (b), that defendant had a prior felony conviction for failure to register as a sex offender.

Defendant successfully moved to represent himself. On August 24, 2011, he entered a plea of *nolo contendere* to the charged offense and admitted the allegation of a prior conviction. The plea was entered on the understanding that he would receive 355 days custody credit as of the hearing date, consisting of 200 days actually served, 100 days for conduct, plus 55 days that, the court said, “the D.A. has agreed to include.” (See pt. II, *post.*) In admonishing defendant concerning the consequences of the plea, the court secured his acknowledgment of the further understanding that “[t]his matter will result in a grant of probation, and that will include the agreed-upon county jail term of one year.” The court also indicated that defendant was not waiving time for sentencing, and would thus have to be sentenced on or before August 31, “because that’s when [defendant] credits out.”¹ The court recognized, however, that the probation department might be unable to prepare a report in that time; it was therefore understood that “if I’m

¹ By this the court apparently meant that on that date defendant would have earned 365 days total credit, reducing to zero the time remaining to be served on the agreed jail term.

not ready to sentence him because of victim notification or other reasons, I would release him on his O.R. since he will have done the time.”

The court’s concerns proved prophetic. On August 31, 2011, the probation officer successfully sought a continuance on the ground that there had been insufficient time to prepare a report. Defendant was released on his own recognizance, signing a written promise to appear for sentencing on September 26, 2011.² He failed to appear, and a bench warrant issued. He was arrested on October 12, 2011.

Sentencing took place on October 31, 2011. The court announced that it was placing defendant on probation for three years. Defendant interjected, “Excuse me. You mentioned that you were going to annul the probation. That was part of the agreement.”³ The prosecutor objected that he did not recall any such agreement and “would have been unhappy with that, considering that I didn’t think this was a probation case. It should be CDC.” The court reiterated its intention to impose three years’ probation, whereupon defendant said, “I won’t accept that, so I take my plea away.” The court said, “All right.

² The prosecutor said, “I would ask for a *Cruz* waiver because Mr. Allison has a habit of not showing up for court dates.” Such a waiver would permit the court to depart from a plea bargain, without entitling defendant to withdraw his plea, if defendant failed to appear at sentencing. (See *People v. Cruz* (1988) 44 Cal.3d 1247.) The court declined to require such a waiver, however, stating, “Mr. Allison knows that failure to appear, a violation of his written promise to appear, is a separate felony offense that’s in the purview of your office. What, if any, effect it has on his sentencing we will see at the time.”

³ We have reviewed the transcript of the plea taking and find nothing in it to sustain defendant’s claim that the plea agreement contemplated that he would not serve a period of supervised probation. On the contrary, when taking the plea the court advised defendant, and he acknowledged, that a consequence of his plea would be “[p]robation” that could “last as long as five years.” In response to a question from defendant, the court added that it was “probably not going to give you probation at all, as long as your parole is going to last another year or so.” However it went on to explain that he could get up to five years’ probation, though “I think it will be less.”

Probation is refused. I would have granted the defendant probation, should he choose to accept it. He has declined it in open court. I will order that he be sentenced on Count 1 to 16 months in the state prison.” The court struck the charged enhancement pursuant to Penal Code section 385. The court imposed a prison sentence of one year and four months, with credit for presentence confinement of 399 days, consisting of 267 days “actual local” and 132 days “local conduct.”

On November 7, 2011, defendant wrote to the court complaining of a “major sentencing error in credits,” in that he had only been allowed “33% credit on prison time,” when “[c]urrent law requires I receive 50%.” He sought an award of “56 additional days.” On January 12, the court solicited a response from the district attorney to this claim. No written response appears in the present record. However, at a hearing on February 16, 2012, the court denied what it construed as defendant’s motion to modify the judgment.

Meanwhile, on December 29, 2011, defendant filed a notice of appeal “based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.”

DISCUSSION

I. Defendant’s Argument

From September 28, 2010, through September 30, 2011, Penal Code section 4019, subdivision (f), allowed two days conduct credit for every four days actually served in county jail prior to sentencing. (Stats. 2010, ch. 426, § 2.) As to most prisoners, however, that formula was superseded by a more liberal formula provided by 2010 amendments to Penal Code section 2933, subdivision (e)(1). (Stats. 2010, ch. 426, § 1.) Prisoners subject to that formula earned one day of conduct credit for every day they were actually confined. The enacting statute declared, however, that this formula was inapplicable, and the two-for-four formula set forth in section 4019 would continue to

govern, as to certain classes of prisoners. (Former Pen. Code, § 2933, subd. (e)(3); Stats. 2010, ch. 426, § 1.) Among the excluded classes were prisoners required, as like defendant was, who were required to register as sex offenders. (*Ibid.*)

Effective October 1, 2011, section 4019 was amended to provide a formula of two days' conduct credit for every two days served. (Pen. Code, § 4019, subd. (f), as enacted by Stats. 2011, 1st Ex. Sess., ch. 12, § 35.) At the same time, Penal Code section 2933 was amended to omit any reference to presentence confinement credits. (Stats. 2011, 1st Ex. Sess., ch. 12, § 16.) The net effect was to prescribe a single formula for all prisoners. If applicable to defendant, this formula would double his conduct credits, and increase his total credit for presentence confinement by about one-third.

Defendant's sole contention is that this formula should have been used to determine his conduct credit for time he spent in confinement between October 1, 2011—the effective date of the statute—and October 31 of that year, when he was sentenced. It appears that he was out of custody from September 1 through October 11, 2011, but was back in custody from October 12 through October 31.⁴ It thus appears that he spent 20 days in presentence confinement after the effective date of the amendments at issue. (See *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 [“Calculation of custody credit begins on the day of arrest and continues through the day of sentencing.”].) Under the older formula this entitled him to 10 days conduct credit; under the current formula it would yield 20.

Defendant predicates his argument solely on the language of the statute. But the statute contains express declarations that are at least in tension with, if not strictly contradictory to, defendant's proposed reading: “The changes to this section enacted by

⁴ Defendant overlooks his time out of custody in stating that he “served 31 days—between and including October 1, 2011 and October 31, 2011—of presentence custody on or after the operative date of the [October 2011] amendment to section 4019.”

the act that added this subdivision *shall apply prospectively* and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp 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.” (Pen. Code, § 4019, subd. (h); italics added.) Defendant contends that notwithstanding the terms we have italicized, the quoted language must be understood to allow credit for time served after its effective date, regardless of when the crime was committed. This follows, he says, because if the new formula applies only to persons committing crimes after its effective date, the second sentence is logically superfluous. Defendant cites the principle that statutes should be read in a manner that avoids “rendering portions of the language mere surplusage.” (*People v. Knight* (2004) 121 Cal.App.4th 1568, 1575-1576.)

In an opinion since rendered non-citable by grant of review, this court issued a dictum favoring defendant’s reading of the statute.⁵ Since then, however, in light of further reflection and intervening authority, we have concluded that we are no longer at liberty to adopt such a reading. As defendant acknowledges, our previous approach was explicitly rejected in *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553, review den. Oct. 31, 2012. We ourselves rejected an argument resting on the language of the statute in *People v. Kennedy* (2012) 209 Cal.App.4th 385, on the ground that the amendment was intended to “appl[y] *only* to crimes that were ‘committed’ on or after October 1, 2011’ ” (*id.* at p. 399, quoting Pen. Code, § 4019, subd. (h)) and “to have prospective application only.” (*Id.* at p. 396, italics added.)

While the appeal to the constructional principle against superfluity retains some force, we no longer find it sufficiently convincing to warrant the reading urged by defendant. It appears that no construction can save the statute from criticism as

⁵ *People v. Olague*, No. H036888, filed May 7, 2012, review granted and briefing deferred, Aug. 8, 2012, No. S203298; review dismissed Mar. 20, 2013.

something less than a model of legislative drafting. The declaration that it “shall apply prospectively” is itself logically superfluous if read strictly literally. Virtually all statutes apply prospectively; declaring that a statute does so is rather like declaring that the sun emits light. The declaration adds nothing to the operation of the statute unless it is understood to mean that it applies *only* prospectively. The ease with which the Legislature could have simply said this by inserting the italicized word may provide a ground to question such a gloss, but is not enough—we now think—to justify its rejection.

The drafters’ apparent aversion to the term “only” is similarly reflected in the declaration that the statute “shall apply to prisoners who are confined . . . for a crime committed on or after October 1, 2011.” Again the stated effect seems staggeringly obvious unless the clause is taken to mean that the new formula applies *only* to such prisoners. It is true that such a reading renders the second sentence logically unnecessary, because any confinement for a crime committed after a given date will necessarily be served after that date. But as we have noted, *any* reading will render some of the statutory language “surplusage.” This is not a warrant to adopt whatever construction we find most pleasing. Rather we remain constrained to attempt to ascertain and give effect to the Legislature’s true intentions. The two clauses just discussed suggest an intention to withhold the statute’s benefits from prisoners whose offenses were committed prior to the effective date of the amendments. Since defendant falls in that class, he cannot obtain the benefit of the statute without showing that enforcement according to its terms would offend some constitutional principle. Since he makes no such contention—which has in any case been rejected in at least three published decisions—he has failed to establish error in the trial court’s calculation of credits.⁶

⁶ In *Kennedy, supra*, 209 Cal.App.4th at pages 396-399, we rejected an argument that continuing to apply the older formula to persons in defendant’s position violated their right to equal protection of the laws. Equal protection challenges have also been

II. Respondent's Argument

Respondent contends that the trial court overstated defendant's credits by including time during which defendant was released from custody. This is incorrect. Some of respondent's confusion is probably attributable to inclusion in the credit calculation of some 56 days based upon time defendant spent on a prior sentence due to an administrative error on the part of correctional authorities. It was a term of defendant's plea agreement that he receive credit for this time; at least, that is how we understand the court's recital at the change-of-plea hearing that "the D.A. has agreed to include" an additional 55 days credit as a term of defendant's plea agreement. We must assume the court included that time in its calculation; had it not done so, it would have been obliged to offer defendant an opportunity to withdraw his plea. Respondent identifies no other flaw in the court's calculations.⁷

rejected in at least two other published decisions. (*People v. Rajanayagam, supra*, 211 Cal.App.4th 42, 56; *People v. Verba* (2012) 210 Cal.App.4th 991, 997.)

⁷ We see no ready explanation for certain other inaccuracies in respondent's recapitulation of the facts. Most notably, defendant was released on his own recognizance on August 31, 2011—not September 26, as respondent suggests—and he was rearrested on October 12, not October 19.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA J.