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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELLE DIANE CASTOR,

Defendant and Appellant.

H037867

(Monterey County
Super. Ct. Nos. SS042324A,
MS042618A, SS072270A)

Defendant Michelle Castor appeals after pleading guilty and no contest to financial elder abuse (Pen. Code, § 368, subd. (e)¹), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and receiving a stolen vehicle (§ 496d, subd. (a)). She was sentenced to a three-year jail term pursuant to section 1170, subdivision (h).

On appeal, defendant claims that she is entitled to additional presentence conduct credit pursuant to section 4019, and that the trial court improperly limited the rate at which she could earn postsentence conduct credit. We agree that the orders concerning defendant's presentence and postsentence conduct credits require modification.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

On August 25, 2004, defendant was charged by complaint in case No. SS042324A with financial elder abuse (count 1; § 368, subd. (e)), theft by misrepresentation of access card information (counts 2 & 3; § 484g, subd. (b)), and elder or dependent adult abuse resulting in death (count 4; § 368, subd. (b)(1)).

On September 28, 2004, defendant was charged by complaint in case No. MS042618A with possession of a controlled substance (count 1; Health & Saf. Code, § 11377, subd. (a)) and possession of controlled substance paraphernalia (count 2; former Health & Saf. Code, § 11364).

On February 18, 2005, defendant pleaded no contest to financial elder abuse (count 1) in case No. SS042324A. On March 29, 2005, the trial court suspended imposition of sentence and placed defendant on probation for five years. Defendant was ordered to serve 365 days in county jail as a condition of probation.

Also on February 18, 2005, defendant pleaded guilty to possession of a controlled substance (count 1) in case No. MS042618A. On November 8, 2005, the trial court granted her deferred entry of judgment. Criminal proceedings were reinstated on October 24, 2006.

On February 7, 2007, a probation violation petition was filed in case No. SS042324A. The petition stated that defendant's whereabouts were unknown. Her probation was revoked on February 20, 2007.

On July 27, 2007, defendant was charged by first amended complaint in case No. SS072270A with receiving a stolen vehicle (count 1; § 496d, subd. (a)) and possession of controlled substance paraphernalia (count 2; Health & Saf. Code, § 11364, subd. (a)).

Defendant did not appear in any of the above matters until October 4, 2011, following her arrest on September 30, 2011. On November 2, 2011, defendant pleaded

no contest to receiving a stolen vehicle (count 1) in case No. SS072270A and was found in violation of probation in case No. SS042324A.

At sentencing on December 9, 2011, the trial court imposed the three-year midterm for financial elder abuse (count 1 in case No. SS042324A) with concurrent terms for receiving a stolen vehicle (count 1 in case No. SS072270A) and possession of a controlled substance (count 1 in case No. MS042618A). Defendant was ordered to serve her term in county jail pursuant to section 1170, subdivision (h).

Defendant was given credit for 284 days of actual custody in case No. SS042324A, plus 142 days of conduct credit, for a total of 426 days. In case No. MS042618A, she was awarded three days of actual custody credits and no conduct credits. In case No. SS072270A, she was awarded 71 days of actual custody credit and 34 days of conduct credit, for a total of 105 days.

During the sentencing hearing, the trial court ordered that defendant would be eligible to earn postsentence conduct credits “at 33 percent.” The minute order states: “The defendant’s good/work credits shall be calculated at a 33% accrual rate.”

On January 20, 2012, defendant brought a motion to recalculate her custody credits. She argued that the trial court should have awarded her “one for one” presentence and postsentence conduct credits “based on the Equal Protection, ex post facto, and the laws that were in effect at the time.” The prosecutor objected “based on the underlying offense dates in this case,” and the trial court declined to recalculate the conduct credits.

DISCUSSION

I. Conduct Credit Statutes

Section 4019 specifies the rate at which a prisoner can earn conduct credit while in local custody.² Section 2933 specifies the rate at which a prisoner can earn conduct credit while in state prison. Both statutes have undergone numerous amendments in the past few years.

When defendant committed her crimes, section 4019 allowed prisoners to earn two days of presentence conduct credit for every four days of actual local custody: a two-for-four rate. (Former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7; see *People v. Brown* (2012) 54 Cal.4th 314, 318 (*Brown*).) Section 2933 allowed prisoners to earn postsentence conduct at a half-time rate: for every six months of custody, a prisoner could earn six months of conduct credits. (Former § 2933, subd. (a), as amended by Stats. 1996, ch. 598, § 2.) A prisoner could also earn a “lesser amount of credit based on this ratio ... for any lesser period of continuous performance.” (*Ibid.*)

Effective January 25, 2010, section 4019 was amended to allow certain eligible prisoners to earn two days of conduct credit for every two days of actual local custody: a two-for-two rate. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 50; see *Brown, supra*, 54 Cal.4th at p. 318.) The January 25, 2010 amendment to section 4019 operated prospectively, to presentence custody time served after its operative date. (*Brown, supra*, 54 Cal.4th at p. 318.) The January 25, 2010 amendment also made changes to section 2933, but it maintained the half-time rate for postsentence conduct credit. (Stats. 2009-2010, 3rd Ex. Sess., ch. 28, § 38.)

Effective September 28, 2010, sections 4019 and 2933 were amended again. (Stats. 2010, ch. 426, § 1 & § 2; see *Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) In

² Conduct credits include credit for performing assigned labor and for complying with applicable rules and regulations. (See § 4019, subds. (b), (c); *People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

section 4019, the Legislature restored the less favorable two-for-four presentence conduct credit rate for prisoners who committed crimes after September 28, 2010. (Stats. 2010, ch. 426, § 2.) However, under a simultaneous amendment to section 2933, certain eligible prisoners who were ultimately sentenced to state prison could earn one day of presentence conduct credit for each day of actual local custody. (Stats. 2010, ch. 426, § 1.)

Operative October 1, 2011, sections 4019 and 2933 were amended yet again. The amendments were enacted via three separate pieces of legislation.

First, on April 4, 2011, the governor signed Assembly Bill 109, an act titled “the 2011 Realignment Legislation addressing public safety.” (Stats. 2011, ch. 15, § 1.) Under the Realignment Legislation, certain felons would serve their terms in county jail. (§ 1170, subd. (h); Stats. 2011, ch. 15, § 450.) Assembly Bill 109 also reinstated the more favorable two-for-two conduct credit rate in section 4019. (See § 4019, subds. (b), (c) & (f), as amended by Stats. 2011, ch. 15 § 482.) However, the changes to section 4019 were to operate prospectively and apply only to prisoners confined to local custody for a crime committed on or after July 1, 2011. (§ 4019, subd. (h), as amended by Stats. 2011, ch. 15 § 482.) Assembly Bill 109 did not enact any changes to section 2933.

Before Assembly Bill 109’s changes to section 4019 became operative, Assembly Bill 117 was signed by the governor, on June 30, 2011. Assembly Bill 117 did not change the two-for-two conduct credit rate enacted by Assembly Bill 109, but it specified that the changes to section 4019 would apply only to prisoners confined to local custody for a crime committed on or after October 1, 2011. (§ 4019, subd. (h), as amended by Stats. 2011-2012, ch. 39, § 53.) Assembly Bill 117 did not enact any changes to section 2933.

On September 20, 2011, before Assembly Bill 117’s changes became operative, the governor signed a third bill, which amended section 4019 and section 2933.

Assembly Bill 17 added a provision specifying that section 4019's conduct credit provisions applied to jail sentences imposed pursuant to section 1170, subdivision (h). (§ 4019, subd. (a)(6); Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35 (A.B. 1X 17).) Assembly Bill 17 also amended section 2933 to delete the presentence conduct credit provision. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 16 (A.B. 1X 17).)

Thus, current section 4019 contains the more favorable two-for-two conduct credit rate. It currently provides that if all possible days of conduct credit are earned, four days will now be deemed served for every two days of actual local confinement. (§ 4019, subds. (b), (c) & (f).) Subdivision (h) of section 4019 presently states: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail ... 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." Section 2933 continues to provide that prisoners sentenced to state prison will receive half-time conduct credits. (§ 2933, subd. (b).)

II. Issues

Defendant's crimes were committed between 2004 and 2007. Had she been sentenced at that time, she would have been eligible for presentence conduct credit at the two-for-four rate of former section 4019, and she would have been eligible for postsentence conduct credit at the half-time rate of former section 2933.

Defendant served some of her presentence custody before any of the recent amendments to sections 4019 and 2933. She was also in local custody between September 30, 2011 and December 9, 2011. The trial court calculated all of her presentence conduct credits at a two-for-four rate and ordered that she serve her three-year jail term at the same rate.

In her opening brief, which was filed before the California Supreme Court decision in *Brown, supra*, 54 Cal.4th 314, defendant argued that the January 25, 2010

amendments to section 4019 were fully retroactive. She claimed she was entitled to two days of conduct credit for every two days she spent in actual presentence local custody.³ She also claimed she was entitled to earn postsentence conduct credits at a halftime rate under principles of statutory interpretation and because of the constitutional prohibition against ex post facto laws.

In her reply brief, defendant acknowledged that *Brown* had rejected her arguments concerning the retroactivity of the January 25, 2010 amendments to section 4019. Thus, defendant conceded that we must affirm the trial court's calculation of conduct credits for the time she spent in local custody prior to January 25, 2010.⁴

Although *Brown* is dispositive of defendant's pre-January 25, 2010 presentence custody, we must determine the rate at which defendant accrued presentence conduct credit during the 71 days she served in local custody from September 30, 2011 to December 9, 2011. We must also determine the rate at which she is eligible to earn postsentence conduct credits.

III. Presentence Custody Credits

In *Brown*, the defendant committed his crimes and was sentenced prior to the January 25, 2010 amendment to section 4019, so he was awarded presentence conduct credits under the two-for-four formula. (*Brown, supra*, 54 Cal.4th at p. 318.) On appeal, the defendant argued that he was entitled to the more favorable two-for-two formula, on

³ Defendant actually refers to the January 25, 2010 version of section 4019 as providing a "one-for-one" conduct credit rate. This is not technically correct. The January 25, 2010 version of section 4019, like the current version, allowed eligible defendants to earn two days of conduct credit for every two days of actual local custody. A defendant who served an odd number of days in presentence custody would earn an equal amount of conduct credit, less one day.

⁴ In case No. SS042324A, defendant spent 213 days in local custody prior to January 25, 2010. In case No. MS042618A, defendant spent three days in local custody prior to January 25, 2010. Defendant was not given credit for any pre-2010 custody time in case No. SS072270A.

equal protection and other grounds. (*Ibid.*) The California Supreme Court rejected these arguments. First, the court found that the Legislature did not intend the January 25, 2010 amendment to apply retroactively, since the amendment's effect was to "increase the existing incentives for good conduct by offering well behaved prisoners the prospect of even earlier release from custody." (*Id.* at p. 322, fn. omitted.) The court likewise found that defendants who served presentence custody before and after the amendment's effective date were not similarly situated, pointing out that "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." (*Id.* at pp. 328-329.)

The *Brown* court made two observations that are particularly relevant to this case. First, the court noted that "[t]o apply [the January 25, 2010 amendment to] section 4019 prospectively necessarily means that prisoners whose custody overlapped the statute's operative date (Jan. 25, 2010) earned credit at two different rates." (*Brown, supra*, 54 Cal.4th at p. 322.) Second, the *Brown* court held that the January 25, 2010 amendment to section 4019 did not lessen the penalty for particular crime, but "address[ed] *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Id.* at p. 325.)

Despite *Brown*, the Attorney General contends that the trial court correctly applied the less favorable pre-January 25, 2010 version of section 4019 to the presentence custody that defendant served between September 30, 2011 and December 9, 2011.⁵ The

⁵ The Attorney General does not argue that the September 28, 2010 version of section 4019 applied to defendant. Although that version of the statute was still in effect when defendant was in local custody on September 30, 2011, it only applied to crimes committed after September 28, 2010. Likewise, although the October 1, 2011 amendment to section 4019 became effective while defendant was in local custody, defendant was not eligible to earn presentence conduct credits under that version of the statute because her crimes were committed prior to October 1, 2011. (See § 4019, subd. (h).)

Attorney General argues that defendant is not entitled to the benefits of the January 25, 2010 amendment to section 4019 because her crimes were committed several years earlier and she apparently absconded for some of that time.

The Attorney General's argument is foreclosed by *Brown*. As pointed out above, *Brown* directly addressed the situation where a defendant served presentence custody both before and after January 25, 2010, finding that such defendants will “earn[] credit at two different rates.” (*Brown, supra*, 54 Cal.4th at p. 322.) *Brown* also explains that the date of the offense is not relevant for purposes of determining whether to apply the January 25, 2010 amendment to section 4019, since it did not lessen the penalty for particular crime, but “addresse[d] *future conduct* in a custodial setting by providing increased incentives for good behavior.” (*Id.* at p. 325.)

In sum, since defendant served 71 days of presentence custody after the January 25, 2010 amendment to section 4019, her conduct credits for that time period should have been calculated at a two-for-two rate.

IV. Postsentence Custody Credits

The final question is whether the trial court properly ordered that defendant would be eligible to earn postsentence conduct credits at a two-for-four rate (i.e., “at 33 percent”).

At the time defendant committed her crimes, a felon would have been sentenced to state prison, not county jail. Thus, her postsentence conduct credit would have been governed by section 2933, which provided (as it does now) half-time credit. (§ 2933, subd. (b); see former § 2933, subd. (a); Stats. 1996, ch. 598, § 2.)

Defendant was not sentenced to prison, however. She was sentenced to a county jail term pursuant to the Realignment Legislation. Thus, section 2933 does not apply to her. Instead, her postsentence conduct credits are governed by section 4019, which specifies that its provisions shall apply “[w]hen a prisoner is confined in a county jail ...

as a result of a sentence imposed pursuant to subdivision (h) of Section 1170.” (§ 4019, subd. (a)(6).)

Defendant contends that if section 4019 is interpreted so as to limit her ability to earn postsentence credits at less than a half-time rate, it would violate the constitutional prohibition against ex post facto laws.

In *Weaver v. Graham* (1981) 450 U.S. 24 (*Weaver*), the United States Supreme Court examined a Florida statutory amendment that changed the amount of “gain-time” credits an inmate could earn. (*Id.* at p. 26.) Before the amendment, inmates could earn five days per month for the first and second years of the sentence, 10 days for the third and fourth years, and 15 days for the fifth and subsequent years. (*Ibid.*) Under the amendment, inmates could only earn three days per month for the first and second years, six days for the third and fourth years, and nine days for the fifth and subsequent years. (*Ibid.*) Florida applied the amendment to all inmates, including Weaver, whose offense took place before the enactment of the amendment. (*Id.* at pp. 27, 31.)

In *Weaver*, the Supreme Court concluded that, for inmates who committed crimes before the amendment’s enactment, the change in the statute “substantially alter[ed] the consequences attached to a crime already completed, and therefore change[d] ‘the quantum of punishment.’ ” (*Weaver, supra*, 450 U.S. at p. 33.) Because the amendment “constrict[ed] the inmate’s opportunity to earn early release, and thereby [made] more onerous the punishment for crimes committed before its enactment,” it violated the ex post facto clause. (*Id.* at pp. 35-36.)

Thus, we agree with defendant that she is entitled to earn postsentence conduct credits at a half-time rate. Before the Realignment Legislation, defendant would have been sentenced to prison and would have been eligible for half-time postsentence conduct credits under section 2933. If the recent amendments to section 4019, combined with the Realignment Legislation, reduced the rate at which defendant could earn postsentence

conduct credits, those amendments would effectively alter the consequences of the crimes she committed prior to the change in the law. (*Weaver, supra*, 450 U.S. at pp. 33-36.)

DISPOSITION⁶

The judgment is modified to award defendant custody credits as follows:

Case No. SS042324A: 284 days of actual custody credit plus 176 days of conduct credit for a total of 460 days of credit.

Case No. SS072270A: 71 days of actual custody credit plus 70 days of conduct credit for a total of 141 days of credit.

Case No. MS042618A: 3 days of actual custody credit plus 0 days of conduct credit for a total of 3 days of credit.

In addition, the superior court is ordered to amend the minute orders of December 9, 2011 in each of the three cases to delete the provision stating that her “good/work credits shall be calculated at a 33% accrual rate” and issue an order that defendant’s good/work credits shall be calculated at a half-time rate.

⁶ On July 20, 2012, defendant filed a motion for calendar preference, asserting that if she prevails on the conduct credit issues, she will have served out her sentence as of approximately October 22, 2012. If in fact our disposition results in defendant having served more time than she should have, any extra days of custody may be applied toward her fees and fines. (§ 2900.5, subd. (a).)

In all other respects, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.