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

THE PEOPLE,

Plaintiff and Respondent,

v.

MORGAN HICKS,

Defendant and Appellant.

H038024

(Monterey County

Super. Ct. No. SS092034)

Defendant Morgan Hicks pleaded guilty to numerous counts of residential burglary, receiving stolen property, identity theft, and grand theft in exchange for a 22-year prison term. On appeal, he claims that he was entitled to additional conduct credit under the October 2011 version of Penal Code section 4019,¹ and he seeks correction of errors on the abstract of judgment. The Attorney General concedes that the abstract must be corrected, and we will so order. We reject defendant's claim for additional conduct credit.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

I. Background

In January 2010, defendant was charged by information with a total of 60 counts of receiving stolen property (§ 496, subd. (a)), residential burglary (§ 459), commercial burglary (§ 459), driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), grand theft (§ 487, subd. (d)), and identity theft (§ 530.5, subd. (a)). It was specially alleged that defendant had committed one of the residential burglary counts while a non-accomplice was present in the residence, thereby making that count a violent felony (§ 667.5, subd. (c)(21)), and that defendant had served a prison term for a prior felony conviction (§ 667.5, subd. (b)). All of the crimes were alleged to have occurred in 2007.

In January 2012, defendant entered into a plea agreement under which he would plead guilty to four counts of residential burglary, 15 counts of receiving stolen property, one count of grand theft, and two counts of identity theft, the remaining counts and allegations would be dismissed, and he would receive a specified term of 22 years in state prison. He also agreed to waive his appellate rights. He entered these pleas. The agreed term was imposed, and the remaining counts and allegations dismissed.

Defendant was awarded 793 days of actual custody credit and 396 days of conduct credit. He had been in jail from October 14, 2009 to May 15, 2010, and from June 28, 2010 to January 27, 2012. The abstract of judgment had an “X” in the box for “consecutive 1/3 violent” next to each of three of the four residential burglary counts. Defendant timely filed a notice of appeal.

II. Discussion

A. Conduct Credit

Because defendant’s current offenses included serious felony convictions, he was not eligible for any enhanced conduct credit under former section 2933, subdivision (e) or former section 4019. The October 2011 version of section 4019 authorizes enhanced conduct credit for even those convicted of serious felony offenses. However, the October

2011 version of section 4019 provides that it “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.” (§ 4019, subd. (h).) Since defendant’s crimes occurred in 2007, he is excluded from the prospective application of the October 2011 version of section 4019.

Defendant contends that it would violate equal protection to deny him the benefit of the enhanced conduct credit that he would have been eligible for under the October 2011 version of section 4019 if it were not prospective only. He claims there is no legitimate basis for distinguishing between him and those to whom the statutory provisions do apply.

“[A]n equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714 (*Nguyen*)). Here, the October 2011 version of section 4019 reserves its benefits for the group of prisoners who committed their crimes *on or after October 1, 2011*, and excludes from its benefits the group of prisoners who committed their crimes *before October 1, 2011*.

The California Supreme Court’s recent decision in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) supports the conclusion that these two groups are not similarly situated with respect to “the purpose of the law in question”² (*Nguyen, supra*, 54 Cal.App.4th at p. 714; see also *People v. Kennedy* (2012) 209 Cal.App.4th 385, 396-399 [relying on *Brown* in rejecting a contention like that of defendant].) *Brown* concerned a previous version of section 4019 that, unlike the October 2011 version, did not expressly

² Defendant’s opening brief was submitted prior to the California Supreme Court’s decision in *Brown*. The Attorney General’s brief relied on *Brown*, and defendant filed no reply brief.

state that it was to be applied prospectively. The court held in *Brown* that the statute was to be applied prospectively to time served after its effective date and further held that prospective only application of the new version of the statute did not violate equal protection because the purpose of the statute was to create an incentive for good behavior, which could not be done retroactively. (*Brown*, at pp. 328-330.) “[T]he 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*, at pp. 328-329.)

While here, unlike the situation in *Brown*, the distinguishing characteristic is not the time of incarceration but the time of the commission of the crime, *Brown*’s analysis is equally applicable and leads us to the same conclusion. Since the October 2011 version of section 4019 plainly stated that it did not apply to a person whose crime occurred before October 1, 2011, the “important correctional purposes” of the enhanced “incentives for good behavior” that the October 2011 version of section 4019 offered would “not [be] served by rewarding prisoners” plainly excluded from the scope of the statute and who “thus could not have modified their behavior in response.” (*Brown*, *supra*, 54 Cal.4th at pp. 328-329.) Because defendant’s crimes occurred in 2007, the provisions of the October 2011 version of section 4019 plainly did not apply to him, and thus the incentive offered by that statute to other prisoners could not have influenced his behavior in jail. Hence, as defendant was not similarly situated to those to whom the statute applied with respect to the “purpose of the law,” his right to equal protection was not violated by the statutory distinction.

In a supplemental opening brief, defendant, citing dicta in an opinion of this court that is no longer published, asserts that he is entitled to additional conduct credit under the October 2011 version of section 4019 for the actual days that he served on and after

October 1, 2011. Defendant does not provide any analysis whatsoever to support this claim. In the absence of any substantive argument, we deem his claim forfeited. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1244 fn. 3, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

B. Abstract

None of defendant's convictions is for a violent felony. On the abstract, there is an "X" in the "consecutive 1/3 violent" box corresponding to each of three of the four residential burglary counts. Because these crimes were not violent felonies, these are errors. The "X" corresponding to each of these three counts should be in the "consecutive 1/3 nonviolent" box. We will order the trial court to correct this clerical error.

III. Disposition

The judgment is affirmed. The trial court is ordered to prepare an amended abstract of judgment that corrects the misidentification of three of the offenses as violent felonies and instead correctly identifies them as nonviolent felonies. The trial court shall transmit a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.