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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOANNE RICHARDS,

Defendant and Appellant.

H038053

(Santa Clara County

Super. Ct. No. C1105860)

Defendants who committed their crimes on or after October 1, 2011, are eligible for presentence conduct credits calculated on the basis of two days of conduct credit for every two days of actual custody. (Pen. Code, § 4019, subs. (b), (c) & (f).)¹ Defendants who committed their crimes before October 1, 2011, are eligible for conduct credits at the previous rate of two days for every four days in custody. (*Id.* subd. (h).) Defendant, who committed his crime in April 2011, appeals from a judgment and contends that affording him a lower level of conduct credits solely because he committed his crime before October 1, 2011, violates his constitutional right to the equal protection of the laws. We conclude that the right to equal protection does not prevent the Legislature from limiting the increased level of presentence conduct credits to detainees who committed their crimes on or after the October 1, 2011, operative date of the statute. We therefore affirm the judgment.

¹ Further unspecified statutory references are to the Penal Code.

BACKGROUND

In July 2011, defendant pleaded no contest to second degree burglary and two drug-related counts concerning events that occurred in April 2011. The trial court suspended imposition of sentence and placed defendant on probation with a condition that he serve four months in jail. It awarded presentence custody credits of 62 actual days and conduct credits of 30 days in accordance with the two-for-four version of section 4019 then in effect.

DISCUSSION

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011 (hereafter the October 2011 amendment), are to have prospective application only--i.e., to crimes committed on or after the effective date of the statute--defendant contends that the October 2011 amendment to section 4019 violates the equal protection clauses of the federal and California Constitutions if it is not applied retroactively because it treats a defendant who committed a crime before October 1, 2011, differently than if he or she committed the same crime after the statute's effective date. Defendant cites *In re Kapperman* (1974) 11 Cal.3d 542, 544-545 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498, 507-508 in support of his equal protection argument.

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. Kennedy* (2012) 209 Cal.App.4th 385, 396 (*Kennedy*).

Preliminarily, we disagree with the People's contention that section 1237.1 bars defendant's challenge to the constitutionality of the October 2011 amendment. Section 1237.1 states in relevant part: “No 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”

Section 1237.1 does not apply here. Defendant does not contend that the trial court erred in calculating his custody credits under the version of section 4019 in effect at the time.

In *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), the California Supreme Court expressly determined that neither *Kapperman* nor *Sage* supports an equal protection argument, at least insofar as conduct credits are concerned. (*Id.* at pp. 329-330.) In rejecting an inmate's argument that January 2010 amendments to section 4019 should apply retroactively, the 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.)

Addressing the inmate's equal protection claims, the court distinguished *Kapperman* on the grounds that it addressed custody credits, rather than conduct credits. (*Brown, supra*, 54 Cal.4th at p. 330.) Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively 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." (*Ibid.*)

Concerning *Sage*, the court acknowledged that "one practical effect of [that decision] was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them." (*Brown, supra*, 54 Cal.4th at p. 329.) However, it declined to read *Sage* as implicitly holding that prisoners serving time before

and after a conduct credit statute takes effect are similarly situated for purposes of equal protection, because that proposition was not considered in the case. (*Ibid.*)

Defendant's reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 [221 N.E.2d 262] (*Frye*), cited in a footnote in *Kapperman, supra*, 11 Cal.3d at page 547, footnote 6, is also erroneous. This Illinois case, similar to *Kapperman*, dealt with actual custody, and not the presentence conduct credits that we are concerned with here. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis was the date of conviction, a date out of a defendant's control, and not the date on which the crime was committed. (*Frye, supra*, 221 N.E.2d at pp. 264-265.)

The *Brown* court finally resolved the equal protection issue by concluding that, "equal protection does not require former section 4019 to be applied retroactively." (*Brown, supra*, 54 Cal.4th at p. 330.)

Although the *Brown* decision concerned the January 2010 version of section 4019, we recently held that there is no reason why the reasoning and holding in *Brown* cannot be extended to the October 2011 amendment to section 4019. (*Kennedy, supra*, 209 Cal.App.4th at pp. 396-397; accord, *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1552.)

Moreover, in observing that the October 2011 amendment to section 4019 has prospective application only, the *Brown* 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. It then observed that the amendment 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 local facility] for a crime committed on or after October 1, 2011.'" [Citation.] Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, defendant committed his offense in April 2011.

We therefore reject defendant's equal protection challenge to the October 2011 amendment of section 4019.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Mihara, J.

Márquez, J.