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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANK QUINONES, Defendant and Appellant.	B231775 (Los Angeles County Super. Ct. No. BA374938)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail R. Feuer, Judge. Affirmed.

D. Inder Comar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Victoria B. Wilson, and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Following the prosecution's presentation of substantial evidence of the offenses (*People v. Bloom* (1989) 48 Cal.3d 1194, 1209), a jury returned verdicts finding Frank Quinones guilty of carrying a concealed dirk or dagger in violation of former Penal Code section 12020, subdivision (a)(4), and criminal threats in violation of Penal Code section 422. Quinones thereafter admitted that he suffered a prior conviction with a prison term. (Pen. Code, § 667.5, subd. (b).) The trial court sentenced Quinones to an aggregate term of three years, eight months in state prison. Quinones appeals, challenging the constitutionality of the concealed dirk or dagger statute, and arguing he is entitled to additional custody credits. We affirm.

DISCUSSION

I. The Second Amendment Constitutional Issue

Quinones contends his conviction for carrying a concealed dirk or dagger under former Penal Code section 12020, subdivision (a)(4),[1] must be reversed because former section 12020, subdivision (a)(4), was unconstitutional on its face in that it criminalized conduct protected by the Second Amendment of the United States Constitution.[2] We disagree.

A criminal statute that makes unlawful "'a substantial amount of constitutionally protected conduct'" may be held invalid on its face as being unconstitutionally overbroad even if the statute may have legitimate, constitutional application. (See *Houston v. Hill* (1987) 482 U.S. 451, 458-459; see also *People v. Rubalcava* (2000) 23 Cal.4th 322, 333 (*Rubalcava*) ["A statute is only overbroad if it 'prohibits a "'substantial amount of constitutionally protected conduct.'"'"].)

Former section 12020, provided: "(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: [¶] . . . [¶] (4) Carries concealed upon his or her person any dirk or dagger." In *Rubalcava*, our Supreme Court ruled that the intent to use a concealed dirk or

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[1] All further section references are to the Penal Code.

[2] Hereafter, the Second Amendment.

dagger for a criminal purpose was not an element of the crime defined by former section 12020, subdivision (a)(4). (*Rubalcava, supra,* 23 Cal.4th at p. 328.) With that predicate in place, the Supreme Court addressed whether former section 12022, subdivision (a)(4), was unconstitutionally overbroad. The Supreme Court observed that, although former section 12020, subdivision (a)(4), could be read on its face as criminalizing the carrying of legal instruments such as steak knives, scissors and metal knitting needles, there was "'no need to carry such items concealed in public.'" (*Id*. at p. 330.) In the end, the Supreme Court ruled that it would "not find [former section 12020, subdivision (a)(4),] *unconstitutionally* overbroad without some concrete impairment of constitutionally protected conduct." (*Id*. at p. 333.)[3]

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*), the United States Supreme Court ruled that the Second Amendment guaranteed an individual right, "not unlimited," to bear arms for traditionally lawful purposes such as self-defense in a person's home. (*Id*. at p. 626.) In *McDonald v. City of Chicago* (2010) 561 U.S. ___ ; 130 S.Ct. 3020, the United States Supreme Court ruled that the individual right to bear arms guaranteed by the Second Amendment applies to the states through the due process clause of the Fourteenth Amendment of the United States Constitution. (*Id*. at p. 3026.)

Quinones contends that, in light of *Heller*'s clarification of the individual right to bear arms guaranteed by the Second Amendment, the weapon-related proscription in former section 12020, subdivision (a)(4), on its face, is unconstitutionally overbroad because it makes "a substantial amount of constitutionally protected conduct" unlawful. We find otherwise.

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[3] Former section 12020 is now repealed. (See Stats. 2011, ch. 11, § 4.) At present, section 21310 reads: "[A]ny person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment in a county jail not exceeding one year or in the state prison."

The following cases, each of which rejected a Second Amendment challenge to a different weapon-related statute, guide our conclusion. In *People v. Ellison* (2011) 196 Cal.App.4th 1342, the court ruled that former section 12025, subdivision (a)(1), which prohibited the carrying of a concealed weapon in a vehicle, did not violate the Second Amendment. (*Id*. at pp. 1346-1351.) The same result was reached in *People v. Delacy* (2011) 192 Cal.App.4th 1481, as to former section 12021, subdivision (c)(1), which prohibited possession of firearms by persons convicted of certain misdemeanors. (*Id*. at pp. 1487-1493.) The same was the case in *People v. Villa* (2009) 178 Cal.App.4th 443, as to former section 12021, subdivision (e), which prohibited a juvenile from possessing a firearm, and as to former section 12031, subdivision (a), which prohibited possession of a loaded firearm in a public place. (*Id*. at pp. 447-450.) Also, in *People v. Flores* (2008) 169 Cal.App.4th 568, as to former section 12025, subdivision (a)(2), which prohibited the carrying of a concealed firearm, and as to former section 12031, subdivision (a)(1), and former section 12021, subdivision (c)(1), a Second Amendment challenge was rejected. (*Id*. at pp. 573-577.) The same result was reached in *People v. Yarbrough* (2008) 169 Cal.App.4th 303, as to former section 12025, subdivision (a)(2). (*Id*. at pp. 311-314.)

We add our voice to this line of Second Amendment cases in the post-*Heller* era, specifically as to former section 12020, subdivision (a)(4), which prohibited carrying a concealed dirk or dagger. A person's right to bear arms under the Second Amendment for traditionally lawful purposes such as self-defense in the home does not encompass the right to carry a concealed dirk or dagger in public. Further, carrying a concealed dirk or dagger in public is not in the nature of a common use of dirk or dagger for lawful purposes. Unlike possession of a dirk or a dagger for protection within a home, carrying such an item concealed in public presents a threat to public safety. *Heller* expressly stated that the Second Amendment did not make unconstitutional any statutory proscriptions against the carrying of concealed weapons in public. (*Heller, supra,* 554 U.S. at p. 626.)

In his reply brief, responding to the People's construction of *Heller*, Quinones further argues that former section 12020, subdivision (a)(4), was unconstitutional on its face because it did not include specific statutory language to limit its application to public places. In other words, Quinones claims that former section 12020, subdivision (a)(4), on its face, was unconstitutionally overbroad because it made it a crime to carry a concealed dirk or dagger *period*, without distinguishing between carrying such a concealed weapon in the home or in public. Because we see no possibility that former section 12020, subdivision (a)(4), ever contemplated the arrest and criminal prosecution of a person who carried a concealed dirk or dagger around inside his or her home, and see no possibility that such an arrest would occur, we are not persuaded by Quinones's argument that the statute was unconstitutionally overbroad.

Quinones states that "[t]he facts of this case highlight the bizarre application[] of section 12020." Quinones tells us that the trial evidence showed that he "armed himself with a kitchen knife in response to a suspected burglar," and was subsequently arrested for carrying the knife. He contends that his actions were "the very type of behavior the Second Amendment is designed to protect." It appears that Quinones is arguing that former section 12020, subdivision (a)(4), was unconstitutional *as applied* in his case because a person has a Second Amendment right to protect himself or herself when a suspected burglar is afoot. However, Quinones was convicted under former section 12020, subdivision (a)(4), for the act of carrying a concealed dirk or dagger while on a public street. He was not protecting himself in his home. For the reasons explained above, such activity is not constitutionally protected activity under the Second Amendment.

II. The Vagueness Constitutional Issue

Quinones contends his conviction for carrying a concealed "dirk or dagger" under former section 12020, subdivision (a)(4), must be reversed because the definition of "dirk or dagger" in former section 12020, subdivision (c)(24), was vague and failed to provide sufficient notice of the proscribed conduct, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. We disagree.

A penal statute is unconstitutionally vague when it fails to define an offense with sufficient definiteness such that (1) a person of ordinary intelligence is not able to understand what conduct that is prohibited, and (2) it encourages arbitrary or discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357-358.)

Former section 12020, subdivision (c)(24), provided: "As used in this section, a 'dirk' or 'dagger' means a [1] knife or [2] *other instrument with or without a handguard* [3] *that is capable of ready use as a stabbing weapon* that [4] may inflict great bodily injury or death." (Numbers and italics added.)

Quinones argues the statutory language italicized above was unconstitutionally vague because it failed to give a person of ordinary intelligence fair notice of what was forbidden by the statute. We reject his argument because a defendant who is "'squarely within" the reach of a statute lacks standing to challenge its vagueness as it hypothetically could be applied to the conduct of others. (*People v. Murphy* (2001) 25 Cal.4th 136, 149, quoting from *Parker v. Levy* (1974) 417 U.S. 733, 756.) Because Quinones carried a concealed a dirk or dagger in the form of a knife that could inflict great bodily injury or death, his conduct fell squarely within the reach of former section 12020, subdivision (c)(24). He thus lacks standing to challenge the vagueness of other parts of the statute that might be applied to the conduct of other persons in other circumstances.

Even if Quinones had standing, we would still reject his argument that former section 12020, subdivision (c)(24), was vague because a person could be drawn within the reach of the statute by innocently carrying a concealed "instrument" that is "capable of ready use as a stabbing weapon," such as a ballpoint pen or knitting needles or a nail file. Quinones's argument relies on cases such as *People v. Munoz* (1961) 9 N.Y.2d 51; 211 N.Y.Supp.2d 146, 149-150. By extension, we understand Quinones to argue also that, without statutory language making it unlawful to carry a concealed instrument "*with the intent to use it as a stabbing weapon*," former section 12020, subdivision (c)(24), was vague in that it had no boundary excluding from its reach the act of carrying an otherwise lawful item used in everyday life.

In *Rubalcava*, our Supreme Court ruled that the intent to use a concealed dirk or dagger for a criminal purpose was not an element of the crime defined by former section 12020, subdivision (a)(4). Further, that the statute, without an intent element, was not unconstitutionally overbroad. (*Rubalcava, supra,* 23 Cal.4th at pp. 328, 333.) We do not and will not disagree. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) For the reasons explained above, our view is not changed by the *Heller* decision in the years since *Rubalcava*. It was the concealment element that sufficiently curbed the reach of former section 12020, subdivision (a)(4), bringing the statute within constitutional bounds.

III. The Sentencing Equal Protection Constitutional Issue

Quinones contends the trial court's decision not to grant him "one-for-one" credit on his presentence time in custody violated his constitutional right to equal protection of the law under the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution. We disagree.

Quinones was arrested on August 17, 2010; he was sentenced on March 15, 2011. It is undisputed that Quinones was in actual custody for 211 days before sentencing. It is undisputed that the trial court granted Quinones 104 days of custody presentence conduct credit based on his actual days in custody.

Effective January 25, 2010, section 4019 was amended so that it essentially read that a defendant who had not committed a serious felony would earn "one-for-one" presentence conduct credit, while a defendant who had committed a serious felony would continue to earn presentence conduct credits as they would have under the former version of section 4019, or, two days of credit for every four days in actual custody. Also effective January 25, 2010, section 2933 was amended to provide that a state prison inmate would earn one-for-one *postsentence* conduct credit. (See Stats. 2009-2010, 3d Ex Sess, ch. 28, §§ 38 & 50.) These sentencing statutes were in effect on the day Quinones committed his offenses in August 2010, and there appears to be agreement

between Quinones and the People that these sentencing statutes control his current claim on appeal.[4]

Quinones argues his right to equal protection under the law was violated because he only received one-third conduct credit (104 conduct credit days for 211 days in actual presentence custody) under section 4019 for the time he was a "detainee/felon" charged with the offense of criminal threats (a serious felony), whereas a state prison inmate who had been immediately convicted of the same offense (i.e., by plea), or who had been able to post bail through sentencing, would have begun receiving one-for-one conduct credit under section 2933. In short, he basically says that he is going to serve more time in state prison because of the less generous formula in section 4019 applied to the time he was in custody prior to sentencing. Quinones's argument relies on *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*).

We are not persuaded by Quinones's equal protection argument. The statutes have not violated Quinones's right to equal protection under the law because there is a rational basis for different accrual rates for conduct credit for time in custody before sentencing (§ 4019) and time in custody after sentencing (§ 2933). The main purpose of presentence conduct credit is to encourage cooperation and good behavior by defendants temporarily held in local custody before trial and commitment to the state prison, while conduct credit for persons serving terms in the state prison implicate other considerations, for example, the extent to which prisoners might benefit from incentives to shorten their terms through participation in rehabilitation or educational or training programs. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.)

Quinones's reliance on *Sage* does not persuade us to reach a different conclusion. In *Sage*, the Supreme Court considered a previous version of section 4019 which denied presentence conduct credit to detainees eventually sentenced to state prison as felons, but gave conduct credit to detainees eventually sentenced to jail. (*Sage, supra,* 26 Cal.3d at

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[4] Sections 4019 and 2933 have since been amended.

p. 507.) The Supreme Court found no rational basis, nor compelling state interest, to deny presentence conduct credit to detainee/felons. (*Id*. at p. 508.)

Quinones's case does not involve a statutory scheme or facts similar to those in *Sage*. The equal protection problem in *Sage* was based on a defendant's ultimate status as a misdemeanant or felon, not on the basis of his or her time in custody presentencing versus his or her time in custody postsentencing.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.