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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEPHAN JACOB MORENO, Defendant and Appellant.	B232383 (Los Angeles County Super. Ct. No. NA087317)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Reversed in part and remanded for further proceedings.

Benjamin Owens, 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, Assistant Attorney General, Chung L. Mar and Victoria B. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Stephan Jacob Moreno appeals from the judgment entered upon his conviction of petty theft with priors (Pen. Code, §§ 484, subd. (a), 666, subd. (a)).[1] He was also found to have suffered one strike under the "Three Strikes" law (§§ 667, subd. (b)–(1), 1170.12, subd. (a)(d)) and served one prior prison term (§ 667.5, subd. (b)). Appellant was sentenced to seven years in state prison, consisting of the upper term of three years for the petty theft, doubled for the prior strike, and enhanced by one year for having served a separate prison term. The trial court ordered appellant to pay a criminal conviction assessment of $40 (Gov. Code, § 70373). Appellant received 231 days of presentence custody credit, consisting of 155 actual days and 76 days of good time/work time credit.

Appellant contends that the court erred (1) when it found that his prior conviction for gross vehicular manslaughter qualified as a serious felony; (2) in its determination of the criminal conviction assessment; and (3) that he is entitled to additional conduct credit based on amendments to section 4019 under The Criminal Justice Realignment Act of 2011.

Respondent concedes that the prior strike finding is not supported by substantial evidence and requests that the matter be remanded for a retrial on that issue. We agree and remand for further proceedings consistent with this opinion. We also modify the abstract of judgment to reflect the proper assessment. In all other respects the judgment is affirmed.

BACKGROUND

Facts[2]

On November 11, 2010, at approximately 4:55 p.m., while Jose Gonzalez was working as a loss prevention officer at the Ralphs supermarket on Pacific Coast Highway

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

2 Because the issues raised are not dependent on the underlying facts, the facts of the offense are presented in summary form.

in Long Beach, he observed appellant take Excedrin pills and Q-tips from the store shelves and place them in his pocket. Appellant then walked out of the store without paying for the merchandise. Gonzales detained appellant and the pills and Q-tips were recovered from appellant's pockets. Officer Richard Armond of the Long Beach Police Department arrived at the Ralphs store, arrested appellant, and transported him to the Long Beach jail.

Appellant testified on his own behalf and stated that he was waiting for a friend and decided to use the restroom in Ralphs to "get high." He injected himself with heroin and smoked methamphetamine with a pipe, but had no memory of what happened after that.

On rebuttal, Officer Armond testified that he observed appellant and did not see any objective signs of drug or alcohol intoxication.

Prior Convictions

Appellant waived jury trial on the prior convictions. The People sought to prove the following priors: (1) gross vehicular manslaughter (§ 191.5, subd. (a)) on October 29, 2004, Orange County case No. 04WF1345; (2) burglary (§ 459) on May 19, 2008, Riverside County case No. INFO58673; and (3) possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) on June 11, 2008, Orange County case No. 07HF2243.

To prove the gross vehicular manslaughter conviction the People presented an abstract of judgment which reflected conviction by guilty plea of gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)), driving under the influence and causing bodily injury (Veh. Code, § 23153, subd. (a)), and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)).[3] The People also presented appellant's plea

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[3] Appellant was initially granted probation. He violated probation and was sentenced to four years in state prison for the gross vehicular manslaughter conviction and received concurrent terms of 16 months each for the Vehicle Code violations.

form from the 2008 drug possession case in which appellant admitted his prior conviction for gross vehicular manslaughter.

The defense introduced various documents on the prior gross vehicular manslaughter conviction including the plea form which contained the following: "On February 22, 2004, in Orange County, I unlawfully killed Autumn Emenegger by driving a vehicle while intoxicated in violation of Vehicle Code sections 23140, 23152, & 23153, and the killing was the proximate result of an unlawful act with gross negligence. [¶] On February 22, 2004, in Orange County, I unlawfully drove a vehicle while under the influence of an alcoholic beverage & while driving did an act forbidden by law to wit speeding, and neglected a duty imposed by law which proximately caused bodily injury to Autumn Emenegger."

The trial court found that appellant's conviction for gross vehicular manslaughter was a serious felony within the meaning of the Three Strikes law. The court stated: "An automobile is a deadly or dangerous weapon and, then, therefore the defendant's prior within the meaning of [section] 1170.12 is a strike because he used a deadly weapon; namely, a car in the commission of that offense for which he pled out."

DISCUSSION

I. Sufficiency of Evidence–Gross Vehicular Manslaughter as a Serious Felony

A. Contention

Appellant contends there is insufficient evidence to support the trial court's finding that his gross vehicular manslaughter conviction was a serious felony. Appellant argues that there is no evidence he personally inflicted great bodily injury or personally used a dangerous or deadly weapon.

B. Analysis

The People must prove the elements of a prior conviction enhancement beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) The crime of "[g]ross vehicular manslaughter while intoxicated is the unlawful killing of a human being

without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." (§ 191.5, subd. (a).)

Pursuant to section 1192.8, subdivision (a), gross vehicular manslaughter while intoxicated is a "'serious felony'" when the commission of the offense involved "the personal infliction of great bodily injury on any person other than an accomplice." (§ 1192.8, subd. (a).) "To 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347.) "To 'personally inflict' injury, the actor must do more than take some direct action which proximately causes injury. The defendant must directly, personally, himself [or herself] inflict the injury." (*Id*. at p. 349.) "Proximately causing and personally inflicting harm are two different things." (*People v. Bland* (2002) 28 Cal.4th 313, 336.)

When an appellant challenges the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We "'"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We draw all reasonable inferences in support of the judgment. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) "An inference is not reasonable if it is based only on speculation." (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

Section 1192.8, subdivision (a) required proof that appellant had suffered the prior gross vehicular manslaughter conviction and that: (1) appellant personally inflicted the injuries that resulted in the victim's death and (2) the victim was not an accomplice. The

evidence presented showed that appellant was charged, pleaded guilty, and was sentenced for gross vehicular manslaughter while intoxicated involving a victim named Autumn Emenegger. The underlying facts of the offense other than the name of the victim were not presented.

There are no facts in the record to indicate that appellant personally inflicted rather than merely proximately caused the injuries that resulted in death. A conviction of gross vehicular manslaughter while intoxicated requires proof that the killing was a proximate result of the defendant's conduct (§ 191.5, subd. (a)), whereas a prior serious felony enhancement requires proof that a defendant personally inflicted the great bodily injury that caused death (§ 1192.8, subd. (a)).

Given the absence of any specific facts of the offense, the court erred in finding appellant's prior vehicular manslaughter conviction to be a serious felony. The court's finding was not based on substantial evidence.

Because we conclude there was insufficient evidence to support the court's determination that appellant's gross vehicular manslaughter conviction was a serious felony, it could not be counted as a strike conviction to elevate the term for his current conviction (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)). Reversal is required of this finding.

Respondent concedes that there is insufficient evidence in the record but requests that the matter be remanded for a retrial on that issue. Appellant seeks reduction of appellant's conviction to a misdemeanor if the people elect not to retry the enhancement. We find remand appropriate.

A retrial is permissible under both state and federal law. (*Monge v. California* (1998) 524 U.S. 721, 734; *People v. Barragan* (2004) 32 Cal.4th 236, 239.) At a retrial, the trier of fact may look to the entire record of the prior conviction to determine the truth of the prior conviction allegation. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355.)

II. Court Facilities Fee

Appellant contends the criminal conviction assessment fee must be reduced from $40 to $30. The People concede error. Government Code section 70373, subdivision (a)(1) requires the imposition of an assessment of $30 for each misdemeanor or felony. Appellant was convicted of one felony, and the assessment should therefore have been $30 instead of $40. We will order the judgment modified to reflect imposition of the correct assessment.

III. Equal Protection Challenge to the October 2011 Amendment to Section 4019

A. Contention

Appellant contends that he is entitled to additional presentence conduct credits because effective October 1, 2011, criminal defendants serving time in county jail are entitled to one for one credit. Appellant committed the current offense on November 11, 2010, well before the operative date of the amended statute. Notwithstanding the express legislative intent that the October 1, 2011 amendment to section 4019 is to have only prospective application, appellant contends, on equal protection grounds, that he is retroactively entitled to the reinstituted one-for-one conduct credits implemented by those changes.

B. Overview of Section 4019

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. (§ 4019, subds. (b) & (c).) Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Prior to January 25, 2010, conduct credits under section 4019 could accrue at the rate of two days for every four days of actual time served in presentence custody. (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)].) Effective January 25, 2010, the Legislature amended section 4019 (the January 2010 amendment) to provide that custody credits could accrue at the rate of two days for every two days actually served, except for

those defendants required to register as a sex offender, those who committed serious felonies (as defined in § 1192.7), and those who had a prior conviction for a violent or serious felony. (Stats. 2009-2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].) These amendments did not state whether they were to have retroactive application. Courts of appeal have split on the issue of whether this amendment to section 4019 is retroactive, and the issue is currently pending before our Supreme Court in multiple cases.[4]

Effective September 28, 2010, section 4019 was again amended to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendment. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared the September 28, 2010 amendments applied only to prisoners confined for a crime committed on or after that date, expressly stating a legislative intent that the provision have prospective application. (Stats. 2010, ch. 426, § 2.)

Thereafter, effective October 1, 2011, the Legislature again amended section 4019 (the October 2011 amendment) deleting conduct credit restrictions imposed on defendants with prior serious or violent felony convictions, those committed for serious felonies, and persons required to register as sex offenders. (Stats. 2011, ch. 15, § 482; Stats. 2011-2012, ch. 12, § 35.) These statutory changes reinstituted one-for-one conduct credits (i.e. two days conduct credit for every two days actually served). (§ 4019, subds. (b) & (c).) The new statute added subdivision (h) which stated: "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, city jail, industrial farm, or road camp for a crime committed *on or after October 1, 2011*. Any days earned by a

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4 The Supreme Court granted review in *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963, in which the Third Appellate District held the amendments are retroactive and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, in which the Fifth Appellate District reached the opposite result.

prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h), italics added.)

C. Equal Protection Principles

"'Guarantees of equal protection embodied in the Fourteenth Amendment of the United States Constitution and article I, section 7 of the California Constitution prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. . . .' [Citation.]" (*People v. Chavez* (2004) 116 Cal.App.4th 1, 4.) "The constitutional guarantee of equal protection of the laws has been defined to mean that all persons under similar circumstances are given '"equal protection and security in the enjoyment of personal and civil rights . . . and the prevention and redress of wrongs. . . ."' [Citation.] The concept '"'compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'"' [Citation.]" (*Pederson v. Superior Court* (2003) 105 Cal.App.4th 931, 939.) "'Under the equal protection clause, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some grounds of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"' [Citations.]" (P*eople v. Wilder* (1995) 33 Cal.App.4th 90, 104.)

'"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*).) Under the equal protection clause, we do not inquire "whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).)

"In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on

gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose." (*Hofsheier, supra,* 37 Cal.4th at p. 1200.)

Legislation that creates sentencing disparity or alters the treatment of custody credits for inmates does not affect a fundamental right and thus satisfies the requirements of equal protection "if it bears a rational relationship to a legitimate state purpose." (*People v. Richter* (2005) 128 Cal.App.4th 575, 584.)

D. Analysis

1. The "Similarly Situated" Requirement

The October 2011 amendment to section 4019 created two distinct groups: those who committed the same offenses or earned conduct credits before the operative date of the statute and those who committed the same crimes or earned their credits on or after October 1, 2011. The two groups are similarly situated in the sense that they committed the same offenses but are treated differently in terms of earning conduct credits based entirely on the dates their crimes were committed. No other factor distinguishes the award of conduct credits. Appellant has satisfied the first prerequisite for a meritorious claim under the equal protection clause, a classification that affects two similarly situated groups in an unequal manner. (*Cooley, supra,* 29 Cal.4th at p. 253.)

2. The Rational Relationship Test

Appellant relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) to argue that he is entitled to the enhanced credit provisions of the October 1, 2011 amendment.

In *Kapperman, supra,* 11 Cal.3d 542, the Supreme court considered an amendment to section 2900.5 which permitted time in custody in county jails before a prison commitment to be credited towards the sentence. (*Kapperman, supra,* at p. 544.) The amended statute went into effect on March 4, 1972, and as here, provided prospective application. (*Ibid.*) Kapperman was delivered to the Department of Corrections before March 4, 1972, and his conviction was final before the new law went

into effect. (*Id*. at p. 545.) The Supreme Court held that the state constitutional guarantee of equal protection under the laws (Cal. Const., art. 1, § 7; art IV, § 16) required that the full benefit of the new presentence credit law be applied retroactively to everyone serving a sentence on March 4, 1972, regardless of when they were in the county jail or whether the conviction was final on the date the statute took effect. (*Kapperman, supra*, at pp. 546–550.) *Kapperman* can be distinguished because it addressed actual custody credits, not conduct credits. Custody credits are awarded automatically on the basis of time served while conduct credits must be earned by a defendant.

Sage, supra, 26 Cal.3d 498, involved a prior version of section 4019 that allowed presentence conduct credits to misdemeanants but not felons. (*Sage, supra,* at p. 508.) Applying *Kapperman,* the court found that there was neither a "rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons." (*Sage, supra*, at p. 508.) The court held that section 4019 must be construed as providing presentence credits to all prisoners. (*Sage, supra,* at pp. 506–508.) The court also held that the award of credits must be given retroactive effect. (*Id*. at p. 509, fn. 7.) *Sage* is distinguishable because the equal protection violation there was based on a defendant's status and here the purported violation is temporal. "'[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*People v. Floyd* (2003) 31 Cal.4th 179, 191.)

The People argue that one of section 4019's principal purposes is to motivate or reward good behavior while in presentence custody, and it is impossible to influence behavior after it has occurred. They argue that the fact that conduct cannot be retroactively influenced provides a rational basis for the Legislature's express intent that the October 2011 amendments to section 4019 apply prospectively.

The People rely on *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*) which involved a similar equal protection challenge to the prospective application of credits for

good conduct while incarcerated in state prison under the Determinate Sentencing Act (§ 1170 et seq.). (*Stinnette, supra,* at p. 806.) The court found that the Legislature had the legitimate purpose "of motivating good conduct among prisoners so as to maintain discipline and minimize threats to prison security." (*Ibid*.) As such, a prisoner whose judgment has become final was not entitled to the benefit of the new law because "[r]eason dictates that it is impossible to influence behavior after it has occurred." (*Ibid.*)

The People's argument is persuasive. "[I]t is irrelevant whether the perceived reason for the challenged distinction actually motivated the Legislature." (*Hofsheier, supra,* 37 Cal.4th at p. 1201.) A proffered reason is sufficient if it '"conceivably or "may reasonably have been the purpose and policy" of the relevant governmental decisionmaker,'" and '"the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" (*Ibid.*) The inquiry is "whether '"the statutory classifications are rationally related to the 'realistically conceivable legislative purpose[s]' [citation]" . . . and . . . by declining to "invent[] fictitious purposes that could not have been within the contemplation of the Legislature . . . ."'" (*Ibid.*)

We agree that a "realistically conceivable legislative purpose" of the amendment was to motivate or reward good behavior while in presentence custody. This purpose provides a rational basis for the challenged classification and appellant's equal protection claim fails.

DISPOSITION

The judgment is reversed as to the sentence only. The matter is remanded for retrial to the extent permitted by *People v. Barragan*, *supra*, 32 Cal.4th at pages 239, 259 on the issue of whether appellant's conviction for gross vehicular manslaughter while intoxicated constituted a serious felony and for resentencing.

The superior court shall direct its clerk to amend the abstract of judgment to reflect an assessment of $30 pursuant to Government Code section 70373. The superior court shall send the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ