Filed 4/11/12 P. v. Merida CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALAN MERIDA, Defendant and Appellant.	B231652 (Los Angeles County Super. Ct. No. KA076932)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wade D. Olson, Judge. Affirmed as Modified.

Julia J. Spikes, 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, Paul M. Roadarmel, Jr., and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Alan Merida appeals from the judgment entered following revocation of his probation. The appeal raises only sentencing issues. Primarily, defendant contends that he is entitled to an additional 60 days in presentence good time/work time custody credits. He relies upon an amendment to section 2933[1] that took effect two years after his actual custody but that was in effect when he was sentenced. We are not persuaded by defendant's arguments. Secondarily, the parties concede that some of the fee orders imposed as part of defendant's sentence need to be modified. We modify the judgment to reflect those concessions but in all other respects, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 13, 2007, the People filed an information charging defendant with possession of marijuana for sale (Health & Saf. Code, § 11359) and transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)).

On May 7, 2007, defendant pled no contest to both charges.[2]

On October 12, 2007, the court suspended imposition of sentence and placed defendant on three years formal probation on various conditions, including serving 180 days in county jail. The trial court granted defendant 180 days credit for time served, consisting of 120 actual days and 60 days good time/work time credits.

On January 7, 2008, the court summarily revoked defendant's probation for failure to report.

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[1] Undesignated statutory references are to the Penal Code.

[2] Because the appeal raises only sentencing issues, we do not set forth the facts underlying defendant's convictions. (*People v. McNeely* (1994) 28 Cal.App.4th 739, 742.)

On March 11, 2011, the court conducted a contested probation violation hearing and found that defendant had violated probation by failing to report as required by law. The court imposed a two-year state prison sentence for the transportation of marijuana charge and a concurrent 16-month sentence on the possession for sale charge. Because defendant had been in custody since November 24, 2010, the trial court awarded him credit for 108 days actually served plus 108 days of conduct credit. (The trial court did not cite the statute it relied upon to compute defendant's conduct credit.) Adding in the credits defendant had been awarded when he pled in 2007 (120 actual days in custody plus 60 days of conduct credit), the court awarded defendant a total of 396 days in custody credits.

On August 17, 2011, defendant filed an "Ex Parte Motion For Correction of Pre-Sentence Custody Credits." He urged:

> "The calculation of the pre-sentence custody credit failed to award defendant the full custody credit for the 120 pre-plea custody time. Because the law changed to defendant's advantage, he is entitled to the benefit of the change in the law. Therefore, all of his pre-sentence custody time should be calculated to provide credits according to the revision effective September 28, 2010, which provides that persons sentenced to prison are entitled to day for day credit for all pre-sentence custody time. (Pen. Code, § 2933, subd. (e)(1)."

Defendant therefore asked the trial court to issue an order correcting nunc pro tunc the award of pre-sentence conduct credits to 120 conduct credits (instead of the 60 days awarded).

On September 8, 2011, the trial court denied the defense motion. Its minute order reads: "The court finds that the defendant received proper credits at the time of sentencing."

DISCUSSION

A. *Presentence Custody Credits – Section 2933, subdivision (e)*

In 2010, the Legislature amended section 2933, subdivision (e) to read as follows: "(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner. [¶] (2) A prisoner may not receive the credit specified in paragraph (1) if it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by, or has not satisfactorily complied with the reasonable rules and regulations established by, the sheriff, chief of police, or superintendent of an industrial farm or road camp." (Stats. 2010, ch. 426, § 1; [§ 2933, subd. (e)(1) & (2)].) This provision became effective September 28, 2010 but was subsequently deleted by the Legislature through an urgency measure effective September 21, 2011. (Stats. 2010-2011, 1st Ex. Sess., ch. 12, § 16.)

Defendant contends section 2933, subdivision (e)[3] applies to him because it was in effect on March 11, 2011 when he was sentenced following revocation of his probation. Because the statute grants one day of credit for each day served, defendant claims that he was entitled to 120 days (not 60 days) of conduct credit for the time served in 2007 prior to his sentencing. We are not persuaded.

Defendant and the Attorney General argue at length whether this statute even applies to the trial court's computation of presentencing conduct credit. We need not decide that issue because the dispositive point is that the statute was not in

[3] Subsequent references to section 2933 refer to the version in effect when defendant was sentenced in March 2011.

effect when defendant served the time for which he seeks additional custody credits. Consequently, the issue is whether the statute applies to all presentence conduct credit (defendant's position) or only to credit earned after its operative date.[4]

In making that determination, several principles guide our decision. Under section 3, "'[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise. [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753.) Neither the bill that amended section 2933 nor the legislative history contains any such clear and compelling implication of retroactive application. Therefore, the amendment applies prospectively only.

We recognize that, under *In re Estrada* (1965) 63 Cal.2d 740, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id*. at p. 748.) However, presentence conduct credits are not a mitigation of punishment. Rather, they are a means of encouraging and rewarding behavior. (*People v. Brown* (2004) 33 Cal.4th 382, 405.) "Credit is a privilege, not a right. Credit must be earned." (§ 2933, subd. (c).) Section 2933 appears to have been enacted, in part, to facilitate management of prisoners by motivating

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[4] Defendant attempts to avoid the retroactive/prospective dichotomy by arguing that "there is no issue of retroactivity because when the court sentenced [him], the sole statute in effect that affected the calculation of pre-sentence custody credits for defendants sentenced to prison was" section 2933, subdivision (e). The argument misses the mark. The point is that the statute was not in effect when defendant was in custody in 2007. Consequently, the first issue is whether its terms can be retroactively applied to that period. Also without merit is defendant's argument that there can be no issue of retroactivity because the statute "had nothing to do with the *earning* of pre-sentence custody credits, but with how the additional conduct credits are calculated." Not so. Subdivision (e)(2), set forth earlier in the text, makes clear that the statute *does* address how the credit can be earned; it explicitly states that the predicate of the award of credit under the statute was good behavior by the defendant.

compliant behavior while in local custody. This objective cannot be served by applying the amendment to section 2933 to custody that occurred before its enactment as "[r]eason dictates that it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806.) Accordingly, the section 3 presumption of prospective application is not rebutted. Defendant's award of conduct credit is therefore governed by the conduct-credit statute in effect at the time he was in custody.

In his reply brief, defendant contends for the first time that, assuming retroactivity is an issue, denial of retroactive application of section 2933 would violate his right to equal protection. We decline to reach this issue because it was not raised in a timely manner. To consider it would deprive the Attorney General of the opportunity to rebut the argument. (*People v. Dixon* (2007) 153 Cal.App.4th 985, 996.) In any event, even were we to consider the argument, we would reject it.

Defendant cites *In re Kapperman* (1974) 11 Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498. In *Kapperman*, the court reviewed a provision which made custody credit prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*In re Kapperman*, *supra*, 11 Cal.3d at pp. 544–545.) The Supreme Court concluded that this limitation violated equal protection, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id*. at p. 545.) In *People v. Sage*, *supra*, 26 Cal.3d 498, the court considered a previous version of section 4019 which denied presentence conduct credit to a detainee eventually sentenced to prison, although credit was given to detainees sentenced to jail and to felons who served no presentence time. (*Id*. at p. 507.) The court found no rational basis, nor compelling state interest, to deny presentence conduct credit to detainee/felons. (*Id*. at p. 508.)

We find *Kapperman* and *Sage* distinguishable. *Kapperman* dealt with actual custody credits, which are constitutionally required and awarded automatically on the basis of time served, not conduct credits like those provided by section 2933, subdivision (e), which must be earned by good behavior. *Sage* is distinguishable because the fact that a defendant's conduct cannot be influenced retroactively provides a rational basis for the Legislature's implicit intent that the section 2933, subdivision (e) amendment only apply prospectively. We conclude that there is no equal protection violation in the prospective application of the amendment.

B. *Imposition of Fines*

First, defendant urges that the court securities fee imposed at sentencing was excessive. When defendant was convicted by plea in 2007, the trial court imposed one $20 court security fine. (Former § 1465.8, subd. (a)(1).) However, following his probation violation hearing, he was ordered to pay a $40 court security fee for each conviction for a total of $80. (§ 1465.8, subd. (a)(1).) The Attorney General concedes that this increase in the amount was improper. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823 [the first fee remained in force despite the probation revocation].)

Second, the Attorney General notes that because defendant suffered two convictions, two $20 court security fees should have been imposed in 2007 instead of just one. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272-273.) Defendant concedes that the judgment should be modified to reflect two $20 court security fees.

Lastly, defendant urges, and the Attorney General agrees, that the trial court erred in imposing two $30 court facilities fees (Gov. Code, § 70373) for a total of $60 because he was convicted before the effective date (Jan. 2009) of the statute. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.)

We will direct modification of the judgment to correct the above errors.

DISPOSITION

The judgment is modified: (1) to reduce the court security fee (§ 1465.8) from $80 to $40; and (2) to delete the $60 court facilities fee (Gov. Code, § 70373). The trial court is directed to prepare a modified abstract of judgment reflecting these changes and to forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.