Filed 3/6/12 P. v. Edwards CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JACK EDWARDS, Defendant and Appellant.	B233547 (Los Angeles County Super. Ct. No. KA 091660)

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

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Robert Jack Edwards appeals from the trial court's determination of his presentence conduct credits. Appellant contends the trial court erred in denying him day-for-day conduct credits under Penal Code section 4019.[1] We affirm.

FACTS AND PROCEEDINGS

On September 16, 2010, appellant was charged with one count of possession for sale of cocaine base and one count of assault by means likely to produce great bodily injury. The information alleged that appellant had suffered a prior strike for first degree burglary (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and had served eight prison terms for prior offenses (§ 667.5, subd. (b)). It was also alleged that he had previously been convicted of two felonies within the meaning of section 1203, subdivision (e)(4), and had previously been convicted of possession of cocaine base for sale within the meaning of Health and Safety Code section 11370.2, subdivision (a).

On May 18, 2011, the trial court permitted the prosecution to amend the information to add a count for possession of cocaine base. Appellant then pled no contest to one count of possession of cocaine base. The court dismissed the other counts and the special allegations and sentenced appellant to two years in state prison. Appellant received 409 days of presentence credit, consisting of 273 days of actual custody and 136 days of good time/work time credit. He filed a timely notice of appeal stating that his sole challenge was the court's denial of day-for-day conduct credits under section 4019.

DISCUSSION

1. Jurisdictional Issue

Preliminarily, the Attorney General contends that we do not have jurisdiction and should dismiss this appeal pursuant to section 1237.1. We disagree.

Section 1237.1 states: "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence

---

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

custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." The Attorney General argues that appellant must first make a motion in the trial court requesting the recalculation of his presentence credits, and because he has not done so, we lack jurisdiction. But appellant complied with section 1237.1 by "present[ing] the claim in the trial court at the time of sentencing." After the court pronounced sentence, appellant sought to "revisit the issue on the credits." A colloquy then occurred in which the court recognized it did not give appellant day-for-day credits, and it noted a split in the courts over the credit issue presented by this appeal. Having presented his claim to the trial court already, appellant was not also required to file a motion. We decline to dismiss this appeal.

2. Presentence Conduct Credits Under Section 4019

Appellant contends he is entitled to day-for-day conduct credits equal to 273 days of credit, rather than the 136 days the court awarded him. He argues that because he did not admit a prior strike and the court dismissed the prior strike allegations, section 4019 entitles him to day-for-day credits. The Attorney General argues that appellant is ineligible for day-for-day conduct credits because he has a prior strike in his background, regardless of whether he admitted it or the court dismissed the allegations.

Defendants sentenced to prison for criminal conduct are entitled to credit against their prison terms for all actual days of presentence confinement solely attributable to the same conduct. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Pursuant to section 4019, defendants may also earn "conduct credit" for good behavior and satisfactory performance of any labor assigned to them during presentence custody. (*Ibid*.; see also § 4019, subds. (b), (c).)

The version of section 4019 that applies in this case awarded prisoners two days of conduct credit for every two days served -- in other words, day-for-day credits -- provided they exhibited good behavior and satisfactorily performed their assigned labor. (§ 4019, former subds. (b)(1), (c)(1), (f), as amended by Stats. 2009, 3d Ex. Sess. 2009-

2010, ch. 28, § 50.) However, if a prisoner had a prior strike for a serious or violent felony, or if the prisoner was required to register as a sex offender, the prisoner accrued credits at the lower rate of two days of conduct credit for every four days served.[2] (§ 4019, former subds. (b)(2), (c)(2), (f).)

Appellant contends that because he did not admit the prior strike allegations, the court could not use them to deny him day-for-day conduct credits. The Courts of Appeal in previous opinions have thoroughly examined this question. The Supreme Court has granted review in some of those cases. (See, e.g., *People v. Lara* (2011) 193 Cal.App.4th 1393, review granted May 18, 2011 (S192784); *People v. Voravongsa* (2011) 197 Cal.App.4th 657, review granted Aug. 31, 2011 (S195672).) It is unnecessary here to repeat the previously published, thorough discussions of the issue, and we will only summarize the basic reason why, in our view, section 4019 should not be construed to impliedly require pleading and proof of a prior serious felony conviction.

Due process does not require pleading and proof of defendant's prior serious felony conviction because the denial of enhanced conduct credits did not increase the penalty for defendant's crime beyond the prescribed statutory maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.) Conduct credits *decrease* a defendant's time in

---

[2] The applicable version of section 4019 is that which was in effect from January 25, 2010 to September 27, 2010, because he committed his crime during that period (on or about August 17 or 18, 2010).~(RT D-2)~ The Legislature amended section 4019 effective September 28, 2010 (Stats. 2010, ch. 426, § 2.) and again effective October 1, 2011 (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53). The September 2010 amendment deleted the subdivisions excluding sex registrants and defendants with a prior strike from enhanced-credit earning eligibility. Instead, all prisoners accrued conduct credits at a rate of two days for every four days in custody. (Stats. 2010, ch. 426, § 2.) The October 2011 amendment continued this change. By their terms, both amendments apply prospectively to prisoners confined for crimes committed on or after their effective dates. (§ 4019, subd. (g), as amended by Stats. 2010, ch. 426, § 2; *id.*, subd. (h), as amended by Stats. 2011, ch. 39, § 53.) These amendments to section 4019 are thus inapplicable to appellant's case because he committed his crime before their effective dates. Accordingly, our discussion of section 4019 concerns the version that was in effect from January 25, 2010 to September 27, 2010.

custody. Denying the enhanced conduct credits of former section 4019 did not increase defendant's punishment. It simply did not decrease the punishment as much as it otherwise would have without the disqualifying prior serious felony conviction. Even if it were correct to construe section 4019 as a sentence enhancement, *Apprendi* would not apply to "sentence enhancement provisions that are based on a defendant's prior conviction." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; see also *Apprendi*, *supra*, 530 U.S. at p. 490.)

Moreover, in *In re Varnell* (2003) 30 Cal.4th 1132, the Supreme Court rejected the claim that a trial court may disregard "sentencing factors" (an aggravating or mitigating circumstance that supports a sentence within the range authorized by the jury's finding of guilt) and found a prior offense barring a defendant from eligibility for Proposition 36 drug treatment need not be pled and proved. *Varnell* reasoned in part: "And even if petitioner's criminal history *were* to bar him automatically from probation, due process would not require that the facts supporting imposition of a mandatory prison term be pleaded and proved." (*Varnell*, at p. 1142, citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 87-88 and *Harris v. United States* (2002) 536 U.S. 545, 568.) With no due process basis for implying a pleading and proof requirement, we see no reason to imply a pleading and proof requirement. (See *Varnell*, at p. 1141 [Legislature knows how to specify a pleading and proof requirement, and none should be implied absent due process/fair procedure concerns].)

Neither the holding nor principle of *People v. Lo Cicero* (1969) 71 Cal.2d 1186 supports the implied imposition of a pleading and proof requirement under former section 4019. That case implied a pleading and proof requirement for a prior conviction that barred the sentencing court from considering probation as an alternative to imposing a prison term. The *Lo Cicero* court concluded that denying the opportunity for probation was the same as an increase in punishment, so the prior conviction had to be pled and proven. (*Lo Cicero*, at p. 1193.) Barring probation removes a sentencing choice from the trial court and requires imposition of a prison (or, in some cases, jail) sentence for a convicted defendant. In contrast, former section 4019 does not impinge on the trial

court's sentencing choices. The due process and fair procedure principles that apply to a trial court's sentencing choices do not apply to section 4019.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

I CONCUR:

BIGELOW, P. J.

FLIER, J., DISSENTING

I respectfully dissent. In my view, *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1194 (*Lo Cicero*) shows that appellant is correct. *Lo Cicero* holds that the prosecution must plead and prove the validity of a prior conviction to use it to increase a defendant's punishment. "'[B]efore a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction,] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.'" (*Id.* at pp. 1192-1193, quoting *People v. Ford* (1964) 60 Cal.2d 772, 794 (*Ford*).) The effect of denying appellant day-for-day conduct credits and using the less favorable accrual rate is 137 more days in prison. Increased time in prison is increased punishment. Therefore, appellant needed to admit his prior strike -- or the prosecution had to prove it -- before the court could use it to reduce his conduct credits.

In re Varnell (2003) 30 Cal.4th 1132 (*Varnell*), on which the majority relies, is distinguishable. *Varnell* held that the absence of a pleading and proof requirement in Proposition 36 meant that a court could use an unpled and unproven prior conviction to deny a drug offender probation for drug treatment. (*Varnell*, at pp. 1138-1139.) The court reasoned that the absence of a pleading and proof requirement in the statute made a prior conviction a "sentencing factor," which need not be pleaded and proved, instead of a sentencing enhancement or allegation, which must be pleaded and proved. (*Ibid*.)

The *Varnell* court drew a distinction between its case and *Lo Cicero*:

> "There is authority for finding an implied pleading and proof requirement in criminal statutes. In [*Lo Cicero*], we recognized an implied pleading and proof requirement in [a narcotics statute], which prohibited probation for any defendant convicted of certain narcotics offenses if the defendant had previously been convicted of a narcotics offense. The statute did not expressly require the prior conviction establishing the defendant's ineligibility be pleaded and proved, but we recognized an implied pleading and proof requirement under [*Ford*], in which 'we held that "before a

> defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction,] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.'" [Citation.] We concluded that '[t]he denial of opportunity for probation involved here is equivalent to an increase in penalty, and the principle declared in *Ford* should apply.' [Citations.]
>
> "However, this case differs from *Lo Cicero* in one key respect: [defendant's] prior conviction and the resulting prison term did not eliminate his opportunity to be granted probation [because he remained eligible for probation under another statute.] Thus, unlike *Lo Cicero*, this is not a case where the prior conviction absolutely denied a defendant the opportunity for probation." (*Varnell*, *supra*, 30 Cal.4th at p. 1140.)

I believe this key distinction, drawn by *Varnell*, is what makes *Lo Cicero* the governing authority in this case. Enhanced presentence conduct credits may be earned *only* under Penal Code section 4019, and appellant has no alternative means to regain those enhanced credits denied to him. *Lo Cicero*, not *Varnell*, thus applies. I would reverse and remand to the trial court for reconsideration of appellant's presentence conduct credits, in light of the foregoing.

FLIER, J.