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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN RODRIGUEZ, Defendant and Appellant.	B235763 (Los Angeles County Super. Ct. No. BA371103)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Jennifer Hansen, 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.

Defendant and appellant Adrian Rodriguez appeals from the judgment entered following his no contest plea to unlawfully driving or taking a vehicle. The trial court sentenced Rodriguez to a term of 10 years in prison. Rodriguez's sole contention on appeal is that equal protection principles require he be awarded additional conduct credits under the current version of Penal Code section 4019.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged that on May 6, 2010, Rodriguez unlawfully drove or took a vehicle (Veh. Code, § 10851, subd. (a), count 1); evaded an officer with willful disregard (Veh. Code, § 2800.2, subd. (a), count 2); and committed two counts of hit-and-run driving (Veh. Code, § 20002, subd (a), counts 3 and 4).[2] The information further alleged that counts 1 and 2 were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)); that Rodriguez had suffered a prior serious conviction for assault with a deadly weapon (§§ 245, subd. (a)(1), 667, subds. (a), (b)-(i), 1170.12, subds. (a)-(d)); and Rodriguez had served a prior prison term within the meaning of section 667.5, subdivision (b).

On June 2, 2011, pursuant to a negotiated disposition, Rodriguez pleaded no contest to unlawfully driving or taking a vehicle. He admitted the gang allegation and the prior strike allegation. The trial court sentenced Rodriguez on September 7, 2011, to a term of 10 years in prison. In accordance with the negotiated plea, the trial court struck the remaining counts. It awarded Rodriguez 448 days of actual custody credit and 224 days of presentence conduct credit, for a total of 672 days. The court ordered Rodriguez

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1 All further undesignated statutory references are to the Penal Code.

2 Because the facts relating to the charged crimes are not relevant to the issues presented on appeal, we do not recite them here. (*People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.)

to pay victim restitution. It also imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal conviction assessment. Rodriguez appeals.[3]

DISCUSSION

1. *Conduct credit under Penal Code section 4019.*

a. *Section 4019.*

Section 4019 specifies the rate at which prisoners in local custody may earn " 'conduct credit' " against their sentences for good behavior. (*People v. Brown* (2012) 54 Cal.4th 314, 317 (*Brown*); *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1549 (*Ellis*).) The Legislature has amended section 4019 multiple times between 2010 and the present. Before January 25, 2010, a defendant could earn a maximum of two days of local conduct credit for every four days spent in custody. (*Brown, supra,* at p. 318, fn. 4; former § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, pp. 4553-4554.)

Effective January 25, 2010, amendments to section 4019 doubled the maximum rate to two days of presentence conduct credit for every two days spent in local custody. (*Brown, supra,* 54 Cal.4th at p. 318; *People v. Lara* (2012) 54 Cal.4th 896, 899 (*Lara*); Stats. 2009-2010 (3d Ex. Sess.) ch. 28, § 50.) However, certain defendants, including those who, like Rodriguez, had suffered a prior conviction for a serious or violent felony as defined in sections 667.5 and 1192.7, were ineligible for the accelerated rate and continued to accrue credits at the previously applicable rate. (*Brown, supra,* at pp. 318-319, fn. 5; former § 4019, subds. (b) & (c).)

Effective September 28, 2010, the Legislature again amended section 4019 to restore the "original, lower credit-earning rate" of two days of local conduct credit for every four days spent in custody. (*Brown, supra,* 54 Cal.4th at p. 318, fn. 3; former § 4019, subd. (f); Stats. 2010, ch. 426, § 2.) At the same time the Legislature amended section 2933—which had previously applied only to prison worktime credits—to

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3 After sentencing, Rodriguez requested that the trial court increase his custody credits for the same reasons he advances here. On February 2, 2012, the trial court denied his request.

encompass presentence conduct credits for defendants who were ultimately sentenced to state prison. (Former § 2933, subd. (e); Stats. 2010, ch. 426, § 1; see *Brown, supra*, at p. 322, fn. 11.) Amended section 2933 provided that notwithstanding section 4019, a prisoner was entitled to one-for-one presentence conduct credits, but excluded from this formula, inter alia, prisoners who had suffered prior serious or violent felonies. (Former § 2933, subd. (e).) Such prisoners were subject to the less favorable two-for-four day rate.

Most recently, in conjunction with the 2011 realignment legislation, the Legislature amended section 4019 to its current version, operative October 1, 2011, to provide for a maximum of two days of conduct credit for every two days spent in actual confinement. (*Ellis, supra,* 207 Cal.App.4th at p. 1549; § 4019, subd. (f); Stats. 2011, ch. 15, § 482; Stats. 2010-2011, 1st Ex. Sess., ch. 12, § 35.) The current version of the law does not exclude prisoners who have suffered prior convictions for serious or violent felonies from this more generous formula. (See *Lara, supra,* 54 Cal.4th at p. 906, fn. 9; § 4019, subds. (f), (h); see generally §§ 2933.1, 2933.2.) Subdivision (h) of the current statute expressly provides that the new rate is to be applied prospectively only: "The changes to this section . . . shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."

b. *Rodriguez is not entitled to additional conduct credits.*

Rodriguez committed his offense on May 6, 2010, and was sentenced on September 7, 2011. Under the law in effect on either of these dates, he was correctly awarded local conduct credits at the two-for-four rate.[4] Under the then-applicable

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[4] The trial court correctly calculated Rodriguez's credits under the applicable formula. Based on Rodriguez's 448 days of actual custody, he was entitled to a maximum of 224 days of local conduct credit, for a total of 672 days of presentence credit. (See, e.g., *People v. Kimbell* (2008) 168 Cal.App.4th 904, 908-909.)

versions of sections 4019 and 2933, he was ineligible to earn conduct credits at the more generous one-for-one rate because he admittedly had suffered a prior serious felony conviction for assault with a deadly weapon. (Former § 4019, subds. (b), (c); former § 2933; Stats. 2010, ch. 426, §§ 1, 2; § 1192.7, subd. (c)(1)(23).) The current version of section 4019, by its express terms, is inapplicable to Rodriguez because Rodriguez's crime was committed prior to October 1, 2011. (§ 4019, subd. (h); *Brown, supra*, 54 Cal.4th at p. 319 [whether a statute operates prospectively or retroactively is a matter of legislative intent]; *Ellis, supra*, 207 Cal.App.4th at p. 1553.) Accordingly, Rodriguez is not entitled to retroactive application of the October 1, 2011 version of section 4019. (See *Brown, supra*, 54 Cal.4th at p. 323, fn. 11 [2011 amendments to section 4019 did not assist defendant, because the statute expressly applied prospectively to prisoners who committed their crimes on or after October 1, 2011, whereas his crime was committed in 2006]; *Lara, supra*, 54 Cal.4th 906, fn. 9 [favorable change in section 4019 did not benefit the defendant "because it expressly applies only to prisoners who are confined . . . '*for a crime committed on or after October 1, 2011*' "].)

Notwithstanding the express legislative intent that the most recent amendments to section 4019 apply only to crimes committed on or after October 1, 2011, Rodriguez contends that equal protection principles require retroactive application of the amendments to him. He posits that amended section 4019 creates two classes of prisoners: "those who receive additional conduct credits since they committed a crime on or after October 1, 2011" and those who will receive fewer credits because they committed their crimes prior to that date. Rodriguez posits that there is no rational basis to treat the two groups differently. In support, Rodriguez relies primarily upon *In re Kapperman* (1974) 11 Cal.3d 542 and *People v. Sage* (1980) 26 Cal.3d 498.

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he 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." ' [Citation.] 'This initial inquiry is not

whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.]" (*Brown, supra,* 54 Cal.4th at p. 328.)

Brown compels rejection of Rodriguez's argument that equal protection principles require retroactive application of amended section 4019. (*Brown, supra,* 54 Cal.4th at pp. 323, fn. 11, 329-330; *Ellis, supra,* 207 Cal.App.4th at p. 1551; see also *Lara, supra,* 54 Cal.4th at p. 906, fn. 9.) *Brown* considered whether the January 25, 2010 amendments to section 4019 should be given retroactive effect. (*Brown, supra,* at pp. 328-329.) The court concluded not only that the statute had to be applied prospectively, but also that prospective application did not violate equal protection principles. (*Id.* at p. 318.) The conduct credits offered under section 4019 "encourage prisoners to conform to prison regulations, to refrain from criminal and assaultive conduct, and to participate in work and other rehabilitative activities." (*Id.* at p. 317.) *Brown* explained: "[T]he 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; *Ellis, supra,* at p. 1551.)

Brown distinguished *In re Kapperman, supra,* 11 Cal.3d 542 as "irrelevant" because it addressed credit for time served, not conduct credit. (*Brown, supra,* 54 Cal.4th at pp. 326, 330.) *Brown* explained: "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." (*Brown, supra,* at p. 330; see also *In re Strick* (1983) 148 Cal.App.3d 906, 912-913.) *Brown* also declined to read *People v. Sage, supra,* 26 Cal.3d 498, as authority for the proposition that prisoners serving time before and after incentives are announced are similarly situated. (*Brown, supra,* at pp. 329-330; see also *Ellis, supra,* 207 Cal.App.4th at p. 1552.)

As is readily apparent, *Brown*'s holding is fatal to Rodriguez's equal protection claim. As *Ellis* explained: "We can find no reason *Brown*'s conclusions and holding with respect to the January 25, 2010, amendment should not apply with equal force to the October 1, 2011, amendment. [Citation.] Accordingly, we reject defendant's claim he is entitled to earn conduct credits at the enhanced rate provided by current section 4019 . . . ." (*Ellis, supra,* 207 Cal.App.4th at p. 1552; see also *People v. Kennedy* (Sept. 14, 2012, H037668) ___ Cal.App.4th __ [2012 Cal.App. Lexis 982]; *People v. Lynch* (Sept. 13, 2012, C068476) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 975].)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.