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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.

EZEKIEL LAFAYETTE, JR.,

Defendant and Appellant.

B235422

(Los Angeles County  
Super. Ct. No. BA360193)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Joel M. Wallenstein, Judge. Affirmed as modified.

Christopher Love, 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, Victoria B.  
Wilson and Kim Aarons, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant Ezekiel Lafayette, Jr., appeals from the judgment entered after the trial court revoked his probation. The underlying crime was committed in August 2009. Relying upon subdivision (f) of section 4019, defendant seeks an award of an additional 63 days in conduct credits.<sup>1</sup> Defendant contends that equal protection requires application of the statutory provision to him even though the statute specially provides it applies only to individuals whose crimes were committed on or after October 1, 2011. Precedent compels rejection of defendant's contention. Therefore, other than correcting a minor computational error in custody credits, we affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On September 4, 2009, the People filed an information charging defendant with possession on August 8, 2009 of cocaine base for sale (Health & Saf. Code, § 11351.5) and alleging that he had suffered numerous prior convictions.

On November 17, 2009, defendant pled nolo contendere to the charged offense and admitted numerous prior convictions.

On November 30, 2009, the trial court imposed an 8-year sentence but then suspended execution of sentence and placed defendant on 3-year formal probation. The court awarded defendant 171 days of presentence custody credit, consisting of 115 days of actual custody and 56 days of conduct credit.

On an unstated date in 2011, the People filed a new drug possession charge against defendant. (Health & Saf. Code, § 11377.) Defendant agreed to admit that he was in violation of probation if the People would dismiss the new case.

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

On June 8, 2011, defendant stipulated he had violated his probation. The trial court revoked probation and continued the matter for sentencing on August 8. The court released defendant on his own recognizance and ordered him to return on August 8.

On August 8, defendant failed to appear and a bench warrant was issued.

On August 10, defendant (represented by counsel) appeared in court. He was in custody, having been arrested the previous day. The trial court imposed the suspended eight-year sentence. The court gave him 175 days of custody credit, the 171 days awarded two years earlier “plus 4 current.” The minute order from August 10 states: “Defendant given total credit for 175 days in custody (171 days previously served plus current credit for 004 days actual and 000 days good time/work time).” The abstract of judgment recites defendant received credit for 175 days “for time spent in custody.”

This appeal follows.

## **DISCUSSION**

Defendant contends that he should be granted an additional 63 days of pre-sentence conduct credits. He relies upon the version of section 4019, subdivision (f) enacted in 2011 that increased the award of custody credits. However, subdivision (h) of section 4019 provides that this statutory change “shall apply prospectively and shall apply to prisoners who are confined . . . 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.” Defendant acknowledges this language but, nonetheless, urges that the statute “must be applied retroactively to [his] case by virtue of the equal protection clauses of the state and federal constitutions.” We disagree.

*People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) involved interpretation of an amendment to section 4019 that was in effect for eight months in 2010. The amendment temporarily increased the rate at which local prisoners could earn conduct credits. (*Id.* at pp. 317-318.) The Legislature had not indicated whether the amendment applied prospectively or retroactively. *Brown* held that it applied prospectively (*id.* at p. 319-323) and that prospective application did not violate the state and federal equal protection clauses. (*Id.* at pp. 328-330; accord: *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.)

In *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550-1553, the issue was whether prospective application of the 2011 amendment to section 4019—the amendment upon which our defendant relies—violates equal protection because its benefit is denied to defendants who committed crimes before October 1, 2011. The Court of Appeal found “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.” (*Id.* at p. 1552.) We agree with that analysis and therefore reject defendant’s contention.

In the alternative, defendant contends that even if his conduct credit is calculated using the statute in effect in 2009 when he committed the crime, he is entitled to three additional days of conduct credit. That is, he claims 59 days of conduct credit instead of 56 days. The Attorney General disagrees, urging defendant is entitled to only an additional two days of conduct credit, for a total of 58 days. The Attorney General is correct.

Former section 4019, subdivision (f) provided that a defendant was entitled to two days of conduct credit for every four days of actual custody. Under this formula, “[c]ustody credits are calculated by dividing the number of actual days [of] custody by four and multiplying the result (excluding any remainder) by two.” (*People v. Madison* (1993) 17 Cal.App.4th 783, 787.) In this case, defendant spent

115 days in custody in 2009 and 2 days in custody in 2011,<sup>2</sup> for a total of 117 days. Dividing 117 by four yields 29.25. We disregard the remainder of .25 and therefore multiply 29 by two, resulting in 58 days of conduct credit. Defendant is therefore entitled to credit for 175 days (117 days of actual time and 58 days of conduct credit). We direct the trial court to prepare an amended abstract of judgment reflecting this calculation.

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<sup>2</sup> Defendant contends that there is an ambiguity as to how many days he spent in custody in 2011 and, on that basis, seeks a remand for recalculation of his conduct credit. We disagree. Both defendant and the Attorney General agree that when the trial court imposed sentence on November 30, 2009, defendant had spent 115 days in custody. The bone of contention is how many days he was in custody in 2011. Defendant appears to believe that he was in custody for four days in August 2011. He relies upon the trial court's August 10 remark giving him credit for "plus 4 current" days and the court's August 10 minute order stating he had "current credit for 004 days actual[.]" We disagree with defendant's interpretation. The reporter's transcripts of the June 8 and August 10 hearings indicate that defendant was not in custody on June 8 but, instead, that he was released on his own recognizance and ordered to return on August 8; that defendant did not appear on August 8; that the trial court issued a bench warrant for his arrest; that he was arrested on August 9; and that he was still in custody on August 10 when sentenced. Based upon this chronology, the only reasonable interpretation is that defendant spent only two days in jail in August 2011 before the suspended sentence was imposed. We agree with the Attorney General that the explanation for the trial court's comment upon which defendant relies is that the court "calculated [his] presentence credit for 2011 as two actual days, and erroneously awarded him one-for-one credit under the current version of section 4019, for a total of four days."

## **DISPOSITION**

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a modified abstract of judgment reflecting that defendant is entitled to credit for 175 days (117 days of actual time and 58 days of conduct credit). In all other respects, the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.