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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.	B235975 (Los Angeles County Super. Ct. No. BA367110)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Modified and, as so modified, 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 being a felon in possession of a firearm. The trial court sentenced Rodriguez to a term of three years. 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] The People request that the abstract of judgment be modified to strike two fines that were not orally imposed by the trial court at sentencing. We modify the abstract of judgment as the People request, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged that on January 20, 2010, Rodriguez committed the offense of being a felon in possession of a firearm (former § 12021, subd. (a)(1)).[2] The information also alleged Rodriguez had suffered a prior "strike" conviction for assault with a deadly weapon (§§ 245, subd. (a)(1), 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served a prior prison term within the meaning of section 667.5, subdivision (b). On May 11, 2011, pursuant to a negotiated disposition, Rodriguez pleaded nolo contendere to the felon-in-possession charge and admitted suffering the prior strike conviction. The trial court sentenced Rodriguez on September 7, 2011, to a term of three years in prison, to run concurrent to the sentence imposed in another case, Los Angeles County Superior Court No. BA371103. In accordance with the negotiated plea, the trial court struck the prior strike allegation on the People's motion. It awarded Rodriguez 464

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

2 Because the facts relating to the charged crime 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.)

days of actual custody credit and 232 days of presentence conduct credit, for a total of 696 days. The court also imposed a court security fee. 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

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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.

section 2933—which had previously applied only to prison worktime credits—to 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 January 20, 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 464 days of actual custody, he was entitled to a maximum of 232 days of local conduct credit, for a total of 696 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 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 at p. 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; *Ellis, supra,* at p. 1550.) The court concluded not only that the statute had to be applied prospectively, but also that prospective application did not violate equal protection principles. (*Brown, supra,* 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].)

2. *The restitution fine and parole restitution fine must be stricken from the abstract of judgment.*

The trial court held a single sentencing hearing for Rodriguez in the instant matter and in Los Angeles County Superior Court Case No. BA371103. In case No. BA371103, the trial court imposed a restitution fine and a suspended parole restitution fine. When sentencing Rodriguez on the instant matter, case No. BA367110, the court did not orally impose additional restitution and parole restitution fines, noting that such fines are "imposed once." The abstract of judgment, however, indicates the imposition of both a restitution fine and a suspended parole restitution fine in the instant matter. The People aver that the trial court correctly declined to impose a separate restitution fine and parole revocation fine, and the abstract of judgment must be amended to conform to the court's oral pronouncement of judgment. We agree that the fines must be stricken, but not for the reasons the People suggest.

"Section 1202.4(b) requires the court to impose 'a separate and additional restitution fine' . . . '[i]n *every case* where a person is convicted of a crime,' absent 'compelling and extraordinary reasons for not doing so.' Section 1202.45 similarly requires 'an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4,' '[i]n *every case* where a person is convicted of a crime and [the] sentence includes a period of parole . . . . This additional

parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked.' " (*People v. Soria* (2010) 48 Cal.4th 58, 62 (*Soria*), italics added; *People v. Villalobos* (2012) 54 Cal.4th 177, 181.)

In *Soria*, the California Supreme Court held: "When separate pleas are entered in separately charged cases, 'every case' plainly means each case filed against the defendant." (*Soria, supra*, 48 Cal.4th at pp. 62-63.) There, the defendant was separately charged in three different cases. He entered negotiated pleas in a " 'package plea bargain' " and was sentenced at a single hearing. (*Id.* at pp. 61-62.) *Soria* rejected the Court of Appeal's conclusion that the cases had been " 'effectively consolidated' " and therefore only one set of restitution fines could properly be imposed. (*Id.* at p. 61.) "When several cases are resolved by a single plea bargain in which the defendant enters separate pleas, it is plain that there is one bargain but multiple cases." (*Id*. at p. 65.) Absent consolidation, "separately filed cases remain separate for purposes of the restitution statutes, even when they are jointly resolved at the plea and sentencing stages. In the context of sections 1202.4(b) and 1202.45, a 'case' is a formal criminal proceeding, filed by the prosecution and handled by the court as a separate action with its own number." (*Soria, supra,* at pp. 64-65.) "Defendants who commit multiple crimes, and are consequently before the court in multiple cases when their pleas are taken, are properly subject to multiple fines. This straightforward application of the requirement that fines be imposed 'in every case' serves the purpose of the state Restitution Fund, as well as the rehabilitative and deterrent functions of restitution fines." (*Id.* at p. 66.)

Here, Rodriguez was separately charged on different dates, in different informations, in cases with different numbers. He entered his pleas in different proceedings; they do not appear to have been part of a "package deal." The record does not reflect that the matters were ever formally consolidated. Sentence was pronounced separately in each case. Indeed, at the sentencing hearing Rodriguez represented himself in case No. BA371103, but was represented by counsel in the instant matter. Thus, other than the facts that sentencing in both cases was conducted at a single hearing transpiring on September 7, 2011, and that the sentence in this case was ordered to run concurrent to

sentence in case No. BA371103, the cases were entirely separate actions. Rodriguez was therefore properly subject to multiple restitution and parole restitution fines.

However, the People did not object at sentencing to the trial court's failure to impose a restitution fine. This circumstance precludes imposition of a restitution fine and of a suspended parole restitution fine on appeal. (*People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Hector* (2000) 83 Cal.App.4th 228, 237; cf. *People v. Rodriguez* (2000) 80 Cal.App.4th 372, 374.) Inclusion of the fines in the abstract of judgment was improper. "The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment. [Citation.] . . . . [T]he clerk's minutes must accurately reflect what occurred at the [sentencing] hearing." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) Where a minute order or abstract of judgment differs from the court's oral pronouncements, the minute order does not control. Any discrepancy is deemed to be the result of clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Price* (2004) 120 Cal.App.4th 224, 242.) Errors in the abstract of judgment may be corrected by this court on appeal. (*People v. Mitchell, supra,* at p. 185; *People v. Zackery, supra,* at p. 388; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1.) Accordingly, we order the restitution fine and parole restitution fine stricken.

DISPOSITION

The restitution fine and suspended parole restitution fine are stricken. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this modification, and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.