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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. NAM JU HOANG, Defendant and Appellant.	B233731 (Los Angeles County Super. Ct. No. GA080800)

APPEAL from a judgment of the Superior Court for Los Angeles County, Michael Villalobos, Judge. Reversed in part, and affirmed in part.

Cindy Brines, 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 Noah P. Hill, Deputy Attorney Generals, for Plaintiff and Respondent.

Defendant Nam Ju Hoang appeals from a judgment sentencing him to nine years in prison after he was found guilty of commercial burglary (Pen. Code,[1] § 459) and vandalism (§ 594, subd. (a)), with three prior felony convictions (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)) and three prior prison terms (§ 667.5, subd. (b)). He contends there was insufficient evidence to support a true finding as to one of the prior prison term allegations, and that he is entitled to additional conduct credits under section 4019, which was amended after he was sentenced. He also asks this court to conduct an independent review of the sealed transcript of the *Pitchess*[2] hearings conducted by the trial court, to determine if there was information that should have been disclosed. The Attorney General concedes there was insufficient evidence to support the true finding as to one of the prior prison term allegations; accordingly, we reverse that finding and order that the one-year prison term based upon that finding be stricken. We affirm the judgment in all other respects.

BACKGROUND

In October 2009, someone broke into a jewelry store in Monterey Park through a hole in the roof. Two police officers responding to the scene recovered several items on the roof of the store, including an empty beer can and three cigarette butts. A DNA analysis was done on the cigarette butts and swabs taken from the beer can, and all of them contained DNA from a single male source. Defendant was subsequently arrested, and the DNA profile from an oral swab taken from defendant matched the DNA profile from the swabs of items found at the scene of the break-in.

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[1] Further undesignated statutory references are to the Penal Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Defendant was charged with one count of second degree burglary (§ 459) and one count of vandalism resulting in over $400 in damage (§ 594, subd. (a)). The information also alleged that defendant suffered three prior convictions within the meaning of the Three Strikes law (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)), and that he had served three prior prison terms within the meaning of section 667.5, subdivision (b). A jury found him guilty of both counts and, after he waived jury trial on the priors allegations, the trial court found all the allegations to be true.

On June 7, 2011, the trial court sentenced defendant to the upper term of three years for the burglary, doubled under the Three Strikes law,[3] plus three consecutive one-year terms for the prior prison terms, for a total term of nine years. The court also imposed a three-year term for the vandalism count, but stayed that sentence under section 654. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Pitchess Motion*

Defendant filed a *Pitchess* motion before trial, seeking discovery of certain personnel records of, among others, the first police officer to respond to the scene, the two officers who collected the evidence found at the scene, and the detective who arrested defendant and obtained the oral swab from him. The trial court granted the motion only as to complaints filed against those officers relating to allegations of tampering with evidence. The court held two *in camera* hearings to review the records produced by the custodian of records for the Monterey Park Police Department, and determined there were no discoverable records.

[3] At the request of the prosecutor, the trial court struck two of the prior conviction findings in order to impose sentence as a two-strike case.

Defendant asks us to review the sealed transcripts of the *Pitchess* hearings to determine whether any of the material should have been disclosed. We have conducted an independent review of the sealed transcripts, and conclude the trial court made an adequate record for review, and did not abuse its discretion in finding there were no relevant materials that required disclosure. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1231; *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

B. *Sufficiency of the Evidence of a Prior Prison Term*

When defendant was sentenced in June 2011, section 667.5, subdivision (b), provided for a one-year sentence enhancement for each prior separate prison term served by a defendant convicted of and sentenced to prison for a felony, but stated that no enhancement shall be imposed "for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." (Former § 667.5, subd. (b).) In other words, "if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply." (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) "The prosecution has the burden of proving beyond a reasonable doubt each element of the section 667.5, subdivision (b) sentence enhancement, including the fact of no five-year 'washout' period." (*Id.* at p. 1232.)

The trial court in this case found that defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b). Defendant contends there was insufficient evidence to support the trial court's finding as to one of the alleged prior prison terms, because the evidence showed that he had remained free from prison custody and the commission of a new felony for more than five years

following his release on parole on one of the alleged convictions. The Attorney General agrees there was insufficient evidence to support the trial court's finding as to one of the alleged prior prison terms. We have examined the record, and concur. The record shows that defendant was released on parole in Los Angeles Superior Court case No. GA034574 (one of the convictions alleged under section 667.5, subd. (b)) on January 29, 2000, and he was not returned to custody and did not commit another offense until 2006. Therefore, we reverse the trial court's finding on the prior prison term as to case No. GA034574, and order that the one-year prison term related to that finding be stricken.

C. *Custody Credits*

Defendant was sentenced on June 7, 2011, at which time the court awarded him 154 days of conduct credit. Although the court's calculation of defendant's conduct credit was correct under the version of section 4019 in effect at the time of his sentencing, defendant argues on appeal that, under equal protection principles, the version of section 4019 that came into effect on October 1, 2011 should be applied retroactively, which would entitle him to additional conduct credits. We disagree.

Under the version of section 4019 in effect at the time of defendant's sentencing, qualifying defendants who were in local custody for crimes committed before September 28, 2010 earned two days of conduct credit for every two days in local custody (i.e., one-for-one conduct credit). A defendant did not qualify for one-for-one conduct credit, however, if he or she was required to register as a sex offender, if the present offense was a serious felony, or if he or she had a prior conviction for a serious or violent felony. Non-qualifying defendants, such as defendant in this case, earned two days of conduct credit for every four days served. (See Stats. 2009-2010, 3d Ex. Sess., ch. 28 (S.B. 18), § 50, eff. Jan. 25,

2010; Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.) Therefore, defendant here was awarded two days of conduct credit for every four days he served in local custody, i.e., 154 days of conduct credit for his 308 days of actual custody.

After defendant was sentenced, the Legislature amended section 4019 to provide one-for-one conduct credit without any exception for defendants who must register as a sex offender, whose present offense was a serious felony, or who had a prior conviction for a serious or violent felony. (Stats. 2011-2012, 1st Ex.Sess., ch. 12 (A.B. 17) § 35.) However, the Legislature also provided that this amendment would apply prospectively to prisoners confined for a crime committed after October 1, 2011, and that any days earned prior to October 1, 2011 shall be calculated by the rate required by the prior law. (§ 4019, subd. (h).) In other words, the one-for-one conduct credit without the exception does not apply to those, like defendant, whose time in local custody was served before October 1, 2011.

Defendant contends that limiting the application of the amendment to defendants who committed crimes after October 1, 2011 violates the equal protection clause, because there is no rational basis for treating those confined before October 1, 2011 differently than those confined after that date. Our Supreme Court effectively rejected this argument in a case filed shortly after briefing was completed in this case.

In that case, *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*), the defendant was sentenced in 2007, at which time the version of section 4019 then in effect entitled him to two days of conduct credit for every four days spent in local custody. (*Id.* at p. 318 and fn. 4, citing § 4019, subd. (f), as amended by Stats. 1982, ch. 1234, § 7, p. 4553.) Shortly after the Court of Appeal affirmed his conviction in January 2010, but before the decision was final, section 4019 was amended to provide one-for-one conduct credit, with exceptions that apparently did

not apply to the defendant, and the defendant filed a petition for rehearing claiming additional credits under the amended statute.[4] The appellate court granted the petition and awarded the defendant the additional credits. The Supreme Court granted the People's petition for review, and addressed the defendant's argument that equal protection required retroaction application of the amended statute. (*Brown*, *supra*, 54 Cal.4th at pp. 318-319.)

The Supreme Court noted that "[t]he 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.)

The Court concluded that prisoners who served time before the amendment went into effect were not similarly situated to those who served after the effective date, because "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who

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[4] Section 4019 was amended twice in 2010. The first amendment provided one-for-one conduct credit with the exceptions noted above, i.e., the increased rate of accrual did not apply to those required to registered as sex offenders, or whose present offense was a serious felony, or who had a prior conviction for a serious or violent felony. (Stats. 2009-2010, 3d Ex. Sess., ch. 28 (S.B. 18), § 50, eff. Jan. 25, 2010.) The second amendment eliminated the one-for-one credit provisions and reinstated the conduct credit provisions in effect before January 25, 2010, but provided that the amendment would apply only to local custody served by defendants for crimes committed on or after September 28, 2010. (Stats. 2010, ch. 426 (S.B. 76), § 2, eff. Sept. 28, 2010.) Since the defendant in *Brown* committed the crime for which he served local custody before 2010, the second amendment would not apply to him.

served time before the incentives took effect and thus could not have modified their behavior in response." (*Brown, supra*, 54 Cal.4th at pp. 328-329.) In reaching this conclusion, the court found persuasive the appellate court's decision in *In re Strick* (1983) 148 Cal.App.3d 906 -- a case that defendant in this case asserts was wrongly decided -- which rejected the argument that an expressly prospective law increasing conduct credits violated equal protection unless it was applied to prisoners who had previously earned conduct credits at a lower rate. (*Brown*, *supra*, 54 Cal.4th at p. 329.) The Supreme Court rejected the defendant's argument -- also asserted by defendant in this case -- that its decision in *People v. Sage* (1980) 26 Cal.3d 498 precluded the appellate court in *Strick* from concluding that prisoners serving time before and after the effective date of a statute increasing conduct credits were not similarly situated. (*Brown*, *supra*, 54 Cal.4th at pp. 329-330.) The Supreme Court also rejected the defendant's argument -- again, also asserted by defendant in this case -- that its decision in *In re Kapperman* (1974) 11 Cal.3d 542 required a finding that the pre-amendment and post-amendment prisoners were similarly situated. (*Brown*, *supra*, 54 Cal.4th at p. 330.)

Having found that pre-amendment and post-amendment prisoners were not similarly situated for the purposes of the challenged law, the Supreme Court in *Brown* concluded that equal protection does not require retroactive application of the amended section 4019. (*Brown*, *supra*, 54 Cal.4th at p. 330.) Although *Brown* involved a different amendment of section 4019 than the most recent amendment at issue in the present case, the same reasoning applies here. In both cases, the defendants were awarded presentence conduct credits under a version of section 4019 that was amended after they were sentenced to increase the rate at which conduct credits were earned for time spent in local custody. The fact that, as defendant observes, the expressed purpose of the amendment at issue in this case was to address a fiscal emergency declared by the Governor (Legis. Counsel's

Dig., Assem. Bill No. 109 (2011-2012 Sess.) ¶ 17; Legis. Counsel's Dig., Assem. Bill No. 17 (2011-2012 1st Ex. Sess.) ¶ 19), rather than specifically to provide an incentive to prisoners in local custody to modify their behavior, does not provide a basis for distinguishing *Brown*. The Supreme Court noted that the expressed purpose of the amendment at issue in *Brown* also was to address a fiscal emergency declared by the Governor (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 62; see *Brown*, *supra,* 54 Cal.4th at p. 320), but nevertheless found that pre-amendment and post-amendment prisoners were not similarly situated based upon the legislative purpose underlying conduct credits generally.

Based upon the reasoning of *Brown*, we conclude that limiting application of the most recent amendment of section 4019 to prisoners confined to local custody on or after October 1, 2011 does not violate equal protection principles.

DISPOSITION

The one-year sentence enhancement imposed under section 667.5, subdivision (b) based upon defendant's conviction in Los Angeles Superior Court case No. GA034574 is reversed. The trial court is directed to prepare and forward to the Department of Corrections an amended abstract of judgment reflecting that one of the section 667.5, subdivision (b) enhancements is stricken. In all other respects, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.