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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.

JOSE ROMERO,

Defendant and Appellant.

B233326

(Los Angeles County
Super. Ct. No. BA329446)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Patricia M. Schnegg, Judge. Affirmed.

Ann Krausz, 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, Steven D.
Matthews and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and
Respondent.

On November 10, 2008, defendant and appellant, Jose Romero, was convicted by plea of transporting a controlled substance with a weight enhancement (Health & Saf. Code, §§ 11379, 11370.4). He was sentenced to nine years in state prison and did not appeal. On March 1, 2011, Romero filed a motion in the trial court asking for a modification of his presentence custody credits. The motion was denied and Romero now appeals that decision.

The judgment is affirmed.

BACKGROUND

At the time of sentencing, Romero was awarded 416 days actual custody credit and 208 days conduct credit pursuant to Penal Code section 4019 as it then existed. Romero now contends his credits should be modified because section 4019 was subsequently amended to award more credits for the same amount of actual custody time.

DISCUSSION

Amendment to section 4019 is not retroactive.

Under Penal Code section 2900.5,¹ a defendant sentenced to state prison is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 permits a defendant to earn additional presentence credit for good behavior and work performance. (§ 4019, subds. (b), (c).) The credits authorized by section 4019 collectively are referred to as conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.) The version of section 4019 in effect at the time Romero was sentenced to state prison allowed for six days of custody credit for every four days of custody. (Former § 4019, subds. (b), (c), (f); Stats. 1982, ch. 1234, p. 4553, § 7.)

¹ All further statutory references are to the Penal Code unless otherwise specified.

Effective January 25, 2010, an amended version of section 4019 permitted defendants to earn conduct credits at twice the previous rate, that is, up to four days of custody credit for every two days of custody, subject to exceptions not relevant here. (Former § 4019, subds. (b), (c), (f); Stats. 2009-2010, 3d Ex. Sess., ch. 28 (Sen. Bill No. 18), § 50, eff. Jan. 25, 2010.) However, effective September 28, 2010, the statute was rewritten to again award conduct credit at the rate of six days of custody credit for every four days of custody. (§ 4019, subds. (b), (c), (f); Stats. 2010, ch. 426 (Sen. Bill No. 76), § 2, eff. Sept. 28, 2010.)

Romero argues he is entitled to retroactive application of the amendment to section 4019 that was in effect after January 25, 2010, even though his judgment of conviction was already final when the amendment became effective.

The question whether the amendment to section 4019 that became effective on January 25, 2010 should be applied retroactively has caused a split of authority in the Courts of Appeal. The California Supreme Court has granted review to consider the issue.² Pending a decision on this matter by our high court, we believe the amendment does not apply retroactively.

As a general rule, a new or amended statute is presumed to operate prospectively rather than retroactively in the absence of a clear and compelling indication the Legislature intended otherwise. (*People v. Alford* (2007) 42 Cal.4th 749, 753; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.) This principle is codified in section 3, which provides: “ “No part of [the Penal Code] is retroactive, *unless expressly so declared.*’ ” “To ascertain whether a statute should be applied retroactively, legislative intent is the ‘paramount’ consideration[.]” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) Because the Legislature did not specify whether it intended the amendment to section 4019

² The lead cases are *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808, which held the amendment does not apply retroactively, and *People v. Brown* (2010) 182 Cal.App.4th 1354 review granted June 9, 2010, S181963, which held it does apply retroactively.

to have retroactive application, we consider other factors to determine the Legislature's intent. (See *In re Estrada* (1965) 63 Cal.2d 740, 744.)

Romero relies on *Estrada*, which held a statutory amendment reducing a term of imprisonment operated retroactively. (*In re Estrada, supra*, 63 Cal.2d at p. 748.) However, the amendment to section 4019 does not necessarily lessen a defendant's punishment. Rather, the amendment increases conduct credit which, in our view, is not equivalent to mitigation of punishment. Because the amendment to section 4019 does not reduce punishment as such, it is different from the reduction in the prison term at issue in *Estrada*.

There are further reasons for concluding this amendment is not retroactive. The purpose of conduct credits is to encourage good behavior by incarcerated defendants prior to sentencing (see *People v. Silva* (2003) 114 Cal.App.4th 122, 127-128; *People v. Guzman* (1995) 40 Cal.App.4th 691, 695), but applying the amendment retroactively would not further that objective because it is not possible to influence behavior after it has occurred. The Legislature did expressly provide for retroactive application of another provision of the amendatory legislation. (See § 2933.3, subd. (d), as amended by Stats. 2009-2010, 3d Ex. Sess., ch. 28 (Sen. Bill No. 18), § 41 [retroactive application of provision increasing conduct credits for inmates who complete training as firefighters after July 1, 2009].) Finally, the more generous provisions of section 4019 in effect after January 25, 2010, were subsequently eliminated by the Legislature effective September 28, 2010.

In sum, pending resolution of the issue by our Supreme Court, we conclude the amendment to section 4019 does not operate retroactively.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.