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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. THOMAS DALE MORGAN, Defendant and Appellant.	B239318 (Los Angeles County Super. Ct. No. NA073081)

APPEAL from an order of the Superior Court of Los Angeles County, Jessie I. Rodriguez, Judge. Affirmed.

Richard L. Fitzer, 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, Senior Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas Dale Morgan appeals from a post-judgment order denying his motion for additional conduct credits based on the provisions of former Penal Code section 4019[1] in effect between January 25, 2010 and September 28, 2010. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007 a jury found Morgan guilty on 14 counts of forgery, two counts of possession of a forged check and one count of burglary. The trial court sentenced Morgan to an aggregate state prison term of 13 years and awarded him presentence custody credit of 409 days (273 actual days and 136 days of conduct credit) in accordance with the provisions of section 4019 then in effect. We affirmed the judgment. (*People v. Morgon* (Dec. 9, 2008, B204856) [nonpub. opn.].)[2]

Three years later, in January 2012, Morgan, appearing in propria persona, moved to "correct" the judgment by increasing his presentence custody credits to reflect the more generous credit provisions in the amendment to section 4019 that took effect on January 25, 2010. The trial court denied the motion.

DISCUSSION

Section 4019 governs conduct credit. Before January 25, 2010 subdivisions (b) and (c) of section 4019 provided, for "each six-day period in which a prisoner is confined in or committed to" a local facility, one day is deducted from the period of confinement for performing assigned labor and one day is deducted from the period of confinement for satisfactorily complying with the rules and regulations of the facility. (Stats. 1982, ch. 1234, § 7, p. 4553.) Former subdivision (f) of section 4019 provided, "[I]f all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." (Stats. 1982, ch. 1234, § 7, p. 4554.) Morgan was awarded presentence custody credit pursuant to this provision.

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[1] Statutory references are to the Penal Code.

[2] Morgan's surname was spelled "Morgon" in court records when this case was previously before us.

Effective January 25, 2010, section 4019 was amended to provide that certain defendants could earn presentence credit at the rate of two days for every two days in custody, commonly referred to as one-for-one credits. (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 50.) The Legislature explained the intended effect of this new accrual rate, "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)." (§ 4019, former subd. (f).) This amendment remained in effect until September 28, 2010 when urgency legislation was adopted restoring the calculation of custody credits to the pre-January 25, 2010 formula for crimes committed after the effective date of the revision. (Stats. 2010, ch. 426, § 2.) Then, in connection with other legislation relating to the Criminal Justice Realignment Act, effective October 1, 2011 section 4019 was once again amended to increase conduct credits to four days deemed served for every two days in custody for crimes committed on or after October 1, 2011. (§ 4019, subds. (b), (c), (f); Stats. 2011, ch. 15, § 482.) This current version of section 4019 expressly provides, "The changes to this section enacted by the act that added this subdivision 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." (§ 4019, subd. (h), fn. omitted.)

In *People v. Brown* (2012) 54 Cal.4th 314, decided after Morgan filed his opening brief in this appeal,[3] the Supreme Court held the January 25, 2010 amendment to section 4019 applied prospectively only, meaning qualified prisoners in local custody first became eligible for the conduct credit at the increased rate beginning on the amendment's

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[3] The People submitted their respondent's brief on June 18, 2012, the same day as *People v. Brown*, *supra*, 54 Cal.4th 314 was filed. Morgan filed no reply brief, and neither party filed supplemental briefs addressing the impact of *Brown* on Morgan's section 4019 claims.

operative date. (*Brown*, at p. 318.) The *Brown* Court specifically addressed *In re Estrada* (1965) 63 Cal.2d 740, upon which Morgan purports to rely, and held it did not require retroactive application of former section 4019 as amended operative January 25, 2010. In *Estrada* the Supreme Court had held, when the Legislature amends a statute to reduce punishment for a particular criminal offense, courts will assume, absent evidence to the contrary, the Legislative intended the amended statute to apply to all defendants whose judgments were not yet final on the statute's operative date. (*Estrada*, at pp. 742-743.) The *Brown* Court concluded *Estrada* did not apply to former section 4019 because that statute did not alter the punishment for any particular crimes. (*Brown*, at pp. 323-325, 328.) Indeed, rather than modifying punishment for past criminal conduct, section 4019 addresses future conduct in a custodial setting "by providing increased incentives for good behavior." (*Id.* at p. 325.)[4]

The *Brown* Court also rejected an equal protection challenge to prospective application of former section 4019, Morgan's second argument. The Court explained inmates who served time in local custody before and after the new statute took effect are not similarly situated. (*Brown, supra*, 54 Cal.4th at p. 329.) The purpose of the new statute "is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison. . . . [¶] '[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.'" (*Id.* at p. 327, see also *id*. at pp. 328-329 ["[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by

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[4] Independent of the *Brown* Court's rejection of the argument that *In re Estrada* requires retroactive application of the January 25, 2010 amendment of section 4019 to all defendants whose judgments were not yet final on the amendment's operative date, Morgan is simply wrong in contending his 2006 conviction was not final as of January 2010 because he had a petition for a writ of habeas corpus pending in federal court on that date. A conviction is final for purposes of retroactivity analysis when all direct appeals have been exhausted and a petition for writ of certiorari in the United States Supreme Court has been denied or the time for filing such a petition has expired. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306; see *Caspari v. Bohlen* (1994) 510 U.S. 383, 390 [114 S. Ct. 948, 127 L.Ed.2d 236].)

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."].)

DISPOSITION

The order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.