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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP C. NYCHAY,

Defendant and Appellant.

D057107

(Super. Ct. No. SCD219414)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed.

Amanda F. Benedict, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Andrew Mestman and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND¹

On April 13, 2009, pursuant to a negotiated plea agreement with the San Diego District Attorney's Office, Phillip C. Nychay pleaded guilty to unlawfully possessing a usable amount of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). He also admitted serving two of three prior prison terms alleged pursuant to Penal Code² section 667.5, subdivision (b). In return, the district attorney agreed to dismiss the balance of the complaint and to stipulate to a four-year prison sentence. It was further agreed that the four-year prison sentence would run concurrent to any parole violations.

Immediately upon accepting the plea agreement, the court sentenced Nychay to the low term of two years in prison for possession of a controlled substance and two consecutive one-year terms for the prior prison terms. In addition, Nychay was ordered to pay \$800 in state restitution fines. Nychay received presentence custody credit of 50 days. A timely notice of appeal was filed.

Nychay argued on appeal that the trial court erred when it found it lacked discretion in setting restitution. The Attorney General agreed with Nychay. We agreed as well.

¹ The issue raised by Nychay does not require recitation of the facts leading to his arrest. Therefore we note only that when he pled guilty, Nychay admitted that he unlawfully possessed a small but usable amount of methamphetamine and that he previously suffered two prior felony convictions.

² All further statutory references are to the Penal Code unless otherwise specified.

Indeed, on December 3, 2009, this court remanded Nychay's case for a new restitution hearing at which the trial court could exercise its discretion pursuant to section 1202.4, subdivisions (b) and (d). In all other respects, we affirmed the judgment. (Unpublished opinion D055289.)

On remand the trial court struck the previously imposed \$800 fine and ordered the fine set at \$200. At the hearing, Nychay also requested the court recalculate his section 4019 custody credits. The court denied his request.

Nychay appeals.

ANALYSIS

As Nychay points out, on April 13, 2009, the day he was initially sentenced in superior court case No. SCD219414,³ section 4019 provided that defendants were to accrue conduct credit at the rate of two days for every four days of actual presentence credit. As Nychay notes, under this formula he accrued 34 days' credit for actual time served and 16 days of conduct credit for a total of 50 days credit. On January 29, 2010, the date his case was heard on remand from this court and restitution was reset at \$200, section 4019 provided that custody credits were to be increased to four days for every four days served.

Nychay argues he is retroactively entitled to section 4019 credits based on the formula existing under that statute on January 29, 2010, the day his restitution was reset,

³ Nychay requests we take judicial notice of the superior court transcripts before this court from his previous appeal in D055289. The request is granted, as we note that a court may take judicial notice of its own records. (Evid. Code, §§ 452, subd. (d), 459.)

rather than the credits available on the day he was originally sentenced. However, we need not reach that issue because our remand in D055289 did not result in any need to recalculate Nychay's credits.

Section 2900.1 provides: "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."

In explaining the application of section 2900.1, our Supreme Court in *People v. Buckhalter* (2001) 26 Cal.4th 20, 38, notes that when an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court pursuant to section 2900.1 must calculate the actual time the defendant has already served and credit that time against the "subsequent sentence." On the other hand, a convicted felon once sentenced, committed and delivered to prison is not restored to presentence status, for purposes of the sentencing credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. In *Buckhalter* appellate remand resulted in additional enhancements to the defendant's prison sentence. The Supreme Court therefore concluded the remand resulted in a new sentence for purposes of section 2900.1 and thus required application of additional credits. (*Ibid.*)

In contrast, in D055289 we affirmed the judgment but remanded for the limited purpose of allowing the court to exercise its discretion in setting the restitution fine. Changing the restitution fine imposed did not alter the time Nychay was ordered to serve.

As such, we conclude section 2900.1 is inapplicable here and we therefore deny his request for recalculation of credits.

In denying Nychay's request for increased credits, the trial court expressly left the calculation of his credits to the Department of Corrections. Nychay argues the court erred in delegating the calculation. However, in light of our determination that Nychay was not entitled to additional presentence credits under section 2900.1, we need not reach this issue.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

I CONCUR:

O'ROURKE, J.

McDONALD, J., dissenting in part and concurring in part.

I disagree with the majority opinion to the extent it rejects Nychay's claim for Penal Code¹ section 4019 conduct credits for the period he was in custody before his original sentence (i.e., up to Apr. 13, 2009) pursuant to the January 25, 2010, amended version of section 4019 (amended § 4019). I agree with the majority opinion to the extent it denies his claim for section 4019 conduct credits for the period he was in custody from the date of issuance of our opinion in *People v. Nychay* (Dec. 3, 2009, D055289) [nonpub. opn.] (*Nychay I*), which partially reversed his sentence, until his resentencing by the trial court on remand after *Nychay I* (Jan. 29, 2010).

A

To the extent Nychay contends amended section 4019 applies retroactively to his custody prior to his original sentencing on April 13, 2009, I believe that amended statute applies retroactively and entitles him to increased conduct credits for that period. At Nychay's original sentencing, the trial court awarded him presentence custody credits of 34 days of actual custody and 16 days of conduct credits, for a total of 50 days of custody credits. In awarding him conduct credits, the court applied the 1982 version of section 4019, then applicable, giving him two conduct days for every four days served in local custody before sentencing. (Stats. 1982, ch. 1224, § 7, pp. 4553-4554.) However, effective January 25, 2010, section 4019 was amended to provide defendants with two

¹ Statutory references are to the Penal Code unless otherwise specified.

days of conduct credit for every two days of actual custody served in local custody before sentencing. (Stats. 2009, 3d Ex.Sess. 2009-2010, ch. 28X, § 50.) In *Nychay I*, we reversed the \$800 restitution fine imposed by the trial court and remanded the matter with directions that the court hold a new restitution hearing and exercise its discretion in awarding a restitution fine. At the January 29, 2010, hearing on remand, Nychay requested the trial court award him section 4019 conduct credits pursuant to amended section 4019, arguing his case was not yet final and amended section 4019 should apply retroactively. The court denied his request, stating the Department of Corrections and Rehabilitation would calculate his custody credits.

By denying Nychay's request for an award of conduct credits pursuant to amended section 4019, I believe the trial court erred. A defendant is entitled to credit for all days in local custody prior to sentencing, including conduct credits pursuant to section 4019. (§ 2900.5, subd. (a).) It is "the duty of the court imposing the sentence to determine . . . custody prior to sentencing and the total number of days to be credited pursuant to [section 2900.5]." (§ 2900.5, subd. (d).) Accordingly, when a trial court imposes a sentence, it "has responsibility to calculate the exact number of days the defendant has been in custody 'prior to sentencing,' add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.)

The instant issue is currently pending review before the California Supreme Court. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963 [holding amended § 4019 applies retroactively to judgments not yet final];

People v. Rodriguez (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808 [holding amended § 4019 does not apply retroactively to judgments not yet final].)

However, until that court may hold otherwise, I believe amended section 4019 applies retroactively to defendants whose judgments are not yet final. Although section 3 generally provides that Penal Code statutes are not retroactive "unless expressly so declared," there is an exception to that general rule when an "amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final" (*In re Estrada* (1965) 63 Cal.2d 740, 744.) In those cases, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id.* at p. 748.)

Courts have applied the *Estrada* rule to statutes that increase the amount of custody and conduct credits a defendant may accrue, interpreting those statutes as mitigating punishment and applying them retroactively to judgments not yet final. (See, e.g., *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239 [conduct credits under former version of § 4019]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 392 [custody credits under § 2900.5].) Since *Doganiere*, the Legislature amended section 4019 in 1982 and 2009 without expressly providing that those amendments would apply prospectively only. (Stats. 1982, ch. 1224, § 7, p. 4553; Stats. 2009, 3d Ex.Sess. 2009-2010, ch. 28X, § 50.) Because the Legislature was presumably aware of *Doganiere* and took no action to abrogate it, I infer the Legislature approved of application of the *Estrada* exception to amendments that mitigate punishment (e.g., increase in § 4019 conduct credits).

Furthermore, the express purpose of amended section 4019 was to address the fiscal emergency declared by the Governor. (Stats. 2009, 3d Ex.Sess. 2009-2010, ch. 28X, § 62.) Applying amended 4019 retroactively, as well as prospectively, would serve that legislative goal by lowering prison costs through earlier release of more prisoners, thereby providing the State with greater prison cost savings.²

At the restitution hearing on remand on January 29, 2010, Nychay's judgment of conviction was not yet final. Prior thereto, in *Nychay I* we reversed his judgment in part and remanded the matter to the trial court for it to exercise its discretion and determine the amount of the restitution fine to be awarded against him. A restitution fine, like a prison term, is considered punishment for a criminal offense and thus part of a defendant's sentence. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-363.) Because as of January 25, 2010 (the effective date of amended § 4019), the trial court had not yet exercised its discretion on remand to determine the amount of the restitution fine awarded against Nychay for his criminal conviction, Nychay's judgment of conviction was not yet final. Therefore, applying the *Estrada* rule, the increased conduct credits provided by amended section 4019 should apply retroactively to Nychay's custody served prior to his original sentencing on April 13, 2009. (*In re Estrada, supra*, 63 Cal.2d at p. 744; *People*

² To the extent the People may argue amended section 4019's purpose was to provide incentives for good behavior, that purported purpose was not expressly cited by the Legislature as its purpose and arguably conflicts with its express purpose of reducing prison costs. Furthermore, section 4019 already provided incentives for good behavior before its January 25, 2010, amendment.

v. Doganiere, supra, 86 Cal.App.3d at p. 239; *People v. Hunter, supra*, 68 Cal.App.3d at p. 392.)

Assuming arguendo Nychay's judgment of conviction were deemed final as of January 25, 2010, I nevertheless believe his constitutional right to equal protection of the law requires that amended section 4019 be applied retroactively to Nychay's custody served prior to his original sentencing on April 13, 2009. Without restating the reasoning in *In re Kemp* (2011) 192 Cal.App.4th 252, I am persuaded by *Kemp's* reasoning and believe, like *Kemp*, that the group of defendants whose judgments of conviction were final before January 25, 2010, are similarly situated to the groups of defendants whose judgments were not yet final or who had not yet been sentenced by that date, and that there is no rational basis for disparate treatment of those groups (i.e., greater conduct credits under amended § 4019 for the latter groups and not the former group). I believe amended section 4019 should apply to all presentence custody served by all groups of defendants, including Nychay's custody served prior to April 13, 2009.

B

However, to the extent Nychay contends amended section 4019 applies retroactively to his custody during the period from the issuance of *Nychay I* (Dec. 3, 2009) until the restitution hearing on remand (Jan. 29, 2010), I concur with the majority opinion that section 4019, whether in its original or amended version, does not apply to his custody during that period. In *People v. Buckhalter*, the California Supreme Court stated:

"[A]n appellate remand solely for correction of a sentence already in progress does not remove a prisoner from the [Director of Corrections and Rehabilitation's] custody or restore the prisoner to presentence status as contemplated by section 4019. Clearly defendant is not entitled to section 4019 credits for his time in a state penitentiary. Nor could he earn them during the time he was physically housed in *county jail* to permit his participation in the remand proceedings. Section 4019 does allow such credits for presentence custody in specified city or county facilities. (*Id.*, subd. (a)(4).) But defendant's temporary removal from state prison to county jail as a consequence of the remand did not transform him from a state prisoner to a local presentence detainee. When a state prisoner is temporarily away from prison to permit court appearances, he remains in the constructive custody of prison authorities and continues to earn sentence credit, if any, in that status. [Citations.] Prison regulations specify how persons otherwise entitled to earn prison worktime credits under article 2.5 are to accrue such credits while '[r]emoved to out-to-court status.' " (*People v. Buckhalter, supra*, 26 Cal.4th at pp. 33-34.)

Accordingly, *Buckhalter* held: "[T]he Court of Appeal correctly concluded that defendant was not entitled to presentence good behavior credit under section 4019 for the time he spent in county jail while awaiting the remand hearing. On the other hand, the Court of Appeal erred in concluding that the trial court had no responsibility whatever to recalculate custody credits upon the remand. . . . [U]nder section 2900.1, *the trial court, having modified defendant's sentence, should have determined all actual days defendant had spent in custody, whether in jail or prison, and awarded such credits in the new abstract of judgment.*" (*Id.* at pp. 40-41, italics added.) Under *Buckhalter*, I believe the trial court in this case should have determined and awarded Nychay all *actual* days he spent in custody both before his original sentencing (Apr. 13, 2009) and between the issuance of *Nychay I* (Dec. 3, 2009) and his restitution hearing on remand (Jan. 29, 2010), but the court properly denied him section 4019 *conduct* credits for the period he was in

custody from the issuance of *Nychay I* (Dec. 3, 2009) until his restitution hearing on remand (Jan. 29, 2010).

McDONALD, J.