

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JOHN SCOPES,
Defendant and Appellant.

No. H912345
(Rhea County
Superior Court
No. CR1234)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following an admission to a violation of probation and is based on the sentence imposed. It is authorized by Penal Code section 1237.5¹ and California Rules of Court, rule 8.304(b)(4).

STATEMENT OF THE CASE

An information was filed on April 7, 2009, alleging appellant, John Scopes was charged by information of teaching evolution in a public school. (§66.6.) (1CT 1-3.) He pled no contest. (1CT 245.)

On June 25, 2009, the court placed appellant on four years probation on condition, among other things, that he spend 145 days in jail with credit for 145 days, pay a \$200 restitution fine, obey all laws, see the probation officer when directed, inform the probation officer if he changed his address, not use

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

drugs or alcohol, and undergo drug testing. (CT 108-110.)

It was alleged on September 28, 2009 appellant violated probation by failing to see the probation officer when directed and failing to provide a drug test. (2CT 114.) It was later alleged he failed to obey all laws. (2CT 125-126.) On January 28, 2010, he admitted the allegations. (2CT 127-128.) On February 25, 2010, he was placed back on probation on condition that he serve 365 days in jail with credit for 146 days of actual credit (plus 146 days of conduct credit for a total of 292 days). (2CT 135-136.)

On May 14, 2010, it was alleged appellant violated probation by being discharged from Genesis House (the residential drug program) and failing to inform the probation officer of his whereabouts. (2CT 138-139.) He admitted the allegation on June 30, 2010. (2CT 150-151.)

On July 28, 2010, the court sentenced appellant to serve 2 years 8 months in prison. (2CT 164-165.) He received 379 days of presentence credits, and he was ordered to pay a \$400 restitution fine and pay another \$400 restitution fine which was stayed unless parole was revoked. (2CT 160.)

A timely notice of appeal was filed on July 29, 2010, challenging the sentence. (2CT 164.)

STATEMENT OF EVIDENCE

According to the probation report, appellant taught in a public school the unholy notion that men somehow evolved from apes and monkeys. (2CT 71.)

ARGUMENT

I. APPELLANT IS ENTITLED TO ADDITIONAL PRESENTENCE CREDITS.

A. Background.

The probation department carefully tracked the time appellant was in custody. However, it miscalculated the length of time he was in custody. Further, trial counsel argued appellant was entitled to 50 percent conduct credit for all the time he spent in custody (2RT 306-307), but the court awarded him “day for day” conduct credits only for the time he was in custody on or after January 25, 2010. He was entitled to additional presentence conduct credits.

The claims are cognizable on appeal because it was an unauthorized sentence. (See *People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15.) Although the miscalculation of credits should first be brought to the trial court (§ 1237.1), the court of appeal may consider the matter when other claims are brought on appeal. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420-427.) Further, the question of whether amended section 4019 applies to time in

custody before January 25, 2010 was already litigated in the trial court (2RT 306-308) and concerns a legal question, not the calculation of credits.

According to the probation report, appellant was in custody as follows:

March 21, 2009	to	June 25, 2009	97 days
January 8, 2010	to	January 24, 2010	17
		actual days before January 25, 2010	114
		conduct credit at 33 percent	56
		total credit before January 25, 2010	170
January 24, 2010	to	April 8, 2010	69
June 23, 2010	to	July 28, 2010	36
		actual days on or after January 25, 2010	105
		conduct credit at 50 percent	104
		total credit on or after January 25, 2010	209
		combined actual days	219
		combined conduct credit	160
		combined total	379

(2CT 156-157.)

Trial counsel argued appellant was entitled to 50 percent conduct credit for all the time he spent in custody under amended section 4019. (2RT 306-307.) The court awarded presentence credits as recommended by the probation officer. (2CT 160, 164, 2RT 308.)

B. Appellant is Entitled to the Benefit of Amended Section 4019 for the Entire Period in Jail.

Appellant is entitled to the benefit of the amended section 4019 as it existed at sentencing because (1) retroactive application best effectuates the

Legislature's intent; and (2) the equal protection clauses of the state and federal constitutions require retroactive application to all defendants meeting the statute's requirements.²

An argument raising an issue of statutory construction is reviewed independently by the appellate court. (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1381.)

1. Statutory Language.

A defendant sentenced to state prison is entitled to credit against his sentence for all actual days spent in custody before sentencing, and for conduct credits pursuant to section 4019. (§ 2900.5, subd. (a).) Before January 25, 2010, section 4019 provided that for each six-day period of custody, one day was deducted for performing assigned labor and one day was deducted for satisfactorily complying with the rules and regulations. (Former § 4019, subs. (b) and (c).) Thus "if 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." (Former § 4019, subd. (f).)

In October of 2009, the Legislature amended section 4019 to increase

² The supreme court granted review to determine if section 4019, as amended to increase presentence custody credits for certain offenders, applies retroactively. (See *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963; *People v. Hopkins* (2010) 184 Cal.App.4th 615, review granted July 28, 2010, S183724.)

pre-sentence credits for defendants who, like appellant, have no current or prior convictions for serious or violent felonies and who are not required to register as sex offenders. (Stats. 2009, 3rd Ex. Sess., ch. 28 (Sen. Bill No.18), § 50.) The amended statute now provides that presentence credits accrue at twice the previous rate for all defendants except those required to register as a sex offender, committed for a serious felony, or with a prior conviction for a serious or violent felony. (§ 4019, subd. (b)(2) and (c)(2).) Thus one day of work credit and one day of conduct credit now may be deducted for each four-day period of confinement or commitment, so “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” (§ 4019, subd. (f).)

Senate Bill No. 18 went into effect on January 25, 2010. (Cal. Const., art. IV, § 8, subd. (c)(1) [“a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed”]; Cal. Senate Journal, 2009-10 Third Extraordinary Session, Nov. 30, 2009, at p. 273 [Third Extraordinary Session adjourned Oct. 26, 2009].)

Effective September 28, 2010, section 4019 was amended to be worded the same as it was before January 25, 2010. (Stats. 2010, ch. 426, § 2.) However, the Legislature amended section 2933 to provide that state prisoners shall receive day for day presentence credit as they did under section 4019 as

it existed from January 25 to September 27, 2010. (Stats. 2010, ch. 426, § 1.)³

Thus, the effect of the statute is to continue to permit day for day presentence credits for those sentenced to prison but not for those who are sent to jail.

For the reasons explained below, because appellant's conviction was not final on January 25, 2010, he is entitled to the full benefit of section 4019 as it existed at sentencing.

³ Section 2933, subdivision (e) now states:

(1) Notwithstanding Section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner.

(2) A prisoner may not receive the credit specified in paragraph (1) if it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by, or has not satisfactorily complied with the reasonable rules and regulations established by, the sheriff, chief of police, or superintendent of an industrial farm or road camp.

(3) Section 4019, and not this subdivision, shall apply if the prisoner is required to register as a sex offender, pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5.

2. Retroactive application best effectuates the legislature's intent.

Senate Bill 18 revised various statutes with the express purpose of reducing the prison population. To this end, the bill amended statutes involving both prison conduct credits (§ 2932, et. seq.) and jail conduct credits (§ 4019).

The Department of Corrections and Rehabilitation shall implement the changes made by this act regarding time credits in a reasonable time. However, in light of limited case management resources, it is expected that there will be some delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act. An inmate shall have no cause of action or claim for damages because of any additional time spent in custody due to reasonable delays in implementing the changes in the credit provisions of this act. However, to the extent that excess days in state prison due to delays in implementing this act are identified, they shall be considered as time spent on parole, if any parole period is applicable.

(Stats. 2009, 3d Ex. Sess., ch. 28, § 59.)

If the Legislature did not intend retroactive application, it would not have been concerned with “delays in determining the amount of additional time credits to be granted against inmate sentences resulting from changes in law pursuant to this act.” (*Ibid.*) It thus follows that while section 59 of Senate Bill No. 18 is certainly not an ironclad statement of legislative intent, it does provide a strong suggestion that the Legislature intended retroactive application. Furthermore, the “fiscal emergency” setting of the amendment

supports a conclusion that the Legislature intended retroactivity, since applying the amendment prospectively does not address the fiscal emergency declared by the Governor. Significantly, the Legislature specifically provided that Section 59 of Senate Bill 18 was to remain in full force.⁴

Appellant submits that the clear language of section 59 of Senate Bill No. 18, along with the overall purpose of the legislation, suggests the Legislature intended that the amendment to Penal Code section 4019 be applied retroactively, at least as to those eligible defendants whose convictions were not final on the effective date.

Therefore, the full benefit of amended section 4019 applied to defendants sentenced before January 25, 2010 when their convictions were not final on that date. *A fortiori*, for appellant, sentenced after January 25, 2010, he is entitled to the full benefit of amended section 4019. The statute applied to his time in custody before January 25 as well as his time in custody on or after that date.

3. Failure to apply amended section 4019 to appellant would violate his state and fourteenth amendment right to equal protection.

When the Legislature increases credits that reduce a defendant's

⁴ Section 3 of Senate Bill 76 provides: "The Legislature intends that nothing in this act shall affect Section 59 of Chapter 28 of the Third Extraordinary Session of the Statutes of 2009, and that this act be construed in a manner consistent with that section."

sentence, the equal protection clauses of the state and federal constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, art. IV, § 16) require that the new law be applied to all defendants who are presently serving a sentence, on parole, or on probation. (*In re Kapperman* (1974) 11 Cal.3d 542, 546-550.)

In *Kapperman*, the court considered a 1972 amendment to section 2900.5 that credited county jail time served before prison to the prison sentence. (*Kapperman, supra*, at p. 544.) The amended statute made the credit prospective only. (*Ibid.*) The defendant was delivered to the Department of Corrections before the date the statute was enacted, and his conviction was final before it went into effect. (*Id.* at p, 545.) The court held that the state constitutional guarantee of equal protection under the laws required that the full benefit of the new pre-sentence credit law be applied retroactively to everyone serving a sentence on March 4, 1972, regardless of when they were in the county jail or whether their conviction was final on the day the statute took effect. (*Id.*, at pp. 546-550.)

Six years later, the supreme court held again that equal protection principles require that all prisoners, regardless of the date they began serving prison terms, benefit when a new law or ruling increases credits. (*People v. Sage* (1980) 26 Cal.3d 498, 509, fn. 7.) *Sage* interpreted the then-current language of section 4019. Before *Sage*, the statute's provision for conduct

credits for pre-sentence incarceration for prisoners “confined in or committed to a county jail . . . under a judgment of imprisonment” had been limited to prisoners serving jail terms, and excluded those serving prison terms. (*Id.*, at p. 506.) Under this interpretation defendants convicted of misdemeanors (and thus sentenced only to jail) received time off their sentences for favorable conduct during presentence custody, while defendants convicted of felonies (and thus sentenced to prison) got no such conduct credits for presentence custody. (*Id.* at pp. 506-508.)

In *Sage*, the court struck down this distinctions as violative of equal protection, holding that there was no “rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons.” (*Ibid.*) Accordingly, the court held that section 4019 must be construed as providing pre-sentence credits to all prisoners. (*Ibid.*)

Then, in pertinent part, the court held that its expansion of the previous application of section 4019 must be applied retroactively. “Inasmuch as the same equal protection concerns as those underlying the court’s decision in *Kapperman, supra*, 11 Cal.3d 542, i.e., the avoidance of arbitrary classification of prisoners, are present in the award of jail conduct credits, our holding that such credits must be awarded, if earned, for all precommitment jail time is retroactive.” (*Id.*, at p. 509, fn. 7.)

The court of appeal in *People v. Doganiere* (1978) 86 Cal.App.3d 237 also held that the equal protection clause commands retroactive application of an amendment increasing credits. “It would appear to be eminently unfair for a defendant to get 10 years for an offense committed on December 31 and another defendant to get 5 years for the identical offense committed on January 1.” (*Id.* at p. 239, fn. 1.)

Given that there is no rational basis for distinguishing between a defendant serving time before January 25, 2010 and someone serving time on that date or later, equal protection requires that amended section 4019 be applied to appellant.

Some have tried to distinguish *Kapperman* and *Sage* on two grounds: because that case involved a distinction between two classes of pretrial detainees, those convicted of felonies versus misdemeanors, and the issue at stake here relates to a temporal distinction; and because of a conclusion that there was a “rational basis” for the Legislature’s implicit intent of prospective application because a defendant’s conduct cannot be influenced retroactively.

These arguments ignore the pertinent retroactivity holding of the supreme court in *Sage*. It is true that the underlying equal protection claim in *Sage* relates to pretrial detainees who are felons versus those who are misdemeanants. However, the secondary holding in *Sage* is at issue here, that

the alteration of the law with respect to jail conduct credits effected by the decision in *Sage* had to be applied retroactively to anyone serving a determinative sentence because “the same equal protection concerns as those underlying the court’s decision in *Kapperman, supra*, 11 Cal.3d 542, i.e., the avoidance of arbitrary classification of prisoners, are present in the award of jail conduct credits. . . .” (*Sage*, 26 Cal.3d at p. 509, fn. 7.) Thus, in *Sage* the court refused, under equal protection grounds, to allow a distinction between felony pretrial detainees who served jail time before the decision in *Sage*, and those whose time was served after. This is precisely the situation presented in the equal protection challenge raised by appellant, and *Sage* compels the same response.

In fact, *Sage* would have been a better case to argue that retroactivity was precluded based on the impossibility of “influencing conduct retroactively” because in that case, there had been no previous determination of entitlement to presentence conduct credits. However, in *Sage*, the court brushed aside such concerns, directing the Department of Corrections to adjust sentences for prisoners based on the credit formula of section 4019 based on the award of custody credits in the abstract of judgment, referring to this process as a “routine ministerial function.” (*Id.*, at p. 509.) The matter is decidedly more routine here, where defendants, like appellant, have already

earned their presentence conduct credits, and the only task needed to carry out retroactive application is to recalculate the number of such credits.

It follows from the foregoing that the analysis of the supreme court in *Sage* applies to the markedly similar situation presented here. If amended section 4019 is not applied retroactively, two classes of state prisoners will be created: those who get the extra credits on or after January 25, 2010, and those who do not. Since both classes are identically situated, since both sets of defendants qualified for conduct credits by exhibiting good behavior in county jail, federal and state equal protection guarantees require that they be treated identically. Just as in *Sage*, there is no rational basis or compelling interest in creating an “arbitrary classification.” (*Sage, supra*, 26 Cal.3d at p. 509, fn. 7.)

II. THE RESTITUTION FINE MUST BE REDUCED.

When appellant was first placed on probation, the restitution fine was set at \$200. (CT 108-110.) When probation was revoked, the court increased the restitution fine in the case to \$400. (CT 160.) The court does not have the authority to increase the restitution fine after a revocation of probation. (*People v. Garcia* (2007) 147 Cal.App.4th 913, 917; *People v. Chambers* (1998) 65 Cal.App.4th 819, 822.) It thus can be corrected at any time, even without an objection below. (*Ibid.*) The amount should be reduced to \$200. (*Ibid.*) Further, since the parole revocation restitution fine must be the same

as the restitution fine (§ 1202.45), the parole revocation restitution fine must also be reduced to \$200. (*Garcia, supra*, at p. 917.)

CONCLUSION

For the foregoing reasons appellant, John Scopes respectfully requests that this Court order that he receive two days of presentence conduct credits for every two days he was in custody for the entire time he was in custody before sentencing; and that the restitution fine and parole revocation restitution fine be reduced to \$200.

DATED: December 16, 2010

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Appellant
John Scopes

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S
OPENING BRIEF contains 3312 words.

Executed under penalty of perjury at Santa Clara, California, on
December 16, 2010.

Jonathan Grossman