

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

PEOPLE OF THE STATE OF CALIFORNIA,)	No. H033733
Plaintiff and Respondent,)	
)	(Santa Clara County
v.)	No. CC809684)
)	
TOMMY LEE GALIA,)	
Defendant and Appellant.)	
_____)	

APPELLANT'S PETITION FOR REHEARING

After Unpublished Opinion Filed February 2, 2010,
Raising New Claim Under Amended Penal Code Section 4019

SIXTH DISTRICT APPELLATE PROGRAM

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Pursuant to rule 8.268 of the California Rules of Court, appellant Tommy Lee Galia hereby petitions this Court for rehearing following its unpublished opinion filed on February 2, 2010, affirming the judgment.

ARGUMENT

UNDER AMENDED PENAL CODE SECTION 4019 APPELLANT IS ENTITLED TO ADDITIONAL PRESENTENCE CONDUCT CREDITS.

Generally, a party to an appeal is precluded from raising an issue on appeal for the first time on petition for rehearing, and courts may properly refuse to consider issues raised in this manner. (*Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121; *County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 459, fn. 5.) However, where good cause appears for the consideration of such new matters, a court has discretion to do so for the first time on a petition for rehearing. (*Mounts v. Uyeda, supra*, at p. 121; *Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 446, fn. 12.)

In the present case, good cause appears based on the California Legislature’s enactment of amendments to Penal Code section 4019 (hereinafter “section 4019”), which increased presentence credits for certain criminal defendants who, like appellant in the present case, have no current or past convictions for violent or serious felonies, and who are not required to

register as sex offenders. Appellant contends that this law applies to his conviction, which is not yet final on review, and asks this court to grant rehearing and modify the judgment to award “one for one” presentence conduct credits under the amended provisions of section 4019. (Stats. 2009-2010, 3rd Ex.Sess., c. 28 (S.B. 18), § 50, eff. Jan. 25, 2010.)

Former section 4019 provided for one day work credit and one day conduct credit for each six-day period of custody, resulting in a “one-for-two” award of custody credits, as was ordered in the present case. (Former § 4019, subds. (b) & (c).) As amended, the statute now provides for one day each of work time and conduct credit for each *four-day* period in custody, resulting in one-for-one credits.

(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

* * *

(c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner 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.

(§ 4019, subds. (b)(1) & (c)(1), as amend. eff. 1/25/10.)

Subdivisions (b)(2) and (c)(2) exclude from this change defendants required to register as sex offenders, or who have current or prior convictions for violent or serious felonies. Appellant Galia’s current convictions are for drunk driving and hit and run causing bodily injury (Veh. Code § 23153, subd.

(b), count 2 & Veh. Code § 20001, subs. (a)/(b)(1), count 3). (CT 39-41) The record does not indicate that appellant has any prior serious or violent felony convictions, or that he is required to register as a sex offender.

The record indicates that appellant received a total presentence credit of 261 days, based on 175 “actual” days and 86 days of section 4019 conduct credits. (CT 39-41) If the amended provisions of section 4019 apply to appellant, he would be entitled to 174 days of conduct credits under section 4019, for a total presentence credit of 349 days. Although appellant has already served out his prison sentence, he is entitled to a correction of his credits since it is well settled that the additional credits will serve to reduce the term of his parole. (*In re Young* (2004) 32 Cal.4th 900, 909, fn. 5; *In re Reina* (1985) 171 Cal.App.3d 638, 642.)

The only issue, then, is whether appellant is entitled to have the benefits of the amended provisions of section 4019. A review of applicable case law provides an unequivocal answer of “Yes” to this question. This is so for two separate sets of reasons, both applicable to appellant.

A. Newly Amended Section 4019 Applies to All Defendants Whose Convictions Are Not Final as of the Effective Date of the Amendment.

First, because appellant’s conviction was not final on January 25, 2010, the amendment applies to him. “[A]bsent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal.” (*People v. Babylon* (1985) 39 Cal.3d 719, 722; see also *People v. Wright* (2006) 40 Cal.4th 81, 90; *People v. Rossi* (1976) 18 Cal.3d 295, 299-300; *In re Estrada* (1965) 63 Cal.2d 740.) “[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed.” (*People v. Vieira* (2005) 35 Cal.4th

264, 306 [citations and internal quotation marks omitted].)

This principle applies equally to increases in custody credits. (See, e.g., *In re Kapperman* (1974) 11 Cal.3d 542 (holding then-newly enacted Pen. Code § 2900.5, awarding presentence custody credits, retroactive to those incarcerated or on parole regardless of date of commitment); *People v. Hunter* (1977) 68 Cal.App.3d 389.) Before January 1, 1977, a defendant granted probation did not receive any pre-sentence custody credit, even for actual days, against a county jail sentence imposed as a condition of felony probation. (*Hunter*, 68 Cal.App.3d at 391-392.) On January 1, 1977, an amendment to Penal Code section 2900.5 took effect to credit pre-sentence jail time against a jail term imposed as a condition of probation. (*Ibid.*) The Court of Appeal in *Hunter*, noting the Legislature’s omission of a prospective-application-only limitation, held that a defendant who was sentenced prior to the effective date of the statute but whose judgment was not yet final, was entitled to the benefit of the new custody credits. (*Id.* at 392.)

Senate Bill 18’s amendment to section 4019 contains no savings clause, it reduces punishment, and it is effective prior to appellant’s judgment becoming final.¹ Appellant is thus entitled to the benefit of the change made to section 4019.

B. Under Settled Equal Protection Principles, Amended Section 4019 Applies Retroactively to All Defendants Serving Prison Sentences, on Parole, or on Probation.

In addition, and irrespective of finality, the new statute retroactively applies to all defendants who are (1) presently serving a sentence, (2) presently

1. Applying the amendment to defendants already sentenced saves the state funds by reducing the inmates’ days in custody. For this reason, application of the amendment to cases not yet final is consistent with the purpose of the legislation, which “addresses the fiscal emergency declared by the Governor.” (Stats.2009-2010, 3rd Ex.Sess., c. 28 (S.B.18), § 62.)

on parole, or (3) presently on probation. This result is compelled by the equal protection clause of the California Constitution. (Cal. Const., Art. I, § 7.)

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court considered the then new Penal Code section 2900.5 which provided for an award of presentence credit for actual time spent in custody. Although the statute expressly stated that it applied only to defendants delivered to prison on or after March 4, 1972, the court held that the statute was fully retroactive and applied to all state prisoners by virtue of the equal protection clause. (*Id.* at pp. 544-550.) As a result, the court awarded presentence credit for time spent in custody prior to the effective date of the statute. (*Ibid.*) Significantly, credit was given to Mr. Kapperman even though his judgment was final as of the effective date of the statute. (*Ibid.*)

Subsequently, the California Supreme Court applied *Kapperman* in *People v. Sage* (1980) 26 Cal.3d 498. In *Sage*, the court found the then-applicable version of section 4019 violative of equal protection since it provided conduct credit solely to misdemeanants and not felons. Citing *Kapperman*, the court held that its ruling was retroactive. (*Id.* at p. 509, fn. 7.)

The conclusion to be drawn from *Kapperman* and *Sage* is indisputable. If a defendant is serving a sentence or is on parole or probation, he or she is entitled as a matter of state equal protection (Cal. Const., Art. I, § 7) to the benefit of the amended statute. As appellant is currently on parole, the law must be applied retroactively to his benefit.

CONCLUSION

Under either or both of the above interpretations, appellant is entitled to retroactive application of the favorable amendments to section 4019 which went into effect on January 25, 2010. Accordingly, appellant respectfully asks this court to grant rehearing, permit respondent, if it so wishes, to brief this issue, and then issue a new opinion on appeal which modifies the judgment to

award appellant a total presentence credit award of 349 days, based on 175 “actual” days and 174 days of conduct credits under the amended section 4019.

Dated: February 11, 2010

Respectfully submitted,

William M. Robinson, Staff Attorney
Sixth District Appellate Program
Attorney for Appellant Tommy Lee Galia

CERTIFICATE OF WORD COUNT

Appellant, by and through his appointed counsel on appeal, hereby certifies that the software used in preparing this brief is Corel Word Perfect 8 and that according to the software report for this document the petition for rehearing contains 1798 words.

I declare under penalty of perjury under the laws of the state of California that this declaration is true and correct. Executed at Santa Clara, California, on February 11, 2010

William M. Robinson, Staff Attorney
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