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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MATTHEW BRIAN TATE, Petitioner, v. THE SUPERIOR COURT OF IMPERIAL COUNTY, Respondent;	D057427 (Imperial County Super. Ct. Nos. JCF24090; JCF24658)
THE PEOPLE, Real Party in Interest.	

Proceedings in mandate after superior court denied motion to correct credits. Christopher W. Yeager, Judge. Petition granted.

Matthew Bryan Tate pleaded guilty to the felony of unlawful sexual intercourse (Penal Code, § 261.5)[1] and burglary of a vehicle (§ 459) in case Nos. JCF24090 and

1 All further statutory references are to the Penal Code.

JCF24658, respectively. Tate filed an appeal (D056951) and a petition for writ of mandate (D057427). The sole issue raised in both matters is whether the trial court erred in not sentencing Tate according to the terms of the amended version of section 4019 in effect at the time of sentencing.[2] We conclude that the trial court erred.

We disregard as inapposite the parties' citations to cases showing a split in authority regarding whether the amended section 4019 should be applied retroactively to cases in which the defendants were sentenced under the previous version of the statute, but whose cases were appealed and therefore not finalized before the effective date of the amended statute.[3]

BACKGROUND

In October 2009, the Legislature passed Senate Bill No. 18 (2009-2010 3d Ex.Sess.) (Senate Bill 18). Senate Bill 18 "addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008" (Stats. (2009, 3d Ex.Sess.), ch. 28, § 62.) It provides various means by which prison populations may be reduced, thereby easing prison overcrowding and lowering the cost. This bill, among other things, amended section 4019, effective January 25, 2010.

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2 We deem the record on appeal in case No. D056951 to be the record in writ proceeding case No. D057427.

3 The California Supreme Court granted review of *People v. Brown* (2010) 182 Cal.App.4th 1354, 1363-1365, review granted June 9, 2010, S181963, holding that the amendments applied retroactively; and *People v. Rodriguez* (2010) 183 Cal.App.4th 1, 13, review granted June 9, 2010, S181808, holding that the amendments were not retroactive.

On January 6, 2010, Tate entered a plea of guilty to one count each of sections 261.5 and 459.

On February 11, 2010, the trial court sentenced Tate to a total of 16 months in prison, and awarded him 121 days of pre-sentence custody credits under section 4019, stating, "It would appear that 18 of the days [in custody] are under the new legislation, and the rest are under the old."

On March 8, 2010, the trial court denied Tate's motion to apply the amended version of section 4019, ruling, "[I]t does not appear that [section 4019] should be retroactive. And I believe that there are many circumstances under which retroactivity would create a basic unfairness, in that we would have people serving sentences for identical crimes that would serve disparate sentencing as a result of whether or not there was a finding that in some way the case remained ripe for application of this section."

DISCUSSION

The California Supreme Court has stated: " '[T]he court imposing a sentence' 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. (§ 2900.5, subd. (d)" (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30 (*Buckhalter*).) "The presentence credit scheme, section 4019, focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody before they are convicted, sentenced, and committed on felony charges." (*Buckhalter, supra*, at p. 36.)

"Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct. (§§ 2900, subd. (c), 2900.1, 2900.5, subds. (a), (b)." (*Buckhalter*, *supra*, 26 Cal.4th at p. 30.) The previous version of section 4019 granted fewer presentence custody credits.[4] The 2010 modified version of section 4019, which was in effect when Tate was sentenced, applies to those persons confined in a county jail or other equivalent specified facility for time served, "including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment" (§ 4019, subd. (a)(1)), or alternatively to those confined in such institutions "following arrest and prior to the imposition of sentence for a felony conviction," (§ 4019, subd. (a)(4); accord *People v. Johnson* (2004) 32 Cal.4th 260, 265). If those persons are not required to register as a sex offender and are not being committed to prison for, or have not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), a term of four days will be deemed to have been served for every two days spent in actual custody. (§ 4019, subd. (f).)

"When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter

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4 The previous version of section 4019 provided for presentence custody credits for: "Persons detained in a specified city or county facility, or under equivalent circumstances elsewhere . . . 'prior to the imposition of sentence' may also be eligible for good behavior credits of up to two additional days for every four of actual custody. . . . One such additional day is awarded unless the detainee refused to satisfactorily perform assigned labor, and a second such additional day is awarded unless the detainee failed to comply with reasonable rules and regulations." (*Buckhalter*, *supra*, 26 Cal.4th at p. 30.)

punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*Id.* at p. 744.)

Here, the defendant's acts were committed before the amendment to section 4019 became effective, but he was not sentenced until after the section 4019 was amended. Therefore, Tate was required to be sentenced under the amended statute. Nonetheless, at sentencing, the trial court calculated Tate's pre-sentence credits based on the different versions of section 4019 in effect at different times during Tate's presentence custody. This was an error because section 4019 contains no provision for such a two-tiered division of the presentence custody credits. Moreover, the previous version of section 4019 was no longer valid at the time of Tate's sentencing, and therefore the trial court was unauthorized to apply the previous statute to Tate's sentence.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to (1) vacate its February 11, 2010 calculation of pre-sentence custody credits in case Nos. JCF24090 and JCF24658 and its March 8, 2010 order denying Tate's motion to correct credits; (2) recalculate Tate's pre-sentence custody credits in those cases according to the current version of section 4019, and (3) forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. This opinion will be final immediately as to this court. (Cal. Rules of Court, rule 8.490(b)(3).)

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.