

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KENT JAMES,

Defendant and Appellant.

D057527

(Super. Ct. No. SCD225061)

APPEAL from a judgment of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

Kent James appeals from a judgment entered after he pled guilty to one count of possession of a controlled substance and admitted that he had a prison prior. James

contends that the superior court erred in denying him enhanced presentence custody credits under Penal Code¹ section 4019, because the prosecution did not plead and prove that he has suffered a prior serious felony conviction. James maintains that in order for a prior conviction to be used to disqualify a defendant from receiving the enhanced credits, the prior must be pled and proved. We conclude that no pleading and proof requirement applies to the enhanced custody credit provisions of section 4019, and thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

After a traffic stop during which police found two packaged pieces of cocaine base and two glass pipes in James's possession, James was arrested and charged with one count each of possession of a controlled substance and possession of narcotics paraphernalia. The charging information also alleged that James had suffered two prison priors and one strike prior.

James subsequently agreed to plead guilty to the drug possession charge and to admit one of the prison prior allegations in exchange for dismissal of the remaining charge and allegations, including the strike prior allegation. James stipulated to a sentence of four years, suspended for a period of three years, on the conditions that he serve 365 days in jail and thereafter be placed on formal probation and enter a long-term drug treatment program. The trial court awarded James 147 days of presentence custody credits, consisting of 99 days actually served and 48 days of conduct credits under section

¹ All further statutory references are to the Penal Code.

4019. The court determined that James's prior strike conviction rendered him ineligible for enhanced credits, despite the fact that the court dismissed the strike prior for purposes of sentencing in this case. James filed a notice of appeal and obtained a certificate of probable cause to challenge the trial court's denial of additional custody credits.

DISCUSSION

Under section 2900.5, a person who is sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody prior to sentencing. (§ 2900.5, subd. (a).) Section 4019 provides that a criminal defendant may earn additional presentence credit against his sentence for being willing to perform assigned labor (§ 4019, subd. (b)), and for complying with applicable rules and regulations (§ 4019, subd. (c)). (See *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3 [recognizing that these presentence credits are collectively referred to as conduct credits].)

Before January 25, 2010, section 4019 provided that "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. (Former § 4019, subds. (b), (c); Stats. 1982, ch. 1234, § 7, p. 4553.) The statute also provided that "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); Stats. 1982, ch. 1234, § 7, p. 4554.)

Effective January 25, 2010, however, section 4019 was amended to provide for the accrual of presentence credits at twice the previous rate. (§ 4019, subd. (f) ["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"]; see also Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Defendants who are required to register as sex offenders, defendants committed for a serious felony, and defendants who have a prior conviction for a serious or violent felony are specifically exempted from eligibility for the enhanced credits. (§ 4019, subds. (b)(2) & (c)(2).)²

James concedes that he has a prior serious felony conviction, but contends that he is nonetheless entitled to enhanced credits under section 4019, subdivision (f). He reasons that the statutory provisions that preclude certain criminal defendants from receiving enhanced credits implicitly require that the prior conviction be pled and proven beyond a reasonable doubt in the current proceeding before the defendant can be deemed ineligible for the credits. James maintains that because his prior strike was neither proven nor admitted in the trial court, he is entitled to such credits.

Section 1385 authorizes the trial court to "order an action to be dismissed" in the furtherance of justice. (§ 1385, subd. (a).) The court's authority includes the power to

² The Legislature amended section 4019 again, effective September 28, 2010, to eliminate the recently enacted sentence enhancements, essentially returning the statute to its pre-January 25, 2010 version. (§ 4019, subds. (b), (c) & (f), as amended by Stats. 2010, ch. 426, § 2.) However, because James was sentenced in April 2010, the short-lived (January 25 to September 28, 2010) version of section 4019 governs his entitlement to conduct credits. The references in this opinion to section 4019 are to that version of the statute.

strike or dismiss a sentencing allegation, including an allegation that the defendant has suffered a prior serious or violent felony conviction, where the trial court concludes that the defendant should not be subjected to a statutorily increased penalty that would otherwise apply. (*People v. Garcia* (1999) 20 Cal.4th 490, 496; *People v. Snow* (2003) 105 Cal.App.4th 271, 283.)

However, the fact that a sentencing allegation is stricken under section 1385 "is not the equivalent of a determination that [the] defendant did not in fact suffer the conviction.' " (*People v. Garcia, supra*, 20 Cal.4th at pp. 496, 499, quoting *People v. Burke* (1956) 47 Cal.2d 45, 50-51.) Even after a court strikes or dismisses a prior conviction allegation, "the [prior] conviction remains part of the defendant's personal history, and a court may consider it when sentencing the defendant for other convictions, including others in the same proceeding." (*People v. Garcia, supra*, at p. 499; *In re Varnell* (2003) 30 Cal.4th 1132, 1138 (*Varnell*).)

Varnell, supra, 30 Cal.4th 1132, is instructive. In that case, the defendant was charged with possession of methamphetamine and was alleged to have suffered a prior strike conviction. The defendant moved to strike the prior strike allegation, which would have rendered him ineligible to be sentenced to a mandatory drug treatment program under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). (*Varnell, supra*, at p. 1135.) The trial court struck the prior strike allegation, but found that the fact of the prior conviction and the resulting prison term rendered the defendant ineligible for Proposition 36 treatment. After issuing an order to show cause, the Court of Appeal held that the trial court had discretion under section 1385 to "disregard

'historical facts' in determining a defendant's eligibility under Proposition 36." (*Varnell, supra*, at p. 1136.)

The Supreme Court reversed the Court of Appeal, stating that the Court of Appeal had erred in holding that the trial court had the power under section 1385 "to disregard petitioner's criminal history, even though petitioner's ineligibility was not a charge or allegation in the information that could be dismissed," and concluding that the trial court lacked the power under section 1385 to disregard a sentencing factor that would render the defendant ineligible for Proposition 36 sentencing. (*Varnell, supra*, 30 Cal.4th at pp. 1134-1135.) In reaching this conclusion, the court distinguished the charges and allegations in a criminal action from uncharged sentencing factors, and in particular, from a sentencing factor that would render the defendant ineligible for certain sentencing options, reasoning: "[A] trial court's power to dismiss an 'action' under section 1385 extends only to charges or allegations and not to *uncharged* sentencing factors, such as those that are relevant to the decision to grant or deny probation . . . or to select among the aggravated, middle, or mitigated terms [Proposition 36], . . . does not require that the basis for a defendant's ineligibility be alleged in the accusatory pleading. In the absence of a charge or allegation, there is nothing to order dismissed under section 1385." (*Varnell, supra*, at p. 1139, citations omitted.)

Applying *Varnell's* analysis to the present case, the question is whether ineligibility for enhanced presentence custody credits under section 4019, subdivisions (b)(2) and (c)(2), based on a prior serious or violent felony conviction constitutes a sentencing allegation that must be pled and proven. Section 4019 does not expressly

require that the disqualifying circumstance under subdivisions (b)(2) and (c)(2) be pled or proven as a prerequisite to the application of their credit-enhancement limitations.

However, based on Supreme Court precedents that have implied a pleading and proof requirement in criminal statutes that provide for increased punishment resulting from the fact of a prior conviction,³ appellate courts in a number of cases have concluded that the January 25, 2010, amendments to section 4019 that authorize the increased custody credits effectively mitigate—or decrease—punishment, for purposes of determining whether those amendments apply retroactively.⁴ James relies on those cases to argue that, by parity of reasoning, the provisions of section 4019, subdivisions (b)(2) and (c)(2), that limit the number of credits that certain defendants can accrue, effectively increase punishment for those defendants.

³ *People v. Lo Cicero* (1969) 71 Cal.2d 1186 [concluding that the absolute denial of the opportunity for probation is equivalent to an increase in punishment, and thus, that the fact of a prior conviction must be pled and proven]; *People v. Ford* (1964) 60 Cal.2d 772 [recognizing a pleading and proof requirement where the fact that the defendant was armed with a deadly weapon at the time of the offense, or with a concealed weapon at the time of arrest, resulted in increased penalties]; compare *Varnell, supra*, 30 Cal.4th at p. 1140 [holding that the denial of the opportunity to be sentenced to probation under one statute did not constitute an increase in penalty where the defendant remained eligible for probation under another statute].

⁴ There is a split of appellate court authority on this issue, which 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].

Assuming, without deciding, that those cases were correctly decided, we nonetheless conclude that although James's argument has superficial appeal, it is ultimately unavailing. The reason for this is straightforward; the analysis that applies in determining whether a statute impliedly requires pleading and proof, on the one hand, and the analysis for determining whether a statute has retroactive application, on the other, are based on entirely different considerations.

The former is based on considerations of fairness and due process (see *Varnell*, *supra*, 30 Cal.4th at p. 1135, fn. 3, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, fn. 19; also *People v. Britton* (1936) 6 Cal.2d 1, 4-5), while the latter is based on the practical notion that when the Legislature reduces the sentence for a particular offense or the amount of time to be served by a particular class of defendants, and does not specify that the reduction is to have prospective application only, the Legislature must have concluded that the previous penalty or treatment was too severe, and thus, must have intended that the provisions more favorable to the defendant be applied "to every case to which it constitutionally could" (*In re Estrada* (1965) 63 Cal.2d 740, 745 [holding that a statutory amendment that reduced the sentence for the defendant's offense and shortened the time within which he would become eligible for parole applied retroactively].) Because the latter analysis has no bearing on whether due process considerations require that a particular statute be deemed to incorporate a pleading and proof requirement, the cases that have utilized that analysis for purposes of determining whether section 4019 applies retroactively do not provide a basis for implying such a

requirement under section 4019, subdivisions (b)(2) and (c)(2), for purposes of determining eligibility for presentence custody credits.

Equally important, while the enhanced custody credits reduce *the amount of time* that a qualified defendant will spend in prison, their application does not reduce *the defendant's punishment* for due process purposes. (See, e.g., *Varnell, supra*, 30 Cal.4th at p. 1135.) The awarding of custody credits is qualitatively different from the imposition of sentence.

For the foregoing reasons, we conclude that the prosecution is not required to plead and prove the existence of a prior strike conviction as a prerequisite to the application of the enhanced credit restrictions of section 4019, subdivisions (b)(2) and (c)(2), and thus, that James's prior strike conviction rendered him ineligible to earn custody credits at an enhanced rate under section 4019. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.