



The People v. Anna Margarette Hirk

2012 | Cited 0 times | California Court of Appeal | January 4, 2012

P. v. Hirk

CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

OPINION

INTRODUCTION

Anna Margarette Hirk appeals from a judgment entered after her probation was revoked. She challenges the imposition of some fees and the calculation of presentence custody credit. We conclude the trial court erred by imposing a \$30 fee under Government Code section 70373, imposing a \$40 fee under Penal Code section 1465.8, and declining to calculate presentence conduct credit under an amended version of Penal Code section 4019 in effect between January 25 and September 28, 2010. We conclude that amended version of section 4019, which we will refer to as Amended Section 4019, applied retroactively here. Accordingly, we remand to the trial court to strike the fees and impose the correct fee under Penal Code section 1465.8, recalculate presentence conduct credit, and prepare an amended abstract of judgment.

FACTS AND PROCEDURAL HISTORY

In October 2007, Hirk entered a bank with the intent to commit larceny and with knowledge of and intent to pass a forged check. Pursuant to a plea agreement, she pleaded guilty in September 2008 to felony burglary (count 1), misdemeanor forgery (count 2), and misdemeanor possession of a forged instrument (count 3). The trial court suspended sentence on count 1, stayed execution of sentence on counts 2 and 3 under Penal Code section 654, and placed Hirk on formal probation for three years on condition she serve 120 days in jail and pay a \$20 fee pursuant to Penal Code section 1465.8. The court awarded Hirk 11 actual days and four conduct days of credit for time served.

In August 2009, Hirk admitted a probation violation. As a consequence, the trial court revoked and



The People v. Anna Margarette Hirk

2012 | Cited 0 times | California Court of Appeal | January 4, 2012

reinstated her probation, ordered her to pay a \$30 fee pursuant to Government Code section 70373, subdivision (a)(1), and ordered her to serve 30 days in jail with credit for three actual days served.

In September 2010, Hirk again admitted a probation violation and the trial court again revoked and reinstated her probation. The trial court ordered her to serve 196 days in jail with 98 days of actual credit and 98 days of conduct credit for a total of 196 days of credit for time served.

In December 2010, Hirk again admitted a probation violation. This time, the trial court revoked probation and sentenced her to a 16-month prison term on count 1 and stayed execution of sentence on counts 2 and 3 pursuant to Penal Code section 654. The court ordered her to pay a \$30 fee under Government Code section 70373, subdivision (a)(1) for each conviction and a \$40 fee under Penal Code section 1465.8 for each conviction. The court determined Hirk was entitled to 105 days of credit for time spent under house arrest, 137 actual days of credit for time served, and 68 days of conduct credit for a total of 310 days of presentence custody credit. Later in December, the trial court denied Hirk's motion to recalculate her custody credit under Amended Section 4019. Hirk timely filed a notice of appeal.

DISCUSSION

I.

Imposition of Fees

Hirk argues the trial court erred by imposing a \$30 fee under Government Code section 70373, subdivision (a)(1) at the December 2010 probation revocation hearing because that fee cannot be imposed in cases in which the conviction occurred before January 1, 2009. We agree. The fee imposed by Government Code section 70373, subdivision (a)(1) does not apply to cases in which the defendant's conviction, by plea or jury verdict, was rendered before January 1, 2009, the effective date of the statute. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000.)

Hirk also argues the trial court erred by imposing a \$40 fee under Penal Code section 1465.8 because at the time of her plea agreement, the statute imposed a \$20 fee. We again agree. When Hirk pleaded guilty in September 2008, section 1465.8, subdivision (a)(1) imposed a \$20 fee per conviction. (Pen. Code, § 1465.8, former subd. (a)(1).)

II.

Retroactivity of Amended Section 4019

Hirk argues the trial court should have calculated her presentence custody credit under Amended Section 4019, which would have resulted in an unspecified number of additional days of credit. She



The People v. Anna Margarete Hirk

2012 | Cited 0 times | California Court of Appeal | January 4, 2012

argues Amended Section 4019 applied retroactively to time she spent in custody before Amended Section 4019's effective date. The Attorney General argues Amended Section 4019 applied prospectively only.

Under Penal Code section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (Pen. Code, § 2900.5, subd. (a).) In addition, Penal Code section 4019 provides that a criminal defendant may earn additional presentence custody credit against his or her sentence for willingness to perform assigned labor (*id.*, § 4019, subd. (b)) and compliance with rules and regulations (*id.*, § 4019, subd. (c)). These forms of presentence custody credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Before January 25, 2010, former subdivisions (b) and (c) of Penal Code 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. (Pen. Code, § 4019, former subds. (b) & (c); Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Former subdivision (f) of section 4019 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." (Stats. 1982, ch. 1234, § 7, pp. 4553, 4554.)

In October 2009, the Legislature enacted Amended Section 4019, effective January 25, 2010, to provide for the accrual of presentence custody credit at twice the previous rate for all prisoners who are not required to register as sex offenders and for all prisoners who are not being committed for, and had not suffered a prior conviction of, a serious felony. (Amended § 4019, subd. (b)(2); see also Amended § 4019, subd. (c)(2); Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) Amended Section 4019, subdivisions (b)(1) and (c)(1) provided that one day of work credit and one day of conduct credit may be deducted for each four-day period of confinement or commitment. Amended Section 4019, subdivision (f) provided, "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." (Amended § 4019, subd. (f); see also Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.)

Effective September 28, 2010, Penal Code section 4019 was amended again to restore the presentence custody credit formula in effect before January 25, 2010. (Stats. 2010, ch. 426, § 2.) This amendment expressly applies only to offenses committed after its adoption. (Pen. Code, § 4019, subd. (g).)

We conclude Amended Section 4019 should be applied retroactively in this case. Generally, amendatory statutes are presumed to apply prospectively, not retroactively unless they contain an express declaration to the contrary. (Pen. Code, § 3.) In *re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) created an exception to Penal Code section 3. In *Estrada*, the California Supreme Court stated that "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that



The People v. Anna Margarette Hirk

2012 | Cited 0 times | California Court of Appeal | January 4, 2012

the amendment will operate retroactively so that the lighter punishment is imposed." (Estrada, *supra*, at p. 748.) The Supreme Court explained the reason for the exception: "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." (Id. at p. 745.)

Courts have traditionally deemed legislative enactments that increase the number of days of custody or conduct credit a defendant may accrue as statutes that mitigate punishment for purposes of the Estrada rule. (See, e.g., *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240 [statute involving conduct credit]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [statute involving custody credit].) Following these decisions, we likewise conclude Amended Section 4019 falls within the Estrada rule because it effectively reduces the amount of time eligible defendants must spend in prison.

The Supreme Court has granted review of the issue and will have the final say on the matter. (See, e.g., *People v. Jones* (2010) 188 Cal.App.4th 165, review granted Dec. 15, 2010, S187135; *People v. Bacon* (2010) 186 Cal.App.4th 333, review granted Oct. 13, 2010, S184782; *People v. Eusebio* (2010) 185 Cal.App.4th 990, review granted Sept. 22, 2010, S184957; *People v. Keating* (2010) 185 Cal.App.4th 364, review granted Sept. 22, 2010, S184354; *People v. Pelayo* (2010) 184 Cal.App.4th 481, review granted July 21, 2010, S183552; *People v. Otubuah* (2010) 184 Cal.App.4th 422, review granted July 21, 2010, S184314; *People v. Norton* (2010) 184 Cal.App.4th 408, review granted Aug. 11, 2010, S183260; *People v. House* (2010) 183 Cal.App.4th 1049, review granted June 23, 2010, S182813; *People v. Rodriguez* (2010) 183 Cal.App.4th 1, review granted June 9, 2010, S181808; *People v. Brown* (2010) 182 Cal.App.4th 1354, review granted June 9, 2010, S181963;.) In the meantime, we hold Amended Section 4019 retroactively applied to the calculation of Hirk's presentence conduct credit.

DISPOSITION

The matter is remanded with directions to the trial court to modify the judgment by (1) striking the \$30 fee per conviction under Government Code section 70373, subdivision (a)(1) imposed at the December 2010 probation revocation hearing; (2) striking the \$40 fee under Penal Code section 1465.8 and instead imposing a \$20 fee per conviction; and (3) recalculating the number of days of presentence conduct credit in accordance with this opinion. The trial court is directed to have an amended abstract of judgment prepared and to forward a certified copy of it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

WE CONCUR: BEDSWORTH, ACTING P. J. ARONSON, J.

