270 Cal.Rptr. 756
Ordered Not Published
Previously published at: 221 Cal.App.3d 1128
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)
Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Appellant,
v.
Reginald Donald McOWENS, Defendant and Respondent.

No. C006755. | June 28, 1990. | Review Denied Sept. 20, 1990*.

* In denying review, the Supreme Court ordered that the opinion be not officially published.

Defendant's probation was revoked in the Superior Court, Yolo County, No. 10016, Harry Ackley, J., and People appealed award of presentence custody credit. The Court of Appeal, Puglia, P.J., held that: (1) defendant who participated in work program while incarcerated in county jail as condition of probation was not entitled to presentence custody credits for participation against his later prison sentence, and (2) Court did not have authority to rule that, notwithstanding California law, defendant was eligible to receive such credits, even if federal court consent decree required that defendant be afforded such credits.

Affirmed as modified.

Attorneys and Law Firms

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Donald I. Segerstrom, Sonora, appointed by the Court of Appeal, for defendant and respondent.

Opinion

PUGLIA, Presiding Justice.

This is a People's appeal challenging an award of 21 days presentence custody credit. (Pen.Code, § 1238, subd. (a)(5).) The dispositive issue is whether a defendant who participates in a work program while incarcerated in county jail as a condition of probation is entitled by virtue of Penal Code section 4024.2 to presentence custody credits for that participation against his later prison sentence. The answer is plainly, "no."

Defendant pled guilty to first degree burglary. (Pen.Code, § 459; all further statutory references to sections of an undesignated code are to the Penal Code.) On June 27, 1988, the trial court placed defendant on probation for three years with a condition that he be confined to the county jail for 180 days. As a result of custody credits, the sheriff released defendant 73 days after he commenced service of his term.

On March 14, 1989, defendant admitted violating probation. The trial court revoked probation and sentenced defendant to state prison for four years. The trial court awarded defendant 130 days custody credit as follows: 73 days actually served (of the 180 day term imposed as a condition of probation) and 36 days conduct credit (§ 4019); in addition, the trial court found that on 21 of the 73 days of custody, defendant worked at least 8 hours in the county jail and awarded defendant 21 days of work credit purportedly under the authority of section 4024.2.[1]

1 Prior to the grant of probation, defendant was in presentence custody and participated in a work program at the county jail. The trial court ruled that defendant could earn work credits under section 4024.2 but only after he had been ordered to serve time in county jail under the order of probation. In his responding brief, defendant contends he was also eligible to receive credit under section 4024.2 for work while in the county jail awaiting the hearing in which he was granted probation. We are not required to review the trial court's ruling on this issue because defendant did not appeal. However, our holding that defendant is not entitled to *any* credits under section 4024.2 effectively disposes of this contention.

On appeal the People contend defendant is ineligible to receive any credit for work performed while incarcerated in county jail. The People assert section 4024.2 authorizes ***758** only a work *release* program, not a means for incarcerated inmates to earn additional credit while they simultaneously earn credit for actual days served in custody plus conduct credit for not refusing work under section 4019, subdivision (b). Defendant counters that in this case section 4024.2 must be construed in the light of a federal consent decree.

On August 4, 1987, the United States District Court for the Eastern District of California issued a consent decree concerning conditions, including overcrowding, at the county jail. The decree was based on an agreement among the sheriff, the board of supervisors, and the federal defender on behalf of a certified class of county jail

inmates. The decree was in effect during defendant's incarceration as a condition of probation. The consent decree provided inter alia that "in order to attain and maintain the inmate population cap, and *notwithstanding the law of the State of California,* the Sheriff is authorized and directed to use the following methods, along with any other methods which are or in the future become available to Defendants: ... (d) *Extension of the Penal Code section 4024.2 work program to incarcerated inmates at the Branch Jail who are eligible under criteria established by the Sheriff.* These inmates shall have one day of their sentence deducted for each day of work performed, and shall stay in the Jail at night while participating in the work program." (Emphasis added.)

I

[1] [2] Subdivision (a) of section 4024.2 authorizes the performance of eight to ten hours of labor "in lieu of" one day of confinement. "In lieu of" clearly implies that a participant may perform the labor *or* serve the day in confinement, but not both.

Subdivision (b) of section 4024.2 requires that a participant "shall give his or her promise to appear for work by signing a notice to appear before the sheriff at a time and place specified in the notice and shall sign an agreement that the sheriff may immediately *retake such person into custody* to serve the balance of his or her sentence if such person fails to appear for work at the time and place agreed to, does not perform the work assigned, or for any other reason is no longer a fit subject for release under this section." (Emphasis added.) Furthermore, "Whenever a peace officer has reasonable cause to believe the person has failed to appear at the time and place specified in the notice or fails to appear or work at the time and place agreed to or has failed to perform the work assigned, the peace officer may, without a warrant, *retake the person into custody, or the court may issue an arrest warrant for the retaking of the person into custody, to complete the remainder of the original sentence.* " (§ 4024.2, subd. (b); emphasis added.)[2] These provisions clearly contemplate the release from custody of ***759** eligible participants who sign a "promise to appear for work ... at a time and place specified" in default of which promise the erstwhile participant may be "retake [n] ... into custody ... to complete the remainder of the original sentence." (§ 4024.2, subd. (b).) These provisions unambiguously describe a work program for persons who are not confined in jail.

[2] In 1988, when defendant was committed to county jail, section 4024.2 stated in relevant part:

"(a) Notwithstanding any other provision of law, the board of supervisors of any county may authorize the sheriff or other official in charge of county correctional facilities to offer a voluntary program under which any person committed to such facility may perform a minimum of 8 and a maximum of 10 hours of labor on the public works or ways in lieu of one day of confinement under the direction of a responsible person appointed by the sheriff or other official in charge. The hours of labor to be performed pursuant to this section shall be uniform for all persons committed to such facilities in a county and may be determined by the sheriff or other official in charge of county correctional facilities, within the minimum and maximum herein set forth, in accordance with the normal working hours of county employees assigned to supervise the labor of such persons.

"As used in this section 'labor on the public works and ways' means manual labor to improve or maintain public facilities, including but not limited to, streets, parks, and schools.

"(b) The board of supervisors may prescribe reasonable rules and regulations under which such labor is to be performed and may provide that such persons wear clothing of a distinctive character while performing such work. As a condition of participating in a work release program, a person shall give his or her promise to appear for work by signing a notice to appear before the sheriff at a time and place specified in the notice and shall sign an agreement that the sheriff may immediately retake such person into custody to serve the balance of his or her sentence if such person fails to appear for work at the time and place agreed to, does not perform the work assigned, or for any other reason is no longer a fit subject for release under this section. A copy of this notice shall be delivered to the person and a copy shall be retained by the sheriff. Any person who willfully violates his or her written promise to appear at the time and place specified in the notice is guilty of a misdemeanor.

"Whenever a peace officer has reasonable cause to believe the person has failed to appear at the time and place specified in the notice or fails to appear or work at the time and place agreed to or has failed to perform the work assigned, the peace officer may, without a warrant, retake the person into custody, or the court may issue an arrest warrant for the retaking of the person into custody, to complete the remainder of the original sentence. A peace officer may not retake a person into custody under this subdivision, without a warrant for arrest, unless the officer has a written order to do so, signed by the sheriff or other person in charge of the program, which describes with particularity the person to be retaken.

"(c) Nothing in this section shall be construed to require the sheriff or other such official to assign labor to a person pursuant to this section if it appears from the record that such person has refused to satisfactorily perform labor as assigned or has not satisfactorily complied with the reasonable rules and regulations governing such assignment or any other order of the court.

"A person shall be eligible for work release under

this section only if the sheriff or other official in charge concludes that such person is a fit subject therefor.
"(d) If the court sentences the defendant to a period of confinement of 15 days or more, it may restrict or deny his or her eligibility for the work release program.
"(e) The board of supervisors may prescribe a program administration fee, not to exceed the pro rata cost of administrative, to be paid by each such person according to his or her ability to pay...." (Stats.1985, ch. 430, § 2, pp. 1697–1698.)

Indeed, section 4024.2 expressly establishes "a work release program" (§ 4024.2, subd. (b)) for certain eligible persons committed to a county correctional facility but who, under the program, are not confined to the facility.

The interpretation urged by defendant disregards the plain language of the statute and leads to unintended results. Thus an inmate awarded section 4024.2 credit for performing a minimum of eight hours of labor while incarcerated in a county facility would receive double credit—one day of this special work credit plus one day of actual custody credit. There is no express statutory authorization for such an outcome nor can one reasonably or plausibly be implied from the statute. Moreover, work credit awarded under section 4024.2 would overlap with credit mandated by section 4019, subdivision (b). The latter provision states: "Subject to the provisions of subdivision (d), for each six-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." Under defendant's interpretation any inmate who satisfactorily performed four eight-hour days of labor while confined in jail would receive four days work credit under section 4024.2 and, in most if not all cases, an additional day of credit under section 4019, subdivision (b), for not refusing satisfactorily to perform assigned labor.[3] Again, the statutes do not expressly or impliedly authorize such overlapping of work release and conduct credits.[4]

[3] This outcome is not inevitable only because of the theoretical possibility the inmate might refuse the sheriff's assignment of an additional task beyond the *voluntary* 8–10 hour daily work program performed under section 4024.2, thus leading to denial of credits under section 4019, subdivision (b).

[4] The work release program authorized by section 4024.2 differs from the work furlough program authorized by section 1208 for which section 4019, subdivision (b) "work time" credits may be granted. (63 Ops.Cal.Atty.Gen. 33, 34 (1980).) In contrast to section 1208, subdivision (f), section 4024.2 does not expressly permit the award of section 4019 credits. The logical reason for this difference is that under the work furlough program the inmate remains in confinement when not engaged in the work or educational activity, earning only actual custody credit. Under section 4024.2, however, the participant's 8–10 hours of work serves *in lieu of* one day in actual custody. Section 4019 credits are earned only by those who remain in custody even though they may temporarily be released pursuant to section 1208 for work or study.

***760** In support of his theory defendant cites the introductory phrase of section 4024.2, subdivision (a): "Notwithstanding any other provisions of law...." As defendant points out the phrase has been interpreted to indicate a legislative intent "that the statute be exclusive or *sui generis,* and thus controlling over other statutes on the same subject." (See 66 Ops.Cal.Atty.Gen. 27, 28 (1983) [§ 4024.2 overrides mandatory 48– or 96–hour jail terms for drunk driving under Veh.Code, § 23160, et seq.].) There is no language, however, in section 4024.2 that will support work release credit for an incarcerated county jail inmate. Thus, whatever controlling power section 4024.2 has regarding inmates who perform labor *in lieu of confinement,* it simply has no application to a person such as defendant who was *actually confined* in county jail.

We hold that section 4024.2 is a work release program that has no application to inmates actually confined in a county correctional facility. To the extent defendant's 180 day term of confinement as a condition of probation was reduced 21 days by virtue of section 4024.2, he received a windfall to which he was not entitled.[5] A fortiori defendant is not entitled to have that period of time applied as a credit to his prison term.

[5] The People did not challenge the 21 day reduction in defendant's probationary term effected on the ostensible authority of 4024.2 (see § 1238, subd. (a)(10)) and they do not do so here.

II

[3] [4] [5] [6] Defendant urges however that the federal consent decree mandates that he be given credit toward his state prison sentence for work ostensibly performed pursuant to section 4024.2. Defendant appears to argue

that section 4024.2 has in effect been amended by the federal consent decree. While a federal court can ignore, override or annul a state or local statute or ordinance in order to uphold constitutional rights, we are aware of no authority in a federal court to amend such an enactment.[6] However that may be, this court quite clearly does not possess that power. The coordinate branches of state government are bound to respect the exclusive province of each of the others. The constitutional principle of separation of powers (art. III, § 3, Cal.Const.) absolutely forbids a court of this state to exercise legislative powers. Since a federal court is not constrained by the Constitution and laws of the State of California, we defer to that court to implement its decree in this case. On application of defendant, the federal court has the power vis-a-vis the state to order defendant's release from state prison if that is necessary to effectuate the intent of its consent decree. The writ of this court, however, is far more modest. Bound as we are by state statutes governing the term of defendant's imprisonment, we are powerless to shorten defendant's term "notwithstanding the law of the State of California."

[6] As we have indicated, the early release of county jail inmates in this manner was in fact contrary to state law. It is worth noting the federal consent decree did not find any particular constitutional violations in the overcrowded jail conditions. In *Duran v. Elrod* (7th Cir.1985) 760 F.2d 756, where the conditions of imprisonment had not reached the threshold of constitutional concern, the district court was deemed to have abused its discretion by refusing to modify a consent decree requiring a county to reduce jail overcrowding below a certain cap. *Duran* cited the district court's failure to consider the public interest in maintaining safety from the threat posed by released inmates. (*Id.* at pp. 760–761.)

The federal consent decree purports to extend section 4024.2 beyond its plain meaning to apply to incarcerated prisoners even though that is a class clearly not intended by the Legislature to be within its coverage. But we think the federal consent decree in fact does not, and indeed could not, expand the authorization of work release credit *under section 4024.2*. It is true the consent degree expressly orders the extension of the section 4024.2 work release program to incarcerated county jail inmates "notwithstanding the law of the ***761** State of California...." However, since a work program premised on release from custody cannot in any meaningful, rational sense be applied to those not released from custody, defendant's early release from his 180 day term as a condition of probation was not authorized by the legislative enactment codified as section 4024.2. If nonetheless defendant received such work credit, it can be rationalized only by the plenary power of the federal court for its own reasons to ignore, override or annul the California statutes governing defendant's term of imprisonment and order his early release.

Because section 4024.2 did not afford a proper legal basis for defendant's early release from county jail, it necessarily could not be the proper basis for work release credits applied to defendant's state prison sentence. Moreover, the federal consent decree is directed to the early release of county jail inmates; it does not deal with prisoners such as defendant committed to state prison. The trial court erred in awarding defendant presentence credit beyond the 73 days actually served and 36 days of conduct credit.

The judgment is modified to award defendant a total of 109 days of credit for time served. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy of the abstract as so amended to the Director of Corrections. As modified, the judgment is affirmed.

SPARKS and DAVIS, JJ., concur.