

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.
JAMES EDWARD DUFF, JR.,
Defendant and Appellant.

S153917
SUPREME COURT
FILED

APR 28 2008

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Fourth Appellate District, Division Three, No. G036562
Orange County Superior Court No. 04NF2414
The Honorable James Stotler, Judge

Deputy

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Does Penal Code section 2933.2, which prohibits an award of presentence conduct credit to “any person who is convicted of murder,” apply where the defendant was convicted of murder but the sentence was stayed under Penal Code section 654?

STATEMENT OF THE CASE

On November 7, 2005, an Orange County jury convicted appellant of second degree murder (count 1, Pen. Code, §187, subd. (a)), and assault on a child with force likely to cause great bodily injury resulting in the child’s death (count 2, Pen. Code, § 273ab). (1 CT 280-281.)

On January 20, 2006, the trial court sentenced appellant to 25 years to life in state prison on count 2. Under Penal Code section 654, which prohibits multiple punishments for a single act, the court stayed sentence on the murder count.^{1/} Appellant received 567 days of credit for actual time served; appellant

1. Penal Code section 654 provides in relevant part that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more

received no presentence conduct credit. (2 CT 316-317.)

On direct appeal, appellant claimed the trial court erred in denying him presentence conduct credit under Penal Code section 2933.2, which prohibits such conduct credit for “any person convicted of murder.” The Court of Appeal, Fourth Appellate District, Division Three, issued a published decision rejecting appellant’s claim and affirming the judgment. (Slip Opn. at 2-7.) The Court of Appeal reasoned that the clear language of section 2933.2, indicates the Legislature intended to preclude presentence conduct credit to anyone convicted of murder, regardless of whether the sentence for murder is subsequently stayed under section 654. (Slip Opn. at 6-7.)^{2/}

On August 29, 2007, this Court granted appellant’s petition for review.

STATEMENT OF FACTS

In the early morning hours of July 3, 2004, appellant used his hand to smother and kill his nearly one-year-old son, James. (See, e.g., 1 RT 173-176, 180-181, 186-194; 2 RT 206, 209-229, 237-238, 280-284, 347-348; 2 CT 338, 340-344, 373-378.)

than one provision.” (Pen. Code, § 654, subd. (a).) Because assault resulting in the death of a child carries a term of 25 years to life (Pen. Code, § 273ab) and second degree murder carries a term of 15 years to life (Pen. Code, §§ 187, 190, subd. (a)), the trial court was required to impose sentence on the assault offense and stay the sentence on the murder offense.

2. Despite correctly considering whether appellant’s eligibility for *presentence conduct credit* was affected by the superior court’s stay of his murder conviction, the Court of Appeal interpreted Penal Code section 2933.2, subdivision (a), which prohibits murderers from accruing postsentence worktime credit, rather than section 2933.2, subdivision (c), at issue here. The two subdivisions have similar language.

ARGUMENT

I.

THE CLEAR LANGUAGE OF PENAL CODE SECTION 2933.2 PROHIBITS A PERSON CONVICTED OF MURDER FROM EARNING PRESENTENCE CONDUCT CREDIT REGARDLESS OF WHETHER THE TERM FOR THE QUALIFYING MURDER CONVICTION IS ULTIMATELY STAYED UNDER SECTION 654

Appellant contends that the trial and appellate courts erred in concluding that appellant's murder conviction rendered him ineligible for presentence conduct credit. He argues that Penal Code section 2933.2, which prohibits any person "who is convicted of murder" from earning presentence conduct credit, was improperly applied to him because the term for his murder conviction was ultimately stayed under Penal Code section 654. (AOB 4-14.) The plain language of section 2933.2 unambiguously shows the Legislature intended to preclude anyone convicted of murder from earning presentence conduct credit, "notwithstanding . . . any other provision of law," including section 654. This Court should so hold.

Under Penal Code section 4019, defendants detained before sentencing in a county jail or other equivalent specified facility, may be eligible for presentence good behavior/worktime credit (collectively referred to as conduct credit) of up to two days for every four days of actual custody. (Pen. Code, § 4019, subs. (a)(4), (b), (c), (e), (f); see *People v. Cooper* (2002) 27 Cal.4th 38, 40.) The Legislature has determined that certain classes of local presentence detainees are barred or severely restricted from earning presentence conduct credit under section 4019. (See Pen. Code, §§ 2933.1, subd. (c) [specified violent felony; 15 percent limit], 2933.2, subd. (c) [murder; no credit available]; see *People v. Buckhalter* (2001) 26 Cal.4th 20, 37, fn. 7.) As applicable here, section 2933.2 bars convicted murderers from being awarded the presentence

conduct credit authorized by section 4019. (Pen. Code, § 2933.2, subd. (c).)

Section 2933.2 states:

(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933.

(b) The limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law.

(c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a).

(d) This section shall only apply to murder that is committed on or after the date on which this section becomes operative.

Here, appellant was contemporaneously convicted of second degree murder (Pen. Code, § 187, subd. (a)), and assault on a child with force likely to cause great bodily injury, resulting in the child's death (Pen. Code, § 273ab). (1 CT 280-281.) The trial court sentenced appellant to 25 years to life in state prison on the section 273ab count, and stayed execution of sentence on the second degree murder count under Penal Code section 654. (2 CT 316-317.) Appellant received 567 days of credit for actual time served; as a result of his murder conviction, appellant received no presentence conduct credit. (4 RT 819, 824; 2 CT 316-317.) Appellant insists that Penal Code section 2933.2 is inapplicable to him because execution of the term on his murder conviction was stayed under section 654. The plain language of section 2933.2, subdivision (c), however, indicates that a person convicted of murder is ineligible for

presentence conduct credit regardless of whether the term on the murder conviction is ultimately stayed under section 654.

In interpreting statutes, the goal is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063; *People v. Pieters* (1991) 52 Cal.3d 894, 898.) To determine intent, a reviewing court examines the language of the statute, giving the words their usual, ordinary meaning. (*Curle v. Superior Court, supra*, 24 Cal.4th at p. 1063.) If there is no ambiguity in the language, the plain meaning of the statute governs. (*Ibid.*) To the extent ambiguity exists, a reviewing court examines the context of the language, keeping in mind the nature and obvious purpose of the statute, adopting the construction that best harmonizes the statute internally and with related statutes. (See *People v. Murphy* (2001) 25 Cal.4th 136, 142; *People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

Penal Code section 2933.2 is unambiguous. Its operative condition is a "conviction" for murder. Thus, a defendant who is convicted of murder becomes ineligible for an award of presentence conduct credit. (See *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366 [plain language of section 2933.2 prohibits grant of presentence conduct credit to convicted murderers].) To create an exception to section 654, a statute need not explicitly refer to section 654. (See *People v. Benson* (1998) 18 Cal.4th 24, 32, and cases cited therein.) On the other hand, if the Legislature had intended for the application of section 2933.2, subdivision (c), to be subject to section 654, it could have said so. (Cf. Pen. Code, § 1170.1, subd. (a) [providing that application to consecutive sentencing is "subject to Section 654"].) But here, nothing in the statute purports to restore eligibility for presentence conduct credit if execution of the murder sentence is ultimately stayed under section 654. Instead, the unambiguous language of the statute – "[n]otwithstanding Section 4019 or any other provision of law" – evinces the Legislature's clear intent to preclude an

award of presentence conduct credit to anyone convicted of murder, regardless of how the person is ultimately sentenced. (See Pen. Code, § 2933.2, subd. (c), italics added.)

Several reasoned decisions support the conclusion that Penal Code section 2933.2, subdivision (c), is not subject to section 654. In *People v. McNamee* (2002) 96 Cal.App.4th 66, the court interpreted the language of section 2933.2, subdivision (c), to “reflect[] an intent to supersede any and all provisions of law that might support an award of presentence conduct credits.” (*Id.* at p. 70.) Accordingly, the court held that the statute barred a murderer from being eligible for presentence conduct credit against both the indeterminate and determinate portions of the sentence he ultimately received. (*Id.* at pp. 72-74.) Moreover, in *People v. Wheeler* (2003) 105 Cal.App.4th 1423, in holding section 2933.2 denied a murderer presentence conduct credit regardless of whether each charge against him was for murder, the court explained that section 2933.2 “applies to the offender not to the offense.” (*Id.* at p. 1432, citing *People v. Ramos* (1996) 50 Cal.App.4th 810, 817 [applying section 2933.1(c)].) Finally, in interpreting section 2933.1, subdivision (c), an analogous statute imposing a 15 percent limitation on the presentence conduct credit that may be awarded a defendant convicted of a specified violent felony, the court in *People v. Ramos, supra*, 50 Cal.App.4th 810 held that a defendant’s conviction for a violent felony barred presentence conduct credit for all other convictions suffered in the same proceeding, including nonviolent offenses. (*Id.* at pp. 816-817.)

This Court’s decision in *In re Reeves* (2005) 35 Cal.4th 765, further supports the conclusion that an award of presentence conduct credit does not depend on whether a defendant’s murder sentence is ultimately stayed. Following a jury trial, the defendant in *Reeves* was sentenced to 10 years in state prison for a nonviolent felony. Two months later, the prisoner pled guilty

to a violent felony and was sentenced to a concurrent five-year prison term. (*In re Reeves, supra*, 35 Cal.4th at p. 769.) The court considered whether section 2933.1, subdivision (a), restricted the prisoner's ability to earn *postsentence* worktime credit under section 2933 against his continuing concurrent term for the nonviolent offense once he completed his term for the qualifying violent offense. (*Id.* at pp. 768-769.)

The court concluded that the statute's credit earning limitation applied throughout the time the prisoner was incarcerated for the violent offense, but not to the remaining portion of his term that was *solely* attributable to the nonviolent offense. (*In re Reeves, supra*, 35 Cal.4th at pp. 780-781.) The court explained that a prisoner cannot be considered to have the status of "is convicted' of a violent offense," once the prisoner has served a concurrent term for the violent offense that caused the section to apply in the first place. (*Id.* at p. 777.) This reasoning makes sense as to postsentence worktime credit where accrual necessarily begins *after* sentencing for a qualifying offense and logically ends upon completion of the qualifying term. This reasoning is inapplicable in cases involving presentence conduct credit, however, because any accrual takes place before conviction and is contingent only upon whether the offenses of which a defendant is ultimately convicted render him ineligible to receive the credit.

Significantly, in *In re Reeves, supra*, 35 Cal.4th 765, this Court distinguished between presentence and postsentence credit under section 4019. (*In re Reeves, supra*, 35 Cal.4th at p. 774-775; see *People v. Buckhalter, supra*, 26 Cal.4th at pp. 30, 36 [noting "separate and independent credit schemes for presentence and postsentence custody" feature "disparate goals" and "distinct purposes"].) This Court generally endorsed the proposition that section 2933.1, subdivision (c)'s limitation on presentence credit applies to the offender and not to the offense. (*In re Reeves, supra*, 35 Cal.4th at pp. 774-775, citing *People*

v. Ramos, supra, 50 Cal.App.4th at p. 817.) This Court explained that such an interpretation makes sense in the context of presentence conduct credit considering that “[a] period of presentence confinement is indivisibly attributable to all of the offenses with which the prisoner is charged and of which he is eventually convicted.” (*In re Reeves, supra*, 35 Cal.4th at p. 775.) Thus, a defendant charged with and convicted of murder is ineligible for an award of presentence conduct credit at the subsequent sentencing hearing. Whether the sentence on the murder is ultimately stayed is irrelevant because any award of presentence conduct credit derives from “indivisibl[e]” presentence confinement.

Appellant asks this Court to adopt the reasoning in *In re Phelon* (2005) 132 Cal.App.4th 1214, which reached a contrary conclusion. (See AOB 9-11.) Respondent submits that *In re Phelon* was wrongly decided. First, it incorrectly relied on *In re Reeves* to construe the phrase “convicted of” as used in analogous section 2933.1, subdivision (c), as requiring that a prisoner not only be found guilty of a qualifying violent offense, but also be “currently” serving a sentence for that offense. As demonstrated above, the reasoning in *In re Reeves* logically relates to the accrual of postsentence worktime credit, but not to eligibility for presentence conduct credit. (See *In re Reeves, supra*, 35 Cal.4th at pp. 774-776.)

Second, the court in *In re Phelon* erroneously concluded that section 654 prohibited the statutory limitation on presentence conduct credit where the qualifying felony has been stayed. (*In re Phelon, supra*, 34 Cal.App.4th at pp. 1220-1221.) Section 654 applies to multiple punishments for the same criminal act. (Pen. Code, § 654.) Section 2933.2, subdivision (c)’s ban on presentence conduct credit for murderers, however, is similar to the recidivist enhancements for prior convictions in that the penalty is based on the nature of the offender, rather than on the offense. (See *People v. Martinez* (2005) 132 Cal.App.4th

531, 535-536.) A penalty provision that relates solely to a defendant's status, such as his status as a repeat offender, does not punish an "act or omission," and is therefore not subject to section 654. (*People v. Coronado* (1995) 12 Cal.4th 145, 157.) Similarly, section 2933.2, subdivision (c), applies to the offender's status as a murderer; it therefore is not subject to section 654's prohibition against multiple punishments for the same criminal act. (See, e.g., *People v. Wheeler, supra*, 105 Cal.App.4th at p. 1432; *People v. Ramos, supra*, 50 Cal.App.4th at p. 817; see also *In re Reeves, supra*, 35 Cal.4th at p. 775.)

Third, as emphasized by the Court of Appeal in this case, the court in *In re Phelon* failed to consider whether the statute could be considered an exception to section 654. (Slip. Op. at 5-6.) Again, the Legislature may create an exception to section 654's prohibition against multiple punishments without explicitly mentioning the statute. (*People v. Benson, supra*, 18 Cal.4th at p. 32.) For example, in *Benson*, this Court considered the effect of section 654 on the Three Strikes law. (*People v. Benson, supra*, 18 Cal.4th at p. 30.) The Court held that the language "[n]otwithstanding any other provision of law. . ." in conjunction with a provision that the Three Strikes law is applicable to stayed or suspended sentences clearly created an exception to section 654's prohibition against multiple punishments. (*Id.* at pp. 31-32.) Similarly, here, the Legislature clearly and unambiguously stated its intent: "*Notwithstanding Section 4019 or any other provision of law,*" any person who is convicted of murder may not earn presentence conduct credit. (Pen. Code, § 2933.2, subs. (a), (c); see *People v. McNamee, supra*, 96 Cal.App.4th at p. 70 ["section 2933.2, subdivision (c) states without qualification that 'no credit' pursuant to section 4019 may be earned by a person convicted of murder. It does not say such a person may earn . . . 'no credit against the sentence for murder'"].)

Construing Penal Code section 2933.2, subdivision (c), as being subject to section 654 would lead to absurd results. Such an interpretation would allow

some defendants, such as appellant, who have been found guilty of murder, to evade section 2933.2's presentence conduct credit prohibition, while other defendants who engaged in the same conduct would remain subject to its terms, merely because their murder terms were not stayed. Significantly, the only reason appellant's murder term was stayed was because he was *also* found guilty of intentionally assaulting his own child causing death. If the mandated punishment for such an assault is any indication, the Legislature clearly deems one who commits such an offense more culpable than one who commits second degree murder alone. (See Pen. Code, §§ 190, subd. (a) [second degree murder carries a prison term of 15 years to life]; 273ab [mandatory 25 years to life sentence].) However, the interpretation espoused by appellant would allow more culpable defendants, like appellant, to escape section 2933.2's conduct credit earning prohibition, while requiring arguably less culpable defendants to be subject to it. Such a result was certainly not intended by the Legislature.

CONCLUSION

Appellant's conviction for second degree murder triggered section 2933.2's ban on presentence conduct credit regardless of how he was ultimately sentenced. Accordingly, respondent respectfully requests the judgment of the trial court be affirmed.

Dated: April 25, 2008

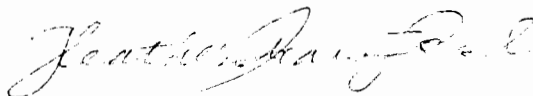
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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 2891 words.

Dated: April 25, 2008

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Heather F. Crawford".

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I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 25, 2008, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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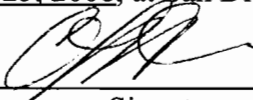
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 25, 2008, at San Diego, California.

C. Herrera
Declarant



Signature

