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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL NEAL BOYD, Defendant and Appellant.	B272471 (Los Angeles County Super. Ct. No. MA065819)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed as modified and remanded with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Neal Boyd pled no contest to possession for sale of a controlled substance. At his sentencing, the court imposed a criminal laboratory analysis fee (Health & Saf. Code, § 11372.5)[1] and a drug program fee (§ 11372.7). The court also imposed penalty assessments and surcharges on these fees. Boyd challenges the penalty assessments and surcharges and takes issue with the court's failure to award him two days of good conduct credits.

Boyd contends the amounts payable under sections 11372.5 and 11372.7 are administrative fees rather than criminal fines. Because penalty assessments and surcharges can only be imposed on criminal fines, penalties, or forfeitures, Boyd argues he should not have to pay the penalty assessments and surcharges. Boyd also contends that because he served two days in custody with good behavior he is entitled to two days of conduct credits.

We conclude the amounts payable under sections 11372.5 and 11372.7 are administrative fees rather than criminal fines, penalties, or forfeitures. We also conclude, and the People agree, Boyd is entitled to two days of good conduct credits. We therefore modify the judgment and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

An information filed on June 26, 2015 charged Boyd with cruelty to a child by endangering health (Pen. Code, § 273a, subd. (b)) and possession of a firearm by a felon (*id.*, § 29800,

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[1] All undesignated statutory references are to the Health and Safety Code.

subd. (a)(1)). The information alleged that Boyd had suffered one prior strike conviction for bank robbery, had served a prison term for that conviction, and had not remained free from the commission of an offense resulting in a felony conviction for a period of five years after the completion of his prison term (*id.*, § 667.5, subd. (b)). An amended information filed on January 5, 2016 added a count for possession for sale of a controlled substance (§ 11378).

Boyd pled no contest to the count for possession for sale of a controlled substance and admitted the strike allegation. The trial court dismissed the other counts pursuant to a plea bargain. The court sentenced Boyd to 32 months in prison and credited him with two days of presentence custody credits. Boyd was not given two days of good conduct credits. The court ordered Boyd to pay various fines, fees, and assessments, including a $50 criminal laboratory analysis fee (lab fee) under section 11372.5, subdivision (a), and a $150 drug program fee (program fee) under section 11372.7, subdivision (a). The court ordered Boyd to pay a total of $620 in penalty assessments and surcharges on those two amounts.[2]

Boyd filed a timely notice of appeal from the judgment.

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[2] The trial court ordered $435 in penalty assessments and a $30 surcharge on the lab fee and $145 in penalty assessments and a $10 surcharge on the program fee.

DISCUSSION

A. *The Lab and Program Fees Are Not Subject to Penalty Assessments or Surcharges*

Section 11372.5, subdivision (a), states: "Every person who is convicted of a violation of [specified code sections, including section 11378] shall pay a criminal laboratory analysis *fee* in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total *fine* necessary to include this increment.

"With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law." (Italics added.)

Section 11372.7, subdivision (a), states: "Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program *fee* in an amount not to exceed one hundred fifty dollars ($150) for each separate offense. The court shall increase the total *fine*, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." (Italics added.) We review issues of statutory interpretation de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Several statutes require payment of penalty assessments or surcharges on "every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses." (Pen. Code, §§ 1464, subd. (a)(1), 1465.7, subd. (a); Gov. Code, §§ 70372, subd. (a)(1), 76000, subd. (a)(1), 76000.5, subd. (a)(1), 76104.6, subd. (a)(1), 76104.7, subd. (a); see *People v. Castellanos* (2009)

175 Cal.App.4th 1524, 1528-1530.) The issue in this case is whether the lab fee and program fee imposed as a result of Boyd's conviction are fines, penalties, or forfeitures.

The Courts of Appeal are split on whether the lab fee and program fee constitute fines, penalties, or forfeitures.[3] "Until recently, the law was settled that both the criminal laboratory analysis fee and drug program fee are subject to imposition of

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[3] The following cases classify the lab fee and program fee as fines, penalties, or forfeitures: *People v. Alford* (2017) 12 Cal.App.5th 964, 974-977, review granted Sep. 13, 2017, S243340 (Fourth Dist., Div. One); *People v. Moore* (2017) 12 Cal.App.5th 558, 563-571, review granted Sep. 13, 2017, S243387 (Third Dist.); *People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870 [lab fee considered punitive for purposes of Pen. Code, § 654] (Second Dist., Div. Five); *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251-1252 (Second Dist., Div. Five); *People v. Taylor* (2004) 118 Cal.App.4th 454, 456 (Third Dist.); *People v. Jordan* (2003) 108 Cal.App.4th 349, 368 (Second Dist., Div. Three); *People v. Turner* (2002) 96 Cal.App.4th 1409, 1416 (Third Dist.); *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 (Second Dist., Div. Four); *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1520-1522 (Second Dist., Div. Five); *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 (Second Dist., Div. Five); *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1694-1696 (Fifth Dist.).

The following cases hold that lab and program fees are not fines, penalties, or forfeitures: *People v. Martinez* (2017) 15 Cal.App.5th 659, 669, review den. Nov. 29, 2017 (Fourth Dist., Div. Three); *People v. Webb* (2017) 13 Cal.App.5th 486, 493-499 (*Webb*) (First Dist., Div. Three); *People v. Watts* (2016) 2 Cal.App.5th 223, 229-237 (*Watts*) (First Dist. Div. One); *People v. Vega* (2005) 130 Cal.App.4th 186, 195 [lab fee not considered punitive for purposes of Pen. Code, § 182] (*Vega*) (Second Dist., Div. Seven).

assessments." (*Webb*, *supra*, 13 Cal.App.5th at p. 494.) Then, in 2016, the First District Court of Appeal decided *Watts*, *supra*, 2 Cal.App.5th 223. *Watts* held the lab fee is a fee and not a fine, penalty, or forfeiture, and therefore is not subject to penalty assessments or surcharges. (*Id.* at p. 231.)

Watts considered the statutory language and its history, examined prior case law, and evaluated the purpose for imposing the lab fee. After a thorough analysis, *Watts* concluded the lab fee imposed under the first paragraph of section 11372.5, subdivision (a), was not a fine, penalty, or forfeiture. (*Watts*, *supra*, 2 Cal.App.5th at pp. 234-235.) "[T]he Legislature intended the crime-lab fee to be exactly what it called it in the first paragraph, a fee, and not a fine, penalty, or forfeiture subject to penalty assessment." (*Id.* at p. 231.) The court found that references in section 11372.5, subdivision (a), to "'total fine,'" "'fine,'" and "'any other penalty'" did not indicate the fee was a fine or penalty subject to penalty assessments. (*Watts*, at p. 234.) "As to the statute's reference to 'total fine,' we fail to perceive how the fact that the crime-lab fee increases the 'total fine' necessarily means the fee is itself a 'fine' subject to penalty assessments. Nothing about the statute's use of the phrase 'total fine' is inconsistent with the conclusion that the crime-lab fee simply gets added to the overall charge imposed on the defendant after penalty assessments are calculated. And as to the statute's references to the word 'fine' and the phrase 'any other penalty,' they appear only in section 11372.5[, subdivision] (a)'s second paragraph, which applies only to offenses 'for which a fine is not authorized by other provisions of law.' . . . [S]ince there are currently no such offenses covered by section 11372.5, in our view the language in the second paragraph does not control over the

language in the first paragraph, which currently applies to all covered offenses."[4] (*Ibid.*)

Watts found the description of the charge as a "fee" in the first paragraph of section 11372.5, subdivision (a), to be significant because it reflected a legislative "intent to treat the charge as an administrative fee," rather than a fine or penalty. (*Watts*, *supra*, 2 Cal.App.5th at p. 234; see also *Vega*, *supra*, 130 Cal.App.4th at p. 195 ["[t]he legislative description of the charge as a 'laboratory *analysis* fee' strongly supports our conclusion" the lab fee is an administrative fee].)[5] The legislative history of section 11372.5 also supports this conclusion. (*Watts*, at p. 234 [noting that the statute originally required payment of $50 "'as part of any *fine* imposed,'" and later was amended to require payment of "'a criminal laboratory analysis fee'"].)

Even if the Legislature's use of the word "fee" to describe the lab fee were not determinative, *Watts* concluded the lab fee could not be characterized as a fine, penalty, or forfeiture. (*Watts*, *supra*, 2 Cal.App.5th at pp. 234-235.) The lab fee could not be considered a "forfeiture" because a forfeiture refers to

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[4] *Watts* explained that all of the 29 offenses currently subject to the lab fee are subject to a fine under another provision of law, so the second paragraph of section 11372.5, subdivision (a) "has no current application and, in that sense, is surplusage." (*Watts*, *supra*, 2 Cal.App.5th at p. 236.) For example, a conviction for section 11378 is subject to a fine pursuant to Penal Code section 672. (*Watts*, at pp. 235-236.)

[5] The legislative description of the charge plays an important part in the court's determination whether the charge is punitive. (See *People v. Alford* (2007) 42 Cal.4th 749, 755-757 [court security *fee* not considered punitive]; *People v. Batman* (2008) 159 Cal.App.4th 587, 591 [DNA *penalty* considered punitive].)

forfeiture of bail. (*Id.* at p. 234.) Neither was the lab fee a fine or penalty because "fines and penalties constitute punishment" and the lab fee was "a fixed charge that [was] 'imposed to defray administrative costs'" and was not punitive in nature. (*Id.* at pp. 234-235.)

Watts cited our opinion in *Vega* in support of the conclusion the lab fee was not a fine or penalty because its purpose was to offset administrative costs rather than impose punishment. (*Watts*, *supra*, 2 Cal.App.5th at p. 235.) The defendants in *Vega* were convicted of conspiracy to transport cocaine and conspiracy to possess cocaine for sale. (*Vega*, *supra*, 130 Cal.App.4th at pp. 186-187.) Section 11372.5, subdivision (a), applied to the crimes of transportation of cocaine and possession of cocaine, but did not apply to conspiracy to commit those crimes. Penal Code section 182, subdivision (a), provided that defendants convicted of conspiracy to commit a felony were subject to the same punishment for that felony. "Thus, if the laboratory analysis 'fee' is a 'punishment' then defendants convicted of conspiracy to commit one of the felonies specified in . . . section 11372.5, subdivision (a) are liable for that fee." (*Vega*, at p. 194.) We recognized that "[a] cogent argument can be made from the language of . . . section 11372.5, subdivision (a) the Legislature intended the $50 laboratory 'fee' to be an additional punishment for conviction of one of the enumerated felonies." (*Ibid.*) Nonetheless, and after reviewing the statute, we concluded the language of the statute was not determinative, especially where the Legislature used both terms "fee" and "fine." (*Id.* at p. 195.) So we looked to the purpose of the statute. (*Ibid.*)

We concluded the lab fee was not intended as a punishment. We stated: "Fines are imposed for retribution and

deterrence; fees are imposed to defray administrative costs. It is clear to us the main purpose of . . . section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing (given the amount of money involved in drug trafficking a $50 fine would hardly be noticed) but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his conviction. The legislative description of the charge as a 'laboratory *analysis* fee' strongly supports our conclusion, as does the fact the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special 'criminalistics laboratories fund' maintained in each county by the county treasurer." (*Vega*, *supra*, 130 Cal.App.4th at p. 195, fn. omitted.)[6]

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[6] We recognize *People v. Sharret, supra*, 191 Cal.App.4th 859, reached a different conclusion, finding the fee was punitive rather than administrative for purposes of Penal Code section 654. *Sharret* did not discuss nor distinguish *Vega, supra*, 130 Cal.App.4th 183. In fact, several of *Sharret*'s stated reasons are specifically contradicted by *Vega* or by other cases cited by *Sharret*. For example: *Sharret* points to the amount of the fee ($180, which is the sum total of the $50 fee plus penalties and surcharges) as large enough to reveal the Legislature's punitive intent (*Sharret*, at p. 870), whereas we characterize the $50 fee as administrative, especially in light of the fact the amount is too small to deter or punish drug dealers (*Vega*, at p. 195); *Sharret* characterizes the fees as being collected for law enforcement purposes (*Sharret*, at p. 870), whereas we note the fees are used to offset the administrative costs associated with laboratory testing (*Vega*, at p. 195); while *Sharret* points out the fees are mandatory and apply to each conviction (*Sharret*, at p. 870), we point out the fees do not increase or decrease depending upon the

In *Vega*, we distinguished *People v. Talibdeen* (2002) 27 Cal.4th 1151, which held that the penalty assessments applicable to ""every fine, penalty, or forfeiture"" were mandatory and not discretionary. (*Vega*, *supra*, 130 Cal.App.4th at p. 194.) The California Supreme Court in *Talibdeen* assumed the lab fee under section 11372.5 was subject to penalty assessments because the defendant did not argue otherwise. We concluded that "*Talibdeen* is not controlling, however, because the court did not address the question whether the laboratory analysis fee was a punishment. Rather, the court and the parties in *Talibdeen* proceeded under the assumption the fee was a punishment and addressed the question whether the trial court had discretion to waive the penalty assessment." (*Vega*, at p. 195.)[7]

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seriousness of the charge (*Vega*, at p. 195); *Sharret* indicates the fees have no application in the civil context (*Sharret*, at p. 870), but neither do the "booking fees" found to be nonpunitive in *People v. Rivera* (1998) 65 Cal.App.4th 705, 707-712, as noted by *Sharret,* at page 868; while *Sharret* states the fees were not identified as a "budget measure" (*Sharret*, at p. 870), we point out the proceeds from the fees "must be deposited into a special 'criminalistics laboratories fund' maintained in each county by the county treasurer" (*Vega*, at p. 195); *Sharret* avoids the Legislature's classification of the lab fee as a fee by calling it an increment of a fine, but as discussed above, the conflicting statutory language does not transform the "legislative description of the charge as a 'laboratory *analysis* fee'" into a fine (*Vega*, at p. 195). Each of *Sharret*'s points finds a counterpoint, and for the reasons stated herein and in *Vega*, we find the lab fee to be administrative rather than punitive.

[7] Several opinions cite *People v. Talibdeen*, *supra*, 27 Cal.4th 1151, as controlling authority for the proposition the lab fee under section 11372.5 and/or program fee under section 11372.7

Recently, the First District Court of Appeal, Division Three in *Webb, supra*, 13 Cal.App.5th 486, and the Fourth District Court of Appeal, Division Three in *People v. Martinez, supra,* 15 Cal.App.5th 659 (*Martinez*), agreed with *Watts*, *supra*, 2 Cal.App.5th 223, and *Vega*, *supra*, 130 Cal.App.4th 183, that the lab fee and program fee were not punitive. *Webb* stated the various statutory provisions use the terms "fee," "fine," and "penalty" interchangeably and inconsistently, so the purpose of a charge determines whether it is a fee or a fine. (*Webb*, at p. 497.) *Martinez* found "the Legislature's imprecise and inconsistent use of the terms 'fee,' 'fine,' and 'penalty' is highly problematic" and agreed with *Webb* that any attempt to resolve the issue based upon the plain language of the statute was unavailing. (*Martinez*, at p. 667.) Both *Webb* and *Martinez* concluded that because the purpose was to defray administrative costs and not for retribution or deterrence, the lab fee and program fee were fees and not fines. (*Webb*, at pp. 495, 497; *Martinez*, at p. 667.)

Many of the appellate court opinions finding the lab fee and program fee to be fines, penalties, or forfeitures have done so based upon their reading of the statutory language. *People v. Sierra*, *supra*, 37 Cal.App.4th 1690 stated that section 11372.7, subdivision (a), "defines the drug program fee as an increase to the 'total fine' and later as a fine in addition 'to any *other penalty*.' . . . In other words, section 11372.7, subdivision (a)

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are subject to penalty assessments. (*People v. Alford*, *supra*, 12 Cal.App.5th at pp. 974-975; *People v. Moore*, *supra*, 12 Cal.App.5th at p. 566; *People v. Taylor*, *supra*, 118 Cal.App.4th at p. 456.) Other opinions conclude as we do that *Talibdeen* did not hold on point and is not controlling. (*Watts*, *supra*, 2 Cal.App.5th at p. 231; *Vega*, *supra*, 130 Cal.App.4th at pp. 194-195.)

describes itself as both a fine and/or a penalty." (*Sierra*, at p. 1695.) *Sierra* therefore concluded that the program fee was a fine or penalty subject to penalty assessments. (*Ibid*.) Similarly, *People v. Martinez*, *supra*, 65 Cal.App.4th 1511 concluded that the lab fee was subject to penalty assessments because section 11372.5, subdivision (a), "defines the criminal laboratory analysis fee as an increase to the total fine." (*Martinez*, at p. 1522.) Other opinions also focus on the references in sections 11372.5, subdivision (a), and 11372.7, subdivision (a), to a "'fine' and/or a 'penalty'" in concluding that the lab fee and program fee are fines or penalties subject to penalty assessments. (*People v. Alford*, *supra*, 12 Cal.App.5th at p. 976; *People v. Moore*, *supra*, 12 Cal.App.5th at pp. 565-571; *People v. McCoy*, *supra*, 156 Cal.App.4th at p. 1252; see also *People v. Terrell*, *supra*, 69 Cal.App.4th at p. 1257 [following *People v. Martinez*, *supra*, 65 Cal.App.4th 1511 and *People v. Sierra*, *supra*, 37 Cal.App.4th 1690].)

"The clear conflict between these decisions presumably will require resolution by our Supreme Court." (*Webb*, *supra*, 13 Cal.App.5th at p. 497.) Until such time, we find the reasoning and analysis in *Watts* and *Vega* persuasive. As we discussed in *Vega*, the purpose for the fee is administrative in nature and not punitive. (*Vega*, *supra*, 130 Cal.App.4th at p. 195.) Given the internally conflicting and inconsistent statutory language, this assessment weighs in favor of finding the lab fee and program fee to be fees, rather than fines, penalties, or forfeitures. (*Martinez*, *supra*, 15 Cal.App.5th at p. 669; *Webb*, at p. 497.) Accordingly, the lab fee and program fee are not subject to the penalty assessments and surcharges imposed by the trial court.

B. *Boyd Is Entitled to Two Days of Conduct Credits*

Penal Code section 4019 provides that prisoners in local custody earn credit against their sentences for good behavior. (*People v. Brown* (2012) 54 Cal.4th 314, 317; *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1358.) For each four-day period of presentence confinement, Penal Code section 4019, subdivision (b), provides credit for one day unless the prisoner failed to satisfactorily perform assigned labor, and, subdivision (c), provides credit for one day unless the prisoner failed to comply with reasonable rules and regulations. Penal Code section 4019, subdivision (f), states, "It is the intent of the Legislature that 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."

Thus, a prisoner who serves two days in actual custody and earns the two days authorized by Penal Code section 4019, subdivisions (b) and (c), is deemed to have served four days. (*People v. Whitaker*, *supra*, 238 Cal.App.4th at p. 1358.) Because four days are deemed to be served for every two days of actual custody, a prisoner who spends two days in actual custody with good behavior as defined by Penal Code section 4019, subdivisions (b) and (c), is entitled to two days of conduct credit pursuant to subdivisions (b) and (c).[8] (See *Whitaker*, at p. 1358

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[8] Penal Code section 4019 does not require that a prisoner spend a full four days in custody before being entitled to conduct credit. Instead, subdivision (f) expressly states that a prisoner is deemed to have served four days for every two days spent in actual custody. (*People v. Dieck* (2009) 46 Cal.4th 934, 941 [applying a prior version of the statute that stated a prisoner was

[Pen. Code, § 4019 "thus requires that a defendant actually serve *two days* in custody before he or she will be entitled to two additional days of conduct credit"].)

The People concede that Boyd is entitled to two days of conduct credit in addition to the two days of credit for actual custody that he received. Accordingly, we modify the judgment to provide Boyd with his custody credits.

DISPOSITION

The judgment is modified by (1) striking $435 in penalty assessments and the $30 surcharge on the lab fee; (2) striking $145 in penalty assessments and the $10 surcharge on the program fee; and (3) crediting Boyd with two days of presentence conduct credit. The clerk is directed to prepare an amended abstract of judgment reflecting these changes and forward a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed as so modified.

BENSINGER, J.*

We concur:

ZELON, Acting P. J. SEGAL, J.

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deemed to have served six days for every four days spent in actual custody].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.