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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA GABRIEL CHAVEZ, Defendant and Appellant.	B277949 (Los Angeles County Super. Ct. No. KA111466)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wade Olson, Commissioner. Affirmed as modified.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General,

Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

BACKGROUND[1]

On December 6, 2015, a marked police unit attempted to stop a car driven by Joshua Gabriel Chavez (Chavez). Chavez refused to pull over. Chavez drove through several red lights, narrowly avoiding other cars while reaching speeds of 80 to 90 miles an hour. On December 29, 2015, Chavez again refused to stop when another marked police unit tried to initiate a traffic stop. Chavez drove erratically and swerved into oncoming traffic while reaching speeds of 85 to 100 miles an hour. Chavez eventually stopped his car. When police searched the car, they found several torn plastic baggies on the driver's side floorboard. When police searched Chavez himself, they found a baggie with approximately five grams of methamphetamine in his pocket. A prosecution expert later testified that this was an amount intended for sale.

The Los Angeles County District Attorney charged Chavez with multiple felonies, including fleeing a pursuing police officer while driving against traffic in violation of Vehicle Code section 2800.4 (counts 1 & 3); fleeing a

[1] Because Chavez pled guilty rather than go to trial, we recite the facts as elicited during the preliminary hearing.

pursuing police officer while driving recklessly in violation of Vehicle Code section 2800.2 (counts 2, 4 & 6); and possession of a controlled substance for sale in violation of Health and Safety Code section 11378 (count 5). Pursuant to Health and Safety Code section 11370.2, subdivision (c), the district attorney also alleged that Chavez had two prior controlled substance convictions.[2]

Chavez ultimately pleaded no contest to counts 1 through 5 and admitted the prior conviction allegations. Count 6 was dismissed pursuant to Penal Code section 1385. The trial court sentenced Chavez to state prison for five years eight months—two years on count 1, eight months on count 3, and three years for the prior conviction. The trial court also imposed two-year sentences on counts 2, 4, and 5 but ordered that they run concurrently to the sentence in count 1.

DISCUSSION

I. Custody and Conduct Credits

Chavez first contends that the trial court improperly calculated his custody credit, receiving credit for 101 days of actual custody and 101 days of good time/work time credit

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[2] Health and Safety section 11370.2, subdivision (c) mandates "a full, separate, and consecutive three-year term for each prior felony conviction of . . . [Health and Safety Code] [s]ection 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

when he should have received credit for 147 days of actual custody and 146 days of good time/work time. Respondent agrees. So do we.

Chavez was arrested on December 29, 2015, and pleaded no contest on May 23, 2016, when he was released from custody on his own recognizance pending sentencing.[3] He thus served 147 actual days in custody prior to sentencing. Nevertheless, Chavez's attorney inexplicably informed the court that Chavez had served only 101 days in custody. Consequently, the abstract of judgment provided that Chavez had served 101 days in custody and calculated his good time/work time credit accordingly. This is plainly incorrect.

The failure to properly calculate custody and conduct credit is a jurisdictional error that can be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People v. Karaman* (1992) 4 Cal.4th 335, 345–346, fn. 11, 349, fn. 15; *People v. Gisbert* (2012) 205 Cal.App.4th 277, 280–282; *People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) Therefore, the judgment must be modified and the abstract of judgment amended to award Chavez 147 days of presentence custody

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[3] Although Chavez pleaded no contest and was released on May 23, 2016, he returned to custody on June 29, 2016, on a new case—a misdemeanor drug paraphernalia possession case. Chavez was sentenced on his felony case on July 18, 2016.

credit and 146 days of conduct credit for a total of 293 days credit.[4]

II. Lab Analysis Fee and Penalty Assessments

The trial court also imposed a $50 laboratory analysis fee pursuant to Health and Safety Code section 11372.5, as well as a $145 penalty assessment (plus a $10 surcharge) for a total of $205. Chavez argues that the trial court erred in applying a penalty assessment to the lab analysis fee. According to Respondent, however, imposing the penalty assessment was statutorily required.

In the absence of legislative history to shed light on the issue, California courts have wrestled with the issue for more than two decades. At the outset, Health and Safety Code section 11372.5, subdivision (a) provides: "Every person who is convicted of a violation of [the offenses enumerated therein 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

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[4] Under Penal Code section 2900.5, subdivision (a), Chavez should have been credited with all time spent in presentence custody, including partial days. (See *In re Jackson* (1986) 182 Cal.App.3d 439, 442–443.) Additionally, under Penal Code section 4019, he should have received conduct credit at a rate of two days for every two days in presentence custody. (See *People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.)

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."

According to Penal Code section 1464 and Government Code section 76000, penalty assessments must be applied to "every fine, penalty, or forfeiture" imposed by the trial court in a criminal case.[5] Thus, if the lab analysis fee mandated by Health and Safety Code section 11372.5 is a "fine, penalty or forfeiture" rather than a nonpunitive fee, then the trial court in this case was required to apply penalty assessments to that fee. Indeed, in *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 (*Talibdeen*), the California Supreme Court implicitly assumed that the lab analysis fee imposed by Health and Safety Code section 11372.5 was a punitive fine to which penalty assessments were required to be appended. The court went on to hold that a trial court has no discretion

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[5] Under Penal Code section 1464, subdivision (a)(1), the trial court "*shall* . . . lev[y] a state penalty, in an amount of ten dollars ($10) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses." (Italics added.) Government Code section 76000, subdivision (a)(1), then provides that "there *shall* be levied an additional penalty in the amount of seven dollars ($7) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses." (Italics added.)

in this respect and that the assessment of such penalties is mandatory. (*Id.* at p. 1157.)

Despite the Supreme Court's guidance in *Talibdeen*, *supra*, 27 Cal.4th 1151, there is a split of authority among the Courts of Appeal as to whether the lab analysis fee truly is subject to penalty assessments. In *People v. Watts* (2016) 2 Cal.App.5th 223, 229, 237 (*Watts*), the Court of Appeal, First Appellate District, Division One, held that the lab analysis fee imposed pursuant to Health and Safety Code section 11372.5 is a fee, rather than a fine, penalty or forfeiture, and thus was not subject to penalty assessments. In *People v. Vega* (2005) 130 Cal.App.4th 183, 194–195 (*Vega*), the Court of Appeal, Second Appellate District, Division Seven, agreed that the lab analysis fee imposed by Health and Safety Code section 11372.5 was a fee, rather than a fine, penalty or forfeiture.[6] The court then held that because the lab analysis fee did not constitute "punishment" within the meaning of Penal Code section 182, subdivision (a), which penalizes a conspiracy to commit a crime, the fee was improperly imposed upon defendants who were convicted of conspiracy to transport cocaine.[7]

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[6] *Vega*, *supra*, 130 Cal.App.4th 183 found that it was not bound by *Talibdeen*, *supra*, 27 Cal.4th 1151 because, as noted above, the California Supreme Court had assumed without deciding that the lab analysis fee was punitive in nature. (*Vega*, at p. 195.)

[7] We note that the California Supreme Court recently granted a petition for review in an unpublished case from

In so holding, *Vega*, *supra*, 130 Cal.App.4th 183 first noted that the Legislature's choice of the word "fee" or "fine" did not definitively determine whether the lab analysis fee was intended as "punishment." (*Id.* at p. 195.) *Vega* also noted that the legislative purpose of the lab analysis fee was to offset administrative costs imposed on local jurisdictions, not to punish convicted defendants. (*Ibid.*) "It is clear to us," the court stated, "[that] the main purpose of . . . Health and Safety Code 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." (*Ibid.*) Thus, *Vega* concluded, the trial court erred in imposing a lab analysis fee and accompanying penalty assessments on the defendants. (*Ibid.*)

In contrast to *Vega*, *supra*, 130 Cal.App.4th 183 and *Watts*, *supra*, 2 Cal.App.5th 223, in *People v. Sharret* (2011) 191 Cal.App.4th 859, 869, the Court of Appeal, Second

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the Court of Appeal, Fifth Appellate District which will necessarily question *Vega*'s holding. (See *People v. Felix*, review granted Sept. 14, 2016, S235556 [requesting briefing as to whether a trial court can impose a lab analysis fee under Health and Safety Code section 11372.5 based on a defendant's conviction for conspiracy to commit certain drug offenses].)

Appellate District, Division Five, held that the lab analysis fee was in fact punitive in nature. Among other considerations, the *Sharret* court relied on the fact that the fee is imposed only upon a criminal offense, and does not apply in any civil context, that separate fees are imposed for each conviction and thus the fee "is assessed in proportion to a defendant's culpability," and that the fee is mandatory and has no ability to pay requirement. (*Sharret*, at p. 870.) The court further noted that the fund into which the fee is deposited is earmarked for criminal investigations, which has no civil purpose, and there is no evidence that the enacting legislation "was a mere budget measure" like other statutory fees.[8] (*Ibid*.)

Sharret, *supra*, 191 Cal.App.4th 859 cannot be reconciled with *Vega*, *supra*, 130 Cal.App.4th 183 and *Watts*, *supra*, 2 Cal.App.5th 223. Compounding the problem in this instance is that fact that *Sharret* and *Vega* are both Second Appellate District opinions. Nevertheless, we see no reason to depart from the California Supreme Court's guidance in *Talibdeen*, *supra*, 27 Cal.4th 1151. Generally speaking, even dicta from the California Supreme Court is to be followed. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) Moreover, although we agree with *Vega* that one purpose of Health and Safety Code section 11372.5 is to

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[8] Accord *People v. Sierra* (1995) 37 Cal.App.4th 1690; *People v. Martinez* (1998) 65 Cal.App.4th 1511; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1416; *People v. Taylor* (2004) 118 Cal.App.4th 454, 457.

offset the cost of testing drugs confiscated from persons convicted of certain drug offenses, this does not mean the Legislature did not have more than one purpose in enacting Health and Safety Code section 11372.5. A fine and fee system can serve as deterrence, punishment, and help mitigate the effects of crime. These goals are not mutually exclusive. Furthermore, such multiple purposes do not evidence a legislative intent to exempt the lab analysis fee from otherwise mandatory penalty assessments.

Indeed, even *Vega*, *supra*, 130 Cal.App.4th 183 acknowledged that "[a] cogent argument can be made from the language of Health and Safety Code section 11372.5, subdivision (a) [that] the Legislature intended the $50 laboratory 'fee' to be an additional punishment for conviction of one of the enumerated felonies." (*Id.* at p. 194.) This is because the statute refers to the "fee" as a "fine" which may be imposed in increments reflecting the number of offenses committed in addition to any other "penalty" prescribed by law. (*Ibid.*)

Furthermore, as noted above, *Sharret*, *supra*, 191 Cal.App.4th 859 engaged in an exhaustive analysis of the fines and fees which may or must be imposed upon conviction and the cases interpreting them, finding no less than eight reasons for concluding that "the Legislature intended the [Health and Safety Code] section 11372.5 criminal laboratory analysis fee to be punitive." (*Id.* at pp. 869–870.)

We find *Sharret*, *supra*, 191 Cal.App.4th 859 the more persuasive of the two conflicting lines of authority. Both *Vega*, *supra*, 130 Cal.App.4th 183 and *Sharret* attempted to divine the legislative intent behind Health and Safety Code section 11372.5. While *Vega* concluded that the statute's main purpose was to defray the cost of lab testing (*Vega*, at p. 195), *Sharret* found that the statute was intended be a punitive measure. (*Sharret*, at p. 869.)

Both *Vega*, *supra*, 130 Cal.App.4th 183 and *Sharret*, *supra*, 191 Cal.App.4th 859 cited the statute's specific attributes in support of their respective holdings. According to *Vega*, "[t]he legislative description of the charge as a 'laboratory *analysis* fee' strongly supports our conclusion, as does the fact the charge . . . 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*, at p. 195.)

However, the factors s cited by *Sharret*, *supra*, 191 Cal.App.4th 859 in support of its holding—the fee is imposed only on conviction of a criminal offense, it is assessed in proportion to culpability based on the number of offenses, and its imposition is mandatory and does not depend on a defendant's ability to pay—are more compelling. (*Id.* at p. 870.) Contrary to *Vega*'s description, the fee is not flat. Although it is tied to the number of offenses committed by a defendant, rather than the seriousness of each crime, it is still imposed in proportion to culpability. Furthermore,

although *Vega*, *supra*, 130 Cal.App.4th 183 cites the fund into which the proceeds must be deposited, the fund has no application in a civil context (*Sharret*, at p. 870), thus supporting the conclusion that the fee constitutes punishment and completing our analysis. (See *Smith v. Doe* (2003) 538 U.S. 84, 92 ["If . . . the intention of the legislature was to impose punishment, that ends the inquiry"].) Accordingly, we deem the lab analysis fee under Health and Safety Code section 11372.5 to be a "punishment" such that the trial court properly imposed penalty assessments against Chavez based on this fee.

DISPOSITION

The judgment shall be modified to reflect 147 days of presentence custody credit and 146 days of conduct credit for a total presentence custody credit of 293 days. The superior court is directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.