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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES MAJORS,

Defendant and Appellant.

D060173

(Super. Ct. No. SCD228982)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Reversed in part, affirmed in part and remanded with directions.

A jury found James Majors guilty of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)) with a prior similar conviction (Health & Saf. Code, § 11370.2, subd. (a)); offering to sell cocaine base (Health & Saf. Code, § 11352, subd. (a)) with a prior similar conviction (Health & Saf. Code, § 11370.2, subd. (a)) and misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)). The jury found true allegations of six prior prison terms (Pen. Code, § 667.5, subd. (b)) and the court found that Majors was the

person who had served the prison terms. The court struck the prison priors and sentenced Majors to nine years in prison: concurrent three-year lower terms for selling cocaine base and offering to sell cocaine base, with a three-year consecutive term for each Health and Safety Code, section 11370.2, subdivision (a) enhancement, and credit for time served for resisting an officer. The court imposed a \$154 criminal justice administration fee (also called a booking fee) (Gov. Code, § 29550.1), a \$570 drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) and a \$190 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) which, the court stated, included a penalty assessment.

Majors appeals, contending that the booking fee and the drug program fee must be vacated because there was no evidence that he had the ability to pay those fees, and that the criminal laboratory analysis fee must be reduced to \$150 because, he maintains, the \$190 that the court ordered exceeds the statutorily specified amount.

Respondent has filed a letter brief stating that it "does not have the resources to respond in a full brief to such de minimus claims" Respondent argues that the appeal should be dismissed "with the suggestion that appellant return to the trial court to seek redress of his grievances concerning his ability to pay and claimed excessive lab

[analysis] fee."¹ Respondent notes that Majors did not object in the trial court to the fees imposed, but does not argue that he has forfeited the right to challenge the fees on appeal.

We construe respondent's failure to address the merits as an implied concession that the booking fee and the drug program fee were improperly imposed on the ground that there was no evidence that Majors had the ability to pay those fees. We reverse the booking fee and drug program fee and remand for the trial court to determine whether Majors has the ability to pay those fees.² (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400; Health & Saf. Code, § 11372.7, subd. (b).)

With respect to the laboratory analysis fee, Health and Safety Code, section 11372.5, subdivision (a) requires that the trial court impose a \$50 criminal

¹ In support of its request that the appeal be dismissed, respondent cites *People v. Knightbent* (2010) 186 Cal.App.4th 1105 and *People v. Fares* (1993) 16 Cal.App.4th 954. In *Knightbent*, *supra*, 186 Cal.App.4th 1105, the appellant contended that a \$34 fee should be reduced to \$10. (*Id.* at pp. 1107-1108.) The reviewing court concluded that the correct fee was \$66 and modified the judgment accordingly (*id.* at p. 1108). In its opinion, the court noted that the appeal had required "the services of an appointed counsel and a deputy attorney general, together with three justices and staff of this court" (*id.* at p. 1107). In *People v. Fares*, *supra*, 16 Cal.App.4th 954, the defendant appealed the sentencing court's failure to award conduct credits. (*Id.* at p. 956.) A panel of this court expressed dismay "that this attempt at a minor correction of a sentence error has required the formal appellate process" (*id.* at p. 957), remanded the case for a determination of credits (*id.* at p. 960) and stated that in the future, an issue concerning the calculation of credits should be addressed first in the trial court via a motion for correction (*id.* at pp. 958-960). While we encourage counsel to make every attempt to correct such errors in the trial court, to avoid the time and expense of an appeal, we reject respondent's argument that the appeal should be dismissed. Such "de minimus" errors are in fact appealable.

² According to the probation report, Majors stated that he had collected unemployment payments for a period of one year four months. After those payments stopped, he became homeless and had been homeless for the six months preceding his arrest in this case.

laboratory analysis fee "for each separate offense" under certain Health and Safety Code sections. While the minute order does not reflect the imposition of a penalty assessment, the court stated that it was imposing a criminal laboratory analysis fee "in the amount of \$190, including penalty assessment." "The oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment." (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) The penalty assessment is \$28 for every \$10 of the \$50 fee, or \$140. (Gov. Code, §§ 76000, 76104.6, 76104.7, 76000.5 & 70372; Pen. Code, § 1464.) Thus, the \$190 the court imposed is the correct amount for one "separate offense."

DISPOSITION

The \$154 criminal justice administration fee (Gov. Code, § 29550.1) and the \$570 drug program fee (Health & Saf. Code, § 11372.7, subd. (a)) are reversed. The case is remanded to the superior court with directions to determine whether Majors has the ability to pay those fees. In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.