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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff and respondent,

v.

KIMBERLY D. MAXWELL,

Defendant and appellant.

D069837

(Super. Ct. No. SCD264635)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed as modified.

Steven John Carroll, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, for Plaintiff and Respondent.

The People charged defendant and appellant Kimberly D. Maxwell with one count of unlawfully taking and driving a vehicle in violation of Vehicle Code section 10851, subdivision (a), and alleged she suffered four prior convictions for vehicle theft within the meaning of Penal Code section 666.5, subdivision (a), three of which also constituted

probation denial prior convictions within the meaning of Penal Code section 1203, subdivision (e)(4). Maxwell pleaded guilty to the count 1 offense, and admitted the allegation that she suffered a 2010 prior conviction of vehicle theft in case No. SCD230024 pursuant to Penal Code section 666.5, subdivision (a). Maxwell appeals under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). Having asked for and considered the parties' supplemental briefing on the fees, fines and assessments imposed by the trial court, we modify the judgment as set forth below, and affirm it as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

San Diego Superior Court Judge Michael Groch took Maxwell's guilty plea. In pleading guilty to count 1, Maxwell stipulated to a four-year prison sentence with two years to be served in local custody and two years in mandatory supervision. She responded affirmatively to the court's questions whether she had read the change of plea form entirely and understood it and had discussed her case and all consequences of pleading guilty with her counsel. She agreed her counsel had answered all of her questions and she was satisfied with her counsel's representation. Maxwell stated she understood she was giving up each of her constitutional rights to a speedy and public jury trial, to confront and cross-examine witnesses, to remain silent, and to present evidence on her own behalf. The court advised Maxwell that the maximum consequence of her guilty plea was four years of custody, a \$10,000 fine, and three years of parole or post-release community supervision, and further advised her of the possible deportation

consequences if she were not a United States citizen. Maxwell stated she understood those consequences.

Maxwell admitted the prior conviction allegation as follows:

"The court: . . . [¶] Are you pleading guilty and admitting [the allegations of the prior conviction] because on the date in question you unlawfully drove a motor vehicle without the consent of the owner with the intent to permanently deprive the owner of their vehicle after having been convicted for the same offense in the past; is that true?

"[Maxwell]: It's a little exaggerated. But, yes. I didn't have thoughts of she couldn't get her car back because I didn't know it belonged to her. I guess I did drive it without permission of the right owner.

"The court: All right. And because you didn't know who it belonged to, you had no way of getting it back to them, correct?

"[Maxwell]: Correct.

"The court: So when you took it, you figured they would not get their car back, at least not while you were using it?

"[Maxwell]: Okay.

"The court: Is that right?

"[Maxwell]: I'll settle with that. I didn't think that far in.

"The court: Are the People satisfied with the factual basis?

"[Prosecutor]: May we ask, during the taking, did it, at the very least, deprive the owner of it temporarily of the use of that vehicle?

"[Maxwell]: I'll settle with that."

Defense counsel concurred in the entirety of the guilty plea, and the court found it was knowingly, voluntarily and intelligently made by Maxwell.

Maxwell's sentencing hearing took place before San Diego Superior Court Judge Daniel F. Link. There, an unreported sidebar conference occurred, after which Maxwell's counsel orally moved to withdraw Maxwell's guilty plea based on what her counsel characterized as "important and sensitive information that was not brought up to me . . . during negotiations and at the time of the plea." According to counsel, Maxwell was embarrassed by the information. Defense counsel advised the court that she had not had the opportunity to fully investigate the matter, but based on what Maxwell told her, there was a possible defense in the case that she had not explored or presented to the district attorney. Counsel stated that she believed medical records she was trying to obtain would clarify the situation. The court confirmed that Maxwell was not contending that her counsel was ineffective. The People responded by pointing out that Maxwell had not told the probation officer that during the incident she was under any emergency, rather, she stated that she found the car and it was a "blessing from god" so she could drive herself to get food. The People stated that had Maxwell felt there was an emergency, she would have told the police at that moment that she needed to get to the hospital, not that she needed to get food.

Pointing out that Maxwell's story as related by her counsel at sidebar and Maxwell's story to probation were "incredibly different," the court denied the motion. It sentenced Maxwell to the stipulated upper four-year term in county jail with 96 days of credit for time served and commitment to the custody of the sheriff for two years, after

which the sentence would be suspended and the concluding two-year portion served in the community with mandatory supervision. It ordered the following fees, fines and assessments: (1) a local crime prevention programs fine of \$39 (Pen. Code, § 1202.5); (2) a drug program fee of \$615 (Health & Saf. Code, § 11372.7, subd. (a)); (3) a criminal laboratory analysis fee of \$205 (Health & Saf. Code, § 11372.5, subd. (a)); (4) a court operations assessment of \$40 (Pen. Code, § 1465.8); (5) a criminal justice administrative booking fee of \$154 (Gov. Code, § 29550.1); (6) a criminal conviction assessment of \$30 (Gov. Code, § 70373); (7) a restitution fine of \$1200 (Pen. Code, § 1202.4, subd. (b)); and (8) a probation revocation restitution fine of \$1200 (Pen. Code, § 1202.45), suspended unless probation is revoked. The trial court did not mention these fees, fines and assessments on the record, but they are reflected in the probation report and the abstract of judgment.

## DISCUSSION

Maxwell's appellate counsel states he is unable to identify any reasonably arguable issues for appeal and has asked this court to review the record for error. (*Wende, supra*, 25 Cal.3d 436.) We offered Maxwell the opportunity to personally file her own brief on appeal but she did not respond.

Thereafter, we asked Maxwell's counsel and the People to submit supplemental briefs on the trial court's authority to impose the fees, fines and assessments reflected in the abstract of judgment, including the \$205 criminal laboratory analysis fee under Health and Safety Code section 11372.5, subdivision (a), and the \$615 drug program fee under Health and Safety Code section 11372.7, subdivision (a). They have done so, and

the People concede the trial court was not authorized to impose these fees, as well as the \$39 fine under Penal Code section 1202.5, and that this court should strike the fees and the fine. We accept the People's concession.

"[A] criminal laboratory analysis fee is imposed only upon conviction of a criminal offense involving the manufacture, cultivation, possession, use, transportation or sale of a controlled substance." (*People v. Sharret* (2011) 191 Cal.App.4th 859, 870; see also *People v. Moore* (2015) 236 Cal.App.4th Supp. 10, 15 ["[Health and Safety Code s]ections 11372.5 and 11372.7 each require the court to impose specified fees on defendants convicted of certain specified drug offenses].)<sup>1</sup> Additionally, with specified exceptions, Health and Safety Code section 11372.7, subdivision (a) requires defendants convicted of offenses listed in chapter 6 of division 10 of the Health and Safety Code to pay a drug program fee. Maxwell did not sustain any such convictions in this case.

Penal Code section 1202.5 is a local crime prevention programs fine. (See *People v. Jefferson* (2016) 248 Cal.App.4th 660, 663.) Subdivision (a) of Penal Code section 1202.5 provides in part: "In any case in which a defendant is convicted of any of the offenses enumerated in [Penal Code s]ection 211, 215, 459, 470, 484, 487, subdivision (a) of [Penal Code s]ection 487a, or [Penal Code s]ection 488, or 594, the court shall

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<sup>1</sup> We observe courts are split as to whether the criminal laboratory fee, which is \$50 "for each separate offense" (Health & Saf. Code, § 11372.5, subd. (a)) is subject to penalty assessments. (See *People v. Watts* (2016) 1 Cal.App.5th 223, 231 [fee is not a fine, penalty or forfeiture subject to penalty assessments, discussing contrary authorities]; *People v. Moore, supra*, 236 Cal.App.4th Supp. at pp. 15-19 & fn. 4 [same]; compare *People v. Sharret, supra*, 191 Cal.App.4th at pp. 863-864 [crime lab fee is subject to penalty assessments].) As any such fee is unauthorized in this case, we need not address the issue.

order the defendant to pay a fine of ten dollars (\$10) in addition to any other penalty or fine imposed." Vehicle theft is not among the enumerated offenses for which a local crime prevention programs fine may be imposed. Thus, as the People concede, no such fine may be imposed in this case.

This court is empowered to correct an unauthorized sentence whenever a potential error appears. (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13 [unauthorized sentence can be corrected by appellate court "at any time"]; see also *People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence is "reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court' "].) Accordingly, we modify the judgment to strike the laboratory analysis fee, the drug program fee, and the local crime prevention programs fine.

We have otherwise reviewed the entire record consistent with the mandate of *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738. We have not identified any other reasonably arguable issues for reversal on appeal. Maxwell has been represented by competent counsel on this appeal.

## DISPOSITION

The judgment is modified to strike the criminal laboratory analysis fee of \$205, the drug program fee of \$615, and the local crime prevention programs fine of \$39. As so modified, the judgment is affirmed. The clerk of the superior court is directed to correct the minutes and specific conditions of mandatory supervision to delete these fees and the fine, amend the abstract of judgment, and forward a certified copy of the amended abstract to the San Diego County jail. (See *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423-1424.)

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.