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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS DAVID MARTINEZ,

Defendant and Appellant.

H037011

(Monterey County

Super. Ct. No. SS100471)

In a negotiated disposition following the denial of his suppression motion, defendant Jesus David Martinez pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted a gang enhancement allegation (Pen. Code, § 186.22, subd. (b)(1)).<sup>1</sup> He was sentenced to 40 months in prison.

On appeal, defendant contends that (1) the trial court prejudicially erred in denying his suppression motion (§ 1538.5); (2) to the extent that motion was inadequate, his trial counsel was prejudicially deficient in failing to move to suppress “a cell phone found on [defendant’s] person, text messages found on the phone, additional drugs found in the car driven by [his codefendant], and statements made by [him and his codefendant]”; (3) the trial court’s failure to apply the October 1, 2011 version of

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise noted.

section 4019 retroactively violated his right to equal protection; (4) the trial court erred “in imposing a \$200 fee” under Health and Safety Code section 11372.5, subdivision (a); and (5) the abstract of judgment must be corrected to reflect a \$600 restitution fine. We reject defendant’s first three claims but conclude that the last two have merit. We modify and affirm the judgment.

### **I. Background<sup>2</sup>**

Assigned to the Monterey County Joint Gang Task Force, California Highway Patrol Officer Ted Rocha and Monterey County Sheriff’s Deputy Jesse Pinon were on patrol in a marked police vehicle on January 10, 2010. They were traveling south on North Main Street in Salinas at about 9:54 p.m. when they noticed a man who had stepped off the curb and “looked like he was going to try to run across the street” to a mini-mart on the other side. North Main Street is a “[f]our-lane highway,” and Rocha believed the man was in danger of being hit “[i]f he was to continue in that path.” When the man “looked up” and saw the officers, “he kind of stopped, went back to the curb. And that’s when we decided to contact him.” “It was a -- basically a pedestrian check when he was about to cross the street.”

Pinon, who was driving, made a U-turn. Rocha had been riding with his passenger-side window down, and as the patrol car pulled up near where the man was standing, Rocha informed him from the car that there was a crosswalk on North Main “that lights up because pedestrians tend to get hit over there.” “Use the crosswalk over there,” Rocha told the man, pointing to it.

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<sup>2</sup> We take the facts from the transcript of the preliminary examination and from the probation report, which includes facts about codefendant Jessica Abbott that were not presented at the hearing on the suppression motion or at any other time in the trial court. Abbott pleaded no contest to sale and/or transportation of a controlled substance. She was placed on three years’ felony probation.

“At that point, [defendant] started to turn. But at the same time, [Pinon] asked him if he was [on] probation and/or parole.” The man said he was on parole, and he provided his name and date of birth. The man was defendant.

Defendant “also stated that he had full gang terms with search and seizure.” At that point, Rocha got out of the patrol car and asked him “if he had any identification, I.D., on him.” Rocha also asked “if he had any illegal contraband on his person.” Defendant said he did not, and Rocha said he was going to search him. “‘Go ahead,’” defendant replied. “At that point, [Rocha] was relying on defendant’s statement” that he had a search and seizure condition. “But at the same time, [Pinon] was running him through Salinas records.” Pinon confirmed that defendant “had the full gang terms and search and seizure.”

Rocha asked defendant if he could search him, and defendant said, “‘Yes.’” In a pocket of defendant’s pants, Rocha found two baggies, each containing 0.3 grams of what “looked like” and subsequently tested presumptively positive for methamphetamine.

Defendant told Pinon he was waiting for a woman “[p]arked directly across the street, at the mini[-]mart.” The woman was Abbott. Pinon approached Abbott’s car and saw she was “holding a jewelry Baggie in her hand.” When Abbott saw Pinon, she “spilled it over . . . onto the floorboard.” “She said it was meth.”

Abbott told Pinon “she had more bindles of meth, or Baggies of meth, in her purse.” He searched it, finding \$152 in cash and “[t]hree additional jewelry Baggies of methamphetamine” weighing 0.7, 1.1, and 1.3 grams. Abbott said she was “holding them for [defendant].” “[S]he stated she just holds it for him. She doesn’t sell drugs[;] she just holds it for him.”

Pinon viewed a cell phone found in defendant’s possession and found an incoming text that said, “‘front me, and I’ll give you the cash tomorrow.’” There were other drug-related texts on the phone. Based on his training and experience, Pinon opined that the

methamphetamine seized from defendant and Abbott was held for sale. Defendant and Abbott were arrested.

Defendant moved to suppress evidence of “[his] cellular telephone, suspected methamphetamine taken from [his] pocket, [his] reactions to police conduct during the unlawful seizure, statements by [him] made during the seizure, and any scientific, forensic, or testimonial conclusions drawn about these items, as well as any other items deemed to have been seized in violation of the United States Constitution.” He was just “standing on a public sidewalk,” his motion asserted, “whereupon he was grabbed by two members of the local gendarme, grilled, and searched” without a warrant.

After evidence was presented at the hearing on the suppression motion, defendant’s trial counsel identified the dispositive issue—“to determine if there was a detention prior to asking [defendant] the question about whether he’s on probation or parole.” Defendant had “obviously” been “target[ed]” by the officers and unreasonably detained, his counsel contended. The district attorney argued that the encounter was “a consensual contact.”

The trial court denied the suppression motion. “The Court feels that the officer’s behavior is reasonable. At least one purpose was to admonish [defendant] about crossing the street in a safe manner. And the detention, if any, was virtually momentary. [¶] Given the particular assignment of these officers, the location, the inquiry about whether the Defendant was on probation or parole would be a reasonable one in the Court’s opinion. [¶] So the Court denies the motion.”

Defendant entered the plea and admission noted above. He did so in exchange for a 40-month prison sentence, consecutive to the sentence he was currently serving in a different case and dismissal of the remaining charges and allegations.

The trial court imposed the agreed-upon 40-month prison term. It awarded 304 days of custody credit and 152 days of conduct credit, for a total of 456 days. Defendant filed a timely notice of appeal.

## II. Discussion

### A. Motion to Suppress

Defendant claims the trial court erred in denying his suppression motion. He contends he was illegally detained without reasonable suspicion, in violation of the Fourth Amendment. We disagree.

“Whether a seizure occurred within the meaning of the Fourth Amendment is a mixed question of law and fact qualifying for independent review. [Citations.] Accordingly, ‘we review the trial court’s findings of historical fact under the deferential substantial evidence standard, but decide the ultimate constitutional question independently. [Citations.]’ [Citation.] We must accept factual inferences in favor of the trial court’s ruling. [Citation.] If there is conflicting testimony, we must accept the trial court’s resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them. [Citations.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 342 (*Zamudio*).

“For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police ‘contacts’ or ‘interactions’ with individuals, ranging from the least to the most intrusive. First, there are . . . ‘consensual encounters’ [citation], which are those police-individual interactions which result in no restraint of an individual’s liberty whatsoever—i.e., no ‘seizure,’ however minimal—and which may properly be initiated by police officers even if they lack any ‘objective justification.’ [Citation.] Second, there are . . . ‘detentions,’ seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police ‘if there is an articulable suspicion that a person has committed or is about to commit a crime.’ [Citation.] Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, . . . which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.” (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784 (*Wilson*).

Consensual encounters do not trigger Fourth Amendment scrutiny. (*Florida v. Bostick* (1991) 501 U.S. 429, 434 (*Bostick* ).) Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. (*Wilson, supra*, 34 Cal.3d at p. 784.) The United States Supreme Court has made it “clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” (*Bostick*, at p. 434.) So long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. (*Ibid.*) Only when the officer, by means of physical force or show of authority, has in some manner restrained an individual’s liberty does a seizure occur. (*Ibid.*; *Wilson*, at pp. 789-790.)

“‘[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.’ [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer’s display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled. [Citations.] The officer’s uncommunicated state of mind and the individual citizen’s subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

Here, there is nothing in the record that suggests the officers “‘by means of physical force or show of authority, . . . in some way restrained [defendant’s] liberty . . . .’” (*Bostick, supra*, 501 U.S. at p. 434; *Wilson, supra*, 34 Cal.3d at pp. 789-

790.) There is no evidence that they activated the patrol car's siren or flashing lights when they saw defendant step off the curb into the highway. They simply made a legal U-turn, pulled up near where defendant was standing, and stopped about five feet away without blocking his path. "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 940; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1494 [no detention where officer "activated the high beams as well as the spotlights on both sides of the patrol car" and parked it "head on with [the] defendant's vehicle, although he left plenty of room for [the] defendant to drive away."].)

The officers did not shine the vehicle's spotlight on defendant, even though "some giant trees that kind of shadow everything" made the area "really dark." Defendant was not even "in the path of the headlights," because "[h]e had stepped back onto the sidewalk." We find no evidence that the officers commanded (or even asked) defendant to stop or to talk to them. There was nothing intimidating or coercive about their approach.

Nor was there anything intimidating or coercive about their verbal exchange with defendant. We do not view the presence of two officers as significant, because both remained in the car until after defendant admitted he was on parole. Rocha pointed through his rolled-down passenger-side window at a nearby crosswalk and warned defendant "that a lot of people get hit on the road." The fact that Pinon then asked if defendant was on probation or parole did not transform what was plainly a consensual encounter into a detention. (*Bostick, supra*, 501 U.S. at p. 434; *People v. Bennett* (1998) 68 Cal.App.4th 396, 399, 403 [holding that officer who asked the defendant if he could talk to him and if he was still on parole "was free to approach [the defendant on the street] and to pose each of the questions he asked."].)

Under all of the circumstances, a reasonable person would have believed that he was "free 'to disregard the police and go about his business.'" (*Bostick, supra*, 501 U.S.

at p. 434; *Wilson, supra*, 34 Cal.3d at pp. 789-790.) As the officers' initial encounter with defendant was consensual, their discovery that he was on parole and the subsequent search of his person were not products of an illegal detention. (See § 3067, subd. (a) [parolees are subject to search or seizure by a parole agent or peace officer "at any time of the day or night, with or without a search warrant and with or without cause"]; *Samson v. California* (2006) 547 U.S. 843, 846, 857 [upholding the constitutionality of § 3067].) Defendant was not "seized," and his Fourth Amendment rights were not violated.

The cases on which defendant relies do not convince us otherwise. In *People v. Jones* (1991) 228 Cal.App.3d 519, an officer who saw the defendant standing on the sidewalk with two other men "suddenly" pulled his patrol car "to the wrong side of the road," parked it "diagonally against the traffic," got out, and told the defendant, who was walking away, to stop. (*Id.* at pp. 522-523.) When the defendant reached towards a pocket, the officer "'grabbed his left forearm.'" (*Id.* at p. 522.) As the officer "withdrew [the defendant's] hand from the pocket," he saw a clear plastic bag containing what he suspected was cocaine. (*Ibid.*) He asked the defendant what it was, and when the defendant said he thought it was methamphetamine, the officer arrested him. (*Ibid.*) The trial court granted the defendant's suppression motion. Affirming, the Court of Appeal held that the defendant "[c]learly" was detained, because "[a] reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic." (*Jones*, at p. 523.)

*Jones* is inapposite. Here, unlike in *Jones*, the officers did not park "against the traffic" on the "wrong" side of the road. Unlike in *Jones*, they did not get out of the car, nor did they order defendant to stop. They did not "grab" or even touch him. Defendant's reliance on *Jones* is misplaced.

Defendant's reliance on *People v. Garry* (2007) 156 Cal.App.4th 1100 (*Garry*) is also misplaced. In that case, a uniformed officer driving a marked police vehicle saw Garry standing on a corner next to a parked car late at night. The officer focused his

spotlight on Garry, immediately got out of his car, and “all but ran directly at” him. (*Id.* at pp. 1103-1104, 1112.) Looking nervous, Garry started walking backwards, pointed to a nearby house, and said, ““I live right there.”” (*Id.* at p. 1104.) The officer continued to approach, telling Garry, ““Okay, I just want to confirm that’” and asking if he was on probation or parole. When Garry said he was on parole, the officer detained him and found narcotics on his person. (*Ibid.*)

The trial court denied Garry’s suppression motion, finding there was no detention until after he disclosed he was on parole. (*Garry, supra*, 156 Cal.App.4th at p. 1105.)

The Court of Appeal reversed. (*Garry, supra*, 156 Cal.App.4th at pp. 1106-1107.) Emphasizing the importance of the officer’s “words and verbal tones,” how he “physically approached” Garry, and whether his use of the spotlight constituted a “show of authority,” the court concluded that a reasonable person would not have felt free to leave. (*Id.* at pp. 1110-1112.) “No matter how politely [the officer] may have stated his probation/parole question, any reasonable person who found himself in defendant’s circumstances, suddenly illuminated by a police spotlight with a uniformed, armed officer rushing directly at him asking about his legal status, would believe [himself] to be ‘under compulsion of a direct command by the officer.’ [Citation.] [The officer’s] actions set an unmistakable ‘tone,’ albeit largely through nonverbal means, ‘indicating that compliance with the officer’s request might be compelled.’” (*Id.* at p. 1112.)

*Garry* is distinguishable. Unlike in *Garry*, defendant was not simply standing on the sidewalk; he had stepped off into the road and looked like he was about to “run across” a four-lane highway when the officers decided to approach him. The officers here, unlike the officer in *Garry*, never turned on the patrol car’s spotlight. They did not even keep defendant in their headlights, although he was briefly illuminated by them as the car made the U-turn. The officers here, unlike the officer in *Garry*, did not “all but r[un] directly at” defendant; instead, they remained in the car until *after* he said he was on parole. (*Garry, supra*, 156 Cal.App.4th at p. 1112.) They did not begin by questioning

defendant about his legal status; although defendant suggests otherwise, Pinon himself testified that Rocha told defendant to use the crosswalk before Pinon asked him about his legal status.<sup>3</sup> Here, unlike in *Garry*, there was nothing intimidating about the officers' approach, and that greatly reduced the impact of Pinon's subsequent question about defendant's legal status. We think a reasonable person would have believed he was free to terminate the encounter and walk away. Defendant's reliance on *Garry* is misplaced.

### **B. Ineffective Assistance of Counsel**

Defendant argues in the alternative that if his suppression motion was not "adequate to entitle him to suppression of all the fruits of the illegal search," then "he was denied the effective assistance of counsel, where counsel failed to move for the suppression of a cell phone found on [defendant's] person, text messages found on the phone, additional drugs found in the car driven by Jessica Abbot[t], and statements made by [defendant] and Abbott." The argument lacks merit.

A defendant seeking reversal for ineffective assistance of counsel must prove both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). The first element "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland*, at p. 687.) "Second, the defendant must show that the deficient performance prejudiced the defense." (*Ibid.*) A court deciding an ineffective assistance claim does not need to

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<sup>3</sup> Although defendant does not dispute this testimony, he argues in his reply brief that there was also testimony that Rocha and Pinon addressed defendant "[j]ust kind of simultaneously," and he urges us to accept that version of events. It is not our task to judge witness credibility, to weigh or resolve conflicts in the testimony, or to draw factual conclusions. Instead, "we must accept the trial court's resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them," as it does here. (*Zamudio, supra*, 43 Cal. 4th at p. 342.)

address the elements in order, or even to address both elements if the defendant makes an insufficient showing on one. (*Id.* at p. 697.)

Defendant cannot show deficient performance here. As we have already determined, his encounter with the police was consensual until *after* he acknowledged he was on parole. Since he was never illegally detained, there was no basis for a suppression motion. The failure to make a meritless claim is not deficient performance. (*Strickland, supra*, 466 U.S. at p. 676.)

### **C. Section 4019**

#### **1. Background**

Defendant spent 304 days in the Monterey County jail between his arrest on January 11, 2010, and his November 10, 2010, release on bail.<sup>4</sup> The 1982 version of section 4019 was in effect during the first 14 days of his presentence incarceration. (Former § 4019; Stats. 1982, ch. 1234, § 7.) The January 25, 2010 version was in effect during the remaining 290 days. (Former § 4019; Stats. 2009, 3d Ex. Sess., 2009-2010, ch. 28, § 50, eff. Jan. 25, 2010.) As applied to defendant, however, both required the same calculation.

Under the 1982 version of section 4019, prisoners who complied with reasonable rules and regulations and did not refuse to satisfactorily perform labor as assigned could earn six days' credit for every four days actually served. (Former § 4019, subds. (b), (c), (f).) The January 25, 2010 version of the statute increased this amount to four days'

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<sup>4</sup> On December 14, 2010, he was arrested in Auburn, California, and he was subsequently convicted of concealing stolen property (§ 496, subd. (a)). On December 17, 2010, he was sentenced in the Auburn case to 16 months in prison. On February 16, 2011, he "was transported to Monterey County on a detainer to address the instant offense." He spent an additional 91 days in the Monterey County jail before he was sentenced in this case on May 18, 2011. "As such," the probation report explains, "[he] would not receive the ninety-one (91) actual days credit [*sic*] for the instant offense." Defendant does not claim entitlement to credit for these 91 days.

credit for every two days served. (Former § 4019, subs. (b)(1), (c)(1), (f).) This version's more generous credit calculation did not apply, however, to prisoners required to register as sex offenders, committed for a "serious felony" (§ 1192.7), or with a prior conviction for a "serious" or "violent" felony (§§ 1192.7, 667.5). (Former § 4019, subs. (b)(2), (c)(2).) Those prisoners' credit was calculated at the former rate. (Former § 4019, subd. (f); Stats. 2009, 3d Ex. Sess., 2009-2010, ch. 28, § 50.) Since defendant was convicted of a "serious" felony, he was not eligible for four-for-two credit under the January 25, 2010 version of section 4019. (Former § 1192.7, subd. (c)(28); *People v. Briceno* (2004) 34 Cal.4th 451, 459.) Accordingly, the probation department calculated and the court awarded six-for-four credit—304 days of custody credit and 152 days of conduct credit, for a total of 456 days. (See *People v. Williams* (2000) 79 Cal.App.4th 1157, 1176, fn. 14 [describing calculation].)

The conduct credit statutes were amended several more times after defendant was sentenced in this case. In September 2010, the Legislature enacted Senate Bill No. 76, which amended section 2933 to provide that "[n]otwithstanding section 4019 and subject to the limitations of this subdivision, a prisoner sentenced to the state prison . . . for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served . . . from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner." (Former § 2933, subd. (e)(1); Stats. 2010, ch. 426, § 1.) Section 4019's exception for prisoners required to register as sex offenders, committed for a "serious" felony, or with a conviction for a "serious" or "violent" felony was moved to section 2933, which also provided that former section 4019, not section 2933, applied to prisoners subject to the exception. (Former § 2933, subd. (e)(3).) The bill amended section 4019 to restore the former six-for-four ratio for prisoners who committed their crimes on or after September 28, 2010. (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010.)

A year later, sections 2933 and 4019 were amended again. (Stats. 2011, 1st Ex. Sess., 2011-2012, ch. 12, §§ 16, 35, eff. Sept. 21, 2011, operative Oct. 1, 2011.) As relevant here, that amendment deleted former section 2933, subdivision (e)'s exception for prisoners required to register as sex offenders, committed for a "serious" felony, or with a conviction for a "serious" or "violent" felony. (See Historical and Statutory Notes to section 2933.) It also deleted the reference to former section 2933, subdivision (e) in section 4019. Under the amended version of section 4019, prisoners who comply with reasonable rules and regulations and do not refuse to satisfactorily perform labor as assigned can earn four days' presentence credit for every two days actually served. (§ 4019, subs. (b), (c), (f).) The amended version of section 4019 expressly provides that it "shall apply prospectively" only, to those prisoners confined for crimes "committed on or after October 1, 2011." (§ 4019, subd. (h).) "Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).)

## 2. Analysis

Defendant claims entitlement to an additional 152 days of conduct credit under the October 1, 2011 version of section 4019. He acknowledges the Legislature's express statement of intent that the statute apply prospectively only, but contends that equal protection principles "compel" retroactive application here. We disagree.

Both the federal and state Constitutions guarantee the right to equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) " "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." [Citation.] ( *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Since the amendments to section 4019 do not involve a " "suspect classification[]" or a " "fundamental interest[]" courts apply the rational basis test to determine whether the "distinction drawn by the challenged statute bears some rational relationship to a

conceivable legitimate state purpose.” (*In re Stinnette* (1979) 94 Cal.App.3d 800, 805 (*Stinnette*)).

Defendant contends that he is similarly situated to a defendant whose crime was committed after October 1, 2011, and whose custody time occurred after October 1, 2011. In *People v. Brown* (2012) 54 Cal.4th 314, the California Supreme Court rejected a similar argument with respect to a previous version of section 4019. The court held that prospective-only application of the new version of the statute did not violate equal protection because the purpose of the statute was to create an incentive for good behavior, which could not be done retroactively. The same is true here. We therefore reject defendant’s contention.

#### **D. Fees**

Defendant contends and the Attorney General concurs that the trial court erred “in imposing a \$200 fee” under Health and Safety Code section 11372.5. (Capitalization omitted.) We do not think the court imposed a \$200 laboratory fee. We agree, however, that the abstract of judgment must be corrected to accurately reflect the fees the court ordered.

According to the transcript of the sentencing hearing, the court ordered defendant to “[p]ay an additional \$200 Health and Safety Code [*sic*] pursuant to 11372.5, *and also pursuant to 11372.7.*” (Italics added.) Health and Safety Code section 11372.5, subdivision (a) authorizes a criminal laboratory analysis fee “in the amount of fifty dollars (\$50) for each separate offense,” while Health and Safety Code section 11372.7, subdivision (a) authorizes a drug program fee “in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense.” (Health & Saf. Code, §§ 11372.5, subd. (a), 11372.7, subd. (a).) Here, where defendant was convicted of a single offense, the two fees total \$200, and it seems clear to us that the trial court intended to impose

both of these fees. The abstract of judgment, however, reflects a \$200 lab fee plus a \$200 drug program fee.

An abstract of judgment that improperly modifies an oral pronouncement presumably does so as a result of clerical error, and clerical errors can be corrected at any time. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 (*Mesa*)). “An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize.” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*)). “Courts may correct clerical errors at any time . . . .” (*Ibid.*) “[A] court—including an appellate court—that properly assumes or retains jurisdiction of a case ‘may correct such errors on its own motion or upon the application of the parties.’” (*Id.* at pp. 186-187, quoting *In re Candelario* (1970) 3 Cal.3d 702, 705.) Here, the abstract of judgment must be amended to reflect a \$50 (not a \$200) laboratory fee pursuant to Health and Safety Code section 11372.5 and a \$150 (not a \$200) drug program fee pursuant to Health and Safety Code section 11372.7.

### **E. Restitution Fine**

Defendant contends and the Attorney General concurs that the abstract of judgment must be corrected to reflect a \$600 rather than an \$800 restitution fine imposed pursuant to former section 1202.4, subdivision (b). We agree.

At sentencing, the court imposed “a fine of \$200 for each year of incarceration pursuant to 1202.4(b) . . . .” Since defendant was sentenced to three years and four months in prison, the abstract of judgment should have reflected a \$600 fine (\$200 x 3 = \$600). Instead, it reflects an \$800 fine. The abstract must be corrected to reflect a \$600 fine pursuant to former section 1202.4, subdivision (b). (*Mesa, supra*, 14 Cal.3d at p. 471; *Mitchell, supra*, 26 Cal.4th at pp. 185-187.)

### III. Disposition

The abstract of judgment is modified to reflect a \$50 (not a \$200) criminal laboratory analysis fee pursuant to Health and Safety Code section 11372.5, subdivision (a) and a \$150 (not a \$200) drug program fee pursuant to Health and Safety Code section 11372.7, subdivision (a).

The abstract of judgment is further modified to reflect a \$600 (not an \$800) restitution fine pursuant to former section 1202.4, subdivision (b).

The trial court shall prepare an amended abstract of judgment reflecting these modifications and forward a certified copy of the abstract to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.\*

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\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.