

RESOLUTION 03-02-04

DIGEST

Drug Treatment Program: Eligibility of Person Arrested for DUI

Amends Penal Code section 1210.1 to permit persons convicted of misdemeanor DUI and non-violent drug offenses to participate in Proposition 36 drug treatment programs.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code section 1210.1 to permit persons concurrently convicted of misdemeanor DUI and non-violent drug offenses to participate in drug treatment programs. This resolution should be disapproved because it improperly assumes that driving under the influence is a simple drug offense.

California courts (see, e.g., *Byrd v. Municipal Court* (1981), 125Cal.App.3d 1054, 1058; *People v. Davalos* (1987) 192 Cal.App.3d Supp 10, 14; *Gilbert v. Municipal Court*(1977) 73 Cal.App.3d 737; *People v. Malvitz* (1992) 11 Cal.App.4th Supp 9, 14) have repeatedly held that driving under the influence involves an offense separate and apart from the simple possession or use of drugs. The California Supreme Court recently ruled in *People v. Canty* (May 27, 2004) 32 Cal.4th 1266 that the misdemeanor of driving a vehicle while under the influence of a controlled substance was "a misdemeanor not related to the use of drugs" within the meaning of section 1210.1, enacted in 2000 as Proposition 36 and also known as The Substance Abuse and Crime Prevention Act (SACPA). See also *People v. Goldberg* (2003) 105 Cal.App.4th 1202, 1210. The crime of driving under the influence of alcohol or a controlled substances is a serious crime which endangers the lives of others, and persons convicted of such an offense should not be eligible for probation and drug treatment diversion.

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TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code section 1210.1 to read as follows:

- 1 § 1210.1
- 2 (a) Notwithstanding any other provision of law, and except as provided in
- 3 subdivision (b), any person convicted of a nonviolent drug possession offense shall receive
- 4 probation. As a condition of probation the court shall require participation in and
- 5 completion of an appropriate drug treatment program. The court may also impose, as a
- 6 condition of probation, participation in vocational training, family counseling, literacy
- 7 training and/or community service. A court may not impose incarceration as an additional

8 condition of probation. Aside from the limitations imposed in this subdivision, the trial
9 court is not otherwise limited in the type of probation conditions it may impose. Probation
10 shall be imposed by suspending the imposition of sentence.

11 In addition to any fine assessed under other provisions of law, the trial judge may
12 require any person convicted of a nonviolent drug possession offense who is reasonably
13 able to do so to contribute to the cost of his or her own placement in a drug treatment program.

14 (b) Subdivision (a) does not apply to either of the following:

15 (1) Any defendant who previously has been convicted of one or more serious or
16 violent felonies in violation of subdivision (c) of Section 667.5 or Section 1192.7, unless
17 the nonviolent drug possession offense occurred after a period of five years in which the
18 defendant remained free of both prison custody and the commission of an offense that
19 results in (A) a felony conviction other than a nonviolent drug possession offense, or (B) a
20 misdemeanor conviction involving physical injury or the threat of physical injury to
21 another person.

22 (2) Any defendant who, in addition to one or more nonviolent drug possession
23 offenses, has been convicted in the same proceeding of a misdemeanor not related to the
24 use of drugs or any felony. A conviction for a violation of Vehicle Sections 23152 (a) or
25 (b) in the same proceeding shall not be deemed automatically ineligible for application of
26 this section.

27 (3) Any defendant who:

28 (A) While using a firearm, unlawfully possesses any amount of (i) a substance
29 containing either cocaine base, cocaine, heroin, methamphetamine, or (ii) a liquid,
30 nonliquid, plant substance, or hand-rolled cigarette, containing phencyclidine.

31 (B) While using a firearm, is unlawfully under the influence of cocaine base,
32 cocaine, heroin, methamphetamine or phencyclidine.

33 (4) Any defendant who refuses drug treatment as a condition of probation.

34 (5) Any defendant who (A) has two separate convictions for nonviolent drug
35 possession offenses, (B) has participated in two separate courses of drug treatment
36 pursuant to subdivision (a), and (C) is found by the court, by clear and convincing
37 evidence, to be unamenable to any and all forms of available drug treatment.

38 Notwithstanding any other provision of law, the trial court shall sentence such defendants
39 to 30 days in jail.

40 (c) Within seven days of an order imposing probation under subdivision (a), the
41 probation department shall notify the drug treatment provider designated to provide drug
42 treatment under subdivision (a). Within 30 days of receiving that notice, the treatment
43 provider shall prepare a treatment plan and forward it to the probation department. On a
44 quarterly basis after the defendant begins the drug treatment program, the treatment
45 provider shall prepare and forward a progress report on the individual probationer to the
46 probation department.

47 (1) If at any point during the course of drug treatment the treatment provider
48 notifies the probation department that the defendant is unamenable to the drug treatment
49 being provided, but may be amenable to other drug treatments or related programs, the
50 probation department may move the court to modify the terms of probation to ensure that
51 the defendant receives the alternative drug treatment or program.

52 (2) If at any point during the course of drug treatment the treatment provider
53 notifies the probation department that the defendant is unamenable to the drug treatment
54 provided and all other forms of drug treatment programs pursuant to subdivision (b) of
55 Section 1210, the probation department may move to revoke probation. At the revocation

56 hearing, if it is proved that the defendant is unamenable to all drug treatment programs
57 pursuant to subdivision (b) of Section 1210, the court may revoke probation.

58 (3) Drug treatment services provided by subdivision (a) as a required condition of
59 probation may not exceed 12 months, provided, however, that additional aftercare services
60 as a condition of probation may be required for up to six months.

61 (d) Dismissal of charges upon successful completion of drug treatment

62 (1) At any time after completion of drug treatment, a defendant may petition the
63 sentencing court for dismissal of the charges. If the court finds that the defendant
64 successfully completed drug treatment, and substantially complied with the conditions of
65 probation, the conviction on which the probation was based shall be set aside and the court
66 shall dismiss the indictment, complaint, or information against the defendant. In addition,
67 except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be
68 deemed never to have occurred. Except as provided in paragraph (2) or (3), the defendant
69 shall thereafter be released from all penalties and disabilities resulting from the offense of
70 which he or she has been convicted.

71 (2) Dismissal of an indictment, complaint, or information pursuant to paragraph (1)
72 does not permit a person to own, possess, or have in his or her custody or control any
73 firearm capable of being concealed upon the person or prevent his or her conviction under
74 Section 12021.

75 (3) Except as provided below, after an indictment, complaint, or information is
76 dismissed pursuant to paragraph (1), the defendant may indicate in response to any
77 question concerning his or her prior criminal record that he or she was not arrested or
78 convicted for the offense. Except as provided below, a record pertaining to an arrest or
79 conviction resulting in successful completion of a drug treatment program under this
80 section may not, without the defendant's consent, be used in any way that could result in
81 the denial of any employment, benefit, license, or certificate.

82 Regardless of his or her successful completion of drug treatment, the arrest and
83 conviction on which the probation was based may be recorded by the Department of
84 Justice and disclosed in response to any peace officer application request or any law
85 enforcement inquiry. Dismissal of an information, complaint, or indictment under this
86 section does not relieve a defendant of the obligation to disclose the arrest and conviction
87 in response to any direct question contained in any questionnaire or application for public
88 office, for a position as a peace officer as defined in Section 830, for licensure by any state
89 or local agency, for contracting with the California State Lottery, or for purposes of
90 serving on a jury.

91 (e) Violation of probation

92 (1) If probation is revoked pursuant to the provisions of this subdivision, the
93 defendant may be incarcerated pursuant to otherwise applicable law without regard to the
94 provisions of this section.

95 (2) Non-drug-related probation violations

96 If a defendant receives probation under subdivision (a), and violates that probation
97 either by being arrested for an offense that is not a nonviolent drug possession offense, or
98 by violating a non-drug-related condition of probation, and the state moves to revoke
99 probation, the court shall conduct a hearing to determine whether probation shall be
100 revoked. The court may modify or revoke probation if the alleged violation is proved.

101 (3) Drug-related probation violations

102 (A) If a defendant receives probation under subdivision (a), and violates that
103 probation either by committing a nonviolent drug possession offense, or a misdemeanor

104 for simple possession or use of drugs or drug paraphernalia, being present where drugs are
105 used, or failure to register as a drug offender, or any activity similar to those listed in
106 paragraph (1) of subdivision (d) of Section 1210, or by violating a drug-related condition
107 of probation, and the state moves to revoke probation, the court shall conduct a hearing to
108 determine whether probation shall be revoked. The trial court shall revoke probation if the
109 alleged probation violation is proved and the state proves by a preponderance of the
110 evidence that the defendant poses a danger to the safety of others. If the court does not
111 revoke probation, it may intensify or alter the drug treatment plan.

112 (B) If a defendant receives probation under subdivision (a), and for the second time
113 violates that probation either by committing a nonviolent drug possession offense, or a
114 misdemeanor for simple possession or use of drugs or drug paraphernalia, being present
115 where drugs are used, or failure to register as a drug offender, or any activity similar to
116 those listed in paragraph (1) of subdivision (d) of Section 1210, or by violating a drug-
117 related condition of probation, and the state moves for a second time to revoke probation,
118 the court shall conduct a hearing to determine whether probation shall be revoked. The
119 trial court shall revoke probation if the alleged probation violation is proved and the state
120 proves by a preponderance of the evidence either that the defendant poses a danger to the
121 safety of others or is unamenable to drug treatment. In determining whether a defendant is
122 unamenable to drug treatment, the court may consider, to the extent relevant, whether the
123 defendant (i) has committed a serious violation of rules at the drug treatment program, (ii)
124 has repeatedly committed violations of program rules that inhibit the defendant's ability to
125 function in the program, or (iii) has continually refused to participate in the program or
126 asked to be removed from the program. If the court does not revoke probation, it may
127 intensify or alter the drug treatment plan.

128 (C) If a defendant receives probation under subdivision (a), and for the third time
129 violates that probation either by committing a nonviolent drug possession offense, or by
130 violating a drug-related condition of probation, and the state moves for a third time to
131 revoke probation, the court shall conduct a hearing to determine whether probation shall be
132 revoked. If the alleged probation violation is proved, the defendant is not eligible for
133 continued probation under subdivision (a).

134 (D) If a defendant on probation at the effective date of this act for a nonviolent
135 drug possession offense violates that probation either by being arrested for a nonviolent
136 drug possession offense, or a misdemeanor for simple possession or use of drugs or drug
137 paraphernalia, being present where drugs are used, or failure to register as a drug offender,
138 or any activity similar to those listed in paragraph (1) of subdivision (d) of Section 1210,
139 or by violating a drug-related condition of probation, and the state moves to revoke
140 probation, the court shall conduct a hearing to determine whether probation shall be
141 revoked. The trial court shall revoke probation if the alleged probation violation is proved
142 and the state proves by a preponderance of the evidence that the defendant poses a danger
143 to the safety of others. If the court does not revoke probation, it may modify probation and
144 impose as an additional condition participation in a drug treatment program.

145 (E) If a defendant on probation at the effective date of this act for a nonviolent drug
146 possession offense violates that probation a second time either by being arrested for a
147 nonviolent drug possession offense, or a misdemeanor for simple possession or use of
148 drugs or drug paraphernalia, being present where drugs are used, or failure to register as a
149 drug offender, or any activity similar to those listed in paragraph (1) of subdivision (d) of
150 Section 1210, or by violating a drug-related condition of probation, and the state moves for
151 a second time to revoke probation, the court shall conduct a hearing to determine whether

152 probation shall be revoked. The trial court shall revoke probation if the alleged probation
153 violation is proved and the state proves by a preponderance of the evidence either that the
154 defendant poses a danger to the safety of others or that the defendant is unamenable to
155 drug treatment. If the court does not revoke probation, it may modify probation and
156 impose as an additional condition participation in a drug treatment program.

157 (F) If a defendant on probation at the effective date of this act for a nonviolent drug
158 offense violates that probation a third time either by being arrested for a nonviolent drug
159 possession offense, or by violating a drug- related condition of probation, and the state
160 moves for a third time to revoke probation, the court shall conduct a hearing to determine
161 whether probation shall be revoked. If the alleged probation violation is proved, the
162 defendant is not eligible for continued probation under subdivision (a).

163 (f) The term "drug-related condition of probation" shall include a probationer's
164 specific drug treatment regimen, employment, vocational training, educational programs,
165 psychological counseling, and family counseling.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Penal Code Section 1210.1 currently makes persons charged with nonviolent drug offenses automatically ineligible for Proposition 36 drug treatment programs when they are also convicted of misdemeanor driving under the influence offenses.

This Resolution: Would allow for persons charged with nonviolent drug offenses to not be automatically ineligible for the Proposition 36 drug treatment programs when they are also convicted of a misdemeanor driving under the influence offense.

The Problem: In November of 2000, the voters approved proposition 36. This was an overwhelming statement by the citizens of this state that want nonviolent drug offenders to have an opportunity to attend drug programs and receive help for their addictions. Currently courts have interpreted Penal Code section 1210.1, subdivision (b)(2), to preclude persons arrested for a nonviolent drug offense to be ineligible for the programs offered under this statute when they are also driving while under the influence of drugs or alcohol. This interpretation fails to address the realities that exist in metropolitan areas of this state; unfortunately drug addicts sometimes get behind the wheel of a car and drive.

This resolution seeks to recognize the will of a majority of the people in this state that want drug addicts to get treatment and return to society as productive people. Nothing in this resolution precludes a court from requiring a defendant to plead guilty to a driving under the influence charge and receiving the appropriate penalty. However, if that person has a small amount of drugs on his person and is an addict, the benefits and programs should be an option that a court should not only be allowed to consider, they should be encouraged to consider it. If a person is involved in an accident or acts in a way that a determination of not suitable for the program, the court still has that discretion. These cases should be determined on their individual merits

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SANTA CLARA COUNTY BAR ASSOCIATION

We share the proponent's desire to encourage the application of Proposition 36 in appropriate cases. However, there is difference between merely possessing and using controlled substances and driving under the influence. The former generally only affects the individual user while the latter can inflict great bodily injury or death on others. For this reason, we oppose this resolution.