

RESOLUTION 03-17-2007

DIGEST

Misdemeanor Diversion: Statewide Application

Amends Penal Code section 1001.2 to provide for a statewide right to pretrial diversion in appropriate cases.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 03-03-2004, which was approved.

Reasons:

This resolution amends Penal Code section 1001.2 to provide for a statewide right to pretrial diversion in appropriate cases. This resolution should be approved in principle because it provides for more uniform treatment of low level offenders, while maintaining the court and prosecution's ability to screen individual applicants for diversion.

Chapter 2.7 of the Penal Code, entitled "Misdemeanor Diversion," defines pretrial diversion as the procedure of postponing prosecution of a misdemeanor offense at any point from charge to adjudication (Pen. Code, § 1001.1). No criteria for acceptability into a diversion program are set forth in Chapter 2.7. Chapter 2.9 specifies eligibility criteria for misdemeanor diversion. (Pen. Code, § 1001.51.) Chapter 2.9 provides that it shall become operative in a county only if the board of supervisors of that county adopts the chapter by ordinance.

Both chapters provide for diversion from the criminal process before trial; supervised participation in rehabilitative programs; and, upon successful completion of such programs, expungement of the entire criminal record, allowing the defendant to represent later that he or she was never arrested or diverted for the charged offense. (Pen. Code, §§ 1001.9, 1001.55.) Both require approval of the district attorney for any diversion program. (Pen. Code, § 1001.2, subd. (b); 1001.50, subd. (b).) Neither chapter 2.7 nor chapter 2.9 contains any language granting a defendant an express right to be diverted.

This leads to substantially different outcomes in different counties. For example, in San Francisco County, almost all first offense misdemeanants are presumptively diversion eligible. In neighboring counties to the South, neither San Mateo nor Santa Clara Counties have diversion programs, although San Mateo County had, until recently, a specific diversion program for non-violent offenses committed by the mentally ill where the activity can be attributed to that illness and ongoing treatment would render such lawlessness unlikely to be repeated.

While the courts have ruled that this does not violate equal protection or the separation of powers (*Davis v. Municipal Court* (1988) 46 Cal.3d 64), sound policy requires the equal and consistent application of diversion throughout the state. This resolution would accomplish that goal by

eliminating the district attorney's ability to disapprove of diversion programs in his or her county, which is the present impediment to statewide implementation.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Association recommends that legislation be sponsored to amend Penal Code Section 1001.2 to read as follows:

- 1 §1001.2
2 (a) This chapter shall not apply to any pretrial diversion or post trial programs for the
3 treatment of problem drinking or alcoholism utilized for persons convicted of one or more
4 offenses under Section 23152 or 23153 or former Section 23102 of the Vehicle Code or to
5 pretrial diversion programs established pursuant to Chapter 2.5 (commencing with Section
6 1000) of this title nor shall this chapter be deemed to authorize any pretrial diversion or post
7 trial programs for persons alleged to have committed violation of Section 23152 or 23153 of
8 the Vehicle Code.
9 ~~(b) The district attorney of each county shall review annually any diversion program~~
10 ~~established pursuant to this chapter, and no program shall continue without the approval of~~
11 ~~the district attorney.~~
12 No person shall be diverted under a program unless it has been approved by the
13 ~~district attorney. Nothing in this subdivision shall authorize the prosecutor to determine~~
14 ~~whether a particular defendant shall be diverted.~~

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: Under existing law, local prosecutors must approve programs for misdemeanor diversion. Some counties have no such programs.

This Resolution: This resolution makes misdemeanor diversion available statewide. This is simply a matter of equal protection of the laws.

The Problem: Some counties have no misdemeanor diversion programs whatsoever. For example, a first offense of shoplifting ban in San Francisco will result in diversion. Such an offense, if committed on the other side of the street in San Mateo County results in conviction with possible penalties of fine and imprisonment. This inconsistency is contrary to the concept of equal protection of the laws.

This resolution was passed twice previously by the Conference of Delegates in presently this form. It was not presented adequately to the legislation. Thus, we renew.

IMPACT STATEMENT

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

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