

RESOLUTION 06-03-2012

DIGEST

Criminal Law: Elimination of 90-Day and 180-Day Mandatory Minimum Sentences

Amends Health and Safety Code section 11550 to eliminate 90-day and 180-day mandatory minimum sentences and reduce the maximum probation from five years to three.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Health and Safety Code section 11550 to eliminate the 90-day and 180-day mandatory minimum sentences for being under the influence and reduces the maximum period of probation from five years to three. This resolution should be disapproved because it makes changes which are inconsistent with the proponent's stated goal.

Removing the 90-day minimum jail sentence for being under the influence of a controlled substance would give courts more discretion to structure sentences to encourage drug treatment and reduce jail crowding. This is consistent with the current drug treatment centered model centered on Proposition 36 probation and would bring the sentencing structure up to date with more recent laws. Similarly, the elimination of the 180-day minimum sentence for repeat offenders may also further the goal of judicial discretion.

The other recommended changes to section 11550, are not supported by the proponents stated goals. As written, this resolution strikes out the entirety of subdivisions (b) and (c). Subdivision (c), in particular, allows the court to permit a person convicted under this statute to complete a drug rehabilitation program in lieu of part or all of the imprisonment in county jail. Subdivision (c) also encourages counties to augment licensed drug rehabilitation programs in order to alleviate jail overcrowding. The removal of these provisions is contrary to the goals of judicial discretion and alleviating jail overcrowding.

In addition, the reduction of the maximum probation is also not supported by this policy. Lowering the maximum probation for under the influence offenses reduces the judiciary's options. The proponent of this resolution argues only that the five year probation maximum is more than is permitted under Proposition 36.

This resolution is related to Resolution 06-04-2012 and addresses the same problem. Resolution 06-04-2012, however, removes only the 90-day minimum sentence and does not make the other changes proposed by this resolution. Resolution 06-04-2012 appears to provide a better and more concise solution to the same problem.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11550 to read as follows:

1 § 11550

2 (a) No person shall use, or be under the influence of any controlled substance which is (1)
3 specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054,
4 specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054,
5 specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (1) or (2) of
6 subdivision (d) or in paragraph (3) of subdivision (e) of Section 11055, or (2) a narcotic drug
7 classified in Schedule III, IV, or V, except when administered by or under the direction of a
8 person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be
9 the burden of the defense to show that it comes within the exception. Any person convicted of
10 violating this subdivision is guilty of a misdemeanor ~~and shall be sentenced to serve a term of~~
11 ~~not less than 90 days or more than which is punishable by up to one year in a county jail.~~ The
12 court may place a person convicted under this subdivision on probation for a period not to
13 exceed five three years, ~~and, except as provided in subdivision (c), shall in all cases in which~~
14 ~~probation is granted require, as a condition thereof, that the person be confined in a county jail~~
15 ~~for at least 90 days. Other than as provided by subdivision (c), in no event shall the court have~~
16 ~~the power to absolve a person who violates this subdivision from the obligation of spending at~~
17 ~~least 90 days in confinement in a county jail.~~

18 (b) ~~Any person who (1) is convicted of violating subdivision (a) when the offense~~
19 ~~occurred within seven years of that person being convicted of two or more separate violations of~~
20 ~~that subdivision, and (2) refuses to complete a licensed drug rehabilitation program offered by~~
21 ~~the court pursuant to subdivision (c), shall be punished by imprisonment in a county jail for not~~
22 ~~less than 180 days nor more than one year. In no event does the court have the power to absolve~~
23 ~~a person convicted of a violation of subdivision (a) that is punishable under this subdivision from~~
24 ~~the obligation of spending at least 180 days in confinement in a county jail unless there are no~~
25 ~~licensed drug rehabilitation programs reasonably available.~~

26 ~~For the purpose of this section, a drug rehabilitation program shall not be considered~~
27 ~~reasonably available unless the person is required to pay no more than the court determines that~~
28 ~~he or she is reasonably able to pay, in order to participate in the program.~~

29 (c) ~~The court may, when it would be in the interest of justice, permit any person~~
30 ~~convicted of a violation of subdivision (a) punishable under subdivision (a) or (b) to complete a~~
31 ~~licensed drug rehabilitation program in lieu of part or all of the imprisonment in the county jail.~~
32 ~~As a condition of sentencing, the court may require the offender to pay all or a portion of the~~
33 ~~drug rehabilitation program.~~

34 ~~In order to alleviate jail overcrowding and to provide recidivist offenders with a~~
35 ~~reasonable opportunity to seek rehabilitation pursuant to this subdivision, counties are~~
36 ~~encouraged to include provisions to augment licensed drug rehabilitation programs in their~~
37 ~~substance abuse proposals and applications submitted to the state for federal and state drug abuse~~
38 ~~funds.~~

39 (d)(b) In addition to any fine assessed under this section, the judge may assess a fine not
40 to exceed seventy dollars (\$70) against any person who violates this section, with the proceeds of
41 this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall,

42 however, take into consideration the defendant's ability to pay, and no defendant shall be denied
43 probation because of his or her inability to pay the fine permitted under this subdivision.

44 ~~(e)(c)~~ Notwithstanding subdivisions (a) ~~and (b)~~ or any other provision of law, any person
45 who is unlawfully under the influence of cocaine, cocaine base, heroin, methamphetamine, or
46 phencyclidine while in the immediate personal possession of a loaded, operable firearm is guilty
47 of a public offense punishable by imprisonment in a county jail for not exceeding one year or in
48 state prison.

49 As used in this subdivision "immediate personal possession" includes, but is not limited
50 to, the interior passenger compartment of a motor vehicle.

51 ~~(f)(d)~~ Every person who violates subdivision ~~(e)(c)~~ is punishable upon the second and
52 each subsequent conviction by imprisonment in the state prison for two, three, or four years.

53 ~~(g)(e)~~ Nothing in this section prevents deferred entry of judgment or a defendant's
54 participation in a preguilty plea drug court program under Chapter 2.5 (commencing with
55 Section 1000) of Title 6 of Part 2 of the Penal Code unless the person is charged with violating
56 subdivision (b) or (c) of Section 243 of the Penal Code. A person charged with violating this
57 section by being under the influence of any controlled substance which is specified in paragraph
58 (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) of
59 Section 11055 and with violating either subdivision (b) or (c) of Section 243 of the Penal Code
60 or with a violation of subdivision ~~(e)(c)~~ shall be ineligible for deferred entry of judgment or a
61 preguilty plea drug court program.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: Specifies that persons convicted of being under the influence of a controlled substance must be incarcerated for a mandatory minimum of 90 days in the county jail or 180 days with specified prior convictions.

This Resolution: Eliminates the mandatory minimums and reduces the maximum period of probation from five years to three.

The Problem: Once upon a time somebody thought it would be a good idea to punish drug users with a mandatory 90 or 180 days in the county jail. The mandatory minimum is unnecessary today for several reasons. First, it is odd that this crime, which is a misdemeanor, carries a mandatory minimum sentence when felony possession of a drug (heroin, cocaine, meth, etc.) does not. In addition, many or even most people who are charged with this crime are eligible for Proposition 36 probation, which means they do no jail time and receive drug treatment. Neophyte users are eligible for drug diversion, also known as Deferred Entry of Judgment, which involves no jail time. Drug users used to be able to avoid the mandatory minimum by doing drug treatment – which now is the bailiwick of Proposition 36. In addition, the jails are so overcrowded that defendants do not do a whole lot of time on 90 days. It's just time to update the statute to be consistent with more recent law and the realities of incarceration. The resolution

also reduces the maximum period of probation from five years to three. Five years of probation is more than most felons on Proposition 36 probation receive.

IMPACT STATEMENT

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

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