

RESOLUTION 06-04-2012

DIGEST

Criminal Law: Elimination of 90-Day Mandatory Minimum Sentence

Amends Health and Safety Code section 11550 to eliminate the 90-day mandatory minimum sentence for a first or subsequent conviction for being under the influence of a controlled substance.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Health and Safety Code section 11550 to eliminate the 90-day mandatory minimum sentence for a first or subsequent conviction for being under the influence of a controlled substance. This resolution should be approved in principle because it would allow courts more discretion in sentencing to encourage intensive drug treatment programs and help reduce overcrowding in the jail system.

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.

This resolution is related to Resolution 06-03-2012 except that it does not eliminate the 180-minute for repeat offenders or reduce the maximum probation period from five to three years.

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~~ may be sentenced to serve a term
- 11 of ~~not less than 90 days or~~ no more than one year in a county jail. The court may place a person

12 convicted under this subdivision on probation for a period not to exceed five years, ~~and, except~~
13 ~~as provided in subdivision (c), shall in all cases in which probation is granted require, as a~~
14 ~~condition thereof, that the person be confined in a county jail for at least 90 days. Other than as~~
15 ~~provided by subdivision (c), in no event shall the court have the power to absolve a person who~~
16 ~~violates this subdivision from the obligation of spending at least 90 days in confinement in a~~
17 ~~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) In addition to any fine assessed under this section, the judge may assess a fine not to
40 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) 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) Every person who violates subdivision (e) is punishable upon the second and each
52 subsequent conviction by imprisonment in the state prison for two, three, or four years.

53 (g) 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) 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: Monterey County Bar Association

STATEMENT OF REASONS

Existing Law: Current law requires a minimum 90-day sentence for a first or subsequent conviction for being under the influence of a controlled substance in violation of Health and Safety Code section 11550.

This Resolution: The resolution would eliminate the mandatory minimum 90-day sentence for a first or subsequent conviction for being under the influence of a controlled substance in violation of Health and Safety Code section 11550.

The Problem: If a defendant pleads or is found guilty of being under the influence of a controlled substance in violation of Health and Safety Code section 11550, he or she is entitled to be first sentenced in according with Proposition 36 and Penal Code sections 1210 *et. seq.* and not initially incarcerated, but given three chances to successfully complete court guided substance abuse treatment. While many defendants successfully complete this court guided treatment with some setbacks along the way, some defendants do not and automatically face a mandatory minimum 90 days in the county jail, instead of receiving continued graduated treatment in a more intensive drug court program unencumbered by arbitrary and scientifically unsubstantiated incarceration requirements. The 90-day requirement also unnecessarily ties the hands of Sheriffs in charge of overcrowded local jails as a result of the recent AB 109 State Prison Realignment, who must house nonviolent, low level misdemeanants in lieu of more serious or violent felonious defendants pre and post sentence and on parole revocations.

Before the advent of scientific and psychological research, the therapeutic court model, and Proposition 36, it was believed that the best way to ensure someone resolved drug addiction problems was through long incarceration to “dry out.” But with the advent of new scientific research, therapeutic drug courts were developed 12 years ago, which were subsequently enhanced by Proposition 36, that are based on the more modern psychological model of the carrot and the stick administration of justice with short bursts of incarceration to confront setbacks but to put the defendant back out in to the community with appropriate follow up treatment. The old mandatory 90-day incarceration method no longer fits into the accepted drug treatment model utilized by the court today, is often ignored, and/or is arbitrarily utilized by courts or a party to thwart effective drug treatment. The mandatory 90-day minimum sentence also unnecessarily confines nonviolent, low level misdemeanants in already overcrowded local jails inundated by state prison inmates sentenced to serve their time locally or state parolees doing flash incarcerations or parole violation time in these local jails as mandated by AB 109 State Prison Realignment.

IMPACT STATEMENT

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

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