

## RESOLUTION 10-04-2014

### DIGEST

#### Criminal Law: Simple Possession of Cocaine or Heroin a Wobbler

Amends Health and Safety Code section 11350 to make simple possession of cocaine or heroin punishable as a wobbler rather than a felony.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Health and Safety Code section 11350 to make simple possession of cocaine or heroin punishable as a wobbler rather than a felony. This resolution should be approved in principle because it would give the prosecutor discretion to charge the offense as a felony or misdemeanor based on the facts and would harmonize the penalty imposed by Health and Safety Code section 11550 (under the influence or control of cocaine or heroin).

Currently, all violations for simple possession of cocaine or heroin is strictly a felony. However, being under the influence or control of either substance is punishable as a misdemeanor. (Health & Saf. Code, § 11550.) Section 11350 creates the novel situation in which a person may be guilty of a felony if found possessing cocaine or heroin, but would only be guilty of a misdemeanor if he or she were discovered to have ingested and therefore under the influence of either substance. Thus, a person possessing a small amount of cocaine or heroin – demonstrating an intent for personal use only – would be subject to the same harsh penalty as someone possessing a quantity that is clearly indicative of an intent to sell. Such a result seems incongruent, especially when analyzed in light of section 11550. This resolution would remedy that inconsistency.

There are some policy reasons for making simple possession of cocaine or heroin a felony, such as when a person is in possession of large quantities indicating the intent to sell. However, this resolution strikes the right balance by granting the prosecutor discretion in charging the violation as either a felony or misdemeanor depending on the circumstances of each case.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 11350 to read as follows:

#### § 11350

- 1 (a) Except as otherwise provided in this division, every person who possesses (1) any
- 2 controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of
- 3 Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or
- 4 specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section

5 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic  
6 drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian  
7 licensed to practice in this state, shall be punished by imprisonment in a county jail for a period  
8 of not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code.

9 (b) Except as otherwise provided in this division, every person who possesses any  
10 controlled substance specified in subdivision (e) of Section 11054 shall be punished by  
11 imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of  
12 Section 1170 of the Penal Code.

13 (c) Except as otherwise provided in this division, whenever a person who possesses any  
14 of the controlled substances specified in subdivision (a) or (b), the judge may, in addition to any  
15 punishment provided for pursuant to subdivision (a) or (b), assess against that person a fine not  
16 to exceed seventy dollars (\$70) with proceeds of this fine to be used in accordance with Section  
17 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's  
18 ability to pay, and no defendant shall be denied probation because of his or her inability to pay  
19 the fine permitted under this subdivision.

20 (d) Except in unusual cases in which it would not serve the interest of justice to do so,  
21 whenever a court grants probation pursuant to a felony conviction under this section, in addition  
22 to any other conditions of probation which may be imposed, the following conditions of  
23 probation shall be ordered:

24 (1) For a first offense under this section, a fine of at least one thousand dollars (\$1,000) or  
25 community service.

26 (2) For a second or subsequent offense under this section, a fine of at least two thousand  
27 dollars (\$2,000) or community service.

28 (3) If a defendant does not have the ability to pay the minimum fines specified in  
29 paragraphs (1) and (2), community service shall be ordered in lieu of the fine.

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

**PROPONENT:** Orange County Bar Association

## **STATEMENT OF REASONS**

The Problem: This statute makes it a felony to possess a useable amount of cocaine or heroin among other drugs for simple personal use. In contrast, simple possession of methamphetamine (Health & Safety Code §11377) is a wobbler and it is only a misdemeanor to be under the influence of a narcotic such as heroin or cocaine. (Health & Safety Code §11550). Ironically, you are punished less if you have ingested the controlled substance than if you still have it in your pocket. It is now recognized by our state that rehabilitation is a wiser policy than straight punishment. While diversion is possible for the first offense, subsequent violations result in felony convictions which can destroy an individual's ability to seek gainful employment. Moreover, the current law increases the potential that persons involved with drug offenses will be incarcerated for significant amounts of time, further creating issues relating to prison overcrowding.

The Solution: This amendment makes this offense a wobbler, thereby giving prosecutors and sentencing courts the discretion to determine whether the defendant should receive misdemeanor or felony punishment. By allowing for such discretion, factors such as a defendant's personal history, criminal history and recidivism can be taken into account. For those that can be rehabilitated, a misdemeanor is far easier to remove from one's record than a felony. Additionally, the revised law would have the potential for easing prison overcrowding by giving

the prosecutor and the court the ability to pursue the matter as a misdemeanor, rather than a felony.

**LEGISLATIVE HISTORY**

This resolution is related to a similar resolution approved in 1995. In 2013, AB 721 added subdivision (c) to Health & Safety Code §11352 which limited transportation of the controlled substance to sales activity as opposed to transportation for personal use.

**IMPACT STATEMENT**

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

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