

RESOLUTION 12-04-2012

DIGEST

Criminal Procedure: Statewide Application of Misdemeanor Diversion

Amends Penal Code section 1001.2 to make misdemeanor diversion available statewide in specified circumstances.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Identical to Resolutions 03-04-2004, 03-17-2007, 02-19-2008, 01-03-2010, and 03-08-2011, all of which were approved in principle.

Reasons:

This resolution amends Penal Code section 1001.2 to make misdemeanor diversion available statewide in specified circumstances. This resolution should be disapproved because it is vague in terms of what diversion refers to, and assigns to the district attorney responsibilities more appropriately the domain of a county board of supervisors.

It is a laudable goal to encourage a statewide justice system in which criminal defendants are treated the same from one jurisdiction to the next. Further, it is a fair observation that misdemeanants are punished differently throughout the state based on locally perceived needs, whims, budgets and politics. Nevertheless, this resolution refers to misdemeanor diversion broadly (see Penal Code section 1001.1 that defines misdemeanor diversion as the procedure of postponing prosecution of a misdemeanor criminal offense “either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication,”) even though misdemeanor offenses that would qualify for diversion represent a spectrum of potential program needs spanning much of the Penal, and Health and Safety codes. The breadth of potential program needs suggests costs, program expertise and review that are not considered in this resolution.

Additionally, it is more reasonably the role of the county, not, as the proponent suggests, the district attorney, to set up social service programs including misdemeanor diversion programs. Moreover, the resolution’s internal inconsistency, that the district attorney both create and approve, on an ongoing basis, misdemeanor diversion programs, causes fatal flaws in this resolution.

A different version of this resolution could position California to have a reliable statewide justice system rather than 58 different systems for encouraging misdemeanants to recover, rehabilitate and correct their behavior. Even if diversion programs might be utilized somewhat differently from one jurisdiction to the next, this is no different from the differences among judges, prosecutors and defense attorneys as they pursue the law from their individual perspectives. Nevertheless, the resolution suffers from problems that are not outweighed by the overarching goals and benefits of diversion.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations 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 1000)
6 of this title nor shall this chapter be deemed to authorize any pretrial diversion or post trial
7 programs for persons alleged to have committed violation of Section 23152 or 23153 of the
8 Vehicle Code.

9 (b) The district attorney for each county shall establish and implement a program for
10 diversion of misdemeanor offenses. The district attorney of each county shall review annually
11 any diversion program established pursuant to this chapter, and no program shall continue
12 without the approval of the district attorney. No person shall be diverted under a program unless
13 it has been approved by the district attorney. Nothing in this subdivision shall authorize the
14 prosecutor to determine 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 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 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 presented in different form and approved several times in the past. It has been re-cast to correct some defects in earlier drafts.

IMPACT STATEMENT

This resolution will not impact any other law, statute, or rule.

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COUNTER-ARGUMENT(S) TO RESOLUTION 12-04-2012

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution should be approved with amendments because misdemeanor diversion is a good idea that should be applied with uniformity across the state, not on a county by county basis dependent upon the District Attorney or County Board approval. However, as currently drafted the resolution still gives the District Attorney the power to withdraw approval of a diversion program. The inconsistent language of the sentence immediately following the proposed language in the resolution should be stricken.
