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DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

HEALTH AND SAFETY CODE
Division 10. Uniform Controlled Substances Act
Chapter 10. Control of Users of Controlled Substances
Article 1. Addicts

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11550 (2007)

§ 11550. Use of controlled substance; Drug rehabilitation program; Possession of firearm; Punishment

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

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

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

(c) The court may, when it would be in the interest of justice, permit any person convicted of a violation of subdivision (a) punishable under subdivision (a) or (b) to complete a licensed drug rehabilitation program in lieu of part

or all of the imprisonment in the county jail. As a condition of sentencing, the court may require the offender to pay all or a portion of the drug rehabilitation program.

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

(d) In addition to any fine assessed under this section, the judge may assess a fine not to exceed seventy dollars (\$70) against any person who violates this section, with the proceeds of this fine to be used in accordance with *Section 1463.23 of the Penal Code*. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

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

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

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

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

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 27, effective October 1, 1973; Stats 1975 ch 248 § 8; Stats 1981 ch 948 § 2; Stats 1983 ch 790 § 15; Stats 1984 ch 1635 § 74; Stats 1985 ch 3 § 14, effective January 29, 1985, ch 1377 § 3; Stats 1986 ch 1026 § 3, ch 1036 § 1, ch 1037 § 1, ch 1044 § 27.7; Stats 1988 ch 1243 § 4; Stats 1989 ch 1041 § 2; Stats 1990 ch 1096 § 1 (AB 3407), operative July 1, 1991; Stats 2001 ch 854 § 9 (SB 205).

NOTES:

Amendments:

1973 Amendment:

Added "which is (1) specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055 or (2) which is a narcotic drug classified in Schedule III, IV, or V,".

1975 Amendment:

Amended the first sentence by (1) deleting "(10)," after "paragraph"; and (2) adding the comma after "11055".

1981 Amendment:

(1) Designated the former section to be subd (a); (2) amended subd (a) by substituting (a) "subdivision" for "section" in the third and fifth sentences; and (b) "under this subdivision" for "hereunder" in the fourth sentence; and (3) added subd (b).

1983 Amendment:

Substituted "subdivision (b), (c), or (e)" for "subdivision (b) or (c)" in the first sentence of subd (a).

1984 Amendment:

Substituted (1) "paragraph (14), (15), or (20)" for "paragraph (11), (12), or (17)" in the first sentence; and (2) "subdivision (f)" for "subdivision (e)" in the first sentence of subd (b).

1985 Amendment (ch 3):

(1) Deleted "which is" after "or (2)" in the first sentence of subd (a); and (2) substituted "paragraph (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) of Section 11055" for "subdivision (f) of Section 11055" in the first sentence of subd (b).

1985 Amendment (ch 1377):

Amended the first sentence of subd (a) by (1) deleting "or" after "Section 11054,"; and (2) adding "or specified in paragraph (1) or (2) of subdivision (d) of Section 11055,".

1986 Amendment:

(1) Deleted subdivision designation (a) at the beginning of the first paragraph; (2) amended the first paragraph by (a) substituting "or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, specified in paragraph (1) or (2) of subdivision (d) or in paragraph (3) of subdivision (e)" for "of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (1) or (2) of subdivision (d)" in the first sentence; and (b) adding the comma after "require" and after "thereof" in the fourth sentence; and (2) substituted the second paragraph for former subd (b) which read: "(b) No person shall use, or be under the influence of, any controlled substance which is specified in paragraph (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) of Section 11055, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled

substances. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this subdivision is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 30 days nor more than one year in the county jail. The court may place a person convicted under this subdivision on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that the person be confined in the county jail for at least 30 days. In no event does the court have the power to absolve a person who violates this subdivision from the obligation of spending at least 30 days in confinement in the county jail." (As amended Stats 1986 ch 1044, compared to the section as it read prior to 1986. This section was also amended by three earlier chapters, chs 1026, 1036, 1037. See *Gov C § 9605*.)

1988 Amendment:

(1) Added subdivision designations (a) and (c); (2) amended subd (a) by (a) adding "or" after "Section 11055," the first time it appears in the first sentence; and (b) substituting "the" for "such" after "thereof, that" in the fourth sentence; and (2) added subd (b).

1989 Amendment:

(1) Added subds (c) and (d); (2) redesignated former subd (c) to be subd (e); and (3) added "or with a violation of subdivision (c)" near the end of subd (e).

1990 Amendment:

(1) Amended subd (a) by (a) deleting "any provision of" after "violating" in the third sentence; (b) adding ", except as provided in subdivision (c)," in the fourth sentence; and (c) substituting "Other than as provided by subdivision (c), in no event shall" for "In no event does" in the last sentence; (2) added subd (b) and (c); (3) redesignated former subds (b) and (c) to be subds (d) and (e); (4) substituted "subdivisions (a) and (b)" for "subdivision (a)" in subd (e); (5) redesignated former subds (d) and (e) to be subds (f) and (g); and (6) substituted "subdivision (e)" for "subdivision (c)" in subds (f) and (g).

2001 Amendment:

(1) Substituted "a" for "the" before "county jail" wherever it appears in subds (a) and (b); (2) added "a" after "punishable by imprisonment in" in the first sentence of subd (e); and (3) amended subd (g) by substituting (a) "deferred entry of judgment or a defendant's participation in a preguilty plea drug court program" for "diversion of a person" in the first sentence; and (b) "deferred entry of judgment or a preguilty plea drug court program" for "diversion" at the end.

Historical Derivation:

Former H & S C § 11721, as added Stats 1939 ch 1079, amended Stats 1945 ch 955 § 40, Stats 1949 ch 1475 § 25, Stats 1953 ch 1770 § 11, Stats 1st Ex Sess 1954 ch 11 § 1, Stats 1955 ch 1381 § 1, Stats 1957 ch 1064 § 1, Stats 1963 ch 913 § 1.

Note

Stats 1990 ch 1096 provides:

SEC. 2. The amendments to *Section 11550 of the Health and Safety Code* made by Section 1 of this act shall become operative on July 1, 1991.

Cross References:

Persons authorized to administer controlled substances: *H & S C § 11215*.

Report of aliens violating this section: *H & S C § 11369*.

Payment of criminal laboratory fee after conviction under this section: *H & S C § 11372.5*.

Registration of controlled substance offenders: *H & S C § 11590*.

Procuring pharmacist's license by fraud or misrepresentation, or issuance of license by mistake, as unprofessional conduct: *B & P C § 4301*.

"Controlled substance offense" as encompassing violation of former Section 11557: *Ed C §§ 44011, 87011*.

Limitations on employers and penalties for conviction: *Lab C § 432.8*.

"Misdemeanor": *Pen C § 17*.

Diversion of criminal proceedings: *Pen C §§ 1000 et seq*.

Evidence of violation of this section, when found during examination in proceeding for involuntary commitment of person for treatment as narcotic addict, as inadmissible in criminal proceedings against the person: *W & I C § 3100.6*.

Collateral References:

2 Witkin Cal. Evidence (4th ed) Demonstrative, Experimental, and Scientific Evidence § 56.

Judicial Council of California Civil Jury Instructions, *CACI No. 709* (Matthew Bender).

Witkin & Epstein, Criminal Law (2d ed) §§ 71, 998, 1410, 1664, 1667, 2062, 2063, 2220, 3188.

Cal Jur 3d (Rev) Criminal Law §§ 1586, 1654; Alien's Rights § 16.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2400, Using or Being Under the Influence of Controlled Substance.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2965, Parent Permitting Child to Consume Alcoholic Beverage: Causing Traffic Collision.

Law Review Articles:

Alcohol or drug addiction, and punishment of a man because he is ill. *52 ABAJ 932.*

Constitutionality of punishment for acts incidental to narcotics addiction. *54 ABAJ 1081.*

The "untouchable" act of addiction. *55 ABAJ 454.*

Nalline as aid in detection and control of users of narcotics. *48 Cal LR 282.*

Civil commitment of narcotic addicts in California. *19 Hast LJ 602.*

Psychedelics and religious freedom. *19 Hast LJ 667.*

California Marijuana Possession Statute: An infringement on the right of privacy or other peripheral constitutional rights. *19 Hast LJ 758.*

Medical and delinquent addicts or drug abusers: A medical distinction of legal significance. *19 Hast LJ 783.*

Effects of the Single Convention on narcotic drugs upon the regulation of marijuana. *19 Hast LJ 848.*

Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters? *36 McGeorge LR 627.*

Preventive Law: The California Rehabilitation Center. *2 San Diego LR 54.*

Control and treatment of narcotic addicts: Civil commitment in California. *6 San Diego LR 35.*

Constitution and the narcotics addict. *11 Santa Clara Law 140.*

Mens rea and status criminality, with respect to narcotics addiction. *40 SCLR 465.*

Conditions of probation. *29 St BJ 44.*

Unconstitutionality of the statute prohibiting use of peyote as applied to religious users. *17 Stan LR 494.*

A primer on heroin. *27 Stan LR 801.*

Constitutional objections to California's Marijuana Possession Statute. *14 UCLA LR 773.*

Marijuana possession and the California Constitutional prohibition of cruel or unusual punishment. *21 UCLA LR 1136.*

LSD and freedom of religion. *1 USF LR 131.*

Barristers Tips: Deferred Entry of Judgment for Criminal Defendants. *29 LA Law 10* (November, 2006).

Attorney General's Opinions:

Absence of exception to restrictions on use of peyote for religious purpose; constitutionality. *39 Ops. Cal. Atty. Gen. 276.*

A county is financially responsible for the costs of analyzing a body fluid specimen obtained from a person arrested for being under the influence of a controlled substance by a California Highway Patrol officer in unincorporated territory of the county if funds in the special account established pursuant to law for such payment are unavailable. A

county is not financially responsible for the costs of analyzing a body fluid specimen obtained from a person arrested for being under the influence of a controlled substance by a city police officer within a city. If funds in the special account established pursuant to law for such payment are unavailable, the city is financially responsible for the costs. 81 *Ops. Cal. Atty. Gen. 118.*

Annotations:

Permitting unlawful use of narcotics in private home as criminal offense. 54 ALR3d 1297.

Review of excessiveness of sentence in narcotics case. 55 ALR3d 812.

Drug addiction or related mental state as defense to criminal charge. 73 ALR3d 16.

Validity and construction of federal statute (18 USCS § 1407) requiring registration, on crossing border, of narcotic addicts, user or violator. 4 ALR Fed 616.

Hierarchy Notes:

Div. 10, Ch. 10 Note

NOTES OF DECISIONS 1. In General 2.5. Search and seizure

Decisions Under Former H & S C § 11721 and Present Section

A. GENERAL CONSIDERATIONS 1. In General 2. Constitutionality B. CONSTRUCTION 3. In General 4. Separate and Included Offenses 5. "Under the Influence" 6. Addiction C. JUDGMENT AND SENTENCE 7. In General

1. In General

Subjecting an arrestee to a strip search with visual cavity inspection during the booking process on a misdemeanor charge of being under the influence of a drug under *H & S C § 11550(a)* is not justified by a jail's blanket policy of strip searching all those arrested on charges involving a controlled substance. Undocumented security needs of a jail facility do not outweigh the invasion of an arrestee's personal rights under *U.S. Const. amends. IV* and *XIV*; nor is such an intrusive search warranted solely on account of the nature of a charge under *H & S C § 11550(a)*, as being under the influence of a drug does not necessarily indicate that the person has concealed more drugs in a body cavity. *Way v. County of Ventura* (2006, 9th Cir Cal) 445 F3d 1157, 2006 US App LEXIS 9878, cert den (2006, US) 166 L Ed 2d 513, 127 S Ct 665, 2006 US LEXIS 9018.

2.5. Search and seizure

District court erred in denying summary judgment for a county sheriff and deputy on the basis of qualified immunity in an arrestee's 42 U.S.C.S. § 1983 action alleging a violation of her civil rights under *U.S. Const. amends. IV* and *XIV* as a result of a body cavity search following her arrest on a misdemeanor charge of being under the influence of cocaine or methamphetamine in violation of *H & S C § 11550(a)*; although the district court correctly concluded that the strip search with a visual cavity inspection during the booking process at a pretrial detention facility was a violation of *U.S. Const. amends. IV* and *XIV* and could not be justified based on the county's blanket strip search policy, which allegedly complied with *Pen C § 4030*, the district court erred in holding that it was clearly established at the time of the arrestee's booking that strip searching persons arrested on drug charges was unreasonable. *Way v. County of Ventura*

(2006, 9th Cir Cal) 445 F3d 1157, 2006 US App LEXIS 9878, cert den (2006, US) 166 L Ed 2d 513, 127 S Ct 665, 2006 US LEXIS 9018.

Decisions Under Former H & S C § 11721 and Present Section A. GENERAL CONSIDERATIONS

1. In General

One who aids and abets a narcotic addict in taking an injection of heroin by manipulating his arm with a handkerchief-tourniquet so as to bring the vein to the surface is guilty as a principal in the commission of a misdemeanor. *People v. Hopkins* (1951, Cal App) 101 Cal App 2d 704, 226 P2d 74, 1951 Cal App LEXIS 1075.

Venue of offense under section is established by doctors' testimony as to defendant's addiction in county in which he was tried and convicted, though there is no evidence that he has used narcotics in such county. *People v. Ackles* (1956, Cal App 3d Dist) 147 Cal App 2d 40, 304 P2d 1032, 1956 Cal App LEXIS 1239.

Offense of unlawful use or addiction to unlawful use of narcotics may be committed by a user at any time and place so long as he retains the character of an addict, and may be proved by competent evidence of such unlawful use or addiction. *People v. Holland* (1957, Cal App 2d Dist) 148 Cal App 2d 933, 307 P2d 703, 1957 Cal App LEXIS 2456; *People v. Johnson* (1957, Cal App 2d Dist) 155 Cal App 2d 369, 317 P2d 1000, 1957 Cal App LEXIS 1295.

When charge is 'addiction,' or 'being under the influence' of narcotics, place where narcotic is taken into system is unimportant, and a court in place where defendants were arrested has jurisdiction of their trial. *People v. Williams* (1958, Cal App Dep't Super Ct) 164 Cal App 2d Supp 858, 331 P2d 251, 1958 Cal App LEXIS 1693.

The history of drug laws shows a consistently the different classification and punishment of the use and possession of regulated substances, with use, or being under the influence, invariably treated as less culpable or not culpable at all. Given this differential treatment, it is obvious that the Legislature did not intend mere use to constitute possession, and the one crime cannot be made into the other either directly, by admixing their elements, or indirectly by circumstantial reasoning. The ultimate fact of one offense cannot be used to prove the categorically different ultimate fact of another offense. Accordingly, conduct such as being under the influence of Valium, which the Legislature has categorically rejected as criminal, as exemplified by the removal of that drug from *Health & Saf. Code*, § 11550, cannot be made into criminal conduct by employing it to circumstantially prove an element of a crime. *People v. Spann* (1986, Cal App 3d Dist) 187 Cal App 3d 400, 232 Cal Rptr 31, 1986 Cal App LEXIS 2262.

The object of *Health & Saf. Code*, § 11550, which prohibits using or being under the influence of a controlled substance, is to protect the individual by proscribing the use which may be an activating part of the process of drug abuse or addiction. *People v. Davalos* (1987, Cal App Dep't Super Ct) 192 Cal App 3d Supp 10, 238 Cal Rptr 50, 1987 Cal App LEXIS 1760.

Defendant's conviction of being under the influence of a controlled substance in violation of *H & S C* § 11550(a) was supported by sufficient evidence because (1) a police officer trained in recognizing the effects of drugs testified as to defendant's symptoms of intoxication when arrested, which included slurred speech, drooling, and stumbling, and defendant was not concerned for defendant's health, as defendant should have been had defendant experienced such symptoms with no drug intoxication, and (2) a criminalist testified that testing showed that defendant's blood contained drugs. *People v. Garza* (2003, Cal App 6th Dist) 112 Cal App 4th 655, 5 Cal Rptr 3d 373, 2003 Cal App LEXIS 1531, review gr, depublished (2004, Cal) 8 Cal Rptr 3d 540, 82 P3d 747, 2004 Cal LEXIS 13, rev'd, superseded (2005) 35 Cal 4th 866, 28 Cal Rptr 3d 335, 111 P3d 310, 2005 Cal LEXIS 5382.

Jury instructions in connection with defendant's trial of violating *H & S C* § 11550(a) did not lower the prosecution's burden of proving that defendant's consumption of drugs was willful; while one part of the instructions taken alone could have been misleading, the instructions on the whole made clear that only willful consumption of a controlled substance was penalized, and the absence of the willfulness element in one portion of the instructions was

remedied by other instructions. *People v. Garza* (2003, Cal App 6th Dist) 112 Cal App 4th 655, 5 Cal Rptr 3d 373, 2003 Cal App LEXIS 1531, review gr, depublished (2004, Cal) 8 Cal Rptr 3d 540, 82 P3d 747, 2004 Cal LEXIS 13, rev'd, superseded (2005) 35 Cal 4th 866, 28 Cal Rptr 3d 335, 111 P3d 310, 2005 Cal LEXIS 5382.

2. Constitutionality

Portion of city ordinance declaring that no person within city shall be addicted to use of narcotics or shall use narcotics except when narcotics are administered by or under direction of person authorized by state is essentially duplication of provisions of this section, and hence is unconstitutional within meaning of Const Art XI former § 11. *People v. Villarino* (1955, Cal App Dep't Super Ct) 134 Cal App 2d Supp 893, 286 P2d 86, 1955 Cal App LEXIS 1851.

Provision of this statute which makes it criminal offense punishable by imprisonment for not less than 90 days nor more than one year, to be addicted to use of narcotics, even though accused has never touched any narcotic drug within state or been guilty of any irregular behavior there, inflicts cruel and unusual punishment in violation of Eight and Fourteenth Amendments to Federal Constitution. *Robinson v. California* (1962) 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417, 1962 US LEXIS 850, rehearing denied (1962) 371 US 905, 9 L Ed 2d 166, 83 S Ct 202, 1962 US LEXIS 234.

Confinement in rehabilitation center, on conviction of unlawful use of narcotics, does not amount to unconstitutional subjection of person to cruel and unusual punishment. *Application of De La O* (1963, SD Cal) 223 F Supp 353, 1963 US Dist LEXIS 6501.

Although former Health & Saf Code, former § 11721, imposing punishment for unlawful use of or addiction to narcotics, lacks express severability clause, usual standards of severability are clearly met in that constitutional portions of statute imposing punishment for use of narcotics can be separated from unconstitutional part imposing cruel and unusual punishment for addiction without destroying statutory scheme or purpose. *In re Carlson* (1966) 64 Cal 2d 70, 48 Cal Rptr 875, 410 P2d 379, 1966 Cal LEXIS 234.

Health & Saf Code, former § 11721, prohibiting person from using or being under influence of narcotics not administered by or under direction of licensed person, is regulatory in nature and constitutes valid exercise of police power. Penalizing addicts and other persons for using narcotics other than as approved does not constitute punishment for addiction; object of statute is to proscribe use of narcotics that is activating part of process of addiction and provision making it offense to be under influence of narcotics must be construed in light of this object. *People v. Davis* (1966, Cal App 4th Dist) 240 Cal App 2d 496, 49 Cal Rptr 663, 1966 Cal App LEXIS 1375.

Under a statute providing for punishment for the unlawful use of or addiction to narcotics, the latter part of which was unconstitutional (Health & Saf C former § 11721), where the court, in a prosecution under the statute, instructed that the defendant should be found guilty if he either used or was addicted to the use of narcotics, though there was no transcript of the evidence, the giving of the instruction indicated that there was evidence both as to use and addiction and it was therefore possible that the unconstitutional part of the statute was a possible alternative sole sufficient ground of conviction, and the defendant met his burden by showing that there was a likelihood that addiction was a ground of conviction; he was not required to show conclusively that his conviction was based on the unconstitutional part of the statute. *In re Montenegro* (1966, Cal App 1st Dist) 246 Cal App 2d 515, 54 Cal Rptr 865, 1966 Cal App LEXIS 1050.

The word "use" in *Health & Saf. Code, § 11550*, proscribing the use of certain controlled substances, is not unconstitutionally vague, in light of its interpretation by the courts as proscribing current use. *Bosco v. Justice Court* (1978, Cal App 5th Dist) 77 Cal App 3d 179, 143 Cal Rptr 468, 1978 Cal App LEXIS 1201.

The mandatory 90-day sentence imposed for violations of *Health & Saf. Code, § 11550*, does not constitute cruel and unusual punishment under *Cal. Const., art. I, § 17*. The mandatory nature of the provision does not divest the trial court of its discretion to divert qualified individuals under *Pen. Code, § 1000*, or to initiate commitment proceedings. *Bosco v. Justice Court* (1978, Cal App 5th Dist) 77 Cal App 3d 179, 143 Cal Rptr 468, 1978 Cal App LEXIS 1201.

The mandatory minimum 90-day sentence imposed for violations of *Health & Saf. Code*, § 11550 (proscribing use of certain controlled substances), does not violate the equal protection clause (*Cal. Const.*, art. I, § 7, subd. (a)). The state has a compelling interest in deterring drug traffic and the distinctions drawn by the law are necessary to the purpose of the statute. *Bosco v. Justice Court* (1978, *Cal App 5th Dist*) 77 *Cal App 3d* 179, 143 *Cal Rptr* 468, 1978 *Cal App LEXIS* 1201.

Under *Health & Saf. Code*, § 11550, making it a misdemeanor for person to use or be under the influence of heroin, the provisions requiring a mandatory 90-day county jail punishment as a condition of probation does not shock the conscience or offend fundamental notions of human dignity, and therefore is not cruel and unusual punishment. The requirement applies to first offenders, contains no enhancement for recidivists, and is of such short duration that it cannot be deemed substantially excessive to fulfill the legitimate penological objectives of deterrence and isolation. Thus, the fact that mandatory minimum sentence is disproportionate in comparison both with other more serious crimes in California and with similar crimes in other states does not render it unconstitutional. *Smith v. Municipal Court* (1978, *Cal App 3d Dist*) 78 *Cal App 3d* 592, 144 *Cal Rptr* 504, 1978 *Cal App LEXIS* 1330.

Health & Saf. Code, § 11550, providing for a mandatory 90-day confinement as a condition of probation for persons convicted of using or being under the influence of a controlled substance, does not deny persons convicted thereunder of equal protection. The statute applies to all violators, and persons convicted of other crimes, most of whom may be eligible for probation without a jail sentence, are not similarly situated for equal protection purposes. *Smith v. Municipal Court* (1978, *Cal App 3d Dist*) 78 *Cal App 3d* 592, 144 *Cal Rptr* 504, 1978 *Cal App LEXIS* 1330.

By punishing individuals found to be under the influence or users of certain dangerous drugs, *Health & Saf. Code*, § 11550, was intended by the Legislature to protect the individual and society from the adverse effects of those substances. Because the state is not required to strike at all evils at the same time or in the same way, the fact that some other highly dangerous drugs are omitted from the statute does not bring it into conflict with the equal protection clause. *In re Orosco* (1978, *Cal App 2d Dist*) 82 *Cal App 3d* 924, 147 *Cal Rptr* 463, 1978 *Cal App LEXIS* 1730.

The mandatory minimum 90-day county jail sentence required by *Health & Saf. Code*, § 11550, prohibiting using or being under the influence of a controlled substance, does not constitute cruel and unusual punishment or violate the equal protection rights of defendants subject to the provision. *People v. Belton* (1978, *Cal App Dep't Super Ct*) 84 *Cal App 3d Supp* 23, 149 *Cal Rptr* 231, 1978 *Cal App LEXIS* 1943.

A mandatory minimum 90-day jail sentence required as a condition of probation for a violation of *Health & Saf. Code*, § 11550, does not violate the concept of separation of powers. Defining offenses and prescribing punishments are legislative functions designed to achieve legitimate legislative goals and objectives. *People v. Belton* (1978, *Cal App Dep't Super Ct*) 84 *Cal App 3d Supp* 23, 149 *Cal Rptr* 231, 1978 *Cal App LEXIS* 1943.

Double jeopardy principles did not apply where the People challenged sentences imposed by trial courts for violation of *Health & Saf. Code*, § 11550, prohibiting the use or being under the influence of a controlled substance, that did not include the mandatory minimum 90-day jail sentence. The sentences were beyond the power of the court to impose and the appellate court had the authority to impose the legally provided sentence at a later time, even though defendants faced the prospect of increased punishment and further prosecution. *People v. Belton* (1978, *Cal App Dep't Super Ct*) 84 *Cal App 3d Supp* 23, 149 *Cal Rptr* 231, 1978 *Cal App LEXIS* 1943.

The trial court committed reversible error in overruling defendants' demurrers to complaints charging them with unlawful use and being under the influence of a controlled substance in violation of *Health & Saf. Code*, § 11550, where the controlled substance of each complaint was otherwise undesignated and undescribed. The complaints denied defendants' due process of law as they were not reasonably advised of the charges against them, given a fair opportunity to prepare and present defenses thereto, or enabled to avoid being taken by surprise at their trials. However, in such prosecutions it is not necessary that the charge pinpoint one of the many controlled substances of the statute, as constitutional demands would be satisfied by charging use or abuse of one of the substances of the particular family,

class or group of controlled substances. *Sallas v. Municipal Court* (1978, Cal App 1st Dist) 86 Cal App 3d 737, 150 Cal Rptr 543, 1978 Cal App LEXIS 2119.

Health & Saf. Code, § 11550, prohibiting a person from using or being under the influence of any controlled substance does not, on its face, necessarily deny an accused thereunder due process by failing to specify the controlled substance in question. It may permit, and is so construed, to require its charging allegations to meet constitutional demands of due process as to notice of the charge. Moreover, since it does not discriminate between members of the affected class, that is, those using or under the influence of the proscribed controlled substance, it comports with the equal protection clause of *U.S. Const., 14th Amend.* *Sallas v. Municipal Court* (1978, Cal App 1st Dist) 86 Cal App 3d 737, 150 Cal Rptr 543, 1978 Cal App LEXIS 2119.

B. CONSTRUCTION

3. In General

Where, as in case of this section, statute makes no reference as to place of performance of act defined as a crime, it will be assumed that legislature did not intend to regulate conduct taking place outside borders of state. *People v. Garcia* (1953, Cal App Dep't Super Ct) 122 Cal App 2d Supp 962, 266 P2d 233, 1953 Cal App LEXIS 1496, overruled *People v. Posey* (2004) 32 Cal 4th 193, 8 Cal Rptr 3d 551, 82 P3d 755, 2004 Cal LEXIS 452.

One who violates this section is dissolute person under Pen C former § 657 subd 5. *People v. Jaurequi* (1956, Cal App 2d Dist) 142 Cal App 2d 555, 298 P2d 896, 1956 Cal App LEXIS 2020, overruled *People v. Perez* (1965) 62 Cal 2d 769, 44 Cal Rptr 326, 401 P2d 934, 1965 Cal LEXIS 294.

Withdrawal from the use of narcotics is not a crime; it is the direct result of discontinuing the crime of use. The fact, therefore, that a person is observed to be experiencing withdrawal systems does not establish reasonable cause to believe that a violation of *Health & Saf. Code*, § 11550 (prohibiting the use, or being under the influence, of a narcotic) is being committed in the presence of the observer. *People v. Gutierrez* (1977, Cal App 2d Dist) 72 Cal App 3d 397, 140 Cal Rptr 122, 1977 Cal App LEXIS 1724.

The term "use" of narcotics refers to the act of injecting or ingesting a controlled substance or narcotic. Thus, an officer may arrest for "use" under *Health & Saf. Code*, § 11550 (prohibiting, as a misdemeanor, the use, or being under the influence, of a narcotic) only when he has reasonable cause to believe that the person to be arrested has injected or ingested a controlled substance in the officer's presence. *People v. Gutierrez* (1977, Cal App 2d Dist) 72 Cal App 3d 397, 140 Cal Rptr 122, 1977 Cal App LEXIS 1724.

The "use" of heroin proscribed by *Health & Saf. Code*, § 11550, is current use. The term "use of narcotics" refers to the act of injecting or ingesting a controlled substance or narcotic. By punishing individuals found to be under the influence or users of certain dangerous drugs, § 11550 was intended by the Legislature to protect the individual and society from the adverse effect of those substances. Thus, the object of the statute is to proscribe a use of narcotics that is an activating part of the process of addiction, whatever may be the stage of that process at the time of their use. *People v. Jones* (1987, Cal App 5th Dist) 189 Cal App 3d 398, 234 Cal Rptr 408, 1987 Cal App LEXIS 1376.

H & S C § 11550(e), which imposes an additional penalty for anyone under the influence of specified controlled substances while in the "immediate personal possession" of a loaded, operable firearm, did not apply when the firearm was inside a pouch on the passenger side of an unlocked toolbox in the bed of the pickup truck defendant was driving. The legislative history indicates that § 11550(e) was not intended to penalize those who use drugs but keep their firearms in a locked closet at home or in the car trunk, i.e., not nearby or quickly and directly accessible, while they are under the influence. On the other hand, § 11550(e) expressly applies to the individual under the influence who has a loaded, operable firearm within the passenger compartment of the vehicle he or she occupies. The section applies in that situation regardless whether the firearm is in a locked compartment or under the back seat of an SUV, i.e., out of reach

or unavailable without some intervening act on the defendant's part. Moreover, vehicle occupants who are under the influence but who carry their loaded, operable firearms outside the passenger compartment are not free of criminal culpability. They can be prosecuted and punished under *Penal C § 12031(a)(1)* (carrying a loaded firearm in a vehicle on a public street or any public place). *People v. Pena* (1999, Cal App 5th Dist) 74 Cal App 4th 1078, 88 Cal Rptr 2d 656, 1999 Cal App LEXIS 830, review denied (1999, Cal) 1999 Cal LEXIS 9185.

THC-positive drug test was "some evidence" to sustain a finding that prisoner possessed marijuana in violation of prison rules. However, the Department of Corrections could not impose a credit forfeiture of more than 30 days for the act of misconduct in question, which the Department agreed could not have been prosecuted criminally under *H & S C § 11550(a)*. *In re Dikes* (2004, Cal App 1st Dist) 121 Cal App 4th 825, 18 Cal Rptr 3d 9, 2004 Cal App LEXIS 1351, modified (2004, Cal App 1st Dist) 2004 Cal App LEXIS 1352, review denied *Dikes (Jayson Wayne) on H.C.* (2004, Cal) 2004 Cal LEXIS 11080.

4. Separate and Included Offenses

Possession of narcotics and addiction are two separate offenses and consist of entirely different elements; thus, defendant charged with possession of narcotics who had been convicted of addiction had not been once in jeopardy for possession offense, despite fact that both prosecutions followed single arrest and were based on same set of facts. *People v. Ayala* (1959, Cal App 2d Dist) 167 Cal App 2d 49, 334 P2d 61, 1959 Cal App LEXIS 2294.

Defendant charged with possession of narcotics who had been convicted of addiction had not been once in jeopardy for possession offense, despite fact that both prosecutions followed single arrest and were based on same set of facts since person at any given moment may be addicted to narcotics and have unconsumed narcotic in his hand or in his pocket and such possession is independent of fact that other narcotics have been consumed and have been assimilated into blood stream so that he is perhaps addicted to their use; two offenses are separate and consist of entirely different elements. *People v. Ayala* (1959, Cal App 2d Dist) 167 Cal App 2d 49, 334 P2d 61, 1959 Cal App LEXIS 2294.

Conviction for child endangerment was supported in part by the fact that defendant, the child's father, possessed and used drugs in the residence and that others were found on the premises in possession of drugs and under the influence of drugs. *People v. Little* (2004, Cal App 6th Dist) 115 Cal App 4th 766, 9 Cal Rptr 3d 446, 2004 Cal App LEXIS 155.

5. "Under the Influence"

There is no analogy between phrase "under the influence," used in this section and Veh C former § 502; object of this section is to control taking of narcotic by individual, which is deemed harmful to human body, and does not prohibit any act or conduct while under influence of narcotic, whereas clear purpose of Veh C § 502 is not to prohibit or control drinking, but to prevent operation of motor vehicle by one who is under influence of intoxicating liquor. *People v. Culberson* (1956, Cal App Dep't Super Ct) 140 Cal App 2d Supp 959, 295 P2d 598, 1956 Cal App LEXIS 2350.

Legislature distinguishes possession of narcotics paraphernalia and being under influence of narcotics, both misdemeanors, from more serious crime of possessing narcotic, a felony; this distinction is pertinent where evidence shows that defendant possessed narcotics kit and was under influence of narcotics, but does not support charge that he knowingly possessed heroin. *People v. Sullivan* (1965, Cal App 2d Dist) 234 Cal App 2d 562, 44 Cal Rptr 524, 1965 Cal App LEXIS 1042.

Being under the influence of narcotics is a misdemeanor (Health & Saf Code, former § 11721), and mere suspicion that a defendant was under such influence, while not justifying an arrest, did justify an investigation, and the request by officers that defendant step outside a car so that they could talk to her and see if their suspicions were well based was a reasonable one where no force was used and defendant voluntarily stepped out of the car. *People v. Lockwood* (1967, Cal App 3d Dist) 253 Cal App 2d 75, 61 Cal Rptr 131, 1967 Cal App LEXIS 2322.

The term "under the influence" as used in *Health & Saf. Code, § 11550* (prohibiting the use, or being under the influence, of a narcotic) refers to the presence of physical symptoms of the unlawful use of narcotics or a controlled substance in any detectable manner. *People v. Gutierrez* (1977, *Cal App 2d Dist*) 72 *Cal App 3d* 397, 140 *Cal Rptr* 122, 1977 *Cal App LEXIS* 1724.

Veh. Code, § 23105 (driving under the influence of a drug), is not a special statute which supplants and precludes the provisions of *Health & Saf. Code, § 11550* (use and being under the influence of a controlled substance or a narcotics drug), and the superior court therefore properly denied a petition for writ of mandate or prohibition by a defendant charged with violations of both statutes, since each statute was a part of a distinct legislative scheme with differing aims, procedures, problems, punishment and treatment programs, with one statute addressed to illicit drug use and the other to dangerous driving, since it was not the legislative intent that one statute usurp the other, and since the elements of the two offenses bore little correlation. *Gilbert v. Municipal Court* (1977, *Cal App 4th Dist*) 73 *Cal App 3d* 723, 140 *Cal Rptr* 897, 1977 *Cal App LEXIS* 1885, superseded by statute as stated in *Williams v. Superior Court* (1988, *Cal App 2d Dist*) 198 *Cal App 3d* 960, 244 *Cal Rptr* 88, 1988 *Cal App LEXIS* 104, superseded by statute as stated in *People v. Alfaro* (1983, *Cal App 1st Dist*) 143 *Cal App 3d* 528, 192 *Cal Rptr* 178, 1983 *Cal App LEXIS* 1782.

The term "under the influence" as used in *Health & Saf. Code, § 11550*, making it a crime to be under the influence of a controlled substance, refers to the presence of physical symptoms of the unlawful use of a controlled substance in any detectable manner. While a person found to be under the influence of a controlled substance may be subject to prosecution, it does not necessarily follow that he is in imminent danger of being addicted. A person is not in imminent danger of being addicted merely because he has begun to experiment with drugs. On the other hand, while a person may be in imminent danger of being addicted, even though the test results are negative, and he is not experiencing withdrawal symptoms, the use proscribed by that statute is a current use, not some use in the past. *People v. Mendoza* (1977, *Cal App Dep't Super Ct*) 76 *Cal App 3d Supp* 5, 143 *Cal Rptr* 404, 1977 *Cal App LEXIS* 2130.

Defendant's criminal history score was properly increased based upon his prior misdemeanor convictions for being "under the influence of a controlled substance" in violation of *California Health and Safety Code Section 11550(a)*, since the offense is almost universally regarded as culpable, is widely criminalized, and offers a substantial basis for predicting future significant criminal activity. *United States v. Martinez* (1992, *9th Cir Cal*) 956 *F2d* 891, 1992 *US App LEXIS* 1509, amended (1992, *9th Cir Cal*) 1992 *US App LEXIS* 7342.

In a murder trial arising from a high speed chase, the jury was improperly instructed on felony murder with a predicate offence of evading an officer with willful or wanton disregard for safety. The court noted that methamphetamine was present at a level of 50 nanograms per million in a sample of blood taken from defendant, who was also charged with driving under and being under the influence of drugs; at that level, defendant was under the influence of methamphetamine for purposes of safety-sensitive operations such as driving a car. *People v. Calderon* (2005, *Cal App 5th Dist*) 129 *Cal App 4th* 1301, 29 *Cal Rptr 3d* 277, 2005 *Cal App LEXIS* 891, modified (2005, *Cal App 5th Dist*) 2005 *Cal App LEXIS* 1016.

Conviction for being under the influence of methamphetamine was reversed where the trial court failed to give advisements and obtain waivers prior to defendant's stipulation. The language of the stipulation mirrored the information and unambiguously represented that defendant violated the statute; thus, although defendant did not expressly stipulate that he acted willfully, the stipulation subsumed all elements and facts necessary for conviction, and, as with a guilty plea, the trial court was required to ensure that he knowingly and voluntarily waived his constitutional rights to confrontation by adverse witnesses and against compulsory self-incrimination. *People v. Little* (2004, *Cal App 6th Dist*) 115 *Cal App 4th* 766, 9 *Cal Rptr 3d* 446, 2004 *Cal App LEXIS* 155.

6. Addiction

Addiction is chronic rather than ordinary acute offense, and one may be guilty of being "drug addict" at any time or place he is found so long as character remains unchanged, although then and there innocent of any act demonstrating his

character. *People v. Jaurequi* (1956, Cal App 2d Dist) 142 Cal App 2d 555, 298 P2d 896, 1956 Cal App LEXIS 2020, overruled *People v. Perez* (1965) 62 Cal 2d 769, 44 Cal Rptr 326, 401 P2d 934, 1965 Cal LEXIS 294.

Legislature has effectively made it a misdemeanor for person either to make unlawful use of narcotics or to be addicted to unlawful use; one is an act, the other is a condition or status; they are not identical, since person may make unlawful use of narcotics (for short time) without becoming or being addicted to the use. *People v. Thompson* (1956, Cal App Dep't Super Ct) 144 Cal App 2d Supp 854, 301 P2d 313, 1956 Cal App LEXIS 1803.

Legislature has given artificial meaning to word "addict," since it has put that label not alone on one who is addicted, but also on one who is unlawful user even though he has not become addict or is not in fact an addict. *People v. Thompson* (1956, App Dep't Super Ct) 144 Cal App 2d Supp 854, *People v. Thompson* (1956, Cal App Dep't Super Ct) 144 Cal App 2d Supp 854, 301 P2d 313, 1956 Cal App LEXIS 1803.

"Addicted" is not a word of art or even a technical word; according to lexicographers it means strongly disposed to some taste or practice or habituated, especially to drugs, whereas judicial and law-writers ascribe to such term the significance of person's habitual use of stimulants or narcotics rather than his mere use of them. *People v. Thompson* (1956, Cal App Dep't Super Ct) 144 Cal App 2d Supp 854, 301 P2d 313, 1956 Cal App LEXIS 1803.

Being addicted to use of narcotic is continuing offense. *People v. Hernandez* (1961, Cal App 2d Dist) 188 Cal App 2d 248, 10 Cal Rptr 267, 1961 Cal App LEXIS 2418.

Though US Supreme Court decision has nullified this section insofar as it attempted to impose criminal penalties for narcotics addiction as distinguished from use, defendant who pleaded guilty to complaint alleging that he "did wilfully and unlawfully use and be addicted to the unlawful use of narcotics" was convicted of both elements alleged in complaint, that is, use as well as addiction, and such conviction is not affected by US Supreme Court cases. *In re Becerra* (1963, Cal App 3d Dist) 218 Cal App 2d 746, 32 Cal Rptr 910, 1963 Cal App LEXIS 1842.

Under *Health & Saf. Code*, § 11550, making it a crime to use heroin, the use proscribed is a current use, not a use in the past. Accordingly, the evidence did not support defendant's conviction for using heroin, where the usage, on the testimony of the People's expert, was from five to seven days old. While a usage no more distant than that might support a finding of danger to become again addicted, it would not support a finding of a current addiction and use. *People v. Velasquez* (1976, Cal App 2d Dist) 54 Cal App 3d 695, 126 Cal Rptr 656, 1976 Cal App LEXIS 1165.

C. JUDGMENT AND SENTENCE

7. In General

The mandatory 90-day sentence imposed for violations of *Health & Saf. Code*, § 11550, does not constitute cruel and unusual punishment under *Cal. Const.*, art. I, § 17. The mandatory nature of the provision does not divest the trial court of its discretion to divert qualified individuals under *Pen. Code*, § 1000, or to initiate commitment proceedings. *Bosco v. Justice Court* (1978, Cal App 5th Dist) 77 Cal App 3d 179, 143 Cal Rptr 468, 1978 Cal App LEXIS 1201.

In an order to show cause proceeding in response to a petition for habeas corpus challenging the criminal penalties of *Health & Saf. Code*, § 11550 (imposing mandatory jail sentence on individuals found to be using or under the influence of certain dangerous drugs) as cruel and unusual punishment, the petitioner was not entitled to relief. The petitioner failed to show that the one year maximum jail sentence imposed on her was unconstitutional because the statute forms part of a comprehensive legislative scheme to control certain dangerous and/or addictive substances; petitioner was not a first time offender and there was physical evidence of continued past drug usage on her part; comparison of the instant statute with statutes that deal with the physical effect of drugs did not show the punishment to be unreasonable; and comparison with other penalties imposed for the same offense in other states was not dispositive in light of differences in the severity of the illicit drug problem from state to state. *In re Orosco* (1978, Cal App 2d Dist)

82 Cal App 3d 924, 147 Cal Rptr 463, 1978 Cal App LEXIS 1730.

The state may punish the use of dangerous or addictive substances, though it may not punish the status of addiction. *In re Orosco* (1978, Cal App 2d Dist) 82 Cal App 3d 924, 147 Cal Rptr 463, 1978 Cal App LEXIS 1730.

In criminal cases, judgment is synonymous with the imposition of sentence. Thus, the People were not entitled, under *Pen. Code*, § 1466, subd. 1(e) (appeal from order made after judgment affecting substantial rights of the people), to appeal from the imposition of a sentence of less than 90 days for a violation of *Health & Saf. Code*, § 11550, which requires that violators be confined for not less than 90 days. *People v. Ventura* (1978, Cal App Dep't Super Ct) 84 Cal App 3d Supp 8, 148 Cal Rptr 581, 1978 Cal App LEXIS 1878.

Defendants who pleaded guilty or nolo contendere to using or being under the influence of a controlled substance (*Health & Saf. Code*, § 11550), as the product of bargains with the court for sentence, were entitled to withdraw their pleas upon a finding that illegal sentences had been imposed, because they would be subjected to increased punishment on resentencing. *People v. Belton* (1978, Cal App Dep't Super Ct) 84 Cal App 3d Supp 23, 149 Cal Rptr 231, 1978 Cal App LEXIS 1943.

Health & Saf. Code, § 11550, prohibiting a person from using or being under the influence of a controlled substance, does not impose cruel or unusual punishment by its mandatorily required minimum of 90 days of county jail confinement of its transgressors. *Sallas v. Municipal Court* (1978, Cal App 1st Dist) 86 Cal App 3d 737, 150 Cal Rptr 543, 1978 Cal App LEXIS 2119.

A defendant sentenced to 3 years in state prison for possession of over 13 grams of heroin (*Health & Saf. Code*, § 11350), and to 1 year for being under the influence of heroin (*Health & Saf. Code*, § 11550), with the sentences to run concurrently, did not receive multiple punishment (*Pen. Code*, § 654), where, even if he used a full gram each day, it would still take at least 13 days to use the quantity he had possessed; thus, defendant had not been possessing the heroin for use within a relatively short time. Since defendant's criminal objectives were legally as well as factually divisible, he was properly punished for both offenses. *People v. Maese* (1980, Cal App 5th Dist) 105 Cal App 3d 710, 164 Cal Rptr 485, 1980 Cal App LEXIS 1821.

Time spent by defendant, who subsequently pleaded nolo contendere to a charge of violating *Health & Saf. Code*, § 11550 (using or being under influence of opiate) in a custodial rehabilitation institution was "attributable to proceedings related to the same conduct for which the defendant has been convicted" within the meaning of *Pen. Code*, § 2900.5, so as to qualify for credit against the time defendant was required to serve in county jail as a condition of probation. Defendant was not in custody for any other offense and her time in the institution was pursuant to a court order releasing her on her own recognizance on condition that she enter a custodial drug treatment program and remain there until further court order. Such restriction on defendant's release was well within the discretion of the trial judge. Moreover, neither the People nor defendant objected to the condition and defendant complied with the order until she entered her plea of nolo contendere; thus it would be unfair to hold that her stay in the institution was not attributable to either the pending charges or an order of the court. *People v. Sylvestry* (1980, Cal App Dep't Super Ct) 112 Cal App 3d Supp 1, 169 Cal Rptr 575, 1980 Cal App LEXIS 2469.

The requirement of *Health & Saf. Code*, § 11550 (using or being under influence of opiate) that a person convicted thereunder spend at least 90 days in the county jail either as a straight sentence or as a condition of probation was satisfied in the case of defendant who was granted probation following her plea of nolo contendere to violation of the statute on condition she serve 90 days in county jail and who was then given 90 days credit for time spent in a rehabilitation facility as a result of a release on her own recognizance prior to sentencing. *Pen. Code*, § 2900.5, which provides for such credit, includes a rehabilitation facility in its definition of "jail" and there is no prohibition in § 11550 to the use of such an equivalent. Reading § 11550 so narrowly that only jail can qualify would read out all meaning to § 2900.5, in violation of the principles that statutes relating to the same subject matter are to be construed together and harmonized if possible and that if two constructions of a penal provision are possible the one favorable to the accused

must be used. *People v. Sylvestry* (1980, Cal App Dep't Super Ct) 112 Cal App 3d Supp 1, 169 Cal Rptr 575, 1980 Cal App LEXIS 2469.

In the case of a defendant charged with violating *Health & Saf. Code*, § 11550, subd. (b), prohibiting the unlawful use of phencyclidine, a controlled substance specified in *Health & Saf. Code*, § 11055, subd. (e), the trial court properly overruled defendant's demurrer to the charge even though a statute enacted while the case was pending, changing the cross-reference in § 11550, subd. (b), had the effect of eliminating criminal sanctions for using phencyclidine, where the change was inadvertent and was corrected by urgency legislation 29 days later. Under these circumstances, defendant could be prosecuted under the current version of § 11550 without violating the prohibition against ex post facto laws. Defendant's act was a crime when committed, the crime was not made more serious by the subsequent statute, nor was the punishment increased or the quantum of evidence necessary to sustain a conviction reduced. *Henry v. Municipal Court* (1985, Cal App 3d Dist) 171 Cal App 3d 721, 214 Cal Rptr 726, 1985 Cal App LEXIS 2447.

Defendant was charged with drug offenses and a misdemeanor vehicular offense. The trial court had the discretion under *Pen C* § 1385 to dismiss defendant's conviction for driving on a suspended license for the purpose of sentencing defendant on the nonviolent drug offenses; therefore, the appellate court remanded the matter for the trial court to exercise its discretion. *People v. Orabuena* (2004, Cal App 6th Dist) 116 Cal App 4th 84, 10 Cal Rptr 3d 99, 2004 Cal App LEXIS 221.

Committing a juvenile to confinement for being under the influence of methamphetamine in violation of *H & S C* § 11550(a) did not violate the juvenile's constitutional right to equal protection, although an adult would have received probation for a nonviolent drug possession offense pursuant to *Pen C* §§ 1210, 1210.1. *In re Jose Z.* (2004, Cal App 5th Dist) 116 Cal App 4th 953, 10 Cal Rptr 3d 842, 2004 Cal App LEXIS 310, review denied (2004, Cal) 2004 Cal LEXIS 5324.

Conviction for vandalism was proper after defendant caused more than \$15,000 in damage to his wife's house and belongings. The court also affirmed a related conviction for being under the influence. *People v. Wallace* (2004, Cal App 5th Dist) 123 Cal App 4th 144, 19 Cal Rptr 3d 790, 2004 Cal App LEXIS 1736, review denied (2005) 2005 Cal. LEXIS 957.

On appeal from defendant's conviction for possessing cocaine base for sale and of being under its influence, the court rejected defendant's contention that his right to a jury trial was violated when the trial court relied on facts not found by the jury, namely that defendant was a recent parolee, in imposing an upper term sentence. Defendant's sentence of six years, consisting of the upper term of five years for possessing cocaine, enhanced by one consecutive year for a prior prison term, was proper because it was within the statutory maximum authorized by the jury's verdict and facts admitted by defendant. *People v. Barnes* (2004, Cal App 6th Dist) 122 Cal App 4th 858, 19 Cal Rptr 3d 229, 2004 Cal App LEXIS 1601, review gr, unpublished *People v. Barnes* (2004) 22 Cal. Rptr. 3d 515, 102 P.3d 902, 2004 Cal. LEXIS 11898, 2004 Cal. Daily Op. Service 11079, 2004 D.A.R. 14935, review dismissed (2005, Cal) 34 Cal Rptr 3d 192, 119 P3d 957, 2005 Cal LEXIS 10286.