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OPINION	:	No. 80-106
	:	
of	:	<u>April 10, 1980</u>
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SUBJECT: VIOLATION OF PENAL CODE SECTION 4573.6—Inmates who possess drugs or alcohol at the place of work furlough employment do not violate Penal Code section 4573.6. The presence of an ingested intoxicant in the system of an inmate who returns from work furlough employment under the influence of alcohol or drugs does not constitute a possession of the substance under Penal Code section 4573.6.

The Honorable Arthur Danner, III, District Attorney, County of Santa Cruz has requested our opinion on questions which we have phrased as follows:

1. Does an inmate who possesses drugs or alcohol at the place of his work furlough employment violate Penal Code section 4573.6?
2. If an inmate returns from work furlough under the influence of alcohol or drugs, does the presence of the ingested intoxicant in the inmate's system constitute a possession of the substance at the jail under Penal Code section 4573.6?

CONCLUSIONS

1. An inmate who possesses drugs or alcohol at the place of his work furlough employment does not violate Penal Code section 4573.6.
2. The presence of an ingested intoxicant in the system of an inmate who returns from work furlough employment under the influence of alcohol or drugs does not constitute a possession of the substance under Penal Code section 4573.6.

ANALYSIS

Section 4573.6 of the Penal Code¹ makes it a felony to possess intoxicants (narcotics, drugs or alcoholic beverages) in custodial locales, and reads in full as follows:

“Any person who knowingly has in his possession in any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any place where prisoners of the state are located under the custody of prison officials, officers, or employees, or in any county, city and county or city jail, road camp, farm, or any place or institution, where prisoners or inmates are being held under the custody of any sheriff, chief of police, peace officer, probation officer, or employees, or within the grounds belonging to any such jail, road camp, farm, place or institution, any narcotics, or drugs in any manner, shape, form, dispenser or container. any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming narcotics or drugs, or alcoholic beverage, without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison or jail, institution, camp, farm or place, or by the specific authorization of the warden, superintendent, jailer or other person in charge of the prison, jail, institution, camp, farm or place, is guilty of a felony.”

Section 1208 of the Code establishes a program whereby inmates of county jails who are deemed fit may continue to pursue their regular employment or undertake new suitable employment. The section vests local administrative authority in a work furlough administrator, who may be the sheriff, the probation officer, the director of the county department of corrections, or the superintendent of a county industrial farm or industrial road camp. (§ 1208(a).) While participating in the work furlough program inmates may be confined without the jail under his custody at a facility designated for that purpose by the county board of supervisors (*ibid.*) and whenever an inmate participant is not employed

¹ All statutory references herein are to the Penal Code unless otherwise stated.

and between the hours or periods of his employment, he is to be confined at that facility unless the work furlough administrator directs otherwise (*id.*, subd. (d)).

The requestor has asked our opinion on whether an inmate who returns intoxicated from his work furlough employment can be prosecuted under section 4573.6. We perceive the question to focus on whether or not the returnee possesses the intoxicating substance (drugs or alcohol in a custodial locale proscribed by the statute. We conclude that an inmate's possession of an intoxicant at the place of his work furlough employment does not occur at a place proscribed by section 4573.6. We also conclude that the existence of the ingested intoxicant in the inmate's system on his return to the jail (or place of work furlough confinement) does not constitute "possession" within the meaning by that statute. In sum, neither the inmate's antecedent possession of the intoxicant at the place of work furlough employment nor the presence of it in his system when he returns to the jail, constitutes a violation of section 4573.6.

Since we must construe section 4573.6 according to a fair import of its terms with a view to effect its purpose and to promote justice (§ 4), we turn first to discussion of the purpose for which it was enacted.

Section 4573.6 along with sections 4573 and 4573.5 with which it stands *in pari materia* (*People v. Buese* (1963) 220 Cal. App. 2d 802, 807), were a legislative effort to deter the presence of intoxicants in custodial institutions, by imposing serious felony sanctions on certain activity involving them. (*Matkis v. Appellate Department* (1972) 28 Cal. App. 3d 1038, 1041; *People v. Waid* (1954) 127 Cal. App. 2d 614, 617; *cf. People v. Woods* (1956) 139 Cal. App. 2d 515, 525.) Section 4573 prohibits the unauthorized bringing of narcotics, narcotic devices, or alcoholic beverages into custodial institutions,² and section 4573.5 does the same with respect to drugs³ other than narcotics, and their related devices. The subject of our concern, section 4573.6, rounds out the scheme of

² See also Business and Professions Code section 25603:

"Every person, nor authorized by law, who brings into any state prison, city or county jail, city and county jail, or reformatory in this State, or within the grounds belonging to any such institution, any alcoholic beverage is guilty of a felony."

³ In *People v. Ortgz* (1962) 200 Cal. App. 2d 150, the court accepted the definition of drug found in Webster's New International Dictionary—to wit, "any substance used as a medicine or in the composition of medicines for internal or external use"—as the "ordinary and normal meaning" to be used in interpreting section 4573.6. (200 Cal. App. 2d at 254.) The court in *People v. Buese* (1963) 220 Cal. App. 2d 802, thought that perhaps that definition was too broad and instead viewed sections 4573.5's use of "drug" to include those drugs having characteristics similar to narcotics—i.e., their internal ingestion followed by an affect on that function of the brain which controls judgment. (220 Cal. App. 2d at 807.)

deterrence by prohibiting on pain of felony prosecution, the unauthorized possession by any person of these intoxicants in the institution or place of custody.⁴

In a former opinion of this office dealing with the question of disposition of contraband (prohibited matter) in prisons we observed that:

“It is the duty of the authorities in charge of a penal institution to enforce discipline, safeguard the security, health, and welfare of the inmates and further their treatment and rehabilitation [citation] . . .” (20 Ops. Cal. Atty. Gen. 259, 260 (1952).)

Toward this end we noted that “property . . . may come to the inmate only through a representative of the institution or some person authorized to make the transfer” (*ibid.*) and that “possession by inmates of . . . particular property may be prohibited because of the inherently dangerous nature of the thing itself or merely as a matter of institution policy.” (*Id.*, at p. 261.)

The three types of intoxicating substances specified in section 4573.6—to wit, alcohol, non-narcotic drugs, and narcotics—all have a common denominator following ingestion they “affect the brain, and particularly that function of the brain controlling judgment.” (*People v. Buese, supra*, 220 Cal. App. 2d at p. 807.) Thus the Legislature, in enacting section 4573 6, prohibited their unauthorized possession in a custodial institution by any person, whether inmate or visitor (*People v. Clark* (1966) 241 Cal. App. 2d 775, 778; *People v. Trout* (1955) 137 Cal. App. 2d 794, 795) as a necessity for orderly prison administration (*People v. Clark* (1966) *supra*, at p. 779) and security (*Davis v. Superior Court* (1959) 175 Cal. App. 2d 8, 19–20). Not only is the specter of a board of custodial inmates who have lost their reason from intoxicants frighteningly unacceptable, but so also are the evils that would result from the black market in the illicit contraband that would certainly develop. Prohibiting importation of the intoxicants into custodial institutions (§§ 4573, 4573.5) and their possession therein (§ 4573.6) lessens if not negates, those concerns.

Turning to the issues presented, we first address the question of whether an inmate who possesses drugs or alcohol at the place of his work furlough employment violates section 4573.6.

⁴ We assume for purposes of discussion that the possession of the intoxicant was nowhere authorized. (Compare *People v. Ortiz, supra*, 200 Cal. App. 2d at pp. 257–258 and *People v. Zepeda* (1964) 231 Cal. App. 2d 18, 20–22 with *People v. Buese, supra*, 220 Cal. App. 2d at p. 808.)

Section 4573.6 proscribes the possession of “any narcotics, or drugs in any manner . . . or alcoholic beverage” in “any county, city and county or city jail, road camp, farm, *or any place or institution, where prisoners or inmates are being held in custody* of any sheriff, chief of police, peace officer, probation officer, or employees” (Emphasis supplied.) We do not view an individual prisoner’s place of work furlough employment as a “place or institution where prisoners or inmates are being held in custody” and therein lies the rub. We do not believe the Legislature intended the place of work furlough employment to be an “institution,” as that term is usually and ordinarily used and is commonly understood. (*Cf. Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230; *cf. People v. Buese, supra*, 220 Cal. App. 2d at p. 807.) The use of the plural “prisoners or inmates” indicates that the place of custody envisioned was to be one of more formal and multiple confinement than an individual prisoner’s employment locale. Further, we do not consider an individual prisoner’s place of employment to be a place where he is being “held in custody,” since “holding” implies an actual confinement.

In these respects the place of work furlough employment stands in stark contrast to the other locales mentioned in the section. Jails, road camps and farms are all places in which inmates are actually confined; they are places of formal and multiple confinement; and they are “institutions” as that term is ordinarily used and is commonly understood. We must assume the Legislature intended “the place or institution” mentioned in the statute, to mean those locales having similar characteristics. (*Cf. People v. Buese, supra*, 220 Cal. App. 2d at p. 807.) The facility of work furlough confinement (§ 1208(a)) would meet that criterion; the place of work furlough employment does not.

Section 4573.6’s setting forth whence authorization for an inmate to possess an intoxicant may stem, also persuades us that the custodial locale spoken of does not include the place of employment of an individual prisoner. It speaks of “the rules of the Department of Corrections, *rules* of the prison or jail, institution, camp, farm or place, or by the specific authorization of the warden, superintendent, jailer or other person in charge of the prison, jail, institution, camp, farm or place.” (Emphases added.) Whether or not a private employer, as the person in charge of the “place,” might have “rules” regarding possession of intoxicants by his employees on his premises while at work, we would not ascribe to the Legislature an intent to found a felony prosecution on that. The “rules” spoken of in section 4573.6 have a more formal and a more official provenance than that private and individual determination, and their status is such to justify a felony prosecution for possession of an intoxicant without their authorization.

Language of a statute should not be given a literal meaning if to do so would result in absurd consequences that the Legislature did not intend. (*Younger v. Superior Court* (1978) 21 Cal. 3d 102, 113.) In this regard it is significant that the cases upholding convictions for violations of section 4573.6 noted that because of the peculiar nature of the

institutions into which the contraband was being brought, custodial officials could “reasonably” conduct searches of visitors under the Fourth Amendment. (See, e.g., *Mathis v. Appellate Department*, *supra*, 28 Cal. App. 3d at pp. 1040–1041; *People v. Woods*, *supra*, 139 Cal. App. 2d at p. 525.) Needless to say those cases involved places of actual confinement. To read section 4573.6 literally and conclude that the place of private employment of a work furlough inmate is also a custodial locale within the meaning of that section, would mean that all persons may be searched on those premises without a warrant and if found to possess an intoxicant there without the owner’s authorization, they could be prosecuted for felony violation. Surely that is a result the Legislature did not intend, and must be avoided. (*Younger v. Superior Court*, *supra*.) Just as the nature of the work furlough locale would not in itself justify such a general search, so do we not believe that its nature is such to be included as a “place or institution where prisoners or inmates are being held under custody . . .” (§ 4573.6.)

We therefore conclude that the place of work furlough employment is not a custodial locale within the meaning of section 4573.6. In reaching this conclusion we are not unaware of the doctrine of *custodia legis* or of the fact that courts have applied it to the work furlough and cognate situations. For example in *People v. Haskins* (1960) 177 Cal. App. 2d 84, it was held that a prisoner who escapes while on work furlough, escapes nonetheless “from the custody of any officer or person in whose lawful custody he is.” (*Id.*, at p. 86–87 construing Pen. Code, § 4532(b) as it read at the time of the escape.) Said the court, “In contemplation of the law he is as much in the sheriff’s custody when he leaves the jail for [Penal Code section 1208 work furlough employment] as when he is confined within its limits [citations].” (177 Cal. App. 2d at p. 87.) (See also, *People v. Hinze* (1950) 97 Cal. App. 2d 1, (escape while outside jail performing work as trustee violated § 4532); *People v. Owens* (1965) 236 Cal. App. 2d 403 (escape while assigned as a forest firefighting crew violates § 4530(b)).) Similarly, the doctrine has been applied to situations where prisoners have failed to return to state prisons from temporary releases pursuant to various sections of the Welfare and Institutions Code, and they too have been held guilty of escape from custody under statutes which did not then so specifically provide. (See, e.g., *People v. Labrum* (1972) 25 Cal. App. 3d 105, 111 (escape while on Welf. & Inst. Code, § 2690 temporary community release violated Pen. Code, § 4530(c)); *People v. Perez* (1972) 24 Cal. App. 3d 340, 346 (escape during Welf. & Inst. Code, § 3306 temporary release to seek employment violated Pen. Code, § 4530(c)); *People v. Ramirez* (1972) 27 Cal. App. 3d 660, 666–667 (escape during Welf. & Inst. Code, § 3306 release violated Pen. Code, § 4530(c)).)

In those escape case’s, however, the doctrine of *custodia legis* could be applied directly to statutes which before their amendment spoke of escape while under or in custody, and so would be consistent with their purpose of preventing inmates from fleeing to the population at large. To apply the doctrine of constructive custody to section 4573.6’s

phrase “*place where prisoners are held in custody*,” to permit a felony prosecution for possession of an intoxicant while at work furlough employment is not only another step removed, but it does not effectuate the statute’s purpose of maintaining the security and orderly administration of prisons and the other places of actual confinement mentioned therein. While it is true that an inmate who possesses and ingests alcohol or drugs at work furlough employment and then returns to jail (or his place of confinement) in an intoxicated condition, presents a problem, it is singular and can be readily handled; the inmate can be restrained before entry and dealt with administratively. (See *People v. Clark*, *supra*, 241 Cal. App. 2d at p. 779 and p. 779, fn. 1.) In contrast, the presence of unknown amounts of drugs, narcotics, and alcohol in the facility poses much more serious and dangerous problems. We perceive that to have been the threat which the Legislature addressed by its enactment of section 4573.6 and its kindred sections 4570 and 4573.5 providing for felony prosecution.

We are also mindful of the fact that when the Legislature has intended for a situation stemming from a prisoner’s participation in the work furlough program to have consequences under other sections of the Penal Code it has specifically so provided. Thus, for example, section 4532 was amended to expressly apply to escapes of prisoners engaged in the program (Stats. 1959, ch. 1463, p. 3759), albeit deemed a clarification of the law. (*People v. Haskins*, *supra*, 177 Cal. App. 2d at p. 87.) With like correlation, section 1208(f) specifically provides: that a work furlough inmate’s satisfactory job performance entitles him to section 4019(b) work time credits lessening his period of confinement. (See 63 Ops. Cal. Atty. Gen. 33 (1980).) The absence of a similar reference in section 4573.6 would seem to indicate that the Legislature did not intend it to apply to the situation of an inmate’s possession of alcohol or drugs at his place of work furlough employment. (Cf. *Board of Trustees v. Judge* (1975) 50 Cal. App. 3d 920, 927.)

We therefore believe that the place or work furlough employment is not a custodial locale within the meaning of section 4573.6, and accordingly conclude that an inmate who possesses drugs or alcohol there does not violate that section.

Turning to the second question, we now see the inmate presenting himself in an intoxicated condition at the jail (or facility, of confinement) itself on his return from work furlough employment, and must determine whether he “possesses” the intoxicant at that custodial locale within the meaning of section 4573.6. In this regard while we accept the notion that the intoxicated inmate would certainly “have” the intoxicating substance in one form or another within him, we cannot accept the proposition that he “possesses” it as that term is used in the law.

The elements of the offense of unlawful possession of a restricted substance are dominion and control over it, in a quantity useable for consumption or sale, with knowledge

of its presence and of its character. (*People v. Groom* (1964) 60 Cal. 2d 694, 696; *People v. Redrick* (1961) 55 Cal. 2d 282, 285.)

Certainly an intoxicated inmate would “have” the intoxicating substance, in one form or another, within him. He ingested it at the place of work furlough employment, and by the time of his return to the jail (or facility of confinement) his demonstrated condition of intoxication indicates that some of it or all of it has passed into the body’s systems. (*People v. Buese, supra*, 220 Cal. App. 2d at p. 807; *cf. In re Martin* (1962) 58 Cal. 2d 509, 512; *People v. Huber* (1965) 232 Cal. App. 2d 663, 670–671.) But clearly the inmate no longer has “dominion or control” over it. As a court said in a Prohibition case involving alcohol, “Possession of whisky within the meaning of the law contemplates a control over the whisky whereas when the whisky is in the man the whisky controls the man. (*Evans v. State* (1931) 132 So 601, 24 Ala. App. 196.) And as our neighbor to the north said in a case involving drugs, “Obviously after a drug is ingested or injected into the human body, the host body can no longer exercise dominion or control over it.” (*State of Oregon v. Downes* (1977) 572 P.2d 1328, 1330, 31 Ore. App. 4183.) So it is with the intoxicated returnee.

A review of the purpose for which section 4573.6 was enacted (*supra*, at pp. 283–285, 287 confirms our belief that the Legislature did not intend to include an uncontained, partially digested intoxicant as “possession” within the meaning of section 4573.6. In that situation, where the digested intoxicant already manifests its effects, the substance is no longer in its original state and its value as a reusable or transferable commodity within the jail is most doubtful.

The problems posed by the existence of an unknown quantity of drugs or alcohol ready to be used at any time or to be sold or bartered within the prison, do not arise.

We therefore believe that the control and dominion over an intoxicating substance that has already been ingested is lacking, and conclude that an inmate returning from work furlough employment does not “possess” the substance in his system at the jail within the meaning of section 4573.6.⁵

⁵ In *Russell v. Superior Court* (1970) 12 Cal. App. 3d 1114, it was held that evidence of barbituric acid found in the blood of an inmate of the San Diego Honor Camp, was sufficient to furnish probable cause to have him answer a charge of possession of a restricted dangerous drug in the camp in violation of section 4573.6. In that case, while Russell had not left the camp for three weeks before the blood test was administered, the quantity of barbituric acid found in his blood indicated that he had ingested the barbiturate just three to five days before. (*Id.*, at p. 1117.) The court affirmed a denial of a motion under section 995, indulging not only in the inference of Russell’s antecedent possession (i.e., dominion and control of the barbiturate from his

With respect to the requestors concern, we do not wish to minimize the fact that an inmate returning from his work furlough employment in an intoxicated condition from either alcohol or drugs, has violated the trust placed in him when he originally was selected for the work furlough program. He probably also has, depending on circumstances and substance ingested, violated other provisions of California law (e.g., Pen. Code, § 647 (f); but see *Russell v. Superior Court*, *supra*, 12 Cal. App. 3d 1114, 1119 fn. 1) for which he could be prosecuted. Further it would be expected that he would be subject to penal administrative action (*cf.* Pen. Code, § 4019.5(e)) including the revocation of the privilege of his participation in the work furlough program.

We conclude herein, however, that an inmate who returns from work furlough employment intoxicated from alcohol or drugs does not violate section 4573.6, since he would not have been in a custodial locale specified in that section when he possessed the intoxicant to ingest it, and he would not “possess” the intoxicant at the jail on his return by reason of its being in his system.

consumption of it, but also his knowledge of its presence and character. (*Id.*, at p. 1118.)

We would accept from Russell the notion that if it could be demonstrated that an inmate who is found under the influence of drugs or alcohol in the jail must have ingested the intoxicating substance while on the premises, he in fact possessed it there before ingestion, and in so doing violated section 4573.6. Moreover in that situation, the probability of additional quantities of intoxicating substances existing in the facility is very real, and is exactly the problem the Legislature wished to avoid in enacting sections 4573, 4573.5 and 4573.6. In the situation described in the request, however, the work furlough inmate, unlike Russell, leaves his place of confinement and ingests the intoxicant outside its limits. Assuming as we did that the entire antecedent possession in that situation took place wholly without the facility, prosecution would founder on our conclusion that that possession did not take place at a proscribed locale.