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OPINION	:	No. 80-112
of	:	July 8, 1980
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SUBJECT: FORMER PRISON RECORD—Penal Code section 4571 does not require a former state prisoner to reveal his prison record to anyone but does prohibit his entry into a prison facility without the consent, based upon knowledge of the prior prison record, of the officer in charge of the facility.

The Honorable David E. Pesonen, Director, Department of Forestry, has requested an opinion on the following question:

Does Penal Code section 4571 require a former state prisoner to reveal his prison record to (a) a state official who employs him in a position that may require entry into a prison facility or (b) the officer in charge of a prison facility prior to entry into the facility?

CONCLUSION

Penal Code section 4571 does not require a former state prisoner to reveal his prison record to anyone but does prohibit his entry into a prison facility without the consent, based upon knowledge of the prior prison record, of the officer in charge of the facility.

ANALYSIS

We are informed that the Department of Forestry (hereinafter "Forestry") supervises eight forestry camps in conjunction with the Department of Corrections (hereinafter "Corrections") as authorized by Penal Code section 2780:[1]

> "Any department, division, bureau, commission or other agency of the State of California or the Federal Government may use or cause to be used convicts confined in the state prisons to perform work necessary and proper to be done by them at permanent, temporary, and mobile camps to be established under this article. The director may enter into contracts for the purposes of this article."

Such forestry camps are managed and are under the control of Corrections, while the actual work performed is supervised by Forestry. (See §§ 2787–2788.)

We are also informed that Forestry occasionally hires persons who have previously been convicted of a felony and confined in the state prison system, especially where the persons have gained experience in fighting forest fires while serving their sentences at prison forestry camps. These employees may at times be sent to a prison forestry camp to perform various duties.

The question presented for analysis concerns whether these employees may violate the provisions of section 4571 when they enter upon the grounds of a prison forestry camp. We conclude that under circumstances, a violation may occur.

Section 4571 states:

> "Every person who, having been previously convicted of a felony and confined in any State prison in this State, without the consent of the warden or other officer in charge of any State prison or prison road camp, or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the State prison are located under the custody of prison officials, officers or employees, or any jail or any county road camp in this State, comes upon the grounds of such institution, or lands belonging or adjacent thereto, is guilty of a felony."

The elements of the offense defined in section 4571 are thus (1) entry upon the grounds of a prison facility or lands belonging or adjacent thereto (2) by a person

[1] All unidentified section references hereinafter are to the Penal Code.

previously convicted of a felony and confined in a state prison in this state (3) without the consent of the officer in charge of the prison facility.

In construing section 4571, we first note the general principles of statutory construction applicable to penal statutes. The basic principle is that a penal provision should be interpreted according to the fair import of its terms, giving effect to its purposes and the promotion of justice. (*People v. Superior Court* (Douglass) (1979) 24 Cal. 3d 428, 435.) Section 4 states in part, "The rule of the common law, that penal statutes, are to be strictly construed, has no application to this code." Nevertheless, if the language is "reasonably susceptible of different interpretations, the Construction more favorable to the defendant should be adopted." (*People v. Boyd* (1979) 24 Cal. 3d 285, 295.)

With these principles in mind, we note that section 4571 imposes no specific duty of disclosure upon the former prison inmate. Nondisclosure is not an element of the crime described in the statute.[2] Inasmuch as penal statutes are to be construed in favor of the defendant where they are ambiguous, we cannot say that section 4571 places a disclosure "responsibility" upon the former inmate and that a violation occurs by the mere lack of an affirmative statement.

What is required under section 4571 is that the officer in charge of the prison facility give his "consent" to the entry. The statute does not specify, however, the type of consent necessary, whether it must be in writing or expressed in any particular terms or be the result of the former inmate's disclosure of his record to the officer.

No reported cases have defined the term "consent" as used in and for purposes of section 4571. Most cases that have defined "consent" in other contexts have dwelt upon the capacity of a person to consent or whether coercion has been used to obtain the desired response. In the most cited case, *People v. Dong Pok Yip* (1912) 164 Cal. 143, 147, the Supreme Court stated, "Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent." The court then noted that where the criminal charge is indecent assault, the age and mentality of the alleged victim should be considered in determining the presence or absence of consent. (See *People v. Westek* (1948) 31 Cal. 2d 469, 473; *People v. Griffin* (1897) 117 Cal. 583, 585.)

[2] We do not consider herein whether any statute other than section 4571 imposes a disclosure obligation under any given circumstances.

In *Heine v. Wright* (1926) 76 Cal. App. 338, 342, the court ruled that the defendants had not consented to a bank account attachment since it resulted from a coercive attitude manifested on the part of the attaching creditor. The court stated, "The word 'consent' means in a legal sense 'capable, deliberate, and voluntary assent or agreement to, cr concurrence in, some act or purpose, implying physical and mutual power and free action (Webster's Dictionary).'" (See *People v. Perez* (1973) 9 Cal. 3d 651, 659–661; *People v. Mcllvain* (1942) 55 Cal. App. 2d 322, 328–329.)

On the other hand, consent may be predicated upon coercion, force or fear in the case of extortion. (§ 518; *People v. Peck* (1919) 43 Cal. App. 638, 643–645.)

As for the use of fraud, the Supreme Court in *Butler v. Collins* (1859) 12 Cal. 457, 463, stated, "But consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake."

Mistake of fact presents a special circumstance. In the law of contracts, a party may rescind a contract to which he has not given his "free" consent. (Civil Code § 1565.) Consent is not "free" if there has been a mistake of fact, which includes "an unconscious ignorance of a fact past or present." (Civ. Code § 1577.) However, an offeree may consent to an offer even though he does not know all of its terms, as long as he is aware that a proposal has been made to him. (*Windsor Mills, Inc. v. Collins & Azkman Corp.* (1972) 25 Cal. App. 3d 987, 992–993.)[3]

Besides "free" consent, one may give "apparent," "actual," "informed," or "legal" consent, among others. (See *People v. Griffin*, *supra*, 117 Cal. 583, 585.)

In *Shea v. Board of Medical Examiners* (1978) 81 Cal. App. 3d 564, 579, the court rejected a doctor's claim that his patients had consented to their treatments since "None of the patients was forewarned of the [treatment]. Without voluntary agreement, their submission to Dr. Shea's treatment did not amount to consent. (See *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 242.) This is fortified by the fact that such treatment, while the patients were supposedly under hypnosis, was totally unrelated to their individual complaints." In *Shea*, therefore, knowledgeable consent was required, consistent with most of the cases defining "consent" in other contexts.

We also note, however, that in *People v. Martin* (1955 45 Cal. 2d 755, 763, a police officer was excused from stating the purpose of his entry into a house since the purpose

[3] In *Brooms v. Brooms* (1957) 151 Cal. App. 2d 351, 352, the Court of Appeal considered whether a mistake of fact precluded the defendant from consenting to the entry of judgment. Without cogent analysis, the court ruled (in effect) that it did not.

was reasonably apparent to the defendant. Hence, one may be deemed to have knowledge under certain conditions.

As in *Martin*, special circumstances may exist with regard to a particular Forestry employee who enters a prison forestry camp. It may be that the officer in charge has knowledge of the prior prison record. He does have access to the state's criminal history files. (§ 11105 (b) (2) and (9).)

On the one hand, as we have mentioned, section 4571 imposes no express duty upon a former prison inmate to disclose his prior record to anyone, including his Forestry employer or the officer in charge of a particular forestry prison camp which he seeks to enter. Depending upon the sophistication of Corrections' record keeping and communications systems, the officer may be able to obtain the prior record information from sources other than the employee or Forestry and may consent, to the entry having such knowledge. No violation of section 4571 would occur in such circumstances.

On the other hand, the employee may falsely inform his Forestry employer or the officer in charge that he has not been previously convicted of a felony and confined in a California state prison. The cases as a whole make clear that consent may not be predicated upon deliberate misrepresentations of fact. A violation of section 4571 would thus occur where the officer in charge permits entry based upon the employee's false statements. (See also § 4570.5.)

The difficult question is whether the officer in charge must have knowledge or notice of the prior record, where no mispresentations have been made, in order to properly consent to an entry under section 4571. We believe that knowledge is required f or purposes of the statute.

The Legislature's intent in enacting section 4571 appears to have been to grant the officer in charge wide discretion in determining whether a particular former inmate should be allowed entry into a prison facility. It is difficult to conceive how an officer may have the intended control of the circumstances where he lacks knowledge of the most critical fact. We believe that in general the cases interpreting the term "consent" in other contexts support the conclusion that an informed 'decision is required unless the circumstances clearly indicate otherwise.

Accordingly, a Forestry employee would be well advised to provide the necessary information to the officer in charge of a prison facility to which he seeks entry so that knowledgeable consent may be obtained and a violation of section 4571 totally precluded. As a practical matter, Forestry itself may wish to obtain the information and the required consent prior to sending an employee to a prison forestry camp, thus facilitating its own

operations.

In summary, then, section 4571 does not require a former state prisoner to reveal his prison record to anyone but does prohibit his entry into a prison facility without the consent, based upon knowledge of the prior prison record, of the officer in charge of the facility.

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