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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-609
of	:	MARCH 3, 1981
GEORGE DEUKMEJIAN Attorney General	:	
Jack R. Winkler Assistant Attorney General	:	

The Honorable James Cramer, Member of The California Assembly, has requested an opinion on the following question:

Is preconviction diversion in a first offense misdemeanor "drunk driving" case currently authorized by state law?

CONCLUSION

Preconviction diversion in a first offense misdemeanor "drunk driving" case is currently authorized by state law if the requirements of Penal Code sections 1001 through 1001.11 are followed.

ANALYSIS

Driving a vehicle while under the influence of intoxicating liquor is a misdemeanor under Vehicle Code section 23102. We are asked whether a person charged

with such an offense who has no prior convictions for that offense may be "diverted" from criminal prosecution under current state law.

The concept of diverting a defendant from the normal procedures of prosecution and punishment for crime is not new, though describing the process as "diversion" is relatively new. Probation is the process of suspending the pronouncement or execution of a sentence following conviction and releasing the defendant upon reasonable conditions imposed by the court. If the conditions are satisfied the case is terminated but if not probation may be revoked and the sentence imposed. Thus probation may be appropriately described as a form of post conviction "diversion."

In 1972, the Legislature enacted Penal Code sections 1000–1000.3 establishing a new procedure for the "diversion" of defendants charged with certain drug offenses before conviction. The district attorney determined whether a defendant met the criteria for diversion established in the statute. If the defendant met those criteria and wanted diversion, the case was referred to the probation officer who investigated the matter and reported what community programs were available to help the defendant with his drug problems, and whether the defendant might benefit therefrom. The court held a hearing on whether the defendant should be diverted. If diversion was granted, the criminal action was continued from six months to two years with the understanding the defendant would participate in a particular program. If the defendant successfully completed the program the criminal charge would be dismissed. If not, criminal proceedings would be reinstated. The new drug diversion procedures have been upheld and interpreted by the Supreme Court in *People v. Superior Court (On Tai Ho)* (1974) 11 Cal. 3d 59 and *Morse v. Municipal Court* (1974) 13 Cal. 3d 149.

In 1976, the District Attorney of Sacramento County sought our opinion regarding the validity of a proposed *nonstatutory* diversion program in which the court could "divert" first time defendants on certain nondrug misdemeanor charges. On successful completion of a "diversion program" the charges would be dismissed. In an unpublished opinion (I.L. 76–165 dated Aug. 20, 1976) we concluded such a program was not authorized because diversion of criminal defendants was preempted by state law.

In response to that opinion, the Legislature, by Statutes 1977, chapter 574, section 2, enacted chapter 2.7 (§§ 1001–1011) of part II, title 6 of the Penal Code (referred to herein as "chapter 2.7") which, among other things, declared the Legislature's intention that state law did not preempt pretrial diversion programs. The conclusion in our opinion was later confirmed by the Court of Appeal in *People* v. *Municipal Court (Gelardi)* (1978) 84 Cal. App. 3d 962, which held that a nonstatutory diversion scheme established as a matter of "judicial practice" prior to the effective date of chapter 574 was preempted by state law and thus not authorized.

Since sections 1001-1001.11[1] are the only statutory provisions which pertain to pretrial diversion programs, other than the drug diversion and a domestic violence diversion program set forth in Penal Code 1001–1001.11, it is critical to determine whether these sections "permit" preconviction diversion for first time "drunk driving" defendants. Because of the importance of the language of these sections in determining this question, we set them forth in their entirety as they were enacted by Statutes 1977, chapter 574, section 2:

"CHAPTER 2.7. DIVERSION

"1001. It is the intent of the Legislature that neither this chapter, Chapter 2.5 (commencing with Section 1000) of this title, nor any other provision of law be construed to preempt other current or future pretrial or precomplaint diversion programs. It is also the intent of the Legislature that current or future posttrial diversion programs not be preempted, except as provided in Section 13201, 13201.5, or 13352.5 of the Vehicle Code. Sections 1001.2 to 1001.11, inclusive, of this chapter shall apply only to pretrial diversion programs as defined in Section 1001.1 herein.

"1001.1. As used in Sections 1001.2 to 1001.11, inclusive, of this chapter, pretrial diversion refers to the procedure of postponing prosecution either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication.

"1001.2. This chapter shall not apply to any pretrial diversion or posttrial programs for the treatment of problem drinking or alcoholism utilized for persons convicted of one or more offenses under Section 23102 of the Vehicle Code or to pretrial diversion programs established pursuant to Chapter 2.5 (commencing with Section 1000) of this title.

"1001.3. At no time shall a defendant be required to make an admission of guilt as a prerequisite for placement in a pretrial diversion program.

"1001.4. A divertee is entitled to a hearing, as set forth by law, before his or her pretrial diversion can be terminated for cause.

"1001.5. No statement, or information procured therefrom, made by the defendant in connection with the determination of his or her eligibility

[1] Section references are to the Penal Code unless otherwise indicated.

for diversion, and no statement, or information procured therefrom, made by the defendant subsequent to the granting of diversion or while participating in such program, and no information contained in any report made with respect thereto, and no statement or other information concerning the defendant's participation in such program shall be admissible in any action or proceeding. However, if a divertee is recommended for termination for cause, information regarding his or her participation in such program may be used for purposes of the termination proceedings.

"1001.6. At such time that a defendant's case is diverted, any bail bond or undertaking, or deposit in lieu thereof, on file by or on behalf of the defendant shall be exonerated, and the court shall enter an order so directing.

"1001.7. If the divertee has performed satisfactorily during the period of diversion, the criminal charges shall be dismissed at the end of the period of diversion.

"1001.8. Any record filed with the Department of Justice shall indicate the disposition of those cases diverted pursuant to this chapter.

"1001.9. Upon successful completion of a diversion program, the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or diverted for such offense. A record pertaining to an arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, be used in any way which could result in the denial of any employment, benefit, license, or certificate.

"1001.10. A county or city which operates a diversion program, pursuant to this chapter, shall report to the Legislature annually regarding the implementation, administration and operation of such program. Such report shall include but not be limited to the following: the date the program commenced; the program's general eligibility criteria for divertees; the name of the county or other agency or agencies which established such eligibility criteria; other criteria or standards established for the program; the offense charged against the divertee; the number of individuals referred to the program; the number of individuals accepted by the program; the reasons for not accepting individuals referred to the program; the specific program completed by each successful divertee; the number of successful and unsuccessful terminations; the reason for unsuccessful termination; and the

funding sources for the diversion organization. At no time shall the names, addresses, or other identifying information of the referred or participating divertees be used in these reports. [Section 1001.10 was repealed by Statutes 1979, chapter 775.]

"1001.11. This chapter shall remain in effect until January 1, 1980, and on such date is repealed. However, if at the time this chapter is repealed a defendant has already been referred to and accepted by a diversion program or if a defendant is then participating in such a program, that defendant shall be allowed to continue in and complete such program." (The date chapter 2.7 was to remain in effect was changed to January 1, 1982 by Statutes 1979, chapter 775.)

The provisions of chapter 2.7 require careful scrutiny to determine the extent to which a defendant may now be diverted by virtue of its provisions. A comparison of chapter 2.7 with the drug diversion procedures in sections 1000 through 1000.5 (referred to herein as "chapter 2.5"); the domestic violence diversion procedures in sections 1000.6 through 1000.11 (referred to herein as "chapter 2.6"); and the drunk driving diversion procedures in Health and Safety Code section 11850 *et seq*. (referred to herein as "H&S 11850 *et seq*.") reveal marked differences. The use of chapter 2.5, chapter 2.6 and H&S 11850 *et seq*. procedures are limited to prosecutions for specified crimes whereas chapter 2.7 has no such limitation except section 1001.2 which provides that chapter 2.7 does not apply to those *convicted* of drunk driving. Chapter 2.5, chapter 2.6 and H&S 11850 *et seq*. set forth criteria which a defendant must meet to be eligible to diversion whereas chapter 2.7 contains no such criteria. Chapter 2.5, chapter 2.6 and H&S 11850 *et seq*. provide express authority for the court to divert the defendant to rehabilitation programs but chapter 2.7 contains no such express authorization.

Section 1001.1 in chapter 2.7 defines pretrial diversion as "the procedure of postponing prosecution either temporarily or permanently . . ." This postponement, continuation or stay of the prosecution for diversion purposes is a judicial act which may not be subjected to approval by the prosecution under the separation of powers doctrine. (*People v. Superior Court (On Tai Ho), supra*, 11 Cal. 3d 59.) It is clear that a court had no power to grant a continuance for diversion not expressly authorized by statute before the enactment of chapter 2.7. (*People v. Municipal Court (Gelardi), supra*, 84 Cal. App. 3d 962.) The court in *Gelardi* noted by way of dicta (*id*., at pp. 700–701) that:

"We observe nothing in the Penal Code's newly enacted (eff. Sept. 13, 1977) chapter 2.7, sections 1001–1001.11, entitled 'Diversion,' which authorizes the above described 'continuance,' dismissal,' and 'rehabilitation' procedures.

Despite the lack of such express authorization or the criteria set forth in chapter 2.5, chapter 2.6 and H&S 11830 *et seq*. it does not necessarily follow that the court does not now have the authority to grant as continuance for diversion.

It is clear from section 1001 that state law no longer preempts pretrial diversion programs. Thus the rationale of our 1976 unpublished opinion was nullified by the enactment of that section. And the conclusion reached in *People v. Municipal Court (Gelardi), supra*, that the court had no power to grant a continuance for purposes of nonstatutory diversion, must be re-examined in the light of section 1001 which was not in effect when the orders reviewed in that case were made. On pages 699–700 of the *Gelardi* opinion the court refers to section 1050 as the basic authority of a court to grant a continuance and points out that the section provides that "continuances shall be granted only upon a showing of good cause." The *Gelardi* opinion then points out that the Legislature has formulated statutory schemes for diversion and concludes that these statutory schemes have preempted the field of diversion not only with respect to local legislation but also as to court devised diversion schemes. The enactment of section 1001 nullifies that rationale which was the basis for the decision that a court had no power to grant a continuance for the purpose of nonstatutory diversion. *Gelardi* may no longer be relied on to answer the question whether a nonstarutory diversion program will furnish the good cause necessary to the grant of a continuance under section 1050. The statutory diversion schemes no longer preempt the field as *Gelardi* held.

Chapter 316, Statutes 1977 made substantial revisions to section 1050 which now reads:

> "1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.
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> "To continue any hearing in a criminal proceedings, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing

specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. *Continuances shall be granted only upon a showing of good cause.* Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council." (Emphasis added.)

In construing chapter 2.7 and section 1050 we must apply the rules of statutory construction. The applicable rules were summarized in *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230, as follows:

"We begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose; a construction making some words surplusage is to be avoided. When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (Citations and quotations omitted.)

Section 1001 made clear the Legislature's intention that the statutory diversion programs do not preempt the field of diversion. Section 3 of chapter 574, Statutes 1977, which enacted chapter 2.7 provides:

"This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"The status of existing local pretrial diversion programs has been placed in doubt by an Attorney General opinion stating that these programs have no statutory basis for existence and that the Legislature has preempted the subject. Consequently, some programs have had their funding held up and for others *the district attorney's office is hesitant to cooperate with proposed or current programs."* (Emphasis added.)

Section 1001 of chapter 2.7 expresses the Legislature's intent that state law was not to be construed to preempt "other current or future pretrial or precomplaint diversion programs."

The Legislature's concern was directed not only toward protecting "existing local pretrial diversion programs" but also to remove any legal impediments which might make local officials hesitate in cooperating with "proposed" diversion programs. Sections 1001.1–1001.11 establish minimum procedural safeguards for such diversion programs.

We believe the language in the clause declaring the urgency of chapter 2.7 and in section 1001 evidences a legislative intention to authorize pretrial diversion of defendants to existing or new programs in a manner which meets the minimum procedural requirements of chapter 2.7. When section 1050 is construed in harmony with chapter 2.7 we conclude diversion pursuant to chapter 2.7 provides the "good cause" necessary to authorize the granting of a continuance under section 1050.

We note the language in section 1001.2 which provides that chapter 2.7 does not authorize the diversion of "persons convicted of one or more offenses under section 23102 of the Vehicle Code." In 61 Ops. Cal. Atty. Gen. 550, 552 (1978) we concluded that state law preempted the entire field of preconviction diversion for the drinking driver, citing section 1001.2. In that opinion we failed to note that the language of section 1001.2 did not apply to a pretrial diversion of persons who have not been convicted of violating Vehicle Code section 23102. Thus our conclusion in that opinion that all pretrial diversion programs with respect to the drinking driver were preempted by state law was overly broad. To the extent that 61 Ops. Cal. Atty. Gen. 550 concludes that pretrial diversion programs for drinking drivers who have never been convicted of violation of Vehicle Code section 23102 are preempted by state law, it is disapproved.

We conclude that preconviction diversion in a first offense misdemeanor drunk driving case is currently authorized by state law providing the requirements of chapter 2.7 are followed.

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