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OPINION	:	No. 83-1105
of	:	DECEMBER 28, 1984
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THE HONORABLE ARLO SMITH, DISTRICT ATTORNEY, CITY AND COUNTY OF SAN FRANCISCO, has requested our opinion on the following question:

May a county establish a nonstatutory pretrial diversion program for defendants charged with sales of small amounts of marijuana?

CONCLUSION

A county may not establish a nonstatutory pretrial diversion program for defendants charged with sales of small amounts of marijuana.

ANALYSIS

The Legislature in chapter 2.5 of the Penal Code has established in controlled substances cases a procedure known as pretrial diversion. (Pen. Code, ch. 2.5, §§ 1000-1000.5.) Diversion under chapter 2.5 allows certain controlled substances offenders, upon

meeting statutory criteria, to bypass criminal prosecutions by completing community programs. (Pen. Code, § 1000, subd. (a) and 1000.1; see 4 ALR 4th 147.) The purposes of the controlled substances diversion statutes are to permit the courts to identify the experimental or tentative user before he or she becomes deeply involved with drugs, to expose the person to community educational and counseling programs, to restore him or her to productive citizenship without the stigma of a criminal conviction, and to reduce the clogging of the criminal justice system. (*People* v. *Superior Court* (On Tai Ho) (1974) 11 Cal.3d 59, 61-62; *California's Experience With Pretrial Diversion* (1975) 7 Southwestern University Law Review 418-420.)

To be eligible for chapter 2.5 diversion, the defendant must not have had a prior conviction involving a controlled substance, the charged offense must not have involved violence or threatened violence, there must be no evidence of a narcotic or restricted dangerous drug offense for which diversion is unavailable, the defendant must not have suffered a prior probation or parole revocation, the defendant must not have had a chapter 2.5 diversion within the prior five years, and the defendant must not have had a felony conviction within the prior five years. (Pen. Code, § 1000, subds. (a)(1)-(6).) When the offense is one of those listed in Penal Code section 1000, the district attorney reviews the defendant's file to determine eligibility[1]. If the defendant is deemed ineligible, the district attorney advises the court and the defendant of the ground for that determination. (Pen. Code, § 1000, subd. (b).) Upon a hearing, the court with the consent of the defendant may order diversion. (Pen. Code, § 1000.3.) If the defendant completes the diversion program the criminal charge will be dismissed. (Pen. Code, § 1000.3.)

In addition to chapter 2.5, pretrial diversion has been authorized by the Legislature in cases involving domestic violence (Pen. Code, ch. 2.6, §§ 1000.6-1000.11), child abuse and neglect (Pen. Code, ch. 2.65, §§ 1000.12- 1000.18), mentally retarded defendants facing misdemeanor charges (Pen. Code, ch. 2.8, §§ 1001.20-1001.35) and misdemeanors generally (Pen. Code, chs. 2.7 and 2.9, §§ 1001-1001.10 and 1001.50-1001.55).

Would a person charged with the *sale* of a small quantity of marijuana, a felony, be eligible for pretrial diversion under chapter 2.5? Such person would not be eligible under that statutory scheme.

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[1] Health and Safety Code section 11357, subdivision (b), authorizes a court to divert persons convicted of possession of 28.5 grams or less of marijuana with prior convictions for the same offense and the concurrence of the district attorney is not required. This is a form of post-conviction diversion.

First, chapter 2.5 does not encompass the crime of selling marijuana, a violation of Health and Safety Code section 11360.[2] Penal Code section 1000, subdivision (a), specifically restricts chapter 2.5 diversion to particular controlled substances offenses not including the sale of marijuana:

> "This chapter shall apply whenever a case is before any court upon an accusatory pleading for violation of Section 11350, 11357, 11364, 11365, 11377, or 11550 of the Health and Safety Code, or Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or section 11368 of the Health and Safety Code if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another, or Section 381 or subdivision (f) of Section 647 of the Penal Code, if for being under the influence of a controlled substance, or Section 4230 of the Business and Professions Code, and it appears to the district attorney that, except as provided in subdivision (b) of Section 11357 of the Health and Safety Code, all of the following [criteria] apply to the defendant . . . ."

(Section 11350 is the crime of possession of a controlled substance. A violation of subdivision (a) of that section is a felony; a violation of subdivision (b) is either a felony or a misdemeanor. Section 11357 is the crime of possession of concentrated cannabis or marijuana and the punishment therefor may be as a felony or as a misdemeanor. Section 11364 covers the possession of an instrument or paraphernalia for injecting or smoking a controlled substance and it carries a misdemeanor penalty. (Health and Saf. Code, § 11374.) Section 11365 is the crime of being present in a place where a controlled substance is being used and is classified as a misdemeanor. (Health & Saf. Code, § 11374.)

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[2] Health and Safety Code section 11360 provides as follows:

> "(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, *sells*, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.
>
> "(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking." (Emphasis added.)

Section 11377 is the crime of possession of certain substances which are not narcotic drugs or possession of certain hallucinogenic substances and bears misdemeanor or felony penalties. Section 11550 is the crime of being under the influence of certain controlled substances and a misdemeanor punishment is specified. Section 11358 is the crime of planting, harvesting or processing marijuana and is punishable as a felony. Section 11368 forbids the forgery of a prescription or possession of a drug secured thereby and is a misdemeanor or a felony. Penal Code section 381 encompasses possession of toluene or similar substance with the intent to breathe, inhale or ingest such substance for the purpose of intoxication. This crime carries a misdemeanor penalty. Penal Code section 647, subdivision (f), is the crime of being under the influence in a public place and it is a misdemeanor. Business and Professions Code section 4230 prohibits possession of certain controlled substances without a prescription and it is punishable under Penal Code section 177 as a misdemeanor.)

None of the above crimes listed in Penal Code section 1000, subdivision (a), involves a sale of a controlled substance or the commercial use thereof. The felony violations, for example, concern simple possession (as contrasted with possession for sale), possession for personal use through a forged prescription, and the cultivating, harvesting or processing of marijuana for personal use.

Secondly, a person charged with a sale of marijuana would not meet one of the criteria for chapter 2.5 diversion, namely, Penal Code section 1000, subdivision (a) (3):

> "There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision."

Appellate courts have held that neither the district attorney nor the courts may modify the statutory eligibility requirements. (See *People* v. *Cina* (1974) 41 Cal.App.3d 136, 140; *People* v. *Fulk* (1974) 39 Cal.App.3d 851, 854-855.) Clearly diversion under chapter 2.5 would be unavailable to a person charged with selling marijuana. (*People* v. *Williamson* (1982) 137 Cal.App.3d 419, 422.)

We are asked, however, whether a county may establish a "nonstatutory" diversion program for such a person, i.e., a program which would operate independently of chapter 2.5. Our attention has been directed to Penal Code section 1001 which introduces a general statutory scheme (chapter 2.7) for misdemeanor diversion enacted

subsequently to chapter 2.5. (Pen. Code, ch. 2.7, §§ 1001-1001.10.) Section 1001[3] states in part:

> "It is the intent of the Legislature that neither this chapter [chapter 2.7], *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." (Emphasis added.)

Some discussion of the historical background of section 1001 is necessary. In 1976, a district attorney sought our opinion respecting the legality of a county's proposed nonstatutory diversion program whereby a court would be able to divert first-time offenders facing certain misdemeanor charges.[4] In a letter opinion we concluded that such program would be invalid since the diversion of criminal defendants was a field of law preempted by state law. (Unpub. Ops.Cal.Atty.Gen. I.L. 76-165, August 20, 1976.) In response to our opinion, the Legislature enacted chapter 2.7 including the aforementioned Penal Code section 1001. In declaring urgency, the Legislature stated in part (Stats. 1977, ch. 574, § 3):

> "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."

Accordingly, in 64 Ops.Cal.Atty.Gen. 179 (1981) we recognized the legislative override of our earlier opinion and concluded that a local diversion program for first- offender misdemeanor drunk drivers could be established if the requirements of chapter 2.7, i.e., Penal Code sections 1001.1 through 1001.11 (misdemeanor diversion), were followed.

Chapter 2.7 as enacted in 1977 defined diversion in Penal Code section 1001.1 as 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." (Stats. 1977, ch. 574, § 2.) The chapter was repealed effective January 1, 1982. (Stats. 1979, ch. 775, § 2.) However, it was reenacted, effective February 17, 1982, with Penal Code section 1001.1 restricting the diversion procedure under the chapter to "an

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[3] Chapter 2.7, including section 1001, was to be repealed by its own terms on January 1, 1985. However, section 1001.11 which provided for such repeal has itself been repealed. (Stats. 1984, ch. 172, § 1.)

[4] The proposed program involved first-time offenders charged with misdemeanors not involving narcotics, deadly weapons, assaults and batteries upon peace officers, Vehicle Code violations or morals charges.

offense filed as a misdemeanor." (Stats. 1982, ch. 42, § 2.) Also in 1982 the Legislature added chapter 2.9 setting down a detailed procedure for diversion of certain misdemeanor offenders if directed by an ordinance adopted by the board of supervisors. (Stats. 1982, ch. 1251, § 2; Pen. Code, §§ 1001.50-1001.55.) In enacting chapter 2.9 the Legislature stated (Stats. 1982, ch. 1251, § 1):

> "The Legislature finds and declares that the diversion of individuals who are amenable to approved diversion programs and are charged with certain misdemeanor offenses promotes the interest of the public in conserving scarce criminal justice resources and promotes the rehabilitation of defendants. It is the intent of the Legislature that nothing in this act shall limit the power to implement a diversion program pursuant to Chapter 2.7 (commencing with Section 1001) of Title 6 of Part 2 of the Penal Code."

Under the present state of the law a pretrial diversion program for misdemeanor offenders may be established under chapter 2.7 or chapter 2.9. However, neither chapter is applicable to a felony offense. Since the sale of marijuana in any amount is a felony, we must return to Penal Code section 1001 to determine if the Legislature intended therein to allow the nonstatutory diversion of such an accused felony offender.

In *People* v. *Tapia* (1982) 129 Cal.App.3d Supp. 1 the appellate department of a superior court was confronted with the question of whether a municipal court could order a diversion of a person charged with petty theft when such diversion was not mandated by a state or a local program. In construing section 1001 the court stated at page 7:

> "Thus, the Legislature has made clear its intention that its previously enacted diversion programs, and any to be enacted in the future, should not be deemed to express a legislative purpose of preempting the field of diversion, that any diversion programs established should meet the criteria set forth in Chapter 2.7, but that those same criteria have no application to existing diversion programs established under the Vehicle Code and by Chapter 2.5."

The court construed section 1001 as permitting local nonstatutory programs which meet the statutory criteria for misdemeanor diversion. This analysis is consistent with that adopted by us in 64 Ops.Cal.Atty.Gen. 179, *supra*, i.e., a local diversion program for first-offender misdemeanor drunk drivers was authorized if the criteria of chapter 2.7 were met. The ultimate holding of *Tapia*, however, is that chapter 2.7 was not a grant of authority to a trial court to divert any defendant from the criminal justice system at any stage of the proceeding at its own volition. The reviewing court stated at pages 7-8:

> "Thus, if it were the intention of the Legislature to empower courts to divert defendants, this chapter stands in stark contrast to Chapter 2.5, which is made applicable to specifically enumerated offenses and sets standards for eligibility for diversion (Pen. Code, § 1000), establishes procedures for making application to be diverted (Pen. Code, § 1000.1), establishes procedures for the court and criteria for determining eligibility of an applicant for diversion (Pen. Code, § 1000.2) and sets forth the consequences of compliance and noncompliance with conditions of diversion. (Pen. Code, §§ 1000.3, 1000.5.) If Chapter 2.7 is to be given the construction urged by defendant, the Legislature has given trial judges unlimited power to divert defendants in every criminal proceeding except as provided in Chapter 2.5 and the Vehicle Code, without restriction as to the nature of the crime, be it misdemeanor or felony or eligibility of a particular defendant, and with no criteria for determining the suitability of the particular defendant for diversion."

Likewise, we do not discern a legislative intent to give local governments an unlimited power to divert defendants in every type of criminal proceeding, including those in which they are expressly ineligible for diversion under state law. The *Tapia* analysis was adopted in *People* v. *Padfield* (1982) 136 Cal.App.3d 218, 230-231 (chapter 2.7 not a general grant of authority to trial courts to divert defendants).

We find nothing in the history of section 1001 which indicates that the Legislature intended to authorize the pretrial diversion of those charged with felonies generally or with the sale of marijuana in particular. Such intent would be contrary to the clear purpose of chapter 2.5 to divert only those using drugs or possessing drugs for their own use rather than for sale or other commercial purpose.

As we have seen, section 1001 had its origin in the Legislature's disagreement with our legal opinion concerning a nondrug misdemeanor diversion program proposed by a local government. Section 1001 is to be construed in this historical context. The Legislature was authorizing the enactment and continuation of local diversion programs. It enacted chapter 2.7 (and subsequently chapter 2.9) as the framework within which such programs could operate, and this framework authorized diversion in misdemeanor cases only. We do not believe that the Legislature authorized local programs that would directly conflict with the precise controlled substances diversion provisions of chapter 2.5.

Chapter 2.5 establishes procedures for making application for diversion (Pen. Code, § 1000.1), specifies procedures for the court and criteria for determining the eligibility of the applicant (Pen. Code, § 1000.2) and sets forth the consequences of compliance or noncompliance with the conditions of diversion (Pen. Code, §§ 1000.3 and

1000.5). Having devised such a scheme for certain controlled substances offenses and not others we do not perceive any legislative intent to permit a county to establish a program to divert a felony controlled substances offender ineligible for diversion under chapter 2.5. Where the Legislature has made a person charged with the sale of marijuana ineligible for diversion it would be anomalous to posit a legislative intent to permit diversion of that person by a local practice in stark contradiction to the purpose of chapter 2.5.

We construe Penal Code section 1001, as did the court in *Tapia*, as an authorization to local governments to establish diversion programs for offenses which are misdemeanors provided the criteria of chapter 2.7 are followed. Moreover, misdemeanor diversion programs may be established by ordinance under chapter 2.9. We do not believe that the Legislature intended by section 1001 to allow local diversion for any felony offense.

Accordingly, we conclude that a county may not establish a nonstatutory pretrial diversion program for defendants charged with the sales of small amounts of marijuana.

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