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DEERING'S CALIFORNIA CODES ANNOTATED
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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 6. Offenses and Penalties
Article 4. Miscellaneous Offenses and Provisions

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Cal Health & Saf Code § 11364 (2007)

§ 11364. Possession of instrument or paraphernalia for injecting or smoking controlled substance; Application to hypodermic needles and syringes

(a) It is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking (1) a controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) 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 (2) of subdivision (d) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V.

(b) This section shall not apply to hypodermic needles or syringes that have been containerized for safe disposal in a container that meets state and federal standards for disposal of sharps waste.

(c) Pursuant to authorization by a county, with respect to all of the territory within the county, or a city, with respect to the territory within in the city, for the period commencing January 1, 2005, and ending December 31, 2010, subdivision (a) shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source.

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 14, effective October 1, 1973; Stats 1975 ch 248 § 6; Stats 1983 ch 790 § 9; Stats 1984 ch 1635 § 56; Stats 1986 ch 1044 § 9; Stats 1990 ch 544 § 1 (SB 2028), ch 1664 § 4 (AB 2645); Stats 2004 ch 608 § 4 (SB 1159).

NOTES:

Amendments:

1973 Amendment:

(1) Added "(1)" after "or smoking"; and (2) substituted "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) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V" for "classified in Schedule I, II, III, IV, or V".

1975 Amendment:

Substituted "paragraph (11), (12), or (17)" for "paragraph (10), (11), (12), or (17)".

1983 Amendment:

Substituted "subdivision (b), (c), or (e)" for "subdivision (b) or (c)".

1984 Amendment:

Substituted "paragraph (14), (15), or (20)" for "paragraph (11), (12), or (17)".

1986 Amendment:

Added ", or paragraph (1) of subdivision (f)".

1990 Amendment:

(1) Added the comma after "instrument"; (2) deleted "or" after "Section 11054," the second time it appears; and (3) added "or specified in paragraph (2) of subdivision (d) of Section 11055,". (As amended Stats 1990 ch 1664, compared to the section as it read prior to 1990. This section was also amended by an earlier chapter, ch 544. See *Gov C* § 9605.)

2004 Amendment:

(1) Redesignated the former section to be subd (a); and (2) added subds (b) and (c).

Historical Derivation:

(a) Former H & S C § 11555, as enacted Stats 1939 ch 60, amended Stats 1st Ex Sess 1940 ch 9 § 30, Stats 1949 ch 1475 § 20, Stats 1953 ch 434 § 1.

(b) Former H & S C § 11915, as added Stats 1965 ch 2030 § 1.

(c) Stats 1929 ch 216 § 3, as amended Stats 1931 ch 709 § 3, Stats 1935 ch 813 § 5.

Editor's Notes

For citation of act, see the 1990 Note following *H & S C § 11353*.

Cross References:

"Narcotic drug": *H & S C § 11019*.

Use of marijuana for medical purposes: *H & S C § 11362.5*.

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

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

Prohibition against selling smoking paraphernalia to minor: *Pen C § 308*.

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

Collateral References:

Witkin & Epstein, *Criminal Law* (3d ed), Crimes Against Public Peace and Welfare § 343.

Witkin & Epstein, *Criminal Law* (3d ed), Pretrial Proceedings §§ 342, 343, 344, 346, 351.

Cal Jur 3d (Rev) *Criminal Law* § 1536.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2410, Possession of Controlled Substance Paraphernalia

Law Review Articles:

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

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

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

Alteration of "natural" biological states by LSD. *19 Hast LJ 803*.

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

Diversion of drug offenders in California; operation of the diversion statute. *26 Stan LR 923*.

A primer on heroin. *27 Stan LR 80*.

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

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

Annotations:

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics law. 92 ALR3d 47.

Validity and construction of Drug Paraphernalia Act (*21 USCS 863*). 123 ALR Fed 637.

Hierarchy Notes:

Div. 10 Note

Div. 10, Ch. 6 Note

Div. 10, Ch. 6, Art. 4 Note

NOTES OF DECISIONS

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.

Knowing possession of the contraband is the gravamen of offenses of illegal possession of narcotics and narcotic paraphernalia (Health & Saf Code, former §§ 11500, 11555). *Jennings v. Superior Court of Contra Costa County* (1967) 66 *Cal 2d* 867, 59 *Cal Rptr* 440, 428 *P2d* 304, 1967 *Cal LEXIS* 351.

Whether an object is a device, contrivance, instrument, or paraphernalia used for the smoking of marijuana within the proscription of Health & Saf Code, former § 11555, is a question of fact. *Fraher v. Superior Court of Los Angeles County* (1969, *Cal App 2d Dist*) 272 *Cal App 2d* 155, 77 *Cal Rptr* 366, 1969 *Cal App LEXIS* 2256, overruled *People v. Fein* (1971) 4 *Cal 3d* 747, 94 *Cal Rptr* 607, 484 *P2d* 583, 1971 *Cal LEXIS* 357.

Possession of any device, contrivance, instrument or paraphernalia used to smoke marijuana is a crime (Health & Saf Code, former § 11555), and whether an object is so used is a question of fact; that fact, where the subject matter is sufficiently beyond common experience, may be determined from an expert witness' opinion though the fact embraces the ultimate issue to be decided. *People v. Nickles* (1970, *Cal App 1st Dist*) 9 *Cal App 3d* 986, 88 *Cal Rptr* 763, 1970 *Cal App LEXIS* 2012.

In an action by an owner of retail stores that sold, in addition to phonograph records and tapes, a variety of pipes, "alligator" clips, small spoons to be worn on neck chains, and all types of cigarette papers, seeking to enjoin civil and criminal enforcement of a city ordinance requiring exclusion of minors from rooms in which devices contrivances, instruments or paraphernalia for smoking or injecting or consuming marijuana, hashish, PCP, or any controlled substance, as well as roach clips, cigarette papers, and rollers designed for smoking those substances are sold or displayed for sale, the trial court erred in ruling that the state had preempted the field of regulation of businesses

displaying drug paraphernalia to minors. The ordinance does not purport to regulate either the use or sale of controlled substances or paraphernalia, but rather to regulate the operation of local retail businesses frequented by minors, so that their operation does not encourage drug use by minors, and thus it neither contradicts nor duplicates state law. Moreover, the subject matter of the ordinance is not fully covered by general law. There is nothing in the general law to suggest a legislative purpose to take over the regulation of local businesses engaged in the exhibition and sale of items which may be legally sold under the general law. Though *Health & Saf. Code, § 11364*, makes possession of certain drug paraphernalia unlawful, it cannot reasonably be inferred that the failure to outlaw possession of other devices for the use of drugs indicates a legislative intent to encourage the sale of all other devices to minors. *Music Plus Four, Inc. v. Barnett* (1980, Cal App 4th Dist) 114 Cal App 3d 113, 170 Cal Rptr 419, 1980 Cal App LEXIS 2623.

An ordinance which was enacted with the intent to prohibit the entire citizenry from use of drug paraphernalia and to prevent its distribution by those who know the purpose for which it is sold, and which included drug paraphernalia relating to marijuana, did not conflict with *Health & Saf. Code, § 11364*, which regulates the use of drug paraphernalia by adults, but excludes marijuana, *Health & Saf. Code, § 11364.5*, which prohibits minors from being in places where drug paraphernalia is displayed, and which permits further local regulation, or *Pen. Code, § 308*, which prohibits the sale of paraphernalia for tobacco or marijuana ingestion to minors, and which also permits further local regulation. *Bamboo Brothers v. Carpenter* (1982, Cal App 2d Dist) 133 Cal App 3d 116, 183 Cal Rptr 748, 1982 Cal App LEXIS 1701.

Health & Saf. Code, § 11364 (unlawful possession of devices, contrivances, instruments, and paraphernalia for smoking controlled substances), was not unconstitutionally vague as applied to defendant, who had been arrested after a police officer observed him drop a cigarette lighter and a small glass tubular object, where an expert witness testified that the purpose of the object was the smoking of cocaine. The statute does not render unlawful "any" pipe; whether an object is a device, contrivance, instrument, or paraphernalia for the smoking of cocaine is a question of fact, which may, if the subject matter is sufficiently beyond common experience, be determined from the opinion of an expert witness even though the fact embraces the ultimate issue to be decided. *People v. Chambers* (1989, Cal App Dep't Super Ct) 209 Cal App 3d Supp 1, 257 Cal Rptr 289, 1989 Cal App LEXIS 724.

The purpose of *Health & Saf. Code, § 11364* (unlawful possession of devices, contrivances, instruments, and paraphernalia for smoking controlled substances), and its companion drug paraphernalia statutes is to eliminate the use and sale of such items. *People v. Chambers* (1989, Cal App Dep't Super Ct) 209 Cal App 3d Supp 1, 257 Cal Rptr 289, 1989 Cal App LEXIS 724.

Cal. Health & Safety Code § 11364.5 is of no use in the interpretation of *Cal. Health & Safety Code § 11364*. *In re Johnny O.* (2003, Cal App 4th Dist) 107 Cal App 4th 888, 132 Cal Rptr 2d 471, 2003 Cal App LEXIS 507.

Trial court erred in adjudicating defendant a juvenile delinquent for possessing two bongs used to smoke natural marijuana; possession of a device for smoking natural marijuana was not unlawful, only a device used to smoke the synthetic substance tetrahydrocannabinols. *In re Johnny O.* (2003, Cal App 4th Dist) 107 Cal App 4th 888, 132 Cal Rptr 2d 471, 2003 Cal App LEXIS 507.

The possession of a device for smoking marijuana, without more, is not a crime in California. *In re Johnny O.* (2003, Cal App 4th Dist) 107 Cal App 4th 888, 132 Cal Rptr 2d 471, 2003 Cal App LEXIS 507.

Drug evidence should not have been suppressed because there was no Fourth Amendment violation when defendant was stopped for a smashed taillight and detained for about two minutes before giving his consent to search. Requesting consent to search did not require reasonable suspicion, as long as the request did not unduly prolong the stop. *People v. Gallardo* (2005, Cal App 4th Dist) 130 Cal App 4th 234, 29 Cal Rptr 3d 455, 2005 Cal App LEXIS 966, review denied (2005, Cal) 2005 Cal LEXIS 10090.

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.