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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

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11365 (2007)

§ 11365. Presence in place where substance used

(a) It is unlawful to visit or to be in any room or place where any controlled substances which are 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, or specified in subdivision (b) or (c) or paragraph (2) of subdivision (d) of Section 11055, or which are narcotic drugs classified in Schedule III, IV, or V, are being unlawfully smoked or used with knowledge that such activity is occurring.

(b) This section shall apply only where the defendant aids, assists, or abets the perpetration of the unlawful smoking or use of a controlled substance specified in subdivision (a). This subdivision is declaratory of existing law as expressed in *People v. Cressey (1970) 2 Cal. 3d 836*.

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 15, effective October 1, 1973; Stats 1975 ch 248 § 7; Stats 1983 ch 790 § 10; Stats 1984 ch 1635 § 58; Stats 1986 ch 1044 § 10; Stats 1991 ch 551 § 1 (AB 55).

NOTES:

Amendments:

1973 Amendment:

Substituted "which are 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 which are narcotic drugs classified in Schedule III, IV, or V," for "classified in Schedule I or II".

1975 Amendment:

Substituted "paragraph (14), (15), or (20)" for "paragraph (10), (14), (15), or (20)".

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 (13)".

1986 Amendment:

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

1991 Amendment:

(1) Designated the former section to be subd (a); (2) added "or paragraph (2) of subdivision (d)" in subd (a); and (3) added subd (b).

Historical Derivation:

(a) Former H & S C § 11556, as added Stats 1st Ex Sess 1940 ch 9 § 31, amended Stats 1945 ch 955 § 33, Stats 1949 ch 1475 § 21, Stats 1953 ch 434 § 2, Stats 1957 ch 2157 § 1.

(b) Former H & S C § 11710, as enacted Stats 1939 ch 60.

(c) Stats 1929 ch 216 § 4, Stats 1935 ch 813 § 5a.

Cross References:

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

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

"Knowingly": *Pen C § 7*.

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

Aggravating circumstances in felony offenses involving methamphetamine: *Pen C § 1170.74*.

Collateral References:

Cal Criminal Defense Practice (Matthew Bender) ch 145 "Narcotics and Alcohol Offenses" § 145.01.

Witkin & Epstein, Criminal Law (3d ed), Crimes Against Public Peace and Welfare §§ 118, 343.

Witkin & Epstein, Criminal Law (3d ed), Criminal Judgment §§ 81, 82.

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. 2401, Aiding and Abetting Unlawful Use of Controlled Substance

Law Review Articles:

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

California Marijuana Possession Statute: An infringement on the right of privacy or other peripheral constitutional rights. *19 Hast LJ 758.*

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

Proposition 36 Eligibility: Are Courts and Prosecutors Following or Frustrating the Will of Voters? *36 McGeorge LR 627.*

Unconstitutionality of the statute prohibiting use of peyote as applied to religious users. *17 Stan LR 494.*

No place for "being in a place". *23 Stan LR 1009.*

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

Marijuana possession and the California constitutional prohibition of cruel or unusual punishment. *21 UCLA LR 1136.*

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:

Permitting unlawful use of narcotics in private home as criminal offense. *54 ALR3d 1297.*

Hierarchy Notes:

Div. 10 Note

Div. 10, Ch. 6 Note

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

NOTES OF DECISIONS

Decisions Under Former H & S C § 11556

1. In General 2. Constitutionality 3. Identity of Offenses 4. Particular Applications

1. In General

In determining whether there has been violation of this section, status of place as one where narcotics have been smoked or used may not be considered; statute refers to actions of smoking or using narcotics, not to standing condition, and requires by its terms that narcotics "are being unlawfully smoked or used" and "with knowledge that such activity is occurring." *People v. Perez* (1963, Cal App 1st Dist) 219 Cal App 2d 760, 33 Cal Rptr 398, 1963 Cal App LEXIS 2434.

The doctrine of ejusdem generis will not be applied to restrict the meaning of the word "place," as used in Health & Saf Code, former § 11556, prohibiting being in a room or place where narcotics are used, to spaces similar to a room and to exclude an automobile as a "place," where such an interpretation would defeat the apparent legislative purpose of eliminating or controlling traffic in narcotics. *People v. Lee* (1968, Cal App 2d Dist) 260 Cal App 2d 836, 67 Cal Rptr 709, 1968 Cal App LEXIS 1923.

The offense of knowingly being present in any room or place where any narcotics are being unlawfully smoked or used (Health & Saf Code, former § 11556) is not an included offense under Health & Saf Code, former § 11530, which forbids possession of marijuana. *People v. Wilson* (1969, Cal App 2d Dist) 271 Cal App 2d 60, 76 Cal Rptr 195, 1969 Cal App LEXIS 2357.

2. Constitutionality

This section prior to 1957 amendment was unconstitutional since it prohibited citizens or inhabitants from entering designated place innocently, not knowing its character, or for any lawful purpose. *Bonwell v. Justice Court for Tulare Judicial Dist.* (1957, Cal App 4th Dist) 148 Cal App 2d 906, 307 P2d 716, 1957 Cal App LEXIS 2451.

There could be no criminal conspiracy to violate this section, as it read prior to 1957 amendment because it was unconstitutional. *People v. Drake* (1957, Cal App 4th Dist) 151 Cal App 2d 28, 310 P2d 997, 1957 Cal App LEXIS 1723.

Health & Saf Code former § 11556, prohibiting being in a place where narcotics are being unlawfully smoked or used with knowledge of such activity is constitutionally clear; a person of common intelligence would understand the statute by its plain meaning to be designed for a person who knowingly, wilfully and intentionally involves himself with unlawful marijuana smoking or using, and the knowledge required is plainly the knowledge of the person charged with a violation of the statute. *People v. Brim* (1968, Cal App 4th Dist) 257 Cal App 2d 839, 65 Cal Rptr 265, 1968 Cal App LEXIS 2513.

In a prosecution for being in a place where narcotics were being unlawfully smoked or used with the knowledge of such activity under Health & Saf Code, former § 11556, defendant may not test the constitutionality of the statute against hypothetical facts not shown to be applicable to himself. *People v. Brim* (1968, Cal App 4th Dist) 257 Cal App 2d 839, 65 Cal Rptr 265, 1968 Cal App LEXIS 2513.

Health & Saf Code, former § 11556, making it unlawful to be in a place where narcotics are used, as amended by the 1957 Legislature to require knowledge of the use by the accused, is constitutional. *People v. Lee* (1968, Cal App 2d

Dist) 260 Cal App 2d 836, 67 Cal Rptr 709, 1968 Cal App LEXIS 1923.

Health & Saf Code, former § 11556, making it unlawful to be in a place in which narcotics are being unlawfully smoked or used with knowledge that such activity is occurring, could constitutionally apply where it was shown that defendant controlled the place in which marijuana was being used and, in fact, had possession of marijuana in his apartment. *People v. Cressey (1970) 2 Cal 3d 836, 87 Cal Rptr 699, 471 P2d 19, 1970 Cal LEXIS 311.*

Health & Saf Code, former § 11556 (knowingly being present in a room or place where any narcotics are being unlawfully smoked or used) is a proper exercise of the state's police power to pass regulations designed to promote the public health, safety, comfort, and welfare, with means reasonably appropriate to the purpose, the classification not appearing to be an abuse of the Legislature's discretionary power to make reasonable classifications, and the statute itself not being one which infringes on the freedom of association, as it does not deny anyone the right to associate with anyone he chooses, but simply prohibits him from being present while narcotics are being used. *People v. Calder (1970, Cal App 2d Dist) 6 Cal App 3d 931, 86 Cal Rptr 446, 1970 Cal App LEXIS 1397.*

To constitutionally sustain a finding of violation of Health & Saf Code former § 11556 (being in a place where any narcotics are being used, with knowledge that such activity is occurring), it is necessary that there be proof of more involvement by a defendant than mere voluntary presence and knowledge; thus, a juvenile court finding that defendant violated that section was improper where, although circumstantial evidence adequately supported the finding that she was voluntarily present in an automobile, knowing marijuana was being smoked therein, there was no evidence that she owned, drove, or had control over the car, no adequate evidence that she was in actual or constructive possession of the contraband, and no evidence that she aided or abetted its illegal use. *In re Elisabeth H. (1971, Cal App 5th Dist) 20 Cal App 3d 323, 97 Cal Rptr 565, 1971 Cal App LEXIS 1177.*

3. Identity of Offenses

In a prosecution for illegal marijuana possession in which defendant was found guilty as charged after trial to the court, but was convicted of the misdemeanor of knowingly being present in a room or place where any narcotics are being unlawfully smoked or used (Health & Saf Code, Pen C § 11556), pursuant to a stipulation of counsel, the judgment of conviction was not authorized by *Pen Code, § 1181*, subd 6, which expressly limits the power of the court to modify a verdict or finding to case where a defendant is guilty of a lesser degree of the crime of which he was convicted or of a lesser crime included therein, and was void, where the judgment convicted him of an offense not necessarily included in the charge and where the evidence did not show any semblance of a violation of the offense of which defendant was convicted to support any theory of informal amendment of the information. *People v. Wilson (1969, Cal App 2d Dist) 271 Cal App 2d 60, 76 Cal Rptr 195, 1969 Cal App LEXIS 2357.*

Defendant's failure to object to a stipulation that he be found guilty of Health & Saf Code, former § 11556 (knowingly being present in a room or place where any narcotics are being unlawfully smoked or used) as a lesser necessarily included offense of Health & Saf Code, former § 11530 (illegal possession of marijuana) with which he was charged, was an implied consent to the stipulation, where defendant, represented by competent counsel, stood by and acquiesced in a procedure whereby he was forever discharged on the serious count in the information as originally filed, and convicted of a less serious offense. *People v. Calder (1970, Cal App 2d Dist) 6 Cal App 3d 931, 86 Cal Rptr 446, 1970 Cal App LEXIS 1397.*

4. Particular Applications

Health & Saf Code, former § 11556, prohibiting being in a place where narcotics are being unlawfully smoked or used with knowledge of such activity, does not require proof of possession, and is designed for a factual situation where knowing, wilful, intentional involvement with unlawful marijuana smoking or using can be proved beyond a reasonable doubt, although possession cannot be so proved. *People v. Brim (1968, Cal App 4th Dist) 257 Cal App 2d 839, 65 Cal Rptr 265, 1968 Cal App LEXIS 2513.*

In a prosecution for possession of marijuana, evidence that after a street arrest of defendant for an unrelated misdemeanor, an unsmoked marijuana cigarette was found in his breast pocket at the police station, did not show any semblance of a violation of Health & Saf Code, former § 11556, which forbids knowing presence in any room or place where any narcotics are being unlawfully smoked or used. *People v. Wilson* (1969, Cal App 2d Dist) 271 Cal App 2d 60, 76 Cal Rptr 195, 1969 Cal App LEXIS 2357.