

LEXSTAT CAL HEALTH & SAF CODE § 11377

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 5. Offenses Involving Controlled Substances Formerly Classified as Restricted Dangerous Drugs

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Health & Saf Code § 11377 (2007)

§ 11377. Possession

(a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with *Section 4211*) of *Chapter 9 of Division 2 of the Business and Professions Code*, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year or in the state prison.

(b)

(1) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (f) of Section 11056, and who has not previously been convicted of a violation involving a controlled substance specified in subdivision (f) of Section 11056, is guilty of a misdemeanor.

(2) Any person who violates subdivision (a) by unlawfully possessing a controlled substance specified in subdivision (g) of Section 11056 is guilty of a misdemeanor.

(c) In addition to any fine assessed under subdivision (b), the judge may assess a fine not to exceed seventy dollars (\$70) against any person who violates subdivision (a), with the proceeds of this fine to be used in accordance with *Section 1463.23 of the Penal Code*. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

HISTORY:

Added Stats 1972 ch 1407 § 3. Amended Stats 1973 ch 1078 § 22, effective October 1, 1973, ch 1088 § 3, effective October 1, 1973; Stats 1976 ch 1139 § 81, operative July 1, 1977; Stats 1977 ch 843 § 23; Stats 1978 ch 699 § 3; Stats

1981 ch 742 § 1; Stats 1984 ch 1635 § 65; Stats 1985 ch 3 § 3, effective January 29, 1985; Stats 1986 ch 1033 § 2, ch 1044 § 20.5; Stats 1988 ch 1243 § 3; Stats 1991 ch 294 § 2 (AB 444); Stats 1998 ch 358 § 1 (AB 1731); Stats 1999 ch 975 § 3 (AB 924); Stats 2001 ch 838 § 3 (AB 98), ch 841 § 5.5 (AB 258); Stats 2002 ch 664 § 131 (AB 3034).

NOTES:

Amendments:

1973 Amendment:

(1) Added subdivision designations (a) and (c); (2) amended subd (a) by (a) adding "which is (1)"; and (b) substituting "other than any substance specified in paragraph (6) of subdivision (b) of Section 11056, and which is not a narcotic drug or (2) which is specified in subdivision (d) of Section 11054, except paragraphs (10), (11), (12), and (17) of such subdivision, or specified in subdivision (d) of Section 11055, unless" for "except"; (3) added subd (b); (4) amended subd (c) by (a) substituting "a" for "such" after "If"; (b) adding "charged with an alleged violation of subdivision (a)"; (c) deleting "felony" after "convicted once of any"; and (d) substituting "subdivision (d)" for "this division, of a conspiracy to commit any offense described in this division, or of any offense under the laws of any other state or the United States which if committed in this state, would have been punishable as an offense described in this division"; and (5) added subd (d). (As amended Stats 1973 ch 1088, compared to the section as it read prior to 1973. This section was also amended by an earlier chapter, ch 1078. See *Gov C § 9605*.)

1976 Amendment:

Deleted (1) "for a period of not less than one year nor more than 10 years" at the end of subd (a); and (2) former subs (c) and (d) which read: "(c) If a person charged with an alleged violation of subdivision (a) has been previously convicted once of any offense described in subdivision (d), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of not less than two years or more than 20 years and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than two years in the state prison.

"(d) Any previous conviction of any felony offense described in this article, of a conspiracy to commit any offense described in this article, or of any offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such a felony offense, shall be charged pursuant to subdivision (c)."

1977 Amendment:

Added (1) ", or pharmacist acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or registered nurse acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or physician's assistant acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1 licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison" in subd (a); and (2) ", or pharmacist acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or registered nurse acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part

1 of Division 1, or physician's assistant acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1 licensed to practice in this state, shall be punished by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment" in subd (b).

1978 Amendment:

Substituted "subdivision (d) or (e)" for "subdivision (d)" in subd (a).

1981 Amendment:

Deleted (1) "other than any substance specified in paragraph (6) of subdivision (b) of Section 11056," after "Schedule III, IV, or V," in subd (a); and (2) former subd (b) which read: "(b) Except as otherwise provided in Article 8 (commencing with *Section 4211*) of Chapter 9 of Division 2 of the *Business and Professions Code*, every person who possesses any controlled substance specified in paragraph (6) of subdivision (b) of Section 11056, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, or pharmacist acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or registered nurse acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or physician's assistant acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, licensed to practice in this state, shall be punished by a fine of not exceeding five hundred dollars (\$500), or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment."

1984 Amendment:

Substituted the section for the former section which read: "(a) Except as otherwise provided in Article 8 (commencing with *Section 4211*) of Chapter 9 of Division 2 of the *Business and Professions Code*, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug or (2) which is specified in subdivision (d) of Section 11054, except paragraphs (10), (11), (12), and (17) of such subdivision, or specified in subdivision (d) or (e) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, or pharmacist acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or registered nurse acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or physician's assistant acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1, or physician's assistant acting within the scope of a project authorized under Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1 licensed to practice in this state, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison."

1985 Amendment:

(1) Substituted "Article 7" for "Article 8"; (2) substituted ", (2)" for "or (2) which is"; (3) added subdivision designation (a)(3); and (4) substituted ", (e), or (f)" for "or (e)" in subd (a)(3).

1986 Amendment:

(1) Amended subd (a) by (a) adding "subdivision (b) or in"; and (b) substituting "(3) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (4)" for "or (3)"; and (2) added subd (b). (As amended Stats 1986 ch 1044, compared to the section as it read prior to 1986. This section was also amended by an earlier chapter, ch 1033. See *Gov C § 9605*.)

1988 Amendment:

Added subd (c).

1991 Amendment:

Added "except subdivision (g) of Section 11056," in subd (a)(1).

1998 Amendment:

(1) Amended subd (a) by (a) deleting "except subdivision (g) of Section 11056," before "(2) specified"; and (b) substituting "a" for "the" after "imprisonment in"; (2) redesignated former subd (b) to be subd (b)(1); and (3) added subd (b)(2).

1999 Amendment:

Added "as authorized by law and" near the beginning of subd (a).

2001 Amendment:

Amended subd (a) by (1) adding "Section 11375, or" near the beginning; (2) adding "(11) of subdivision (c) of Section 11056, (4) specified in paragraph"; and (3) substituting "(5)" for "(4)" after "Section 11054, or". (As amended Stats 2001 ch 841, compared to the section as it read prior to 2001. This section was also amended by an earlier chapter, ch 838. See *Gov C § 9605*.)

2002 Amendment:

Deleted "such" after "convicted of" in subd (b)(1).

Historical Derivation:

Former H & S C § 11910, as added Stats 1965 ch 2030 § 1, amended Stats 1968 ch 1465 § 2, Stats 1970 ch 1098 § 14.

Cross References:

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

"Dangerous drug" or "dangerous device": *B & P C § 4022*.

Unspecified felony punishment: *Pen C § 18*.

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

Mandatory referral of child violators to prosecuting attorney: *CRC Rule 1404(d)*.

Collateral References:

Cal Forms Pl & Practice (Matthew Bender) ch 214 "Drugs and Pharmacists".

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

10 Witkin Summary (10th ed) Parent and Child § 768.

Defense of Narcotics Cases (Matthew Bender) ch 1 "Narcotic Crimes," ch 4 "Identification of Drugs".

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2300, Sale, Transportation, etc., of Controlled Substance

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2301, Offering to Sell, Transport, etc., a Controlled Substance

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2303, Possession of Controlled Substance While Armed With Firearm

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2304, Simple Possession of Controlled Substance

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2380, Sale, Furnishing, etc., of Controlled Substance to Minor

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2381, Offering to Sell, Furnish, etc., Controlled Substance to Minor

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2748, Possession of Controlled Substance or Paraphernalia in Penal Institution

Law Review Articles:

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

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

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

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*.

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

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:

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense. *35 ALR3d 939*.

Minimum quantity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law. *4 ALR5th 1*.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant-Cocaine cases. *2 ALR6th 551*.

Propriety of lesser included offense charge in state prosecution of narcotics defendant-Heroin cases. *7 ALR6th 169*.

Propriety of lesser-included-offense charge in state prosecution of narcotics defendant-Methamphetamine cases. *8 ALR6th 265*.

NOTES OF DECISIONS

Decisions Under Current Law

1. Generally 2. Applicability 3. Construction with Other Law 4. Legislative Intent 5. Elements 6. Error 7. Evidence: Admissible 8. Evidence: Sufficient 8.5. Evidence-Insufficient 9. Hearing 10. Instructions 11. Jurors 12. Sentencing

Decisions Under Former Law

1. Generally 2. Constitutionality 3. Applicability 4. Construction 5. Construction with Other Law 6. Elements 7. Instructions 8. Sentencing

Decisions Under Current Law 1. Generally

In a controlled substance prosecution, the trial court did not err in permitting the People to amend the information during trial to charge possession of the substance rather than possession for sale or in permitting an amendment later in trial to specify possession of phenobarbital rather than secobarbital, where the charges were all based on defendant's alleged possession of specific capsules, where his defense at all times was that he had not "possessed" them at all within the meaning of the statute, and where defense counsel was offered a continuance for purposes of further preparation if the amendment made one necessary. At the time of the initial amendment, defendant was already in jeopardy of conviction of the lesser included offense, and phenobarbital and secobarbital are both barbituric acid derivatives falling within the definition of controlled substance of *H & S C § 11056*, (b)(1), and the punishment for possession of one is identical to punishment for possession of the other. *People v. Garringer (1975, Cal App 2d Dist) 48 Cal App 3d 827*,

121 Cal Rptr 922, 1975 Cal App LEXIS 1160.

In a prosecution of defendant for possession of phencyclidine (PCP) in violation of *Health & Saf. Code, § 11377*, evidence that the handrolled cigarette defendant apparently tried to abandon while entering a police vehicle following her arrest weighed .4 gram and was made up of mint leaves laced with PCP and that such a cigarette was sufficient to produce a narcotic effect on a person who takes as little as two puffs was sufficient to prove that defendant possessed PCP in a usable quantity, even though no chemical analysis of the substance sufficient to determine the weight or volume of the PCP in the cigarette was made. *People v. Camp (1980, Cal App 2d Dist) 104 Cal App 3d 244, 163 Cal Rptr 510, 1980 Cal App LEXIS 1671*, cert den (1980) 449 US 960, 66 L Ed 2d 227, 101 S Ct 373, 1980 US LEXIS 3821.

In a prosecution for possession of a controlled substance, methamphetamine, in violation of *H & S C § 11377*, subd. (a), the trial court's failure to impose a drug program fee pursuant to *H & S C § 11372.7*, subd. (a) was not jurisdictional error. Under *H & S C § 11372.7*, subd. (b), a trial court may, without expressly so stating, and taking into account any fine or restitution amount imposed, conclude that a defendant does not have the ability to pay a drug program fee. Hence, factual issues come into play in determining whether a defendant has the ability to pay a drug program fee. Further, on a silent record, the trial court is presumed to have resolved those issues in favor of not imposing the fee. Because a trial court must determine whether the defendant has the ability to pay a drug program fee (*H & S C § 11372.7*), and is not required to state its finding on the record, a judgment that fails to impose the fee is not a legally unauthorized judgment. *People v. Martinez (1998, Cal App 2d Dist) 65 Cal App 4th 1511, 77 Cal Rptr 2d 492, 1998 Cal App LEXIS 711.*

In a prosecution for possession of PCP (*H & S C § 11377(a)*), the prosecutor did not commit prejudicial misconduct when, in his summation, having referred to the jurors' life experience, he argued that they could conclude defendant consumed PCP voluntarily, knowing what it was, for the purpose of intoxicating himself with it. While intoxication does not always prove possession, past or present, and there were instances in which the prosecutor urged the jury that if defendant was under the influence of PCP, that was enough to establish possession, the evidence was susceptible of various interpretations and it was proper to argue for the interpretation that defendant voluntarily consumed PCP. Viewed in context, there was no reasonable likelihood that the prosecutor's arguments misled the jury. Moreover, the instructions did not permit a conviction solely on evidence of intoxication, and it was presumed that the jury relied on the instructions, not the arguments, in convicting defendant. *People v. Morales (2001) 25 Cal 4th 34, 104 Cal Rptr 2d 582, 18 P3d 11, 2001 Cal LEXIS 1163*, cert den (2001) 534 US 857, 151 L Ed 2, 122 S Ct 133, 2001 US LEXIS 6094.

Substantial evidence supported a finding that defendant, who was on probation for possession of methamphetamine, was unamenable to treatment under *Pen C § 1210.1(e)(3)(B)* because he was removed from a treatment program for three dirty tests and one failure to test and was subsequently found with a "whizinator" strapped to his penis. *People v. Budwiser (2006, Cal App 3d Dist) 140 Cal App 4th 105, 44 Cal Rptr 3d 296, 2006 Cal App LEXIS 848*, review denied (2006, Cal) 2006 Cal LEXIS 11796.

2. Applicability

Under *H & S C § 11372.5*, subd. (a), the trial court is required to impose a criminal laboratory analysis fee in the amount of \$50 for each violation of *H & S C § 11377*. The fee is mandatory. There is no requirement that a defendant be found to have the ability to pay a criminal laboratory analysis fee before such a fee can be imposed. *People v. Martinez (1998, Cal App 2d Dist) 65 Cal App 4th 1511, 77 Cal Rptr 2d 492, 1998 Cal App LEXIS 711.*

3. Construction with Other Law

Where the defendant was convicted of one count of methamphetamine possession in violation of *H & S C § 11377*, subd. (a), the trial court erred in failing to impose penalty assessments pursuant to *Pen C §§ 1202.4*, subd. (a)(2), 1464, and *Gov C § 76000* in connection with the criminal laboratory analysis fee imposed under *H & S C § 11372.5*, subd. (b).

Because the penalty assessments attach to the criminal laboratory analysis fee, imposition of the assessments was mandatory. *People v. Martinez* (1998, Cal App 2d Dist) 65 Cal App 4th 1511, 77 Cal Rptr 2d 492, 1998 Cal App LEXIS 711.

Although defendant's conviction of possession of methamphetamine qualified as a nonviolent drug possession offense under *Pen C § 1210(a)* of the Substance Abuse and Crime Prevention Act of 2000, *Pen C §§ 1210 et seq.*, because defendant was also convicted of driving under the influence in violation of *Veh C § 23152(b)*, defendant was ineligible for sentencing under the Act. *People v. Cantu* (2003, Cal App 6th Dist) 112 Cal App 4th 729, 5 Cal Rptr 3d 389, 2003 Cal App LEXIS 1534, rehearing denied (2003, Cal App 6th Dist) 2003 Cal App LEXIS 1680, review gr, depublished (2004, Cal) 8 Cal Rptr 3d 539, 82 P3d 746, 2004 Cal LEXIS 9, review dismissed (2004, Cal) 19 Cal Rptr 3d 828, 99 P3d 5, 2004 Cal LEXIS 10130.

Denial of alien's petition for a writ of habeas corpus was reversed because the alien's violation of California's possession of a controlled substances law, *H & S C § 11377* was not an aggravated felony under *21 USCS § 844(a)* of the Controlled Substances Act (CSA), *21 USCS § 801 et seq.*; therefore, the alien was not ineligible for cancellation of removal. *Ferreira v. Ashcroft* (2004, 9th Cir Ariz) 382 F3d 1045, 2004 US App LEXIS 18988.

Even though a forgery offense was only defendant's second violation of his probation for possession of methamphetamine, *H & S C § 11377*, Proposition 36, & *Pen C § 1210 et seq.*, did not prevent revocation. It was only if a probation violation was "drug-related" that the prohibition against incarceration arose, and passing a bad check was not "drug related" under *Pen C § 1210.1(f)*. *People v. Martinez* (2005, Cal App 2d Dist) 127 Cal App 4th 1156, 26 Cal Rptr 3d 234, 2005 Cal App LEXIS 465, review denied (2005, Cal) 2005 Cal LEXIS 7184.

Board of Immigration Appeals erred in upholding an Immigration Judge's order, which found an alien removable under *8 U.S.C.S. § 1227(a)(2)(B)(i)* as an alien who had been convicted of a violation of a law relating to a controlled substance, because the judicially noticeable documents failed to establish the substance that the alien pled guilty to possessing under *H & S C § 11377(a)*; because there was no way to connect the references to methamphetamine in the charging document with the conviction under *H & S C § 11377(a)*, the Government did not establish the particular substance that the alien was convicted of possessing and, thus, it failed to establish that the alien possessed a controlled substance under *21 U.S.C.S. § 802*. *Ruiz-Vidal v. Gonzales* (2007, 9th Cir) 473 F3d 1072, 2007 US App LEXIS 1015.

4. Legislative Intent

In a prosecution in which defendant pled guilty to one count of unlawful possession of methamphetamine (*Health & Saf. Code, § 11377*, subd. (a)), in exchange for dismissal of a second count and probation with no more than six months in jail, the trial court was not precluded from imposing, as conditions of probation, both a \$500 fine under *Pen. Code, § 672*, which provides for imposition of a fine upon conviction of an offense for which no fine is otherwise prescribed, and a separate penalty assessment under *Health & Saf. Code, § 11377*, which authorizes an additional fine of up to \$70 for anyone convicted of possessing various controlled substances. Although *Health & Saf. Code, § 11377*, is ambiguous, the legislative history of the statute does not support the conclusion that the statute was intended to "prescribe" a fine for possession of controlled substances so as to preclude imposition of a further fine under *Pen. Code, § 672*, but instead indicates that the statute was intended to create a separate, additional funding source for the establishment of AIDS education programs. *People v. Clark* (1992, Cal App 1st Dist) 7 Cal App 4th 1041, 9 Cal Rptr 2d 726, 1992 Cal App LEXIS 844.

5. Elements

The elements of the crime of unlawful possession of a controlled substance, such as PCP, are dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. *People v. Camp* (1980, Cal App 2d Dist) 104 Cal App 3d 244, 163 Cal Rptr 510, 1980 Cal App LEXIS 1671, cert den (1980) 449 US 960, 66 L Ed 2d 227, 101 S Ct 373, 1980 US LEXIS 3821.

6. Error

Where the defendant was convicted of one count of methamphetamine possession in violation of *H & S C § 11377*, subd. (a), the trial court erred in imposing a criminal laboratory analysis fee pursuant to *H & S C § 11372.5*, subd. (a), in the amount of \$100. *H & S C § 11372.5*, subd. (a), required the trial court to impose a criminal laboratory analysis fee in the amount of \$50 for each violation of *H & S C § 11377*. Therefore, a fine in the amount of \$100 was not legally authorized; the mandatory fine was statutorily limited to \$50. The imposition of a sentence not statutorily authorized is jurisdictional error that is subject to correction whenever it comes to a court's attention. *People v. Martinez (1998, Cal App 2d Dist) 65 Cal App 4th 1511, 77 Cal Rptr 2d 492, 1998 Cal App LEXIS 711*.

Permitting defendant to select the drug treatment to be provided on the condition that he accepted a particular sentence should he subsequently violate probation was clearly contrary to the mandates of the Substance Abuse and Crime Prevention Act, *Pen C 1210* et seq. *People v. Campbell (2004, Cal App 1st Dist) 119 Cal App 4th 1279, 15 Cal Rptr 3d 188, 2004 Cal App LEXIS 1032, review denied (2004) 2004 Cal. LEXIS 9469*.

7. Evidence: Admissible

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*.

8. Evidence: Sufficient

THC-positive drug test was "some evidence" to sustain a finding that a prisoner possessed marijuana in violation of prison rules. The fact that use and possession were treated differently in criminal statutes did not persuade the court that due process required the same distinction in the prison context. *In re Dikes (2004, Cal App 1st Dist) 121 Cal App 4th 825, 18 Cal Rptr 3d 9, 2004 Cal App LEXIS 1351, modified (2004, Cal App 1st Dist) 2004 Cal App LEXIS 1352, review denied Dikes (Jayson Wayne) on H.C. (2004, Cal) 2004 Cal LEXIS 11080*.

8.5. Evidence-Insufficient

Evidence was properly suppressed in a trial under *H & S C § 11377* because the Fourth Amendment standard for a detention was not met when officers observed defendant's car idling in a convenience store lot, further than necessary from the entrance, and heard a thud on approaching; the fact that the officers permitted defendant to retrieve his identification from his car was some indication they did not associate the thud with danger. Defendant's appearance had not been matched to robbers in a string of convenience store robberies, the hour was not particularly late, and the store was apparently open. *People v. Perrusquia (2007, Cal App 4th Dist) 150 Cal App 4th 228, 58 Cal Rptr 3d 485, 2007 Cal App LEXIS 650, review denied (2007, Cal) 2007 Cal LEXIS 8040*.

Discovery of methamphetamine on a nightstand in a bedroom defendant shared with his girlfriend, while sufficient to prove defendant's constructive possession of the drug, was insufficient to prove that defendant knew of its nature as a controlled substance. Therefore, defendant's conviction for possession of methamphetamine was reversed. *People v. Tripp (2007, Cal App 5th Dist) 151 Cal App 4th 951, 60 Cal Rptr 3d 534, 2007 Cal App LEXIS 897*.

9. Hearing

In a proceeding on two petitions to revoke defendant's probation for possession of methamphetamine, conducting a single hearing was proper. *Pen C § 1210.1(e)(3)(A), (B)* does not require separate hearings. *People v. Budwiser (2006,*

Cal App 3d Dist) 140 Cal App 4th 105, 44 Cal Rptr 3d 296, 2006 Cal App LEXIS 848, review denied (2006, Cal) 2006 Cal LEXIS 11796.

10. Instructions

In a prosecution of defendant for possession of phencyclidine for sale, the trial court properly instructed the jury that it was no defense to the charge that defendant believed he possessed cocaine rather than phencyclidine, and the trial court properly refused to give an instruction requested by defendant that the prosecution had to prove defendant knew the controlled substance he possessed was phencyclidine. For the purpose of conviction under *Health & Saf. Code, § 11377*, proof of knowledge of the controlled nature of the substance, and not its precise chemical composition, is all that is required. *People v. Guy (1980, Cal App 2d Dist) 107 Cal App 3d 593, 165 Cal Rptr 463, 1980 Cal App LEXIS 1987.*

11. Jurors

In a trial under *Cal. Health & Safety Code § 11377(a)*, a juror was not competent because she had a proven hearing impairment and stated that she missed a lot of testimony, despite a court-provided listening device. The juror's misconduct in failing to notify the court when she could not hear denied defendant his constitutional right to a fair trial; therefore, defendant was entitled to a new trial. *People v. Rubio (2006, Cal App 6th Dist) 141 Cal App 4th 1214, 46 Cal Rptr 3d 853, 2006 Cal App LEXIS 1186.*

12. Sentencing

In a prosecution in which defendant pled guilty to one count of unlawful possession of methamphetamine (*Health & Saf. Code, § 11377*, subd. (a)), in exchange for dismissal of a second count and probation with no more than six months in jail, the trial court's imposition of \$1,100 in fines, penalty assessments, and laboratory and drug program fees constituted reversible error, since such sums were not specified in the plea form. Although defendant did not object to the fines at the sentencing hearing, he was not advised that he had the right to withdraw his plea if the plea bargain was not honored, as required by *Pen. Code, § 1192.5*, and the aggregate amount imposed was a significant deviation from the terms of the plea bargain as a whole. Moreover, only the laboratory fees imposed under *Health & Saf. Code, § 11372.5*, the drug program fees imposed under *Health & Saf. Code, § 11372.7*, and the restitution fines imposed under *Gov. Code, § 13967*, subd. (a), were statutorily mandated, and none of the fines, fees, and assessments were standard conditions of probation. *People v. Clark (1992, Cal App 1st Dist) 7 Cal App 4th 1041, 9 Cal Rptr 2d 726, 1992 Cal App LEXIS 844.*

Where defendant had pled no contest to welfare fraud and possession of methamphetamine, defendant's waiver of future custody credits to be earned in a residential drug or alcohol treatment facility was a waiver of such credits for all purposes, including the application of such credits to a subsequently imposed prison term when probation was revoked. *People v. Jeffrey (2004) 33 Cal 4th 312, 14 Cal Rptr 3d 852, 92 P3d 345, 2004 Cal LEXIS 5969.*

Defendant who was on probation for possession of methamphetamine under *H & S C § 11377(a)* was improperly deprived of a third chance at probation under Proposition 36 because the facts supporting the third drug-related revocation petition took place before the second petition was filed. It would have been improper to treat the result as if the People had made three separate noticed motions, as required by *Pen C § 1210.1(f)(3)(A)-(C)*. *People v. Hazle (2007, 3d Dist) 2007 Cal App LEXIS 1968.*

Decisions Under Former Law **1. Generally**

The proposition that conviction may not be predicated on possession of a narcotic so limited in quantity or so altered in form as to be useless for narcotic purposes applies to restricted dangerous drugs. *People v. Johnson (1970, Cal App 4th Dist) 5 Cal App 3d 844, 85 Cal Rptr 238, 1970 Cal App LEXIS 1483.*

To establish unlawful possession of contraband, it must be shown that the accused exercised dominion and control over it with knowledge of its presence and character. *Frazzini v. Superior Court* (1970, Cal App 4th Dist) 7 Cal App 3d 1005, 87 Cal Rptr 32, 1970 Cal App LEXIS 2231.

The possession of a restricted dangerous drug proscribed by Health and Saf Code, former § 11910, is that creating a potentiality for future use or sale and includes possession of such a drug intended for use by the possessor. *Russell v. Superior Court* (1970, Cal App 4th Dist) 12 Cal App 3d 1114, 91 Cal Rptr 255, 1970 Cal App LEXIS 1697.

The offense of unlawful possession of a restricted dangerous drug may be proven without offering in evidence the drug that is the subject of the offense. *Russell v. Superior Court* (1970, Cal App 4th Dist) 12 Cal App 3d 1114, 91 Cal Rptr 255, 1970 Cal App LEXIS 1697.

Defendant's knowledge of the character of a restricted dangerous drug found in his possession may be shown by his acts or declarations that indicate a consciousness of guilt. *People v. Williams* (1971) 5 Cal 3d 211, 95 Cal Rptr 530, 485 P2d 1146, 1971 Cal LEXIS 245.

Possession of a restricted drug may be imputed where the contraband is found in a place that is immediately and exclusively accessible to the accused and is subject to his dominion and control, or to the joint dominion and control of the accused and another person. *People v. Williams* (1971) 5 Cal 3d 211, 95 Cal Rptr 530, 485 P2d 1146, 1971 Cal LEXIS 245.

In a prosecution for possession of a restricted dangerous drug (H & S C former § 11910), possession of a restricted dangerous drug for sale (H & S C former § 11911) and transporting a restricted dangerous drug (H & S C former § 11912), conviction for possession was improper where defendant was convicted of all three offenses, and where the possession proved was incidental to and a necessary part of the possession for sale and transportation. *People v. Cuevas* (1971, Cal App 5th Dist) 16 Cal App 3d 245, 93 Cal Rptr 916, 1971 Cal App LEXIS 1582.

2. Constitutionality

Health & Saf Code, former § 11912, prohibiting sale of restricted dangerous drugs, is not unconstitutional as being vague in that "dangerous" is a word having so broad a meaning as to be ineffective to give an intelligible warning that certain acts are proscribed, where former § 11901(b), which appears in the same division of the code, provides that "restricted dangerous drugs" as used in the chapter means "amphetamine including amphetamine, desoxyephedrine, or compounds or mixtures thereof". Thus, an information appropriately charging defendant with sale of "a dangerous drug, to wit, amphetamine" and evidence that defendant sold to a state narcotics agent a quantity of tablets which on analysis proved to be amphetamine was sufficient to sustain a conviction under former § 11912. *People v. Donohue* (1967, Cal App 1st Dist) 251 Cal App 2d 272, 59 Cal Rptr 417, 1967 Cal App LEXIS 1969.

Health & Saf Code former § 11910, prohibiting the unauthorized possession of restricted dangerous drugs, is not unconstitutional as applied to convict a defendant, who is a drug addict. The fact that the statute does not distinguish between addict possessors and nonaddict possessors does not constitute a violation of equal protection or due process of law, and the statute does not thereby inflict cruel or unusual punishment on drug addicts. *People v. Omori* (1972, Cal App 2d Dist) 25 Cal App 3d 616, 102 Cal Rptr 64, 1972 Cal App LEXIS 1061.

3. Applicability

Defendant could neither be legally convicted of nor lawfully punished for both possessing and transporting an amphetamine pill, where his possession was incidental to and a necessary part of the transportation charged. Since no prior, different, or subsequent possession of the pill was shown, the offense of possession was necessarily included in the offense of transporting the pill and defendant may not be convicted of both charges. *People v. Johnson* (1970, Cal App 4th Dist) 5 Cal App 3d 844, 85 Cal Rptr 238, 1970 Cal App LEXIS 1483.

A defendant cannot be convicted of both a greater and a lesser included offense, and where defendant was convicted of possession for sale and transportation of restricted dangerous drugs, as well as possession of such drugs, the latter conviction, a lesser included offense of the former, cannot stand. *People v. Kilborn* (1970, Cal App 4th Dist) 7 Cal App 3d 998, 87 Cal Rptr 189, 1970 Cal App LEXIS 2230, cert den (1971) 400 US 998, 91 S Ct 478, 27 L Ed 2d 449, 1971 US LEXIS 3548.

4. Construction

Where defendant was charged in two counts with possession of marijuana for sale, a felony, and possession of a dangerous drug (amphetamine sulphate) without a prescription, a misdemeanor, his conviction and sentence in municipal court for possession of the dangerous drug did not bar his prosecution in the superior court for possession of marijuana for sale, under *Pen Code*, § 654; although the marijuana and drug were in the defendant's possession at the same time, their possession constituted two offenses, and the provisions of § 654 did not preclude prosecution and punishment for both offenses. *People v. Bell* (1968, Cal App 2d Dist) 258 Cal App 2d 450, 65 Cal Rptr 730, 1968 Cal App LEXIS 2431.

5. Construction with Other Law

The conviction of a licensed physician and surgeon for possession of a quantity of nembutal, amytol and benzedrine tablets in violation of former H & S C § 11910, making the possession of restricted dangerous drugs without the prescription of a physician a felony, was proper and there was no merit to defendant's contention that he should have been charged under the misdemeanor provisions of *B & P C* § 2390, prohibiting the use of a restricted dangerous drug by a licensed doctor, since the latter statute deals with the licensing of practitioners of the healing arts, relates to "use" not "possession," and since no exception to former H & S C § 11910 was made for doctors, even though the Legislature specified exceptions applicable to pharmacists. *People v. Michals* (1974, Cal App 2d Dist) 36 Cal App 3d 850, 111 Cal Rptr 892, 1974 Cal App LEXIS 725, overruled *People v. Superior Court of Orange County* (1979) 24 Cal 3d 428, 155 Cal Rptr 704, 595 P2d 139, 1979 Cal LEXIS 266.

6. Elements

The elements of the offense of unlawful possession of a restricted dangerous drug are dominion and control over the drug in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. *Russell v. Superior Court* (1970, Cal App 4th Dist) 12 Cal App 3d 1114, 91 Cal Rptr 255, 1970 Cal App LEXIS 1697.

The elements of the offense of unlawful possession of a restricted dangerous drug may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. *Russell v. Superior Court* (1970, Cal App 4th Dist) 12 Cal App 3d 1114, 91 Cal Rptr 255, 1970 Cal App LEXIS 1697.

Mere constructive possession of a restricted dangerous drug will not supply the element of knowledge of the character of the drug required for a conviction for illegal possession of such a drug. *People v. Williams* (1971) 5 Cal 3d 211, 95 Cal Rptr 530, 485 P2d 1146, 1971 Cal LEXIS 245.

7. Instructions

Where the defendant charged with possession and transportation of an amphetamine pill requested an instruction to the effect that the jury must find he possessed or transported a usable quantity of a dangerous drug, any error in a second requested instruction to the effect that usable quantity is that capable of being consumed and having a narcotic effect would not excuse the failure to give the first instruction, which properly stated the law. *People v. Johnson* (1970, Cal App 4th Dist) 5 Cal App 3d 844, 85 Cal Rptr 238, 1970 Cal App LEXIS 1483.

In a prosecution for possession of an amphetamine pill, an instruction inaccurately and incompletely stated that the statute on possession of dangerous drugs does not specify any particular amount and a small amount is possession just as much as a large amount if the law is violated in other ways. *People v. Johnson* (1970, Cal App 4th Dist) 5 Cal App 3d 844, 85 Cal Rptr 238, 1970 Cal App LEXIS 1483.

To sustain a conviction of possession of a restricted dangerous drug, it is not necessary that the quantity of the drug possessed be sufficient to produce a drug effect, and, in a prosecution for that crime, the trial court did not err in refusing to give defendants' requested instruction to the jury that it must find he possessed the drug in a usable quantity and that it could not find him guilty of possessing a drug so limited in quantity or so altered in form as to be useless for drug purposes, where the jury was instructed that to constitute the crime it must be established that the substance was in an amount sufficient to be used as a drug, and where the usual instruction on reasonable doubt was given. *People v. Schenk* (1972, Cal App 3d Dist) 24 Cal App 3d 233, 101 Cal Rptr 75, 1972 Cal App LEXIS 1132.

8. Sentencing

The error in assessing double punishment for the possession and transportation of a dangerous drug, where the possession was incidental to and a necessary part of the transportation charged, is not cured by permitting the two sentences to run concurrently. *People v. Johnson* (1970, Cal App 4th Dist) 5 Cal App 3d 844, 85 Cal Rptr 238, 1970 Cal App LEXIS 1483.

A municipal court misdemeanor conviction of possession of marijuana was not a "felony offense" or an offense "punishable as a felony" so as to be chargeable as a prior conviction for the purpose of enhancement of penalties on conviction of subsequent felony charges of possession of marijuana under H & S C former § 11530, and possession of a restricted dangerous drug under Health & Saf Code, former § 11910, where the offense giving rise to the municipal court conviction was initially charged by the prosecutor as a misdemeanor as permitted by *Pen C § 17*, subd (a). Under Health & Saf Code, former §§ 11533, 11914, a "felony offense" or an "offense punishable as a felony" is an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence received, but the prosecutor's action in charging the offense as a misdemeanor removed the alternative of a prison sentence; it was a misdemeanor from the moment the complaint was filed. *People v. Garnett* (1973, Cal App 1st Dist) 31 Cal App 3d 255, 107 Cal Rptr 197, 1973 Cal App LEXIS 1067.

Hierarchy Notes:

Div. 10 Note

Div. 10, Ch. 6 Note

Div. 10, Ch. 6, Art. 5 Note