

Date of Hearing: April 6, 2021
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 282 (Lackey) – As Introduced January 21, 2021

As Proposed to be Amended in Committee

SUMMARY: Prohibits a judge from offering misdemeanor diversion to a person charged with driving under the influence of drugs and/or alcohol (DUI).

EXISTING LAW:

- 1) Authorizes a superior court judge to offer diversion to a person charged with a misdemeanor over the objection of a prosecuting attorney (court initiated misdemeanor diversion), except that a defendant may not be offered diversion for any of the following currently charged offenses:
 - a) Any offense for which a person, if convicted, would be required to register as a sex offender;
 - b) A domestic violence offense – i.e., the willful infliction of corporal injury resulting in a traumatic condition upon a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant’s child, former spouse, former cohabitant, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship;
 - c) A domestic battery offense – i.e., battery against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant’s child, former spouse, fiancé or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship; and,
 - d) Stalking. (Pen. Code, § 1001.95, subds. (a) & (e).)
- 2) Provides that a judge may continue a diverted case for a period not to exceed 24 months and order the defendant to comply with terms, conditions, or programs that the judge deems appropriate based on the defendant’s specific situation. (Pen. Code, § 1001.95, subd. (b).)
- 3) States that if the defendant has complied with the imposed terms and conditions, at the end of the diversion period, the judge shall dismiss the action against the defendant. (Pen. Code, § 1001.95, subd. (c).)
- 4) Requires the court to provide the defendant notice and hold a hearing to determine whether criminal proceedings should be reinstated if it appears to the court that the defendant is not complying with the terms and conditions of diversion. If the court finds that the defendant

has not complied with the terms and conditions of diversion, the court may end the diversion and order resumption of the criminal proceedings. (Pen. Code, § 1001.95, subd. (d).)

- 5) Provides that in order for a defendant who is diverted pursuant to this provision to have their action dismissed, the defendant must complete all conditions ordered by the court, make full restitution, and comply with any court-ordered protective order, stay-away order, or order prohibiting firearm possession. However, a defendant's inability to pay restitution due to indigence cannot be grounds for denial of diversion or a finding that the defendant has failed to comply with the terms of diversion. (Pen. Code, § 1001.96.)
- 6) States that upon successful completion of the court-ordered terms, conditions, or programs of diversion, the arrest upon which diversion was imposed shall be deemed to never have occurred. The defendant may indicate in response to any question concerning their prior criminal record that they were not arrested. (Pen. Code, § 1001.97, subd. (a).)
- 7) Prohibits, without the defendant's consent, using a record pertaining to an arrest resulting in successful completion of diversion in any way that could result in the denial of any employment, benefit, license, or certificate. (Pen. Code, § 1001.97, subd. (a).)
- 8) Requires that the defendant be advised that, regardless of their successful completion of diversion, the arrest on which the diversion was based may be disclosed by the Department of Justice in response to a peace officer application request and that, notwithstanding the foregoing provisions, the defendant is not relieved of the obligation to disclose the arrest in response to a direct question contained in a questionnaire or application for a position as a peace officer, as defined. (Pen. Code, § 1001.97, subd. (b).)
- 9) Authorizes the prosecution to approve a pretrial diversion program for misdemeanor offenses. (Pen. Code, §§ 1001.2, subd. (b) & 1001.50, subd. (b).)
- 10) Defines "pretrial diversion" 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. (Pen. Code, § 1001.50, subd. (c).)
- 11) Provides that to be eligible for a prosecution-approved misdemeanor diversion program, all of the following must apply to the defendant:
 - a) The defendant has not ever had probation or parole revoked without thereafter being completed;
 - b) The defendant has not participated in a diversion program within the previous five years; and,
 - c) The defendant has never been convicted of a felony, and has not been convicted of a misdemeanor within the previous five years. (Pen. Code, § 1001.51, subd. (a).)
- 12) Specifies that a prosecution-approved misdemeanor diversion program does not apply to DUI offenses. (Pen. Code, § 1001.51, subd. (b).)

- 13) Excludes defendants from a prosecution-approved misdemeanor diversion program where the accusatory pleading charges the commission of a misdemeanor:
 - a) Which requires incarceration upon conviction;
 - b) Which requires sex offender registration upon conviction;
 - c) Which the magistrate determined should be prosecuted as a misdemeanor, as specified;
 - d) Which involves the use of force or violence against a person, unless the charge is a simple assault or battery;
 - e) For which the granting of probation is prohibited; or,
 - f) Which is a driving offense punishable as a misdemeanor, as specified. (Pen. Code, § 1001.51, subd. (c).)
- 14) Specifies that when a person is charged with a DUI offense, the court shall not suspend or dismiss the criminal proceedings because the defendant participates in education, training, or treatment programs. (Veh. Code, § 23640.)

FISCAL EFFECT: Unknown.

COMMENTS:

- 1) **Author's Statement:** According to the author, "In a time when our nation desperately needs healing, we must send a message that we remain tough on serious crime and committed to victims' rights, especially victims of hate crimes DUIs, child abuse, and elder abuse. This bill brings us one step closer to building a society we know we can and must be. This bill also answers the Governor's call to exclude DUIs from diversion eligibility."
- 2) **Diversion:** Existing law permits pretrial diversion programs. (Penal Code, § 1001 et seq.) Pre-trial diversion suspends the criminal proceedings without requiring the defendant to enter a plea. The defendant must successfully complete a program or other conditions imposed by the court. If a defendant does not successfully complete the diversion program, criminal proceedings resume but the defendant, having not entered a plea, may still proceed to trial or enter a plea. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that they have never been arrested or charged for the diverted offense.
- 3) **Prosecution Approved Misdemeanor Diversion Programs:** There are multiple diversion programs under existing law, including a prosecution approved diversion program for misdemeanors generally. (Pen. Code, § 1001 et. seq.) The Legislature has authorized the prosecution to approve a local misdemeanor diversion program. (See Pen. Code, §§ 1001-1001.9, 1001.50-1001.55.) No program can continue without the approval of the prosecution. And no person can be diverted under a diversion program unless it has been approved by the prosecution. (Pen. Code, §§ 1001.2, subdivision (b), 1001.50, subdivision (b); *People v. Marroquin* (2017) 15 Cal.App.5th Supplement 1, 37.) However, the prosecution is not

authorized to determine whether a particular defendant shall be diverted. (Pen. Code, § 1001.2.)

A prosecution approved misdemeanor diversion program has a number of exclusions. (Pen. Code, § 1001.51, subs. (b) & (c).) Ineligible misdemeanor offenses include those which require registration as a sex offender and involve use of force other than simple assault and battery. Also ineligible are offenses for which probation is prohibited and for which incarceration is mandatory, as well as certain Vehicle Code offenses. (*Ibid.*) DUI offenses are expressly excluded. (Pen. Code, § 1001.51, subd. (b).) There are also requirements in order to be eligible, including that the defendant has not been granted diversion within five years of the current charges filed, the defendant has never been convicted of a felony or convicted of a misdemeanor within the preceding five years, and the defendant has never had their probation or parole revoked without thereafter successfully completing it. (Pen. Code, § 1001.51, subd. (a).)

- 4) **AB 3234 – Court Initiated Misdemeanor Diversion:** AB 3234 (Ting), Chapter 334, Statutes of 2020, created a court initiated misdemeanor diversion program. (Pen. Code, §§ 1001.95-1001.97.) Under this program, a superior court judge is authorized to divert a misdemeanor defendant outside of a prosecutor approved program. Unlike existing prosecutor approved misdemeanor diversion programs, the court initiated program has no requirements for the defendant to satisfy in order to be eligible. However, several offenses are excluded from court initiated misdemeanor diversion; domestic violence, stalking, and registrable sex offenses are ineligible.

Though whether or not to divert otherwise eligible misdemeanor defendants is in the court's discretion, that judicial discretion is not without limits. "[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.) A trial court abuses its discretion when it exceeds the bounds of reason, all of the circumstances before it being considered. (*Id.* at p. 194.)

- 5) **Need to Clarify Whether a DUI Offense is Ineligible for Court Initiated Misdemeanor Diversion:** Vehicle Code section 23640 prohibits diversion for anyone charged with a DUI offense (Veh. Code, §§ 23152, 23153). The court-initiated diversion statute does not mention this rule. (Pen. Code, § 1101.95.)

When originally enacted, California's military diversion statute (Pen. Code, § 1001.80) contained a similar omission with respect to DUI offenses. (Stats. 2014, ch. 658, § 1.) In grappling with the military diversion statute and Vehicle Code section 23640, the state courts of appeal issued conflicting opinions. Division One of the Fourth Appellate District held that Vehicle Code section 23640 prohibits diversion pursuant to Penal Code section 1001.80 for defendants charged with DUI offenses. (*People v. VanVleck* (2016) 2 Cal.App.5th 355, rev. gtd. Nov. 16, 2016, S237219.) Division Four of the Second Appellate District reached the opposite conclusion. (*Hopkins v. Superior Court* (2016) 2 Cal.App.5th 1275, rev. gtd. Nov. 16, 2016, S237734.) The California Supreme Court took up the issue in these cases but dismissed review as moot (*Hopkins, supra*, 2 Cal.App.5th 1275, review disp. Oct. 18, 2017; *VanVleck, supra*, 2 Cal.App.5th 355, review disp. Nov. 15, 2017), after the Legislature amended the military diversion statute, effective August 7, 2017, to clarify that military

members charged with misdemeanor DUI offenses are eligible for military diversion, provided they meet specified criteria. (Stats. 2017, ch. 179, § 1.)

This bill would correct a similar ambiguity in the court initiated misdemeanor diversion statute enacted by AB 3234 – whether a misdemeanor DUI offense is eligible for court initiated diversion. Under this bill, a court would be prohibited from granting misdemeanor diversion on a DUI offense – i.e., DUIs would be ineligible for court initiated misdemeanor diversion.

This clarification is consistent with the Governor’s Signing Message on AB 3234. In signing AB 3234, which created court-initiated misdemeanor diversion, the Governor expressed concern that DUI offenses were not excluded from the misdemeanor diversion program. He wrote that he would work with the Legislature to expeditiously remedy this situation. (<https://www.gov.ca.gov/2020/09/30/governor-newsom-signs-critical-criminal-justice-juvenile-justice-and-policing-reform-package-including-legislation-banning-the-carotid-restraint/> [as of March 18, 2021].)

- 6) **Argument in Support:** According to *Mothers Against Drunk Driving*: “AB 282 would fix a law enacted last year (AB 3234) which allows for drunk and drugged drivers, regardless of first or subsequent offense, to enter into an unlimited number of diversion or plea deals. When Governor Newsom signed AB 3234 into law last year, he urged lawmakers to fix the law as it relates to impaired drivers.

“Drunk driving is still a deadly crime in California. Although drunk driving deaths have decreased by 52 percent since 1982, this violent crime has killed over 50,000 California residents in 37 years, including 949 in 2019 alone.”

- 7) **Argument in Opposition:** According to the *American Civil Liberties Union*, “Existing law allows a judge to offer diversion to a defendant in a misdemeanor case. In a case where the judge chooses to offer diversion, the judge continues the case for a period of up to two years and orders the defendant to comply with terms, conditions or program that the judge deems appropriate. At the end of the period of diversion, if the defendant has complied with all terms and conditions, the judge dismisses the action. Defendants whose cases are diverted and monitored by the court are far less likely to reoffend, and far more likely to find employment in the future than those who are simply convicted.¹ The misdemeanor diversion statute allows judges to make individualized determinations as to the best course of action in each case, with results that are effective in protecting public safety and preventing crime.

8) **Prior Legislation:**

- a) AB 3234 (Ting), Chapter 334, Statutes of 2020, created a court-initiated misdemeanor diversion program and lowered the minimum age limitation for the Elderly Parole Program to inmates who are 50 years of age and who have served a minimum of 20

¹ “<https://thecrimereport.org/2021/02/25/texas-study-shows-diversion-curbs-recidivism-strengthens-job-prospects/> [study showing the use of diversion statutes reduced likelihood of recidivism by 75% and increased likelihood of employment by 50%]”

years.

- b) SB 725 (Jackson), Chapter 179, Statutes of 2017, specifies that a trial court can grant military pretrial diversion on a misdemeanor charge of driving under the influence of alcohol and/or drugs (DUI).
- c) SB 1227 (Hancock), Chapter 658, Statutes of 2014, allows misdemeanor pretrial diversion for defendants who have military-service-related mental health issues.

REGISTERED SUPPORT / OPPOSITION:

Support

Crime Victims United of California (Co-Sponsor)
California District Attorneys Association
California State Sheriffs' Association
Mothers Against Drunk Driving
Peace Officers Research Association of California (PORAC)
San Diego County District Attorney's Office

1 private individual

Opposition

American Civil Liberties Union
California Public Defenders Association (CPDA)
Drug Policy Alliance
San Francisco Public Defender

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