
THIRD READING

Bill No: SB 73
Author: Wiener (D), et al.
Amended: 8/30/21
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 3-1, 3/9/21
AYES: Bradford, Skinner, Wiener
NOES: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE FLOOR: 25-10, 4/12/21
AYES: Allen, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo,
Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Kamlager, Laird, Leyva,
McGuire, Pan, Portantino, Roth, Rubio, Skinner, Stern, Wieckowski, Wiener
NOES: Bates, Dahle, Grove, Hurtado, Jones, Melendez, Min, Nielsen, Ochoa
Bogh, Wilk
NO VOTE RECORDED: Archuleta, Borgeas, Limón, Newman, Umberg

ASSEMBLY FLOOR: 42-26, 9/9/21 - See last page for vote

SUBJECT: Probation: eligibility: crimes relating to controlled substances

SOURCE: Drug Policy Alliance

DIGEST: This bill permits a court to grant probation for specified drug offenses which are currently either ineligible or presumptively ineligible for probation.

Assembly Amendments make technical changes.

ANALYSIS:

Existing law:

- 1) Defines “probation” as the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. (Pen. Code, § 1203, subd. (a).)

- 2) Prohibits the court from granting probation to or suspending the imposition of a sentence for any person convicted of specified drug offenses, if the person has previously been convicted of one of several specified drug offenses. (Health & Saf. Code, §11370, subd. (a).)
- 3) Prohibits the court from granting probation to or suspending the imposition of the sentence for any person convicted of any of the following offenses:
 - a) Possession for sale of 14.25 grams or more of a substance containing heroin.
 - b) Selling or offering to sell 14.25 grams or more of a substance containing heroin.
 - c) Possession of heroin for sale or selling or offering to sell heroin, and who has one or more prior convictions for either offense.
 - d) Possession for sale of 14.25 grams or more of any salt or solution of phencyclidine (PCP) or any of its analogs, as specified, or any of the precursors of PCP.
 - e) Transporting for sale, importing for sale, or administering, or offering to transport for sale, import for sale, or administer, or attempting to import for sale or transport for sale, PCP or any of its analogs or precursors.
 - f) Selling or offering to sell PCP or any of its analogs or precursors.
 - g) Manufacturing or offering to perform an act involving the manufacture of PCP or any of its analogs or precursors.
 - h) Using, soliciting, inducing, encouraging, or intimidating a minor to act as an agent to manufacture, compound, or sell any controlled substance, as specified.
 - i) Using a minor as an agent or who solicits, induces, encourages, or intimidates a minor with the intent that the minor be in possession of PCP for sale, sells, distributes, or transports PCP, or manufactures PCP or any of its analogs or precursors.
 - j) Possession of piperidine, pyrrolidine, or morpholine, and cyclohexanone, with intent to manufacture PCP or any of its analogs.
 - k) Possession for sale, selling, or offering to sell cocaine base, cocaine, or methamphetamine, and who has one or more prior drug offense convictions, as specified. (Pen. Code, § 1203.07, subd. (a).)

- 4) Requires the existence of any fact which makes the defendant ineligible for probation to be alleged in the charging document, and either admitted by the defendant or found to be true by the trier of fact. (Pen. Code, § 1203.07, subd. (b).)
- 5) Restricts the granting of probation, except in an unusual case where the interests of justice would be served, when a defendant is convicted of the following drug crimes:
 - a) Possessing for sale or selling of a substance containing 28.5 grams or more of cocaine or cocaine base.
 - b) Possessing for sale or selling a substance containing 28.5 grams or more of methamphetamine.
 - c) Manufacturing, compounding, converting, producing, deriving, processing, or preparing of specified controlled substances, except manufacturing of PCP.
 - d) Using, soliciting, inducing, encouraging, or intimidating a minor to manufacture, compound, or sell heroin, cocaine base, cocaine, or methamphetamine.
 - e) Manufacturing, or offering or arranging to sell, furnish, transport, administer, or give any methamphetamine, or possession of its precursor chemicals, with one or more specified prior convictions involving methamphetamine. (Pen. Code, § 1203.073, subds. (a) & (b).)
- 6) Requires the existence of any previous conviction or fact which would make the defendant ineligible for probation to be alleged in the charging document, and either admitted by the defendant or found to be true by the trier of fact. (Pen. Code, § 1203.073, subd. (d).)

This bill:

- 1) Removes the above listed drug offenses from the prohibition against granting probation or suspending a sentence except those offenses involving minors.
- 2) Authorizes the court to grant probation for drug offenses involving minors only where the interests of justice would best be served.

Background

Probation is the suspension of the imposition or the execution of a criminal sentence and the order of conditional release to the community. (Pen. Code, § 1203, subd. (a).) As a general rule, most felony and misdemeanor cases are eligible for probation. However, a number of statutes prohibit the granting of probation for certain crimes or offenders. (See e.g., Pen. Code, §§ 1203.06 (certain violent felonies); 1203.065 (certain sex offenses); 1203.07 (certain drug offenses); 1203.075 (specified crimes when the defendant inflicts great bodily injury).) The existence of the fact which makes the defendant ineligible for probation must be alleged in the accusatory pleading and either admitted by the defendant in open court, or found to be true by the jury or judge. (*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1192-1193.)

There are other circumstances and enumerated offenses which are presumptively ineligible for probation and for which probation may be granted only in unusual circumstances where the interests of justice would best be served if the person is granted probation. Some examples include use of a deadly weapon during the commission of a crime (Pen. Code, § 1203, subd. (e)(2)); infliction of great bodily injury during the commission of the offense (Pen. Code, § 1203, subd. (e)(3)); defendants previously convicted of two or more felonies (Pen. Code, § 1203, subd. (e)(4)); theft cases involving over \$100,000 (Pen. Code, § 1203.045); using, soliciting, or encouraging a minor to commit a felony (Pen. Code, § 1203.046); and certain drug offenses (Pen. Code, § 1203.073). In such instances, the defendant bears the burden of demonstrating that his or her case is the unusual case in which justice would be served by a granting of probation.

The Rules of Court list certain factors that may indicate the existence of unusual circumstances warranting probation eligibility for such offenses. Specifically, the court may consider whether the factor giving rise to the probation limitation is less serious than typically present coupled with the defendant's lack of similar criminal history. (Cal. Rules of Court, rule 4.413(c)(1)(A).) The court may also consider whether the current offense is less serious than a prior conviction which is the basis for the probation limitation, coupled with the defendant remaining free from incarceration for a substantial time before the present offense. (Cal. Rules of Court, rule 4.413(c)(1)(B).) Additionally, the court may consider factors not amounting to a defense, but reducing culpability, including: (1) that the defendant participated in the crime under provocation, coercion, or duress and does not have a recent record involving crimes of violence; (2) that the defendant committed the crime because of a mental condition and there is a likelihood that he or she would respond favorably to treatment that would be required as a condition of probation; (3) that

the defendant is youthful or aged, and has no significant record of prior criminal offenses. (Cal. Rules of Court, rule 4.413(c)(2).) Finally, the court may consider the results of a risk/needs assessment of the defendant, if one was performed. (Cal. Rules of Court, rule 4.4.13(c)(3).) The trial court may, but is not required to, find the case unusual if the relevant criteria is met. (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1587.) In this respect, the court has broad discretion and its decision will only be overturned if there was an abuse of discretion. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

This bill allows a court to grant probation for controlled substance offenses that are currently either ineligible or presumptively ineligible for probation, except in those cases in which a person uses, solicits, induces, encourages, or intimidates a minor to act as an agent to manufacture or sell controlled substances. However, even in cases involving minors, the court may grant probation if it finds that the interests of justice would be served in doing so.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

According to the Assembly Appropriations Committee:

- Possible costs (local costs and Proposition 30-General Fund) in the low hundreds of thousands of dollars annually to county probation departments for increased costs of supervision given these drug crimes are not currently eligible for probation. GF costs will depend on whether the duties imposed on county probation departments by this bill are considered a state reimbursable mandate by the Commission on State Mandates.
- Cost savings possibly in the millions of dollars annually (GF) to the California Department of Corrections and Rehabilitation and local county jails in incarceration costs. The annual cost per year to house an inmate in state prison is approximately \$87,000. If a court grants probation to 10 defendants that might have otherwise been sentenced to an average of two years in state prison, cost savings to the GF in incarceration costs would be \$1.7 million dollars.
- Minor absorbable costs (Trial Court Trust Fund) for courts to determine whether probation is appropriate for specified drug crimes.

SUPPORT: (Verified 9/9/21)

Drug Policy Alliance (source)
A New PATH

Access Support Network of San Luis Obispo, Monterey, and Santa Barbara
Counties
ACLU of California
APLA Health
Asian American Drug Abuse Program, Inc.
Being Alive - Los Angeles
Bienestar Human Services
California Attorneys for Criminal Justice
California Civil Liberties Advocacy
California Coalition for Women Prisoners
California NORML
California Public Defenders Association
Californians for Safety and Justice
Californians United for a Responsible Budget
Center for Living and Learning
Communities United for Restorative Youth Justice
Community Health Project Los Angeles
Community Legal Services in East Palo Alto
Desert AIDS Project
Ella Baker Center for Human Rights
End Hep C SF
FAMM
Fresno Barrios Unidos
Friends Committee on Legislation of California
GLIDE
Harm Reduction Services
Homeless Health Care Los Angeles
Immigrant Legal Resource Center
Initiate Justice
L.A. Voice
Legal Enforcement Action Partnership
Legal Services for Prisoners with Children
Los Angeles LGBT Center
Los Angeles Regional Reentry Partnership
National Harm Reduction Coalition
National Institute for Criminal Justice Reform
Positive Women's Network-USA
Project Rebound Consortium
Prosecutors Alliance of California
Re:Store Justice

Root & Rebound
Rubicon Programs
San Francisco Public Defender
Secure Justice
Showing Up for Racial Justice Bay Area
Sierra Harm Reduction Coalition
Smart Justice California
Southeast Asia Resource Action Center
The Los Angeles Trust for Children's Health
UC Berkeley - Underground Scholars Initiative
UCLA - Center for Behavioral and Addiction Medicine
Valley Community Healthcare
William C. Velásquez Institute
Women Organized to Respond to Life-Threatening Diseases
Three individuals

OPPOSITION: (Verified 9/9/21)

California Association of Highway Patrolmen
California Family Council
Peace Officers Research Association of California

ASSEMBLY FLOOR: 42-26, 9/9/21

AYES: Aguiar-Curry, Bauer-Kahan, Bennett, Berman, Bloom, Mia Bonta, Bryan, Burke, Calderon, Carrillo, Chau, Chiu, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Jones-Sawyer, Kalra, Lee, Levine, Low, Mayes, McCarty, Medina, Mullin, Quirk, Reyes, Luz Rivas, Robert Rivas, Santiago, Stone, Ting, Ward, Akilah Weber, Wicks, Wood, Rendon

NOES: Bigelow, Boerner Horvath, Cervantes, Chen, Choi, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Gallagher, Irwin, Lackey, Mathis, Nguyen, Patterson, Petrie-Norris, Salas, Seyarto, Smith, Valladares, Voepel, Waldron

NO VOTE RECORDED: Arambula, Cooley, Kiley, Maienschein, Muratsuchi, Nazarian, O'Donnell, Quirk-Silva, Ramos, Rodriguez, Blanca Rubio, Villapudua

Prepared by: Stephanie Jordan / PUB. S. /
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