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New Criminal Laws for 2009

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CRIMINAL JUSTICE

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NEW CRIMINAL LAWS FOR 2009

INTRODUCTION

In this month's ***Criminal Justice*** Column we will take a look at the new laws passed in the last legislative session as well as one of the initiatives passed by the voters and a brief reference to new Rules of Court. As a member of the CACJ Legislative

Committee (and Co-Chair for the last two years), I have had the opportunity to see the legislative bills as they made their way through the Public Safety Committees and the Legislature itself. Less than 20 percent of the criminal justice bills proposed this year passed. The ones that did not make it – often ill-thought out or designed to advance the career of a legislator by putting her or his name on a get-tough-on-crime bill – were mind boggling. When you see first hand the taxpayers' money being spent on full-time legislators with full-time staffs and layers of bureaucracy, it has to make you wonder. How many new laws are really necessary each year, if any? But, that is the way it is.

For better or worse, the criminal law bills that were passed were fairly restrained this year. This year, as in recent years, there have been a plethora of bills that sought to add jail or prison time to existing crimes or to further expand the definition of existing crimes. This is the get-tough-on-crime stuff that looks good to voters in the promotional literature for the inevitable next campaign. This year, there was still a plethora of bills proposed but most were not passed. The big reason is that the legislators know that they can get publicity out of proposing this kind of legislation but, if they actually pass it, there is a tremendous cost. Most get-tough sounding bills would simply result in more people being warehoused in local jails and the state prison system. We already have one of the highest incarceration rates in the world and no one, except the correctional officers' union, wants to continue to fund it.

In any event, the laws that were passed should be of interest to practitioners, whether or not they specialize in criminal law. A complete history of all legislation -- proposed, passed, signed or vetoed -- can be found at the Legislative Information index.[1] Here are the highlights of the 2008 legislative session, a brief discussion of Proposition 9 passed by the voters and a briefer reference to the new Rules of Court as they pertain to criminal law..

SENATE BILL "40" CONTINUES TO LIVE

We have followed the life of Senate Bill 40 for some time in the *Criminal Justice* column. This was the bill introduced in the 2007 session to deal with the holding of the United States Supreme Court in *Cunningham v. California*.[2] The Court in *Cunningham*, it may be recalled, held that the triad of potential sentences for any determinate felony sentence was unconstitutional. In essence, the judge

imposing prison was mandated to choose the mid term of three potential sentences unless s/he found that mitigating circumstances outweighed aggravating (resulting in the lower term) or that aggravating outweighed mitigating (resulting in the upper term). The constitutional problem was that no jury had found beyond a reasonable doubt that these aggravating circumstances were true. Under the pre-Senate Bill 40 and pre-Cunningham law, a defendant could be punished for conduct found true only by a judge. Cunningham said you have a right to a jury trial on the factors giving rise to the upper term and, absent that, the upper term cannot be imposed.

Senate Bill 40 was a "quick fix" that simply allowed the judge to impose the upper term without making factual findings. The judge had only to state her or his reasons for the term. The original author, Senator Gloria Romero, recognized that the bill was not the final answer and the bill contained a sunset clause providing that it would be ineffective as of January 1, 2009 unless extended. The news is that the bill has been extended this year to January 1, 2011.[3]

The back story, however, is that this is another temporary fix. The fact is that the Legislators, particularly State Senators who have time to learn about government in California (as opposed to the Assembly persons who are in and out on term limits), know that the sentencing system in California has to be overhauled. Hence, there has been an effort to create a Sentencing Commission. It is clear that there is no way that we can afford to continue to warehouse people, especially without real rehabilitative efforts. The cost of mindlessly increased sentences, particularly for non-violent offenders, is a shocking reality. The prisons are at over twice their capacity. The county jails are overcrowded and jailors are letting people out early. The Governor knows this as well but has his own idea of a commission to be controlled by his office.

So, the real news regarding Senate Bill 40 is that efforts to reform sentencing or to create a Sentencing Commission were unsuccessful this last year. The extension bill was, once again, a stop-gap. And we can expect that the idea of sentencing reform, and perhaps a Sentencing Commission, will be on the agenda again in 2009.

PROPOSITION 9

The new “Victim’s Rights” bill was passed by the public on November 4, 2008 and took effect the next day when certified by the Secretary of State. The warnings of such people as Madison and de Tocqueville regarding legislation by the uninformed public have gone unheeded in California with the initiative process. Worse yet, our Supreme Court starting with Brosnahan v. Eu[4] has managed to look the other way at initiatives that conglomerate legal changes under a catchy title. The “single subject” rule has been all but abrogated. If there was ever an idea behind the initiative process, it was to let the voters decide simple and fundamental issues on a single subject. What has happened is that convoluted and multi-faceted initiatives are put on the ballot that have titles the public cannot vote against. Remember Proposition 8 from 1981, the “Victims’ Bill of Rights,” or Proposition 115 of 1990, “The Victims’ Speedy Trial Act.” Proposition 9 also used “Victim’s” in the title and, ironically, had more to do with actual victims’ rights than the other two.

The first two “Victim’s” propositions were sponsored by the California District Attorney’s Association. Propositions 8 and, in particular 115, gave district attorneys a tremendous number of powers and rights – many of which could not get through the legislature.[5] The CDAA could argue that victims were the beneficiary of some of P:roposition 8’s and 115’s provisions, in the sense it made convictions easier, but victim’s rights, *per se*, were not the subject of the greater part of those initiatives. Ironically, the new Proposition 9 is more focused on actual victims’ rights and powers. However, it was actually opposed by some prosecutors because it gave alleged victims too many rights and increased the burden on prosecutors’ offices to implement them. Nevertheless, whatever the voters thought they were voting for this time, Proposition 9 passed.

First of all, most of the provisions of Proposition 9 were already law in California. For instance, the rights of victims to be present and to be heard at sentencing and to be advised of the progress of criminal proceedings existed but now have a constitutional basis. There is a provision that these rights are “enforceable” which may result in legal actions and other proceedings by particularly overzealous alleged victims and victims’ lawyers against local prosecutors themselves. To an extent, legislation might be necessary to implement some of this but it is unlikely that there will be a considered consensus. Prosecutors’ offices already have state and federally funded victims’ advocate programs and much is done to keep alleged victims advised of proceedings and their rights.

There are seventeen paragraphs which are now inserted into the California Constitution, Article I, Section 28 and several of them do seem to expand the law. The effect of these provisions will have to be worked out in the courts since many of them are vague or create procedural rules that may place an alleged victim at odds with not only the defendant but with the prosecutor and the court. For instance, alleged victims theoretically can take appeals from decisions to continue cases and can possibly argue that they can interfere with negotiated resolutions of criminal cases.

Proposition 9 also has created significant changes in the parole process. Victims already have a central role in that process and victims and prosecutors are already invited to parole hearings. But this may be a further tool in the effort to effectively eliminate parole for people who are sentenced to life. As a practical matter, such people are currently not being released on parole. Even when it is recommended, the Governor generally overrides the parole board's recommendation. One of the provisions of this new proposition allows the parole board to extend the length of time between parole hearings to as much as 15 years.

There will be issues to be litigated on the part of the accused and the convicted regarding retroactivity and possible *ex post facto* challenges to Proposition 9. The Proposition also would seem to violate the "single subject" rule (*pace Brosnahan*) or the constitutional revision rule (per *Raven*) and is liable to be challenged on other grounds. Some of its provisions could be in direct conflict with other State and federal Constitutional provisions. And we can expect that alleged victims and their lawyers will be filing actions as well. In a perfect world (allowing for the imperfection of crime itself) only the guilty would be charged and all alleged victims would be actual victims. In our real world, it does not work this way and courts and prosecutors may rue the day of Propositions 9's passage. We will see.

OTHER HIGHLIGHTS

Statute of Limitations on Felonies

One new law of interest is the amendment of Penal Code Section 804. Interestingly, until this amendment, the commencement of a criminal action in a felony occurred at the time of the filing of an Information or an Indictment. The idea was that, in a felony, either a complaint and preliminary hearing or a grand jury proceeding was necessary to screen cases before the actual criminal case proceeded. This was different than a misdemeanor where the prosecution could be commenced by the simple filing of a complaint.

While this makes sense on one level, there was an unintended consequence. If the prosecutors filed a felony complaint and did not seek an arrest warrant, the statute of limitations would not be tolled until the filing of the Information after a holding order at the preliminary examination. In cases, like complicated white collar matters with extensive pre-preliminary hearing litigation, the statute of limitations could run if the prosecutor was not paying attention. The new Penal Code 804 changes this. Felony cases are now officially commenced upon the filing of a felony complaint.

Highway Workers and Academic Researchers

Another series of statutes involves special protection for certain classes of people. There are special penalties for assault or battery of "highway workers" under Penal Code Sections 241.5 and 243.65. There is also a new Penal Code Section 422.4 that makes it a crime to publish the personal information of academic researchers for the purpose of exposing them to violence. Arguably these crimes are covered by existing law but these groups now have their own statutes.

New Drugs to be Avoided

It is true that bananas were never made illegal as a result of Donovan's reference to mellow yellow. But current legislators have decided that Khat should be illegal under Health and Safety Section 11377(b)(3). Khat is apparently a stimulant that causes excitement, loss of appetite and euphoria. Although this sounds like it could be advertised as a good thing by a major drug company during prime time, possession of Khat is now a misdemeanor. Another drug, known as sage of the seers, Salvio

Divinorum, is now made illegal under Penal Code Section 379 despite questions as to the wisdom of doing so.

Driving Digitally

If you have a GPS, Vehicle Code Section 26708 has been amended to allow a unit within a 5 inch square in the lower left corner of the windshield (for a left hand driver car) and a 7 inch square in the lower right corner. And for those of you who neither assault highway workers nor read their large illuminated signs, you are no longer allowed to text message while driving pursuant to Vehicle Code Sections 12810.3 and 23123.5.

Weapons of Mass Distraction

It has been illegal to possess or import an undetectable knife which undoubtedly made California a safer place. The legislature has now made the rest of the world safer by making it a misdemeanor to export undetectable knives according to Penal Code Section 12001.1. It is unclear how you could export them without possessing them but now we know we are covered.

"Brass" knuckles are now made illegal if they are made of hard paper or wood (Penal Code Section 12020.1) and it is now illegal to display an imitation firearm at public or private schools or colleges (Penal Code Section 12556). You may only possess a less than lethal weapon or stun gun at a college or university with the permission of the president or chancellor (Penal Code Section 626.10) and it is illegal to sell them to minors (Penal Code Section 12655).

Electronic Stalking

There are a number of new crimes relating to radio transmissions, electronic piracy and internet threats against minors under 14 (Civil Code Sections 1798.79 to 1798.795, Penal Code Section 1202.4 and Penal Code Section 273i, respectively). But one of the major additions is an extensive electronic stalking statute under Penal Code Section 653.2. In essence, it punishes using an electronic communications device to intentionally place a person in fear of his or her safety or the safety of the person's immediate family. In addition, it is illegal to place information on the internet -- including using e-mail or hyperlinks or making material available for downloading -- that would harass another person and which would incite or produce an unlawful action.

Drunk Driving

The interlock device industry has lobbied successfully to require that their instruments be placed in vehicles as a result of a number of additional violations (Vehicle Code Section 23573). The court also now may require a device as a condition of probation in ordinary DUI's with "heightened consideration" in cases with a blood alcohol level of .15 or more (Vehicle Code Section 23575). In addition, the consequences of a "wet reckless" conviction are becoming closer yet to a drunk driving (Vehicle Code Section 23103.5).

Consequences

If someone violates any of these laws or any of the older ones, and is sent to jail, she or he should not invite anyone to visit who has a handcuff key or that person will be guilty of a misdemeanor (Penal Code Section 4575(d)). A variety of sex offenders will not be allowed to posses firearms (Penal Code Section 12022.3 and 12022.8) and probation will be prohibited to others (Penal Code Section 1203.065(b), 1203.067 and 112021(c)(1)). Furthermore, the sex offender web site law is amended to include names, pictures and addresses of people convicted of a larger list of crimes (Penal Code Section 290.46).

My favorite

There are several other criminal law related statutes pertaining to such things as vandalism, public housing fraud, domestic violence and gangs. Most are more technical than substantive. But, my favorite of the year is the addition of Penal Code Section 496e which makes it a crime to possess, buy or receive stolen fire hydrant parts – this would already be a crime but now fire hydrants have their own code section joining the ranks of highway workers and academic researchers.

Rules of Court

Finally for the new year, there has been a substantial revision of the California Rules of Court for misdemeanor and infraction appeals and writ petitions. The Judicial Council has also created and revised a number of forms in these same areas. The changes are too numerous to examine here but it appears that it will make the process a bit more user friendly.

CONCLUSION

We might ask, do we need a full time legislature and its incredibly expensive staff, overhead and bureaucracy? You might also ask, do we need the initiative process? Or maybe you think it is just fine. Either way, like every year, we have to get caught up on the new laws – I hope this gives a start to criminal practitioners and those who want to know.

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[1] http://www.leginfo.ca.gov

[2] 549 U.S. ___, 172 S.Ct. 856 (2007)

[3] Amending Penal Code Sections 1170 and 1170.3.

[4] 31 Cal. 3d 1 (1981).

[5] Ironically, despite the title “Victims’ Speedy Trial Act,” Proposition 115 actually sought to repeal the Constitutional right to a speedy trial along with virtually every other right a suspect or accused had. Of course, this litany of repealed constitutional rights could not supersede rights protected by the United States Constitution. Nevertheless, the California Supreme Court in *Raven v. Deukmajian* 52 Cal. 3d 336 (1991) found that the wholesale repeal of constitutional rights in the midst of an initiative amending multiple other constitutional and statutory provisions amounted to an impermissible constitutional revision and held that portion of the initiative invalid.