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California Criminal Defense Practice

Publication 171

Release 65

July 2010

HIGHLIGHTS

Right to Counsel

- Dismissal is not warranted when jail cell search turns up notes from the defendant's attorney, if the notes are not given to the prosecution. See *People v. Ervine* (2009) 47 Cal. 4th 745, now discussed in Chs. 1, 20, 51, and 80.

Accusatory Pleadings

- After a magistrate dismisses a felony charge at a preliminary hearing for supporting only a lesser included misdemeanor offense, the People may refile the charge as that lesser included misdemeanor without being barred from doing so under Penal Code § 1387(a). See *People v. Traylor* (2009) 46 Cal. 4th 1205, now discussed in Ch. 40.

Deferred Entry of Judgment

- To minimize recidivism among nonviolent drug offenders, the legislature has authorized counties to create "Back on Track" deferred entry of judgment reentry programs. The existence of such a

program in a particular county will not affect the availability of the statewide deferred entry of judgment program under Penal Code § 1000 et seq. If a defendant successfully completes either deferred entry of judgment program, the charge will be dismissed and, for most purposes, the arrest on which judgment was deferred will be treated as never having occurred. See Penal Code § 1000.8 et seq., now discussed in Ch. 51.

Proposition 36

- Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, generally provides for the diversion of nonviolent drug offenders from incarceration into community-based substance abuse treatment programs, with the charges to be dismissed on the successful completion of probation. In 2006, the Legislature enacted SB 1137 to amend Proposition 36. 2006 Stats., ch. 63 (SB 1137) (eff. July 12, 2006). However, a court of appeal has ruled that SB 1137 is invalid in its entirety, preventing the legislation from being implemented. See *Gardner v. Schwarzenegger*

(2009) 178 Cal. App. 4th 1366, now discussed in Ch. 51. That chapter has been revised to reflect pre-SB 1137 law, but for informational purposes, significant provisions of SB 1137 are summarized as well.

Double Jeopardy

- When a jury deadlocks on a penalty allegation or a trial court grants a new trial on a penalty allegation because the verdict is contrary to the evidence, double jeopardy does not bar retrial of that penalty allegation. See *Porter v. Superior Court* (2009) 47 Cal. 4th 125, and *People v. Anderson* (2009) 47 Cal. 4th 92, now discussed in Ch. 63.

Defendant's Trial Rights

- A trial court may allow law enforcement to stand near a testifying defendant, without finding manifest need but nevertheless finding reasons for doing so. See *People v. Stevens* (2009) 47 Cal. 4th 625, now discussed in Ch. 80.

Conduct Enhancements

- The California Supreme Court has explained the sentencing rules when both a Penal Code Section 186.22(b) allegation and a Penal Code Section 12022.53 allegation are found true regarding the same offense. See *People v. Rodriguez* (2009) 47 Cal. 4th 501, *People v. Jones* (2009) 47 Cal. 4th 566, and *People v. Brookfield* (2009) 47 Cal. 4th 583, now discussed in Chs. 91 and 144.

Sentencing

- The California Legislature has amended the statutes governing sentence enhancements, including those relating to enhancements for criminal street gang activity and firearms, to provide that when an enhancement statute specifies three possible terms, the choice of the appropriate term rests within the sound discretion of the court, and the court must select the term

that, in the court's discretion, best serves the interests of justice. The legislation deleted former provisions that had required the court to impose the middle term in the absence of circumstances in aggravation or mitigation. See Penal Code §§ 186.22(b)(3), 186.33(a), 1170.1(d), 12021.5(a),(b), 12022.2(a),(b), 12022.4(a), now discussed in Chs. 80, 87, and 91.

Sentencing Credits

- The legislature has replaced the former system of worktime credits available to state prisoners, who could earn such credits for performance in work assignments and educational programs, with a system of credits for continuous incarceration. At the same time, the Legislature authorized the Department of Corrections and Rehabilitation to award sentence-reduction credits to inmates who successfully complete specific program performance objectives for approved rehabilitative programming. See Penal Code §§ 2933 and 2933.05, now discussed in Ch. 91.

Homicide

- A defendant may be guilty of first degree murder under the provocative act doctrine. See *People v. Concha* (2009) 47 Cal. 4th 653, now discussed in Ch. 142.

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