
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 730 **Hearing Date:** June 9, 2015
Author: Quirk
Version: February 25, 2015
Urgency: No **Fiscal:** No
Consultant: JM

Subject: *Controlled Substances: Transport*

HISTORY

Source: California Attorneys for Criminal Justice; Conference of California Bar Associations

Prior Legislation: AB 721 (Bradford) Ch. 504, Stats. 2013

Support: American Civil Liberties Union; California Chapter of the National Organization for the Reform of Marijuana Laws (NORML); California Public Defenders; Californians for Safety and Justice; Drug Policy Alliance; Legal Services for Prisoners with Children; Taxpayers for Improving Public Safety

Opposition: None known

Assembly Floor Vote: 49 - 29

PURPOSE

The purpose of this bill is to provide that a conviction for transportation of marijuana, psilocybin mushrooms or PCP requires proof of intent to sell, as is currently the case for cocaine, heroin and numerous other drugs.

Existing law classifies controlled substances in five schedules according to their danger and potential for abuse. Schedule I controlled substances have the greatest restrictions and penalties, including prohibiting the prescribing of a Schedule I controlled substance. (Health & Saf. Code, §§ 11054 to 11058.)

Existing law provides that every person who transports, imports into the state, sells, furnishes, administers, or gives away, or offers to transport, import into the state, sell, furnish, administer, or give away, or attempts to import into this state or transport marijuana shall be punished in the county jail pursuant to realignment for a period of two, three or four years. (Health & Saf. Code, § 11360, subd. (a)-(b).)

Existing law provides that every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport PCP or any of its specified analogs or precursors shall be punished by imprisonment pursuant to realignment for a period of three, four, or five years. (Health & Saf. Code, § 11379.5, subd. (a).)

Existing law provides that every person who transports, imports into this state, sells, furnishes, gives away, or offers to transport, import into this state, sell, furnish, or give away any spores or mycelium capable of producing mushrooms or other material which contain a specified controlled substance shall be punished by imprisonment in the county jail for a period of not more than one year or in the state prison. (Health & Saf. Code, § 11391.)

Existing law provides that every person that transports, imports into the state, sells, furnishes, administers, or gives away, or offers to transport, import into the state, sell, furnish, administer or give away, or attempts to import into this state or transport cocaine, cocaine base, or heroin, or any controlled substance which is a narcotic drug, without a written prescription shall be punished by imprisonment pursuant to realignment for three, four, or five years. For purpose of this section, "transport" means to transport for sale (Health & Saf. Code, § 11352.) .

Existing law provides that every person that transports, imports into the state, sells, furnishes, administers, or gives away, or offers to transport, import into the state, sell, furnish, or give away, or attempts to import into this state or transport methamphetamine, or any controlled substance, which is not a narcotic, listed in the controlled substance schedule without a written prescription shall be punished by imprisonment for two, three, or four years. For purposes of this section, "transport" means to transport for sale. (Health & Saf. Code, § 11379.)

This bill provides that to "transport" psilocybin mushrooms, phencyclidine (PCP), or marijuana shall be defined to mean to "transport for sale."

This bill provides that these provisions of law do not preclude or limit prosecution under an aiding and abetting, or conspiracy offenses.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14)). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

Prior to 2014, the use of the word “transportation” in many drug statutes was determined by the courts to mean simply that – moving a prohibited drug from point A to point B, regardless of intent. This meant that an individual walking or riding a bicycle with drugs could be found guilty of transportation, even if those drugs are for personal use. The way the statute used the term "transport" did not make clear that there needs to be intent to sell at the end of the act of transporting.

In 2013, the Legislature enacted AB 721 (Bradford), Chapter 504, Statutes of 2013, which amended Health and Safety Code §11379 and §11352 to specify that “transportation” of specified drugs, including cocaine and methamphetamine, meant transport for sale, and did not include transport for personal use. However, AB 721 neglected to make the same change in other, similar anti-drug statutes. Although almost certainly due to oversight, the act of changing certain statutes while leaving other unchanged has the effect of reinforcing an argument that the Legislature intended that simple transportation of psilocybin mushrooms, PCP, or marijuana warrants a higher penalty than simple possession alone.

AB 730 will conform the definition of “transportation” in the statutes overlooked during the consideration and enactment of AB 721, to specify that to “transport” means to “transport for sale,” not for personal use.

2. Transportation of a Controlled Substance Includes an Element That the Transportation be For Purposes of Sale, Except for Transportation of, Psilocybin Mushrooms, PCP Marijuana

Prior to January 1, 2014, a person in possession of a controlled substance (a drug that cannot be possessed without a prescription) could be convicted of the more serious crime of drug transportation if the person even minimally moved the drug. This was true regardless of the amount of the drug possessed or the intent of the possessor. "Transportation of a controlled substance is established by simply carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316.) Courts interpreted the word "transports" to include transport of controlled substances for personal use. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-135; *People v. Eastman* (1993) 13 Cal.App.4th 668.) Further, although this initially appears to be illogical, transportation of a controlled substance does not necessarily include possession of it. That is, one could knowingly transport a controlled substance for another person who actually possesses the drug. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-137; *People v. Eastman, supra*, 13 Cal App 4th 668, 674-678.)

In 2013, AB 721¹ amended three statutes prohibiting transportation of a controlled substance to add an intent-to-sell element. Specifically, each statute was amended to add a new subdivision that states the following: "For purposes of this section 'transports' means to transport for sale." The new crime of transportation for sale applied to numerous drugs, including heroin, cocaine, methamphetamine and others. However, the new crime does not apply to transportation of marijuana, phencyclidine (PCP), or psilocybin mushrooms. This bill requires that a person have the intent to sell these specified controlled substance in order to be convicted of felony transportation.

3. Equal Protection: Persons Prosecuted for Transportation of Controlled Substances Under Separate Statutes With Differing Major Elements

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that all persons similarly situated be treated alike under the law. (*Lawrence v. Texas* (2003) 539 U.S. 558, 579.) Under current law, a person can be punished more severely for transporting marijuana for personal use than for transporting methamphetamine or cocaine. That they are treated differently raises equal protection concerns.

To prevail on an equal protection argument, the defendant must show that the state has enacted a law that affects similarly situated groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Under the equal protection clause, a court does not inquire "whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.'" (*Cooley v. Superior Court, supra*, 29 Cal.4th at p. 253 internal quotation marks and citation omitted.) Defendants who have committed the "same quality" of offense are similarly situated. (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541 [thieves and embezzlers similarly situated]; *In re King* (1970) 3 Cal.3d 226 [out-of-state fathers who fail to support children are similarly situated with in-state nonsupporting fathers].) If the court finds that similarly situated persons are treated differently under the law, the court will then apply separate levels of scrutiny to different types of classifications. "In the absence of a classification that is inherently invidious or that impinges

¹ AB 721 (Bradford) - Ch. 504, Stats. 2013; effective January 1, 2014.

upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends." (*Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 514.) However, liberty is a fundamental right. Imposing different punishments upon similarly situated persons likely requires strict scrutiny, such that the state must show a compelling interest for the classification. (*People v. Oliva* (1976) 17 Cal.3d 236

The two groups at issue here are arguably similarly situated for purposes of these statutes. Where no sales element is proven, each group is transporting controlled substances for personal use. The only difference is the specific drug possessed for personal use. All other parts of the contested act, such as the method of transportation, are the same. Arguably, transporting marijuana for personal use should carry no greater of a penalty than transporting methamphetamine. However, the opposite is true. This by itself supports the notion of an equal protection violation as to transportation of marijuana. This bill would address those equal protection concerns.

ARE DEFENDANTS CONVICTED OF TRANSPORTATION OF MARIJUANA, PSILOCYBIN MUSHROOMS OR PCP DENIED EQUAL PROTECTION BECAUSE A CONVICTION FOR TRANSPORTATION OF THESE DRUGS DOES NOT REQUIRE PROOF OF INTENT TO SELL, WHILE TRANSPORATION OF OTHER DRUGS DOES INCLUDE AN ELEMENT OF INTENT TO SELL?

4. SACPA (Substance Abuse and Crime Prevention Act – Proposition 36 of the 2000 General Election – One who Transports a Drug for Personal use is Guilty of Non-Violent Drug Possession and Eligible for Drug Treatment on Probation

SACPA – the Substance Abuse and Crime Prevention Act – requires that defendants be offered drug treatment on probation, without incarceration, if the defendant committed a non-violent drug possession offense. Non-violent drug possession includes “transportation for personal use.” (Pen. Code § 1210.1, subd. (a); *People v. Harris* (2009) 171 Cal.App.4th 1488, 1496.)

Under existing law, a conviction for transportation of heroin, cocaine, methamphetamine or one of a list of numerous other drugs necessarily involves the intent to sell and excludes the defendant from SACPA. Conversely, a person who moved a controlled substance, but intended to personally use the drug, would clearly be eligible for treatment under SACPA, unless otherwise excluded.

However, it appears that transportation of less than an ounce of marijuana, psilocybin mushrooms or PCP does not include an element that the defendant intended to sell the drug. Eligibility for treatment under SACPA of a defendant convicted of transportation of one of these three drugs must be determined by a special jury finding or by the court at sentencing. (*People v. Harris, supra*, 171 Cal.App.4th at p. 1496-1499.) As SACPA involves a reduction in penalty, the defendant bears the burden of proving that he or she transported a drug for personal use, not commerce. This bill will require the prosecution to prove intent to sell to convict a defendant of transportation of marijuana. If the element is not proved, a defendant in possession of the drug while moving or traveling would only be convicted of simple possession, and thus would be eligible for treatment under SACPA.