

## Proposition 47: Impact on Criminal Investigations

On November 4, 2014, California voters passed Proposition 47 which went into effect immediately. Virtually all of the pre-election discussion about the initiative centered on its provision that certain nonviolent felonies and wobblers would automatically be converted into crimes that could only be prosecuted as misdemeanors unless the arrestee had certain priors. The most notable of these crimes were drug possession for personal use and various theft offenses when the value of the loss was less than \$950. The initiative may, however, have some unintended consequences to the law pertaining to search and seizure. Although it will be up to the courts to determine the scope of these changes, if any, here are some thoughts.

**POST-ARREST PROCEDURE:** Because Proposition 47 converted certain felonies and wobblers into cite-and-release misdemeanors, some arrestees who would have been transported to jail in the past must now be released after they sign a promise to appear.<sup>23</sup> (These crimes include straight possession of drugs (see Health and Safety Code sections 11350, 11377, and 11377) and the new shoplifting statute (Penal Code section 459.5). Proposition 47 did not, however, affect the various statutes that authorize officers to book people who have been arrested for misdemeanors. See this endnote for a partial list of situations in which a custodial arrest is permitted.<sup>24</sup>

The question is whether misdemeanor arrestees must be cited and released at the scene of the arrest, or whether officers may book them then cite them out from the jail or police station. Technically, officers can choose either,<sup>25</sup> although it seems they should have a good reason for taking the arrestee into custody. And most of the good reasons have already been incorporated into the Penal and Vehicle codes. (See footnote 24.) One other thing. It appears that suspects who are booked must be released promptly after the booking procedure has been completed. This would mean, for example, that suspects could not be held for interrogation or for inclusion in a lineup (unless they consented to it), and they must not be housed in the general population of the facility.

**POST-BOOKING PROCEDURE:** If officers decide to book a cite-and-release arrestee, it is likely that they will be required to release him *promptly* after the booking process has been completed and he has signed a promise to appear. This would mean, for example, that officers could not interrogate the suspect or hold him for a lineup unless he consented. It may also mean that the arrestee must be kept in the booking area and not moved into the general population section, even temporarily.

**SEARCH WARRANTS:** Penal Code section 1524(a) specifies that search warrants may be issued whenever there is probable cause to believe there is evidence of a felony on the premises. There are also some limited circumstances in which a warrant may be issued if the crime under investigation was a misdemeanor. See this footnote for a list.<sup>26</sup> There is one additional circumstance that may be of special interest to law enforcement. Subsection (3) authorizes judges to issue warrants for contraband (meaning anything that is illegal to possess, such as any amount of illegal drugs or stolen property) if the evidence was possessed “with the intent to use them as a means of committing a public offense.” Although it might be difficult to prove that people who possess small amounts of illegal drugs or stolen property intend to use it to commit an additional public offense, the Court of Appeal in *Dunn v. Municipal Court* that proof of intent is unnecessary because it is “the possession itself [that] is the public offense.”<sup>27</sup>

**SEARCHES INCIDENT TO ARREST:** It is unlikely that Proposition 47 will affect the longstanding rule that officers may search the clothing of any arrestee if he will be taken into custody for booking.<sup>28</sup> In other words, if officers decide to transport of a cite-and-release arrestee for booking, they may search him for weapons and contraband before placing him in a police vehicle.

**BOOKING SEARCHES:** Another longstanding rule is that, upon arrival at the jail, but before the arrestee had been placed in a booking cell, officers may conduct a pre-booking search.<sup>29</sup> Again, this rule should not be affected by Proposition 47 because pre-booking searches are necessary whenever an arrestee is taken to a secure area of a jail or police station—even if he had been arrested for a cite-and-release misdemeanor. Note, however, that pre-booking searches, like searches incident to arrest, must be strictly limited.<sup>30</sup>

**VEHICLE SEARCHES:** The Supreme Court has ruled that officers may search a vehicle without a warrant if they have probable cause to believe there is evidence inside.<sup>31</sup> Because neither the Supreme Court nor the California courts have ever interpreted this rule as applying only to evidence of felonies, it appears that passage of Proposition 47 will have no affect on it. Similarly, officers may conduct an inventory search of the vehicle if (1) the suspect will be booked, and (2) the search was reasonably necessary; e.g., to inventory the contents or protect the vehicle from theft or vandalism.<sup>32</sup> POV

**Date posted:** December 3, 2014

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<sup>23</sup> See Pen. Code §§ 853.6.

<sup>24</sup> **NOTE:** A person arrested for a misdemeanor may be taken into custody for any of the reasons below. See Pen. Code §§ 827.1, 853.6(i); Veh. Code §§ 40302, 40303(b).

**Warrant arrests**

- Warrant says no cite and release.
- It is reasonably likely that the offense would continue.
- It is reasonably likely that the safety of persons or property would be immediately endangered if the arrestee was cited and released.
- The suspect was arrested for domestic violence or a violation of a protective court order involving domestic violence.”
- Arrest for a crime of violence, a crime involving a firearm, resisting arrest, or furnishing false information to a peace officer.
- Arrestee was unable to provide satisfactory ID.
- Arrestee is a danger to himself due to alcohol or drugs.
- Arrestee requires medical exam or care or was otherwise unable to care for his safety.
- Arrestee is charged with another crime for which he is ineligible for release.
- Arrestee refuses to sign a promise to appear.

**Warrantless arrest**

- Arrest for violation of Veh. Code §§ 23152.
- Arrest for domestic violence or violation of a protective court order involving domestic violence.
- It is reasonably likely that the offense would continue.
- It is reasonably likely the safety of persons or property would be jeopardized by immediate release.
- Arrestee unable to provide satisfactory ID. Also see Veh. Code § 40302(a).
- Arrestee needed medical care or was so intoxicated that he could have posed a danger to himself or others.
- Arrestee refuses to sign the promise to appear.
- Arrestee has outstanding warrants.
- Arrest for violation of any of the following Veh. Code sections: 23152, 40303, 10852, 10853, 23103, 23104, 2800, 20002, 20003, 23109, 14601, 14601.1, 14601.2, 23332, 2813, 21461.5, 21200.5.

<sup>25</sup> See Pen. Code §§ 853.6(a)(1) [“nothing prevents an officer from first booking an arrestee pursuant to subdivision (g)”]; *People v. Superior Court (Murray)* (1973) 30 Cal.App.3d 257, 264 [“There is no requirement that a person arrested for a non-Vehicle Code misdemeanor violation must be released without bail nor without booking. It is a matter within the discretion of the arresting officer or the booking officer.”].

<sup>26</sup> **NOTE:** Per Pen. Code § 1524(a), a judge may issue a warrant to search for evidence pertaining to the following misdemeanors: DUI blood draw: The evidence consists of blood in the bloodstream of a person who had been arrested for DUI and the person has refused to voluntarily submit to a blood test. Vehicle tracking warrants: A judge may issue a warrant authorizing the

installation and monitoring of a tracking device on a vehicle if the affidavit demonstrated probable cause to believe that the tracking information will tend to show that a felony had been committed, that a particular person committed a felony, or that a person violated a misdemeanor violation of the Fish and Game Code or a misdemeanor violation of the Public Resources Code. Stolen property: The evidence consists of stolen or embezzled property. Concealed evidence: The evidence is in the possession of a person to whom it was delivered for the purpose of concealing it. Cell phone and internet records: The evidence consists of records in the possession of a provider and it tends to prove that certain property was stolen; e.g., identity theft. Sexual exploitation of a child: The evidence tends to show that sexual exploitation of a child occurred in violation of Penal Code § 311.3. Child pornography: The evidence tends to show that a person is in possession of matter depicting sexual conduct of a person under 18 years of age in violation of Penal Code § 311.11. Home of 5150: The premises are occupied or under the control of a person who is in custody on a hold under Welfare & Institutions Code § 5150. Home of domestic violence arrestee: A resident had been arrested for a domestic violence incident that included threatened harm. Home subject to “no firearms” order: The premises are owned or occupied by a person is prohibited from possessing firearms pursuant to Family Code § 6389.

<sup>27</sup> (1963) 220 Cal.App.2d 858, 874.

<sup>28</sup> See *United States v. Robinson* (1973) 414 U.S. 218 [explaining justification for search, Court noted the danger to officers “is far greater in the case of the extended exposure which follows the taking of a suspect into custody,” (at p. 234-35) especially because of the “attendant proximity, stress and uncertainty.” (at p. 235, fn.5)]; *Knowles v. Iowa* (1998) 525 US 113; Pen. Code § 827.1(h).

<sup>29</sup> See Pen. Code § 4030(e); *People v. Panfili* (1983) 145 Cal.App.3d 387, 393-94; *People v. Superior Court (Fuller)* (1971) 14 Cal.App.3d 935, 945 [“It is well established that persons about to enter jails or penal institutions may be searched for the purpose of preventing the introduction of weapons or contraband into the premises, and for the purpose of inventorying the accused’s property.”].

<sup>30</sup> See Pen. Code § 4030(e).

<sup>31</sup> See *United States v. Ross* (1982) 456 U.S. 798, 809 [“[A vehicle] search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.”]; *People v. Carpenter* (1997) 15 Cal.4th 312, 365 [“The police had probable cause to search the vehicle. Under the ‘automobile exception’ to the warrant requirement, they did not need a warrant at all.”].

<sup>32</sup> See *Halajian v. D&B Towing* (2012) 209 Cal.App.4th 1, 15 [community caretaking exception applied to towing of unregistered vehicle in convenience store parking lot]; *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247 [“[T]he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances.”].