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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ATANACIO G. GARCIA, Defendant and Appellant.	F039327 (Super. Ct. No. 01CM2606) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Lynn C. Atkinson, Judge.

James Bisnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Atanacio G. Garcia pleaded guilty to felony possession of methamphetamine and misdemeanor driving under the influence of methamphetamine. He requested the trial court place him on probation and order treatment pursuant to the provisions of Proposition 36, the Substance Abuse and Crime Prevention Act of 2000

(Pen. Code,[1] § 1210 et seq.). The court denied appellant's request having determined he was not eligible for probation and treatment under Proposition 36, because his conviction for driving under the influence of methamphetamine was a "misdemeanor not related to the use of drugs" within the meaning of section 1210.1, subdivision (b)(2). On appeal, appellant asserts his misdemeanor conviction involved the "simple possession or use of drugs" and did not render him ineligible under Proposition 36. We will affirm.

FACTS

On August 23, 2001, Kings County Sheriff's Deputy Brandt was on patrol when he observed a vehicle swerve across a traffic lane and cross over the center divider line.[2] When Deputy Brandt conducted the traffic stop, the vehicle stopped in the middle of the road. Deputy Brandt approached the driver's side window and smelled the odor of an alcoholic beverage from the vehicle. Appellant Atanacio Garcia was the driver, and Mario Garcia was sitting in the front passenger seat. Deputy Brandt observed an open bottle on the floorboard of the front passenger seat between Mario Garcia's legs. Deputy Brandt also noticed appellant was rolling a ball of aluminum foil between his thumb and forefinger.

Deputy Brandt determined appellant's driver's license had been suspended, and questioned him about his consumption of alcohol. Appellant denied he had been drinking. However, appellant displayed obvious signs of being under the influence when he stepped out of the car. Appellant denied he had ever been arrested, but later admitted he had previously been arrested for being under the influence of a controlled substance. Appellant also admitted he used crank two days earlier.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The facts of appellant's offenses are taken from the probation report since appellant waived his preliminary hearing and pleaded guilty.

Deputy Brandt conducted field sobriety tests and determined appellant was under the influence of a controlled substance, specifically a stimulant. Appellant consented to a search of the vehicle, which revealed a 12-pack of beer, an open beer bottle, and a cigarette package containing a small plastic bindle. The bindle contained a substance which appeared to be marijuana. Deputy Brandt also found a white rock, which consisted of 6.0 grams of methamphetamine.

Appellant was arrested, transported to the Kings County Sheriff's Department, and advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Appellant stated he had last used methamphetamine two or three days earlier, but the methamphetamine in the vehicle did not belong to him. Appellant submitted a urine sample and it was later determined appellant was under the influence of methamphetamine.

Appellant was charged with multiple narcotics offenses, but pleaded guilty to felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and misdemeanor driving under the influence of a controlled substance, methamphetamine (Veh. Code, § 23152, subd. (a)), with two prior convictions for driving under the influence. Appellant requested the court to place him on probation and order treatment pursuant to Proposition 36. The court referred the matter to the probation department for a determination of appellant's eligibility. The prosecutor stated his intent to oppose appellant's request for probation and treatment under Proposition 36.

The Probation Report

According to the probation report, appellant (born 1975) stated he used approximately $30 worth of methamphetamine every other day. He occasionally smoked marijuana and drank alcohol on the weekends. Appellant stated he had a drug problem and was willing to participate in a treatment program. Appellant was employed as an installer with a monthly income of $1,200.

Appellant did not have a juvenile or adult felony record and never served time in state prison. However, appellant had an extensive record of driving offenses. In 1997, he was convicted of driving with a blood-alcohol level of .08 or higher (Veh. Code, § 23152, subd. (b)), placed on 36 months of probation, and also served time in jail. In March 2000, he was convicted of driving on a suspended license (Veh. Code, § 14601.1), and again placed on probation. In October 2000, he was convicted of driving with a blood-alcohol level of .08 or higher, placed on probation for 18 months, and served time in jail.

The probation report stated there were no statutory provisions which prohibited a grant of probation in this case. However, appellant was required to serve a minimum of 120 days in custody for violating Vehicle Code section 23152, subdivision (a), with two prior convictions. In addition, appellant posed a danger to society if he was not imprisoned for the instant offenses because he continued to drive while under the influence of controlled substances. He was on probation when the instant offenses were committed, and his prior performance was unsatisfactory.

> "After reviewing the present case and [appellant's] prior criminal record, [appellant] does not appear to be suitable for probation in the Substance Abuse and Crime Prevention Program, Prop. 36. [Appellant] has been convicted of a crime other than a non-violent drug offense, specifically 23152(a) VC, and therefore is not eligible for a grant of probation under Prop. 36, pursuant to Section 1210.1(b)(2) of the California Penal Code. Furthermore, it is the opinion of this officer that [appellant] is not eligible under 1210.1 PC due to the fact the driving under the influence of alcohol and/or a drug involves the threat of physical injury to another person, and therefore [appellant] poses a serious danger to society. Therefore, it is respectfully recommended that probation be denied."

The probation report recommended imposition of the midterm of two years in state prison for possession, with a concurrent one-year term for driving under the influence.

Sentencing Hearing

At the sentencing hearing, the prosecutor argued appellant was ineligible for treatment under Proposition 36 for two reasons. First, driving under the influence was a

misdemeanor not related to drug use because it involved the use of a motor vehicle. Second, driving under the influence involved a threat of violence or physical injury to other people.

The court reviewed the probation report and agreed appellant was not eligible for treatment. The court noted that "[s]uperficially, it would seem that [driving under the influence] is a crime involving the use of drugs, because that's the way you get under the influence." However, the court found the offense was a misdemeanor not related to the simple use of drugs, which rendered appellant ineligible for treatment.

> "The sole question then is whether or not the [word] 'simple' applies to or defines or limits or modifies the phrase, quote, 'possession or use,' as I believe it does. In that case I would find that Vehicle Code 23152(a) is a disqualifying crime as it is not simple use, but it is use coupled with another distinct activity or circumstance, i.e., driving a car. The word 'simple' means 'plain, unmixed or free or secondary complications.' I believe that the intent of the drafters was to exclude an offense such as 23152(a) as it was not a crime involving the simple use of drugs.
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> "I also note in this regard that 23152(a) is not, as I mentioned before, not a nonviolent drug possession offense as defined, but that being under the influence of drugs under 11550 is a nonviolent drug diversion offense. My analysis is that if the drafters had wished to include 23152(a), either as a nonviolent drug possession offense or as a qualifying misdemeanor, they could have easily done so.
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> "If I were to interpret the statute as it's presently written to include 23152(a) by use of drugs as an eligible offense, we would have the anomaly of not having a person eligible for Prop 36 treatment if they had consumed all the drugs they had and they were driving under the influence. They would be -- if the only violation, in other words, was it 23152(a), he would be punished under Vehicle Code statutes.
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> "If he did not consume all the drugs, but enough to become under the influence and drove a vehicle and was stopped, as was in this particular instance, being under the influence of drugs while driving and possessing drugs, [appellant's] interpretation would result in his being qualified for Prop 36 treatment, which I don't think makes any sense, because you have the exacerbated person in Prop 36 treatment and the one who merely drove under the influence who's not eligible for Prop 36.

> "In any event, my conclusion is that the Vehicle Code 23152(a) conviction, no matter how it was performed, is a disqualifying offense since [appellant] was convicted in the same proceeding of this, so it makes his treatment for the 11377(a) under Prop 36 not an option in this case."

Defense counsel asserted that even if appellant was ineligible for treatment, he should still receive probation for the possession conviction on condition of serving local time and attending a mandatory treatment program, with the possibility of being sent to prison if he failed to comply with the probationary terms. The prosecutor replied appellant had demonstrated his inability to comply with probationary terms and conditions, his conduct was becoming increasingly serious, and his drug use was escalating based on his possession of 6.0 grams of methamphetamine.

The court determined appellant was not a suitable candidate for probation based on his numerous driving offenses, he was on probation at the time of the instant offenses, and his prior performance was unsatisfactory. The court further found appellant "continues to pose a danger to the motoring public by driving while under the influence of alcohol or drugs." The court imposed the midterm of two years for possession, with a concurrent one-year term for driving under the influence.

DISCUSSION

Appellant contends the court should have placed him on probation and ordered treatment pursuant to the provisions of Proposition 36, and his conviction for misdemeanor driving under the influence of methamphetamine should not have disqualified him from the benefits of the statutory scheme. We will thus review the provisions of Proposition 36 and determine whether appellant qualified for probation and treatment under the statutory scheme.

Proposition 36

In the General Election held November 7, 2000, the voters of California passed Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). Proposition 36 requires probation and drug treatment, not incarceration, for the

commission of "nonviolent drug possession offenses," i.e., possession, use, transportation of controlled substances and similar parole violations. (*In re Scoggins* (2001) 94 Cal.App.4th 650, 652.) "Proposition 36 . . . effected a change in the sentencing law [of California] so that a defendant convicted of a nonviolent drug possession offense is generally sentenced to probation, instead of state prison or county jail, with the condition of completion of a drug treatment program." (*In re DeLong* (2001) 93 Cal.App.4th 562, 566, citing Prop. 36, § 3.) The stated purpose and intent of the Act was: " '(a) To divert from incarceration into community-based substance abuse treatment programs nonviolent defendants, probationers and parolees charged with simple drug possession or drug use offenses; [¶] (b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration—and reincarceration—of nonviolent drug users who would be better served by community-based treatment; and [¶] (c) To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.' " (See Historical and Statutory Notes, 51 West's Ann. Pen. Code (2002 supp.) foll. § 1210, p. 207.)

The statutory scheme consists of the following sections: Penal Code section 1210, which defines the operative terms; Penal Code section 1210.1, which provides for probation and drug treatment for persons convicted of a nonviolent drug possession offense and excludes certain offenses; Penal Code section 3063.1, generally providing for drug treatment rather than parole revocation if a parolee commits a nonviolent drug possession offense or violates a drug-related condition of parole; and division 10.8 of the Health and Safety Code (§§ 11999.4—11999.13), pertaining to funding for substance abuse treatment. (*In re DeLong, supra*, 93 Cal.App.4th at p. 566; *In re Scoggins, supra*, 94 Cal.App.4th at p. 655.)

A defendant convicted of a nonviolent drug offense will, in general, be sentenced to probation on condition of completing a drug treatment program. (§ 1210.1, subd. (a).)

Although a court may not impose incarceration as a condition of probation, it may require, as additional conditions of probation, "participation in vocational training, family counseling, literacy training and/or community service." (§ 1210.1, subd. (a).) If defendant successfully completes drug treatment and probation, the conviction is set aside, the information or indictment is dismissed, and for most purposes, the arrest is deemed not to have occurred. (§ 1210.1, subd. (d); *In re Scoggins, supra*, 94 Cal.App.4th at p. 656.)

Proposition 36 emphasizes treatment, not punishment, and applies only to those convicted of simple drug possession. (*People v. Superior Court* (*Turner*) (2002) 97 Cal.App.4th 1222, 1226.) It does not apply to a defendant who, "in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony." (§ 1210.1, subd. (b)(2).) Likewise, it does not apply to a defendant who possesses or is under the influence of certain drugs and uses a firearm (§ 1210.1, subd. (b)(3)(A), (B)); a defendant who has twice been convicted of simple drug possession and proven himself or herself unamenable to treatment (§ 1210.1, subd. (b)(5)); a defendant who refuses drug treatment as a condition of probation (§ 1210.1, subd. (b)(4)); or a defendant who previously has been convicted of one or more serious or violent felonies and has not remained free of prison custody for a period of five years (§ 1210.1, subd. (b)(1)).

After Proposition 36 was passed, the Legislature amended some of the new code sections and added others. (Stats. 2001, ch. 721, §§ 1-10, No. 11 West's Cal. Legis. Service, pp. 4444-4452.) Among other things, the Legislature added division 10.9 (commencing with § 11999.20) to the Health and Safety Code, which provides an accountability program for substance abuse testing and treatment. (Stats. 2001, ch. 721, § 1.) It also added sections 1210.5 and 3063.2 to the Penal Code, which require drug testing as a treatment tool for probationers and parolees. (Stats. 2001, ch. 721, §§ 4, 6.)

Proposition 36 applies to defendants convicted on or after July 1, 2001. A defendant found guilty before the initiative's effective date, but not sentenced until after the passage of the initiative, is within the ambit of the statute. (*In re DeLong, supra*, 93 Cal.App.4th at p. 564.) Appellant pleaded guilty on October 4, 2001, and was sentenced on November 2, 2001, and his case is thus within the provisions of Proposition 36.

Section 1210.1, subdivision (b)

Measures adopted through the initiative process are subject to the ordinary rules and canons of statutory construction. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.) Construction of a statute is a question of law which appellate courts review de novo, and proper interpretation begins with the actual language of the statute. (*American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 923-924.)

We thus turn to the express provisions of the statute which are applicable to the instant case. Section 1210.1, subdivision (a) states:

> "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted *of a nonviolent drug possession offense* shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. . . ." (Italics added.)

Section 1210, subdivision (a) defines a "nonviolent drug possession offense" as:

> "[T]he unlawful possession, use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term 'nonviolent drug possession offense' does not include the possession for sale, production, or manufacturing of any controlled substance and does not include violations of Section 4573.6 or 4573.8 [authorized possession of controlled substances or alcoholic beverages in prison, camp, jail, etc.]."

Appellant herein pleaded guilty to felony possession of methamphetamine in violation of Health and Safety Code section 11377, subdivision (a). Appellant thus suffered a felony conviction for a "nonviolent drug possession offense" under the

definitions in section 1210.1, subdivision (a) and section 1210, subdivision (a), which qualifies him for probation and treatment under Proposition 36.

As discussed above, however, section 1210.1, subdivision (b) excludes certain qualifying offenders from probation and treatment under specific circumstances. As relevant in the instant case, section 1210.1, subdivision (b)(2) states the treatment provisions of section 1210.1, subdivision (a) do not apply to:

> "Any defendant who, in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a *misdemeanor not related to the use of drugs* or any felony." (§ 1210.1, subd. (b)(2), italics added.)

Section 1210, subdivision (d) provides the following definition:

> "The term 'misdemeanor not related to the use of drugs' means a misdemeanor *that does not involve* (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender, or (2) any activity similar to those listed in paragraph (1)." (Italics added.)

Appellant pleaded guilty in the same criminal proceeding to both felony possession of methamphetamine and misdemeanor driving under the influence of methamphetamine. Thus, even though appellant qualifies for treatment based on his conviction for felony possession of methamphetamine, the question is whether his conviction in the same criminal proceeding for driving under the influence of methamphetamine is a "misdemeanor not related to the use of drugs," which would render him ineligible for treatment under Proposition 36.

As noted above, the same principles that govern statutory construction apply when interpreting a voter initiative. Thus, the courts first turn to the language of the statute, giving the words their ordinary meaning. "The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'

[Citation.] If a penal statute is still reasonably susceptible to multiple constructions, then we ordinarily adopt the ' "construction which is more favorable to the offender ...." ' " (*People v. Rizo* (2000) 22 Cal.4th 681, 685-686; *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530, 536.)

> "Words used in a statute ... should be given the meaning they bear in ordinary use. [Citations.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the ... voters .... [Citations.] [¶] But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].…" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In approaching this issue, we are mindful that when language in a penal statute is reasonably susceptible of two constructions, ordinarily the construction which is more favorable to the defendant will be adopted. (*People v. Alday* (1973) 10 Cal.3d 392, 394; see generally 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, pp. 51-53; *In re DeLong, supra,* 93 Cal.App.4th at p. 568.) However, an *exception* to the main premise of a statute is to be strictly construed. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at pp. 735-736.) An exception qualifies the main premise and may not be ascribed an unreasonably expansive meaning. (*Id.* at p. 736; *People v. Superior Court* (*Turner*)*, supra*, 97 Cal.App.4th at p. 1228.)

It is clear that a conviction for being under the influence of narcotics, in violation of Health and Safety Code section 11550, is a nonviolent drug possession offense which qualifies an individual for probation and treatment under section 1210.1, subdivision (a). In the abstract, it could be said that driving under the influence of drugs in violation of Vehicle Code section 23152, subdivision (a) would be a misdemeanor "related" to or involving the simple possession or use of drugs, simply based on the elements of the offense: (1) a person drives a motor vehicle, (2) while under the influence of any drug. (*People v. Enriquez* (1996) 42 Cal.App.4th 661, 664.) "[I]t is evident that Vehicle Code section 23152, subdivision (a) . . . is a drug related offense. Being under the influence of 'any drug' is one of its essential elements …." (*People v. Duncan* (1990) 216 Cal.App.3d 1621, 1627.)

However, the definition of the term "under the influence" differs for the purpose of *being* under the influence (Health & Saf. Code, § 11550) and *driving* under the influence (Veh. Code, § 23152, subd. (a)).

> "To be 'under the influence' within the meaning of the Vehicle Code, the … drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.] In contrast, 'being under the influence' within the meaning of Health and Safety Code section 11550 merely requires that the person be under the influence in any detectable manner. The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability. [Citation.]" (*Byrd v. Municipal Court* (1981) 125 Cal.App.3d 1054, 1058; *Gilbert v. Municipal Court* (1977) 73 Cal.App.3d 723, 727; *People v. Enriquez, supra*, 42 Cal.App.4th at p. 665.)

Indeed, the purpose of Vehicle Code section 23152, subdivision (a) is to protect members of the public who use the highways from those who have impaired their ability to drive as the result of substance use. (*People v. Davalos* (1987) 192 Cal.App.3d Supp. 10, 14; *People v. Woodard* (1983) 143 Cal.App.3d Supp. 1, 4; *People v. Lujan* (1983)

141 Cal.App.3d Supp. 15, 25.) Driving under the influence of alcohol or drugs poses a substantial danger to public health and safety with the potential for catastrophic consequences. (See *People v. Schofield* (2001) 90 Cal.App.4th 968, 973.) "It is crystal clear to us that courts in the formulation of rules on damage assessment and in weighing the deterrent function must recognize the severe threat to the public safety which is posed by the intoxicated driver. The lesson is self-evident and widely understood. Drunken drivers are extremely dangerous people." (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899.) "[O]ur observation that '[d]runken drivers are extremely dangerous people' [citation] seems almost to understate the horrific risk posed by those who drink and drive." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 262.)

Moreover, the public safety rationale behind Vehicle Code section 23152, subdivision (a) is applicable whether the driver is under the influence of either a controlled substance or alcohol. "[T]he objective intent of the Legislature as derived from the language of the pertinent Vehicle Code provisions is that a person who is driving while under the influence of alcohol and/or drugs is always a threat and the purpose of section 23152 is to prohibit those 'extremely dangerous' persons from driving anywhere in California." (*People v. Malvitz* (1992) 11 Cal.App.4th Supp. 9, 14.)

Based on our analysis of the plain meaning of the exclusionary language of section 1210.1, subdivision (b), we conclude that appellant's conviction for driving under the influence of methamphetamine renders him ineligible for probation and treatment under Proposition 36. Driving under the influence of a controlled substance implicates important public safety concerns and does not involve the simple use or possession of drugs. Proposition 36 was intended to divert only simple drug offenders into probation and treatment, and our interpretation is consistent with the rules of statutory construction that an exception to the main premise of a statute is to be strictly construed because it qualifies the main premise and may not be ascribed an unreasonably expansive meaning.

(*Lungren v. Deukmejian, supra*, 45 Cal.3d at pp. 735-736; *People v. Superior Court* (*Turner*)*, supra*, 97 Cal.App.4th at p. 1228.)

Legislative History

A review of the history of Proposition 36 supports our interpretation of section 1210.1, subdivision (b). The Attorney General's ballot measure summary identified Proposition 36 as "Drugs, Probation and Treatment Program," and described it as "[r]equir[ing] probation and drug treatment program, not incarceration, for conviction of possession, use, transportation for personal use or being under [the] influence of controlled substances and similar parole violations, not including sale or manufacture. [¶] Permits additional probation conditions except incarceration." (Ballot Pamp., Gen. Elec. (Nov. 7. 2000) summary of Prop. 36, p. 22.)

The Legislative Analyst's analysis of Proposition 36 informed the voters:

> "The measure defines a nonviolent drug possession offense as a felony or misdemeanor criminal charge for being under the influence of illegal drugs or for possessing, using, or transporting illegal drugs for personal use. The definition excludes cases involving possession for sale, producing, or manufacturing of illegal drugs. [¶]…[¶] … This measure specifies that certain offenders would be *excluded from its provisions* and thus could be sentenced by a court to a state prison, county jail, or probation without drug treatment. This would be the case for an offender who refused drug treatment, or who possessed or was under the influence of certain (although not all) illegal drugs while using a firearm. *This measure also excludes offenders convicted in the same court proceeding of a misdemeanor unrelated to drug use or any felony other than a nonviolent drug possession offense.*…" (Ballot Pamp., Gen. Elec., *supra*, analysis of Prop. 36 by Legislative Analyst, p. 23, italics added.)

The ballot argument does not directly address the question of whether a misdemeanor conviction for driving under the influence of narcotics excludes an otherwise qualified defendant from treatment. However, it does indicate the initiative was intended to exclude any defendant who was more than a "simple," "nonviolent" drug offender:

> "Proposition 36 is *strictly limited*. It only affects those guilty of simple drug possession. If previously convicted of violent or serious felonies, they will not be eligible for the treatment program unless they've served their time and have committed no felony crimes for five years. *If convicted of a non-drug crime along with drug possession, they're not eligible.* If they're convicted of selling drugs, they're not eligible." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 36, p. 26, italics added.)

The ballot argument further states: "Proposition 36 only affects *simple* drug possession. No other criminal laws are changed." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 36, p. 26, italics added.)

The ballot summary and analysis of the initiative is consistent with our interpretation of the exclusionary language of Proposition 36. The voters were specifically informed the enactment would be strictly limited to those who commit simple drug use or possession offenses. As discussed above, the public safety rationale behind Vehicle Code section 23152, subdivision (a) is applicable to driving under the influence of either drugs or alcohol. Under appellant's interpretation of Proposition 36, an offender who was driving under the influence of drugs would receive more lenient treatment than a person who was driving under the influence of alcohol. This result is contrary to the purpose and intent of Proposition 36, and the voters were clearly informed that no other criminal laws were changed by Proposition 36. Appellant's interpretation would effectively lead to a duality of treatment for those convicted of violating section 23152, subdivision (a) depending upon what type of intoxicant the person had consumed, and would be clearly inconsistent with the public safety interests implicated by that Vehicle Code provision.

The Arizona Statute

We find further support for our interpretation of Proposition 36's exclusionary provisions based on our review of the Arizona statute which served as the model for Proposition 36. " '(c) In 1996, Arizona voters by a 2-1 margin passed the Drug Medicalization, Prevention, and Control Act [Proposition 200], which diverted

nonviolent drug offenders into drug treatment and education services rather than incarceration. According to a Report Card prepared by the Arizona Supreme Court, the Arizona law: is 'resulting in safer communities and more substance abusing probationers in recovery,' has already saved state taxpayers millions of dollars, and is helping more than 75 percent of program participants to remain drug free.'" (See Historical and Statutory Notes, 51 West's Ann. Pen. Code, *supra*, foll. § 1210, p. 207.)

When Proposition 200 was passed in Arizona, it resulted in the enactment of section 13-901.01 of the Arizona Revised Statutes (A.R.S.), Title 13 (Criminal Code), Chapter 9 (Probation and Restoration of Civil Rights), which is substantially similar to California's probation and treatment statutes. As in California, the purpose of Arizona's section 13-901.01 is to divert nonviolent drug possessors to treatment and to free prison space for drug dealers and violent offenders. (*State v. Pereyra* (Ariz.App. Div. 1 2001) 18 P.3d 146, 149.) The statute requires the court to suspend the defendant's sentence and impose probation for the commission of a nonviolent, first time drug offense, and order the defendant's participation in a drug treatment or education program as a condition of probation. The court may not impose jail as a condition of probation for a first offense but may do so for a second offense. (*State v. Tousignant* (Ariz.App. Div. 1 2002) 43 P.3d 218.) A person who is convicted a third time for personal possession or use must be sentenced under the normal criminal sentencing statutes. (*State v. Rodriguez* (Ariz.App. Div. 2 2001) 23 P.3d 100, 101.)

Arizona's section 13-901.01 provides that any person convicted of "the *personal possession or use* of a controlled substance or drug paraphernalia" is eligible to receive probation and treatment under the statutory scheme. (A.R.S. § 13-901.01, subd. (A), italics added.)

> "Personal possession or use of a controlled substance . . . shall not include possession for sale, production, manufacturing or transportation for sale of any controlled substance." (A.R.S. § 13-901.01, subd. (C).)

A person who "has been convicted of or indicted for a violent crime," as defined by Arizona law, is not eligible for probation and treatment. (A.R.S. § 13-901.01, subd. (B).) Likewise, a person is not eligible if he or she has been convicted three times "of personal possession of a controlled substance or drug paraphernalia," refused drug treatment as a term of probation, or rejected probation. (A.R.S. § 13-901.01, subd. (H).)

An Arizona appellate court has held that a defendant's conviction for driving under the influence of a controlled substance renders him ineligible for probation and treatment under Proposition 200 because the offense does not involve personal possession or use within the meaning of A.R.S. section 13-901.01. In *Wozniak v. Galati* (Ariz.App. Div. 1 2001) 30 P.3d 131, defendant was stopped by a police officer for driving a vehicle with expired registration tags. Defendant showed signs of intoxication and failed field sobriety tests, and admitted he had smoked marijuana. He was arrested and found in possession of a small amount of marijuana. His urine sample tested positive for the presence of cannabinoids. Defendant was convicted of driving while he had a drug or its metabolite in his body (A.R.S. § 28-1381(A)(3)) and sentenced to jail. (*Wozniak v. Galati, supra*, at pp. 132-134.)

In *Wozniak*, defendant argued he should have received probation and treatment under A.R.S. section 13-901.01 because his offense merely involved the personal use of illicit drugs and essentially amounted to a conviction for "personal drug use" within the meaning of Proposition 200. (*Wozniak v. Galati, supra*, 30 P.3d at pp. 135-136.) *Wozniak* rejected this argument and held section 13-901.01 did not extend that far.

> "The plain language of A.R.S. § 13-901.01(A) applies to 'any person who is convicted of the personal possession or use' of drugs. But [defendant] was convicted of violating section 28-1381(A)(3), which, along with other statutes, regulates the privilege of driving on Arizona's public roads. *The legislature apparently concluded that the public has a strong interest in deterring those who use banned substances from driving motor vehicles*. *See State v. Hammonds*, 192 Ariz. 528, 531, 968 P.2d 601, 604 (App. 1998) (noting that 'there is a rational basis for believing that the presence of an

> illicit drug's metabolite establishes the possibility of the presence of the active, impairing component of the drug. This possibility in turn justifies the legislature banning entirely the right to drive when the metabolite is present.'). Thus, [defendant's] contention that section 28-1381(A)(3) is a personal drug-use statute subject to probation under A.R.S. § 13-901.01 is incorrect.
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> "We are not unmindful of our decision in *State v. Pereyra*, 199 Ariz. 352, 18 P.3d 146 (App. 2001). In *Pereyra*, we held that a person convicted of personal drug possession within a school zone was entitled to probation, despite Arizona's drug-free school zone statute, A.R.S. § 13-3411 (2001), which seemed to require incarceration. *Pereyra*, 199 Ariz. at 355, ¶ 12, 18 P.3d at 149. The drug-free school zone statute renders persons convicted of possessing or using drugs within school zones ineligible for probation and subject to increased penalties. *Id.* at 354, ¶ 4, 18 P.3d at 148. We applied A.R.S. § 13-901.01 to possession within a drug-free school zone because of 13-901.01's comprehensiveness in treating personal possession, because of its explicit language superseding laws that deny probation for personal possession, and because it does not specifically list among its exceptions possession or use in a drug-free school zone. *Id*. at ¶ 7. But the reasons we applied section 13-901.01 to personal possession in a drug-free school zone do not exist here. *Section 28-1381(A)(3) does not proscribe personal possession or use; it proscribes driving under certain conditions*. The drug-free school zone statute proscribed personal possession, the underlying offense intended to be covered by section 13-901.01, adding only the additional element of location. *See id.* at 355, ¶ 9, 18 P.3d at 149. *Section 28-1381(A)(3), however, prohibits driving under circumstances that might pose a danger to others who drive on Arizona's roads*. We conclude that A.R.S. § 13-901.01 does not mandate probation for violations of A.R.S. § 28-1381(A)(3)." (*Wozniak v. Galati, supra*, 30 P.3d at p. 136, italics added.)

Wozniak thus concluded the public safety aspect of defendant's offense rendered him ineligible for treatment under Proposition 200.

While decisions of the courts of other states are not binding, such rulings may be regarded as persuasive when addressing a statutory provision similar to a California enactment. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 269; *Myers v. Carter* (1960) 178 Cal.App.2d 622, 625; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §940, pp. 980-981.) Given the similarities between the statutes, we find the reasoning in

Wozniak persuasive and consistent with our interpretation of Proposition 36, particularly as it relates to the public safety aspect of driving under the influence.

In summary, appellant's felony conviction for possession of methamphetamine qualified him for consideration under section 1210.1, subdivision (a), but his conviction in the same criminal proceeding for driving under the influence of methamphetamine constitutes a misdemeanor offense not related to drugs and renders him ineligible for probation and treatment under Proposition 36. The offense of driving under the influence of drugs is "not related" to drug use within the meaning of section 1210.1, subdivision (b)(2), and does not "involve" the simple use or possession of drugs or similar activity within the meaning of section 1210, subdivision (d). The offense implicates the public safety and the very real threat of injury to others.

We thus conclude the trial court properly denied appellant's request for probation and treatment under Penal Code section 1210.1.

DISPOSITION

The judgment is affirmed.

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HARRIS, J.

WE CONCUR:

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ARDAIZ, P. J.

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WISEMAN, J.