Shasta County District Attorney

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THE PROSECUTOR'S PERSPECTIVE

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EXPERTISE REQUIRED!

By Deputy District Attorney, Tim Weerts

With the passage of Prop 47, sales cases are more important than ever. The difference between a possession charge and a sales case is now the difference between a misdemeanor and a felony, and it often comes down to the officer's expert opinion. Expert opinions are powerful pieces of evidence; testifying as an expert allows the witness to tell the jury exactly what the evidence shows, and stops just short of telling them how to vote. Normally, such strong words are reserved for the attorneys in closing, but having a sworn witness lay out the facts of the case and draw the appropriate conclusions is much more persuasive.

In order to offer an expert opinion in court, you first have to qualify as an expert. Qualifying as an expert depends on your background – this includes training and the experience that you have in connection to the specific controlled substance you are set to testify about. It is not based on the particular case in which you are testifying; this means even in a case where there is a confession to sales, you will not be permitted to give the opinion that drugs were possessed for sales if you do not separately qualify as an expert. Although this statement may be a factor in the basis for you opinion, it will not by itself qualify you make an expert opinion.

Evidence Code § 720 defines an expert witness as someone who has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." For drug sales, an expert would be expected to be familiar with the appearance and, where applicable, odor, of controlled substances, the method of ingestion for the drug including a range of dosage, the going price for the drug, how drugs are packaged and separated for sales, and be familiar with the effects of those drugs on users. Knowledge of these factors can come from formal training or field experience. In order to convince the judge that you should be allowed to testify as an expert, it is important to know your CV (legal term for training and experience) well. Before you testify, be sure you can recite your relevant training, and which agency or person provided that training and jurors and judges need to hear about all training – all the way back to the academy.

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Expertise Required...

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As to field experience, conversations with users and dealers are invaluable to showing that you are familiar with the trends and prices in our area. I am also sure most of you have spoken, and if you haven't it would be a good idea to, with veteran officers and drug task force agents about common characteristics. Prescription drugs and marijuana present an additional challenge, as an expert will be required to distinguish drugs possessed legally versus those possessed for sale. The absence of a prescription or recommendation on hand, running a CURES report, pay owes, and texts related to sales are all examples of evidence that tends to show that the drugs are not possessed in a legal manner, but again, you must be able to explain why, in your training and experience, these factors are associated with illegal sales.

Unfortunately there have been a few cases lately where an officer forms an opinion in their report but when it comes down to having the training and experience to back up that opinion in court, they did not. If an officer does not have the training and experience to testify in court regarding an expert opinion, chances are there is another officer on the scene that can help out with the investigation of the suspected drug sales case. This officer could then come into court and testify, if necessary, regarding their opinion. Another benefit of having a more experienced officer look over the evidence, it will be part of the building of your training and experience in forming an expert opinion in the future.

All in all, you all deal with controlled substances on a daily basis at work but the Court needs to hear, and you need to be able to articulate, about the specifics about your background that will allow to testify as an expert. If you don't have that expertise, there are plenty of other officers that do and I am sure are willing to lend a hand with your case, they just need to be asked

DRUG HOUSES AND THE FACTS NEEDED TO CONVICT

By Deputy District Attorney, Laura Smith

In the wake of AB 109 (Realignment) and the passage of Proposition 47, one of the few drug-related charges that remains prison eligible is a violation of Health and Safety Code section 11366 - Maintaining a Place for Use or Sales of a Controlled Substance. Often, when officers arrest individuals who are chronic problems for the community, a HS 11366 charge is submitted; however, these charges can be difficult to prove at jury trial. And, now especially in light of the shift in sentencing laws, defense lawyers are becoming more skilled at defending these charges.

What constitutes a violation of Health and Safety Code section 11366? The jury instruction provided in trials, CALCRIM 2440, reads as follows:

> **To prove that the defendant is guilty of this crime, the People must prove that:**
> **The defendant (opened/ [or] maintained) a place;**
> **AND**
> **The defendant (opened/ [or] maintained) the place with the intent to (sell[,]/ [or] give away[,]/ [or] allow others to use) a (controlled substance / [or] narcotic drug), specifically _____<insert name of drug>, on a continuous or repeated basis at that place.**

So at trial, we must prove each of those elements beyond a reasonable doubt in order to secure a conviction.

In order to prove this charge, we need to prove that the defendant opened or maintained the location in question. Cases have defined the terms "opening" and "maintaining." To "open" means to make available for entry or to make accessible for a particular purpose. To "maintain," means to continue or persevere in opening a place. Therefore, we need some evidence that the defendant had some control over the location. This evidence could be gathered by indicia of ownership or control or admissions of the defendant, among other evidence.

Next, we need to prove that the defendant opened or maintained the location with the intent to sell, give away, or allow others to use a controlled substance. Evidence of personal drug use or personal drug possession is not sufficient. (See *People v. Franco* (2009) 180 Cal.App. 4th 713, 718-719.)

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Drug Houses...

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This can be established in a number of ways, such as evidence of drug use paraphernalia in the location searched that appear to belong to more than one person, locating numerous people in a home that appear to be under the influence, buy-walk operations, the presence of drugs packaged for sales and evidence that the sales were occurring from the home in the form of text messages, or admission of defendants or statements of witnesses, among other evidence.

Finally, we must prove that the purpose must be continuous or repetitive use of the place for illegal activity of selling, giving away, or allowing others to use a controlled substance. (See *People v. Horn* (1960) 187 Cal.App.2d 68, 72; *People v. Holland* (1958) 158 Cal.App.2d 583, 588-589.) This can be established by law enforcement's observations of foot traffic at the residence, speaking to neighbors, statements of people who use at that location, or admissions of the defendant, among other evidence. If investigating such a case, it may help to pull log reports from the location to determine if prior arrests for controlled substance-related violations have repeatedly occurred at the location. Unfortunately, personal use (by the defendant or roommates) of drugs at a location on a repeated basis, or the use or sale of the substance at that location on a single occasion are not sufficient.

Lately, we have had several cases proceed to trial, which included an HS 11366 charge. In People v. Tommy Sparhawk, we were unsuccessful at securing a conviction on that charge, despite the defendant being arrested in his home with large amounts of drugs on two occasions, and being arrested in his home with small quantities of methamphetamine on three other occasions. This case lacked the observations of other people using or buying drugs at his residence on a repeated basis. In fact, we had video evidence of him selling drugs in the Win River Casino parking lot, rather than his home. After trial, jurors stated that they would have been more convinced if officers would have evaluated the people at his residence during the repeated arrests to determine whether they were under the influence, if the people had admitted to buying drugs from the defendant or using at his house on more than one occasion, or testimony from law enforcement or neighbors about foot traffic at the residence.

Conversely, in People v. George Veronikis, we were successful at convicting the defendant of a violation of HS 11366. In that case, the defendant's cell phone was seized, which when downloaded, showed that sales were occurring at the home. Officers also did follow-up and contacted neighbors who talked about the constant foot traffic in and out of the home with short visits, observations consistent with hand-to-hand transactions, and testimony at trial that it was like "living next to a McDonald's drive-thru." Also, during one arrest, there were people in the garage with paraphernalia for multiple people's drug use located. In addition to adding to the strength of the evidence, the statement of upset neighbors also adds an element of juror sympathy to the case.

We look forward to successfully prosecuting these violations, but need the help of law enforcement to gather sufficient evidence to cover each element at trial.

REPORT WRITING REFRESHER: *Tightening Up Details to Eliminate Ambiguity*

By Deputy District Attorney, Tom Toller

As the filing deputy, I've read a lot of incident reports. Most are well-written and clearly establish the nature of the crimes committed and the role of the various suspects, victims, witnesses and law enforcement officers. And I recognize that paperwork often comes at the end of a long shift; so that speed and accuracy are the goal. But a little time spent on tightening up the details can transform a great report into a truly excellent one. Below are some suggestions drawn from recent reports that will help eliminate ambiguity and provide greater information to the deputy district attorneys who review your reports.

By now, the reality that possession of methamphetamine or heroin for personal use is a misdemeanor thanks to Prop. 47 has sunk in. Officers frequently find a handgun when they search the car looking for dope. Maybe the defendant is not a prohibited felon. If, however, that firearm is loaded and within close proximity to the 0.3 g bindle in his pocket, e.g. in his backpack or under the car seat, the defendant can be charged with a violation of HS 11370.1 (a), which is a prison-eligible felony. The report that provides detailed facts about the location of a gun relative to any controlled substance, and whether it is loaded or not; lets the prosecutor know that he or she is no longer dealing with just a misdemeanor case.

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RESTITUTION

By Crime Victims Assistance Center, Advocate, Candice Biddle

Under the Victims' Bill of Rights Act in the California Constitution, "All persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffered." California State law also requires judges to order offenders to pay restitution in every case in which a crime victim suffers an economic loss as a direct result of the crime committed, regardless of the sentence or disposition imposed.

In order for a criminal court judge to determine the amount of restitution owed to a victim, the victim must submit copies of receipts, estimates, insurance documents and/or a written statement to verify the dollar amount they are requesting. This information is most often submitted to the Shasta County Crime Victims Assistance Center, attached to a Restitution Request Form, which is mailed to the victim when a criminal case has been filed by the District Attorney's Office.

Examples of Losses Covered by a Restitution Order

Property Loss – stolen or damaged property	**Wage & Income Loss**
Medical & Dental Expenses	**Mental Health Counseling**
Funeral & Burial Expenses	**Home or Vehicle Modifications**
Relocation Expenses	**Security System Expenses**
Attorney Fees	**Possible Future Losses**

The primary objectives for enforcing criminal restitution orders are to provide compensation to the victims, and to hold the offenders accountable for their actions; specifically criminal actions that cause financial harm. Therefore, it is an essential component of the District Attorney's Office to ensure restitution orders are imposed in all cases where the victim has incurred a loss as a result of the crime.

How Law Enforcement Can Assist

Make sure the cover page of your report includes the victim's name, phone number and mailing address.

Take photographs of the damaged property as evidence.

Provide your observation of the visible damage said to be caused by the offender.

Question the victim as to how much they believe the property is valued at, based upon what they paid for the item and/or based upon any other knowledge of its value.

When the above information is included in the police report, it proves to be useful when the case goes before the court and the defendant disputes the amount of damage caused. The above information also assists prosecution at a restitution hearing should the defendant dispute the amount of damage and/or the amount being requested by the victim. Additionally, officers can avoid receiving a "Further Investigation Request" at a later date by providing the information in the initial report or through a supplemental report.

As a reminder, the Shasta County Crime Victims Assistance Center itself does not have the financial capability to assist victims with property crime related expenses such as impound fees or property repair/replacement costs. However, depending on the circumstances surrounding the criminal activity, the victim may qualify for financial assistance through the California Victim Compensation Program (CalVCP) for pecuniary losses that cannot be reimbursed by any other source. Advocates are available to speak with victims to help determine if a CalVCP application is applicable; if not, the advocates can assist the victim in completing the proper Restitution Request Form to ensure the victim's loss is addressed through a criminal court restitution order.

To obtain additional information on the services your local Crime Victims Assistance Center provides, please visit *http://www.co.shasta.ca.us/index/da_index/vwp_index.aspx* or simply call us at 225-5220. Law enforcement is often the first agency to provide information to a victim about the Crime Victims Assistance Center; therefore, law enforcement is an integral part of the restitution process, as well as an irreplaceable resource to victims and to the Crime Victims Assistance Center.

TO CITE OR NOT TO CITE, THAT IS THE QUESTION….
THE CHALLENGE OF H+S CODE 11364 AND HYPODERMIC NEEDLES

By Deputy District Attorney, Margarita Velikanov

A man is walking down the street. He is disheveled, twitching, and has obvious needle marks in his arm – some of which are oozing in blood. An officer approaches him and asks if he can search him. The man allows him to do so. The officer discovers a number of needles, typically used for injecting controlled substances. Should the officer cite him for Health and Safety Code Section 11364 – Possession of Drug Paraphernalia – or should he thank the man and bid him farewell?

Health and Safety Code Section 11364, previously known as Health and Safety Code Section 11364.1, carves an exception for hypodermic needles. Specifically, the legislature wanted to make sure that individuals were able to attain clean needles, so as to prevent the spread of HIV and other diseases transmitted through needles. In doing so, the legislature re-sculptured the classification of hypodermic needles as drug paraphernalia. Specifically, Health and Safety Code Section 11364 states the following:

> *(a) It is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking (1) a controlled substance specified in subdivision (b), (c), or (e) or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (2) of subdivision (d) of Section 11055, or (2) a controlled substance that is a narcotic drug classified in Schedule III, IV, or V.*
>
> *(b) This section shall not apply to hypodermic needles or syringes that have been containerized for safe disposal in a container that meets state and federal standards for disposal of sharps waste.*
>
> *(c) Until January 1, 2021, as a public health measure intended to prevent the transmission of HIV, viral hepatitis, and other bloodborne diseases among persons who use syringes and hypodermic needles, and to prevent subsequent infection of sexual partners, newborn children, or other persons, this section shall not apply to the possession solely for personal use of hypodermic needles or syringes if acquired from a physician, pharmacist, hypodermic needle and syringe exchange program, or any other source that is authorized by law to provide sterile syringes or hypodermic needles without a prescription.*

Previously, Health and Safety Code Section 11364.1 limited the amount of needles a person may possess for personal use. However, with the "sunset" of 11364.1 (meaning that the provision came to an end as established through its creation), the new 11364 provision allows for an authorized pharmacist or physician to provide an *unlimited* number of hypodermic needles and syringes to any person 18 years or older, solely for his or her personal use. This means that the new bill, which similarly "sunsets" on January 1, 2021, will exempt the possession of *ANY* amount of hypodermic needles and syringes that are acquired from an authorized source. As such, as long as the needles are not loaded with any type of controlled substance, they may not be taken, booked into evidence, or relied upon in issuing a citation, as long as the individual states that the needle is for their personal use.

So as to go back to the original example – if the man stated that his needles were for personal use and did not contain any drug residue, the officer would have no basis to issue a citation. Because of that, it becomes imperative for the officer to take the time to inspect the needle, ask the appropriate questions, and write down all of the answers. Without doing so, a DA's office would be unable to prosecute any suspected 11364 crimes dealing with hypodermic needles. The more information provided, the easier it becomes in determining whether an individual qualifies for the personal use exception. Because of that, it is imperative that officers inspect, listen, and document.

REPORT WRITING REFRESHER…

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Practically every day, officers are conducting probation searches in motel rooms or houses and finding a small amount of dope but large amounts of paraphernalia of use throughout the residence. You've seen the bits of foil with burn marks in the bedroom, the used needles in the living room, and the scraper baggies in the kitchen. Typically, several people are present, some of whom may live there and others just "visiting." This situation frequently leads to requests for a charge of HS 11366, perhaps because it is one of the few remaining prison-eligible narcotics felonies. To establish a violation of HS 11366, the prosecutor has to prove repeated use as a place for ingesting narcotics by people who do not reside at the location. If a report provides detailed statements from neighbors, or law enforcement observations, showing frequent traffic coming and going and prior narcotics contacts at the location; the HS 11366 can be considered. Without that information, the charge cannot be sustained.

In a recent report, an officer observed a bicyclist who looked out of place in the neighborhood. It was daylight, so no stop for biking without a light. But the officer provided a lot of detail, based on the bicyclist's appearance and the officer's prior knowledge of the neighborhood, to support his hunch that the bicyclist was suspected of criminal activity and why he detained him. That hunch proved correct. A search yielded a stolen handgun in the bicyclist's backpack. But the case was initially declined because the prosecutor did not think there was reasonable suspicion for the initial detention. After a conversation with the officer, a supplemental report was submitted, detailing the bicyclist's riding pattern and articulating that the he was stopped for a violation of VC 21202. These details provided the objectively reasonable basis for the detention; so the case was filed. Cases like these usually result in a defense suppression motion. Putting the details surrounding the detention in your report at the outset will help you articulate reasonable suspicion should you find yourself testifying later.

Finally, just a little suggestion about using names versus pronouns in detailing the statement of one witness about the words or actions of another involved party. It can be confusing to the reader of a report to see something like W/Jones said that S/Smith was acting physically threatening. He (Smith or Jones?) said that he (Smith or Jones?) walked quickly from the doorway to the street. Smith said he (Smith or Jones?) was talking loudly and aggressively. To clarify, consider using the party names throughout and avoiding the pronouns altogether. So, "W/Smith said that S/Jones walked from the doorway to the street. W/Smith said S/Jones was talking loudly and aggressively." It might write cumbersome, but it reads clearly and unambiguously.

Keep writing excellent reports!

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A Note From the Editor

After reading this edition of the Prosecutor's Perspective, you can see we spent a lot of time discussing jury instructions and how they come into play during the prosecution of a case. The reason we wanted to focus on these instructions are that in certain situations they differ from what is written in the Penal Code or Health and Safety Code. I assume that it would be frustrating to an officer, who after reading a specific code section and knowing in their mind that all the elements of the crime are clearly present, is sent a Further Investigation request (from some know it all prosecutor!) asking to clarify a certain point or articulate a specific fact in order to file the case. So that is why we wanted to highlight some of the many hurdles that we must jump through in court and must also be passed down to you who are working hard on the street. We are all in this fight together and the hope is to continue this battle united.

Remember we would love to hear any feedback/questions on any of our articles and any suggestions that you may have for future editions.

Thank you, keep up the great work and be safe!!

Curtis Woods
Senior Deputy District Attorney
Shasta County