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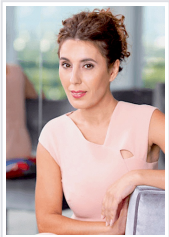


Criminal,  
California Courts Of Appeal  
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# Judicial diversion should be an option for DUI offenders

**Whether through legislative action or court decision, the outcome of a recent appellate decision must be reversed. There is no rational basis for denying misdemeanor DUI offenders an opportunity to earn dismissal of the cases against them.**



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In a precedent-setting ruling, a panel of judges for the 4th District Court of Appeal ruled that DUIs do not qualify for judicial diversion under a law that allows judges to grant diversion to misdemeanor defendants.

In rendering its decision in *Grassi v. Superior Court of Orange County* (<https://www.dailyjournal.com/dar/278624-grassi-v-superior-court-people>), 2021 DJDAR 13225 (Dec. 28, 2021), the appellate court effectively closed the door to diversion for first-time DUI offenders, the very individuals who would most benefit from such a program. Its holding was in direct opposition to the legislative history of the diversion law, and it should be overturned by the state Supreme Court.

In contrast to defendants who have committed far more serious crimes, such as assault and weapons violations -- for whom judges have discretion to assign diversion -- this class of offenders was relegated by the appeals court to sentencing and a criminal record, even if no one was seriously hurt by their actions. This was not what lawmakers intended when they vested judges with the power to divert.

The appeal was brought in 2019 by a woman charged with a misdemeanor for driving under the influence of drugs. Attorneys for Nancy *Grassi* argued that she was eligible for diversion pursuant to Penal Code Section 1001.95, which became effective January 1, 2021, and authorizes trial judges to offer a misdemeanor defendant diversion, unless expressly excluded. Defense counsel noted that the law specifies just four exceptions to judicial diversion, none of which involve DUI:

- (1) Any offense for which a person, if convicted, would be required to register pursuant to Section 290.
- (2) A violation of Section 273.5.
- (3) A violation of subdivision (e) of Section 243.
- (4) A violation of Section 646.9.

Nevertheless, the appellate court ruled that diversion was not on the table for *Grassi* because the Legislature did not expressly include it in the bill. According to the court's reasoning, this omission was purposeful. Lawmakers, the court said, clearly intended to defer to Vehicle Code Section 23640, which deals with DUIs. Prior to passage of Assembly Bill 3234, which created the diversion provision, at least one court had ruled that this Vehicle Code section barred diversion for DUIs. *People v. Weatherill*, 215 Cal. App. 3d 1569, 1572 (1989).

Vehicle Code Section 23640(a) reads as follows: "In any case in which a person is charged with a violation of [Vehicle Code] [S]ection 23152 [DUI] or [Vehicle Code Section] 23153 [DUI causing injury], prior to acquittal or conviction, the court shall neither suspend nor stay the proceedings for the purpose of allowing the accused person to attend or participate, nor shall the court consider dismissal of or entertain a motion to dismiss the proceedings because the accused person attends or participates during that suspension, in any one or more education, training, or treatment programs, including, but not limited to, a driver improvement program, a treatment program for persons who are habitual users of alcohol or other alcoholism program, a program designed to offer alcohol services to problem drinkers, an alcohol or drug education program, or a treatment program for persons who are habitual users of drugs or other drug-related program."

The *Grassi* panel reasoned that the "Legislature in enacting section 1001.95 gave no indication it intended to repeal section 23640" and that it would have been "redundant to expressly exclude misdemeanor DUIs in section 1001.95 in light of section 23640." They effectively rendered AB 3234 toothless for a huge swath of defendants, but their decision was absolutely predictable. By failing directly to address the DUI issue, legislators left it to the courts to make the decision.

This would make sense if there were no legislative history supporting the opposite conclusion. When legislators voted to grant judges broad discretion to override prosecutors and offer diversion to misdemeanor offenders, they purposely left DUIs in the mix. During floor debate, they referenced no other code sections that would exclude diversion, in contrast to previous laws that explicitly excluded defendants charged with misdemeanor DUI from diversion programs.

In fact, just a few months earlier, a lower court reviewing the case of Sebastian Andres Diaz-Armstrong used the AB 3234 legislative history to support a finding that misdemeanor DUIs were intended to be eligible for diversion. In *People v. Superior Court of Riverside County* (<https://casetext.com/case/people-v-superior-court-of-riverside-cnty-45>), 67 Cal. App. 5th Supp. 10 (2021), the court examined different iterations of the bill considered by the Legislature, including an original version that had no exclusions. Following a request from the California District Attorneys Association that a list of exclusions be added to the bill, including one for DUIs, the court noted that the next version had such a list but that DUIs were conspicuously absent. "The omission of misdemeanor DUIs in the final list of exclusions and corresponding analysis is telling evidence of the Legislature's intent to include them as eligible," the court concluded.

The *Diaz-Armstrong* court looked at *Hopkins v. Superior Court* (<https://www.dailyjournal.com/dar/268735-hopkins-v-superior-court-people>), 2 Cal. App. 5th 1275 (2016), in which military diversion for DUIs under Penal Code Section 1001.80 was at issue. The *Hopkins* court held that "failure to expressly exempt DUI cases in [Penal Code] section 1001.80 stands in stark contrast to prior actions by the Legislature with respect to other diversion programs." In a statement that foreshadows the current debate, the *Hopkins* court wrote, "That the Legislature did not do so here supports our conclusion that it did not intend that Vehicle Code section 23640 would bar pretrial diversion under section 1001.80 in DUI cases."

The *Diaz-Armstrong* court reviewed the legislative debates surrounding Section 1001.95 and pointed out that "no member ever contradicted the assertions of Assemblymember Cooper and Senator Melendez that misdemeanor DUIs were included" in the judicial diversion bill. It went on to say, "Though the indicators found in the legislative history are perhaps sporadic, they are not ambiguous as they all point in the same direction: that the Legislature did not intend to exclude misdemeanor DUIs from section 1001.95 diversion." The court concluded: "If such was not the Legislature's intent they could and should have clearly said otherwise."

Diversion is exactly the right approach for many first-time DUI offenders. A college student going out with friends after exams, or a new father celebrating the birth of a child, should not automatically be labeled criminals and consigned to lifelong record. They should be eligible for the same ameliorative benefits of intervention afforded other misdemeanor offenders, including those guilty of much more serious offenses. Misdemeanor DUI offenders should have exactly the same right to a court determination of eligibility for diversion.

The *Grassi* court acknowledged that its decision could have gone either way, and it directly asked the Legislature to resolve the matter. "We invite, indeed we implore, the Legislature to resolve yet another entirely avoidable diversion conundrum," the justices wrote. Defense attorneys, concerned about the lack of clarity regarding DUI diversion, have taken a different approach. In June of last year, Riverside County defense attorney Lara Gressley asked the state Supreme Court to hear the matter, but the court declined. In the aftermath of *Grassi*, Orange County Public Defender Martin Schwartz has now suggested taking it back to the state's highest court for reconsideration.

Whether through legislative action or court decision, the *Grassi* outcome must be reversed. There is no rational basis for denying misdemeanor DUI offenders an opportunity to earn dismissal of the cases against them.

In fact, when diversion is available to DUI offenders, they are likely to go above and beyond the basic requirements of their programs. I have personally seen DUI defendants sign up for more counseling and attend more AA meetings than required, because they have a compelling incentive: to have a clean record. Judicial diversion should be available to misdemeanor DUI offenders whom judges believe will benefit from them.

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