

San Diego District Attorney

D.A. LIAISON LEGAL UPDATE

(COPY -- DISTRIBUTE -- POST)

Vol. 11

April 26, 2006

No. 5

Subscribers: 2,078

www.sdsheriff.net/legalupdates/

Remember 9/11/01; Support our Troops

Robert C. Phillips
Deputy District Attorney
Law Enforcement Liaison Deputy

(W) (858) 974-2421
(C) (858) 395-0302
(E) Robert.Phillips@SDSheriff.org
(E) RCPhill808@AOL.com

THIS EDITION'S WORDS OF WISDOM:

"I think that's how Chicago got started. Bunch of people in New York said; 'Gee, I'm enjoying the crime and poverty, but it just isn't cold enough. Let's go west.'"
(Richard Jeni)

IN THIS ISSUE:

Page:

Case Law:

| | |
|--|---|
| Prostitution; Words Alone as "An Act in Furtherance Thereof" | 1 |
| Kidnapping; Defense of Consent | 2 |
| Violating the Implied Consent Law in a DUI Arrest | 5 |
| Miranda; Questioning an In-Custody Witness | 6 |
| Miranda; Voluntariness After Waiver | 7 |
| Urinating in Public as a Public Nuisance | 9 |

CASE LAW:

Prostitution; Words Alone as "An Act in Furtherance Thereof:"

Kim v. Superior Court [People] (Feb. 14, 2006) 136 Cal.App.4th 937

Rule: For purposes of a charging an agreement to engage in prostitution, per P.C. § 647(b), the necessary element of "an act done in furtherance of the act of prostitution" may be satisfied by defendant's unambiguous and unequivocal words.

Facts: On May 27, 2005, undercover Los Angeles police officers arrested defendant Jeongrye Kim for agreeing to engage in an act of prostitution, per P.C. § 647(b). After defendant demurred to the complaint (challenging its legal sufficiency), arguing that it, as written, failed to allege a criminal act, the L.A. City Attorney filed an amended complaint alleging that the agreement was evidenced by the following acts in furtherance of the commission of an act of prostitution: (1) Placing her (defendant's) right index finger on her mouth and telling the undercover officer to be quiet when he asked her if he could have sex with her for a little more money; (2) raising her index finger and saying "one" after the officer asked if he could have sex for \$60; (3) stating "yes" after the officer pointed to her groin area and asked if she was clean "down there;" (4) responding "yes" when the officer asked whether she had a condom; and (5) instructing the officer to take off his clothes. The trial court denied defendant's demurrer. Defendant filed a pretrial writ challenging this ruling.

Held: The Second District Court of Appeal (Div. 7) affirmed. Pursuant to Penal Code § 647(b), a person is guilty of "agree(ing) to engage in . . . (an) act of prostitution" only if it can be proved that the defendant committed some act, in addition to the agreement, in furtherance of the commission of the act of prostitution. The issue here was whether words (or "utterances") alone are legally sufficient to satisfy this element of an act done in furtherance of the act of prostitution. In denying defendant's demurrer, the trial court ruled that it was. The Appellate Court agreed. In reaching this conclusion, the Court looked to the legislative history of the section and noted that the Legislature, while not specifying whether a "verbal act" was sufficient, referenced the concepts of criminal attempts and conspiracies in its reasoning. The purpose of including some act in furtherance of the intended target offense is to prevent premature arrests before the defendant's intent to participate in an act of prostitution is clear. In reviewing the applicable case law, the Court here determined that so long as a defendant's verbal acts unambiguously and unequivocally convey that the agreed act of prostitution will occur and moves the parties toward the completion of that act, verbal acts are sufficient to satisfy this element. In this case, the complaint alleged that defendant instructed the undercover officer to undress; "a clear and unequivocal statement directed at completing the agreed-to act of prostitution." The complaint as written, therefore, is legally sufficient to charge the crime of agreeing to commit an act of prostitution.

Note: The other statements attributed to the defendant as alleged in the complaint (and as listed as numbers 1 through 4, above) were found to be too ambiguous to constitute an act in furtherance of the act of prostitution. (See fn. 3 of the decision) So the case pretty clearly sets out what you need to do to arrest for, charge in court, and/or convict a defendant of agreeing to commit an act of prostitution.

Kidnapping; Defense of Consent:

People v. Platz (Feb. 15, 2006) 136 Cal.App.4th 1091

Rule: Taking a minor child in violation of a court order despite the willingness of the victim, is a kidnapping. A kidnapping is an offense which continues so long as the

kidnappers are fugitives, still in possession of the victim, with law enforcement continuing to look for them.

Facts: Rebecca was born in 1992, in a union between defendant and Jose Aramburo. Jose was a recovering alcoholic and part-time petty criminal. Jose's infrequent contacts with defendant and Rebecca lasted only until defendant left the state in 1994, taking Rebecca and moving to Alaska. Defendant married Robert Platz in Alaska, who then attempted to adopt Rebecca. Jose, however, resisted this effort, initiating court proceedings to regain his visitation rights with Rebecca. In the mean time, defendant left Robert and took Rebecca to Ohio with her new boyfriend, James Csucsai. Some five years later, Jose tracked them down in Ohio and served defendant with court documents seeking custody of Rebecca in a case filed in Alaska. When defendant failed to formally respond to Jose's petition, the Alaska court awarded Jose visitation rights by default. Defendant, however, refused to comply with this order, prompting the Alaska court to give Jose full custody. Jose and his new wife flew from their home in Washington state to Ohio and took Rebecca home with them. A year later, the Alaska Supreme Court reversed the lower court and a custody investigation was ordered. Despite evidence that defendant was capable of providing Rebecca with a stable home life, and that the then 8-year old Rebecca preferred to live with her mother, the Alaska court recommended that Jose retain primary custody. Then, in 2001, defendant failed to return 9-year old Rebecca to Jose after a spring break visit. Meanwhile, James (defendant's significant other), who had a history of being bipolar and delusional, was having a custody battle of his own with his ex-wife. He started making threats to kill himself. These disruptions provided a Washington family court with sufficient cause to finally award Jose full custody, ordering defendant to have no further contact with Rebecca. Shortly thereafter, defendant and James, both wielding firearms, showed up at Rebecca's daycare center in Washington and ordered her to get into their car, taking her from Jose's wife. Rebecca, happy to see her mother, went with them willingly. James told Jose's wife that if they followed them, he would shoot Jose. For other a month, defendant and James, still holding Rebecca, were fugitives as James sent periodic e-mails to his family describing his desperation and hinting at suicide. Eventually, information led authorities to a campground near South Lake Tahoe, California, where they surrounded their tent. After a nine-hour standoff, which included some unsuccessful negotiations with an emotional James and defendant, SWAT officers stormed the tent. Rebecca was found dead with a slashed throat. Defendant's wrists were slashed. James (who later committed suicide in his cell) was arrested along with defendant. Defendant was eventually convicted in a California Court (El Dorado County) of kidnapping and first degree murder with a true finding as to an alleged special circumstance that the murder occurred during the commission of a kidnapping. Sentenced to prison for life without parole, she appealed.

Held: The Third District Court of Appeal affirmed in a decision heavily laced with disgust for the Alaska court's handling of the child custody issues; "set(ting) in motion a mother's unraveling." But those issues aside, the prosecutor had argued that defendant was at least a principal in her daughter's intentional murder. Holding that the jury did not buy that argument, the Court found that defendant's conviction for first degree murder could more easily be justified under a "felony murder" theory; i.e., a murder committed

during the commission of a kidnapping. (P.C. § 189) Also, the “life-without-parole” sentence was based upon the theory that Rebecca’s murder was committed during the commission of a kidnapping. (P.C. § 190.2(a)(17)(B)) The kidnapping being central to both issues, the Court concentrated on defendant’s argument that a kidnapping never occurred, and that even if it did, the kidnapping was over by the time Rebecca was killed; over a month after the she was originally taken from Jose’s wife. In addition to murder, defendant was charged with kidnapping under subdivision (d) of P.C. § 207: “Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, . . . that person within the limits of this state, . . . is guilty of kidnapping.” Under this section, “the law of the place where the (forcible taking was) committed” must be considered. Defendant noted in her appeal that the evidence showed that Rebecca was willing to go with defendant and James when confronted at her Washington daycare center. However, under Washington law, a person under the age of 16, by statute, cannot consent or acquiesce to a taking. And even if California law were to be used on this issue, the Court determined that with an existing court order depriving defendant of the right to take Rebecca, she could not legally consent to her own taking. The California Supreme Court has devised a special rule dictating that the force element of a kidnapping is satisfied whenever a child cannot legally consent, “so long as the perpetrator takes the child for an illegal purpose or with an illegal intent.” Therefore, defendant “could not avoid a kidnapping conviction even if Rebecca acquiesced in the taking because Lisa’s unlawful intent sufficed as a matter of law.” The Court also rejected defendant’s argument that the kidnapping was completed at some time before Rebecca’s murder. A kidnapping is in progress after the original abduction so long as the perpetrator is fleeing in an attempt to escape, and is still in progress for as long as pursuers are attempting to capture the perpetrator and/or obtain the release of the person abducted. Defendant and James were fugitives, fleeing from the law for the entire time between when Rebecca was originally taken until they were captured at the campground, never having reached anything that could be described as a “place of safety.” “There are simply no facts to suggest a material change in circumstances from the time of (Rebecca’s) forcible taking that would give rise to a consent defense up until the moment the child was killed in the tent.”

Note: This is a valuable case, particularly in its discussion concerning the original taking of a minor child during a custody dispute, when the child is not objecting to being taken, as well as the implications of it being a continuing offense. California law has long since included as a kidnapping any circumstance where the victim was an infant, or otherwise too young (or, perhaps, too old) to give consent: “(T)he amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.” (*In re Michele D.* (2002) 29 Cal.4th 600.) Based upon this case, a nine-year-old would come within this rule, at least when she is taken in violation of a court order. Also note how this kidnapping was held to be “continuing” over the time span of a month or more because the kidnappers were still fleeing from the law with the victim and had not yet reached the so-called “place of temporary safety.” There is no requirement that the pursuing police officers be right on the heels of the kidnappers (i.e., “hot pursuit”) to constitute a “continuing offense.”

Violating the Implied Consent Law in a DUI Arrest:

Ritschel v. City of Fountain Valley (Feb. 27, 2005) 137 Cal.App.4th 107

Rule: Violating California’s “implied consent law” by making a DUI suspect submit to a blood test does *not* give rise to any state or federal civil liability. Use of reasonable force in extracting blood, when done in a medically approved manner, is lawful.

Facts: Plaintiff Ritschel in this civil suit was stopped by Officer Robert Gallagher of the Fountain Valley Police Department after he observed Ritschel violate several traffic laws. Ritschel displayed symptoms of intoxication and admitted to drinking “two beers” and consuming some pain medication. Poor performance on the lateral gaze nystagmus test, a poor perception of time, and an aborted field sobriety test (Ritschel complaining of pain and starting to shake) led to the administration of a PAS (Preliminary Alcohol Screening) test. Repeated attempts to perform a PAS test (Ritschel blocking the device with his tongue as he pretended to blow) finally resulted in two usable readings; .092 and .095 percent blood/alcohol. Ritschel was arrested for driving while under the influence. A suspended Nevada driver’s license was found in his wallet. Although a breath machine was available, it was decided that Ritschel would be given a blood test due to his “breathing problems.” Ritschel decided to become totally uncooperative, requiring four officers to handcuff him and hold him down on a chair as a blood test was administered. Ritschel eventually pled guilty to a plea bargained reckless driving charge. He then sued in state court pursuant to 42 U.S.C. § 1983 and California Civil Code § 52.1, alleging a violation of his federal and state civil rights, assault, and battery. The trial court judge eventually dismissed the lawsuit mid-trial, ruling that plaintiff’s suit was without any legal basis, based upon the evidence. Ritschel appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. Ritschel argued that the police violated both his right to be free from unreasonable searches, under the Fourth Amendment, and his Fourteenth Amendment due process rights, when they denied him the choice of taking a breath test as provided for by California’s “implied consent” law. He also objected the use of force when they made him submit to a blood test. Under California’s implied consent law, a person arrested for driving while under the influence of alcohol is to be advised, and has the choice, of either a breath or blood test. (V.C. § 23612(a)) But even assuming that Officer Gallagher violated this section, it is a rule of law that violation of a state statute alone does not constitute a violation one’s federal constitutional rights as well. Federal civil liability, pursuant to Title 42 U.S.C. § 1983, arises only when a person’s U.S. constitutional rights, or a federal statute, are violated. V.C. § 23612 is not based upon either the U.S. Constitution nor any federal statute. Therefore, there is no civil liability under this theory. Similarly, taking a blood sample from a DUI suspect, even though in violation of the state’s implied consent law, is not grounds for a civil suit under California’s Civil Code § 52.1. Lastly, the California Supreme Court has already held that when necessary, and so long as using appropriate medical procedures, officers may use reasonable force to extract blood from a person where there is probable cause to believe he or she was driving while under the influence. Plaintiff’s lawsuit, therefore, was properly dismissed by the trial court.

Note: This, of course, doesn't mean that you don't have to comply with V.C. § 23612(a)(2)(A) & (B), where it says to give the guy a choice. In this case, the plaintiff was already being uncooperative, plus there was cause to believe he had more than just alcohol in his system (in which case he should have been offered a blood or urine test; see V.C. § 23612(a)(2)(C)). So there was a reason to insist on a blood test. But absent some excuse as was present here, the Legislature has dictated that you should give the guy a choice. Even though there may not be any civil liability (or suppression remedy) attached to ignoring a procedural statute does not mean you have that option.

Miranda; Questioning an In-Custody Witness:

United States v Chen (9th Cir. Mar. 2, 2006) 439 F.3rd 1037

Rule: Interviewing an in-custody witness under circumstances where the questions are likely to elicit a response incriminating the witness *may* require a *Miranda* admonishment.

Facts: Defendant was arrested during the execution of a search warrant by federal INS agents at an apartment in Guam believed to be housing a number of illegal aliens smuggled in from China. The search warrant was part of a larger criminal investigation of a suspected big-time smuggler; Ho Chun Li. Fourteen illegal aliens, including defendant, were found in the apartment and taken into custody. Even though defendant was potentially liable under 8 U.S.C. § 1325, a misdemeanor, for having entered the country illegally, the INS agents were more interested in building a case on Ho Chun Li, using the captured aliens as witnesses. Therefore, because he was interviewed primarily as a witness, defendant was not advised of his *Miranda* rights before questioning. When questioned, however, defendant claimed to have come onto the island by way of a Taiwanese fishing boat, in effect absolving Li of any criminal wrongdoing. Hoping to put the squeeze on defendant (and several other aliens arrested with him) to cooperate, the U.S. Attorney filed criminal charges on him alleging perjury (18 U.S.C. § 1621) and making false statements to the INS (18 U.S.C. § 1001), for having lied on an asylum application and for lying to the INS agent when interviewed after his arrest, respectively. Defendant brought a motion to suppress his statements. The trial court granted defendant's motion and the Government appealed.

Held: The Ninth Circuit Court of Appeal affirmed the trial court's suppression of defendant's statements, finding that under the circumstances, defendant should have been advised of his *Miranda* rights before questioning. Defendant was in custody when questioned by the INS, having been arrested for being in the country illegally. The question here is whether, under these circumstances, he was subjected to an "interrogation," as that term is defined for purposes of *Miranda*. An "interrogation" occurs whenever, under the circumstances, "the questions are reasonably likely to elicit an incriminating response from the suspect." While the investigating officer's subjective intent is relevant to this inquiry, it is not determinative. The focus of the inquiry must be on the defendant. The trial court received evidence on the likelihood that defendant

would ever be prosecuted for entering the country illegally, and found that such prosecutions do in fact occur. So, even though the INS interrogator's primary purpose was to collect evidence against Ho Chun Li, the questions asked of defendant were likely to result in defendant incriminating himself for an offense that could potentially be prosecuted. With this in mind, the Court established the following rule: "(B)ecause the government's interest in (defendant's) testimony and the U.S. Attorney's practice of pursuing § 1325 (misdemeanor illegal entry) prosecutions, combined to create a *heightened threat* that the defendant might actually face a § 1325 prosecution," his questioning constituted an interrogation. As such, he should have been Mirandized before questioning. Because he was not, his responses were properly suppressed.

Note: I had difficulty following the Court's reasoning in this case, in that they use some standards that only the Ninth Circuit seems to use. Typically, the test for determining whether an in-custody suspect was "*interrogated*" is whether the officer should have realized that his questions were reasonably likely to elicit an incriminating response. But then the Court goes into an involved discussion on whether the U.S. Attorney in Guam ever even prosecutes misdemeanor illegal entry cases, finding that a "*heightened threat*" of such a prosecution triggers the *Miranda* requirements. But whether or not this is a correct statement of the law, I briefed it anyway to point out the potential *Miranda* issue that rears its ugly head any time you decide to interview a crook you hope to use as a witness only. While another defendant has no standing to challenge a potential *Miranda* violation perpetrated on your "witness," should your witness say something that we later try to use against him (the witness), it will be an issue, as it was in this case, whether your interview involved questioning that you should have expected would elicit an incriminating response. A court's decision on this issue could go either way, depending upon the circumstances. Moral to this story: *When in doubt, Mirandize.*

Miranda; Voluntariness After Waiver:

People v. Guerra (Mar. 2, 2006) 37 Cal.4th 1067

Rule: Constitutional voluntariness of a suspect's statements is not affected by a threat to arrest the suspect and other interrogation tactics under circumstances where the suspect continually expresses a desire to talk.

Facts: Defendant was working on a construction project at a private residence. Kathleen Powell lived next door. Powell often provided sandwiches and beverages to the workers. On several occasions Powell, expressed concern to others, including the other workers, about defendant who would come over to her house and walk in uninvited. Defendant normally would be drunk when he would do this. He was told several times by Powell and the other workers not to go into Powell's house. Defendant, however, would respond by simultaneously gyrating the lower portion of his body and thrusting his hips forward, saying in broken English: "Kathy for me; me for Kathy." Powell was advised by the other workers to lock her doors. On the evening of October 25, 1990, Powell was found by her boyfriend dead on her kitchen floor with multiple stab wounds and a kitchen knife on her chest. Physical evidence found at the scene (e.g., a bloody palm print and

fingerprints) connected defendant with the murder. The day after Powell's murder, defendant was contacted at his work by homicide detectives and asked to accompany them to the police station. Defendant agreed to go with them after being told that he was not under arrest. He was transported without handcuffs and taken to an interrogation room. Through the use of a translator, defendant was again told that he was not in custody or under arrest, and that he was there voluntarily. However, he was read his *Miranda* rights. In response, defendant indicated that he didn't need an attorney and wanted to talk to the investigators, and that he couldn't afford an attorney anyway. When it was reiterated that the attorney would be provided for free, defendant said that in that case, he wanted an attorney. The investigator responded with: "Okay, understand this, if he (speaking through the translator) wants the attorney and doesn't wish to speak to us, then from the information that we have, he's going to be arrested for murder and we'll book him into jail right now." When told this, defendant changed his mind and said that he'd "rather speak with them." Questioning, led to defendant's denials that he'd ever even been in the victim's house, ever approached her, or even spoke to her. After consenting to going to his house with the investigators to retrieve the clothing he had worn the day of the murder, defendant was finally arrested and booked. Four days later, but still before arraignment, defendant was interviewed again. This time defendant waived his *Miranda* rights again and eventually made some damaging admissions. He was tried for murder with the special circumstance that he killed Powell during the commission of an attempted rape. The trial court denied defendant's motion to suppress the statements he made at his first interview. As to the second interview, the trial court suppressed the statements on the ground that they were obtained during a delay in his arraignment (P.C. § 825), but allowed the statements to be used for impeachment purposes. He was convicted of first degree murder with the special circumstance and sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court, in a split 4-to-3 decision, affirmed. On appeal, defendant challenged the trial court's rulings on the admissibility of his statements from his first interview, and the use of his statements from his second interview for purposes of impeachment. Conceding that he had been properly advised of his *Miranda* rights (thus waiving any *Miranda* issues), defendant argued that his statements from the first interviews were not "*voluntarily*" obtained, a Fourteenth Amendment, "*due process*" violation, and therefore should not have been admissible against him. To support this argument, defendant raised three issues: (1) The detective failed to cease the questioning when defendant invoked his right to an attorney in the first interview; (2) the detective threatened to arrest him and put him in jail if he did not speak with the investigators causing him to agree to continue talking; and (3) defendant's experiences in his native Guatemala affected his understanding of the interrogation process. Defendant further argued that his admissions made during his second interview were the product of this due process violation, and therefore should not have been admissible for any purpose; impeachment or otherwise. As to the first issue, the Court noted that defendant had indicated both before and after his purported request for an attorney that he wanted to talk with the detectives and that he did not need the assistance of an attorney. His desire to cooperate with the detectives remained unchanged. Therefore, continuing the questioning did not "*overbear (defendant's) will.*" As such, his resulting statements were not

involuntary. Similarly, the detective's threat to arrest him had no effect on defendant's obvious desire to talk with the investigators and therefore did not cause an involuntary statement. "The sole cause appearing in the record for defendant's cooperation during the interview was his desire to exculpate himself." Absent a "causal link" between the detective's threat and defendant's stated desire to talk with the detectives, there is no constitutional coerciveness. Lastly, whatever effect defendant's experiences in Guatemala might have had on his beliefs are irrelevant to the issue of voluntariness. For a statement to be found involuntary, coercion must be shown to have occurred at the hands of the law enforcement officers involved. "Due Process . . . is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion." Because nothing was done in defendant's first interview that would have made his statements involuntary, the Court further concluded that his admissions made at his second interview could not have been the product of any improper prior interrogation, and were therefore also admissible, at least for purposes of impeachment.

Note: While I like the result, I sometimes have difficulty following the Supreme Court's reasoning. This case is an example of that. Defendant was held to have waived any argument to the effect that questioning should have automatically ceased when he asked for an attorney during the first interview, so this possible *Miranda* violation was not even discussed. The whole discussion was therefore centered *not* on a possible violation of *Miranda*, but rather whether his "due process" rights were violated. Even so, defendant's request for an attorney could have been more easily excused by simply noting that he really didn't want an attorney's assistance, as is evident when you consider all the surrounding circumstances. He had already declined the assistance of an attorney. But then, when told he could have one for free (in response to his comment that he couldn't afford one), that made him think; "Well, great. If I get one for free, bring him in." But he never really intended to invoke. As soon as he was told that if he really wanted an attorney the interview would be over, he immediately responded that this was *not* what he wanted. As noted by the Court, he seriously wanted to get his denials on the record and had no wish to postpone his right to say what he wanted to say. As to the interrogation tactics used, despite the Supreme Court's finding that it was a non-issue, I really *don't* recommend that you follow up a suspect's request for an attorney with a threat to turn a non-custodial situation into an arrest. Any subsequent waiver under these circumstances is immediately going to be suspect, as it was in this case. We really dodged a bullet on this issue when the defense chose to waive the *Miranda* issues. Also note that the three dissenting judges did not disagree with the Court's majority ruling on these issues. The dissenters were concerned with the lack of any evidence to support the jury's true finding on the attempted rape special circumstance.

Urinating in Public as a Public Nuisance:

***People v. McDonald* (Mar. 8, 2006) 137 Cal.App.4th 521**

Rule: Urinating in public is a public nuisance, per P.C. §§ 370/372, and may be charged as a criminal offense.

Facts: Oakland Police Officer Francisco Rojas observed defendant urinating in the parking lot of a closed restaurant in Berkeley, at 11:23 a.m. on a Sunday morning. Intending to cite defendant for littering, per P.C. § 374.4(b), the officer stopped and detained defendant. When defendant was unable to produce any identification the officer physically arrested him. A search of his person incident to arrest resulted in the recovery of six off-white rocks which were found to contain cocaine base. Charged in state court with possession of cocaine base, defendant filed a motion to suppress this evidence at his preliminary examination, arguing that his initial detention was illegal in that there is no statutory offense of urinating in public. The prosecutor argued that although the officer used the wrong subdivision, there was probable cause to arrest defendant for littering pursuant to P.C. § 374.4, subdivisions (a) and (c). It was also suggested that defendant's offense might be better described as a public nuisance, pursuant to P.C. §§ 370 and 372, or maybe the release of injurious or nauseous substances in a place of public assembly, as described in P.C. § 375(a). Finding that urine was included within the legal description of "waste matter," per P.C. § 374(b), the magistrate held that littering waste matter, per P.C. § 374.4, applied. Defendant was bound over for trial. He then raised the issue again before the trial court in a motion to dismiss, per P.C. § 995. After considering all the above options, the trial court agreed that P.C. § 374.4 applied, and denied the motion. Defendant appealed from his subsequent conviction for this offense.

Held: The Fifth District Court of Appeal (Div. 2) affirmed. However, the Court agreed with defendant's argument that section 374.4 did not apply to urinating. This is because 374.4 contains its own definitions of "litter" and "waste matter," as described in 374.4, subdivision (c). Subdivision (c) is limited, by its terms, to items "carried on or about the person." Urine is not something that is "carried on or about the person." It is carried "within the person." Therefore, using the definition of "waste matter" as contained in P.C. § 374(b) to find a violation of the littering provisions of P.C. § 374.4 was error. The Court also rejected the People's argument that P.C. § 375, dealing with the release of injurious or nauseous substances, applied. This section is interpreted to be limited to artificially created substances through some process of fabrication. Urine, of course, is a natural byproduct of the human body, and not artificially created. However, the Court found that P.C. §370, making it a misdemeanor (per P.C. § 372) to commit a "*public nuisance*," does apply. Section 370 defines, in pertinent part, a public nuisance to include; "Anything which is injurious to health, or is indecent, or offensive to the senses, . . . so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, . . ." Urinating in public is in fact injurious to health, indecent, *and* offensive to the senses. It interferes with the comfortable enjoyment of life or property by a considerable number of people, at least when done in a populated area near a busy street. As such, P.C. §§ 370/372 applies.

Note: Whether or not urinating or defecating in public is a criminal offense has been an issue for some time. Your jurisdiction may have a city or county ordinance covering these acts, which you may also use. If not, P.C. § 370 (a misdemeanor per § 372) may now be charged. Now I have to go wash my hands.