

GHB Laws-Possession, Possession for Sale and DUI of GHB

GHB is a narcotic or controlled substance and is regulated under the federal Controlled Substances Act; accordingly, its sale, possession for sale or driving a motor vehicle while under its influence is unlawful under Health and Safety Codes 11350 and 11377, as well as CVC 23152(a).

GHB is the initials for Gamma Hydroxybutyric Acid but it has various street names such as “liquid E,” “liquid X,” “G,” and is known as the classic “date rape” drug. It has the unusual distinction of being classified as a controlled substance under both Schedule I and Schedule III of the Controlled Substances Act.

Schedule I drugs are those with no medically accepted value or use and have a high potential for abuse and dependence. These include such well-known hard-core drugs as heroin, cocaine, LSD and PCP.

Schedule III drugs do have currently accepted medical uses with a low to moderate potential for abuse leading to physical dependence but a high psychological dependence if abused. Abused refers to being used extensively. GHB has dual classifications since the FDA approved Xyrem, a drug with GHB as its main component, to be used for certain medical conditions.

What Effect does GHB Produce?

GHB is a popular drug among club patrons and is often referred to as a “club drug” along with other narcotics like Ecstasy or “X” or “Molly” and Ketamine or “Special K.” It produces a euphoric effect but also dizziness and nausea and has the potential of causing muscle spasms and loss of consciousness.

The drug comes in powder, liquid or tablet form and is quickly dissolved. Consequently, it is used by individuals who may slip the substance into an unsuspecting date’s drink, rendering him or her incapacitated or unable to defend against sexual assault.

Medical Uses of GHB

GHB has been used to treat clinical depression, anxiety and sleeplessness. It has been used a growth hormone as well in bodybuilders.

As noted above, it can be legally prescribed as Xyrem. In this form, it is used to treat narcolepsy, cataplexy and has been prescribed to individuals suffering from extreme daytime fatigue or sleepiness.

Health and Safety Code 11377 and 11350

Under 11377 HS, you are prohibited from possessing a controlled substance without a valid prescription, or if you possess more of the drug than was legally prescribed. It is also unlawful to use the drug in a manner other than how it has been prescribed.

You can also be charged with violation of 11350 HS for possession of a controlled substance. This is a more serious charge since the drugs in this section are considered Schedule I and II drugs. These include heroin, cocaine and hydrocodone.

CVC Section 23152(a)-DUID

Like all states, California prohibits driving a motor vehicle while under the influence of alcohol (DUI) or drugs (DUID). It is irrelevant if the drug used was legally prescribed so long as it affected your ability to operate a motor vehicle to an appreciable degree.

The effects of driving under the influence of a drug differs from that of alcohol. A patrol officer who stopped your vehicle, usually for a traffic violation or erratic driving behavior, can detect or suspect alcohol use by slurred speech, the odor of alcohol, bloodshot and watery eyes and even an admission of "having had one or two." Different drugs produce different effects and symptoms but if you are suspected of being unable to understand or respond inappropriately to questions, seem confused, dazed, incoherent or erratic, then drug use may be suspected.

If you appear impaired, the officer can request that you perform certain coordination tests or field sobriety tests (FST). FST tests are used in any situation where an officer believes a driver is under the influence of alcohol or drugs. In some cases where alcohol or a drug is suspected to be the cause of the driver's impairment, the officer may ask that you submit to a test called horizontal gaze nystagmus. This involves asking the suspect to look to the side while the officer looks for indications of lateral or horizontal jerking movements in the eye. The basis of the test is that certain drugs that depress the nervous system, such as GHB, hinder the brain's ability to control eye muscles. The validity of this test is often challenged at trial if the DA uses it to justify probable cause to arrest the defendant or as evidence of being under the influence of a drug.

A breath test can detect and measure your blood alcohol concentration level (BAC) but you need a blood or urine test to detect the presence of a drug, which is objective evidence that the drug is at least in your system. However, there is no legal limit regarding the amount of a drug in your system that would be a violation of any law, unlike alcohol where you are driving unlawfully if your BAC is 0.08% or more.

As a motorist, you are required under California's implied consent law to submit to chemical testing so long as the arresting officer has probable cause to believe you are under the influence. If you refuse chemical testing, you risk losing your driver's license for a year, or even longer if you have prior DUI or DUID convictions within the past 10 years. Your refusal can be used against you at trial as evidence of your impairment and by the court to enhance your sentence if convicted.

A first time DUID conviction results in the same sentence as a first DUI. You could spend a weekend in jail, do community service, lose your driving privileges for 9 months, participate in a drug education or counseling program and pay a fine up to \$1000. Subsequent violations result in mandatory minimum sentences, a longer suspension of your driver's license and other consequences.

Sentencing for Possession and Intent to Sell GHB

11377 HS and 11350 HS are wobbler offenses, meaning that the DA can elect to charge you with either a misdemeanor or felony. This largely depends on your criminal history and other circumstances of your case.

If a misdemeanor under either code section, you face up to one year in county jail. If convicted under 11377 HS, your fine can be up to \$10,000 while under 11350, it is a maximum of \$20,000.

If charged as a felony under either statute, you face 16 months, 2 or 3 years in state prison.

Possession of GHB with Intent to Sell

It is unlawful to possess a controlled substance with the intent to sell under Health and Safety Code 11351. Possession with intent to sell GHB also comes under Health and Safety Code 11378. These code sections also prohibit purchasing a controlled substance including GHB with the intent to resell it.

Your intent to resell may be based on the quantity you purchased or other circumstances in your case. For instance, if you are arrested while in possession of GHB and a valid search reveals that you have scales, baggies or a list of customers, or police observe numerous people entering and exiting your house at all hours, then you will likely be charged under either of these statutes for intent to sell.

A violation of either statute is a felony. If convicted under 11351 HS, you face:

- probation with up to a year in county jail, or
- 2, 3 or 4 years in state prison
- and a fine up to \$20,000

If convicted under 11378 HS, you face:

- 16 months, 2 or 3 years in state prison, and
- A fine up to \$10,000

Transporting or Selling GHB

If you do sell GHB or are charged with transporting it, giving it away or administering it, you may be charged under Health and Safety Code 11352. Administering the drug means directly giving it to someone who then ingests or inhales it, such as at a club. 11379 HS prohibits the actual sale of GHB and not merely intent.

A conviction under 11352 HS carries 3, 4 or 5 years in state prison and a fine up to \$20,000.

If convicted under 11379, sales or transportation of GHB, you face 2, 3 or 4 years in state prison and a maximum fine of \$10,000.

But if you transported GHB across more than two California counties, the law imposes a sentence of up to 9 years. You also face an enhanced sentence if you knowingly sold GHB or gave it to a person who fit one of these criteria:

- pregnant
- under treatment for a mental disorder, mental health illness or condition
- under treatment for a drug dependency problem
- had a previous violent felony conviction

Diversionsary Disposition

A violation of either 11350 or 11377 as a misdemeanor or felony, however, makes you eligible for diversion. Diversion is an alternative to jail or prison and can result in a dismissal of all charges if you complete all conditions imposed and successfully complete a drug counseling or therapy program.

Pleading to or being found guilty of possession of GHB makes you eligible for any of California's diversionary programs under Proposition 36 and Penal Code 1000, which provide for a deferred judgment or diversion. You may also qualify for participation in any of California's drug courts.

You are not eligible if you possessed GHB for sale or were selling under 11379.2 HS. Other criteria that you must meet include:

- no prior possession conviction with intent to sell
- no record of probation or parole violations
- no participation in a drug diversion program within 5 years of the current offense
- no prior felony convictions within 5 years of the current offense

Under PC 1000, you enter a plea of guilty but the judge defers further proceedings for up to 3 years. You must complete a court-approved drug treatment, not commit any further criminal offenses and pass all drug tests, which may be randomly scheduled. If you are successful, the court will dismiss the charges.

Proposition 36 is also a deferred judgment alternative available for those with violent or an otherwise serious felony conviction. You still, however, must not have committed any of the conditions outlined above.

Proposition 36 was designed for defendants with a drug possession charge but who committed a violent or serious felony. You still plead guilty to the underlying charge and the court will defer further proceedings except that you are under formal probation and any conditions imposed. Completion of your treatment program along with adherence to all conditions does not guarantee the court will dismiss the charges but it is unlikely you will spend any time in jail or prison.

Another program is participation a California drug court. You still must not have a record of past possession with intent to sell convictions, have no previous felony convictions in the past 5 years and no participation in a diversionary program within this time. Drug courts are more flexible in the conditions imposed on you, such as requiring drug counseling, seeking or maintaining employment and meeting regularly with your probation officer. If you complete all conditions to the satisfaction of the court, it will dismiss your charges.

Defenses to GHB Possession, Sale and DUID

Possession of a Valid Prescription for Xyrem

Having a valid prescription for Xyrem is a defense so long as it is in your name, you do not possess more than what was prescribed and it was used as prescribed.

Lack of Proof of Possession

There are situations where you were unaware of the presence of the drug in your jacket, purse or car because someone had used your car, jacket or purse. In other cases, more than one person may have had access to the area where the drug was found.

You must also be shown that you were aware that the drug was a controlled substance. Facts supporting that might be that you were given the substance in a club setting where its use was known or you have a prior conviction for drug possession. Otherwise, the DA might not be able to show that you knew the nature or the drug.

Lack of Intent to Sell

If you were not caught selling, giving away or transporting GHB, then the DA can attempt to convict you for intent to sell based on the quantity you possessed. But if no baggies, cash, scales or similar paraphernalia are found with you that are commonly associated with selling controlled substances, then you might convince a court or jury that you only possessed it for personal use.

If so, you may be eligible for a diversionary disposition or at less severe sentence and an opportunity to have it expunged.

Lack of Proof of Being under the Influence

To be convicted under CVC 23152(a) or DUID, your blood will have to be tested. The officer who requests that you be tested, however, must have probable cause to believe you are under the influence. This might include the officer's observation of your demeanor, such as confusion, incoherence, an inability to follow instructions, inappropriate responses to questions and poor performance on field sobriety tests.

Other indications are acting irrationally or experiencing hallucinations. Absent a drug test, however, symptoms that an officer might attribute to drug use are just as likely to be from fatigue, dehydration or some other illness or condition unrelated to any drug use.

Also, no one, unless you are under probation, are a commercial driver or under the age of 21, is required to perform any field sobriety test or answer any questions other than producing your license, registration and insurance card. You will have to submit to a blood test, however, in most instances or risk losing your license along with other consequences.

Tainted Blood or Urine Test

The person who takes a sample of your blood must be a trained technician. The sample must be preserved and properly labeled and the chain of custody followed. A defense attorney can also obtain documentation to determine if the equipment used was properly maintained and serviced. Any interruption in this process or breach of protocol or guidelines in taking the sample or in preserving it can render it inadmissible.

Illegal Search and Seizure

Law enforcement officers must respect your civil and constitutional rights before searching you or your home, car or place of business. It is not that unusual for an officer to violate the rights of criminal suspects by forcing them to submit to a search or by searching a person suspected of a crime without probable cause to do so. Planting of evidence does occur as well.

If you are stopped for a traffic violation, your car may not be searched unless the officer has probable cause to believe you are carrying controlled substances in your car other evidence of a crime, usually by it being in open view.

If you are validly arrested, you can be searched incident to your arrest but only of your person and the immediate area for weapons. Your car, home or business may not be searched without a search warrant, unless certain exigent circumstances exist, that is supported by an affidavit properly attested to by a peace officer who can point to certain articulable facts to demonstrate probable cause. Search warrants limit the extent, place, time and scope of the search. If officers are looking for a drugs, looking through your computer files or your financial documents in your home likely exceeds the scope.

Can Police Force You to Submit to Blood Testing?

In most cases, law enforcement officers cannot force you to submit to a blood test unless you are suspected of committing a felony and the police obtain a warrant. There are circumstances where a warrant is not required, or exigent circumstances, where there is no time to obtain one. The US Supreme Court in a 2013 decision, *Missouri v. Tyler McNeely*, offered little guidance other than to say that there may be circumstances where no warrant may be required but such situations should be subject to strict scrutiny by a court.

Your refusal can be used against you as evidence of your impairment and cause you to lose your driver's license if you driving a motor vehicle. You can be incarcerated for a refusal if you were under probation or parole.

Expungement of Your Conviction

You can seek post-conviction relief in most instances if you were convicted under Health and Safety Code 11377 and 11350 under Penal Code 1203.4. California law allows expungement of a conviction so long you did not serve time in state prison. You can also seek expungement of your DUID conviction.

An expungement is post-conviction relief from many of the obstacles convicted felons face after serving their time, if any. Its main benefit is that it prevents any member of the general public from seeing that you were convicted of a crime if anyone performs an online criminal background check.

An expungement is advantageous since your conviction will not appear on a public database. Employers and landlords routinely use online services that are linked to certain criminal databases to conduct criminal background checks when checking on your character or suitability.

Any expungement, however, does not abolish your conviction record. It remains accessible to public employers such as any government agency, police department or the military as well as to the court for sentence enhancement if you commit a subsequent felony offense.

An expungement does allow you to state under oath on any private employment application or rental application that you were never convicted of a crime. If your expungement was for a felony, you are disqualified for running for public office. You do have to disclose it an expungement well for any felony if you:

- Apply for a professional license
- Apply for public employment—court, law enforcement, military, state or federal agency
- Apply to a public school as a teacher or administrator

Reducing Your Felony to a Misdemeanor

State prison time disqualifies you from this type of relief so it is vital that your criminal defense attorney negotiate your charge to a misdemeanor before trial. But if you are convicted of a felony under either 11377 HS or 11350 HS, you may move the court to reduce it to a misdemeanor under PC 17(b) so long as you served no state prison time. Further, under Proposition 47, you can seek to have your felony conviction reduced to a misdemeanor and be resentenced for simple drug possession convictions.

Eligibility for Expungement

As indicated herein, if you were convicted under 11377 HS and your offense was not dismissed pursuant to a diversionary disposition, or you were convicted of a misdemeanor under Health and Safety Code 11350, then you qualify for an expungement of the conviction. You may petition the court so long as you satisfy these other conditions:

- completion of all conditions of your sentence and probation
- you have not committed a subsequent felony
- you have no criminal charges pending
- you committed no serious violation of your probation

If your conviction was for sale or intent to sell, and you served time in state prison, you are not eligible for an expungement of your conviction. You may be able to get a Certificate of Rehabilitation that can offer you some of the benefits of an expungement except that your criminal conviction is still on your public record.