Department of Legislative Services

Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 168 (Delegate Anderson, *et al.*)
Judiciary

Criminal Law - Controlled Dangerous Substances - Eligibility to Participate in Drug Treatment Program

This bill removes legal restrictions against participation in State-certified drug treatment for offenders who have received mandatory minimum sentences after conviction of specified drug crimes, including repeat offenses and drug distribution.

Fiscal Summary

State Effect: Potential minimal reduction in general fund expenditures in the Department of Public Safety and Correctional Services. If a court decides to commit an inmate for drug treatment, this bill may reduce, to the extent that there is treatment space available, the number of persons sentenced to mandatory minimum sentences for the covered drug offenses. However, because the number of such treatment referrals cannot be reliably predicted, any potential savings for the Division of Correction (DOC) from fewer drug conviction intakes cannot be reliably estimated. The Department of Health and Mental Hygiene can handle the bill's requirements within existing resources as the number of treatment slots annually available to the courts for such referrals are not affected.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: Under the Health-General Article, § 8-507, a court is authorized to refer an individual to substance abuse treatment as an alternative to incarceration. However,

courts have held that a subsequent offender under Maryland's drug statutes is ineligible to participate in drug treatment while serving a mandatory minimum sentence unless the statute under which the person was sentenced includes language indicating legislative intent to preserve eligibility for drug treatment. See *Collins v. State*, 89 Md.App. 273 (1991).

For the primary crimes covered under the bill involving controlled dangerous substances and paraphernalia, a person may not:

- manufacture, distribute, dispense, or possess with intent to distribute a controlled dangerous substance;
- manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a controlled dangerous substance with intent to use it to produce, sell, or dispense a controlled dangerous substance;
- create, distribute, or possess with intent to distribute a counterfeit substance;
- manufacture, distribute, or possess equipment designed to render a counterfeit substance;
- keep a common nuisance (any place resorted to for the purpose of illegally administering controlled dangerous substances or where such substances or controlled paraphernalia are illegally manufactured, distributed, dispensed, stored, or concealed); or
- pass, issue, make, or possess a false, counterfeit, or altered prescription for a controlled dangerous substance with intent to distribute the controlled dangerous substance.

A violator is guilty of a felony and subject to maximum penalties of imprisonment for five years and/or a fine of $15,000. A subsequent offender under these prohibitions must be sentenced to imprisonment for at least two years, which term is nonsuspendable and nonparolable.

When the controlled dangerous substance is a Schedule I or Schedule II narcotic drug, a convicted person is subject to maximum penalties of imprisonment for 20 years and/or a fine of $25,000. A repeat offender or conspirator, even if the prior conviction was under federal law or in another state, must receive a mandatory minimum sentence of 10 years and is subject to a maximum fine of $100,000. The mandatory minimum sentence is nonsuspendable and nonparolable.

A second-time offender or conspirator convicted again of those same primary crimes involving a Schedule I or Schedule II narcotic drug, if certain confinement and conviction prerequisites are met, is subject to a mandatory minimum nonsuspendable, nonparolable

sentence of 25 years and a maximum fine of $100,000. A convicted offender or a conspirator with three or more prior separate convictions for such offenses is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 40 years and a maximum fine of $100,000.

When the controlled dangerous substance is specified other hallucinogenic drugs – including PCP, LSD, and MDMA – a convicted person is subject to maximum penalties of imprisonment for 20 years and/or a fine of $20,000. A repeat offender or conspirator, even if the prior conviction was under federal law or in another state, must receive a mandatory minimum sentence of 10 years and is subject to a maximum fine of $100,000. The mandatory minimum sentence is nonsuspendable and nonparolable.

A second-time offender or conspirator convicted again of those same primary crimes involving the specified other drugs, if certain confinement and conviction prerequisites are met, is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 25 years and a maximum fine of $100,000. A convicted offender or a conspirator with three or more prior separate convictions for such offenses is subject to a mandatory minimum nonsuspendable, nonparolable sentence of 40 years and a maximum fine of $100,000.

State Fiscal Effect: According to the Maryland Commission on Criminal Sentencing Policy, the Maryland Sentencing Guidelines database shows a total of 34 convictions in fiscal 2007 and 23 convictions in fiscal 2008 for subsequent convictions under the drug crime penalty provisions affected under this bill. The number of these persons who might have been referred to treatment instead of incarceration under the bill cannot be reliably predicted, as an inmate must consent to treatment and petition a court for reconsideration of the sentence. A court then evaluates the inmate and determines whether or not the inmate would be a good candidate for treatment. Also, Maryland's courts may not make such referrals under § 8-507 of the Health-General Article unless there are definite open treatment slots with a provider contractor to which to make the referral.

To the extent that fewer individuals are incarcerated, general fund expenditures for DOC will decrease under this bill.

Persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at $2,600 per month. Excluding overhead, the average cost of housing a new DOC inmate (including variable medical care and variable operating costs) is $342 per month. Excluding all medical care, the average variable costs total $164 per month. Thus, assuming variable inmate costs which may include medical care, the cost of sending the convicted subsequent drug offender to a term of incarceration, with a mandatory

minimum sentence of 10 years, costs $41,040. Since mandatory minimum sentences may be up to 40 years long for covered drug offenses, variable costs increase accordingly.

Although such drug crime conviction referrals could be made to out-patient care, most are made to in-patient facilities. The average length of stay for an in-patient placement is 120 days at a cost of $135 per day, totaling $16,200 per treatment episode. These costs are borne by the Alcohol and Drug Abuse Administration under contracts let annually with various drug and alcohol treatment providers. A commitment must be for at least 72 hours but not longer than one year. A court may extend treatment in increments of six-month periods for good cause shown.

In fiscal 2008, there were 554 orders for such referrals from the courts statewide. Of that number 462 were actually placed with a treatment provider. This does not include all data on placements in Baltimore City. In any event, the number of annual referrals under § 8-507 of the Health-General Article are not expected to increase, and any potential reductions in inmate costs for DOC may or may not be realized. Accordingly, while this bill may make more convicted persons eligible for such referrals, the number of actual referrals made by a court in any given year is limited by available treatment slots. Although the § 8-507 referrals have a priority standing with providers, they are made to facilities operated by providers who also take other public and private referrals for the same treatment care.

Recent reports by the Department of Legislative Services have found that a lack of residential treatment alternatives, in particular, has limited the use of § 8-507 commitments. While the addition of slots in 2008 appears to have had an impact on wait times for certain types of court-ordered residential treatment, it remains unclear if the total number of available slots is adequate. The Judiciary continues to have concerns generally about how court-ordered treatment should be funded in the context of overall prevention and treatment funding.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene, Commission on Criminal Sentencing Policy, Department of Public Safety and Correctional Services, Department of Legislative Services

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Analysis by: Guy G. Cherry

Direct Inquiries to:
(410) 946-5510
(301) 970-5510