

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1445
Judiciary

(Delegate Shewell, *et al.*)

Vehicle Laws - Controlled Dangerous Substances - Per Se Driving Offenses

This bill establishes a *per se* offense for driving while impaired by a controlled dangerous substance. A person who drives or attempts to drive any vehicle with (1) *any* amount of a Schedule I controlled dangerous substance or its metabolites in the blood or (2) *any* amount of a Schedule II or III controlled dangerous substance or its metabolites that was not medically prescribed for the person, is guilty of driving while impaired by a controlled dangerous substance *per se*. A person may not commit this *per se* offense while transporting a minor. The established affirmative defense (that the Schedule II or III controlled dangerous substance was medically prescribed) for driving while impaired with a Schedule II or III controlled dangerous substance is limited by the bill's provisions. Existing penalties for driving or attempting to drive any vehicle while impaired by a controlled dangerous substance apply to the *per se* offense, including those for transporting a minor while so impaired.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues and expenditures to the extent that the bill's provisions lead to additional convictions. It is anticipated that the Motor Vehicle Administration (MVA), the Office of Public Defender (OPD), the Department of State Police (DSP), and the State's Attorneys can handle the bill's requirements with existing resources.

Local Effect: Potential minimal increase in expenditures to the extent that the bill's provisions lead to additional convictions.

Small Business Effect: None.

Analysis

Bill Summary: Establishing the specified affirmative defense does not preclude prosecution under other State laws. This affirmative defense is also limited in that it cannot be claimed unless the person was also unaware that ingestion of the Schedule II or III controlled dangerous substance would make the person incapable of safely driving a vehicle.

Current Law:

Controlled Dangerous Substances

A “controlled dangerous substance” is a drug or substance generally containing narcotics, opiates, hallucinogens, and other depressant or stimulant substances regarded as dangerous due to their potential for abuse and habit-forming due to their impacts on the human central nervous system. The Department of Health and Mental Hygiene is responsible for maintaining lists of controlled dangerous substances on designated Schedules I through V, depending on their potential for abuse and acceptance for medical use. State law specifies that a controlled dangerous substance is a drug or substance listed on Schedules I through V; an immediate precursor to a drug or substance that is designated as a principal compound; or an immediate chemical intermediary used to manufacture the drug or substance. Access to a controlled dangerous substance must be controlled to prevent or limit the manufacture of any drug or substance listed in Schedules I through V.

Federal policy dictates that a physician who prescribes Schedule I drugs to a patient may lose his or her federal license to prescribe drugs and be prosecuted. In Maryland, an authorized provider may conduct research in the State with a controlled dangerous substance listed in Schedule I if the authorized provider is registered under federal law to conduct research with a Schedule I substance and gives evidence of the registration to the Department of Health and Mental Hygiene.

No distinction is made in State law regarding the illegal possession of any controlled dangerous substance, regardless of which schedule it is on, with the exception of marijuana. A controlled dangerous substance does not include distilled spirits, wine, malt beverages, or tobacco.

Impaired Driving

A person is prohibited from driving or attempting to drive any vehicle while impaired by a controlled dangerous substance, if that person is not entitled to use the controlled dangerous substance under State law.

A first offense is punishable with a maximum fine of \$1,000 and/or imprisonment for one year. Maximum penalties for second and third offenses, that occur *more than* five years after a prior conviction, each increase by \$1,000 and an additional year of imprisonment with a maximum penalty of a fine of \$3,000 and/or imprisonment for three years.

A person who is convicted of driving or attempting to drive while impaired by a controlled dangerous substance *within* five years after a prior conviction for any included offenses is subject to a mandatory minimum penalty of imprisonment for at least five days. A person who is convicted a third or subsequent time *within* five years of this same offense is subject to a mandatory minimum penalty of imprisonment for at least 10 days. Imprisonment includes confinement in an inpatient rehabilitation or treatment center or home detention that includes electronic monitoring for the purpose of participation in a certified or court-approved drug treatment program. MVA is required to assess 12 points against the driver's license of anyone convicted of this offense. A driver who receives 12 points on the driver's license within two years is subject to license revocation. MVA is required to suspend for one year the license of anyone convicted of driving or attempting to drive while impaired by a controlled dangerous substance more than once within a five-year period.

A person convicted of driving or attempting to drive any vehicle while impaired by a controlled dangerous substance within five years of a prior conviction for any included offenses must be required by a court to undergo a comprehensive drug abuse assessment. If recommended at the conclusion of the assessment, the offender must participate in a drug program certified by the Department of Health and Mental Hygiene, certified by an adjacent State agency, or approved by the court. The penalties are mandatory and are not subject to suspension or probation.

Additionally, MVA may revoke the license of any person convicted of driving while impaired by a controlled dangerous substance or issue a restricted license prohibiting a licensee from driving with any drug or controlled dangerous substance content in the licensee's blood or with any other restriction that MVA determines necessary to ensure safe driving.

A person convicted of driving or attempting to drive while impaired by a controlled dangerous substance and transporting a minor is subject to a maximum fine of \$2,000 and/or two-years imprisonment for a first offense; \$3,000 and/or three-years imprisonment for a second offense; and \$4,000 and/or four-years imprisonment for a third or subsequent offense.

Background: The term "*per se*" means "by itself." For purposes of impaired driving offenses, it means that the State does not need to introduce subjective, observational, or behavioral evidence to establish the offense. Introduction of credible objective evidence

(for example, a test or tests of a specimen of blood) that establishes the presence of a specified amount of the prohibited substance is enough to establish that the offense occurred as a matter of law.

At a recent meeting of the United Nations Commission on Narcotic Drugs, the director of the U.S. Office of National Drug Control Policy warned that drugged driving is becoming a growing threat on U.S. roads while the number of those who drink alcohol and drive has declined. The director stated that, on any weekend evening, about one in six drivers on the road will be under the influence of an illicit, prescription, or pharmaceutical drug. The director stated that drugged driving is a significant problem and called for the commission to debate the topic officially at the next meeting scheduled for 2011.

According to the federal Controlled Substances Act classifying a drug as Schedule I or II requires that specific findings be made. **Exhibit 1** lists the findings that must be made for a drug to be classified as Schedule I or II.

Exhibit 1
Findings for Classification as a Schedule I or II Substance Under the
Federal Controlled Substances Act

Schedule I

- The substance has a high potential for abuse.
- The drug or other substance has no currently accepted medical use in treatment in the United States.
- There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Schedule II

- The substance has a high potential for abuse.
- The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
- Abuse of the drug or other substance may lead to severe psychological or physical dependence.

Source: Federal Controlled Substances Act

Controlled dangerous drugs and substances listed on Schedules III, IV, and V have a currently accepted medical use in treatment in the United States. Other attributes of Schedules III, IV and V are:

Schedule III

The drugs or substances have a lesser potential for abuse than the substances listed on Schedules I and II.

Abuse of the drugs or substances may lead to moderate or low physical dependence or high psychological dependence.

Schedule IV

The drugs or substances listed have a low potential for abuse relative to the drugs and substances in Schedule III.

Abuse of the drugs or substances may lead to limited physical dependence or psychological dependence relative to the drugs and substances listed in Schedule III.

Schedule V

The drugs or substances listed have a low potential for abuse relative to the drugs and substances in Schedule IV.

Abuse of the drugs or substances may lead to limited physical dependence or psychological dependence relative to the drugs and substances listed in Schedule IV.

The Department of State Police reports that, in 2009, 909 people were arrested for suspicion of driving while impaired by drugs, a combination of drugs and/or alcohol, or a controlled dangerous substance. According to the District Court, 1,575 citations were filed in fiscal 2009 for driving while impaired by a controlled dangerous substance. There were 88 guilty dispositions for this offense in the same period.

State Revenues: General fund revenues potentially increase minimally as a result of the bill's monetary penalty provisions if additional people are convicted and fined for this offense in the District Court.

State Expenditures: MVA advises that Transportation Trust Fund expenditures may minimally increase due to revisions of forms to add this impaired driving offense. However, Legislative Services advises that MVA can accomplish these revisions with existing resources.

OPD advises that general fund expenditures should increase by \$112,500 in fiscal 2011 and 150,000 annually thereafter for additional expert testimony that may be needed due to the bill. Legislative Services disagrees with this assessment. For the cases undertaken

by OPD under existing law, it is likely that the police would request a test or tests of blood to establish the presence of a controlled dangerous substance and OPD might need to hire expert witnesses to defend those cases. DSP has advised that the bill's provisions can be handled with existing resources. As a result, it does not appear that the police anticipate requesting a significant increase in the number of requested blood tests because of this bill. Although the number of additional cases due to the bill cannot be reliably predicted and it is possible that the bill might require some additional time for defense of these cases, the level of required resources is not likely to rise to the level of resources that are already in place to defend *per se* charges for those defendants charged with driving under the influence of alcohol. Legislative Services advises that OPD can handle the bill's changes with existing resources.

General fund expenditures increase minimally as a result of the bill's incarceration penalties due to more people being committed to Division of Corrections (DOC) facilities. The number of additional people convicted due to the bill's provisions is expected to be minimal.

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 \$2,750 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including variable medical care and variable operating costs) is \$409 per month. Excluding all medical care, the average variable costs total \$182 per month.

Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or DOC. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person has served 90 days. Currently, the State provides assistance to the counties for locally sentenced inmates and for inmates who are sentenced to and awaiting transfer to the State correctional system. A \$45 per diem grant is provided to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of DOC are confined in a local facility. The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in DOC facilities. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Local Expenditures: Expenditures increase minimally as a result of the bill's incarceration penalties. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. A \$45 per diem State grant is provided

to each county for each day between 12 and 18 months that a sentenced inmate is confined in a local detention center. Counties also receive an additional \$45 per day grant for inmates who have been sentenced to the custody of DOC but are confined in a local facility. Per diem operating costs of local detention facilities are expected to range from \$57 to \$157 per inmate in fiscal 2011.

Additional Information

Prior Introductions: None.

Cross File: SB 698 (Senator Haines) - Judicial Proceedings.

Information Source(s): Baltimore City; Caroline, Howard, Montgomery, and Prince George's counties; Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Department of State Police; Office of the Public Defender; State's Attorneys' Association; Maryland Department of Transportation; reuters.com; wikipedia.org; National Highway Transportation Safety Administration; Department of Legislative Services

Fiscal Note History: First Reader - March 16, 2010
mpc/ljm

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