

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 777
Judiciary

(Delegate B. Wilson, *et al.*)

Judicial Proceedings

Criminal Law - Smoking Marijuana in a Public Place - Prohibition

This bill repeals the civil offense for the use or possession of marijuana involving smoking marijuana in a public place and instead establishes a criminal offense for smoking marijuana (1) in a public place; (2) in or on a public conveyance; or (3) in any area otherwise accessible to the public, as specified in the bill. A violation is a misdemeanor subject to the existing maximum fine of \$500. The bill authorizes an individual to petition for expungement of a conviction for smoking or consuming marijuana in a public place. In addition, a conviction of the bill's proposed crime is a shieldable conviction.

Fiscal Summary

State Effect: General fund expenditures for the Judiciary increase minimally beginning in FY 2020 due to the bill's shielding and expungement provisions. General fund expenditures for the Department of Public Safety and Correctional Services (DPSCS) also increase minimally beginning in FY 2020 due to the bill's expungement provision. General fund revenues increase minimally beginning in FY 2020 due to shielding and expungement fees, which may partially offset expenditures. Enforcement can be handled with existing resources.

Local Effect: The bill is not expected to materially affect local government operations or finances.

Small Business Effect: None.

Analysis

Bill Summary: The bill does not apply to the use of a vaporizer by a qualifying patient in the State's medical cannabis program.

“Public place” and “public conveyance” have the same meanings as in Title 10 of the Criminal Law Article. A public place or public conveyance need not be devoted solely to public use for purposes of prosecution under the bill.

Additionally, under the bill, areas that are otherwise accessible to the public include (1) an indoor area open to the public; (2) an indoor place where meetings are open to the public; (3) a government-owned or operated means of mass transportation; or (4) an indoor place of employment.

Current Law: Under Title 10 of the Criminal Law Article, “public place” means a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment, or other lawful purpose. The definition includes restaurants, shops, and taverns; public buildings, parking lots, streets, and parks; common areas of multidwelling units; hotels and motels; amusement parks, theaters, swimming pools, and sports arenas; educational institutions; places of public worship; bus terminals and railway stations; and other grounds and structures that are part of a public place. “Public conveyance” means a conveyance to which the public or a portion of the public has access to and a right to use for transportation, and includes an airplane, vessel, bus, railway car, school vehicle, and subway car.

Marijuana Use and Possession: Controlled dangerous substances (CDS) are listed on one of five schedules (Schedules I through V) set forth in statute depending on their potential for abuse and acceptance for medical use.

No distinction is made in State law regarding the illegal possession of any CDS, regardless of which schedule it is on, with the exception of marijuana.

In general, a defendant in possession of marijuana is guilty of a misdemeanor and subject to imprisonment for up to one year and/or a fine of up to \$1,000. However, pursuant to Chapter 158 of 2014, possession of less than 10 grams of marijuana is a civil offense punishable by a fine of up to \$100 for a first offense and \$250 for a second offense. The maximum fine for a third or subsequent offense is \$500. If a person commits a third or subsequent violation, or is younger than age 21, the court must summon the person for trial upon issuance of a citation. Additionally, the court must order a person who (1) commits a third or subsequent violation or (2) is younger than age 21 and commits a violation to attend a drug education program approved by the Department of Health and Mental

Hygiene and refer the person to an assessment for a substance abuse disorder. After the assessment, the court must refer the person to substance abuse treatment, if necessary.

A citation for a violation for possession of less than 10 grams of marijuana, and the related public court record, are not subject to public inspection and may not be included on the public website maintained by the Maryland Judiciary. Existing criminal penalties continue to apply to the use or possession of 10 grams or more of marijuana. An affirmative defense is available to defendants for use or possession of marijuana due to a debilitating medical condition. Pursuant to Chapters 61 and 62 of 2013, as of June 1, 2013, an affirmative defense is available to defendants for the possession of marijuana if the defendant possessed marijuana because the defendant was a caregiver and the marijuana was intended for medical use by an individual with a debilitating medical condition. Additionally, pursuant to Chapter 351 of 2015, as of October 1, 2015, if a court finds that the defendant used or possessed marijuana because of medical necessity, the court must dismiss the charge.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. However, the law also established that the use or possession of marijuana involving smoking marijuana in a public place is a civil offense, punishable by a fine of up to \$500.

Expungement: Under the Criminal Procedure Article, a person who has been charged with the commission of a crime may file a petition for expungement listing the relevant facts of a police record, court record, or other record maintained by the State or a political subdivision of the State, under various circumstances listed in the statute. These grounds include acquittal, dismissal of charges, entry of probation before judgment, entry of *nolle prosequi*, stet of charge, and gubernatorial pardon. Individuals convicted of a crime that is no longer a crime or convicted or found not criminally responsible of specified public nuisance crimes are also eligible for expungement of the associated criminal records under certain circumstances. For these public nuisance crimes, an individual may file a petition for expungement no earlier than three years after a finding of not criminally responsible and no earlier than three years after a conviction (or satisfactory completion of the sentence, whichever is later).

If two or more charges, other than one for a minor traffic violation, arise from the same incident, transaction, or set of facts, they are considered to be a unit. If a person is not entitled to expungement of one charge or conviction in a unit, the person is not entitled to expungement of any other charge in the unit.

A person is not entitled to expungement if (1) the petition is based on the entry of probation before judgment, except a probation before judgment for a crime where the act on which the conviction is based is no longer a crime, and the person within three years of the entry

of the probation before judgment has been convicted of a crime other than a minor traffic violation or a crime where the act on which the conviction is based is no longer a crime or (2) the person is a defendant in a pending criminal proceeding.

Expungement of a court record means removal from public inspection:

- by obliteration;
- by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access; and
- if access to a court record or police record can be obtained only by reference to another such record, by the expungement of that record, or the part of it that provides access.

Shielding: Chapter 313 of 2015 authorizes the shielding of specified types of records under certain circumstances. “Shield” means to render a court record and police record relating to a conviction of a crime inaccessible by members of the public. “Shieldable conviction” means a conviction of 1 of a list of 12 specified crimes. A “unit” means two or more convictions that arise from the same incident, transaction, or set of facts.

Chapter 313 of 2015 authorizes a person to petition a court to shield the person’s court records and police records relating to one or more “shieldable convictions” of the person entered in the circuit court or the District Court in one county no earlier than three years after the person satisfies the sentence imposed for all convictions for which shielding is requested, including parole, probation, or mandatory supervision. This authorization does not apply to a conviction for a domestically related crime. If a person is not eligible for shielding of one conviction in a “unit,” the person is not eligible for shielding of any other conviction in the unit. A person may be granted only one shielding petition over the lifetime of the person, and a court may grant a shielding petition for good cause.

If the person is convicted of a new crime during the applicable time period, the original conviction or convictions are not eligible for shielding unless the new conviction becomes eligible for shielding. A person who is a defendant in a pending criminal proceeding is not eligible for shielding. A shielded conviction may not be considered a conviction for specified expungement provisions. Chapter 313 also contains provisions regarding victim notification, hearings on petitions, continued access to shielded information by specified individuals and entities, prohibited disclosures of shielded information, and prohibited inquiries into a person’s shielded information.

The Maryland Judiciary Case Search may not in any way refer to the existence of specific records shielded in accordance with the provisions of Chapter 313.

Background: According to the National Conference of State Legislatures, 20 states and the District of Columbia have decriminalized small amounts of marijuana. Additionally, in 2014, voters in Alaska, the District of Columbia, and Oregon joined Colorado and Washington by legalizing limited amounts of marijuana for adult recreational use. Alaska's Measure 2 authorizes the legalization, taxation, and regulation of marijuana for individuals age 21 years or older. Oregon's Measure 91 allows for the possession, licensing, taxation, and regulation of marijuana by adults, while maintaining medical marijuana laws. Voters in the District of Columbia approved Initiative 71 to make it lawful for individuals 21 years of age or older to possess marijuana, but congressional proposals to limit or repeal the initiative are under consideration.

Federal Law: Although possession of marijuana remains illegal at the federal level, the U.S. Department of Justice (DOJ) announced in August 2013 that it would focus on eight enforcement priorities when enforcing marijuana provisions of the Controlled Dangerous Substances Act. The guidelines also state that, although the department expects states with legalization laws to establish strict regulatory schemes that protect these eight federal interests, the department is deferring its right to challenge their legalization laws. Further, in 2014 and 2015, the U.S. Congress passed federal spending measures that contained provisions to effectively terminate federal enforcement against legal *medical* marijuana operations by prohibiting federal spending on actions that impede state *medical* marijuana laws.

In February 2014, the U.S. Treasury Department, in conjunction with DOJ, issued marijuana guidelines for banks that serve "legitimate marijuana businesses." The February 2014 guidelines reiterated that the provisions of money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct. Further, the guidelines state that financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under these provisions. However, the guidelines also establish that prosecutors should apply the eight enforcement priorities listed in the August 2013 guidance document when deciding which cases to prosecute. Thus, although the federal government appears to have relaxed its position on the enforcement of marijuana laws, marijuana remains a CDS under federal law, and residents of states that have legalized marijuana are not immune from federal prosecution. In addition, DOJ has reserved the right to file a preemption lawsuit against states that have legalized marijuana at some point in the future.

States are not obligated to enforce federal marijuana laws, and the federal government may not require states to recriminalize conduct that has been decriminalized.

According to the Judiciary, in fiscal 2015, there were 6,956 criminal violations for possessing or administering a CDS involving marijuana and 75 criminal violations for possessing or distributing controlled paraphernalia under circumstances that indicated an

intention to use the paraphernalia to illegally administer CDS involving marijuana. Additionally, in calendar 2015, there were 10,345 civil citations for possession of less than 10 grams of marijuana.

State Fiscal Effect: Chapter 4 of 2016 established a civil offense for smoking marijuana in a public place with a fine of up to \$500. The bill repeals this civil offense and instead establishes smoking marijuana in a public place, *a public conveyance, or in an area otherwise accessible to the public* as a misdemeanor with a fine of up to \$500. Chapter 4 of 2016 went into effect on February 20, 2016; therefore, the number of civil violations for smoking marijuana in a public place is unknown at this time. Chapter 4 of 2016 also did not define “public place.” However, this analysis assumes that (1) the scope of the civil offense and the bill’s criminal offense generally overlap, with minimal differences; (2) the number of violations for the civil offense and for the bill’s criminal offense are comparable; and (3) fines assessed for the civil offense and for the bill’s criminal offense are also comparable. Therefore, the bill’s criminal penalty is not expected to materially affect State finances or operations.

However, the bill also authorizes an individual to petition for expungement of a conviction or a finding of not criminally responsible for smoking *or consuming* marijuana in a public place. Given the bill’s October 1, 2016 effective date, the earliest a petition for expungement may be filed is fiscal 2020. The Judiciary advises that the expungement process is a largely manual process that includes several lengthy procedures, including the determination of eligibility and the removal of appropriate records.

The Department of Legislative Services (DLS) advises that the number of convictions or findings of not criminally responsible for smoking or consuming marijuana in a public place cannot be projected and, therefore, the number of petitions and expungements that result from the bill cannot be reliably estimated at this time. However, this analysis assumes that a minimal number of individuals petition for expungement as a result of the bill and that a smaller portion of convictions are eligible for expungement. Therefore, any costs incurred by the Judiciary beginning in fiscal 2020 due to increased expungements are expected to be minimal. Actual costs may vary depending on the number of (1) expungement petitions actually received and (2) convictions or findings deemed eligible for expungement, which also depends on the eligibility of other convictions in the same “unit.”

Additionally, general fund expenditures for DPSCS increase minimally beginning in fiscal 2020 as a result of additional expungement orders generated by the bill. The Criminal Justice Information System (CJIS) requires one expungement clerk for every 2,500 additional expungement orders generated by the bill. The number of additional clerks needed cannot be reliably estimated at this time as it depends on the number of individuals who file a petition for expungement and whether the records are eligible for

expungement. Several positions in the expungement unit at CJIS have been frozen or have remained vacant in recent years. The cost associated with hiring one expungement clerk is \$55,738 in fiscal 2020.

A conviction under the bill is also a shieldable conviction. Again, given the bill's October 1, 2016 effective date, the earliest a petition for shielding may be filed is fiscal 2020. The Judiciary advises that the Judicial Information Systems department must reprogram computers so that shielded information is taken off of Judiciary Case Search. Therefore, general fund expenditures increase by \$6,420 in fiscal 2020 for the Judiciary to make one-time programming changes.

The Judiciary further advises that it incurs increased expenditures of \$17,066 to create and revise expungement and shielding forms and brochures. However, DLS advises that revising printed materials to reflect changes to statute is a routine function of the Judiciary and can be incorporated into annual revisions of forms and brochures.

Finally, DLS advises that expenditures may be offset, at least in part, by a minimal increase in general fund revenues beginning in fiscal 2020 for shielding and expungement applications filed in the District Court, which charges a \$30 filing fee for each shielding and expungement petition filed.

Additional Comments: The bill establishes smoking marijuana in a public place, public conveyance, or in any area otherwise accessible to the public as a criminal offense. However, the bill's expungement provision does not specifically reference the bill's proposed crime and instead refers to the crime of smoking *or consuming* marijuana in a public place.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Montgomery County; Judiciary (Administrative Office of the Courts); Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; Department of Public Safety and Correctional Services; Maryland Department of Transportation; National Conference of State Legislatures; U.S. Department of Justice; Department of Legislative Services

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