

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 445

(Senator Cassilly)

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, including indoor areas, 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 marijuana in a public place.

Fiscal Summary

State Effect: General fund expenditures for the Judiciary increase minimally beginning in FY 2021 due to the bill's expungement provisions, which may be partially offset by fees. General fund expenditures for the Department of Public Safety and Correctional Services (DPSCS) also increase minimally beginning in FY 2021 due to the bill's expungement provisions. Enforcement can be handled with existing resources.

Local Effect: The bill is not expected to materially affect local government operations or finances, as enforcement can be handled with existing resources.

Small Business Effect: None.

Analysis

Bill Summary: "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 10 grams or more 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. For a third or subsequent offense, or if the individual is younger than age 21, the court must (1) summon the individual for trial upon issuance of a citation; (2) order the individual to attend a drug education program approved by the Department of Health and Mental Hygiene (DHMH); and (3) refer him or her to an assessment for a substance abuse disorder. After the assessment, the court must refer the individual to substance abuse treatment, if necessary.

Chapter 4 of 2016 repealed the criminal prohibition on the use or possession of marijuana paraphernalia and eliminated the associated penalties. 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.

However, in a prosecution for the use or possession of marijuana, it is an affirmative defense that the defendant used or possessed the marijuana because (1) the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the

defendant has a bona fide physician-patient relationship; (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a prosecution for the possession of marijuana, it is an affirmative defense that the defendant possessed marijuana because the marijuana was intended for medical use by an individual with a debilitating medical condition for whom the defendant is a caregiver; however, such a defendant must notify the State's Attorney of the intention to assert the affirmative defense and provide specified documentation. In either case, the affirmative defense may not be used if the defendant was using marijuana in a public place or was in possession of more than one ounce of marijuana.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of marijuana. A defendant who cannot meet the affirmative defense standard for a not guilty verdict may introduce and the court must consider as a mitigating factor (with regard to penalties on conviction) any evidence of medical necessity. Pursuant to Chapter 351 of 2015, if a court finds that the use or possession of marijuana was due to medical necessity, the court *must dismiss* the charge.

Justice Reinvestment Act – Changes Effective October 1, 2017

Effective October 1, 2017, Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”) reduces the maximum incarceration penalty for the use or possession of 10 grams or more of marijuana from one year to six months.

Further, before imposing a sentence for this offense, the court is authorized to order DHMH, or a certified and licensed designee, to conduct an assessment of the defendant for a substance use disorder and determine whether the defendant is in need of and may benefit from drug treatment. DHMH or the designee must conduct an assessment and provide the results, as specified. The court must consider the results of an assessment when imposing the defendant's sentence and, as specified, (1) must suspend the execution of the sentence, order probation, and require DHMH to provide the medically appropriate level of treatment or (2) may impose a term of imprisonment and order the Division of Correction within DPSCS or a local correctional facility to facilitate the medically appropriate level of treatment.

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.

Effective October 1, 2017, Chapter 515 of 2016 expands eligibility for expungements by authorizing individuals convicted of specified misdemeanors contained in a list of approximately 100 offenses (including possession of a CDS) to file petitions for expungements. In general, a petition for expungement may not be filed earlier than 10 years after the person satisfied the sentence or sentences imposed for all convictions for which expungement is requested, including parole, probation, or mandatory supervision.

Background: The Judiciary advises that in fiscal 2016, there were approximately 15,051 violations and 9,394 guilty dispositions involving the possession of less than 10 grams of marijuana. Additionally, in fiscal 2016, there were 5,444 violations and 189 convictions in the District Court and 1,944 violations and 350 convictions in the circuit courts for possession of 10 grams or more of marijuana.

According to the National Conference of State Legislatures, 21 states (including Maryland) and the District of Columbia have decriminalized small amounts of marijuana. Prior to the November 2016 election, recreational use was legal in four states (Alaska, Colorado, Oregon, and Washington) and the District of Columbia. In the November 2016 election, ballot initiatives to legalize recreational use passed in California, Massachusetts, Maine, and Nevada.

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 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.

Additionally, the above-mentioned federal policies were adopted under a previous administration and are subject to change under the new administration.

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

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; the Judiciary advises that it is unable to estimate the number of violations for smoking marijuana in a public place as it does not track these violations. 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 marijuana in a public place. Given the bill’s October 1, 2017 effective date, the earliest a petition for expungement may be filed is fiscal 2021. 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 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 2021 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 2021 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 \$64,022 in fiscal 2021. CJIS does not charge a fee for expungements.

The Judiciary further advises that it incurs increased expenditures to create and revise expungement 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 2021 for expungement applications filed in the District Court, which charges a \$30 filing fee for each expungement petition filed that is not based on acquittal.

Additional Information

Prior Introductions: HB 777 of 2016, a similar bill, passed the House as amended and received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of State Police; National Conference of State Legislatures; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2017
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Analysis by: Sasika Subramaniam

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