

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader

House Bill 1408

(Delegates Sanchez and Vallario)

Judiciary

Judicial Proceedings

Criminal Law - Controlled Dangerous Substances - Places of Use

This bill alters the criminal penalties for the existing offense of keeping a dwelling, building, vehicle, vessel, aircraft, or any other place resorted to by individuals for the purpose of administering illegal controlled dangerous substances (CDS). The bill applies the criminal penalties for possessing, administering, obtaining, or procuring CDS to this offense instead of the criminal penalties for keeping a common nuisance. The bill alters the definition of “common nuisance” accordingly.

Fiscal Summary

State Effect: Minimal decrease in general fund expenditures due to fewer individuals being committed to State correctional facilities under the bill. Minimal increase in general fund revenues due to more cases being heard in the District Court.

Local Effect: Minimal increase in expenditures due to more individuals being committed to local correctional facilities under the bill. Minimal decrease in local revenues due to a reduced monetary penalty for an existing offense and fewer cases heard in the circuit courts.

Small Business Effect: None.

Analysis

Current Law: “Common nuisance” means a dwelling, building, vehicle, vessel, aircraft, or other place (1) resorted to by individuals for the purpose of administering illegal CDS or (2) where CDS or controlled paraphernalia are manufactured, distributed, dispensed, stored, or concealed illegally. A person who keeps a common nuisance is subject to the

same criminal penalties that are associated with the distribution of CDS and related offenses.

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. Under the federal Controlled Substances Act, for a drug or substance to be classified as Schedule I, the following findings must be made: (1) the substance has a high potential for abuse; (2) the drug or other substance has no currently accepted medical use in the United States; and (3) there is a lack of accepted safety for use of the drug or other substance under medical supervision.

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.

A person may not possess or administer a CDS unless the CDS is obtained directly or by prescription or order from an authorized provider acting in the course of professional practice. A person may also not obtain or attempt to obtain a CDS, or procure or attempt to procure the administration of a CDS, by specified methods, including by fraud, counterfeit prescription, or concealment of fact. A person who violates these provisions is guilty of a misdemeanor and on conviction is subject to imprisonment for up to four years and/or a fine of up to \$25,000. Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized.

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.

Justice Reinvestment Act – Changes Effective October 1, 2017

Chapter 515 of 2016 (also known as the Justice Reinvestment Act) altered the criminal penalties associated with the possession, administration, obtainment, and procurement of a
HB 1408/ Page 2

CDS and related offenses. Effective October 1, 2017, a person who violates these provisions is subject to the following penalties: (1) for a first conviction, imprisonment for up to one year and/or a fine of up to \$5,000; (2) for a second or third conviction, imprisonment for up to 18 months and/or a fine of up to \$5,000; (3) for a fourth or subsequent conviction, imprisonment for up to two years and/or a fine of up to \$5,000. The authorization to double penalties for repeat offenders applies only when the person has also been previously convicted of a crime of violence. Additionally, Chapter 515 reduced 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 these offenses, 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 the Department of Public Safety and Correctional Services (DPSCS) or a local correctional facility to facilitate the medically appropriate level of treatment.

For information on crimes involving the *distribution* of CDS, including the criminal penalties associated with keeping a common nuisance, please refer to the **Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses**.

Background: The Judiciary advises that in fiscal 2016, there were two guilty dispositions in the circuit courts for keeping a common nuisance.

State Revenues: General fund revenues increase minimally as a result of the bill's application of the monetary penalty for possession of CDS and related offenses to the offense of keeping a dwelling or other specified place for the purpose of administering illegal CDS, instead of the monetary penalty for keeping a common nuisance. This analysis assumes that the provisions of Chapter 515 of 2016 take effect October 1, 2017. Chapter 515 reduces the maximum criminal penalties both for possession of CDS and related offenses and the maximum criminal penalties for keeping a common nuisance.

Under Chapter 515, the maximum fine for a first-time offense of possession of CDS and related offenses is \$5,000; the maximum fine for a first-time offense of keeping a common nuisance involving a Schedule I or II substance is \$15,000; and the maximum fine for a first-time offense of keeping a common nuisance involving a substance other than a Schedule I or II substance is also \$15,000.

The offense of keeping a dwelling or other specified place for the purpose of administering illegal CDS is a felony. Under the bill, this offense is a misdemeanor. In general, misdemeanors are heard in the District Court and felonies are heard in the circuit courts. However, a misdemeanor may be brought in either the District Court or a circuit court, at the discretion of the prosecutor, if the penalty is confinement for three years or more or a fine of \$2,500 or more.

The Judiciary advises that there were two guilty dispositions for keeping a common nuisance in fiscal 2016 in the circuit courts. *For illustrative purposes only*, if two individuals pay the maximum \$5,000 fine for a first offense under the bill in the District Court, general fund revenues increase by \$10,000.

The Department of Legislative Services notes that a violation of the offense under the bill involving the use or possession of 10 grams or more of marijuana is subject to a maximum \$1,000 fine (under Chapter 515 of 2016). An offense that involves the use or possession of less than 10 grams of marijuana is not a criminal offense but is instead a civil offense that is subject to specified civil penalties. This analysis assumes that violations under the bill generally involve CDS other than marijuana.

State Expenditures: The bill applies the incarceration penalty for the possession of CDS and related offenses to the offense of keeping a dwelling or other specified place for the purpose of administering illegal CDS, instead of the incarceration penalty for keeping a common nuisance. Therefore, general fund expenditures for DPSCS decrease minimally due to fewer people being committed to State correctional facilities and reduced payments to counties for reimbursement of inmate costs. Again, this analysis assumes that the provisions of Chapter 515 of 2016 take effect October 1, 2017.

Under Chapter 515, the maximum term of imprisonment for a first-time offense of possession of CDS and related offenses is one year; the maximum term of imprisonment for a first-time offense of keeping a common nuisance involving a Schedule I or II substance is 20 years; and the maximum term of imprisonment for a first-time offense of keeping a common nuisance involving a substance other than a Schedule I or II substance is five years.

Although the bill imposes a significantly reduced maximum incarceration penalty for an existing offense, given that there were only two guilty dispositions for the related offense of keeping a common nuisance in fiscal 2016, this analysis assumes that general fund expenditures for DPSCS decrease only minimally as a result of these individuals shifting from State correctional facilities to local correctional facilities under the bill.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at

\$3,600 per month. This bill alone, however, should not reduce the need for beds, personnel, or facilities. Excluding overhead, the average cost of housing a new State inmate (including variable health care costs) is about \$800 per month. Excluding all health care, the average variable costs total \$210 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 a State correctional facility. Prior to fiscal 2010, the State reimbursed counties for part of their incarceration costs, on a per diem basis, after a person had 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 the State but are confined in a local facility; beginning October 1, 2017, counties may receive the additional \$45 per day grant for inmates sentenced to the custody of the State who receive reentry or other prerelease programming and services from 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 State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Finally, Chapter 515 establishes that, before imposing a sentence for possession of CDS and related offenses, 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 to provide appropriate treatment. Chapter 515 also authorizes individuals convicted of possession of CDS and related offenses to petition for expungement of the conviction. Again, given that there were only two guilty dispositions for the related offense of keeping a common nuisance in fiscal 2016, this analysis assumes that the bill does not materially affect the number of individuals undergoing court-ordered assessments and/or treatment or filing petitions for expungement.

Local Revenues: Revenues decrease minimally as a result of the bill's application of the monetary penalty for possession of CDS and related offenses to the offense of keeping a dwelling or other specified place for the purpose of administering illegal CDS, instead of the monetary penalty for keeping a common nuisance, and fewer cases heard in the circuit courts.

Local Expenditures: Expenditures increase minimally as a result of the bill's application of the incarceration penalty for the possession of CDS and related offenses to the offense of keeping a dwelling or other specified place for the purpose of administering illegal CDS, instead of the incarceration penalty for keeping a common nuisance. 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 the State but are confined in a local facility; beginning October 1, 2017, counties may receive the additional \$45 per day grant for inmates sentenced to the custody of the State who receive reentry or other prerelease programming and services from a local facility. Per diem operating costs of local detention facilities have ranged from approximately \$60 to \$160 per inmate in recent years.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; Montgomery, Washington, and Worcester counties; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of State Police; Department of Legislative Services

Fiscal Note History: First Reader - February 24, 2017
mm/kdm Third Reader - March 17, 2017

Analysis by: Sasika Subramaniam

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

Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses

Under Title 5, Subtitle 6 of the Criminal Law Article, a person may not:

- distribute, dispense, or possess with the intent to distribute a controlled dangerous substance (CDS);
- manufacture a CDS or manufacture, distribute, or possess a machine, equipment, or device that is adapted to produce a CDS with the intent to use it to produce, sell, or dispense a CDS;
- create, distribute, or possess with the 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 CDS 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 CDS with the intent to distribute the CDS.

Exhibit 1 shows the applicable sentences for these crimes under current law, and under Chapter 515 of 2016 (also known as the “Justice Reinvestment Act”), which repealed mandatory minimum penalties applicable to a repeat drug offender (or conspirator) convicted of distribution of CDS and related offenses and established new maximum penalties. The changes take effect October 1, 2017.

Exhibit 1
Penalties for Distribution of Controlled Dangerous Substances and Related Offenses

| Offense | Current Penalty ¹ | New Penalty ² |
|---|--|--|
| CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS) | | |
| First-time Offender | Maximum penalty of 5 years imprisonment and/or \$15,000 fine | Maximum penalty of 5 years imprisonment and/or \$15,000 fine |
| Repeat Offender | 2-year mandatory minimum sentence. Maximum penalty of 5 years imprisonment and/or \$15,000 fine | Maximum penalty of 5 years imprisonment and/or \$15,000 fine |
| CDS (Schedule I or II Narcotic Drug & Specified Drugs) | | |
| First-time Offender | Maximum penalty of 20 years imprisonment and/or \$25,000 fine | Maximum penalty of 20 years imprisonment and/or \$15,000 fine |
| Second-time Offender | 10-year mandatory minimum sentence (20 years maximum imprisonment) and a fine of up to \$100,000 | Maximum penalty of 20 years imprisonment and/or \$15,000 fine |
| Third-time Offender | 25-year mandatory minimum sentence and a fine of up to \$100,000 | Maximum penalty of 25 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence) |
| Fourth-time Offender | 40-year mandatory minimum sentence and a fine of up to \$100,000 | Maximum penalty of 40 years imprisonment and/or a \$25,000 fine (parole eligibility at 50% of sentence) |

CDS: controlled dangerous substance

¹Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized. All mandatory minimum sentences listed in the exhibit are nonsuspendable and nonparolable. Pursuant to Chapter 490 of 2015, a court may depart from the listed mandatory minimum sentences under specified circumstances.

²Under Chapter 515 of 2016, effective October 1, 2017, the authorization to double penalties for repeat offenders is made applicable only when the person has also been previously convicted of a crime of violence. Additionally, a person serving a term of confinement that includes a mandatory minimum sentence, imposed on or before September 30, 2017, for specified crimes generally involving the manufacture, sale, and distribution of CDS may apply to the court for a modification or reduction of the mandatory minimum sentence, regardless of whether the defendant filed a timely motion for reconsideration or if a motion for reconsideration was denied by the court (the court is authorized to depart from the specified mandatory minimum sentences).

Source: Department of Legislative Services