Department of Legislative Services

Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 68 (Senator Young)
Judicial Proceedings

Criminal Law - Veterans - Medical Cannabis

This bill extends the right to assert an affirmative defense in a prosecution for the use or possession of marijuana to (1) a defendant who did so because the defendant has posttraumatic stress disorder (PTSD), if that condition has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship and meets other specified requirements and (2) a qualified veteran patient. The bill retains the stipulation that the affirmative defense may not be used if the defendant (qualified veteran patient or otherwise) was using marijuana in a public place or was in possession of more than one ounce of marijuana. Even so, the bill *requires* the court to dismiss a use or possession of marijuana charge against an individual who is a qualified veteran patient.

In addition, the bill establishes specified legal protections (as well as limits on those protections) for qualified veteran patients for the medical use of cannabis (for specified debilitating medical conditions, including PTSD) and for physicians who certify qualified veteran patients. The bill also provides a statutory form for physicians to use in their written certification of a qualified veteran patient.

Fiscal Summary

State Effect: Minimal decrease in general fund revenues and expenditures due to the bill's provisions that limit prosecutions for the use or possession of marijuana.

Local Effect: Minimal decrease in revenues and expenditures due to the bill's provisions that limit prosecutions for the use or possession of marijuana.

Small Business Effect: None.

Analysis

Bill Summary:

Qualified Veteran Patients and Written Certifications

A "qualified veteran patient" is an individual who is (1) a veteran and (2) a State resident who suffers from a debilitating medical condition (including PTSD) and possesses a written certification issued to the patient by a physician with whom the patient has a bona fide physician-patient relationship.

A "written certification" is a document, signed and dated by a physician, stating that in the physician's professional opinion a patient is likely to receive therapeutic or palliative benefit from the use of cannabis to treat or alleviate the patient's medical condition. The written certification is valid for one year and must be in (at least substantially) the statutory form specified in the bill. Moreover, a written certification is valid only if provided in the course of a bona fide physician-patient relationship, after the physician has completed a full assessment of the qualified veteran patient's medical history.

Legal Protections and Limitations

A qualified veteran patient is not subject to arrest, citation, prosecution, or civil or administrative penalty – and may not be denied a right or privilege – for the medical use of cannabis. Furthermore, the possession of a written certification may not be the basis for a finding of probable cause to search an individual (or the individual's property) or otherwise subject the individual (or the individual's property) to inspection by a governmental unit. Cannabis, property, or interest in property that is possessed, owned, or used in connection with the medical use of cannabis by a qualified veteran patient as allowed under the bill (or acts incidental to the possession, ownership, or use) may not be seized or forfeited on the basis of the use or possession of cannabis.

For the purposes of medical care (including organ transplants), a qualified veteran patient's use of cannabis in accordance with the bill is the equivalent of the authorized use of any other medication used at the direction of a physician and does not constitute the use of an illicit substance or otherwise disqualify a qualified veteran patient from needed medical care. Even so, the bill does not require a public or private health insurer to reimburse an individual for the costs associated with the medical use of cannabis.

If an individual is otherwise entitled to custody of (or visitation or parenting time with) a minor, he or she may not – solely for conduct allowed under the bill – be denied that right or be presumed guilty of neglect or child endangerment. In addition, an individual is not

subject to arrest or prosecution solely for being in the presence or vicinity of the medical use of cannabis by a qualified veteran patient as allowed under the bill.

A physician is not subject to arrest, prosecution, or civil or administrative penalty (including disciplinary action by an occupational or professional licensing board) – and may not be denied a right or privilege – solely for providing a written certification or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of cannabis. However, the bill may not be construed to prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition.

Finally, the bill neither authorizes an individual to engage in, nor prevents the imposition of penalties for, (1) performing a task under the influence of cannabis when doing so would constitute negligence or professional malpractice; (2) operating, navigating, or controlling a motor vehicle, aircraft, or boat while under the influence of cannabis; or (3) smoking cannabis in a public place, in a motor vehicle, or on private property (that is either rented from a landlord or an attached dwelling *and* subject to specified policies prohibiting the smoking of cannabis on the property).

Current Law/Background:

Criminal Law Provisions Related to Marijuana

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. Under the federal Controlled Dangerous 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. The use or possession of a CDS other than marijuana is a misdemeanor with maximum criminal penalties of four years imprisonment and/or a $25,000 fine.

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.

A "bona fide physician-patient relationship" is a relationship in which the physician has ongoing responsibility for the assessment, care, and treatment of a patient's medical condition. A "debilitating medical condition" is a chronic or debilitating disease or medical condition (or the treatment of a chronic or debilitating disease or medical condition) that produces one or more of the following, as documented by a physician with whom the patient has a bona fide physician-patient relationship: (1) cachexia or wasting syndrome; (2) severe or chronic pain; (3) severe nausea; (4) seizures; (5) severe and persistent muscle spasms; or (6) any other condition that is severe and resistant to conventional medicine.

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 the Department of Public Safety and Correctional Services or a local correctional facility to facilitate the medically appropriate level of treatment.

Medical Cannabis Commission

Chapter 403 of 2013 established, Chapters 240 and 256 of 2014 expanded, and Chapter 251 of 2015 and Chapter 474 of 2016 further modified the State's medical cannabis program. The Natalie M. LaPrade Medical Cannabis Commission currently allows for the licensure of growers, processors, and dispensaries, and the registration of their agents. The program also establishes a framework to certify physicians, qualified patients (including veterans), and their caregivers to provide qualified patients with medical cannabis legally under State law via written certification. Effective June 1, 2017, dentists, podiatrists, nurse practitioners, and nurse midwives are authorized to be certifying providers – along with physicians – under the medical cannabis program. Specifically, a qualified patient who has been provided with a written certification from an authorized certifying health care provider in accordance with a bona fide provider-patient relationship may obtain a 30-day supply of medical cannabis. Medical cannabis is defined in regulation as any product containing usable cannabis or medical cannabis finished product. A 30-day supply is defined as 120 grams of usable cannabis, unless a qualified patient's certifying physician determines that this amount is inadequate to meet the medical needs of the patient. Regulations establish PTSD as one of several debilitating medical conditions.

Background: According to the National Conference of State Legislatures (NCSL), 28 states, the District of Columbia, Guam, and Puerto Rico have comprehensive public medical cannabis programs. Additionally, another 17 states allow for the use of low THC (delta-9-tetrahydrocannabinol), high CBD (cannabidiol) products for medical reasons in limited situations or as a legal defense. Further, also according to NCSL, 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 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.

State Revenues: General fund revenues decrease minimally as more cases are dismissed in the District Court (and fewer fines are imposed) as a result of the bill's establishment of an affirmative defense for qualified veteran patients and expansion of debilitating medical conditions to encompass PTSD in a prosecution for the use or possession of one ounce or less of marijuana. Moreover, for any quantity of marijuana, the bill appears to require the court to dismiss a charge for the use or possession of marijuana if the court finds the person is a qualified veteran patient.

State Expenditures: General fund expenditures decrease minimally as a result of the bill's establishment of an affirmative defense for qualified veteran patients and expansion of debilitating medical conditions to encompass PTSD in a prosecution for the use or possession of one ounce or less of marijuana. Likewise, for any quantity of marijuana, the bill appears to require the court to dismiss a charge for the use or possession of marijuana if the court finds the person is a qualified veteran patient. Thus, fewer people may be committed to State correctional facilities, and payments to counties for reimbursement of inmate costs may decrease. The bill's impact on the number of people convicted of the use or possession of marijuana is expected to be minimal.

Generally, persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Local Revenues: Revenues decrease minimally as more cases are dismissed in the circuit courts (and fewer fines are imposed) as a result of the bill's establishment of an affirmative defense for qualified veteran patients and expansion of debilitating medical conditions to encompass PTSD in a prosecution for the use or possession of one ounce or less of marijuana. Likewise, for any quantity of marijuana, the bill appears to require the court to dismiss a charge for the use or possession of marijuana if the court finds the person is a qualified veteran patient.

Local Expenditures: Expenditures decrease minimally as a result of fewer people being incarcerated for the use or possession of marijuana. The bill establishes an affirmative defense for qualified veteran patients and expands the use of an affirmative defense for PTSD as a debilitating medical condition in a prosecution for the use or possession of one ounce or less of marijuana. Likewise, for any quantity of marijuana, the bill appears to require the court to dismiss a charge for the use or possession of marijuana if the court finds the person is a qualified veteran patient.

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: SB 902 of 2016, a substantially similar bill, received an unfavorable report by the Senate Judicial Proceedings Committee. Its cross file, HB 1452, was heard in the House Health and Government Operations Committee, but no further action was taken.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); State's Attorneys' Association; Department of Health and Mental Hygiene; Department of Veterans Affairs; Department of Legislative Services

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