

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 127

(Senator Zirkin)

Judicial Proceedings

Judiciary

Criminal Law and Vehicle Laws – Marijuana – Criminal Threshold and
Smoking in Vehicles

This bill increases the amount of marijuana below which possession is a civil offense from 10 grams to one ounce and makes conforming changes. Additionally, the bill prohibits (1) a driver of a motor vehicle from smoking or otherwise consuming marijuana in a passenger area of a motor vehicle on a highway and (2) an occupant of a motor vehicle from smoking marijuana in a passenger area of a motor vehicle on a highway. The offense is a misdemeanor and the existing penalty of a maximum fine of \$500 applies to the new offense created by the bill.

Fiscal Summary

State Effect: Potential significant increase in general fund revenues beginning in FY 2019 from open-container criminal penalties, which are likely offset minimally by a decrease in general fund revenues from fewer criminal violations for marijuana use or possession. Special fund revenues and expenditures increase minimally for substance abuse treatment. General fund incarceration expenditures decrease minimally. General fund expenditures for the Judiciary increase by \$30,700 in FY 2019 only.

Local Effect: Minimal decrease in revenues and expenditures due to fewer individuals receiving criminal violations for marijuana use or possession.

Small Business Effect: None.

Analysis

Current Law:

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. 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.

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 Maryland Department of Health (MDH); 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.

Chapter 515 of 2016 (also known as the Justice Reinvestment Act) reduced the maximum incarceration penalty for the use or possession of *10 grams or more* of marijuana from one year to six months (but retained the maximum fine of up to \$1,000).

Further, pursuant to Chapter 515 of 2016, before imposing a sentence for these offenses, the court is authorized to order MDH, 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. MDH 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 MDH 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.

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.

Driving While Impaired

Under § 21-902 of the Transportation Article, a person may not drive or attempt to drive any vehicle while impaired by a CDS. A person may not commit this offense while transporting a minor.

With a conviction for an alcohol- and/or drug-related driving offense under the Transportation Article, a violator is subject to a range of penalties involving fines and imprisonment, as well as suspension or revocation of the driver's license by the Motor Vehicle Administration (MVA). A person convicted of driving under the influence of alcohol, under the influence of alcohol *per se*, or while impaired by a CDS is subject to fines ranging from \$1,000 to \$3,000 and/or a maximum imprisonment term of one to three years – depending on whether it is a first or subsequent offense. A repeat conviction or convictions within five years requires a mandatory minimum penalty of imprisonment from 5 to 10 days or community service from 30 to 60 days, as specified, as well as a mandatory alcohol or drug abuse assessment.

If an offender is transporting a minor at the time of the drug-related driving offense, fines and sanctions increase beyond those already specified for lesser included offenses.

Additionally, under § 21-903 of the Transportation Article (also referred to as the “open container” law), a driver of a motor vehicle may not consume an alcoholic beverage in a passenger area of a motor vehicle on a highway. This prohibition applies to a motor vehicle that is driven, stopped, standing, or otherwise located on a highway. “Passenger area” means an area that is designed to seat the driver and any passenger while the motor vehicle is in operation or is readily accessible to the driver or passenger while in their seating positions. The definition does not include (1) a locked glove compartment; (2) the trunk of a motor vehicle; or (3) if the motor vehicle does not have a trunk, the area behind the rearmost upright seat or an area that is not normally occupied by the driver or a passenger. A violation is a misdemeanor subject to a fine of up to \$500. However, for certain violations of the Transportation Article, the District Court may set a fine that may be prepaid if the individual does not wish to appear at a court hearing to either contest guilt or enter a guilty plea with an explanation. A driver who consumes an alcoholic beverage in a passenger area of motor vehicle on a highway may prepay a fine of \$530. MVA must assess one point against the driver’s license for a violation or three points if the violation contributes to an accident.

Background: The Judiciary advises that in fiscal 2017, there were 11,521 civil citations and 7,504 guilty dispositions involving the possession of less than 10 grams of marijuana. Additionally, in fiscal 2017, there were 5,192 violations and 168 guilty dispositions in the District Court and 2,289 violations and 303 guilty dispositions in the circuit courts involving the possession of 10 grams or more of marijuana.

Authorization for the medicinal and recreational use of marijuana, as well as decriminalization of small amounts of marijuana, has gained momentum across the country. However, possession of marijuana remains illegal at the federal level, although 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 Marijuana Laws

According to the National Conference of State Legislatures, 29 states (including Maryland), 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, 22 states (including Maryland) and the District of Columbia have decriminalized small amounts of marijuana.

As of January 2018, nine states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, Washington, and Vermont) and the District of Columbia have legalized the recreational use of marijuana. Four of these states (California, Massachusetts, Maine, and Nevada) passed ballot initiatives to legalize recreational use in the November 2016 election. In January 2018, Vermont became the first state to legalize recreational use of marijuana through the legislature (rather than through ballot initiative).

Federal Guidance

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.

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.

On January 4, 2018, in a memorandum to all U.S. Attorneys, Attorney General Jefferson B. Sessions III announced that the aforementioned guidance regarding federal marijuana prosecutions was rescinded, effective immediately. Citing Congress’ determination (through the Controlled Substances Act) that marijuana “is a dangerous drug and that marijuana activity is a serious crime,” the memorandum declared previous DOJ guidance specific to marijuana enforcement “unnecessary” and instead instructed prosecutors to follow the principles that govern all federal prosecutions, including “federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community,” when deciding which cases to prosecute.

State Revenues: General fund revenues decrease minimally due to fewer individuals receiving criminal violations for the use or possession of marijuana, to the extent criminal violations involve at least 10 grams but less than one ounce (28 grams) of marijuana, for those cases heard in the District Court.

However, the bill also adds smoking marijuana to the existing open container law regarding alcoholic beverages. Therefore, general fund revenues may increase significantly as a result of the application of an existing monetary penalty to the bill's provisions relating to smoking marijuana in a vehicle from cases heard in the District Court.

This analysis assumes that the number of violations for smoking marijuana in the passenger area of a motor vehicle is less than the number of violations for consuming alcohol in a passenger area of a motor vehicle, and that the District Court sets a comparable prepayment fine for violations involving marijuana. According to the District Court, in fiscal 2017, there were 1,022 citations for consuming an alcoholic beverage in the passenger area of a motor vehicle. *For illustrative purposes only*, if 50% of these violations involve smoking marijuana, and these individuals choose to prepay a \$530 fine, general fund revenues increase by at least \$203,123 in fiscal 2019, accounting for the bill's October 1, 2018 effective date, and by at least \$270,830 annually thereafter for this offense.

Special fund revenues for MDH increase at least minimally due to more individuals receiving civil citations as a result of the bill. Pursuant to § 7-302(g) of the Courts and Judicial Proceedings Article, the District Court must remit the civil citation penalties collected for the use or possession of marijuana to MDH for drug treatment and education programs. The Behavioral Health Administration in MDH administers the Marijuana Citation Fund. Special fund revenues totaled \$525,513 in fiscal 2017; projected revenues for fiscal 2019 are \$550,000.

State Expenditures: The Judiciary advises that it must make one-time programming changes to permanently shield citations for the use or possession of less than one ounce (instead of 10 grams) of marijuana. Thus, general fund expenditures increase by \$30,660 in fiscal 2019 only.

The Judiciary also advises that citations need to be recalled and revised to meet the bill's requirements. The Department of Legislative Services advises that the District Court can implement the changes during the annual reprinting of these citations using existing budgeted resources.

General fund expenditures for DPSCS decrease minimally as a result of the bill's repeal of an incarceration penalty for the use or possession of marijuana, to the extent criminal violations involve at least 10 grams, but less than 28 grams of marijuana, resulting in fewer people being committed to State correctional facilities for convictions in Baltimore City. Generally, persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to a local detention facility. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

Special fund expenditures for MDH increase minimally to the extent additional individuals (those younger than age 21 or who commit a third or subsequent offense involving the possession of less than 28 grams of marijuana) must attend a drug education program and/or are referred for a substance abuse disorder assessment or treatment. (In fiscal 2018, MDH advises that, on average, the cost for an individual to attend a drug education program is \$400 for eight classes, and the cost to undergo a preliminary assessment by MDH is approximately \$225.)

Local Revenues: Revenues decrease minimally due to fewer individuals receiving criminal violations for the use or possession of marijuana, to the extent criminal violations involve at least 10 grams, but less than 28 grams of marijuana, for those cases heard in the circuit courts.

Local Expenditures: Expenditures decrease minimally due to fewer individuals being committed to local detention facilities for the use or possession of marijuana, to the extent criminal violations involve at least 10 grams but less than 28 grams of marijuana. Counties pay the full cost of incarceration for people in their facilities for the first 12 months of the sentence. Per diem operating costs of local detention facilities have ranged from approximately \$40 to \$170 per inmate in recent years.

Additional Information

Prior Introductions: SB 891 of 2016, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: None.

Information Source(s): Kent, Montgomery, Prince George's, and Worcester counties; cities of Bowie, Takoma Park, and Westminister; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Department of State Police; Maryland Department of Transportation; Maryland State's Attorneys' Association; Maryland Department of Health; National Conference of State Legislatures; Department of Legislative Services

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