Department of Legislative Services

Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 875 (Delegate Moon, *et al.*)
Judiciary

Criminal Law - Marijuana - Urinalyses, Civil Offense Threshold, and Evidence Standards

This bill increases the amount of marijuana below which possession is a civil offense from 10 grams to one ounce and makes conforming changes. The bill prohibits the Division of Pretrial Detention and Services and the Division of Parole and Probation (DPP) within the Department of Public Safety and Correctional Services (DPSCS) from considering the submission of a urine sample that is positive for marijuana as a violation of a condition of pretrial release, parole, or probation. The bill establishes a rebuttable presumption that a quantity of marijuana less than one ounce is not a sufficient quantity to reasonably indicate under all circumstances an intent to distribute or dispense marijuana and that the odor of marijuana emanating from a person does not constitute probable cause to arrest that person.

Fiscal Summary

State Effect: Minimal decrease in general fund revenues and expenditures, as discussed below. Minimal increase in special fund revenues and expenditures, as discussed below.

Local Effect: Minimal decrease in local revenues and expenditures, as discussed below.

Small Business Effect: None.

Analysis

Bill Summary: The prohibitions related to the Division of Pretrial Detention and Services and DPP in the bill do not apply to an inmate, an offender, or a probationer who has been expressly prohibited from using or possessing marijuana, as opposed to controlled

dangerous substances (CDS) generally, as a condition of pretrial release, parole, or probation.

The State may rebut the presumption related to possession with intent to distribute or dispense marijuana through showing evidence of an intent to sell marijuana.

The bill does not apply to the odor of marijuana emanating from a vehicle.

Current Law:

Criminal Law Provisions Related to Marijuana

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.

Under Maryland law, a person may not (1) distribute or dispense a CDS or (2) possess a CDS *in sufficient quantity reasonably to indicate under all circumstances* an intent to distribute or dispense a CDS.

For additional information on crimes involving the distribution of CDS, please refer to the **Appendix – Penalties for Distribution of Controlled Dangerous Substances and Related Offenses.**

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. A citation for the use or possession of less than 10 grams of marijuana and the official court record are not subject to public inspection and may not be included on the public website maintained by the

Maryland Judiciary if the defendant has prepaid the fine and has met other specified conditions.

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 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.

Chapter 801 of 2017 expands eligibility for expungements to include a conviction for possession of marijuana under § 5-601 of the Criminal Law Article, in addition to acquittal, dismissal, entry of probation before judgment, entry of *nolle prosequi*, stet of charge, and gubernatorial pardons. A petition for expungement under the Act may not be filed within four years after the conviction or satisfactory completion of the sentence, including probation that was imposed for the conviction, whichever is later.

Parole and Probation

Probation is a disposition that allows an offender to remain in the community, frequently requiring compliance with certain standards and special conditions of supervision imposed by the court. A court has broad authority to impose reasonable conditions to fit each case. A standard condition of probation, for example, prohibits the offender from engaging in any further criminal activity. Additional conditions may require an offender to participate in drug or alcohol treatment, refrain from the use of drugs or alcohol, participate in counseling (common in domestic violence and sexual offense cases), pay restitution, or refrain from contacting or harassing the victim of the crime and the victim's family. A judge may also order "custodial confinement," which usually refers to home detention or inpatient drug or alcohol treatment but can also include other forms of confinement short of imprisonment.

If an offender is alleged to have violated a condition of probation, the offender is returned to court for a violation of probation hearing. If the court finds that a violation occurred, it may revoke the probation and impose a sentence allowed by law. The court may alternately choose to continue the offender on probation subject to any additional conditions it chooses to impose. Probation may either be probation before judgment (commonly known as "PBJ") or probation following judgment.

In general, parole is a discretionary and conditional release from imprisonment determined after a hearing for an inmate who is eligible to be considered for parole. If parole is granted, the inmate is allowed to serve the remainder of the sentence in the community, subject to the terms and conditions specified in a written parole order.

The Maryland Parole Commission (MPC) has jurisdiction regarding parole for eligible inmates sentenced to State correctional facilities and local detention centers. Inmates in the Patuxent Institution who are eligible for parole are under the jurisdiction of the Patuxent Board of Review.

Any violation of a condition of release may result in revocation of parole. A violation is classified as either a "technical" violation that is not a crime (*e.g.*, failure to attend a required meeting or failing to be employed) or a commission of a new crime. If a violation is alleged, MPC or DPSCS (if this power is delegated to the department in a particular case) must decide whether to issue a subpoena or a retake warrant for purposes of a parole revocation hearing. A subpoena is requested from the parole commission if the parole agent believes that the offender is not a public safety threat and that the offender will not flee. Otherwise, a parole agent must request a retake warrant, which subjects the individual to arrest, and submit a written report to the commission on the alleged violation.

Probable Cause to Arrest – Odor of Marijuana

The Fourth Amendment to the U.S. Constitution states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In essence, the Fourth Amendment protects individuals from unreasonable searches and seizures by the government. Generally, U.S. Supreme Court decisions have established the principle that a warrant issued by a "neutral and detached magistrate" must be obtained before a government authority may breach the individual privacy that the Fourth Amendment secures. However, the U.S. Supreme Court recognizes a number of exceptions to the warrant requirement including for arrests where probable cause exists to believe that a crime has been committed by the person being seized.

Additionally, in *U.S. v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004) the court stated that while the odor of marijuana provides probable cause to believe that marijuana is present, the presence of marijuana does not of itself authorize the police to arrest any person in the vicinity. Additional factors must be present to localize the presence of marijuana such that its placement will justify the arrest.

The Maryland Court of Special Appeals considered whether the scent of marijuana alone provided probable cause to arrest despite the decriminalization of possession of less than 10 grams of marijuana, and subsequently held that "a police officer who has reason to believe that an individual is in possession of marijuana has probable cause to effectuate an arrest, even if the officer is unable to identify whether the amount possessed is more than 9.99 grams." *Barrett v. State*, 234 Md. App. 653, 672 (2017).

Background: The Judiciary advises that, in fiscal 2018, there were 1,867 violations in the District Court and 1,486 violations in the circuit courts for the possession of 10 grams or more of marijuana. Additionally, there were 17,584 civil citations filed in the District Court for possession of less than 10 grams 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, 33 states (including Maryland), the District of Columbia, Guam, and Puerto Rico have comprehensive public medical cannabis programs. Additionally, another 13 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 2019, 10 states (Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Washington, and Vermont) and the District of Columbia have legalized the recreational use of marijuana. Four of these states (California, Maine, Massachusetts, 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 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. Then, on January 4, 2018, in a memorandum to all U.S. Attorneys, former Attorney General Jefferson B. Sessions III announced that the aforementioned guidance regarding federal marijuana prosecutions was rescinded, effective immediately.

In February 2014, the U.S. Treasury Department, in conjunction with DOJ, issued separate 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. The U.S. Treasury Department has not revised

this guidance in response to the DOJ's revocation of the August 2013 guidelines in January 2018.

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 District Court.

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 $604,343 in fiscal 2018; projected revenues for fiscal 2020 are $700,000.

State Expenditures:

Department of Public Safety and Correctional Services

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.

General fund expenditures also decrease minimally as a result of fewer people being committed to State correctional facilities for possession with intent to distribute. The extent of any impact depends on several factors, including law enforcement and prosecutorial discretion, but is expected to be minimal.

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 $3,800 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. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates

confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or 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.

The bill may also result in fewer violations of pretrial release, parole, and probation. However, the impact is not anticipated to materially affect the incarcerated population. The bill also likely results in a reduction in parole revocation hearings for MPC. However, the overall impact is expected to be negligible.

Judiciary

The Judiciary 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. In addition, the required shielding of citations and official court records that is expanded under the bill (to include individuals charged with use or possession of less than one ounce of marijuana) can be handled with existing resources.

As noted above, the bill also likely results in fewer violations of probation and thus a reduction in related hearings for the courts. However, the overall impact on the courts is expected to be negligible.

Maryland Department of Health

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 use disorder assessment or treatment.

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, and due to fewer individuals being prosecuted for possession with intent to distribute marijuana for those cases heard in the circuit courts. However, the extent of any impact depends on several factors, including law enforcement and prosecutorial discretion.

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: None.

Cross File: None.

Information Source(s): Montgomery and Prince George's counties; cities of Bowie and Takoma Park; Maryland Municipal League; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Maryland Department of Health; Maryland Court of Appeals; U.S. Supreme Court; U.S. Constitution; Department of Legislative Services

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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.

Chapter 515 of 2016 (also known as the "Justice Reinvestment Act") 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 took effect October 1, 2017.

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

Offense	Current Penalty[1,2]
CDS (Other than Schedule I or II Narcotic Drugs and Other Specified CDS)[3]	
First-time Offender	Maximum penalty of 5 years imprisonment and/or $15,000 fine
Repeat Offender	Maximum penalty of 5 years imprisonment and/or $15,000 fine
CDS (Schedule I or II Narcotic Drug and Specified Drugs)[4]	
First-time Offender	Maximum penalty of 20 years imprisonment and/or $15,000 fine
Second-time Offender	Maximum penalty of 20 years imprisonment and/or $15,000 fine
Third-time Offender	Maximum penalty of 25 years imprisonment and/or a $25,000 fine (parole eligibility at 50% of sentence)
Fourth-time Offender	Maximum penalty of 40 years imprisonment and/or a $25,000 fine (parole eligibility at 50% of sentence)

CDS: controlled dangerous substance

[1]Repeat offenders are subject to twice the term of imprisonment and/or fines that are otherwise authorized. Under Chapter 515 of 2016, effective October 1, 2017, this authorization is made applicable only when the person has also been previously convicted of a crime of violence.
[2]Chapter 569 of 2017 prohibits a person from knowingly distributing or possessing with the intent to distribute (1) a mixture of CDS that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl or (2) fentanyl or any analogue of fentanyl. In addition to any other penalty imposed, a person is subject to imprisonment for up to 10 years. A sentence imposed for a violation of this prohibition must be served consecutively to any other sentence imposed.
[3]*e.g.,* marijuana
[4]*e.g.,* cocaine and heroin

Source: Department of Legislative Services