

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 550

Judiciary

(Delegate Mosby, *et al.*)

Judicial Proceedings

Criminal Law - Marijuana - Possession and Possession With Intent to Distribute

This bill increases the threshold for the civil offense of possession of marijuana from less than 10 grams to less than one ounce and makes conforming changes. The bill establishes a presumption that a person in possession of less than one ounce of marijuana is not in violation of the prohibition on possession with intent to distribute a controlled dangerous substance with regard to marijuana, in the absence of any other evidence of a violation of the prohibition.

Fiscal Summary

State Effect: General fund revenues decrease minimally due to fewer criminal violations for marijuana use and possession. Special fund revenues and expenditures increase minimally for substance abuse treatment. Medicaid expenditures (general and federal funds) increase minimally; federal fund revenues increase accordingly. General fund incarceration expenditures decrease minimally. General fund expenditures for the Judiciary increase by \$38,500 in FY 2021 only.

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

Small Business Effect: None.

Analysis

Current Law: 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.

Possession of Marijuana

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 the individual 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.

Distribution/Possession with Intent to Distribute Marijuana

A person may not possess a CDS in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a CDS. If the CDS is marijuana, a violator is guilty of a felony, punishable by imprisonment for up to five years and/or a \$15,000 maximum fine.

Background: The Judiciary advises that in fiscal 2019, there were 17,127 civil citations filed with the District Court for violations for possession of less than 10 grams of marijuana and 77 civil citations filed in the circuit courts for the possession of less than 10 grams of marijuana. There were 15,443 violations filed in the District Court for possession of more than 10 grams of marijuana and 1,959 violations filed in the circuit courts for possession of more than 10 grams of marijuana.

The Maryland State Commission on Criminal Sentencing Policy advises that a review of the Maryland Sentencing Guidelines Database indicates that for fiscal 2019, it received information for 318 individuals sentenced to 319 total counts of possession of a controlled dangerous substance for marijuana in the circuit courts. The database does not identify the quantity of the drug involved in a conviction.

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, 26 states (including Maryland) and the District of Columbia have decriminalized small amounts of marijuana. As of June 2019, 14 states and territories have approved adult-use cannabis.

Federal Guidance

Although cannabis remains on the list of Schedule I drugs, the federal government has been enforcing cannabis/marijuana provisions primarily pursuant to (1) guidelines issued by the U.S. Department of Justice (DOJ) and (2) appropriations riders passed by the U.S. Congress in every year since 2014 that prevent DOJ from using any of its funding to prevent states from “implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”

DOJ published the “[Ogden Memorandum](#)” in October 2009, which deprioritized using federal law enforcement resources against state medical marijuana programs. In August 2013, DOJ published the “[Cole Memorandum](#),” which announced that it would focus on eight enforcement priorities when enforcing marijuana provisions of the federal Controlled Dangerous Substances Act. The guidelines also state that, although DOJ 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. On January 4, 2018, in a [memorandum](#) to all U.S. attorneys, former Attorney General Jefferson B. Sessions III announced that previous guidance regarding federal marijuana prosecutions was rescinded, effective immediately. Current Attorney General William Barr has pledged to not go after marijuana companies that comply with state laws, but there has been no official DOJ guidance since the 2018 memorandum rescinding prior guidance.

State Fiscal Effect:

Revenues from Penalties

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.

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 \$546,559 in fiscal 2019.

Judiciary 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 \$38,534 in fiscal 2021 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.

DPSCS Expenditures

General fund expenditures for DPSCS decrease minimally due to fewer individuals being committed to State correctional facilities for convictions in Baltimore City involving the use or possession of at least 10 grams but less than one ounce (28 grams) of marijuana. General fund expenditures for DPSCS also decrease minimally due to fewer incarcerations for possession with the intent to distribute marijuana as a result of the bill's presumption with respect to that offense.

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.

Substance Abuse Treatment – Impacts on MDH and Medicaid

Special fund expenditures for MDH increase minimally to the extent additional individuals (those younger than age 21 or those who commit a third or subsequent offense involving the possession of less than 28 grams of marijuana) are referred to substance abuse treatment. Medicaid expenditures (general and federal funds) increase minimally for substance abuse assessments for individuals on Medicaid or who are uninsured. Federal fund revenues increase accordingly. MDH advises that an assessment costs the State

approximately \$160 if not covered by private insurance. However, the Public Behavioral Health System permits only one assessment in a 12-month period, absent a break in 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, for those cases heard in the circuit courts. Likewise, revenues decrease minimally due to fewer individuals receiving criminal violations for possession with intent to distribute marijuana, to the extent criminal violations involves less than one ounce (28 grams) of marijuana, for those cases heard in 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 one ounce (28 grams) of marijuana. Likewise, expenditures decrease minimally due to fewer individuals being committed to local detention faculties for possession with intent to distribute marijuana, to the extent criminal violations involve less than one ounce (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 127 of 2018, a similar bill, passed the Senate with amendments and received a hearing in the House Judiciary Committee, but no further action was taken on the bill.

Designated Cross File: None.

Information Source(s): Garrett and Montgomery counties; City of Laurel; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland Department of Health; Department of Public Safety and Correctional Services; Department of State Police; National Conference of State Legislatures; U.S. Department of Justice; Department of Legislative Services

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Analysis by: Hillary J. Cleckler

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