

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 143

(Senators Waldstreicher and Carter)

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 distribution or 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 or possession and distribution. 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 Department of State Police (DSP) decrease minimally.

Local Effect: Minimal decrease in revenues and expenditures due to fewer individuals receiving criminal violations for marijuana use or possession and distribution and reduced case volume in local forensic laboratories.

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 distribute or dispense a CDS or 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.

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 \$317,288 in fiscal 2020 and \$546,559 in fiscal 2019. MDH advises that the reduced revenues in fiscal 2020 were a result of the ongoing COVID-19 pandemic.

Judiciary Expenditures

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.

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 in Baltimore City for distribution/possession with the intent to distribute marijuana as a result of the bill's presumption with respect to that offense.

As stated before, use or possession of 10 grams or more of marijuana carries a maximum incarceration penalty of six months and distribution/possession with intent to distribute marijuana carries a maximum incarceration penalty of five years. This estimate assumes that individuals incarcerated for distribution/possession with intent to distribute marijuana based on the possession of less than one ounce of marijuana are serving sentences of one year or less.

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 has advised in previous years 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.

DSP Expenditures

General fund expenditures for DSP decrease to the extent that fewer criminal cases involving the possession of marijuana require CDS analysis by the DSP Forensic Sciences Division (FSD). Although five jurisdictions (Baltimore City and Anne Arundel, Baltimore, Montgomery, and Prince George's counties) conduct their own CDS analysis, FSD is available to all Maryland law enforcement agencies for collecting, preserving, and analyzing physical evidence in criminal cases, including CDS analysis. According to its annual report, FSD completed 9,977 CDS analyses in calendar 2019.

Office of the Public Defender

The Office of the Public Defender (OPD) advises that increasing the threshold for the civil offense of possession of marijuana from less than 10 grams to less than one ounce (28 grams) decreases caseloads for the office. However, given the current caseloads and resources of OPD, it is unlikely that the bill has a material effect on OPD expenditures, and it is assumed that any OPD resources spent on these cases will be shifted to other OPD cases and duties.

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.

Local expenditures also decrease minimally due to reduced case volume in local forensic laboratories.

Additional Information

Prior Introductions: HB 550 of 2020 passed the House with amendments and was referred to the Senate Judicial Proceedings Committee, but no further action was taken. 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.

Designated Cross File: HB 324 (Delegate Moon) - Judiciary.

Information Source(s): Baltimore City; Caroline, Howard, Montgomery, and Prince George's counties; City of Bowie; 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 State Police; Department of Public Safety and Correctional Services; Department of Legislative Services

Fiscal Note History: First Reader - January 15, 2021
an/aad

Analysis by: Amber R. Gundlach

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