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Fiscal Note & Local Impact Statement

Click here for S.B. 3's Bill Analysis

Version: In Senate Judiciary

Primary Sponsors: Sens. Eklund and O'Brien

Local Impact Statement Procedure Required: No

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Highlights

- Under the bill, the Department of Rehabilitation and Correction (DRC) can expect up to 2,700 fewer offenders being sentenced to prison annually for a drug possession offense. The estimated annual cost savings to DRC is up to $75 million. The annual savings is likely to be reduced to the degree that the facts surrounding certain drug possession cases still result in a felony conviction and the imposition of a prison term. The bill's effect on the sentencing of drug trafficking offenders to prison, including the amount of time to be served, is indeterminate.
- The bill's requirements for drug treatment in lieu of incarceration for certain drug offenders may generate potentially significant annual cost increases for Ohio's local trial courts.
- Medicaid costs for treatment services would increase under the bill. While the total increase is uncertain, it will depend on the number of individuals that receive treatment, as well as the type and duration of such treatment. In addition, any treatment costs not covered under Medicaid or another insurance may instead be paid for by local alcohol, drug addiction, and mental health services boards, courts, or hospitals.
- The bill could shift up to 3,000 or more drug offense cases annually from the felony jurisdiction of courts of common pleas to the misdemeanor jurisdiction of municipal and county courts. The magnitude of the related increases and decreases in the operating costs and revenues (fines, and court costs and fees) of municipalities and counties, respectively, is indeterminate.
- The potential annual loss in state court cost revenues that otherwise may have been collected and apportioned between the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020) could be minimal at most.

- Under the bill, an unknown number of additional persons will be eligible to apply for record sealing. The degree to which the fee revenue may offset the additional work and related operating costs of local and state criminal justice agencies is uncertain.
- The work and related annual operating costs of the Ohio Criminal Sentencing Commission's expanded duties under the bill can be absorbed utilizing its existing staff and appropriated resources.

Detailed Analysis

The bill replaces the current controlled substance trafficking and controlled substance possession offenses with new offenses located in six Revised Code sections and redesignates the offenses as aggravated trafficking offenses, major trafficking in drugs, trafficking offenses, possession of a controlled substance, possession of marihuana, possession of hashish, possession of a controlled substance trace amount, and possession of a trace amount of marihuana or hashish.

Generally, the bill increases the controlled substance threshold amounts necessary to qualify for the same penalty as under current law for a violation of a drug trafficking or possession offense, and prioritizes treatment over conviction for possession.[1] It also makes changes to current law provisions for court-ordered involuntary treatment, record sealing, and the Ohio Criminal Sentencing Commission.

Trafficking offenses

Table 1 below shows the minimum amounts of each controlled substance necessary to qualify for felony-level penalties under the bill's trafficking offenses. (See the LSC bill analysis for full details on substances and offense levels.)

- Aggravated trafficking offenses under the bill range from second degree to first degree felonies and penalties include mandatory prison terms within the range specified for those levels of offense.
- Major trafficking offenses under the bill are generally third degree felonies and increase to first degree felonies if committed in the vicinity of a school. Increased amounts of sexual assault-enabling drugs are a second degree felony, and elevate to a first degree felony if committed in the vicinity of a school.
- Trafficking offenses under the bill range from fourth to fifth degree felonies which elevate up to a third degree felony for trafficking in the vicinity of a school for certain substances.

[1] The bill's trafficking and possession offense provisions apply to conduct which occurs after the bill's effective date, but apply to charges involving conduct committed before the bill's effective date if the charges are pending on the bill's effective date, or the offender has not yet been sentenced as of that date and the bill's provisions result in a reduction in the penalty that would otherwise be imposed.

Table 1. Minimum Threshold Amounts for the Bill's Trafficking Offenses			
Controlled Substance	**Aggravated Trafficking**	**Major Trafficking**	**Trafficking**
Schedule I or II	≥ 50 times bulk	≥ bulk amount	≥ 0.025 g
Schedule III, IV, or V	N/A	≥ 5 times bulk	≥ 0.025 g
Marihuana	≥ 40 kg	≥ 1 kg	≥ 0.025 g*
Cocaine	≥ 50 g	≥ 10 g	≥ 0.025 g
LSD (solid)	≥ 500 unit doses	≥ 50 unit doses	≥ 0.25 unit doses
LSD (liquid)	≥ 50 g	≥ 5 g	≥ 0.025 g
Heroin	≥ 30 g or 300 unit doses	≥ 5 g or 50 unit doses	≥ 0.025 g or 0.25 unit doses
Hashish	≥ 2 kg	≥ 50 g	≥ 0.025 g
Controlled substance analog	≥ 30 g	≥ 20 g	≥ 0.025 g
Schedule I or II sexual assault-enabling drug	≥ 50 times bulk	≥ bulk amount	≥ 0.025 g
Schedule III, IV, or V sexual assault-enabling drug	N/A	≥ 5 times bulk	≥ 0.025 g
Fentanyl-related compound	≥ 10 g or 200 unit doses	≥ 5 g or 50 unit doses	≥ 0.025 g or 0.25 unit doses

*Gifts of marihuana ≤ 20 g are generally a minor misdemeanor under the bill.

Possession offenses

The amounts of each controlled substance necessary to qualify for misdemeanor penalties under the bill's possession offenses generally mirror the range for the bill's trafficking offenses as highlighted in the table above, and include penalties for trace amounts below the minimums for possession. Under current law, violations of these offenses range from misdemeanors to fourth or fifth degree felonies.[2] Under the bill, a violation of a possession

[2] The bill specifies that the provisions of the existing laws governing the period of limitations for felonies, the application of the speedy trial time limits for felonies, and the application of the forfeiture law regarding felonies will apply with respect to a violation of the current drug possession law committed prior to the bill's effective date that currently is a felony and that the bill converts to a misdemeanor.

offense is generally an unclassified misdemeanor with felony elevations for subsequent violations and for sexual assault-enabling drugs and fentanyl-related compounds. (See the LSC bill analysis for full details on substances and offense levels.) An attempted possession offense under the bill is a first degree misdemeanor and the court sentencing the offender has available any sentencing alternative that would be available for the unclassified misdemeanor if it had been committed.

A certain number of felony offenders who would have been sentenced to the Department of Rehabilitation and Correction (DRC) under current law will be sanctioned locally under the bill. The number of such offenders is not known, but the result will be an increased cost to the local criminal justice systems to sanction locally – generally through treatment as described below – and a decrease in costs for DRC.

For local criminal justice systems, in additional to increased costs described above, an increased number of misdemeanor-level offenders will be sentenced to treatment who would have otherwise been sentenced to a jail term. The number of such offenders is not known, but will vary by jurisdiction, as will costs for treatment versus incarceration locally, therefore any cost increase or savings associated with such individual offenders is not known.

The reclassification of certain offenses from felonies to misdemeanors will also lead to an annual loss for the state in the amount of locally collected court cost revenue apportioned between the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020). This is because the total amount of state court costs imposed on an offender and apportioned between Fund 5DY0 and Fund 4020 is higher for a felony ($60) than it is for a misdemeanor ($29). From FY 2014 through FY 2018, an average of approximately 3,000 offenders were sentenced to DRC for possession offenses each year. This suggests that the potential total annual loss in state court cost revenues that otherwise may have been collected and apportioned between those two state funds could be minimal at most.

Treatment

With exceptions, under the bill it is assumed that an offender sentenced for an unclassified misdemeanor offense of possession and misdemeanor possession of marihuana or hashish (except minor misdemeanors) must be sentenced to treatment. The bill allows the court to hold a criminal proceeding in abeyance while an alleged offender undergoes treatment without requiring a guilty plea. If the person successfully completes a drug treatment program as ordered by the court, the court is required to dismiss the proceedings without an adjudication of guilt. It is not a criminal conviction for any purposes of any disqualification or disability generally imposed by law upon a conviction of a crime, and the court may order the record to be sealed.

If an offender has private insurance that will cover the type of treatment ordered by the court, the offender and his or her insurance company will pay for the treatment, however this applies to only a small percentage of cases. Generally, treatment costs are either borne by the court or, if the offender is eligible, by Medicaid. Cost per offender varies based on type and duration of treatment ordered by the court, however, it is likely to be significant for both the local courts and Ohio's Medicaid Program.

Court jurisdiction

Cases for certain felony-level offenses under current law will shift to misdemeanor-level offenses under the bill and transition from the courts of common pleas to municipal or county courts. The bill enacts a procedure for deciding, when a reclassified misdemeanor drug possession offense is committed within the territory of a municipal court or county court, whether that court or the court of common pleas of the county in which the municipal or county court is located, will hear the case pertaining to the offense.[3] Under the bill, if a person commits a reclassified misdemeanor drug possession offense within the territory of a municipal court or county court, the charges must be filed in the municipal court or county court. After the charges are filed, the municipal court or county court, whichever is applicable, on the motion of the prosecutor in the case, on the motion of the defendant, or on its own motion, may transfer the case to the court of common pleas of the county in which the offense was committed.

The volume of new cases filed is likely to be significant for municipal and county courts, although the volume of any increase in a specific court will depend on the volume of cases in the county generally, the number of municipalities operating courts in a given county, and the instances of offenses in each municipality. For the courts of common pleas, there is likely to be a decrease in drug possession-related workload offset somewhat by the procedure for the transfer of reclassified misdemeanor drug possession offense cases, as described above. The magnitude of any decrease in workload is unknown.

Possession of marihuana or hashish

The bill enacts new offenses for the possession of marihuana and hashish. The amounts of each controlled substance necessary to qualify for misdemeanor penalties for the bill's possession offenses mirror the range for the bill's trafficking offenses as highlighted in Table 2. Unlike possession offenses generally, as described above, penalties for violations of the prohibitions range from a minor misdemeanor to a first degree misdemeanor.

[3] For purposes of this provision, a reclassified misdemeanor drug possession offense means any violation of a prohibition under any of the possession offenses under the bill committed on or after the bill's effective date, or of a prohibition under the current possession offenses that was committed prior to the bill's effective date, and to which all of the following apply: (1) prior to the bill's effective date, the violation was a felony under the current possession offenses, (2) on the bill's effective date, the offense classification of the felony violation was reduced to a misdemeanor under one of the possession offenses under the bill, and (3) if the offense is a violation of a prohibition under the current possession offenses and was committed prior to that date, the penalty, forfeiture, or punishment for that violation has not been imposed as of the bill's effective date.

Table 2. Possession of Marihuana or Hashish and Offense Level Under the Bill		
Drug	**Amount**	**Offense Level**
Marihuana	≥ 0.025 g and < 200 g	Minor misdemeanor
	≥ 200 g and < 400 g	4th degree misdemeanor
	≥ 400 g and < 1 kg	1st degree misdemeanor
Hashish	≥ 0.025 g and < 10 g	Minor misdemeanor
	≥ 10 g and < 20 g	4th degree misdemeanor
	≥ 20 g and < 50 g	1st degree misdemeanor

An arrest or a conviction for a minor misdemeanor violation of either prohibition does not constitute a criminal record and need not be reported by the person so arrested or found guilty in response to any inquiries about the person's criminal record.

Having weapons while under disability

Existing law prohibits certain persons from knowingly acquiring, having, carrying, or using any firearm or dangerous ordnance. The bill expands the list of those so prohibited to include any person who is charged, has been convicted of, or had been adjudicated a delinquent child for committing any unclassified misdemeanor offense involving the illegal possession of a controlled substance under the bill. A violation of the prohibition is the offense of "having weapons while under a disability," unchanged by the bill, a third degree felony punishable by up to 36 months in prison, a fine of up to $10,000, or both. In CY 2019, 834 people were committed to DRC with a violation of this prohibition as the most serious offense.

A person may apply to the court of common pleas of the county in which the person resides for relief from the prohibition and the court, if it makes specified findings, may grant the requested relief.

The bill is likely to increase the number of persons who violate this prohibition as well as the number of those seeking relief from the disability in the courts of common pleas. Any increase in state incarceration expenses are likely to be offset by the bill's overall savings effect for DRC as described below.

Any increase in relief-related workload in the courts of common pleas may be offset somewhat by costs assessed to the applicant. Certain offenses under the bill would have been felonies under current law, and, therefore, subject to the disability in the absence of the bill.

State incarceration cost savings

The overall effect of the changes to the trafficking and possession offenses will be a decrease in the number of offenders sentenced to a prison term. Table 3 below shows the number of offenders committed to DRC from CYs 2015 through 2019 for drug possession and drug trafficking offenses. For the five-year period, an average of 2,694 offenders were

committed for drug possession offenses annually, and an average of 1,808 were committed for drug trafficking offenses.

Table 3. Number of Offenders Committed to DRC for Drug Possession or Trafficking, CYs 2015-2019		
Calendar Year	**Drug Possession**	**Drug Trafficking**
2019	2,608	1,736
2018	2,469	1,850
2017	2,738	1,687
2016	2,926	1,834
2015	2,728	1,931
Average	**2,694**	**1,808**

Note: Based on DRC Annual Commitment Reports

Under the bill, DRC can expect up to 2,700 fewer offenders being sentenced to prison annually for a drug possession offense. The estimated annual cost savings to DRC is up to $75 million (FY 2018 average cost per inmate of $27,835 x 2,700 offenders). The annual savings is likely to be reduced to the degree that the facts surrounding certain drug possession cases still result in a felony conviction and the imposition of a prison term. The bill's effect on the sentencing of drug trafficking offenders to prison, including the amount of time to be served, is indeterminate. Table 4 below shows the average time served for felony drug offenses in CY 2016.

Table 4. Average Time Served for Drug Offenses, CY 2016		
Felony Level	**Total Offenders**	**Average Time Served (in years)**
Felony 1	315	5.65
Felony 2	612	3.49
Felony 3	940	1.84
Felony 4	840	1.14
Felony 5	2,363	0.69
All Drug Offenses	5,070	1.62

Note: Based on DRC Average Time Served Report

Involuntary treatment

The bill modifies the criteria governing applications for, granting of, and treatment under a mechanism providing for a probate court order requiring involuntary treatment for a person suffering from alcohol or other drug abuse. These modifications are likely to increase the number of petitions and subsequent hearings in the probate courts to initiate orders for involuntary treatment, while at the same time reducing the courts' revenue from filing fees

It is possible that this could increase the number of people who will receive treatment, which would increase treatment costs. The amount of any increase is uncertain, but will depend on the following factors: the number of individuals affected, whether the individual has health insurance, and whether the services rendered are reimbursable by the individual's health insurance. If an individual is enrolled in Medicaid, it is possible that Medicaid will realize an increase in treatment costs. If the individual is uninsured, it is possible that costs could increase for local alcohol, drug addiction, and mental health services boards, courts, or hospitals.

Record sealing

On and after the bill's effective date, any conviction of a violation of R.C. 2925.11 that, prior to that date, was a felony and that is a reclassified misdemeanor drug possession offense on and after that date must be considered and treated for purposes of the Conviction Record Sealing Law as if it were, and always had been, a conviction of a misdemeanor. Additionally, the bill clarifies current law to ensure that record sealing provisions apply to a person who was charged with the bill's possession offenses, had the charge held in abeyance, successfully completed the court-imposed treatment or intervention, and, as a result, had the charges dismissed.

Under the bill, an unknown number of additional persons will be eligible to apply for record sealing. Applicants for sealing of a record of dismissal are not charged a fee. Applicants for sealing of a record of conviction, unless indigent, are required to pay a $50 fee. The $50 application fee is divided between the state GRF ($30) and the county or municipality ($20). The degree to which the fee revenue may offset the additional work and related operating costs of local and state criminal justice agencies is uncertain.

Ohio Criminal Sentencing Commission

According to staff of the Ohio Criminal Sentencing Commission, the work and related annual operating costs of its expanded duties under the bill can be absorbed utilizing existing staff and appropriated resources.[4] Those expanded duties:

- Designate the Commission a criminal justice agency and specifies that it is authorized to apply for access to the computerized databases of the National Crime Information Center or the Law Enforcement Automated Data System (LEADS) in Ohio, and to certain other computerized criminal justice information databases.

[4] The Ohio Criminal Sentencing Commission is an affiliated office of the Supreme Court of Ohio that, among other things, studies Ohio's criminal laws, sentencing patterns, and juvenile offender dispositions, and recommends comprehensive plans to the General Assembly that encourage public safety, proportionality, uniformity, certainty, judicial discretion, deterrence, fairness, simplification, additional sentencing options, victims' rights, and other reasonable goals.

- Require the Commission to study the impact of sections relevant to the bill on an ongoing basis and to make biennial reports, commencing not later than December 31, 2020, to the General Assembly and the Governor regarding the results of the study described above and recommendations.

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