



OHIO LEGISLATIVE SERVICE COMMISSION

Robert Meeker

Fiscal Note & Local Impact Statement

Bill: S.B. 1 of the 132nd G.A.

Status: As Recommended by Conference Committee

Sponsor: Sen. LaRose

Local Impact Statement Procedure Required: No

Subject: Fentanyl-related drug penalties

State & Local Fiscal Highlights

- **Prison.** The bill's criminal penalty changes will increase both the number of felony offenders being sentenced to prison and the prison terms for offenders that otherwise would have been prison bound under current law. The magnitude of the additional annual incarceration costs for the Department of Rehabilitation and Correction are uncertain, as the number of affected offenders and the associated lengths of stay are unknown.
- **Drug abuse.** The bill's permitting drug abuse penalty change: (1) will likely elevate certain misdemeanors to felonies, resulting in a potential savings effect for municipal criminal justice system operating costs and related revenue loss, and a potential increase in county criminal justice system operating costs and revenues and (2) could generate minimal additional annual state court cost revenue that is distributed between the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).
- **Fentanyl.** The bill's changes to the criminal penalties for fentanyl-related compounds is not likely to increase the number of felony drug offense cases processed by county criminal justice systems and their associated costs, but will more likely change the charge(s) and elevate the associated penalty or penalties. There could also be a savings effect if offenders are sentenced to a prison term at state expense rather than being sanctioned locally at county expense.

Detailed Fiscal Analysis

The substantively notable fiscal effects of the bill will come from: (1) increasing the penalties for drug trafficking, drug possession, aggravated funding of drug trafficking, and major drug offender specification convictions when the drug involved is a fentanyl-related compound, (2) increasing, under certain circumstances, the penalty for permitting drug abuse from a first degree misdemeanor to a fifth degree felony, and (3) specifying that a prison term for an involuntary manslaughter conviction based on certain drug offense convictions runs consecutively to a prison term imposed for the base offense.

Fentanyl-related penalties

Possession

Currently, the penalties for a violation of the drug possession or use prohibition involving fentanyl or any of the compounds related to fentanyl elevate based on: (1) the amount of the drug involved ("bulk amount") and (2) the location of the offense in some circumstances (committed in the vicinity of a school or juvenile). The penalty structure starts at a fifth degree felony (presumption against prison) when the amount of the drug involved is less than 20 grams, or less than five times the maximum daily dose, and elevates up to a first degree felony with a mandatory prison term when the amount of the drug involved is equal to or more than 1,000 grams, or equal to or more than 250 times the maximum daily dose. The bill essentially restructures these "bulk amounts" (starting at less than one gram or less than ten unit doses) making it more likely that an offender will face an elevated penalty, including the presumption for a prison term or a mandatory prison term.

When the drug involved is a fentanyl-related compound mixed with marijuana and the offender does not know that the drug compound or combination includes fentanyl, the above penalty increase does not apply. When the drug involved is a fentanyl-related compound mixed with a Schedule III, IV, or V drug, the above penalty increase does not apply unless the offender knows or has reason to know that the drug compound or combination includes fentanyl.

Trafficking

Currently, the penalties for a violation of the drug trafficking prohibition involving fentanyl or any of the compounds related to fentanyl elevate based on: (1) the amount of the drug involved ("bulk amount") and (2) the location of the offense in some circumstances (committed in the vicinity of a school or juvenile). The penalty structure starts at a fourth degree felony (presumption against prison) when the amount of the drug involved is less than 20 grams, or less than five times the maximum daily dose, and elevates up to a first degree felony with a mandatory prison term when the amount of the drug involved is equal to or more than 1,000 grams, or equal to or more than 250 times the maximum daily dose. The bill essentially restructures these "bulk amounts" (starting at less than one gram or less than ten unit doses) making it more likely that an offender will face an elevated penalty, including the presumption for a prison term or a mandatory prison term.

When (1) the drug involved is a fentanyl-related compound mixed with marijuana and (2) the offender does not know that the drug compound or combination includes fentanyl, the above penalty increase does not apply.

Aggravated drug trafficking

The bill reduces the amount of fentanyl that must be involved in order for a person who provides funding to another for the purpose of selling or offering to sell the fentanyl to have committed the offense of "aggravated funding of drug trafficking" and

changes the penalty for the offense when fentanyl is the drug involved. Under the bill, a violation is a first degree felony, the offender is a major drug offender, and the court is required to impose the maximum applicable prison term for a first degree felony (11 years). Currently, a violation is a first degree felony, and the court is required to impose a prison term from the prison terms prescribed for a first degree felony (3, 4, 5, 6, 7, 8, 9, 10, or 11 years). Thus, this provision of the bill makes it more likely that an offender will face an elevated penalty, including the presumption for a mandatory prison term.

Major drug offender

The bill provides for an additional mandatory prison term of 3, 4, 5, 6, 7, or 8 years for a drug trafficking, drug possession, or aggravated funding of drug trafficking conviction when the drug involved is a fentanyl-related compound and the offender is also convicted of a major drug offender specification.

The National Forensic Laboratory Information System¹ reports that there were 1,245 fentanyl seizures in Ohio in calendar year (CY) 2014, and that there was an increase of 203% in reports of fentanyl being submitted for testing from CY 2014 to CY 2015 nationwide. This suggests that there could be a notable number of criminal cases in Ohio affected by the bill's fentanyl-related penalty changes.

The bill's elevation of the penalties for these fentanyl-related offenses will increase the Department of Rehabilitation and Correction's (DRC) annual incarceration costs. As of February 2018, DRC's annual cost to incarcerate an offender was \$26,365; the marginal cost was between \$3,000 and \$4,000. The magnitude of the additional annual incarceration costs for DRC is uncertain, as the number of affected offenders and the associated lengths of stay are unknown.

DRC's annual incarceration cost increase will be a function of two groups of offenders as follows:

1. Offenders that under current law and practice would have been sanctioned locally, with the county paying the related incarceration and community supervision costs, and under the bill will be sentenced to a term in prison; and
2. Offenders that under current law and practice would have received a prison sentence, but under the bill are likely to have a longer prison term imposed.

These increased penalty provisions appear unlikely to generate any additional costs for county criminal justice systems, as the more likely outcome is not the filing of more criminal cases, but changes in how certain drug offenders are charged and sentenced subsequent to their conviction. It is also possible that there could be a savings effect if offenders are sentenced to a prison term at state expense rather than being sanctioned locally at county expense.

¹ The National Forensic Laboratory Information System is a program of the Drug Enforcement Administration that collects drug identification results from drug cases submitted to and analyzed by federal, state, and local forensic laboratories.

Permitting drug abuse penalty

The bill enhances the penalty for the offense of permitting drug abuse in cases based upon the illegal manufacture of drugs, illegal cultivation of marijuana, or illegal assembly or possession of chemicals for the manufacture of drugs. Under current law, the offense of permitting drug abuse in these cases is a first degree misdemeanor. Under the bill, the offense of permitting drug abuse in these cases is a fifth degree felony.

Available data suggests that the number of permitting drug abuse cases statewide ranges roughly 200 to 400 per year, and that the number of such cases in any given local jurisdiction will be relatively small in the context of that jurisdiction's overall criminal caseload. For example, the Franklin County Municipal Court reported the filing of 22 and 17 permitting drug abuse-related charges for 2015 and 2014, respectively.

This penalty enhancement provision will affect local expenditures on certain criminal cases in two ways. First, it will shift criminal cases that would have been handled by municipal courts and county courts as misdemeanors under existing law to courts of common pleas where they will be handled as felonies and offenders could be subjected to more serious sanctions. As a result, municipalities may save some of their annual criminal justice system expenditures related to investigating, adjudicating, prosecuting, defending (if indigent), and sanctioning offenders who commit these offenses. Second, counties could experience an increase in their annual criminal justice system expenditures, as felonies are typically more time consuming and expensive to resolve and the local sanctioning costs can be higher as well. The table below summarizes the sentences and fines for a misdemeanor of the first degree and a felony of the fifth degree.

Sentences and Fines for Certain Criminal Offenses Generally		
Offense Level	Possible Fine	Possible Term of Incarceration
1st Degree Misdemeanor	Up to \$1,000	Not more than 180 days in jail
5th Degree Felony	Up to \$2,500	6, 7, 8, 9, 10, 11, or 12 months definite prison term

Given the number of criminal cases in any given local jurisdiction that will be affected by the penalty enhancement appears to be relatively small, any potential decrease in annual municipal criminal justice system expenditures and any potential increase in annual county criminal justice system expenditures would likely be no more than minimal.

As the penalty enhancement would shift certain cases out of county courts and municipal courts (which handle misdemeanors) and into courts of common pleas (which handle felonies), this creates a potential loss of court cost, fee, and fine revenue for municipalities. Conversely, it creates the possibility that counties may gain court cost, fee, and fine revenue. As the number of affected criminal cases appears likely to be relatively small, the amount of annual court cost, fee, and fine revenue that municipalities might lose and counties might gain would be no more than minimal.

The penalty enhancement may lead to a minimal annual gain for the state in the amount of locally collected court cost revenue that would be divided 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 is higher for a felony (\$60) than it is for a misdemeanor (\$29).

Involuntary manslaughter

The bill specifies that a prison term imposed for an involuntary manslaughter conviction based on a drug trafficking, drug possession, or funding of drug trafficking offense not involving marijuana runs consecutively to any prison term imposed for the base offense. This will increase the prison term for any offender who otherwise may have been sentenced to concurrent prison terms, and likely increases DRC's annual incarceration costs. The magnitude of the additional annual incarceration costs for DRC is uncertain, as the number of affected offenders and the associated lengths of stay are unknown.