House
Legislative
Analysis
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MARIHUANA PENALTIES

Senate Bill 234 (Substitute H-2)
First Analysis (2-1-94)

Sponsor: Senator Michael J. Bouchard
Senate Committee: Family Law, Criminal Law, and Corrections
House Committee: Judiciary

THE APPARENT PROBLEM:

The Public Health Code makes the manufacture, delivery, or possession with intent to deliver marihuana a felony punishable by up to four years in prison, a fine of up to $2,000, or both. Many find this penalty structure to be overly lenient, particularly in the case of large-quantity dealers who may bring in or grow marihuana by the truckload. In such situations, four years and $2,000 may be neither sufficient deterrent or sufficient punishment, say some. A graduated penalty structure, where potential penalties increase with the amount of marihuana involved, has been proposed, along with other amendments aimed at those who violate the laws proscribing the possession or delivery of marihuana.

In a related matter, while the Public Health Code exempts from its licensure requirements law enforcement officers engaged in their official duties, the exemption allows officers only to possess a controlled substance or to transfer a controlled substance to another exempt official. This means that "Michigan police have no statutory authority to 'sell' drugs in an undercover 'reverse buy,'" according to sources quoted in an article in Michigan Lawyers Weekly (8-24-92). Reportedly, this lack of statutory authority has led some courts to dismiss charges stemming from such undercover operations. To eliminate any doubt over the matter, it has been proposed that law enforcement officers explicitly be allowed to distribute controlled substances in the course of criminal investigations.

THE CONTENT OF THE BILL:

The bill would amend the Public Health Code to increase penalties for manufacture and delivery of marihuana and establish a graduated penalty structure based on the amount of marihuana or number of plants involved; double the possible fine for possession of marihuana or certain hallucinogens; specify that possession of 84 grams or more of marihuana is to be prima facie evidence of possession with intent to deliver; reinstate enabling language for a marihuana therapeutic research program (statutory authority for that program, established in the Department of Public Health in 1979, expired in 1987); and explicitly allow law enforcement officers to distribute controlled substances in the course of criminal investigations. The bill would take effect June 1, 1994. A more detailed explanation follows.

Manufacture, delivery penalties. Manufacture or delivery of marihuana is at present a felony punishable by up to four years in prison, a fine of up to $2,000, or both. Under the bill, manufacture or delivery of marihuana or a mixture containing marihuana would be a felony punishable under a penalty structure that authorized more severe sanctions for larger quantities. If the amount was 45 kilograms or more, or 200 plants or more, the maximum penalty would be 15 years in prison and a $10 million fine. For 5 to 45 kilograms or 20 to 200 plants, the maximum penalty would be 7 years in prison and a $500,000 fine. For less than 5 kilograms or fewer than 20 plants, the maximum penalty would be four years in prison and a $20,000 fine.

Prima facie evidence. The bill would specify that possession of 84 grams (a little under three ounces) or more of marihuana would constitute prima facie evidence of possession with intent to deliver. (Possession with intent to deliver is subject to the same penalties as manufacture and delivery.)

Possession penalties. Possession of marihuana, LSD, peyote, mescaline, psilocybin, or certain other substances is a misdemeanor punishable by up to one year in jail and/or a fine of up to $1,000. The bill would increase the maximum fine to $2,000.

Definition of plant. A marihuana "plant" for the purposes of the manufacture and delivery penalties would be a marihuana plant that had produced cotyledons or a cutting of a marihuana plant that had produced cotyledons.

Research program. The bill would reinstate, with modification, expired provisions that established a marihuana therapeutic research program within the Department of Public Health. These provisions were originally enacted in 1979 and expired November 1, 1987. Administration of the program would have to conform with applicable rules of the Drug Enforcement Agency, the Food and Drug Administration (FDA), and the National Institute on Drug Abuse (NIDA) relative to the use of marihuana for therapeutic purposes.

Participation would be limited to individuals certified by their physicians as being involved in a life-threatening or sense-threatening situation, and who either were not responding to conventional medical treatment or had suffered severe side effects to conventional treatment. To be eligible, a patient would have to be undergoing cancer chemotherapy, be confined to a wheelchair with debilitating degenerative rheumatoid arthritis, or have one of the following: glaucoma; multiple sclerosis; cerebral palsy; or a severe spinal cord injury causing paraplegia, quadriplegia, or hemiplegia. The public health department also could include other disease groups for which the department had obtained an investigational new drug permit from the FDA.

The department would contract with NIDA for receipt of marihuana, which would be distributed at cost by certified pharmacies upon the written prescription of physicians. The Michigan Board of Pharmacy would designate pharmacies for participation in the program. If adequate supplies were not forthcoming from federal sources, the department would approve the use of marihuana obtained from law enforcement agencies in the state, and test that marihuana for purity and dosage.

If required by federal authorities, the department director could appoint a patient qualification review board. The department, in conjunction with the review board, if appointed, would be required to report annually to the governor and legislature on the effectiveness of the research program.

Police exemption. The bill would specify that a law enforcement officer could distribute a controlled substance to another person in the course of that officer's official duties as a means to detect criminal activity or to conduct a criminal investigation.

FISCAL IMPLICATIONS:

There is no fiscal information at present. (1-31-94)

ARGUMENTS:

For:

Marihuana has many harmful physiological effects; marihuana smoke contains more carcinogens than cigarette smoke and marihuana smoking has been linked to cancer of the throat and lungs, short-term memory problems, and impaired motor skills, among other things. Marihuana is the drug that many future addicts start with, and the drug that may dealers use to draw people into the drug culture. And, with law enforcement efforts and stiff statutory sanctions making trafficking in cocaine and other "hard" drugs less attractive than it might be, reports are that some dealers are turning to marihuana. To fully combat the traffic in "hard" drugs that is plaguing many communities, trafficking in marihuana should be taken seriously. Current penalties for manufacturing or distributing marihuana are woefully inadequate to deter large-quantity dealers or to adequately punish them. For someone contemplating large marihuana shipments or operations, the prospect of substantial profits may seem well worth the risk of no more than four years in prison and a fine of no more than $2,000. There are no doubt some who might just consider it a cost of doing business. The bill would remedy the situation by setting stiff penalties that varied with the amount of marihuana involved. Major dealers would be adequately punished, and amateurs contemplating dealing would be effectively deterred.

Response:

The seriousness of marihuana's harmful effects on those who smoke it is a matter of some debate among researchers; the therapeutic benefits attributable to marihuana are similarly debated. Sometimes advocates on both sides of the issue have tended to rely on early studies and preliminary reports. A close review of the medical literature reveals that much is inconclusive, and little has been investigated over the past ten years or so, presumably because of lack of funding for marihuana research.

Against:

Many might argue that marihuana use leads to abuse of "hard" drugs. While proponents of the bill have testified to the numbers of cocaine addicts who started with marihuana, data appears to be lacking on the number of marihuana users who never crossed over into "hard" drugs or otherwise presented problems for society. Many might find the bill's punishments to be excessively harsh, particularly with regard to the possession of live plants, which would subject a violator to the penalties for manufacture.

The bill would define a plant as something that had produced cotyledons, but a cotyledon is basically an embryonic structure that precedes the emergence of the first true leaf. Cotyledons, sometimes called seed leaves, are present on the mature embryo; the bill's definition is more descriptive of a sprout than a seedling. A "cutting" also would be considered a plant under the bill, but this term is not defined; a sprig that had not been rooted or planted could conceivably be considered a cutting. The bill would treat botanic material with the potential to be marketable marihuana as if it were mature plants.

In addition, the bill would treat a "mixture" containing marihuana as if it were pure marihuana. There should at least be some standard for proportion of marihuana in the mixture.

For:

The act's regulation of who may distribute controlled substances should not hinder police in their efforts to quell the increased use and distribution of illicit drugs. However, it appears that in several jurisdictions, charges arising from undercover "reverse buy" situations have been dismissed because officers were not authorized to distribute controlled substances. The bill would prevent such dismissals from happening again by specifically allowing law enforcement officers to deliver drugs in the course of criminal investigations.

Against:

The bill would declare possession of 84 grams of marihuana to be prima facie evidence of possession with intent to deliver marihuana, which would be subject to the same heightened penalty structure as manufacture or delivery; the effect of the provision would be to shift the burden of proof to the defendant.

A similar provision, with a threshold level of 56 grams (about two ounces), was once in Michigan statute, but was declared unconstitutional by the court of appeals in 1974 (People v. Serra, 55 Mich App 514). The court found the provision to violate a person's right against self-incrimination, as the only effective way to rebut the inference from possession to intent would be through the defendant's own testimony. The court also held the two-ounce presumption to violate the limits that constitutionally-guaranteed due process of law places on the state's power to make the proof of one fact evidence of the ultimate fact on which guilt is predicated.

Response:

Many law enforcement experts apparently believe that when a person possesses more than two ounces or so of marihuana, he or she likely intends to sell or deliver at least some of that amount to others. To enforce the state's drug delivery laws more effectively, prosecutors should be given the legal tool of a statutory presumption of intent to deliver when the amount of marihuana possessed exceeds a threshold figure. The bill's threshold is higher than that struck down in Serra, which should help it to meet the tests of case law.

Moreover, since the court of appeals decided Serra, the Michigan Supreme Court issued its decision in People v. Gallagher (404 Mich 429 [1979]). Although that case involved a different kind of prima facie evidence (obliteration of a vehicle's identifying number), in its discussion the supreme court said that it disapproved of Serra's distinction between "state of mind" presumptions that could effectively be rebutted only by the defendant's own testimony and other presumptions that can effectively be rebutted by other types of evidence. There is reason to believe that the bill's prima facie evidence presumption would be upheld.

Against:

The bill proposes stiff criminal sanctions that would greatly increase costs to the criminal justice system, especially the Department of Corrections. Absent a comprehensive and consistent system of sentencing guidelines, the legislature should forbear from creating new crimes and criminal punishments that would worsen prison and jail overcrowding, fail to reduce crime, and drain money away from effective preventative and rehabilitative programs such as education, substance abuse services, family services, and job training.

Against:

The bill likely holds out false promise to the people in this state who rely on marihuana to ease or prevent the physical suffering of chemotherapy, neurological disorders, rheumatoid arthritis, or glaucoma. While the bill would restore language establishing a state research program under which patients could legally obtain marihuana, the likelihood is that budget constraints coupled with a reluctance on the part of the medical community to participate will preclude any meaningful implementation. When the program was first enacted in 1979, there was a good deal of interest at both the state and federal levels in the potential therapeutic uses of marihuana; even so, chemotherapy studies under the program barely got off the ground, while glaucoma studies never did. While some raw data was developed, no report was issued.

In the ensuing fifteen years, interest has waned and more effective conventional remedies--such as antiemetics for chemotherapy patients--have been developed. In addition, the most significant active ingredient in marihuana, delta-9-tetrahydrocannabinol, has been synthesized and is available to patients who need it. Further, it is this purified form that is the preferred subject of research, not the crude plant material contemplated by the bill. Funding problems, scientific developments, and declining interest evidently played a part in the original program's demise; it is hard to see how the current climate would be any more favorable.

Response:

The new administration in Washington may be more favorable to marihuana research than its predecessors. With the enabling language for a marihuana research program, there at least would be the framework to take advantage of any interest that may develop at the state and local level. Without that language, there would be little alternative for the many people in this state who find marihuana necessary to ease their suffering.

POSITIONS:

The Department of State Police supports the bill. (1-26-94)

The Prosecuting Attorneys Association of Michigan supports the bill. (1-31-94)

The Michigan Association of Chiefs of Police is reviewing the bill and has no position at this time. (1-28-94)

The Michigan Council on Crime and Delinquency opposes the bill. (1-26-94)

The Michigan State Conference of NAACP opposes the bill. (1-28-94)