



Ohio Legislative Service Commission

122nd Senate Bill Analysis

S.B. 2

122nd General Assembly
(As Reported by H. Criminal Justice)

Sen. Blessing

- Eliminates the provision that specifies that it is an affirmative defense to the offense of possessing marihuana that the offender, pursuant to the prior written recommendation of a licensed physician, possessed the marihuana solely for medicinal purposes.

CONTENT AND OPERATION

Existing law

Prohibition against obtaining, possessing, or using a controlled substance

Existing law prohibits a person from knowingly obtaining, possessing, or using a controlled substance. The name of the offense that constitutes a violation of this prohibition and the classification of each of those offenses varies, depending on the type of drug involved, the amount of the drug involved, and, in one case, whether the offender previously was convicted of the offense, as follows: (1) if the drug is a Schedule I or II controlled substance and is not marihuana, cocaine, L.S.D., heroin, or hashish, the offense is "aggravated possession of drugs," and the offense classification ranges from a felony of the fifth degree to a felony of the first degree, (2) if the drug is a Schedule III, IV, or V controlled substance, the offense is "possession of drugs," and the offense classification ranges from a misdemeanor of the third degree to a felony of the second degree, (3) if the drug is marihuana, the offense is "possession of marihuana," and the offense classification ranges from a minor misdemeanor to a felony of the second degree (but excluding a felony of the fourth degree), (4) if the drug is cocaine, L.S.D., or heroin, the offense is possession of the specified drug, and the offense classification ranges from a felony of the fifth degree to a felony of the first degree, and (5) if the drug is hashish, the offense is "possession of hashish," and the offense classification ranges from a minor misdemeanor to a felony of the second degree.

Persons who commit a first, second, or third degree felony violation of the prohibition generally are subject to mandatory fines. Persons who commit any violation of the prohibition are subject to a mandatory six month-to-five year driver's or commercial driver's license suspension and to a mandatory professional license reporting provision. (Sec. 2925.11(A), (C), and (E).)

Persons and conduct exempt from the possession offenses

The above possession offenses do not apply to: (1) any manufacturer, practitioner, pharmacist, pharmacy owner, or other person whose conduct was in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. or section 4723.56 (the cited provisions pertain to controlled substances, dentists, pharmacists, physicians, limited practitioners, veterinarians, and advanced practice nurses), (2) any person who engages in certain conduct related to anabolic steroids, or (3) any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, provided the drug is in the original container in which it was dispensed to the person (sec. 2925.11(B)).

Medicinal use affirmative defense to charge of possession of marihuana

Existing law specifies that it is an affirmative defense, as provided in section 2901.05 to a charge of possessing marihuana in violation of the above-described prohibition that the offender, *pursuant to the prior written recommendation of a licensed physician*, possessed the marihuana *solely for medicinal purposes* (sec. 2925.11(I)). (See **COMMENT 1** and **2**.)

Personal use affirmative defense to fourth degree felony charges of possession of certain drugs

Existing law specifies that it is an affirmative defense, as provided in section 2901.05 to a charge of a fourth degree felony violation of the above-described prohibition that the controlled substance that gave rise to the charge is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under

any other circumstances, that indicate that the substance was *possessed solely for personal use*. If an accused charged with a fourth degree felony violation that pertains to a Schedule III, IV, or V controlled substance, cocaine, L.S.D., or heroin establishes the above-described "personal use" affirmative defense, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation in relation to a Schedule III, IV, or V controlled substance or a fifth degree felony violation in relation to cocaine, L.S.D., or heroin. (Sec. 2925.11(E).)

Operation of the bill

The bill repeals the existing "medicinal use" affirmative defense that applies to a charge under state law of possessing marihuana. Thus, under the bill, it no longer is an affirmative defense to a charge of possessing marihuana in violation of the above-described prohibition that the offender, pursuant to the prior written recommendation of a licensed physician, possessed the marihuana solely for medicinal purposes (repeal of sec. 2925.11(I)).

COMMENT

1. Existing section 2901.05 of the Revised Code provides that:

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

2. The "medicinal use" affirmative defense to a charge of possession of marihuana applies only in relation to a charge under state law, contained in existing section 2925.11. However:

(a) Article XVIII, Sections 3 and 7 of the Ohio Constitution authorize municipal corporations to adopt ordinances to prohibit and "criminalize" certain conduct within its territory. If a municipal corporation has enacted an ordinance that prohibits the possession of marihuana, the state's "medicinal use" affirmative defense does not apply to a charge of possession of marihuana under the ordinance.

(b) Section 844 of Title 21 of the United States Code generally prohibits a person from knowingly or intentionally possessing a controlled substance unless the substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of the practitioner's professional practice. Federal law does not contain an affirmative defense to its possession offenses that is comparable to Ohio's "medicinal use" affirmative defense, and Ohio's "medicinal use" affirmative defense does not apply to a charge of possession of marihuana under 21 U.S.C. 844.

(c) Notwithstanding the language of Ohio's "medicinal use" affirmative defense that refers to a "recommendation" of a licensed physician that a person needs to possess marihuana for medicinal purposes, physicians are subject to state and federal laws and rules governing the practice of medicine and their conduct, and it is unclear whether those laws and rules permit a physician to make such a recommendation. Related to the affirmative defense: (i) existing section 3719.06 permits a licensed physician or dentist to prescribe, dispense, or administer Schedule II, III, or IV controlled substances in the course of the physician's or dentist's professional practice, but it does not mention Schedule I controlled substances, and marihuana is classified by existing section 3719.41(C) as a Schedule I controlled substance, and (ii) existing section 4731.22 requires the State Medical Board, pursuant to an Administrative Procedure Act hearing and to the extent permitted by law, to limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand and place on probation the holder of a certificate for any of a list of specified reasons, including the failure to employ acceptable scientific methods in the selection of drugs or other modalities for the treatment of disease, the sale, prescription, gift of, or administration of drugs for other than legal and legitimate therapeutic purposes, or a plea of guilty to or a judicial finding of guilt of any federal or state law regulating the possession, distribution, or use of any drug.

HISTORY

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Justice 03-11-97 p. 353

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