

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 51

(Senator Carter)

Judicial Proceedings

Criminal Procedure - Reasonable Suspicion and Probable Cause - Cannabis

This bill (1) prohibits specified types of cannabis-related evidence to be used as the sole basis to establish reasonable suspicion or probable cause for the possession of contraband or other criminal activity and (2) specifies that the prohibition does not apply to an investigation into whether a person is driving, operating, or controlling a motor vehicle or vessel while impaired by drugs (with limited exception). Evidence discovered or obtained in violation of the bill, including evidence discovered or obtained by consent, is not admissible in a trial, hearing, or other proceeding.

Fiscal Summary

State Effect: General fund revenues and expenditures decrease minimally, as discussed below.

Local Effect: Local revenues and expenditures decrease minimally, as discussed below.

Small Business Effect: None.

Analysis

Bill Summary: A finding or determination of reasonable suspicion or probable cause related to the possession of contraband or other criminal activity, with limited exception, may not be based solely on evidence of the (1) odor of raw or burnt cannabis; (2) possession (or suspicion of possession) of cannabis; or (3) the presence of money in proximity to cannabis.

When investigating whether a person is driving, operating, or controlling a motor vehicle or vessel while impaired by drugs, a law enforcement officer may use the above specified types of evidence for reasonable suspicion or probable cause. However, the odor of cannabis still may not be used as the basis for finding probable cause for a search of an area of the vehicle or vessel that is not (1) readily accessible to the driver or operator or (2) reasonably likely to contain evidence relevant to the condition of the driver or operator.

Current Law:

Controlled Dangerous Substances – Cannabis

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. Cannabis (also known as marijuana) is listed on Schedule I. 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.

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 cannabis.

Among other things, Chapter 26 of 2022, renamed marijuana as “cannabis” in statute and defined cannabis as the plant *Cannabis sativa* L. and any part of the plant, including all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol (delta-9-THC) concentration greater than 0.3% on a dry weight basis. “Cannabis” does not include hemp as defined in § 14-101 of the Agriculture Article.

Possession of Cannabis

Pursuant to Chapter 26 of 2022 and the passage of the affiliated constitutional referendum, as of January 1, 2023, statute distinguishes between a “personal use amount” and a “civil use amount” of cannabis. **Exhibit 1** shows a comparison of what is included under the definitions of each of these terms.

Exhibit 1
Comparison of “Personal Use Amount” and “Civil Use Amount” Definitions

<u>Personal Use Amount</u>	<u>Civil Use Amount</u>
<ul style="list-style-type: none">• up to 1.5 ounces of usable cannabis;• up to 12 grams of concentrated cannabis; or• cannabis products containing up to 750 milligrams of delta-9-THC; or• (as of July 1, 2023) up to two cannabis plants.	<ul style="list-style-type: none">• more than 1.5 ounces but not more than 2.5 ounces of usable cannabis;• more than 12 grams but not more than 20 grams of concentrated cannabis; or• cannabis products containing more than 750 milligrams but not more than 1,250 milligrams of delta-9-THC.

Note: Effective July 1, 2023, “personal use amount” also includes up to two cannabis plants. Cannabis plants are not included in the definition of civil use amount, thus cultivating any number of plants from January 1, 2023 to June 30, 2023 and more than two plants as of July 1, 2023, is a criminal misdemeanor with a maximum penalty of imprisonment for three years and/or a \$5,000 fine.

Source: Department of Legislative Services

Effective July 1, 2023, an individual at least age 21 may possess the personal use amount of cannabis. **Exhibit 2** shows the penalties related to cannabis possession from January 1, 2023, through June 30, 2023, and the penalties that take effect July 1, 2023.

Exhibit 2
Civil and Criminal Penalties for Possession of Cannabis
Effective January 1, 2023, through June 30, 2023, and Effective July 1, 2023

<u>Offense</u>	<u>Offense Type</u>	<u>Maximum Penalty Effective January 1 through June 30, 2023</u>	<u>Maximum Penalty Effective July 1, 2023</u>
Possession of the personal use amount	Civil	\$100 fine*	\$100 fine for individual younger than age 21*
Possession of the civil use amount	Civil	\$250 fine*	\$250 fine*
Possession of more than the civil use amount	Criminal misdemeanor	Six months imprisonment and/or \$1,000 fine	Six months imprisonment and/or \$1,000 fine

*With respect to a person younger than age 21, the court may (1) order the person to attend a drug education program approved by the Maryland Department of Health; (2) refer the person to an assessment for substance abuse disorder; and (3) refer the person to substance abuse treatment, if necessary.

Source: Department of Legislative Services

Possession with the Intent to Distribute and Adult Sharing of Cannabis: As of January 1, 2023, a person may not possess cannabis in sufficient quantity to reasonably indicate under all circumstances an intent to distribute or dispense cannabis. However, possession of the personal use amount of cannabis or the civil use amount of cannabis without other evidence of an intent to distribute or dispense does not constitute a violation of this prohibition. A police officer must charge a violation of this provision by citation, as specified. A person who violates this provision is guilty of a misdemeanor and subject to a maximum penalty of imprisonment for three years and/or a \$5,000 fine.

Effective July 1, 2023, the prohibition against distributing, dispensing, or possessing with the intent to distribute a CDS does not prohibit adult sharing of the personal use amount of cannabis. A civil or criminal penalty may not be imposed for “adult sharing” (generally defined as the transfer of cannabis between persons who are at least age 21 without

remuneration) of the personal use amount of cannabis.

Smoking Cannabis in Public: Effective January 1, 2023, the penalty for the civil offense of smoking cannabis in a public place is a fine of up to \$250 for a first finding of guilt and a fine of up to \$500 for a second or subsequent finding of guilt. In addition, the smoking of cannabis or hemp is specifically prohibited in specified locations, including an indoor area open to the public, under the Clean Indoor Air Act.

Smoking Cannabis in the Passenger Area of a Vehicle: Effective July 1, 2023, an occupant of a motor vehicle may not smoke cannabis in the passenger area of a motor vehicle on a highway. “Passenger area” means an area that is designed to seat the driver and any passenger while the motor vehicle is in operation or is readily accessible to the driver or passenger while in their seating positions. The passenger area of a vehicle does not include (1) a locked glove compartment; (2) the trunk of a motor vehicle; or (3) if the motor vehicle does not have a trunk, the area behind the rearmost upright seat or an area that is not normally occupied by the driver or a passenger.

A violation of this prohibition is a civil offense subject to a maximum fine of \$25. Additionally, a driver of a motor vehicle may not smoke or consume cannabis in the passenger area of a motor vehicle on a highway. A violation of this prohibition is a misdemeanor subject to a maximum fine of \$500. The prepayment penalty established by the District Court is \$530, and the Motor Vehicle Administration (MVA) must assess one point against a violator’s license. If, however, the violation contributes to an accident, the prepayment penalty is \$570, and MVA must assess three points against the violator’s license.

Debilitating Medical Conditions and Medical Necessity: In a prosecution for the use or possession of cannabis, it is an affirmative defense that the defendant used or possessed the cannabis 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) cannabis is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. Likewise, in a prosecution for the possession of cannabis, it is an affirmative defense that the defendant possessed cannabis because the cannabis 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 cannabis in a public place or was assisting the person for whom the defendant is a caregiver in using cannabis in a public place or was in possession of more than one ounce of cannabis.

Finally, medical necessity may be used as a mitigating factor in a prosecution for the possession or use of cannabis. A defendant may introduce, and the court must consider as a mitigating factor, any evidence of medical necessity. If a court finds that the use or possession of cannabis was due to medical necessity, the court *must dismiss* the charge.

Driving Under the Influence of Alcohol or While Impaired by Alcohol, Drugs, or Controlled Dangerous Substances

Under the Transportation Article, a person may not drive or attempt to drive any vehicle while (1) under the influence of alcohol or under the influence of alcohol *per se*; (2) impaired by alcohol; (3) impaired by a drug, any combination of drugs, or any combination of drugs and alcohol; or (4) impaired by a CDS. Additionally, a person may not commit any of these offenses while transporting a minor.

A person convicted of one of the above offenses is subject to higher maximum penalties when that person has specified prior convictions. Chapter 20 of 2019 increased maximum penalties for subsequent drunk and drugged driving violations. **Exhibit 3** displays the maximum penalties for alcohol and drug-related driving offenses.

Exhibit 3

Driving Under the Influence of Alcohol, Under the Influence *Per Se*, or While Impaired by a CDS

First Offense	1 year imprisonment and/or fine of \$1,000
Second Offense	2 years imprisonment and/or fine of \$2,000
Third Offense	5 years imprisonment and/or fine of \$5,000
Fourth or Subsequent Offense	10 years imprisonment and/or fine of \$10,000

Driving Under the Influence of Alcohol, Under the Influence *Per Se*, or While Impaired by a CDS While Transporting a Minor

First Offense	2 years imprisonment and/or fine of \$2,000
Second Offense	3 years imprisonment and/or fine of \$3,000
Third Offense	5 years imprisonment and/or fine of \$5,000
Fourth or Subsequent Offense	10 years imprisonment and/or fine of \$10,000

Driving While Impaired by Alcohol or While Impaired by a Drug, a Combination of Drugs, or a Combination of One or More Drugs and Alcohol

First Offense	2 months imprisonment and/or fine of \$500
Second Offense	1 year imprisonment and/or fine of \$500
Third Offense	5 years imprisonment and/or fine of \$5,000
Fourth or Subsequent Offense	10 years imprisonment and/or fine of \$10,000

Driving While Impaired by Alcohol or While Impaired by a Drug, a Combination of Drugs, or a Combination of One or More Drugs and Alcohol While Transporting a Minor

First Offense	1 year imprisonment and/or fine of \$1,000
Second Offense	2 year imprisonment and/or fine of \$2,000
Third Offense	5 years imprisonment and/or fine of \$5,000
Fourth or Subsequent Offense	10 years imprisonment and/or fine of \$10,000

CDS: controlled dangerous substance

Notes: All listed offenses are misdemeanors. Additionally, for the offense of driving under the influence of alcohol, under the influence *per se*, or while impaired by a CDS, a repeat conviction or convictions within five years requires a mandatory minimum penalty of imprisonment from 5 to 10 days.

Source: Department of Legislative Services

Probable Cause to Arrest – Odor of Marijuana

The Fourth Amendment to the U.S. Constitution protects individuals from unreasonable searches and seizures by the government. Generally, U.S. Supreme Court decisions have established the principle that a warrant issued by a “neutral and detached magistrate” must be obtained before a government authority may breach the individual privacy that the Fourth Amendment secures. However, the U.S. Supreme Court recognizes a number of exceptions to the warrant requirement including for arrests where probable cause exists to believe that a crime has been committed by the person being seized.

Additionally, in *U.S. v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004) the court stated that while the odor of marijuana provides probable cause to believe that marijuana is present, the presence of marijuana does not of itself authorize the police to arrest any person in the vicinity. Additional factors must be present to localize the presence of marijuana such that its placement will justify the arrest.

The Maryland Court of Appeals (now the Supreme Court of Maryland) considered whether the odor of marijuana alone provided probable cause to arrest despite the decriminalization of possession of less than 10 grams of marijuana, and subsequently held that “the mere odor of marijuana alone is not indicative of the amount of marijuana that may be in a person’s possession and does not provide a law enforcement officer with the requisite probable cause to arrest a person and perform a warrantless search of that person incident to the arrest.” *Lewis v. State*, 470 Md. 1 (2020). However, the Court of Appeals held that “the odor of marijuana provides reasonable suspicion of criminal activity sufficient to conduct a brief investigatory detention.” *In re D.D.*, 479 Md. 206 (2022).

State Expenditures: The bill may result in a decrease in arrests and charges where probable cause would previously have been based on the odor of cannabis, the possession/suspicion of possession of cannabis, or the presence of money in proximity to cannabis. Although such an impact may result in decreased workloads directly attributable to those cases for affected entities (*e.g.*, State law enforcement agencies – including the Department of State Police, Maryland Transit Administration Police, and the Maryland Transportation Authority – the Judiciary, the Office of the Public Defender, etc.), it is generally assumed that resources are simply redirected to meet other responsibilities and there is no material impact on associated State expenditures.

General fund incarceration expenditures decrease minimally to the extent that the bill results in fewer people being committed to State correctional facilities and reduced payments to counties for reimbursement of inmate costs.

Persons serving a sentence longer than 18 months are incarcerated in State correctional facilities. Currently, the average total cost per inmate, including overhead, is estimated at

\$4,970 per month. Persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to local detention facilities. For persons sentenced to a term of between 12 and 18 months, the sentencing judge has the discretion to order that the sentence be served at a local facility or a State correctional facility. The State provides assistance to the counties for locally sentenced inmates and for (1) inmates who are sentenced to and awaiting transfer to the State correctional system; (2) sentenced inmates confined in a local detention center between 12 and 18 months; and (3) inmates who have been sentenced to the custody of the State but are confined in or who receive reentry or other prerelease programming and services from a local facility.

The State does not pay for pretrial detention time in a local correctional facility. Persons sentenced in Baltimore City are generally incarcerated in State correctional facilities. The Baltimore Pretrial Complex, a State-operated facility, is used primarily for pretrial detentions.

State Revenues: General fund revenues for the Judiciary decrease minimally to the extent that the bill results in fewer fine penalties being imposed (and collected) for cases heard in District Court.

Local Expenditures: Incarceration expenditures decrease minimally to the extent that the bill results in fewer people being committed to local correctional facilities. 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 \$90 to \$300 per inmate in recent years.

Similar to the impact described above for State entities, it is generally assumed that the bill does not materially impact other local expenditures, as resources that would have been devoted to cases affected by the bill are simply reallocated elsewhere.

Local Revenues: Revenues decrease minimally to the extent that the bill results in fewer fine penalties being imposed (and collected) for cases heard in the circuit courts.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Kent, Montgomery, and Worcester counties; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Department of Public Safety and Correctional Services;

Department of State Police; Maryland Department of Transportation; Department of Legislative Services

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