



Dennis M. Papp

Bill Analysis
Legislative Service Commission

Sub. H.B. 202

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(As Passed by the House)

Reps. Winkler, Allen, Brading, Ford, Haines, Mottley, O'Brien, Padgett, Pringle, Sulzer, Terwilleger, Tiberi, Van Vyven, Young, Ferderber, Callender, DePiero, Perry, Clancy, Harris, Barnes, Perz, Myers, Barrett, Evans, Thomas, Austria, Schuler, Opfer, Salerno, Roman

BILL SUMMARY

- Creates the offense of "tampering with drugs," which prohibits a person from knowingly doing either of the following: (1) adulterating or altering any dangerous drug or substituting any dangerous drug with another substance or (2) adulterating or altering any package or receptacle containing any dangerous drug or substituting any package or receptacle containing a dangerous drug with another package or receptacle.
- Makes ineligible for treatment in lieu of conviction an offender charged with tampering with drugs if the alleged violation resulted in physical harm to any person or if the person previously has been treated for drug abuse.
- Removes from the existing offense of tampering with records the requirement that the person have knowledge that the person does not have privilege to perform the prohibited acts.
- Increases the penalty for the existing offense of tampering with records when the violation involves any record required to be kept by the Controlled Substances Laws or the Pharmacy and Dangerous Drug Laws.
- Includes within the definition of "drug abuse offense" the new offense of tampering with drugs and the existing offense of tampering with records when the violation involves any record required to be kept by the Controlled Substances Laws or the Pharmacy and Dangerous Drug Laws.

CONTENT AND OPERATION

Tampering with drugs

Prohibition and penalty

The bill creates a new offense called "tampering with drugs." Under the offense, a person is prohibited from knowingly doing either of the following (sec. 2925.24(A) and (B)):

(1) "Adulterating" or altering any "dangerous drug" or substituting any dangerous drug with another substance (see "Definitions," below, for the meanings of the terms in quotes);

(2) Adulterating or altering any package or receptacle containing any dangerous drug or substituting any package or receptacle containing a dangerous drug with another package or receptacle.

A person who violates either prohibition is guilty of "tampering with drugs," a felony of the third degree. If the violation results in physical harm to any person, tampering with drugs is a felony of the second degree. (Sec. 2925.24(E).) (See **COMMENT.**)

Exception

The preceding prohibitions do not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, nurses, and other persons, when their conduct is in accordance with the Controlled Substances Laws, the Dentists and Dental Hygienists Laws, the Nursing Laws, the Pharmacy and Dangerous Drug Laws, the Physicians and Limited Practitioners Laws, and the Veterinarians Laws (sec. 2925.24(C)).

Affirmative defense

Under the bill, it is an affirmative defense to a charge of tampering with drugs that alleges that a person changed or altered a dangerous drug that the dangerous drug the person allegedly changed or altered was lawfully prescribed for the person's personal use and that the person did not sell or transfer or intend to sell or transfer the dangerous drug to another person (sec. 2925.24(D)).

Treatment in lieu of conviction

Operation of the bill

Under the bill, in order for an offender charged with tampering with drugs to be eligible for treatment in lieu of conviction, the court must find, in addition to the other findings required by existing law (see below), that the alleged violation did not result in physical harm to any person and that the offender previously has not been treated for drug abuse. Put another way, an offender charged with tampering with drugs is not eligible for treatment in lieu of conviction if the alleged violation resulted in physical harm to any person or if the offender previously has been treated for drug abuse. (Sec. 2951.041(B)(1)(f).)

Existing law

Under existing law, if a court has reason to believe that an offender charged with a felony or misdemeanor is a drug dependent person or is in danger of becoming a drug dependent person, the court must accept, prior to the entry of a plea, that offender's request for treatment in lieu of conviction. If the offender requests treatment in lieu of conviction, the court must stay all criminal proceedings pending the outcome of the hearing to determine whether the offender is a person eligible for treatment in lieu of conviction. At the conclusion of the hearing, the court must enter its findings and accept the offender's plea.

An offender who requests treatment in lieu of conviction is eligible for that treatment if the court finds that:

(1) The offender's drug dependence or danger of drug dependence was a factor leading to the criminal activity with which the offender is charged, and rehabilitation through treatment would substantially reduce the likelihood of additional criminal activity.

(2) The offender has been accepted into a program licensed by the Department of Alcohol and Drug Addiction Services, specified programs certified by the Department, a public or private hospital, the veterans administration or other agency of the federal government, private care or treatment rendered by a physician or a psychologist licensed in the state, or other appropriate drug treatment facility or program.

(3) If the offender is convicted of a misdemeanor, the offender would be eligible for probation, except that a finding of any of specified criteria cause the offender to be conclusively ineligible for treatment in lieu of conviction.

(4) If the offender is convicted of a felony, the offender would be eligible for a community control sanction.

(5) The offender is not a repeat offender or dangerous offender;

(6) The offender is not charged with corrupting another with drugs (sec. 2925.02), a trafficking offense (sec. 2925.03), illegal manufacture of drugs or cultivation of marijuana (sec. 2925.04), or a drug possession offense (sec. 2925.11) that is not a minor drug possession offense.

Upon a finding that the offender is eligible for treatment in lieu of conviction and if the offender enters a plea of guilty or no contest, the court may stay all criminal proceedings and order the offender to a period of rehabilitation. If a plea of not guilty is entered, a trial must precede further consideration of the offender's request for treatment in lieu of conviction.

An eligible offender must be placed under the control and supervision of the county probation department or the Adult Parole Authority as if on probation or under a community control sanction. The court must order a specific period of rehabilitation and may extend the period of rehabilitation, but the total period must not exceed three years. The period of rehabilitation must be conditioned upon the offender's voluntary entrance into an appropriate drug treatment facility or program, faithful submission to prescribed treatment, and any other conditions that the court orders.

If the offender successfully completes treatment and is rehabilitated, the court may dismiss the charges pending against the offender. If the offender successfully completes treatment and is rehabilitated or has obtained maximum benefits from treatment and also has completed the period of rehabilitation and other conditions ordered by the court, the court must dismiss the charges pending against the offender. If the offender fails treatment, fails to submit to or follow the prescribed treatment, or becomes a discipline problem, if the offender does not satisfactorily complete the period of rehabilitation or the other conditions ordered by the court, or if the offender violates the conditions of the period of rehabilitation, the offender must be arrested and removed from the facility or program. If the court determines at a hearing that the offender failed treatment, failed to submit to or follow the prescribed treatment, did not satisfactorily complete the period of rehabilitation or any other condition ordered by the court, or violated any condition of the period of rehabilitation, it immediately must enter an adjudication of guilt and impose upon the offender a term of imprisonment.

If, on the motion of the offender, the court finds that the offender has successfully completed the period of rehabilitation, is rehabilitated, is no longer

drug dependent or in danger of becoming drug dependent, and has completed all other conditions, the court must dismiss the proceeding against the offender. Successful completion of a period of rehabilitation must be without adjudication of guilt and is not a criminal conviction for purposes of disqualifications or disabilities imposed by law and upon conviction of a crime. The court may order the sealing of the offender's records in the manner provided in the Sealing of Criminal Records Law. (Sec. 2951.041.)

Tampering with records

Existing law

Existing law prohibits a person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, from doing any of the following (sec. 2913.42(A)):

- (1) Falsifying, destroying, removing, concealing, altering, defacing, or mutilating any writing, computer software, data, or record;
- (2) Uttering any writing or record, knowing it to have been tampered with as described in paragraph (1).

A person who violates this prohibition is guilty of "tampering with records." Tampering with records is one of the following (sec. 2913.42(B)):

- (1) A misdemeanor of the first degree if (2), (3), or (4), below, do not apply.
- (2) If the writing or record is a will unrevoked at the time of the offense and if (4), below, does not apply, tampering with records is a felony of the fifth degree.
- (3) Except when (4), below, applies, if the offense involves data or computer software, tampering with records is whichever of the following that is applicable: (a) except as provided in clause (b), (c), or (d), a misdemeanor of the first degree, (b) if the value of the data or computer software or the loss to the victim is \$500 or more and is less than \$5,000, a felony of the fifth degree, (c) if the value of the data or computer software or the loss to the victim is \$5,000 or more and is less than \$100,000, a felony of the fourth degree, or (d) if the value of the data or computer software or the loss to the victim is \$100,000 or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is \$5,000 or more, a felony of the third degree.

(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, tampering with records is a felony of the third degree.

Operation of the bill

Revised mental state. The bill removes the "knowledge" component from the element of the offense that requires that the offender know the person has no privilege to perform the prohibited acts. Thus, under the bill, the revised existing prohibitions prohibit a person, *without* privilege to do so and with purpose to defraud or knowing that the person is facilitating a fraud, from doing any of the following (sec. 2913.42(A)):

(1) Falsifying, destroying, removing, concealing, altering, defacing, or mutilating any writing, computer software, data, or record;

(2) Uttering any writing or record, knowing it to have been tampered with as described in paragraph (1).

Revised penalties when the offense involves a record required to be kept by certain drug related laws. The bill revises the penalties for the offense of tampering with records when the offense involves a record that is required to be kept by the Controlled Substances Laws or Pharmacy and Dangerous Drug Laws. Under the bill, the penalties for tampering with a record that is required to be kept by those Laws are as follows (sec. 2913.42(B)):

(1) Except as provided in paragraphs (2) and (3), a felony of the fifth degree;

(2) Except as provided in paragraph (3), if the offense involves data or computer software and if the data involves records required to be kept by those Laws, tampering with records is whichever is applicable: (a) except as provided in clause (b) or (c), a felony of the fifth degree, (b) if the value of the data involved in the offense or the loss to the victim is \$5,000 or more and is less than \$100,000, a felony of the fourth degree, or (c) if the value of the data involved in the offense or the loss to the victim is \$100,000 or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is \$5,000 or more, a felony of the third degree.

(3) If the writing, data, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

Tampering with drugs and tampering with records (in certain circumstances) made "drug abuse offenses"

The bill adds to the definition of the phrase "drug abuse offense" (see "Definitions," below) the offense of tampering with records when the violation involves any record required to be kept by the Controlled Substances Laws or the Pharmacy and Dangerous Drug Laws and the new offense of tampering with drugs that it enacts (sec. 2925.01(G)).

The phrase "drug abuse offense" is used in 32 Revised Code sections, and the bill subjects a person suspected or convicted of tampering with records or tampering with drugs in the manner specified above to the application of those sections. The effects of revising the definition of "drug abuse offense" include the following:

(1) A previous conviction of tampering with records or tampering with drugs in the specified manner enhances the penalty of a person who pleads guilty to or is convicted of certain drug offenses (see e.g., sec. 2925.11--not in the bill).

(2) A person who pleads guilty to or is convicted of tampering with records or tampering with drugs in the specified manner may be subject to the criminal and civil forfeiture provisions in the Drug Offense Forfeiture Laws (secs. 2925.42 and 2925.43--not in the bill).

(3) When there is reasonable ground to believe that tampering with records or tampering with drugs in the specified manner has been committed, specified peace officers may arrest and detain until a warrant can be obtained any person whom the peace officer has reasonable cause to believe is guilty of the violation (sec. 2935.03--not in the bill).

(4) In some circumstances, a person convicted of tampering with records or tampering with drugs in the described circumstances would be considered a repeat offender who is ineligible for a pre-trial diversion program (sec. 2935.36--not in the bill). (This effect is somewhat duplicative, since tampering with records is a theft offense as well; for a person convicted of tampering with records, the person would be subject to this possibility without the revised definition.)

Definitions

Adulterate

Under the bill "adulterate" means to cause a drug to be adulterated as described in section 3715.63 (sec. 2925.01(HH)). Under section 3715.63 (not in the bill), a drug is adulterated, if any of the following apply:

(1) It consists, in whole or in part, of any filthy, putrid, or decomposed substance.

(2) It has been produced, processed, prepared, packed, or held under unsanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health.

(3) Its container is composed, in whole or in part, of any poisonous or deleterious substance that may render the contents injurious to health.

(4) It bears or contains, for purposes of coloring only, a coal-tar color other than one from a batch certified under authority of the Federal Food, Drug, and Cosmetic Act.

(5) It purports to be or is represented as a drug the name of which is recognized in the United States Pharmacopoeia and National Formulary, or any supplement to them, and its strength differs from or its quality or purity falls below the standard set forth in those compendiums.

Dangerous drug

"Dangerous drug" means any of the following (sec. 2925.01(C) by reference to sec. 4729.01(F)--not in the bill):

(1) Any drug to which either of the following applies:

(a) Under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, the drug is required to bear a label containing the legend "Caution: Federal law prohibits dispensing without prescription" or "Caution: Federal law restricts this drug to use by or on the order of a licensed veterinarian" or any similar restrictive statement, or the drug may be dispensed only upon a prescription.

(b) Under the Controlled Substances Laws and the Pure Food and Drug Laws, the drug may be dispensed only upon a prescription.

(2) Any drug that contains a schedule V controlled substance and that is exempt from the Controlled Substances Laws or to which those laws do not apply;

(3) Any drug intended for administration by injection into the human body other than through a natural orifice of the human body.

Drug abuse offense

Under existing law, expanded by the bill as described above, "drug abuse offense" means any of the following (sec. 2925.01(G)):

(1) Theft of drugs (sec. 2913.02(A) in specified circumstances), corrupting another with drugs (sec. 2925.02), trafficking offenses (sec. 2925.03), illegal manufacture of drugs or cultivation of marijuana (sec. 2925.04), funding of drug or marihuana trafficking (sec. 2925.05), illegal administration or distribution of anabolic steroids (sec. 2925.06), drug possession offenses (sec. 2925.11), possessing drug abuse instruments (sec. 2925.12), permitting drug abuse (sec. 2925.13), deception to obtain a dangerous drug (sec. 2925.22), illegal processing of drug documents (sec. 2925.23), abusing harmful intoxicants (sec. 2925.31), trafficking in harmful intoxicants (sec. 2925.32), improperly dispensing or distributing nitrous oxide (sec. 2925.32), illegal dispensing of drug samples (sec. 2925.36), or possession of or trafficking in counterfeit controlled substances (sec. 2925.37);

(2) A violation of an existing or former law of Ohio or any other state or of the United States that is substantially equivalent to any offense listed in paragraph (1), above;

(3) An offense under an existing or former law of Ohio or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, shipping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy to commit, attempt to commit, or complicity in committing or attempting to commit any offense described in paragraphs (1), (2), and (3), above.

COMMENT

An existing provision in the Pure Food and Drug Law, in relevant part, prohibits the following acts and the causing of them (sec. 3715.52 -- not in the bill):

(1) The manufacture, sale, or delivery, holding or offering for sale of any food, *drug*, device, or cosmetic *that is adulterated or misbranded*;

(2) The *adulteration or misbranding* of any food, *drug*, device, or cosmetic;

(3) The receipt in commerce of any food, *drug*, device, or cosmetic that is *adulterated or misbranded*, and the delivery or proffered delivery thereof for pay or otherwise;

(4) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, *drug*, device, or cosmetic, if the act is done while the article is held for sale and results in the article being misbranded.

Existing section 3715.63, not in the bill but summarized above under "Definitions" and used in the bill's new offense of tampering with drugs, specifies when a drug is adulterated within the meaning of section 3715.52. Existing section 3715.64, not in the bill, specifies when a drug is misbranded within the meaning or section 3715.52. One of the manners in which a drug is considered to be misbranded is when the drug's labeling is false or misleading in any particular.

Under existing section 3715.99(E), not in the bill, a violation of section 3715.52 is a misdemeanor of the fourth degree on a first offense and, on each subsequent offense, is a misdemeanor of the second degree.

HISTORY

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Introduced	02-23-99	p. 225
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