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Bill Analysis
Legislative Service Commission

Sub. H.B. 202*
123rd General Assembly
(As Reported by S. Judiciary)

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.
- Includes within the definition of "drug abuse offense" the new offense of tampering with drugs.
- Contingent on Am. Sub. H.B. 137 of the 123rd General Assembly becoming law, replaces a provision of that act that provides for an increased penalty for the offense of menacing by stalking if the offender previously had been found to be a mentally ill person subject to hospitalization by court order under the criteria set forth in R.C. 5122.01(B)(1) or (2) or the offender previously had been voluntarily admitted under R.C. 5122.02 and, as the basis for or subsequent to that voluntary admission, the offender was determined to represent a risk to

** This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

self or others to the extent described in R.C. 5122.01(B)(1) or (2)--under the bill, the factor provides for the increased penalty if, prior to committing the menacing by stalking offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.

- Expands existing provisions that permit a court to order a mental evaluation of a person charged with the offense of violating a protection order, in certain circumstances, so that they also will apply in any case in which a person is charged with the offense of menacing by stalking.

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 altered a dangerous drug that the dangerous drug the person allegedly 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 drugs made "drug abuse offense"

The bill adds to the definition of the phrase "drug abuse offense" (see "Definitions," below) 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 drugs 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 drugs 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 drugs 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 drugs would be considered a repeat offender who is ineligible for a pre-trial diversion program (sec. 2935.36--not in the bill).

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, "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 marijuana 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.

The bill expands the definition, as described above.

Menacing by stalking

Penalty escalation

Existing law. Am. Sub. H.B. 137 of the 123rd General Assembly, concurred in on June 24, 1999, but not yet signed by the Governor, in relevant part, increased the penalty for the offense of menacing by stalking from a misdemeanor of the first degree to a felony of the fourth degree if any of nine factors apply. One of the nine factors is that the offender previously had been found to be a mentally ill person subject to hospitalization by court order under the criteria set forth in R.C. 5122.01(B)(1) or (2), or the offender previously had been voluntarily admitted under R.C. 5122.02 and, as the basis for or subsequent to that voluntary admission, the offender was determined to represent a risk to self or others to the extent described in R.C. 5122.01(B)(1) or (2). R.C. 5122.01(B)(1) states that the person represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm; R.C. 5122.01(B)(2) states that the person represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness. (R.C. 2903.211(B)(2)(i).)

Operation of the bill. The bill replaces the escalating factor described in the preceding paragraph with a new factor that states that, prior to committing the menacing by stalking offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness (R.C. 2903.211(B)(2)(i)). If an offender is convicted of menacing by stalking and this factor applies, the offender is guilty of a felony of the fourth degree. This change is a contingent change, and will apply only if Am. Sub. H.B. 137 of the 123rd General Assembly becomes law; if that act does become law, the change will take effect on the earliest date permitted by law or on the effective date of Am. Sub. H.B. 137, whichever is later (Sections 3 to 6).

Mental health evaluations

Existing law. Existing law provides that, if a person is charged with the offense of violating a protection order or with a violation of a municipal ordinance that is substantially similar to that offense, the court may order an evaluation of the mental condition of the person if the court determines either of two specified criteria. Procedures are provided relative to an evaluation so ordered. If the court

decides to order such an evaluation, it generally must make its decision to do so, and issue the order, before it sets bail for the person. (R.C. 2919.271 and 2937.23.)

Operation of the bill. The bill expands the existing provisions described in the preceding paragraph so that they also will apply in any case in which a person is charged with the offense of menacing by stalking. A court may issue an evaluation order under the bill relative to a person so charged without having to determine any additional criteria. The procedures contained in existing law will apply to an evaluation so ordered under the bill. (R.C. 2919.271 and 2937.23.)

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

ACTION	DATE	JOURNAL ENTRY
Introduced	02-23-99	p. 225
Reported, H. Criminal Justice	05-26-99	pp. 724-725
Passed House (97-1)	06-02-99	pp. 746-747
Reported, S. Judiciary	---	---

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