Michael J. O'Neill *Legislative Service Commission*

H.B. 327

124th General Assembly
(As Introduced)

Reps. Latta, Goodman, Seitz, Reinhard, Lendrum, Willamowski, Schmidt, Aslanides, Fedor, Carano

BILL SUMMARY

? Eliminates the major drug offender penalty for the offense of illegal dispensing of drug samples.

? Establishes a penalty for the existing prohibition contained in the offense of illegal processing of drug documents that prohibits knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws.

? Makes an offender ineligible for intervention in lieu of conviction if the offender is charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marihuana, or illegal administration or distribution of anabolic steroids and the offense is a felony of the fourth or fifth degree or a misdemeanor.

? Expands one of the factors used in sentencing an offender for a felony of the fourth or fifth degree to require the court also to consider whether the offender at the time of the offense was serving a prison term.

? Limits the circumstances in which the court must impose the shortest prison term authorized for an offense to exclude instances when the offender was serving a prison term at the time of the offense.

? Expands the definition of "repeat violent offender" to also include a person who at the time of the involved offense was serving a prison term for a specified offense.

? Expands the standard for imposing consecutive sentences for multiple offenses to permit the imposition of consecutive sentences when one or

more of the multiple offenses was committed at a time other than when the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense, and expands the standard to permit consecutive sentences to be imposed when there are multiple courses of conduct.

? Clarifies when an offender may file a motion for judicial release if the offender is serving a stated prison term of exactly ten years.

? Transfers to the Department of Rehabilitation and Correction the duty to determine if an offender is eligible for placement in a program of shock incarceration or is eligible for placement in an intensive program prison.

? Extends from not later than July 1, 2001, to not later than July 1, 2002, the date the State Criminal Sentencing Commission must recommend to the General Assembly any necessary changes to the forfeiture statutes in the Criminal Code and the Motor Vehicles Law.

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CONTENT AND OPERATION

Illegal dispensing of drug samples

Operation of the bill

The bill repeals the existing major drug offender penalties for the offense of "illegal dispensing of drug samples" (R.C. 2925.36(E), 2929.14(D)(3)(a), and 3719.21).

Under those provisions that the bill repeals, notwithstanding the prison term otherwise authorized or required for illegal dispensing of drug samples, if the violation involves the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and if the court imposing sentence upon the offender finds that the offender as a result of the violation is a *major drug offender* and is guilty of a major drug offender specification, the court, in lieu of the prison term otherwise authorized or required, must impose upon the offender the mandatory ten-year major drug offender prison term.

Under those mandatory drug offender provisions that are repealed by the bill, the court also may impose an additional prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years, if the court, with respect to the mandatory major drug offender prison term imposed and, if applicable, an additional prison term imposed as the result of a firearms specification, drive by shooting specification, body armor specification, and gang specification, makes both of the following findings:

(1) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable sentencing factors indicating a greater likelihood of recidivism outweigh the applicable sentencing factors indicating a lesser likelihood of recidivism.

(2) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the sentencing factors indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable sentencing factors indicating that the offender's conduct is less serious than conduct normally constituting the offense. (R.C. 2925.36(E) and 2929.14(D)(3).)

Existing law

Existing law prohibits a person from knowingly furnishing another a sample drug.[1] A person who violates this prohibition is guilty of illegal dispensing of drug samples. (R.C. 2925.36(A) and (C)(1).)

If the drug involved in the offense is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, the offense is either (1) a felony of the fifth degree, subject to the major drug offender penalty provisions described above, or (2) if the offense was committed in the vicinity of a school or a juvenile, a felony of the fourth degree, subject to the major drug offender penalty provisions described above. The Felony Sentencing Law imposes no preference for or against a prison term on the offender. If the drug involved in the offense is a dangerous drug or a compound, mixture, preparation, or substance included in schedule III, IV, or V, or is marihuana, the offense is either: (1) a misdemeanor of the second degree or (2) if the offense was committed in the vicinity of a school or a juvenile, a misdemeanor of the first degree. In addition to any prison term for the offense and in addition to any other sanction imposed for the offense, the sentencing court must suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit and comply with specified professional licensing entity notification provisions. (R.C. 2925.36(C)(2) and (3) and (D).)

Illegal processing of drug documents

Existing law

A person commits the existing offense of illegal processing of drug documents by doing any of the following (R.C. 2925.23(A) to (D)):[2]

(1) Knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws;

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[1] *This prohibition does not apply to manufacturers, wholesalers, pharmacists, owners of pharmacies, licensed health professionals authorized to prescribe drugs, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4725., 4729., 4731., and 4741. of the Revised Code (R.C. 2925.36(B)).*

[2] *These prohibitions do not apply to licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4725., 4729., 4731., and 4741. of the Revised Code. (R.C. 2925.23(E).)*

(2) Intentionally making, uttering, or selling, or knowingly possessing any of the following that is a false or forged: (a) a prescription, (b) an uncompleted preprinted prescription blank used for writing a prescription, (c) an official written order, (d) a license for a terminal distributor of dangerous drugs, or (e) a registration certificate for a wholesale distributor of dangerous drugs;

(3) By committing the offense of theft, acquiring any of the following: (a) a prescription, (b) an uncompleted preprinted prescription blank used for writing a prescription, (c) an official written order, (d) a blank official written order, (e) a license or blank license for a terminal distributor of dangerous drugs, or (f) a registration certificate or blank registration certificate for a wholesale distributor of dangerous drugs;

(4) Knowingly making or affixing any false or forged label to a package or receptacle containing any dangerous drugs.

Existing law does not contain a penalty for the prohibition described above in paragraph (1). If the offender violates a prohibition described above in paragraph (2)(b), (d), or (e) or paragraph (3)(b), (d), (e), or (f), illegal processing of drug documents is a felony of the fifth degree. If the offender violates a prohibition described above in paragraph (2)(a) or (c), paragraph (3)(a) or (c), or paragraph (4), illegal processing of drug documents is either of the following: if the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, a felony of the fourth degree, or, if the drug involved is a dangerous drug or a compound, mixture, preparation, or substance included in schedule III, IV, or V or is marihuana, a felony of the fifth degree. The Felony Sentencing Laws imposes no preference for or against a prison term on the offender. (R.C. 2925.23(F).)

Operation of the bill

The bill establishes a penalty for the existing prohibition against knowingly making a false statement in any prescription, order, report, or record required by the Controlled Substances Laws or the Pharmacy/Dangerous Drugs Laws (the prohibition in paragraph (1) above). The penalty for a violation of that prohibition is the same as the penalty for the existing prohibitions described above in paragraphs (2)(a) and (c), (3)(a) and (c), and (4). It is determined as follows: if the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, illegal processing of drug documents is a felony of the fourth degree, or, if the drug involved is a dangerous drug or a compound, mixture, preparation, or substance included in schedule III, IV, or V or is marihuana, illegal processing of drug documents is a felony of the fifth degree. The Felony Sentencing Laws imposes no preference for or against a prison term on the offender. (R.C. 2923.23(F).)

Intervention in lieu of conviction

Operation of the bill

The bill changes the eligibility requirements for intervention in lieu of conviction. Under the bill, an offender is ineligible for intervention in lieu of conviction if the offender is charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marihuana, or illegal administration or distribution of anabolic steroids, regardless of the degree of the offense (under existing law, an offender charged with one of those offenses is ineligible only if the charged offense is a felony of the first, second, or third degree. An offender continues to be ineligible for intervention in lieu of conviction if the offender is charged with a drug possession offense that is a felony of the first, second, or third degree. As under existing law, the court must make an affirmative finding that the offender does not have a disqualifying charge of this nature. (R.C. 2951.041(B)(3).)

Existing law

Request for intervention. Under existing law, if an offender is charged with a criminal offense and the court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior, the court may accept, prior to the entry of a guilty plea, the offender's request for intervention in lieu of conviction. If the court considers an offender's request, it must conduct a hearing to determine whether the offender is eligible and must stay all criminal proceedings pending the outcome of the hearing. It also must order an assessment of the offender for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan. (R.C. 2951.041(A)(1).)

Eligibility for intervention. An offender is eligible for intervention in lieu of conviction if the court finds all of the following (R.C. 2951.041(B)):[3]

(1) The offender previously has not been convicted of or pleaded guilty to a felony, previously has not been through intervention in lieu of conviction or any similar regimen, and is charged with a felony for which the Felony Sentencing Laws impose a preference against the imposition of a prison term (a fourth or fifth degree felony) or with a misdemeanor.

(2) The offense is not a felony of the first, second, or third degree, is not an offense of violence, is not aggravated vehicular homicide, aggravated vehicular assault, or state OMVI or substantially similar municipal ordinance, and is not an

[3] *This provision reads as if it is written backwards, but it is drafted in this fashion to require the court to affirmatively find the absence of the disqualifying criteria.*

offense for which a sentencing court is required to impose a mandatory prison term, a mandatory term of local incarceration, or a mandatory term of imprisonment in a jail.

(3) The offender is not charged with corrupting another with drugs, a drug trafficking offense, illegal manufacture of drugs or cultivation of marihuana, illegal administration or distribution of anabolic steroids, or a drug possession offense that is a felony of the first, second, or third degree (this is the provision modified by the bill).

(4) The offender is not charged with a drug possession offense that is a felony of the fourth degree, or the offender is charged with a drug possession offense that is a felony of the fourth degree, and the prosecutor in the case has recommended that the offender be classified as being eligible for intervention in lieu of conviction.

(5) The offender has been assessed by certain licensed, certified, or credentialed persons or facilities for the purpose of determining the offender's eligibility for intervention in lieu of conviction and recommending an appropriate intervention plan.

(6) The offender's drug or alcohol usage was a factor leading to the criminal offense with which the offender is charged, intervention in lieu of conviction would not demean the seriousness of the offense, and intervention would substantially reduce the likelihood of any future criminal activity.

(7) The alleged victim of the offense was not 65 years of age or older, permanently and totally disabled, under 13 years of age, or a peace officer engaged in the officer's official duties at the time of the alleged offense.

(8) If the offender is charged with tampering with drugs, the alleged violation did not result in physical harm to any person, and the offender previously has not been treated for drug abuse.

(9) The offender is willing to comply with all terms and conditions imposed by the court.

Intervention. If the court finds that the offender is not eligible or does not grant the offender's request, the criminal proceedings against the offender must proceed as if no request for intervention in lieu of conviction had been made.

If the court finds that the offender is eligible and grants the offender's request, the court must (1) accept the offender's plea of guilty and waiver of rights, (2) may stay all criminal proceedings and order the offender to comply with all terms and conditions imposed by the court, (3) must place the offender under the general control and supervision of the county probation department, the Adult

Parole Authority, or another appropriate local probation or court services agency, and (4) must establish an intervention plan for the offender and set the terms and conditions of the intervention plan.

If the court finds that the offender has successfully completed the intervention plan, the court must dismiss the proceedings against the offender without adjudication of guilt. The dismissal is not a criminal conviction for purposes of any disqualification or disability imposed by law upon conviction of a crime. The court also may order the sealing of records related to the offense in question. If the offender fails to comply with any term or condition imposed as part of the intervention plan, the supervising authority for the offender promptly must advise the court of this failure, and the court must hold a hearing to determine whether the offender failed to comply with any term or condition imposed as part of the plan. If the court so determines, it must enter a finding of guilty and impose an appropriate sanction. (R.C. 2951.041(C) to (F).)

Repeat offenders

Sentencing guidelines

Existing law. Under existing law, in sentencing an offender for a felony of the fourth or fifth degree, the sentencing court generally is required to determine whether any of certain factors apply. If the court finds that one of those factors apply and if the court, after considering other factors required in felony sentencing, finds that a prison term is consistent with the purposes and principles of sentencing and finds that the offender is not amenable to an available community control sanction, the court must impose a prison term upon the offender. Otherwise, the sentencing court must impose a community control sanction upon the offender. (R.C. 2929.13(B)(1) and (2).)

One of the factors the sentencing court generally must determine applies is whether the offender previously served a prison term (R.C. 2929.13(B)(1)(g)).

Operation of the bill. The bill revises the sentencing factor related to the offender's previous prison term to require the court, in sentencing an offender for a felony of the fourth or fifth degree, to determine whether *the offender at the time of the offense was serving*, or previously had served, a prison term (R.C. 2929.13(B)(1)(g)).

Default length of sentence

Existing law. Generally, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender *and if the offender previously has not served a prison term*, the court must impose the shortest prison term authorized for the offense, unless the court finds on the record

that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others (R.C. 2929.14(B)).

Operation of the bill. The bill further limits the circumstances in which the court must impose the shortest prison term authorized for an offense. Under the bill, the court is not required to impose the shortest prison term *if the offender was serving a prison term at the time of the offense*. (R.C. 2929.14(B).)

Thus, under the bill, generally, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court generally is required to impose the shortest prison term authorized for the offense, unless *one or more of the following applies*:

(1) *The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.*

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

Definition of "repeat violent offender"

Operation of the bill. The bill revises the definition of "repeat violent offender" so that it also applies to a person who is serving at the time of the offense a prison term for one of the following offenses (R.C. 2929.01(DD)(2)(a)).

(1) Aggravated murder, murder, involuntary manslaughter, rape, the former offense of felonious sexual penetration, a felony of the first or second degree that resulted in the death of a person or in physical harm to a person, or complicity in or an attempt to commit any of those offenses;

(2) An offense under an existing or former law of Ohio, another state, or the United States that is or was substantially equivalent to an offense listed under the preceding paragraph and that resulted in the death of a person or in physical harm to a person.

Existing law. Under existing law, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification that the offender is a repeat violent offender, the court is required to impose a prison term from the range of terms authorized for the offense that may be the longest term in the range. If certain other criteria are met, the court is authorized to impose an additional prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years (R.C. 2929.14(D)(2)).

Under existing law, "repeat violent offender" means a person about whom both of the following apply (R.C. 2929.01(DD)):

(1) The person has been convicted of or has pleaded guilty to, and is being sentenced for committing, for complicity in committing, or for an attempt to commit, aggravated murder, murder, involuntary manslaughter, a felony of the first degree other than one set forth in the Drug Laws, a felony of the first degree set forth in the Drug Laws that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person, or a felony of the second degree that involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person.

(2) Either of the following applies:

(a) The person previously was convicted of or pleaded guilty to, and served a prison term for, any of the offenses listed above in paragraph (1) or (2) of "***Existing law***."

(b) The person previously was adjudicated a delinquent child for committing an act that if committed by an adult would have been an offense listed above in paragraph (1) or (2) of "***Existing law***," the person was committed to the Department of Youth Services for that delinquent act.

Consecutive prison terms

The bill revises the standard for imposing consecutive sentences for multiple offenses to permit the imposition of consecutive sentences when one or more of the multiple offenses was committed at a time other than when the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense. The bill also revises the standard to permit consecutive sentences to be imposed when there are multiple courses of conduct, not just a single course of conduct. (R.C. 2929.14(E)(4)(a) and (b).)

Thus, under the bill, if multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following (new language is in italics) (R.C. 2929.14(E)(4)):

(1) The offender committed *one or more of* the multiple offenses while the offender was awaiting trial or sentencing, was under a community control sanction, or was under post-release control for a prior offense.

(2) *At least two of the multiple offenses were committed as part of one or more courses of conduct, and* the harm caused by *two or more of* the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of *any of the courses* (a single course in existing law) of conduct adequately reflects the seriousness of the offender's conduct.

(3) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

Judicial release

Operation of the bill

The bill corrects an oversight in the Revised Code that states that offenders serving a stated prison term of exactly ten years are eligible for judicial release but does not specify when such an offender may file a motion for judicial release. Under the bill, if the stated prison term is more than five years and *not more* than ten years and is an aggregate of stated prison terms that are being served consecutively and that were imposed for any combination of felonies of the fourth degree and felonies of the fifth degree, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term. Similarly, if the stated prison term is more than five years and *not more* than ten years, the eligible offender may file the motion after the eligible offender has served five years of the stated prison term. (R.C. 2929.20(B)(1)(c) and (4).)

Existing law

Upon the filing of a motion by an eligible offender or upon its own motion, a sentencing court may reduce an eligible offender's stated prison term through a judicial release. A person serving a stated prison term of *ten years or less* is eligible for judicial release if the stated prison term does not include a mandatory prison term or if the stated prison term includes a mandatory prison term and the person has served the mandatory prison term. Certain additional criteria must be met if an eligible offender is imprisoned for a felony of the first or second degree, or if an eligible offender committed an offense contained in the Drug Laws or the Controlled Substances Laws and for whom there was a presumption in favor of a prison term. If the court grants a motion for judicial release, the court must (1) order the release of the eligible offender, (2) place the eligible offender under an appropriate community control sanction, under appropriate community control conditions, and under the supervision of the probation department serving the court, and (3) reserve the right to reimpose the reduced sentence if the offender violates the sanction. (R.C. 2929.20(A), (B), (H), and (I).)

Shock incarceration and intensive program prisons

Determination of eligibility

Existing law. At the time of sentencing, existing law requires the court to determine if an offender is eligible for placement in a program of shock incarceration or is eligible for placement in an intensive program prison. The court may recommend: (1) the offender, if eligible, for placement in a program of shock incarceration or in an intensive program prison, (2) disapprove placement of the offender in either program, regardless of eligibility, or (3) make no recommendation on placement of the offender. The court must give its reasons for its recommendation or disapproval. (R.C. 2929.14(K) and 2929.19(D).)

Operation of the bill. The bill repeals the requirement that the court must determine if an offender is eligible for placement in a program of shock incarceration or an intensive program prison and transfers that duty to the Department of Rehabilitation and Correction (DRC). The court continues to have the authority to recommend the offender for placement in a program or prison of that nature, disapprove such a placement, or make no recommendation on placement of the offender. In no case may DRC place the offender in a program or prison of that nature unless DRC determines, as specified below, that the offender is eligible for the placement. If the court disapproves placement of the offender in a program or prison of that nature, the Department of Rehabilitation and Correction (DRC) may not place the offender in any program of shock incarceration or intensive program prison. If the court recommends or disapproves placement, it must make a finding that gives its reasons for its recommendation or disapproval. (R.C. 2929.14(K), 2929.19(D), 5120.031(B)(1) and (C)(1), and 5120.032(B)(1)(a).)

Duties of the State Criminal Sentencing Commission

Existing law

Under existing law, the State Criminal Sentencing Commission must review all forfeiture statutes in the Criminal Code (R.C. Title 29) and the Motor Vehicles Law (R.C. Title 45) and, not later than July 1, 2001, recommend to the General Assembly any necessary changes to those statutes (R.C. 181.25(B)).

Operation of the bill

The bill changes the date the recommendations are due from July 1, 2001, to July 1, 2002 (R.C. 181.25(B)).

Effective date

The bill takes effect on the later of January 1, 2002, or the earliest date permitted by law (Section 3).

HISTORY

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Introduced	07-12-01	p. 803

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