



H.B. 95

125th General Assembly

(As Introduced)

Reps. Seitz, McGregor, C. Evans, Allen, Widener, Wolpert, Combs, Latta, T. Patton, Schaffer, Raussen, Wagoner, Faber, Webster, Hoops, Taylor, Gilb, Raga, Brinkman, Hagan, Reidelbach, White, Willamowski, Harwood, Uecker, G. Smith, Gibbs, Schneider, Hartnett, Carmichael, Buehrer, Seaver, Hughes, Collier, Trakas, Flowers, Oelslager

BILL SUMMARY

- Revises the definition of "repeat violent offender."
- Modifies the sentencing provisions for a repeat violent offender so that a court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years if: (1) the offender is convicted of or pleads guilty to a repeat violent offender specification, (2) the offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person, (3) the court imposes the longest prison term for the offense that is not life imprisonment without parole, and (4) the court finds that certain recidivism and seriousness of the offense elements are present.
- Requires the court to impose on an offender the longest prison term authorized or required for the offense and to impose an additional 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 year sentence if: (1) the offender is convicted of or pleads guilty to a repeat violent offender specification, (2) the offender

within the preceding 20 years has been convicted of or pleaded guilty to *three* or more repeat violent offender offenses, and (3) the offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

- Requires the court to state its findings explaining a repeat violent offender sentence.
- Permits a defendant to seek leave to appeal an additional repeat violent offender sentence but only if the sentence is for a definite prison term that is longer than five years.
- Specifies that a sentence imposed on a third time repeat violent offender is not subject to review except that a defendant (1) retains all existing rights to appeal and (2) may appeal the manner in which the court considers whether two or more offenses committed at the same time or as part of the same act are to be considered one offense.
- Modifies a provision that requires a mandatory prison term for certain felony offenses of the third degree listed in current law's definition of a "repeat violent offender" (that are removed by the bill) to reflect those third degree felonies for which current law requires a mandatory sentence.

TABLE OF CONTENTS

| | |
|---|---|
| Definition of "repeat violent offender" | 3 |
| Existing law..... | 3 |
| Operation of the bill | 4 |
| Notice of an intent to use a prior conviction as proof that a defendant is a repeat violent offender..... | 5 |
| Sentencing a repeat violent offender..... | 5 |
| Existing law..... | 5 |

| | |
|---|----|
| Operation of the bill | 7 |
| Mandatory prison term for certain felony offenses of the third degree | 10 |
| Current law | 10 |
| Operation of the bill | 10 |
| Appeal of felony sentences--background..... | 10 |
| Defendant's appeal as of right under Felony Sentencing Law--generally | 10 |
| Prosecution's appeal as a matter of right | 11 |
| Discretionary appeal of consecutive sentence | 12 |
| _Toc101583932 | |

CONTENT AND OPERATION

Definition of "repeat violent offender"

Existing law

Under existing law, as used in the Felony Sentencing 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 Offenses Laws, a felony of the first degree set forth in the Drug Offenses Laws that involved an attempt to cause serious physical harm to a person¹ 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 previously served or, at the time of the offense was serving, a prison term for, any

¹ "Serious physical harm to persons" means any of the following (R.C. 2901.01(A)(5), not in the bill): (1) any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment, (2) any physical harm that carries a substantial risk of death, (3) any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity, (4) any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement, or (5) any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

of the following: (i) 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,² or complicity in or an attempt to commit any of those offenses, or (ii) 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 clause (2)(a)(i) and that resulted in the death of a person or in physical harm to a person.

(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 in the preceding paragraph, the person was committed to the Department of Youth Services for that delinquent act.

Operation of the bill

Change in the definition of "repeat violent offender." The bill revises the definition of "repeat violent offender" to mean a person about whom both of the following apply (R.C. 2929.01(DD)):

(1) The person is being sentenced for committing or for complicity in committing any of the following: (a) aggravated murder, murder, any felony of the first or second degree that is an offense of violence,³ or an attempt to commit

² "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration (R.C. 2901.01(A)(3), not in the bill).

³ "Offense of violence," as defined in existing law unaffected by the bill, means any of the following offenses (R.C. 2901.01(A)(9)): (1) aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, assault, permitting child abuse, aggravated menacing, menacing by stalking, menacing, kidnapping, abduction, extortion, rape, sexual battery, gross sexual imposition, aggravated arson, arson, terrorism, aggravated robbery, robbery, aggravated burglary, burglary under certain circumstances, inciting to violence, aggravated riot, riot, inducing panic, domestic violence, intimidation, intimidation of crime victim or witness, escape, and improperly discharging a firearm at or into a habitation, a school safety zone, or with the intent to cause harm or panic to persons in a school, in a school building, or at a school function or the evacuation of a school function, endangering children under certain circumstances, and the former offense of felonious sexual penetration, (2) a violation of an existing or former municipal ordinance or law of Ohio, any other state, or the United States, substantially equivalent to any offense listed in paragraph (1), (3) an offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio, any other state, or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons, or (4) a conspiracy or attempt to commit, or complicity in committing, any offense described in paragraph (1), (2), or (3).

any of these offenses if the attempt is a felony of the first or second degree or (b) 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 described under clause (1)(a).

(2) The person previously was convicted of or pleaded guilty to an offense described under (1) above.

Notice of an intent to use a prior conviction as proof that a defendant is a repeat violent offender

The bill specifies that at the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use a certified copy of the entry of judgment of a prior conviction as proof of that prior conviction. The defendant must then give notice to the prosecuting attorney of the defendant's intention to object to the use of the entry of judgment. If the defendant pursuant to Criminal Rule 12 does not give notice of that intention to the prosecuting attorney before trial, the defendant waives the objection to the use of an entry of judgment as proof of the defendant's prior conviction, as shown on the entry of judgment. (R.C. 2941.149(C).)

Sentencing a repeat violent offender

Existing law

Sentencing generally. The existing Felony Sentencing Law sets forth the purposes and principals of sentencing for courts to follow in sentencing felony offenders and specifies factors to consider when deciding whether to impose a prison term and when determining the length of prison term to impose. For certain offenses and certain situations, the Felony Sentencing Law requires a prison term to be imposed. But, generally, for felonies of the first and second degree and certain drug offenses, the Law presumes that a prison term is the appropriate sentence. For felonies of the third degree, except for certain drug offenses, the Law expresses no preference for or against a prison term. For felonies of the fourth and fifth degree, except for certain drug offenses, the Law expresses a preference against a prison term being the appropriate sentence. (R.C. 2929.11, 2929.12, and 2929.13.)

Mandatory prison terms--generally. Notwithstanding the general sentencing provisions, the court is required to impose a prison term or terms for certain offenses and generally is prohibited from reducing the term or terms so imposed. These offenses for which mandatory prison terms must be imposed include, but are not limited to, the following offenses (R.C. 2929.13(F)):

- (1) Aggravated murder when death is not imposed or murder;
- (2) Any rape, regardless of whether force was involved and regardless of the age of the victim, or an attempt to commit rape if, had the offender completed the rape that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the rape;
- (3) Gross sexual imposition or sexual battery, if the victim is under 13 years of age, if the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and if the victim of the previous offense was under 13 years of age;
- (4) A felony violation of involuntary manslaughter, aggravated vehicular homicide, vehicular homicide, vehicular manslaughter, aggravated vehicular assault, vehicular assault, felonious assault, aggravated assault, or assault if the penalty provided for the offense requires the imposition of a prison term;
- (5) A first, second, or third degree felony drug offense for which R.C. 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2925.11, 2925.13, 2925.22, 2925.23, 2925.36, 2925.37, 3719.99, or 4729.99, whichever is applicable regarding the violation, requires the imposition of a mandatory prison term;
- (6) Any offense that is a first or second degree felony and that is not set forth above in paragraph (1), (2), (3), or (4), if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of Ohio, another state, or the United States that is or was substantially equivalent to one of those offenses;
- (7) Any offense that is a third degree felony and that is listed in paragraph (1) of the definition of "repeat violent offender" if the offender previously was convicted of or pleaded guilty to any offense that is listed in paragraph (2)(a) of that definition (see "*Definition of "repeat violent offender"--Existing law,*" above).
- (8) through (14) Certain felonies committed while armed with a firearm, offenses of violence committed while wearing body armor, certain corrupt activity offenses, sexually violent offenses involving a sexually violent predator specification, certain offenses involving conveying deadly weapons, dangerous ordnance, or drugs of abuse into detention facilities or mental health or mental retardation or developmentally disabled facilities, and aggravated vehicular homicide if the victim is a peace officer or the offender has three or more violations of R.C. 4511.19(A) or (B) or of an equivalent offense.

Repeat violent offender sentencing. 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 and that may not be reduced. But, if the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court is required to impose the longest prison term from the range of terms authorized for the offense. (R.C. 2929.14(D)(2)(a).)

If the court imposes the longest prison term from the range of terms authorized for the offense, the court *may impose* on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to the preceding paragraph and, if applicable, certain other mandatory prison term provisions (R.C. 2929.14(D)(2)(b)):

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

(2) The terms so imposed are demeaning to the seriousness of the offense, because one or more specified factors indicate that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable statutory factors indicating that the offender's conduct is less serious than conduct normally constituting the offense.

Operation of the bill

Sentencing of a repeat violent offender. The bill specifies that a court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years if all of the following criteria are met (R.C. 2929.14(D)(2)(a)):

(1) The offender is convicted of or pleads guilty to a repeat violent offender specification.

(2) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole; murder; terrorism and the court does not impose a sentence of life imprisonment without parole; any

felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole; or any felony of the second degree that is an offense of violence and the trier of fact finds the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(3) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(4) The court finds that the prison terms imposed pursuant to (3), above, and, if applicable, pursuant to R.C. 2929.14(D)(1) or (3) are inadequate to punish the offender and protect the public from future crime, because specified factors indicating a greater likelihood of recidivism outweigh specified factors under that section indicating a lesser likelihood of recidivism.

(5) The court finds that the prison terms imposed pursuant to (3), above, and, if applicable, pursuant to R.C. 2929.14(D)(1) or (3) are demeaning to the seriousness of the offense, because one or more specified factors indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh specified factors indicating that the offender's conduct is less serious than conduct normally constituting the offense.

Sentencing of a third time repeat violent offender. The bill requires a court to impose on the offender the longest prison term authorized or required for the offense and requires the court to impose an additional prison term of 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10 years if all of the following criteria are met (R.C. 2929.14(D)(2)(b)):

(1) The offender is convicted of or pleads guilty to a repeat violent offender specification.

(2) The offender within the preceding 20 years has been convicted of or pleaded guilty to *three* or more offenses described in the definition of a repeat violent offender, including all offenses described in that definition of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that definition of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(3) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole; murder; terrorism and the court does not impose a sentence of life imprisonment without parole; any felony of the first degree that is an offense of violence and the court

does not impose a sentence of life imprisonment without parole; or any felony of the second degree that is an offense of violence and the trier of fact finds the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

The bill specifies that for purposes of sentencing a repeat violent offender with three or more qualifying convictions or guilty pleas, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty (R.C. 2929.14(D)(2)(c)).

For both repeat violent offenders and third time repeat violent offenders, the bill maintains existing law's provision that a repeat violent offender sentence may not be reduced. However, the bill specifies that the offender must serve any additional prison term under the repeat violent offender sentence consecutively to and prior to the prison term imposed for the underlying offense. (R.C. 2929.14(D)(2)(d).)

The bill also requires a court to state its findings explaining the sentence imposed on a repeat violent offender or a third time repeat violent offender (R.C. 2929.14(D)(2)(e)).

Appeal options for a repeat violent offender. The bill permits a defendant to seek leave to appeal an additional sentence imposed because the offender is a repeat violent offender or a third time repeat violent offender but only if the additional sentence is for a prison term that is longer than five years (R.C. 2953.08(C)(2)). If leave to appeal is granted, the bill directs an appellate court to review the statement of findings that the trial court issued explaining the repeat violent offender sentence and to remand the case to the sentencing court if it failed to state the required findings (R.C. 2953.08(G)).

For a third time repeat violent offender, the bill provides that a sentence imposed upon that defendant is not subject to review.⁴ However, except as otherwise provided in the prior paragraph, a defendant retains all rights to appeal under R.C. Chapter 2953. or any other provision of the Revised Code. Also, a defendant has the right to appeal under R.C. Chapter 2953. or any other provision of the Revised Code the court's application of R.C. 2929.14(D)(2)(c), discussed above in "**Sentencing of a third time repeat violent offender**" (R.C. 2953.08(D)(2)).

⁴ See the **COMMENT** for a description of the general law pertaining to appeals of a felony sentence.

Mandatory prison term for certain felony offenses of the third degree

Current law

As listed above, in paragraph (7) of "**Mandatory prison terms--generally,**" current law specifies that a mandatory prison term is required for any offense that is a third degree felony and that is listed in current law's definition of a "repeat violent offender" if the offender previously was convicted of or pleaded guilty to any offense listed in current law's definition of a repeat violent offender (R.C. 2929.13(F)(7)).

Operation of the bill

Because the bill removes third degree felonies from the definition of a "repeat violent offender," the bill amends R.C. 2929.13(F)(7) to reflect the third degree felonies that require mandatory sentences under the current R.C. 2929.13(F)(7). The bill generally requires a court to impose a prison term and not reduce that prison term for an offense that is a third degree felony and either is the offense of involuntary manslaughter or an attempt to commit a felony of the second degree that is an offense of violence and involved an attempt to cause serious physical harm to a person or that resulted in serious physical harm to a person if the offender previously was convicted of or pleaded guilty to any of the following offenses:

(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 similar to an offense listed in (1) above that resulted in the death of a person or in physical harm to a person.

COMMENT

Appeal of felony sentences--background

Defendant's appeal as of right under Felony Sentencing Law--generally

Generally, in addition to any other right to appeal, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds (R.C. 2953.08(A)):

(1) The sentence consisted of or included the maximum prison term allowed for the offense, the sentence was not imposed as an additional major drug offender prison term, the maximum prison term was not required for the offense pursuant to any provision of the Revised Code, and the court imposed the sentence for only one offense or for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of the Drug Offenses Laws and that is specified as being subject to R.C. 2929.13(B) (preference against a prison term), and the court did not specify at sentencing that it found one or more specified factors justifying the imposition of a prison term to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this provision to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a sexually violent offense, was adjudicated as being a sexually violent predator, and was sentenced to an indefinite sentence under the Sexually Violent Predator Law, if the minimum term of the indefinite term imposed is the longest term available for the underlying sexually violent offense.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed under the existing provisions described under "**Repeat violent offender prison term**," above.

(6) The sentence consisted of an additional prison term of ten years imposed under the major drug offender provisions in the Felony Sentencing Law.

Prosecution's appeal as a matter of right

In addition to any other right to appeal, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the Attorney General, if one of those persons prosecuted the case, generally may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in (3), below, the modification of a sentence imposed upon such a defendant, on any of the following grounds (R.C. 2953.08(B)):

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed.

(2) The sentence is contrary to law.

(3) The sentence is a modification under R.C. 2929.20 of a sentence that was imposed for a felony of the first or second degree.

Discretionary appeal of consecutive sentence

In addition to the defendant's right to appeal as described above, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under certain circumstances and that the consecutive sentences exceed the maximum prison term allowed for the most serious offense of which the defendant was convicted. Upon the filing of a motion, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true. (R.C. 2953.08(C).)

Sentences not subject to review

A sentence imposed upon a defendant is not subject to review under these provisions if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. Also, a sentence imposed for aggravated murder or murder is not subject to review under these provisions. (R.C. 2953.08(D).)

HISTORY

| ACTION | DATE | JOURNAL ENTRY |
|------------|----------|---------------|
| Introduced | 03-01-05 | p. 238 |

H0095-I-126.doc/jc