

## MIP REVISIONS

**Senate Bill 637 (Substitute H-1)**

**Sponsor: Sen. Tom George**

**House Committee: Criminal Justice**

**Senate Committee: Judiciary**

**First Analysis (1-22-04)**

### ***THE APPARENT PROBLEM:***

Under Michigan's zero tolerance laws, it is illegal for a person under 21 years of age to purchase, consume, possess (or to attempt to purchase, consume, or possess) alcoholic beverages. A violation is a misdemeanor with penalties that include automatic driver's license sanctions (for second and subsequent violations) and the possibility of a fine, community service, and substance abuse screening (at the violator's own expense) and/or substance abuse prevention or treatment services.

Until recently, a minor could be prosecuted under the minor in possession (MIP) laws based on the results of a Breathalyzer or chemical test even if the law enforcement officer did not observe the youth actually consuming the alcohol or if no beverages containing alcohol were found on his or her person. But in *People v Rutledge*, 250 Mich App 1 (2002), Michigan Court of Appeals held that a minor who legally consumed alcohol in a jurisdiction outside of Michigan, but who returned to the state (in this case, as a passenger in a car), could not be prosecuted under the MIP statute. The decision hinged on the court's interpretation of "consume" and "possess", which were determined to mean acts taking place in the present. Hence, a person could not be prosecuted for still having in his or her body something that was consumed in the past or that a person no longer had control over, e.g., during digestion. In its decision, the court noted that Section 625(6)(b) of the Michigan Vehicle Code, which makes it illegal for a minor to operate a vehicle with a BAC of more than 0.02, did criminalize the "mere presence of alcohol in a minor's body as a result of the consumption of alcohol" but that the MIP statute did not "criminalize the consumption itself".

Earlier this year, the Marquette County Circuit Court took the *Rutledge* ruling a step further when it upheld a trial court's suppression of evidence of alcohol consumption or possession and the subsequent discovery of a small amount of marijuana. The case

involved a minor defendant, also a passenger in a car, who was charged under the MIP statute after registering a 0.151 BAC on a Breathalyzer test. This case differed from *Rutledge* in that the alcohol had been consumed within the state. The appellate court reviewed *de novo* whether the trial court correctly applied the findings in *Rutledge* and held that no error had been made by the trial court [*People v LaJoice*, No. 02-40196-AR (2003)]. The result was that once again an MIP charge was thrown out based on the interpretation of the words "consume" and "possess".

According to testimony presented before the members of the House Criminal Justice Committee, the word is beginning to spread around the state that minors can successfully fight an MIP charge if the officer did not actually see them holding or drinking an alcoholic beverage. Reportedly, in one northern jurisdiction, intoxicated youths have even taunted law enforcement officers to that effect. As this appears to defeat the spirit and intent of the MIP laws, legislation has been offered to close this so-called loophole in the law by specifically criminalizing the consumption itself of alcohol as evidenced by the results of a Breathalyzer or other test.

In a separate but related matter, law enforcement personnel believe that the current penalties do not have the hoped for deterrent effect on underage alcohol consumption, as many minors are convicted of repeat violations. It is not uncommon for the same person to be convicted of a third, fourth, or even fifth violation (and one judge had a person who was appearing before the court on his tenth violation). Even if a judge orders the minor to attend either a substance abuse prevention or treatment program, there is no additional penalty if the minor refuses to comply. Since 1978, the law has not specifically given judges authority to jail minors who did not comply with court-ordered sanctions. On occasion, some judges did hold offenders accountable for

violating the conditions of probations by ordering jail under contempt of court charges. Reportedly, however, a recent appeals court decision ruled that since the MIP statute provides for no jail sanctions, a court cannot therefore use jail sanctions to enforce orders of treatment for repeat offenders.

Many believe that if judges had the discretion to sentence a repeat offender to complete a substance abuse program or spend time in jail, more violators would comply with the court-ordered treatment program. Legislation is therefore being offered to add the possibility of jail time to the current penalties for violations involving minors and alcohol.

### ***THE CONTENT OF THE BILL:***

Senate Bill 637 would amend the Michigan Liquor Control Code to apply the same penalties for consuming, possessing, or purchasing alcohol by a person under 21 years of age to a minor who had any bodily alcohol content (BAC). The bill would also allow, in addition to current penalties, a minor convicted or adjudicated of a second or subsequent offense to be subject to limited imprisonment for probation violations. The bill would define “any bodily alcohol content” as meaning: 1) an alcohol content of 0.02 grams or more; or 2) any presence of alcohol within a person’s body resulting from the consumption of alcoholic liquor, other than that consumed as part of a generally recognized religious service or ceremony.

For a second offense, the minor could be imprisoned for not more than 30 days but only if he or she had been found by the court to have violated an order of probation, and for a third or subsequent offense, imprisonment could be ordered for up to 60 days.

However, the bill would provide for a discharge and dismissal for a first offense. When an individual who had not previously been convicted of or received a juvenile adjudication for a violation of the MIP laws, the court – without entering a judgment of guilt and with the consent of the minor – could defer further proceedings and place the individual on probation. The probation terms and conditions would include, but not be limited to, payment of the costs as provided under the Probate Code and the Code of Criminal Procedure and payment of a probation supervision fee as prescribed in the Code of Criminal Procedure.

If the individual violated a term or condition of the probation or if it were found that the individual was utilizing these provisions in another court, the court

could enter an adjudication of guilt and proceed as provided by law. If the individual fulfilled the terms or conditions of probation, the court would have to discharge the individual and dismiss the proceedings. The discharge and dismissal would have to be without adjudication of guilt and would not be a conviction for purposes of determining if it were a first, second, or subsequent offense, nor would it be a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under the MIP law.

Only one discharge and dismissal would be available to a person. The court would have to maintain a nonpublic record of the matter while proceedings were deferred and the individual was on probation. The secretary of state would have to retain a nonpublic record of an arrest, plea, and discharge or dismissal under the bill’s provisions. This record could only be furnished to the following:

- To a court, prosecutor, or police agency upon request for the purpose of determining if an individual had already used the diversion provision.
- To the Department of Corrections, a prosecutor, or a law enforcement agency upon request subject to the following conditions: 1) at the time of the request, the individual was employed by one of these entities or was an applicant for employment; and 2) the record was used by the entity only to determine whether an employee had violated his or her conditions of employment or whether an applicant met criteria for employment.

The bill is tie-barred to House Bill 5120, which would make mostly technical revisions to the drunk driving provisions of the Michigan Vehicle Code. The effective date of the bill would be May 1, 2004.

MCL 436.1703

### ***HOUSE COMMITTEE ACTION:***

The H-1 substitute adopted by the Criminal Justice committee differs from the Senate-passed bill in the following ways:

- Specifies that a violation of the minor in possession (MIP) provisions would include violations of a local ordinance substantially corresponding to the state law.
- Includes payment of the state minimum costs of \$60 for a felony, \$45 for a serious or specified

misdemeanor, and \$40 for other misdemeanors in the costs that must be paid as a condition of probation. (The state minimum costs were added by Public Act 71 of 2003 and took effect October 1 of that year.)

- Clarifies that upon a finding that an individual was utilizing the discharge and dismissal provision of the bill in another court, the court could enter an adjudication of guilt and proceed as otherwise provided by law.
- Requires the court to maintain a nonpublic record of the matter while the proceedings were deferred and the individual on probation.
- Changes the effective date to May 1, 2004.
- Tie-bars the bill to House Bill 5120.

### ***BACKGROUND INFORMATION:***

Components of the bill are similar to two House Bills. The “any bodily alcohol” component was also contained in House Bill 4819, which was passed by the House in July 2003. The provisions of Senate Bill 637 allowing for limited imprisonment for MIP parole violations is similar to provisions contained in House Bill 5033 which, though the bill did receive a hearing, has not been reported by the Criminal Justice Committee. House Bill 4200 of the 2001-2002 legislative session, which was passed by the House, would have allowed up to 90 days imprisonment for a MIP violation (except that a term of imprisonment could only be imposed on a first offense if the minor failed to successfully complete any court-ordered treatment, screening, or community service or had failed to pay any court-ordered fine).

#### Liquor code prohibitions on minors and alcohol:

Prior to 1978, a minor who purchased alcohol was guilty of a misdemeanor punishable by up to 90 days in jail and a fine of up to \$100. The misdemeanor sanction was eliminated when an amendment to the state constitution raised the drinking age to 21. Instead, a violator was subject to a fine of \$25 for a first violation, \$50 for a second violation, and \$100 for subsequent violations. In 1995, the fines were increased to \$100, \$200, and \$500, respectively; an offense was made a misdemeanor; and license sanctions could be levied by the secretary of state. Public Act 492 of 1996 gave courts the authority to order community service, substance abuse screening and assessment, and participation in substance abuse prevention or treatment programs. The Liquor Control Code was recodified in 1998. Legislative action later in 1998 gave the secretary of state the

authority to suspend licenses based upon prior convictions.

Drinking and driving: Under the Michigan Vehicle Code, a minor who is found to be driving with a blood alcohol count (BAC) of .02 or more is guilty of a misdemeanor punishable by community service for not more than 360 hours and/or a fine of not more than \$250, and could be ordered to pay the costs of prosecution. In addition, the minor’s driver’s license is suspended for 30 days (but a restricted license may be issued) and the person receives four points on his or her driving record. According to the Department of State, if a minor fails to complete the community service or to pay the fine, he or she would be subject to “failure to comply with judgment” provisions of the law and could face license suspension until such time as the minor were cleared by the court. For a second or subsequent offense, a minor could be fined up to \$500, perform community service for up to 60 days, and/or be sentenced to not more than 93 days in jail, as well as face mandatory driver’s license sanctions and prosecution costs.

### ***FISCAL IMPLICATIONS:***

The House Fiscal Agency reports that the bill would have no impact on the state and an indeterminate impact on local units of government depending on whether the offender was processed as an adult (the offense is a misdemeanor) or adjudicated as a minor (typically, youth under age 17 are adjudicated as minors), and on how the bill affected charging and sentencing practices. Incarceration and probation supervision of adults convicted of misdemeanor offenses is a local responsibility, as is detention and supervision of juveniles. Any impact on collections of fines would affect local libraries, which are the constitutionally designated recipients of penal fine revenues. (12-15-03)

### ***ARGUMENTS:***

#### ***For:***

When the zero tolerance laws were enacted, the intent clearly was to criminalize the use of alcohol by minors. However, two recent court cases have greatly reduced the ability of law enforcement officers to enforce the statute. In particular, the courts have ruled that the terms “consume” and “possess” refer to actions done in the present. Under this interpretation, a minor cannot be prosecuted for “consuming” alcohol unless he or she is observed drinking an alcoholic beverage. Having alcohol in the system that was ingested earlier fails the test of

“consuming”. Likewise, where a minor previously could have been convicted of “possessing” alcohol by having alcohol within his or her body, “possessing” now has been interpreted by the *Rutledge* court to apply only to a substance that the person has control over, e.g., is holding in his or her hand. Once the alcohol is inside the body and undergoing the processes of digestion and metabolizing, it no longer constitutes “possession” because the person no longer has control over the alcohol.

The bill would close this loophole by specifying that a person under 21 years of age would be in violation of the MIP laws if he or she had any bodily alcohol content. The bill would incorporate the definition contained in the vehicle code, thereby addressing the issue raised by both the *Rutledge* and *LaJoice* courts that the vehicle code demonstrated a legislative intent to criminalize the presence of alcohol in a minor’s body whereas the MIP statute did not. In short, passage of the bill will ensure that a minor who consumes alcohol in violation of the zero tolerance laws will be prosecutable, regardless of whether or not an officer actually saw the minor drinking an alcoholic beverage or holding onto an alcoholic beverage.

***For:***

The minor in possession (MIP) provisions of the Liquor Control Code lack the “teeth” necessary for enforcement of sanctions. Other than mandatory driver’s license suspensions by the secretary of state for repeat violations, a judge can only order community service, levy a fine, or order participation in a substance abuse prevention or treatment program. According to several district judges, if a minor refuses to comply with a court order, there is little a judge can do to force compliance. Reportedly, judges have had minors tell them that they know a court can’t make them pay the fines or go to the treatment programs. The fact that many minors are being cited with repeat violations (in some cases, up to 10 violations) of the MIP laws is evidence that current sanctions do little to deter underage alcohol usage. Some judges have tried to use minimal jail time in connection with a contempt of court charge, but a recent circuit court ruling has ended that practice. Many believe that adding the possibility of time in jail would decrease the number of repeat offenses and increase the rates of attending and completing substance abuse programs.

Under the bill, a judge would have the discretion to order a minor to spend up to 30 days in jail for a second offense or up to 60 days for a third or

subsequent offense, or in the case of juveniles, place the individual in a juvenile facility. However, jail could only be ordered if the minor violated a condition of probation, such as failing to complete any court-ordered substance abuse program, substance abuse screening, or community service or paying a court-ordered fine. Also, it is important to note that the bill would create an opportunity for a minor to enter a diversion program for a first offense – meaning that if he or she complied with all of the probation conditions, the MIP charge would be discharged and the case dismissed. Nothing would appear on the minor’s record. In effect, this means that if the minor reoffended, the second offense would be treated as a first offense (fines, community service, treatment and education programs, but no jail time). Therefore, for those minors who had their first offense dismissed but who continued to violate the MIP provisions, jail would not come into play until what would be their third violation (although on the record it would appear as a second offense) – and then only if the probation requirements were broken.

Reportedly, even forced participation in substance abuse programs has a positive effect on reducing alcohol abuse by minors. It is hoped, therefore, that this possibility of time in jail will act as an effective encouragement to comply with participation in a substance abuse prevention or treatment program. In light of the serious nature of alcohol addictions and the negative effects of alcohol on individuals as well as society, it is important to give judges the tools necessary to discourage alcohol abuse on the part of minors.

***For:***

Recent studies have revealed many damaging effects of alcohol on the developing brain. Alcohol use by young people can result in more than lifetime alcohol addictions; it can impair cognitive functioning and memory; it is associated with depression; and individuals under the influence of alcohol commit many crimes, especially assaultive crimes. Teenagers already are responsible for the majority of car accidents, and most of those accidents are alcohol related. Therefore, it is time to move past the mentality that drinking is a right of passage, and to get serious about discouraging inappropriate alcohol use by minors. The current laws are a good start, but in light of the sheer number of citations issued by law enforcement agencies for violations and the number of repeat offenders, the laws need to be strengthened.

**Against:**

Jails are already overcrowded and the bill could further strain local budgets for incarceration costs. Therefore, the bill should not be supported unless additional funding is made available to offset local costs associated with the jail provision.

**Response:**

Only those 17 and older who were convicted of a second or subsequent offense and violated probation would face jail time. A judge could order those 16 and younger to placement in a juvenile facility. This would provide the younger offenders with a similar incentive to comply with whatever conditions or orders that a judge issued. It must be remembered that the intent of the legislation isn't to be overly punitive, but to enable the enforcement of current laws and to encourage compliance with the state's zero tolerance laws.

With regard to the cost associated with the bill and further overcrowding of jails, it is unlikely that most minors would serve time in jail. Just the possibility of jail time should be an effective encouragement to comply with any court orders for community service and substance abuse treatment programs. If jail time must be served, it would be likely that the time ordered would be minimal. Sometimes, even just a few days in jail are enough to "awaken" a person to the seriousness of alcohol problems. Remember, though a violation of the MIP law does not involve drinking and driving, many MIP offenders appear later in court as adults for drunk driving violations.

In addition, local costs to house offenders are mitigated by a provision of the Prisoner Reimbursement to the County Act (Public Act 118 of 1984), which allows a county to charge a prisoner up to \$60 per day for the entire period of time he or she is confined in the county jail. Again, in light of the seriousness of underage drinking and the negative personal and societal impacts of alcohol abuse, the bill should be supported. Besides, the bill may have an indirect decrease in local costs if increased participation in treatment programs leads to fewer crimes being committed under the influence, less alcohol-related accidents and injuries, and less alcoholism in general.

**Against:**

Canada's drinking age is 19, and 33 states, including some of our border states, allow minors to consume alcohol in some manner, such as with a parent present. It doesn't seem right that a minor drinking legally in a different jurisdiction should be punished if they return to Michigan before all the alcohol has

been metabolized out of his or her system, especially since an MIP violation does not include drinking and driving.

In addition, the practice of law enforcement officers to require minors to submit to a breathalyzer test or face being fined for a state civil infraction if they refuse may infringe on Fourth Amendment rights to protection from unreasonable searches, according to a recent Bay City case.

**Response:**

The case in question, *Spencer v City of Bay City* (No. 02-10280-BC) which was decided on November 18, 2003 in federal district court, ruled that a section of the Bay City Code of Ordinances is unconstitutional to the extent that it authorizes warrantless searches in all cases. The ordinance, which is similar to Section 436.1703(5) of the Michigan Liquor Control Code, allows police officers having reasonable cause to believe that a minor has consumed alcohol to require that person to undergo a preliminary breath test analysis (PBT). In that case, officers conducted PBTs on several minors because an officer smelled an odor of intoxicants coming from one or more individuals of the group. The plaintiff registered negative for alcohol consumption and later filed a complaint alleging that the ordinance was unconstitutional because a search warrant had not been obtained.

In general, the Fourth Amendment, in protecting citizens against unreasonable searches, requires law enforcement officers to first obtain a warrant for the search, and requests for search warrants must be based on reasonable grounds. Various U.S. Supreme Court rulings have established the ground rules for a "reasonable" search and for those circumstances in which a search may be conducted without first obtaining a warrant. The *Spencer* court held that no special needs existed under the Bay City ordinance that excused obtaining a search warrant before administering a PBT, nor were there exigent circumstances that would automatically exclude a search warrant. Therefore, since no exigent circumstances had been demonstrated in this particular case to excuse the officers from first obtaining a search warrant, the court ruled in favor of the plaintiff's motion for partial summary judgment.

The court's ruling is confined to the Bay City ordinance. Though the state law is similar, the bill's provisions center around the possibility of jail time for repeat offenders who break the terms of their probations and on closing the loophole regarding a

minor having any bodily alcohol content. As to the applicability of the *Spencer* ruling to the state statute, that may be up to the federal courts to decide. Meanwhile, the provisions of the bill are necessary to enforce the intent of the MIP laws and, with possible jail time to encourage completion of substance abuse programs, to possibly nip potential alcohol abuse problems in the bud.

Regarding border jurisdictions which allow alcohol consumption by minors (for instance Canada, which has a drinking age of 19), if there were a blanket exemption, then every minor near one of those borders would claim that he or she had consumed the alcohol legally in that jurisdiction. It is better to allow each case to be reviewed individually.

### ***POSITIONS:***

Mothers Against Drunk Driving Michigan State Organization supports the bill. (12-10-03)

A representative of the Michigan Supreme Court testified in support of the bill. (12-10-03)

A representative of the Prosecuting Attorneys Association testified in support of the bill. (12-10-03)

A representative of the Michigan State Police indicated support for the bill. (12-10-03)

A representative of the Office of Secretary of State indicated support for the bill. (12-10-03)

A representative of the Michigan Licensed Beverage Association testified in opposition to the bill. (12-10-03)

Analyst: S. Stutzky

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.