



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 637 (as enrolled)
House Bill 5120 (as enrolled)
Sponsor: Senator Tom George (S.B. 637)
Representative William Van Regenmorter (H.B. 5120)
Senate Committee: Judiciary
House Committee: Criminal Justice

PUBLIC ACT 63 of 2004
PUBLIC ACT 62 of 2004

Date Completed: 7-25-05

RATIONALE

Section 703 of the Michigan Liquor Control Code prohibits a minor (a person under 21 years old) from purchasing, consuming, or possessing alcoholic liquor, or attempting to do so. This section was addressed by a 2002 decision of the Michigan Court of Appeals, which held that merely having a bodily alcohol content did not constitute possessing or consuming alcohol (*Michigan v Rutledge*, 250 Mich App 1). The *Rutledge* Court also ruled that purchasing and consuming alcohol legally, outside of the State, and then returning to Michigan was not a violation of Section 703. Some people suggested that a minor should be prohibited from having any bodily alcohol content, in addition to being prohibited from buying, possessing, or consuming alcohol. (Please see **BACKGROUND** for further information on the *Rutledge* decision.)

In addition, the penalties for a violation of Section 703 include a fine, community service, and substance abuse prevention or treatment and rehabilitation services, but previously did not include imprisonment. It was suggested that, in order to ensure that violators meet conditions of probation requiring substance abuse treatment and community service, judges should be authorized to sentence repeat offenders to jail if they fail to comply with those terms.

Further, some first-time offenders, including certain drug offenders, have the opportunity under law to have the charges against them dismissed without an adjudication of guilt if they plead guilty and meet certain probationary requirements without

committing additional violations. Some people believe that this opportunity also should be available to minors charged with purchasing, possessing, or consuming alcohol.

In a different matter related to alcohol offenses, Public Act 61 of 2003, which took effect on October 1, 2003, amended the Michigan Vehicle Code to establish a blood alcohol content of .08 gram as the level at which a person is considered to be operating while intoxicated. Also, in Section 625(8), the Act created a new offense category prohibiting a person from operating a vehicle with any amount of a Schedule 1 drug or cocaine present in his or her body (sometimes called a "bodily presence" offense). Evidently, as the changes were implemented, it became apparent that there were inconsistencies in the way the Vehicle Code treated various drunk driving offenses. It was suggested that provisions related to license sanctions and court procedures should include the new violation under Section 625(8), and that the definition of "alcoholic liquor" should be expanded.

CONTENT

Senate Bill 637 amended the Michigan Liquor Control Code to do all of the following:

-- Include having "any bodily alcohol content" in the prohibition against a minor's purchasing, consuming, or possessing alcohol.

- **Include jail time in the penalties for a second or subsequent conviction or juvenile adjudication if the minor violated an order of probation, failed to complete any court-ordered treatment, screening, or community service, or failed to pay any fine for that conviction or adjudication.**
- **Allow a first-time offender who pleads guilty or offers a plea of admission to serve a probationary term and have the charges dismissed without an adjudication of guilt or a determination that he or she committed the offense, upon fulfilling the conditions of probation.**
- **Include the "any bodily alcohol content" offense in provisions that allow preliminary breath tests, and the admissibility of test results in criminal prosecutions, for consuming or possessing alcohol.**
- **Include the offense in provisions that require a law enforcement agency to notify the parent, custodian, or guardian of a minor who allegedly consumed, possessed, or purchased alcohol.**

House Bill 5120 amended the Michigan Vehicle Code to do all of the following:

- **Include violations of Section 625(8) of the Code in several provisions related to license sanctions and court proceedings in drunk driving cases.**
- **Require court clerks to forward to the Secretary of State an abstract of a court record if a person pleads guilty to or admits responsibility for a violation under Section 703 of the Michigan Liquor Control Code, and require courts to forward a dismissal of proceedings under that section.**
- **Revise the definition of "alcoholic liquor".**

Senate Bill 637 took effect on September 1, 2004, and House Bill 5120 took effect as indicated below. The bills were tie-barred to each other. They are described below in further detail.

Senate Bill 637

Minor's Alcohol Violation & Penalties

Section 703 of the Liquor Control Code prohibits a minor from purchasing or

attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor. The bill also prohibits a minor from having any bodily alcohol content, and makes a violation subject to the same penalties.

(Under the bill, "any bodily alcohol content" means either of the following:

- An alcohol content of .02 gram or more per 100 milliliters of blood, 210 liters of breath, or 67 milliliters of urine.
- Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than as part of a generally recognized religious service or ceremony.)

Under the Code, a violation is a misdemeanor punishable by a maximum fine of \$100. The sentencing court also may order an offender to participate in substance abuse prevention or substance abuse treatment and rehabilitation services and to perform community service and undergo substance abuse screening and assessment at his or her own expense. The maximum fine is \$200 for a violation following a prior conviction or juvenile adjudication, or \$500 for a violation following two or more prior convictions or juvenile adjudications.

In addition, the Secretary of State (SOS) must suspend the driver's license of a minor convicted of possessing, consuming, or buying alcohol, or attempting to do so, as provided in Section 319 of the Michigan Vehicle Code (MCL 257.319). (Under that section, if a minor has one prior conviction, the suspension must be for 90 days and the SOS may issue a restricted license after the first 30 days. If a minor has two or more prior convictions, the license suspension must be for one year and the Secretary of State may issue a restricted license after 60 days.)

Under the bill, a violation following a prior conviction or adjudication also is punishable by up to 30 days' imprisonment, and the penalty for a violation following two or more prior convictions or adjudications includes up to 60 days' imprisonment. The jail penalties apply only if the court finds that the minor has violated an order of probation, failed to complete successfully any court-ordered treatment, screening, or community service,

or failed to pay any fine for that conviction or juvenile adjudication.

In addition, for sentencing purposes, the bill includes a violation of a substantially corresponding local ordinance as a prior conviction or adjudication.

Probation & Discharge

Under the bill, when a minor pleads guilty or offers a plea of admission in a juvenile delinquency proceeding to possessing, consuming, or buying alcohol, attempting to do so, or having any bodily alcohol content, and the minor has not previously been convicted of or received a juvenile adjudication for violating Section 703, the court may defer further proceedings and place the individual on probation, with the accused's consent and without entering a judgment of guilt in a criminal proceeding or a determination in a juvenile delinquency proceeding that the juvenile has committed the offense. Terms of probation must include, at a minimum, the sanctions allowed for a first-time offender and payment of the costs, including the minimum State cost as prescribed under the juvenile code and the Code of Criminal Procedure, and the costs of probation as prescribed in the Code of Criminal Procedure.

(Under the juvenile code, if a juvenile is within the court's jurisdiction as a result of a specified offense, and is ordered to pay any combination of fines, costs, restitution, assessments, or payments arising out of the proceeding, the court must order the juvenile to pay a minimum State cost of \$40, if he or she is found to be within the court's jurisdiction for a misdemeanor. The minimum State cost under the Code of Criminal Procedure for a person convicted of a misdemeanor and ordered to pay any combination of a fine, costs, or applicable assessments also is \$40.

Under the Code of Criminal Procedure, each order of probation for a defendant convicted of a crime must require the Department of Corrections to collect a maximum probation supervision fee of \$135 multiplied by the number of months of probation ordered, up to 60 months.)

Upon a violation of a term or condition of probation or upon a finding that the

individual is using this provision in another court, the court may enter an adjudication of guilt or, in a juvenile delinquency proceeding, a determination that the individual has committed the offense, and proceed as otherwise provided by law. When the probationary terms and conditions are fulfilled, the court must discharge the individual and dismiss the proceedings without adjudication of guilt or a determination that the individual committed the offense. The bill specifies that the discharge and dismissal is not a conviction or juvenile adjudication for purposes of Section 703 or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent juvenile adjudications or convictions of the offense. An individual may have only one discharge or dismissal under the bill.

The bill requires the court to maintain a nonpublic record of the matter while proceedings are deferred and the individual is on probation. The Secretary of State must retain a nonpublic record of a plea and discharge or dismissal under the bill. That record must be furnished upon request to a court, prosecutor, or police agency for the purpose of determining if an individual has already used the discharge and dismissal allowed under the bill. The record also must be given to the Department of Corrections (DOC), the prosecutor, or a law enforcement agency, upon its request, subject to both of the following:

- At the time of the request, the individual is an employee of the DOC, the prosecutor, or the law enforcement agency, or is an applicant for employment.
- The DOC, the prosecutor, or the agency uses the record only to determine whether an employee has violated his or her conditions of employment or whether an applicant meets criteria for employment.

Preliminary Breath Test

Under the Liquor Control Code, a peace officer who has reasonable cause to believe that a minor has consumed alcohol may require the person to submit to a preliminary chemical breath analysis. The peace officer may arrest a person based on

the results of that preliminary analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcohol. Refusal to submit to a preliminary chemical breath analysis is a State civil infraction, subject to a civil fine of up to \$100. Under the bill, these provisions also apply to a minor whom a peace officer has reasonable cause to believe has any bodily alcohol content.

Parental Notification

The Code requires a law enforcement agency to notify the parent or parents, custodian, or guardian of an unemancipated person under 18 years of age upon determining that the person allegedly consumed, possessed, or purchased alcohol or attempted to do so, if the name of the parent, guardian, or custodian is reasonably ascertainable. Under the bill, a law enforcement agency also must notify the parent, guardian, or custodian of a minor who has any bodily alcohol content.

Legal Consumption Defense

Under the bill, in a criminal prosecution for a violation concerning a minor having any bodily alcohol content, it is an affirmative defense that the minor consumed the alcoholic liquor in a venue or location where that consumption is legal.

House Bill 5120

License Sanctions

The bill amended the Michigan Vehicle Code to include violations of Section 625(8) of the Code in several provisions relating to license sanctions and court proceedings in drunk driving cases. Each of these provisions already applied to all or most of the following offenses:

- Operating a vehicle while intoxicated.
- Operating a vehicle while impaired by alcohol or a controlled substance.
- Causing a death or serious impairment of a bodily function due to driving while intoxicated or impaired.
- Driving while intoxicated or impaired with a passenger under 16 years old (child endangerment).

- Operation of a vehicle by a person under 21 years old who has "any bodily alcohol content" (a zero-tolerance violation).
- Operation of a commercial motor vehicle by a person whose blood alcohol content is .04 gram or more.

The bill also includes a bodily presence offense in provisions that do the following:

- Require a one-year suspension of all vehicle group designations on a person's driver's license if he or she is convicted of or found responsible for an offense described above while operating a commercial motor vehicle.
- Require a 10-year revocation of all vehicle group designations if the offender is convicted of or found responsible for any combination of two violations described above, while operating a commercial motor vehicle, arising from two or more separate incidents.

In addition, the Vehicle Code requires the Secretary of State to suspend a person's driver's license if he or she is charged with, or convicted of, a drunk driving offense under the Code (or a substantially corresponding local ordinance) and fails within certain time periods to answer a citation or a notice to appear in court or fails to comply with a court order or judgment. Under the bill, this requirement also applies to a local ordinance substantially corresponding to a bodily presence violation.

These amendments took effect on May 3, 2004.

Court Procedures

Under the Code, a person arrested for a drunk driving offense must be arraigned within 14 days after arrest; have a pretrial conference within 35 days (or, if the district court has only one judge who sits in more than one location, within 42 days); and be finally adjudicated within 77 days. The bill includes a person arrested for a bodily presence violation or a substantially corresponding local ordinance in the time requirements for those proceedings.

Those time requirements do not apply to particular drunk driving offenses punishable as a felony or joined with a felony charge. The bill also makes an exception for a bodily presence violation and child endangerment

that is punishable as a felony and a bodily presence violation joined with a felony charge.

The bill includes a bodily presence violation in provisions that do the following:

- Require the court, before accepting a plea of guilty or no contest for any drunk driving violation under the Code or a substantially corresponding local ordinance, to advise the accused of the maximum possible term of imprisonment and the maximum possible fine that may be imposed, and that the maximum possible license sanctions that may be imposed will be based upon the master driving record maintained by the SOS.
- Require the court, before imposing a sentence for certain drunk driving offenses, to order the person to undergo screening and assessment to determine whether he or she is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs.
- Require the court immediately to forward to the SOS an abstract of the court record for each case charging a drunk driving offense in which the charge is dismissed or the defendant is acquitted.

In addition, if a person is arrested without a warrant for a drunk driving violation, he or she must be arraigned, without unreasonable delay, by the magistrate who is nearest or most accessible within the judicial district; or, if the person is a minor, he or she must be taken before the family division of circuit court. The bill added a bodily presence violation and a substantially corresponding local ordinance to that provision.

These amendments took effect on May 3, 2004.

Additionally, beginning September 1, 2004, the bill requires the clerk of the court to forward an abstract of the court record to the Secretary of State if a person has pleaded guilty to, or offered a plea of admission in a juvenile proceeding for, a violation of Section 703 of the Michigan Liquor Control Code or a substantially corresponding local ordinance, and has had further proceedings deferred under that section (as provided by Senate Bill 637). If the person is sentenced to a term of

probation and terms and conditions of probation are fulfilled and the court discharges the individual and dismisses the proceedings, the court also must report the dismissal to the SOS.

The bill prohibits the Department of State from releasing information received concerning a plea to and the discharge of a violation of Section 703 of the Liquor Control Code or a substantially corresponding local ordinance, except as provided in the Liquor Control Code. This provision took effect on September 1, 2004.

Definitions

Previously, under the Michigan Vehicle Code, "alcoholic liquor" meant that term as defined in the Michigan Liquor Control Code. (Under that Code, "alcoholic liquor" means "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing ½ of 1% or more of alcohol by volume, which are fit for use for beverage purposes".) Under the bill, "alcoholic liquor" is defined instead as "any liquid or compound, whether or not medicated, proprietary, patented, and by whatever name called, containing any amount of alcohol including any liquid or compound described in...the Michigan Liquor Control Code".

The bill added the Dominion of Canada to the Vehicle Code's definition of "state", which also means any U.S. state, territory, or possession, Indian country as defined in Federal law (18 USC 1151), the District of Columbia, or any province of the Dominion of Canada.

These amendments took effect on May 3, 2004.

MCL 436.1703 (S.B. 637)
257.1d et al. (H.B. 5120)

BACKGROUND

The case of *Michigan v Rutledge* originated in the summer of 2000, when Scott Rutledge was arrested as a minor illegally possessing and consuming alcohol. Rutledge was a passenger in a car that was stopped for speeding, and he tested positive for a bodily presence of alcohol. Rutledge and the other occupants of the vehicle had drunk alcohol

legally in Ontario, Canada, where the drinking age is 19.

The district court determined that Rutledge violated Section 703 of the Michigan Liquor Control Code because he possessed alcohol in Michigan by having it in his body. On appeal, the circuit court found that the defendant “consumed alcoholic liquor in his body” and possessed alcohol by having it in his body. The Court of Appeals, however, held that it was not a crime under Section 703 for a minor to have alcohol in his or her body if the alcohol was obtained and consumed legally in another jurisdiction.

The Appeals Court reasoned that, since a state generally has jurisdiction only over offenses committed within the state’s physical borders and there was no claim in the *Rutledge* case that the defendant purchased alcohol in Michigan, the case turned on the meaning of “consume” and “possess”. The Court found that, consistent with dictionary definitions, “...the commonly accepted meaning of ‘consume’ as it relates to a beverage means to drink or physically ingest the beverage” and that “...a person does not ‘possess’ a beverage once it has been ingested and is digesting” in his or her body. The Court concluded, “Therefore, as defendant sat as a passenger in the vehicle in Michigan, he did not consume or possess ‘alcoholic liquor.’”.

The *Rutledge* Court also noted that the Michigan Vehicle Code explicitly prohibits a minor from operating a vehicle if he or she has any bodily alcohol content (MCL 257.625(6)). “This statute demonstrates that the Legislature, when it wanted to do so, criminalized *the mere presence of alcohol in a minor’s body* as a result of the consumption of alcohol” (emphasis in original). The Court stated, “If the Legislature intended to criminalize this conduct [legally ingesting alcohol in another jurisdiction and returning to Michigan], it could easily have done so or can amend the statute to include it.”

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Although the Michigan Liquor Control Code prohibited a minor from purchasing, possessing, or consuming alcohol, as the *Rutledge* Court pointed out, the Code did not prohibit a minor from having alcohol in his or her system if the minor purchased and consumed alcohol legally outside of Michigan. As the Court indicated in its decision, the Michigan Vehicle Code prohibits a minor from *driving* while he or she has any bodily alcohol content. By prohibiting a minor from *having* any bodily alcohol content, the bill closed a loophole in the minor-in-possession law and made this provision of the Liquor Control Code consistent with that of the Michigan Vehicle Code.

Supporting Argument

The penalties for a violation of Michigan’s minor-in-possession statute include fines, community service, and substance abuse screening and treatment. Some district court judges found it difficult to enforce those sanctions, however, because there was no threat of jail time if the offender failed to comply. According to testimony before the Senate Judiciary Committee, in some judicial circuits, district courts were able to enforce the sanctions through a threat of jail time under the courts’ contempt of court powers; in other circuits, however, circuit court judges ruled that district judges could not order jail time for contempt of court when the underlying criminal charge did not include jail time. Consequently, some minors who repeatedly violated the Liquor Control Code’s prohibition against purchasing, possessing, or consuming alcohol sometimes shirked their responsibilities to perform community service or receive substance abuse treatment, knowing that the court had limited or no ability to enforce its order. By allowing a judge to sentence a repeat offender to imprisonment if he or she does not meet the probationary requirements laid down by the court, Senate Bill 637 gives teeth to the sanctions that already existed and will encourage minors with alcohol problems to seek treatment and perform community service.

Supporting Argument

First-time offenders, especially youthful offenders, often may get caught up in a situation in which they commit a crime but do not pose a great risk of violating the law

again. Several Michigan laws recognize this by affording first-time offenders an opportunity to have criminal proceedings deferred, comply with certain probationary requirements, and, upon fulfilling those requirements, have their cases discharged without adjudication of guilt. For example, Section 7411 of the Public Health Code includes a deferral and dismissal provision for certain controlled substance offenses (MCL 333.7411), which Senate Bill 637 essentially replicates. The Code of Criminal Procedure also allows the court to defer and dismiss proceedings against a first-time domestic violence offender (MCL 769.4a). In addition, the Holmes Youthful Trainee Act (MCL 762.11-762.16) allows a sentencing court to assign youthful trainee status to a person between the ages of 17 and 21 for a criminal offense, except for certain major offenses and traffic violations. Under that Act, after the offender serves a period of incarceration or probation, the court must discharge him or her and dismiss the proceedings. Assignment to youthful trainee status is not a criminal conviction and the youthful trainee "shall not suffer a civil disability or loss of right or privilege following his or her release".

By allowing proceedings to be deferred and dismissed, Senate Bill 637 recognizes that a person under 21 who violates the minor-in-possession law once should not be burdened with a criminal record for a youthful indiscretion.

Supporting Argument

House Bill 5120 amended the Vehicle Code to expand the definition of "alcohol" in relation to drunk driving offenses. Previously, the meaning of that term was limited to the definition in the Liquor Control Code. While it is appropriate for regulatory purposes to define alcohol narrowly in the Liquor Control Code, a broader interpretation is more suitable for the Vehicle Code since it is designed to protect the public from individuals who would use substances that make the operation of a motor vehicle dangerous.

Opposing Argument

Senate Bill 637 goes too far by subjecting a person to criminal penalties for engaging in a legal activity. Consuming alcohol is legal in Ontario at age 19 and, according to testimony before the Senate Judiciary Committee, both Wisconsin and Illinois allow

a minor to consume alcohol in some situations if accompanied by a parent. According to comments of the Macomb County prosecutor that appeared in the *Macomb Daily*, there is not a significant problem with 19- to 21-year-olds drinking legally in Canada and returning to Michigan ("Lawmakers Want to Close Loophole That Lets Teens Drink", 10-21-03). In that article, the prosecutor also asserted that punishing those who drink legally in another jurisdiction amounts to "punishing the status of a person, not an illegal act the person did". Those under 21 who drink legally in another jurisdiction should not be subject to criminal penalties simply because they cross a border into Michigan while alcohol is still present in their system.

Opposing Argument

Imprisonment is an inappropriate punishment for a minor's alcohol offense. Jail time for purchasing, possessing, or consuming alcohol, or for simply having a bodily alcohol content, is just too harsh. While alcohol abuse and underage drinking are legitimate concerns, "...sentencing otherwise law-abiding young adults to jail for drinking alcohol sends a draconian message", as stated in an editorial in *Adrian's Daily Telegram* ("Jail Time Is Too Harsh For Teenage Drinking", 11-16-03). The editorial distinguished the underage alcohol offenses from other crimes, such as theft, assault, and drug dealing, for which jail time is appropriate. The previous penalties for a minor's buying, possessing, or consuming alcohol were sufficient punishment to fit the crime.

In addition, a *Lansing State Journal* editorial asserted that adding jail time to the penalties for underage alcohol offenses "would impose an undetermined burden on local governments" ("Under 21: Revisions to Youth Drinking Law Should Be Shelved", 11-12-03). The editorial suggested that, "...since local governments finance jails, it would be up to them to pay for holding the kid". At a time when the State has been cutting revenue sharing expenditures and local governments are reducing their budgets, adding to the financial burdens of county jails is ill-advised.

Response: Senate Bill 637 does not mandate jail time for underage alcohol offenders, and allows short jail sentences only upon second and subsequent convictions. If a person receives a deferral

and dismissal for a first violation, as the bill allows, jail time is possible only upon a third or subsequent violation. In addition, imprisonment may be ordered only if the court finds that the minor violated an order of probation for that conviction. So, a minor may be sent to jail only upon failing to comply with such conditions as substance abuse screening or treatment or community service. Judges expressed a desire to have the threat of jail time in order to encourage minors to meet their probationary terms. The number of minors actually sent to jail under the bill should be minimal.

Legislative Analyst: Patrick Affholter
Julie Koval

FISCAL IMPACT

Senate Bill 637

Corrections. The bill will have no fiscal impact on the State correctional system and an indeterminate fiscal impact on local government. There are no statewide data available to indicate how many minors have been convicted of a misdemeanor for the purchase, consumption, or possession of alcoholic liquor. Local units of government incur the cost of both misdemeanor probation and incarceration in a local facility, which varies by county. The bill may increase costs to local units by adding the possibility of imprisonment for up to 30 days for a second violation or up to 60 days for a third or subsequent violation, if the minor violates probation, fails to complete substance abuse programming or community service, or fails to pay a fine for previous convictions. The bill also might increase costs by increasing the number of potentially convicted offenders, as a result of adding having any bodily alcohol content to the existing offense. Public libraries will benefit from any additional penal fines collected.

License Sanctions. The bill will have an indeterminate impact on the Department of State depending on the extent to which the number of license revocations increases.

House Bill 5120

The bill will have no fiscal impact on State or local government.

By adding a reference to Section 625(8) violations to a number of court deadlines, the bill may increase the number of cases on which courts must take action in a given time period, thereby potentially increasing court costs.

Fiscal Analyst: Bruce Baker
Bill Bowerman
Bethany Wicksall

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.