STATE OF NEW YORK

1284

2021-2022 Regular Sessions

IN SENATE

January 8, 2021

Introduced by Sen. RIVERA -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law, the criminal procedure law and the general business law, in relation to decriminalizing possession of controlled substances; to amend the public health law, in relation to establishing the drug decriminalization task force; to repeal certain provisions of the penal law related thereto; and providing for the repeal of certain provisions upon the expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds that substance use disorder is a disease and should therefore be treated using a public health, rather than a criminal-legal-system-centered approach. Existing laws criminalizing the possession of drugs have been ineffective in reducing drug use and preventing substance use disorder. Instead, these laws have devastated individuals, families, and communities. Treating substance use as a crime by arresting and incarcerating people for personal use offenses causes significant harm to individuals who use drugs by disrupting and further destabilizing their lives. It also contributes to an increased risk of death, the spread of infectious diseases, mass incarceration, the separation of families, and barriers to accessing housing, employment, and other vital services. Furthermore, even though research shows that drugs are used and sold at similar levels across all races, laws criminalizing the use of drugs have disproportionately impacted Black and Latinx communities. The purpose of this legislation is to save lives and to help transform New York's approach to drug use from one based on criminalization and stigma to one based on science and compassion, by eliminating criminal and civil penalties for the personal possession of controlled substances.

§ 2. Section 220.03 of the penal law, as amended by section 4 of part I of chapter 57 of the laws of 2015, is amended to read as follows:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 220.03 [~~Criminal~~] Unlawful possession of a controlled substance [~~in the seventh degree~~].

A person is guilty of [~~criminal~~] unlawful possession of a controlled substance [~~in the seventh degree~~] when [~~he or she~~] they knowingly and unlawfully [~~possesses~~] possess a controlled substance; provided, however, that it shall not be a violation of this section when a person possesses a residual amount of a controlled substance and that residual amount is in or on a hypodermic syringe or hypodermic needle obtained and possessed pursuant to section thirty-three hundred eighty-one of the public health law, which includes the state's syringe exchange and pharmacy and medical provider-based expanded syringe access programs; nor shall it be a violation of this section when a person's unlawful possession of a controlled substance is discovered as a result of seeking immediate health care as defined in paragraph (b) of subdivision three of section 220.78 of [~~the penal law~~] this article, for either another person or [~~him or herself~~] themself because such person is experiencing a drug or alcohol overdose or other life threatening medical emergency as defined in paragraph (a) of subdivision three of section 220.78 of [~~the penal law~~] this article.

[~~Criminal~~] Unlawful possession of a controlled substance [~~in the seventh degree~~] is a [~~class A misdemeanor~~] violation punishable by a fine of up to fifty dollars or participation in a needs screening to identify health and other service needs, including but not limited to services that may address any problematic substance use and mental health conditions, lack of employment, housing, or food, and any need for civil legal services. The screening should prioritize the individual's self-identified needs for referral to appropriate services. Such screening shall be conducted by individuals trained in the use of evidence-based, culturally and gender competent trauma-informed practices. Upon verification that the person has completed the screening within forty-five days of when the fine was imposed, the fine imposed by this section shall be waived. Failure to pay such fine shall not be the basis for further penalties or for a term of incarceration.

§ 3. Subdivision 3 of section 160.50 of the criminal procedure law is amended by adding a new paragraph (m) to read as follows:

(m) (i) the conviction was for a violation of an offense defined in section 220.03 of the penal law prior to the effective date of this paragraph.

(ii) the conviction is for an offense defined in section 220.03 of the penal law.

No defendant shall be required or permitted to waive eligibility for sealing or expungement pursuant to this section as part of a plea of guilty, sentence or any agreement related to a conviction for a violation of section 220.03 of the penal law and any such waiver shall be deemed void and wholly unenforceable.

§ 4. Paragraph (a) of subdivision 5 of section 160.50 of the criminal procedure law, as amended by chapter 132 of the laws of 2019, is amended to read as follows:

(a) Expungement of certain [~~marihuana-related~~] records. A conviction for an offense described in subparagraph (iii) of paragraph (k) or subparagraph (ii) of paragraph (m) of subdivision three of this section shall, [~~on and after the effective date of this paragraph,~~] in accordance with the provisions of this paragraph, be vacated and dismissed, and all records of such conviction or convictions and related to such conviction or convictions shall be expunged, as described in subdivision forty-five of section 1.20 of this chapter, and the matter shall be

considered terminated in favor of the accused and deemed a nullity, having been rendered by this paragraph legally invalid. All such records for an offense described in this paragraph where the conviction was entered on or before the effective date of the chapter of the laws of 2019 **or 2020, as applicable,** that amended this paragraph shall be expunged promptly and, in any event, no later than one year after such effective date.

§ 5. Subparagraph (ii) of paragraph (b) of subdivision 5 of section 160.50 of the criminal procedure law, as added by chapter 131 of the laws of 2019, is amended to read as follows:

(ii) where automatic vacatur, dismissal, and expungement, including record destruction if requested, is required by this subdivision but any record of the court system in this state has not yet been updated to reflect same (A) notwithstanding any other provision of law except as provided in paragraph (d) of subdivision one of this section and paragraph (e) of subdivision four of section eight hundred thirty-seven of the executive law: (1) when the division of criminal justice services conducts a search of its criminal history records, maintained pursuant to subdivision six of section eight hundred thirty-seven of the executive law, and returns a report thereon, all references to a conviction for an offense described in paragraph (k) **or (m)** of subdivision three of this section shall be excluded from such report; and (2) the chief administrator of the courts shall develop and promulgate rules as may be necessary to ensure that no written or electronic report of a criminal history record search conducted by the office of court administration contains information relating to a conviction for an offense described in paragraph (k) **or (m)** of subdivision three of this section; and (B) where court records relevant to such matter cannot be located or have been destroyed, and a person or the person's attorney presents to an appropriate court employee a fingerprint record of the New York state division of criminal justice services, or a copy of a court disposition record or other relevant court record, which indicates that a criminal action or proceeding against such person was terminated by conviction of an offense described in paragraph (k) **or (m)** of subdivision three of this section, then promptly, and in any event within thirty days after such notice to such court employee, the chief administrator of the courts or [~~his or her~~] **their** designee shall assure that such vacatur, dismissal, and expungement, including record destruction if requested, have been completed in accordance with subparagraph (i) of this paragraph.

§ 6. Paragraph (k) of subdivision 1 of section 440.10 of the criminal procedure law, as added by chapter 132 of the laws of 2019, is amended to read as follows:

(k) The judgment [~~occurred prior to the effective date of this paragraph and~~] is a conviction for an offense as defined in subparagraph (i) or (ii) of paragraph (k) **or subparagraph (i) of paragraph (m)** of subdivision three of section 160.50 of this part, in which case the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has [~~severe or~~] ongoing **collateral** consequences, including but not limited to potential or actual immigration consequences, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions.

§ 7. Subdivision 6 of section 440.10 of the criminal procedure law, as amended by chapter 131 of the laws of 2019, is amended to read as follows:

6. If the court grants a motion under paragraph (i) or paragraph (k) of subdivision one of this section, it must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances. **A defendant shall not be required to demonstrate prejudice prior to vacating the judgment.**

§ 8. Subdivision 9 of section 440.10 of the criminal procedure law, as added by section 4 of part OO of chapter 55 of the laws of 2019, is amended to read as follows:

9. Upon [~~granting of~~] **considering** a motion pursuant to paragraph (j) of subdivision one of this section, **a defendant shall not be required to demonstrate prejudice. Upon granting the motion,** the court may either:

(a) With the consent of the people, vacate [~~the judgment or~~] **and** modify the judgment [~~by reducing it~~] to [~~one of conviction for a lesser~~] **an alternate** offense; or

(b) Vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant in accordance with the amendatory provisions of subdivision one-a of section 70.15 of the penal law.

§ 9. Section 220.46 of the penal law is REPEALED.

§ 10. Section 220.25 of the penal law is REPEALED.

§ 11. Subdivision 2 of section 850 of the general business law, as amended by chapter 812 of the laws of 1980, is amended to read as follows:

2. **(a)** "Drug-related paraphernalia" consists of the following objects used for the following purposes:

[~~(a)~~] **(i)** Kits, used or designed for the purpose of planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

[~~(b)~~] **(ii)** Kits, used or designed for the purpose of manufacturing, compounding, converting, producing, or preparing controlled substances;

[~~(c)~~] **(iii)** Isomerization devices, used or designed for the purpose of increasing the potency of any species of plant which is a controlled substance;

[~~(d)~~] **(iv)** Scales and balances, used or designed for the purpose of weighing or measuring controlled substances; and

[~~(e)~~] **(v)** Diluents and adulterants, including but not limited to quinine hydrochloride, mannitol, mannite, dextrose and lactose, used or designed for the purpose of cutting controlled substances; **and**

[~~(f)~~] **(vi)** Separation gins, used or designed for the purpose of removing twigs and seeds in order to clean or refine marihuana[~~;~~

~~(g) Hypodermic syringes, needles and other objects, used or designed for the purpose of parenterally injecting controlled substances into the human body;~~

~~(h) Objects, used or designed for the purpose of ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body~~].

(b) "Drug-related paraphernalia" shall not include objects used for the purpose of injecting, ingesting, inhaling or otherwise introducing drugs into the human body.

§ 12. A person under parole, probation or other state or local supervision, or released on bail awaiting trial as of the effective date of this act shall not be punished or otherwise penalized for conduct that

is no longer considered criminal under article 220 of the penal law pursuant to the provisions of this act.

§ 13. The public health law is amended by adding a new section 3395 to read as follows:

§ 3395. Drug decriminalization task force. 1. There is hereby established a drug decriminalization task force which, pursuant to the provisions of this section, shall develop recommendations for reforming state laws, regulations and practices so that they align with the stated goal of treating substance use disorder as a disease, rather than a criminal behavior.

2. The task force shall study and utilize reliable evidence and information to:

(a) Identify amounts of individual controlled substances consistent with non-prescribed personal use;

(b) Identify qualitative and quantitative research data about the types of services that people with substance use disorders who are involved with the criminal legal or child welfare systems desire and currently cannot access, and barriers to accessing existing services; and

(c) Issue recommendations regarding laws, regulations and policies identified by the task force as needing reform, including changes to the penal law, the social services law and any other statutes that will help the state achieve the objective of addressing the use of drugs through a public health approach. In developing recommendations, the task force shall consider:

(i) the quantity of drugs used by individuals with a substance use disorder;

(ii) policies and practices that will prioritize access to treatment and recovery for individuals wishing to address their use of controlled substances;

(iii) non-carceral strategies to divert individuals who use drugs from the criminal legal system, including charges for selling drugs;

(iv) the criminalization of possession of methadone and buprenorphine;

(v) the immigration consequences of convictions for crimes related to drug use;

(vi) how to reduce unnecessary family separation;

(vii) how to reduce civil collateral consequences of drug convictions including effects on employment, housing, education, and licensing;

(viii) how to maximize the use of harm reduction strategies; and

(ix) how to address racial disparities in enforcement.

3. (a) (i) Such task force shall be comprised of the commissioner of health or their designee; the commissioner of addiction services and supports or their designee; the commissioner of mental health or their designee; the commissioner of the division of criminal justice services or their designee; the commissioner of the office of children and family services or their designee; the director of the office of indigent legal services or their designee; one public defender recommended by the New York state defenders association; one prosecutor recommended by the district attorneys association of the state of New York; two experts in the etiology and treatment of substance use disorders recommended by the New York academy of medicine, at least one of whom must be an expert in medication-assisted treatment and at least one of whom must be an expert in the comorbidity of substance use disorders with mental health; and eleven members to be appointed as follows: (A) three members shall be appointed by the governor; (B) three members shall be appointed by the temporary president of the senate; (C) one member shall be appointed by

the minority leader of the senate; (D) three members shall be appointed by the speaker of the assembly; and (E) one member shall be appointed by the minority leader of the assembly.

(ii) If appointments are not made within thirty days, the senate majority leader and speaker of the assembly shall appoint the remaining members.

(iii) All appointees shall have expertise in at least one of the following fields: public health, substance use disorders, mental health, drug user health and harm reduction, the criminal legal system, child welfare, immigration, drug policy or racial justice. Further, appointees shall include people with prior drug convictions, individuals who have participated in a drug court program, individuals who have been formerly incarcerated, individuals impacted by the child welfare system, and representatives of organizations serving communities impacted by past federal and state drug policies. All appointments shall be coordinated to ensure statewide geographic representation that is balanced and diverse in its composition.

(iv) The task force shall be chaired by the commissioner of health or selected by the commissioner from the appointed members. The task force shall elect a vice-chair and other necessary officers from among all appointed members.

(b) The members of the task force shall receive no compensation for their services but shall be reimbursed for expenses actually and necessarily incurred in the performance of their duties;

(c) No civil action shall be brought in any court against any member of the drug decriminalization task force for any act or omission necessary to the discharge of their duties as a member of the task force, except as provided herein. Such member may be liable for damages in any such action if they failed to act in good faith and exercise reasonable care. Any information obtained by a member of the task force while carrying out their duties as prescribed in subdivision two of this section shall only be utilized in their capacity as a member of the task force.

4. No later than one year after the effective date of this section, the task force shall provide a report containing the results of the study, including evidence used as a basis in making such report, and its recommendations, if any, together with drafts of legislation necessary to carry out its recommendations by filing said report, documentation, and draft legislation, with the governor, the temporary president of the senate, the minority leader of the senate, the speaker of the assembly, and the minority leader of the assembly. The task force shall also make the report, documentation, and draft legislation available to the public by posting a copy on the website maintained by the office.

§ 14. This act shall take effect on the one hundred and eightieth day after it shall have become a law; provided, however, that section thirteen shall expire and be deemed repealed two years after such effective date.