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BILL ANALYSIS

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Senate Bill 637 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Tom George
Committee: Judiciary

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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. According to a 2002 Michigan Court of Appeals decision, merely having a bodily alcohol content does 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 is not a violation of Section 703. Some people believe 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 do not include imprisonment. It has been 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 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.

CONTENT

The bill would amend 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 if the minor had violated an order of probation for that conviction or juvenile adjudication.**
- **Allow a first-time offender who pleaded guilty to serve a probationary term and have the charges dismissed without adjudication of guilt 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 proposed 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.**

“Any bodily alcohol content” would mean either of the following:

- An alcohol content of not less than .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.

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 would prohibit a minor from having any bodily alcohol content, and a violation would be subject to the same penalties.

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 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 Secretary of State 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 would be punishable by up to 30 days' imprisonment, and the penalty for a violation following two or more prior convictions or adjudications would include up to 60 days' imprisonment. The jail penalties would apply only if the court found that the minor had violated an order of probation for that conviction or juvenile adjudication.

Probation & Discharge

Under the bill, when a minor pleaded guilty to possessing, consuming, or buying alcohol,

attempting to do so, or having any bodily alcohol content, and the minor had not previously been convicted of or received a juvenile adjudication for violating Section 703, the court could defer further proceedings and place the individual on probation, without entering a judgment of guilt and with the accused's consent. Terms of probation would have to include, at a minimum, the sanctions allowed for a first-time offender and payment of a probation supervision fee as prescribed under the Code of Criminal Procedure.

Upon violation of a term or condition of probation, the court could enter an adjudication of guilt and proceed as otherwise provided by law. When the probationary terms and conditions were fulfilled, the court would have to discharge the individual and dismiss the proceedings without adjudication of guilt. The discharge and dismissal would not be a conviction 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 convictions of the offense. An individual could have only one discharge or dismissal under the bill.

The Department of State Police Records and Identifications Division would have to retain a nonpublic record of an arrest and discharge or dismissal under the bill. That record would have to be furnished to a court, prosecutor, or police agency upon request for the purpose of showing that a defendant had already used the discharge and dismissal allowed under the bill. The record also would have to 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 was an employee of the DOC, the prosecutor, or the law enforcement agency, or was an applicant for employment.
- The DOC, the prosecutor, or the agency used the record only to determine whether an employee had violated his or her conditions of employment or whether an applicant met criteria for employment.

Preliminary Breath Test

Under the Code, a peace officer who has reasonable cause to believe 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 would apply to a minor whom a peace officer had reasonable cause to believe had 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 would have to notify the parent, guardian, or custodian of a minor who had any bodily alcohol content.

MCL 436.1703

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 is not a crime under Section 703 for a minor to have alcohol in his or her body if the alcohol is 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 prohibits a minor from purchasing, possessing, or consuming alcohol, as the *Rutledge* Court has pointed out, the Code does not prohibit a minor from having alcohol in his or her system if the minor purchases and consumes 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 would close a loophole in the minor-in-possession law and make 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 find it difficult to enforce those sanctions, however, because there is no threat of jail time if the offender fails to comply. According to testimony before the Senate Judiciary Committee, in some judicial circuits, district courts are 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 have ruled that district judges may not order jail time for contempt of court when the underlying criminal charge does not include jail time. Consequently, minors who repeatedly violate the Liquor Control Code's prohibition against purchasing, possessing, or consuming alcohol sometimes shirk their responsibilities to perform community service or receive substance abuse treatment, knowing that the court has limited or no ability to enforce its order. By allowing a judge to sentence a repeat offender to imprisonment if he or she did not meet the probationary requirements laid down by the court, the bill would give teeth to the existing sanctions and 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 this proposal 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, except for registration requirements under the Sex Offenders Registration Act, 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, the bill would recognize that a person under 21 who violated the minor-in-possession law once should not be burdened with a criminal record for a youthful indiscretion.

Opposing Argument

The bill would go 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, would be 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 distinguishes the underage alcohol offenses from other crimes, such as theft, assault, and drug dealing, for which jail time is appropriate. The existing penalties for a minor's buying, possessing, or consuming alcohol are sufficient punishment to fit the crime.

In addition, a *Lansing State Journal* editorial asserts 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 suggests 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 would be ill-advised.

Response: The bill would not require jail time for underage alcohol offenders, and would allow short jail sentences only upon second and subsequent convictions. If a person received a deferral and dismissal for a first violation, as the bill would allow, jail time would be possible only upon a third or subsequent violation. In addition, imprisonment could be ordered only if the court found that the minor had violated an order of probation for that conviction. So, a minor could be sent to jail only upon failing to comply with such conditions as substance abuse screening or treatment or community service. Judges have 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

FISCAL IMPACT

Corrections. The bill would 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 are currently 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 could 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 violated probation. The bill also could 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 would benefit from any additional penal fines collected.

Law Enforcement. The bill would require the establishment of a nonpublic record of arrests and discharge or dismissal for a first offense. Since a first offense is a misdemeanor not punishable by imprisonment, it does not fall among those offenses for which a fingerprint file is mandated. Since the record system of the Department of State Police is fingerprint-based, maintaining a nonfingerprint-based record system could result in additional costs, which cannot be determined at this time.

License Sanctions. The bill could have an impact on the Department of State if the number of license revocations changed.

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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.