

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2444/P1dn
RLR:kmg:cph

August 27, 2003

Rachel Roller:

1. Under the bill, a person who commits a first or second drug possession offense is automatically eligible for probation. The bill does not count convictions for drug possession offenses in other jurisdictions as prior convictions. Should it?
2. Do you want to specify a time frame for prior convictions that count against a person for purposes of eligibility for probation and treatment under the primary route. For example, if a person had two possession offenses when he or she was 20, and then was convicted of possession again at age 40, should the two prior convictions bar him from automatic eligibility?
3. Should a person who has two or more prior drug possession convictions be eligible for probation and treatment under the secondary route? Under the bill, such a person is eligible.
4. Instead of using two or more prior convictions for possession as the bar to automatic eligibility, perhaps you could use a combination of prior convictions and failure in the probation and treatment program.
5. The bill uses Stoiber's list of offenses that trigger automatic eligibility for probation and treatment, including possession of drug paraphernalia related to methamphetamine [s. 961.573 (3)] and making counterfeit drugs [s. 961.43 (1) (b) 1.]. A person who operates a methamphetamine lab or counterfeits drugs does not necessarily use drugs, so it may be more appropriate to make persons who commit these offenses eligible for probation and treatment under the secondary route rather than under the primary route.
6. Under the bill, a court must order a person to be assessed for drug use under the secondary route if the person had a controlled substance that he or she was not authorized to take in his or her blood when he or she committed the offense. Should an assessment also be mandatory if the person has a controlled substance that he or she is authorized to take in his or her blood, for example, morphine or vicodin?
7. We talked about allowing a defense attorney to request that his or her client be assessed for drug use for purposes of eligibility under the secondary route. Under the bill, only the defendant, the district attorney, or the court may seek an assessment.

Allowing a defense attorney to seek an assessment contrary to the wishes of his or her client would interfere with the defendant's right to make decisions regarding the conduct of his or her defense.

8. A defendant is generally charged in the county in which the offense is committed, which is not necessarily the county in which the defendant resides. It would be difficult for a person to participate in treatment provided by a county other than the county in which the person resides. Do you want to include a provision that requires the court in the county where the offense is committed to transfer the case to the offender's county of residence after the conviction is entered? If so, which county should pay for the treatment?

9. Should there be a distinction between the terms drug "use" and drug "abuse"? In other words, is drug use always abuse for purposes of this bill? I used the term drug "use" throughout the bill.

10. Do you want to set a maximum number of days that a court may confine a person in jail as a sanction for a violation of a condition of probation? Under current law, a court may place a person who is on probation in jail for up to one year. The bill specifies that the one-year confinement provision does not apply to the treatment and probation program, but does allow some jail time as a sanction. Theoretically, under the bill, a court could confine a person for up to 364 days as a sanction.

11. Under current law, if a county does not have sufficient funding to provide drug treatment to all persons who need treatment, the county must give priority to pregnant women (*see s. 51.42 (3) (ar) 4m.*). Do you want to mandate full funding of the probation and treatment program. If not, do you want to establish what priority level people in the probation program have versus others who need drug treatment. Do you want to specify how counties should prioritize among people who are participating in the probation and treatment program? During our phone conversation with representatives from the Public Defender's office, one of the representatives expressed concern that the probation and treatment program will get filled up with people who commit lesser offenses, and then the people who commit felonies will not be given sufficient services, so they will fail and will be sent to prison.

12. The bill requires that, in developing a plan to provide services under the probation and treatment program, county departments solicit input from residents of the county. Should counties be required to solicit input from anyone else, for example, treatment providers?

13. We discussed allowing counties to join together to develop a single multicounty treatment program. Under current law, counties may already form joint departments of community programs, so it is not necessary to give counties additional authority.

14. Under the bill, if a person successfully completes probation, the court must both vacate the judgment of conviction and expunge the record of conviction. Further, the vacated conviction cannot be considered as a conviction for any purposes (including as a strike against future eligibility for probation and drug treatment). Are there any circumstances under which you would not want the record of conviction expunged? Do

you want the vacated conviction to remain of record for any purpose? Would you prefer that courts determine whether expunction is appropriate on a case-by-case basis?

15. Under the current law “volunteers in probation” provision (s. 973.11), courts may place people on probation under the supervision of a person other than the Department of Corrections. This serves as a precedent for choosing an entity other than the Department of Corrections to supervise people participating in the probation and treatment program in the city of Milwaukee.

16. This bill does not address funding for treatment. Nor does it specify whether persons who are placed on probation under the bill will be required to pay for any portion of their treatment.

17. The bill repeals current law ss. 961.47, 961.472, and 961.475, the conditional discharge provision for certain first time possession offenses, and the treatment option (including the assessment provision for treatment), all of which are described in the analysis of the bill. Please let me know if you would prefer to modify these provisions rather than repealing them. The current treatment provision under s. 961.475 allows a person to voluntarily enter treatment at his or her own expense and does not require significant court oversight. You may therefore wish to keep this provision because it seems to be of little or no cost to government. If you do keep it, should a person who fails private voluntary treatment be eligible for the probation and treatment program created under the bill?

18. The bill does not provide that a person who is convicted of an attempt to commit an offense is eligible for probation to the same extent as the person would be if he or she had committed the offense. I will add this in the next draft.

19. Following are the major differences between the bill and the Stoiber proposal:

a. Under the bill, a court must place a defendant on probation if he or she commits a simple drug offense or if he or she commits another eligible offense that is drug motivated. Stoiber requires the district attorney’s consent to probation, and allows the judge discretion to impose a sentence instead of granting probation.

b. The Stoiber proposal requires the defendant to “promptly assume responsibility” by pleading guilty within 10 days of the charge for a felony and 30 days for a misdemeanor. Under the bill, a defendant is not required to plead guilty — he or she may plead no contest or may even go to trial, and there are no time limits on eligibility for probation and treatment. Also, the bill does not defer motion practice.

c. The Stoiber proposal uses the presentence investigation conducted by the Department of Corrections to evaluate a defendant’s drug use. The bill requires that assessments be performed by persons who meet standards established by the Department of Health and Family Services.

d. The Stoiber proposal requires that a person achieve a sustained period of abstinence (9 months suggested) before he or she may successfully complete probation. The bill leaves up to DHFS and the courts what constitutes success.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us