

State of Wisconsin



1995 Assembly Bill 816

Date of enactment: **June 6, 1996**
Date of publication*: **June 20, 1996**

1995 WISCONSIN ACT 402

AN ACT to amend 161.48 (1) and 161.48 (2); and to create 161.48 (2m) of the statutes; relating to: charging a person with a 2nd or subsequent violation of certain laws concerning controlled substances.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: Under current law, s. 161.48 provides that if any person is convicted of a 2nd or subsequent offense under ch. 161, the authorized maximum fine and maximum period of imprisonment for the offense are doubled. Also, for certain specified offenses, the minimum and maximum fines and periods of imprisonment are doubled. In addition, the statute provides that a 2nd or subsequent offense under s. 161.41 (3m), (3n), (3p) or (3r) is a felony.

In *State v. Young*, 180 Wis. 2d 700, 511 N.W. 2d 309 (Ct. App. 1993), the court of appeals held that under this statute, a prosecutor does not have discretion as to whether to charge a person as a 2nd or subsequent offender if that person has had a prior conviction for an offense under ch. 161. In *Young*, the defendant, who had been convicted of a ch. 161 offense in 1988, was again charged in 1992 with a crime under ch. 161. Prior to the scheduled trial date, the parties agreed to a plea bargain in which the prosecutor agreed to strike the penalty enhancer under s. 161.48 by not charging the defendant as a 2nd or subsequent offender. The trial court state that this was not permissible under the statute because no action is required by the prosecutor before the defendant's increased exposure as a repeat offender subject to the penalty enhancers is triggered. The court of appeals in *Young* upheld the trial court's interpretation of s. 161.48.

This bill amends s. 161.48 to provide that applicable prior convictions may be alleged in the complaint, indictment or information or in amendments to the complaint, indictment or information at any time prior to the entry of a guilty plea or the commencement of trial. The district attorney may also amend a complaint, information or indictment prior to the entry of a

guilty plea or the commencement of trial, to withdraw a charge that a person is a 2nd or subsequent offender.

SECTION 1. 161.48 (1) of the statutes is amended to read:

161.48 (1) Except as provided in subs. (2) and (4), any person ~~convicted of~~ who is charged under sub. (2m) with a 2nd or subsequent offense under this chapter and convicted of that 2nd or subsequent offense may be fined an amount up to twice that otherwise authorized or imprisoned for a term up to twice the term otherwise authorized or both.

SECTION 2. 161.48 (2) of the statutes is amended to read:

161.48 (2) If any person is ~~convicted of~~ charged under sub. (2m) with a 2nd or subsequent offense under this chapter that is specified in s. 161.41 (1) (cm), (d), (e), (f), (g) or (h), (1m) (cm), (d), (e), (f), (g) or (h), (2r) (b), (3m), (3n), (3p) or (3r), and he or she is convicted of that 2nd or subsequent offense, any applicable minimum and maximum fines and minimum and maximum periods of imprisonment under s. 161.41 (1) (cm), (d), (e), (f), (g) or (h), (1m) (cm), (d), (e), (f), (g) or (h), (2r) (b), (3m), (3n), (3p) or (3r) are doubled. A person convicted of a 2nd or subsequent offense under s. 161.41 (3m), (3n), (3p) or (3r) is guilty of a felony and the person may be imprisoned in state prison.

SECTION 3. 161.48 (2m) of the statutes is created to read:

* Section 991.11, WISCONSIN STATUTES 1993-94: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

161.48 (2m) (a) Whenever a person charged with an offense under this chapter may be subject to a conviction for a 2nd or subsequent offense, he or she is not subject to an enhanced penalty under sub. (1) or (2) unless any applicable prior convictions are alleged in the complaint, indictment or information or in an amended complaint, indictment or information that is filed under par. (b) 1. A person is not subject to an enhanced penalty under sub. (1) or (2) for an offense if an allegation of applicable prior convictions is withdrawn by an amended complaint filed under par. (b) 2.

(b) Notwithstanding s. 971.29 (1), at any time before entry of a guilty or no contest plea or the commencement of a trial, a district attorney may file without leave of the court an amended complaint, information or indictment that does any of the following:

1. Charges an offense as a 2nd or subsequent offense under this chapter by alleging any applicable prior convictions.
 2. Withdraws the charging of an offense as a 2nd or subsequent offense under this chapter by withdrawing an allegation of applicable prior convictions.
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