

Mike Menahan
Deputy County Attorney
Lewis and Clark County
Courthouse – 228 Broadway
Helena, MT 59601
(406) 447-8221

CRIMINAL LAW AND PROCEDURE

LEGISLATIVE REVIEW – 2011 SESSION

HB 12 Menahan (Chapter No. 225, Effective 4/20/2011)

An act revising penalties for misdemeanor DUI and BAC offenses. Amends Sections 61-8-714 and 61-8-722, MCA, to increase the maximum possible penalty for second offense DUI from 6 months to 1 year; first offense BAC from 10 days to 6 months; and second offense BAC from 30 days to 1 year.

HB 43 McLaren (Chapter No. 315, Effective May 6, 2011)

An act clarifying employer rights related to medical marijuana. Amends Titles 39 (Labor) and 50 (Health and Safety) to give employers the authority to “discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment” if the employee uses medical marijuana off the employer’s premises during nonworking hours; relieves insurance companies and employers to reimburse the costs associated with the use of medical marijuana; and gives employers the authority to prohibit the use of medical marijuana.

HB 69 Menahan (Chapter No. 226, Effective 10/1/2011)

An act encouraging DUI court participation; allowing DUI courts to suspend sentences; and defining a DUI court, amending Sections 61-8-714 and 61-8-722, MCA. This bill gives judges authority to suspend a sentence (except for the mandatory minimum) if the person participates in a “DUI court,” defined as those courts establishing a special docket for handling cases using incentives and sanctions to assist a participant to complete treatment. It eliminates the provision which currently allows a portion of the mandatory minimum to be served on house arrest but allows an exception if “the judge finds that the imposition of the imprisonment sentence will pose a risk to the person’s physical or mental well being.”

HB 83 Berry (Chapter No. 241, Effective July 1, 2011)

An act creating a prescription drug registry and establishing prescription drug reporting requirements. This bill establishes the “Montana Patient Safety Act” in Title 37 (Professions and Occupations) giving the board of pharmacy the authority to

establish and maintain a prescription drug registry. The registry will contain a list of controlled substances prescribed to a patient. Authorized staff will review the registry for misuse and diversion. The health care information contained in the registry is confidential but will be available to doctors and pharmacists. County coroners and law enforcement officers may access the registry when they obtain an investigative subpoena.

HB 96 Menahan (Chapter No. 31, Effective October 1, 2011)

An act allowing the Office of State Public Defender to recover costs of representation. Amends Section 47-1-110, MCA to allow the OPD to receive payment for costs of representation incurred under Title 72, chapter 5 (Guardianship and Conservatorship Petitions); and involuntary commitment of developmentally disabled persons “when the respondent is determined to have the financial ability to pay for a public defender and a judge orders payment under 47-1-111.”

HB 102 Menahan (Chapter No. 149, Effective October 1, 2011)

An act revising probationary driver’s license provisions for DUI offenders, allowing DUI courts to authorize probationary driver’s licenses to second or subsequent DUI/BAC offenders. This bill gives judges discretion to authorize a probationary driver’s license to a participant in a DUI court. It also gives the court authority to revoke the probationary license if the participant violates the court’s conditions.

HB 106 Lavin (Chapter No. 318, Effective October 1, 2011)

An act establishing the 24/7 sobriety program. The “Montana 24/7 Sobriety Program Act” gives authority to the Attorney General to administer a sobriety program within the department of justice and assist county sheriffs who choose to participate. Sheriffs may provide testing services or designate another entity to do so. The AG is given rulemaking authority to provide for the manner of testing used and establish reasonable fees. Courts may order those convicted of a second or subsequent DUI/BAC to participate who may be required to submit to testing as a condition of bond and as a condition of a suspended sentence. Courts are also given authority to order probationary licenses for those participating in the program.

HB 114 O’Hara (Chapter No. 32, Effective October 1, 2011)

An act amending the Crime Victims Compensation Act to provide coverage for mental health counseling expenses for minor children present in homes where domestic violence has occurred. This bill authorizes the office of victims services to pay up to \$2000 for counseling expenses for minor children present in a home where domestic violence occurred.

HB 117 Hunter (Chapter No. 125, Effective October 1, 2011)

An act requiring adult offenders subject to supervision by the Department of Corrections pursuant to the interstate compact provide a biological sample for DNA testing. Amends Section 44-6-103, MCA to require adult offenders convicted in another state who are subject to supervision by the department of corrections under the Interstate Compact for Adult Offender Supervision to provide a biological sample for DNA analysis.

HB 141 Peterson (Chapter No. 102, Effective July 1, 2011)

An act revising the makeup, operation, and procedures of the board of pardons and parole. Amends Section 2-15-2302, MCA, by eliminating the four auxiliary members on the board but adds four ‘regular’ members. Currently the board consists of three members and four auxiliary members, appointed by the governor. HB 141 requires the governor “to attempt to establish geographic balance among board members.

HB 185 Berry (Chapter No. 156, Effective April 8, 2011)

An act listing synthetic marijuana and salvia as dangerous drugs. Amends Section 50-32-222, MCA, to include synthetic marijuana and salvia divinorum as dangerous drugs in Schedule I.

HB 250 Menahan (Chapter No. 130, Effective April 7, 2011)

An act repealing Section 46-13-109, MCA, requiring a prosecutor to notify a defendant of intent to introduce evidence of previous crimes. In response to the Montana Supreme Court’s decision in *State v. District Court of the 18th Judicial District*, 358 Mont. 325 (2010), holding that *State v. Just* was wrongly decided and overruling its previous opinion, the Legislature repealed the statutory requirement that prosecutors must give written notice, at or before the omnibus hearing, if the prosecutor intends to use evidence of other crimes.

HB 336 Menahan (Chapter No. 250, Effective October 1, 2011)

An act revising penalties for waste of game, requiring forfeiture of privileges and payment of restitution. Amends Section 87-1-111, MCA, to require, in addition to other penalties provided by law, a person convicted of waste of a game animal (wild bird, mammal, or fish) to pay restitution. Under the new law, a person convicted of waste of game *shall* forfeit their hunting, fishing, or trapping license for 24 months.

HB 337 Menahan (Chapter No. 134, Effective October 1, 2011)

An act revising definitions related to fish and game violations. Amends Section 87-2-101, MCA, to define “conviction” so that it includes a guilty plea, a nolo contendere plea, a guilty verdict by a jury or by a court, or a forfeiture of bail. The bill

also provides that “possession,” as used in Title 87 (Fish and Wildlife), has the same meaning as in 45-2-101.

HB 391 Berry (Chapter No. 161, Effective October 1, 2011)

An act providing that the power of initiative does not extend to the prioritization of the enforcement of any state law by a unit of local government.

Amends Section 7-5-131, MCA, to limit the powers of initiative of a local government. Under HB 391, the powers of initiative do not extend to “the prioritization of the enforcement of any state law by a unit of local government.”

HB 548 Bangerter (Chapter No. 230, Effective April 20, 2011)

An act providing that a petition to revoke the suspension or deferral of a criminal sentence may be filed with a court either before the period of suspension or deferral begins to run or during the period of suspension or deferral. In response to the Montana Supreme Court’s opinion in *State v. Stiffarm*, 2011 MT 9, the Legislature amended Section 46-18-203, MCA, to allow a prosecutor to file a petition for revocation “either before the period of suspension or deferral has begun or during the period of suspension or deferral but not after the period has expired.”

SB 15 Jent (Chapter No. 282, Effective April 28, 2011)

An act establishing the offense of aggravated driving under the influence. SB 15 creates a new misdemeanor DUI offense in which the person has a BAC of .16 or more; is required to have an ignition interlock device; is driving with a license suspended as a result of a prior DUI/BAC conviction; refuses a blood or breath test *and* the person’s privilege to drive was suspended or revoked; or the person has a prior or pending DUI/BAC.

SB 26 Blewett (Chapter No. 37, Effective October 1, 2011)

An act requiring temporary orders of protection contain a warning that a violation of the order is a criminal offense. A temporary order of protection, issued pursuant to Section 40-15-201, MCA, must *conspicuously bear* the following warning: “Violation of this order is a criminal offense under 45-5-626 and may also be a criminal offense under 45-5-220.”

SB 29 Moss (Chapter No. 412, Effective October 1, 2011)

An act providing for the training of persons selling or serving alcoholic beverages. SB 29, the “Responsible Alcohol Sales and Service Act,” establishes a training program administered by the Department of Revenue to ensure those licensed to sell alcohol comply with state law prohibiting the sale to minors and to persons who are intoxicated. Licensees and their employees must complete a responsible alcohol server training program within 60 days of hire and every three years thereafter.

SB 41 Shockley (Chapter No. 38, Effective July 1, 2011)

An act allowing a city to establish a city court of record. Under SB 41, Montana cities now have the statutory authority to establish a city court of record by a resolution of the city commissioners. The court's proceedings must be recorded electronically or by a stenographer. Appeals from a city court of record are no longer *de novo*.

SB 42 Shockley (Chapter No. 283, Effective April 28, 2011)

An act authorizing search warrants for blood samples if the offender has a prior refusal or conviction or pending offense. A peace officer may apply for a search warrant for "blood samples that may yield evidence of any measured amount" of alcohol or drugs in a person's body if the person (1) has previously refused to submit to a blood, breath or urine test; (2) has a prior conviction; or (3) a pending offense for DUI, BAC, negligent homicide, vehicular homicide, or negligent vehicular assault.

SB 68 Jent (Chapter No. 235, Effective October 1, 2011)

An act clarifying a driver's duty to remain at the scene of an accident or collision involving death, personal injury, or damage to a vehicle. SB 68 amends Section 61-7-103, MCA, requiring the driver of a vehicle "who knows or reasonably should have known" that the driver was in an accident "with another person or a deceased person" to stop and fulfill the obligations of 61-7-105, i.e. to give information and render aid.

SB 76 Jent (Chapter No. 176, Effective October 1, 2011)

An act providing for parole eligibility for persons sentenced to the custody of the director of the Department of Public Health and Human Services and confined in certain state facilities. SB 76 amends Section 46-23-201, MCA, to authorize the parole board to grant nonmedical parole those prisoners "sentenced to be committed to the custody of the director of the department of public health and human services provided in 46-14-312 and confined in the Montana state hospital, the Montana developmental center, or the Montana mental health nursing home."

SB 124 Ripley (Chapter No. 258, Effective October 1, 2011)

An act reorganizing and recodifying fish and game code criminal statutes and definitions. SB 124 reorganizes and revises Montana's fish and game criminal statutes found in Title 87. The bill was drafted by a working group, appointed by the Director of FW&P, consisting of Justices of the Peace, prosecutors, an Assistant Attorney General, FW&P legal counsel and law enforcement officers, and legislative staff. The bill does not include any policy changes.

SB 149 Essmann (Chaper No. 274, Effective October 1, 2011)

An act creating the offense of predatory loitering by sexual offender. SB 149 establishes the misdemeanor offense of predatory loitering in which a person, previously convicted of a predatory sexual offense or sexual abuse of children, purposely or knowingly loiters near a school, church, place or work or residence of the person's previous victim; or in the vicinity of a school, park, playground, church, or other place frequented by minors. The person must first be given notice to leave the area.

SB 152 Brown (Chapter No. 46, Effective October 1, 2011)

An act increasing the penalty for sexual assault for second and subsequent offenses. SB 152 amends Section 45-5-502, MCA, by increasing the penalty of a second conviction for sexual assault to a fine not to exceed \$1000 or a jail term not to exceed 1 year. A third conviction for sexual assault "the offender shall be fined an amount not to exceed \$10,000 or be imprisoned for a term not to exceed 5 years, or both."

SB 180 Sonju (Chapter No. 220, Effective April 18, 2011)

An act substituting the term "criminal mischief damage to rental property" for "damage to rental property" as an offense. Section 45-6-106, MCA, "Damage to rental property," was enacted in 2009. The purpose of the legislation was to hold tenants responsible when they purposely or knowingly damage or destroy rental property. SB 180 changes the name of the crime to "Criminal mischief damage to rental property." It removes the requirement that the value of the damage exceed, by \$1000, the amount of any damage deposit.

SB 187 Shockley (Chapter No. 344, Effective July 1, 2011)

An act revising the Montana Public Defender Act, limiting caseload levels for the chief public defender and deputy public defenders, requiring notarized affidavits of indigency and revising the provision for payment by defendants. SB 103 modifies the makeup of the public defender commission and prohibits the chief public defender from maintaining a client caseload. Judges now have the authority to deny appointment of a public defender in misdemeanors if, during the initial appearance, the court orders "that incarceration may not be exercised as a sentencing option if the defendant is convicted." The cost of a public defender is now \$250 for a misdemeanor and \$800 for a felony. Costs "must be included in the court's judgment" and must be paid to the clerk of the sentencing court.

SB 203 Zinke (Chapter No. 77, Effective March 25, 2011)

An act allowing the sale and furnishing beer by on-premises retailers in growlers for off-premises consumption. SB 203 authorizes an on-premises retailer to

sell beer in a package or “growler” for off-premises consumption. A growler is any refillable, resealable container.

SB 210 Tutvedt (Chapter No. 194, Effective October 1, 2011)

An act making it a criminal offense for a person to obtain or attempt to obtain a dangerous drug by making certain communications with a person authorized to prescribe or dispense dangerous drugs. Under Section 26-1-805, MCA, fraudulent, deceitful statements to physicians (to obtain or attempt to obtain dangerous drugs) are not a privileged (doctor-patient) communication. SB 210 also amends 45-9-104 to include (1) failing to disclose to a practitioner that the person has received the same or similar dangerous drug from another source within the prior 30 days; or (2) communicating false or incomplete information to a practitioner with the intent to obtain a dangerous drug.

SB 319 Essmann (Chapter No. 280, Effective July 1, 2011)

An act revising child safety restraint standards; waiving the fine for violation of the child restraint requirement under certain conditions; and eliminating the secondary enforcement restriction. SB 319 establishes a primary seatbelt law in which a peace officer may stop a driver if the officer believes there is “a person in the vehicle who is under 6 years of age and weighs less than 60 pounds” and is not properly restrained. The mandatory fine (of not more than \$100) for a person convicted “must be waived if proof of acquisition of an appropriate child safety restraint is presented within 7 days of the violation to the office of the charging officer.”

SB 423 Essmann (Chapter No. 419, Effective (some sections) May 13, 2011. The remainder became effective July 1, 2011)

An act establishing the Montana Marijuana Act and revising laws relating to the use of marijuana; creating a registry program for the cultivation, manufacture, transportation and transfer of marijuana, requiring reporting, allowing inspections, and establishing a transition process. SB 423 repeals the Medical Marijuana Act adopted by initiative in 2004 and replaces it with a statutory scheme intended to: (1) provide legal protections to individuals with debilitating medical conditions who use marijuana to alleviate the symptoms of their conditions; (2) allow for the limited cultivation, manufacture, and possession of marijuana by those who obtain registry identification cards; (3) allow individuals to assist a limited number of cardholders with the cultivation of marijuana; (4) establish reporting requirements for production of marijuana and marijuana-infused products, including inspection requirements for premises; and (5) give local governments a role in establishing regulations for the cultivation, manufacture, and use of marijuana that protect the public health, safety, and welfare of residents within their jurisdiction.