

SENATE BILL REPORT

ESHB 1169

As of February 22, 2022

Title: An act relating to sentencing enhancements.

Brief Description: Concerning sentencing enhancements.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Goodman, Davis, Dolan, Simmons, Bateman, Lekanoff, Springer, Gregerson, Senn, Fitzgibbon, Ramos, Frame, Ramel, Peterson, Lovick, Ryu, Callan, Slatter, Duerr, Ormsby, Macri and Hackney).

Brief History: Passed House: 2/12/22, 53-45.

Committee Activity: Law & Justice: 2/22/22.

Brief Summary of Bill

- Eliminates sentencing enhancements for certain controlled substance violations committed in protected zones and for involving a minor in a criminal street gang-related felony.
- Allows courts to order multiple firearm or deadly weapons enhancements run consecutively or concurrently to each other.
- Allows for resentencing for individuals currently serving sentences that include multiple consecutive firearms enhancements.
- Eliminates restrictions on partial confinement and earned release for sentencing enhancements and applies the changes retroactively to all incarcerated individuals.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Joe McKittrick (786-7287)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Background: In 1981, Washington adopted the sentencing reform act which sought to provide consistent standards for judges to consider when determining the appropriate sentence in a criminal case. Since adoption, courts determine most sentences for felony convictions by reference to a sentencing grid. The grid provides a standard range of months of confinement, and a particular individual's sentence range on the grid is determined by evaluating the seriousness level of the offense committed and the individual's offender score, which is based on the individual's criminal history. Once a base sentencing range is established, it is within the discretion of the court to determine the individual's specific sentence within that range.

Beyond a base standard-range sentence, in certain circumstances the court may sentence an individual to a period of confinement outside the standard range. For example, a court may impose a treatment-based alternative to a standard-range sentence, or a court may, given the particular underlying facts of the case, impose an exceptional sentence either above or below the standard sentence range.

A court may impose a sentencing enhancement in addition to a standard-range sentence under certain circumstances. These sentence enhancements add a specified period of confinement to an individual's base sentence and are determined by the existence of particular facts in the case. For a court to impose a sentencing enhancement, the facts supporting the enhancement must have been plead and proven beyond a reasonable doubt.

Firearms and Deadly Weapons Enhancements. If it is plead and proven that an offender or an accomplice was armed with a firearm at the time of the offense, the court must impose:

- an additional five years of confinement for any class A felony;
- an additional three years of confinement for any class B felony; and
- an additional 18 months confinement for any class C felony.

If it is plead and proven that an offender or an accomplice was armed with a deadly weapon, other than a firearm, at the time of the offense, the court must impose:

- an additional two years of confinement for any class A felony;
- an additional one year of confinement for any class B felony; and
- an additional six months confinement for any class C felony.

If the individual has previously been sentenced for a firearm or deadly weapon enhancement, the additional time must be doubled.

Controlled Substances Violations in Protected Zones Enhancement. If it is plead and proven that an individual committed certain controlled substance crimes within a protected zone, the court must add an additional 24 months to the individual's standard sentence. Protected zones include schools and school buses; the area within 1,000 feet of a school bus route or school grounds; public parks; any public housing projects designated as a drug-free zone; public transit vehicles and stop shelters; civic centers; and the area within 1,000 feet of a civic center if designated by the local governing authority.

Involving a Minor in a Criminal Street Gang-Related Felony Enhancement. A criminal street gang-related offense is an offense committed; for the benefit of, at the direction of, or in association with any criminal street gang; with the intent to promote, further, or assist criminal conduct of the gang; or for other specified reasons such as gaining admission or promotion within the gang, exacting revenge for the gang, intimidating or eliminating witnesses, or providing some other benefit to the gang. If it is plead and proven that an individual, over the age of 18 at the time of the offense, involved a minor in a criminal street gang-related felony, the individual's standard sentence must be multiplied by 125 percent.

Impaired Driving Enhancement. For each passenger in an individual's vehicle under the age of 16 at the time of an offense, the court must impose a 12-month enhancement to a standard sentence for convictions for vehicular homicide committed under the influence, vehicular assault committed with under the influence, felony driving under the influence, or felony physical control of a vehicle while under the influence.

Sexual Motivation Enhancement. If it is plead and proven that an individual committed an offense with sexual motivation, meaning one of the purposes of committing the crime was the perpetrator's sexual gratification, the court must impose a sentencing enhancement as follow:

- an additional two years for any class A felony;
- an additional 18 months for any class B felony; and
- an additional one year for any class C felony.

If the individual has previously been sentenced for a sexual motivation enhancement, the additional time is doubled.

Multiple Enhancements. When a court orders multiple sentences for an individual at one sentencing hearing, those sentences are presumed to run concurrent to each other. In certain circumstances, sentencing enhancements must be served consecutively to both the base sentence as well as all other sentencing provisions, including other enhancements of the same type.

Partial Confinement. For certain offenders, a portion of a term of total confinement may be converted to partial confinement. Partial confinement is confinement for up to one year in a facility operated or contracted by the state or other unit of government, or in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement may include work release, home detention, work crew, or electronic monitoring. During the period of partial confinement, an offender may be required to comply with crime-related prohibitions and affirmative conditions imposed by the court or the Department of Corrections. If the offender violates the rules of the partial confinement program, the offender may be required to serve the remainder of the term in total confinement.

Portions of an offender's sentence attributed to certain sentencing enhancements, including firearm and weapons enhancements, impaired driving enhancements, and sexual motivation enhancements, must be served in total confinement and are not eligible for partial confinement.

Earned Early Release. An offender's felony sentence may be reduced by earned release time, which is earned through good behavior and good performance, as determined by the correctional agency that has jurisdiction over the offender. The total percentage of the sentence that may be reduced by earned release time depends on various factors, including the underlying offense and the date of conviction. An offender may not receive any earned release time for the portion of the sentence that results from certain enhancements specified in statute, including the firearm and deadly weapons enhancements, the impaired driving enhancements, and the sexual motivation enhancement.

Summary of Bill: The sentencing enhancement for certain controlled substances violations committed in protected zones and the sentence enhancement for involving a minor in a criminal street gang-related felony are eliminated.

Mandatory consecutive sentences for firearm and deadly weapon enhancements are eliminated. The court may, but is not required to, order these enhancements be served consecutively. Any person currently serving a sentence that includes consecutive firearm or deadly weapons enhancements may petition the sentencing court for resentencing on the grounds that the consecutive enhancements no longer serve the interests of justice. The applicable county prosecutor may file a petition on the same grounds.

Whenever a resentencing hearing is scheduled, the prosecuting attorney must attempt to notify victims and their survivors of the hearing and must provide access to available victim advocates and related services. The court must provide victims and survivors an opportunity to present a statement. If the court grants the petition, the court may order the firearm or deadly weapons enhancement be served concurrently.

The restrictions on partial confinement and earned release for all sentencing enhancements are removed. While this applies to impaired driving enhancements, if an individual who has been sentenced to one or more impaired driving enhancements has three or more prior impaired driving offenses, the enhancement or enhancements must still be served in total confinement.

The elimination of restrictions on partial confinement and earned release apply retroactively to any person currently serving an applicable sentence. The Department of Corrections has discretion to recalculate the earned release date for any qualifying offender over a period of 12 months following the effective date of the bill. The recalculation must not extend the individual's term of incarceration beyond that which the individual is currently subject.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony: PRO: This bill is an attempt to repair a distortion in the sentencing law where judges do not have discretion to order deadly weapon and firearm enhancements concurrently rather than consecutively. This proposal is the result of cooperation of stakeholders, including prosecutors. Likewise, this bill addresses issues that have resulted in racial disparities in sentencing.

This bill is a step in the right direction, correcting a racially biased, outdated, and dysfunctional sentencing system in Washington. I am currently serving 31.5 years of mandatory consecutive weapons enhancements. These enhancements have no cap and provide no discretion to the courts. This bill gives courts discretion to correct the erroneous and disproportionate stacking of enhancements proven to be more harmful to BIPOC communities.

The language in our firearm enhancement statute should be changed. The current laws have resulted in a friend of mine, who was convicted of possession of two controlled substances while possessing two firearms, receiving a 26-year sentence. Six years for the underling controlled substance conviction, and 20 years for the firearm enhancements. I was incredulous to see this result when the perpetrator of a sexual assault against myself received a sentence that was a decade shorter. Please pass this bill, give judges discretion, and restore balance to our criminal justice system.

Thousands of family members of incarcerated individuals support this bill and have experienced the crushing result of these enhancements. Most people serve more time on the enhancement than on the underlying conviction. This issue is even more egregious because the data shows the racial disparity in those who have received enhancements.

Average sentence lengths are now double and triple what they were in the 1980s. Washington imprisons its citizens at a rate three times that of most developed countries. We now imprison more people with life sentences than we imprisoned persons for all crimes in 1970. Studies have shown these extremely long sentences do nothing for public safety. They do not deter crime, do not reduce recidivism, and are disproportionately applied to persons of color. This bill will allow courts to stack sentencing enhancements only when appropriate in particular cases. I urge you pass this bill.

This bill is an important step in sentencing reform. Part of the issue is the prohibition on sentencing judges' ability to impose sentences they believed were just. Whatever the law is,

it must not compel judges to impose sentences they believe are unjust. This bill simply allows judges to use the discretion we entrust them with in virtually every other realm of sentencing.

This bill helps to resolve some of the disparities in sentencing in Washington. Black, indigenous, and women of color are sentenced at a rate of two to eight times higher than their white counterparts, and enhancements like those this bill seeks to change are at the heart of this problem. Bias appears to play a roll in sentencing, and our current laws are not working.

My son is serving a 387-month sentence due in part to sentencing enhancements running consecutively to his underlying sentence. These were non-violent offenses. While he deserves to serve time for the crimes he committed, the sentence he received is not rational compared to the crime he committed.

I am the sister of a man who, because of Washington's three-strikes law, was sentenced and condemned to die because of a crime he committed when at the age of 25. Because of laws passed last year, he was given the opportunity to be resentenced, and our entire family could finally see a light at the end of the tunnel. This bill seeks to address what amounts to de facto life-sentences because of the stacking of enhancements. How do you tell someone they are more than their worst mistake and then send them back to spend the rest of their lives in prison? Please pass this bill so I don't have to explain to my brother's children again how the interests of justice have not been served and he will not be able to come home.

There is broad evidence that shows that long sentences do nothing to deter future crime. These policies are simply in place to punish black, brown, and poor people. People should be given the opportunity to pay their debts to society outside of prison.

I was recently released from prison after serving 18 years. I was a juvenile tried as an adult at the age of 17, and I was sentenced to three stacked weapons enhancements. I received a resentencing hearing due to changes in case law over the past years, and with agreement of the prosecutor, I was resentenced to time served. The prosecutor noted that prosecutors no longer seek sentences such as the one I received. This bill does not allow everyone with a firearm enhancement to get out of prison. It only allows for those with disproportionate sentences to petition for resentencing and gives judges more discretion in the sentencing process. I urge you to pass this bill.

Studies over the passed two decades have shown a correlation between sentencing disparities and racial bias. While passing this bill will not end systemic racism, it will aid undoing the mandatory harm created by consecutive enhancements that disproportionately cage our black and brown community members.

I am the wife of a resident of the Washington State Department of Corrections serving a 96-month sentence. My husband was forced to take a plea deal that included a gun

enhancement. In his case there was no justice. So, why should taxpayers be forced to pay on a case that is no longer doing justice? This bill gives inmates a feeling of hope and an incentive to be on their best behavior to be able to go home. We need to find balance and in doing so we should seek equality.

My son is currently serving a sentence that includes a firearm enhancement. He was abused as a child, was diagnosed with ADHD, and has childhood trauma issues. In the six years he has been incarcerated, he has received his AA degree and has kept himself out of trouble. He was convicted on his first offense, and this process has been traumatizing on me as his father. His sentence is not serving justice. I urge you pass this bill.

CON: This bill will allow gang members to more easily recruit in schools and use younger kids to perpetuate crime. There are certain criminals who have been sentenced for a reason, and I ask this committee to consider the victims of these crimes.

For years, this body has declared that anything relating to a firearm is a public safety risk and is extremely dangerous. While this body has sought to regulate the lawful possession of firearms, this bill deals directly with criminals with firearms. Why does the Legislature wish to reduce the punishment for criminals who were in possession of firearms? This disregards public safety. I am struggling to find the proper words except, hypocrisy. How many community members will be endangered by passively giving the thumbs-up to criminals who wish to carry a firearm while committing a crime?

The Legislature has claimed to be committed to reducing the gun violence it claims is running rampant in the streets. This violence is not being committed by law-abiding National Rifle Association members, but the criminals and gang activities we are discussing today. These soft- on- crime policies further perpetuate that violence.

The policy issues in this bill are supported by prosecutors, however, we are opposed to this bill because of the retroactive implications. Resentencing has grown exponentially over the last year, and prosecutors simply don't have the resources to implement another large resentencing reform. Likewise, resentencing will have a negative impact on victims.

This bill does not distinguish between the types of sentences where individuals should be allowed to petition for resentencing. It should be limited to only those situations where an individual received an inordinate amount of time due to the stacking of sentencing enhancements. Many of these sentences came by way of a plea rather than a trial, which is a distinct difference. Those pleas often include an agreement with the state for a plea in exchange for the state dropping additional charges. Prosecutors' offices are simply overwhelmed due to changes in the law, the pandemic, and the rise of violent crime.

This bill waters down enhancements for dealing drugs near schools and parks while overdose deaths continue to increase in Washington. It waters down impaired driving enhancements and criminal street gang enhancements as well. Criminals learn the effects of

these changes in the law and modify their behaviors to take advantage of them.

Crime has dropped since the 1990s when these laws were passed and have only increased when we do not hold people accountable. When do we get serious about gun crimes? If you are serious about gun crimes, you will keep these enhancements.

There has been an increase in crimes due to the police reforms. There are now more offenders in the community unsupervised. Possession of a firearm while committing a crime greatly increases the chances of injury or loss of life. This committee should reject this bill.

It is incredible that the Legislature would respond to the surge in rates of criminal violence by stripping prosecutors of the sentencing enhancement for adults who coerce minors to commit gang-related felonies. If you want more of something, you incentivize it, and this bill will incentivize criminal enterprises to recruit youth into illegal activity.

OTHER: This policy will result in savings to the state, but it will also result in counties having to hold resentencing hearings for those individuals currently in confinement. As counties have been strapped for cash and courts have been severely backlogged, the savings from this bill should be reinvested in the local courts.

Persons Testifying: PRO: Representative Roger Goodman, Prime Sponsor; Davina Kerrelola; Sarah Leon; Marla Zink, Washington Supreme Court Gender and Justice Commission; Janice Wesner; Deepa Sivarajan; Cassandra DuBois, coalition for 1169; Melody Simle; David Trieweiler, Wa Defenders Assoc. and the Wa. Assoc. of Criminal Defense Attorneys; Vidal Vincent; Kehaulani Walker, FOTi (Families of the Incarcerated); Azias Ross; Brian Flaherty, King County Department of Public Defense.

CON: James McMahan, WA Assoc Sheriffs & Police Chiefs; Ozzie Knezovich; Brad Thurman; Brett Bass; Robert Snaza; Daniel Mitchell; Aoibheann Cline, National Rifle Association; Russell Brown, WA Association of Prosecuting Attorneys; Jon Tunheim, Thurston County Prosecutor.

OTHER: Juliana Roe, Washington State Association of Counties.

Persons Signed In To Testify But Not Testifying: No one.