



Dennis M. Papp

Final Analysis
Legislative Service Commission

Sub. H.B. 179

125th General Assembly
(As Passed by the General Assembly)

Reps. Wolpert, McGregor, DeWine, C. Evans, Carano, Schmidt, Flowers, Aslanides, D. Evans, Gibbs, Seitz, Beatty, Harwood, Book, Schlichter, Willamowski, Grendell, Latta, Barrett, Boccieri, Buehrer, Carmichael, Cates, Clancy, Collier, Daniels, DeBose, Domenick, Gilb, Hagan, Hoops, Hughes, Jerse, Jolivette, Kearns, Key, Koziura, Niehaus, Olman, Price, Reidelbach, Schaffer, Schneider, Seaver, G. Smith, J. Stewart, Taylor, Ujvagi, Wagner, Walcher, Widener, Williams, Wilson, Young

Sens. Austria, Amstutz, Carey, Randy Gardner, Robert Gardner, Harris, Schuring, Mumper, Spada

Effective date: March 9, 2004

ACT SUMMARY

- In addition to the applicable penalty for theft under current law, permits the sentencing court to suspend the driver's, probationary driver's, or commercial driver's license, temporary instruction permit, or nonresident operating privilege of a person who commits a theft offense by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without full payment for gasoline dispensed into the motor vehicle's fuel tank or another container.
- Authorizes the sentencing court that suspends an offender's license, permit, or privilege pursuant to the provision described in the preceding dotpoint to grant the offender limited driving privileges during the period of suspension.
- States that the General Assembly declares that the Revised Code sections that regulate persons who leave the premises of an establishment at which gasoline is offered for retail sale without making full payment for gasoline dispensed are general laws that completely fill the field of regulation of that nature, and that any municipal ordinance that prohibits establishments at which gasoline is offered for retail sale from requiring prepayment for gasoline is in conflict with those general laws.

- Enacts the offense of "motion picture piracy," a misdemeanor of the first degree on the first offense and a felony of the fifth degree on each subsequent offense.
- Permits the owner or lessee of a facility in which a motion picture is being shown, or the owner's or lessee's employee or agent, who has probable cause to believe that a person is or has been operating an audiovisual recording function of a device in violation of the act's new motion picture piracy prohibition to detain the person, for the purpose of causing an arrest to be made by a peace officer or of obtaining an arrest warrant, in a reasonable manner for a reasonable length of time within the facility or its immediate vicinity.
- Extends, from January 1, 2004, until January 1, 2009, the time by which environmental audits must be completed in order to be within the scope of certain privileges and immunities provided under preexisting law regarding such audits.

CONTENT AND OPERATION

Theft of gasoline; suspension of driver's license

Formerly

Under preexisting law, unchanged by the act, a person commits the offense of theft if the person, with purpose to deprive the owner of property or services, knowingly obtains or exerts control over either the property or services in any of the following ways: (1) without the consent of the owner or person authorized to give consent, (2) beyond the scope of the express or implied consent of the owner or person authorized to give consent, (3) by deception, (4) by threat, or (5) by intimidation (R.C. 2913.02(A)).

The offense of theft has different classifications and penalties, depending upon the circumstances of the violation. The different classifications and penalties, in general, are as follows (R.C. 2913.02(B)(2)):

(1) If the value of the property or services stolen is less than \$500, the offense is *petty theft*, a misdemeanor of the first degree.

(2) If the value of the property or services stolen is \$500 or more and is less than \$5,000 or if the property stolen is any of the property listed in R.C. 2913.71 (e.g., a credit card, negotiable instrument, vehicle license plate or sticker,

vehicle certificate of title form, etc.), the offense is *theft*, a felony of the fifth degree.

(3) If the value of the property or services stolen is \$5,000 or more and is less than \$100,000, the offense is *grand theft*, a felony of the fourth degree.

(4) If the value of the property or services stolen is \$100,000 or more and is less than \$500,000, the offense is *aggravated theft*, a felony of the third degree.

(5) If the value of the property or services stolen is \$500,000 or more and is less than \$1 million, the offense is *aggravated theft*, a felony of the second degree.

(6) If the value of the property or services stolen is \$1 million or more, the offense is *aggravated theft of one million dollars or more*, a felony of the first degree.

Preexisting law, unchanged by the act, imposes distinct classifications and penalties for theft if the victim of the offense is an elderly person or disabled adult or if the property stolen is a firearm or dangerous ordnance, a motor vehicle, or a dangerous drug. (R.C. 2913.02(B)(3) to (B)(6).)

Operation of the act

The act enacts a license suspension sanction as an additional discretionary sanction that applies, in specified circumstances, when an offender commits the offense of theft involving gasoline. It provides that, if the offender committed the offense of theft by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, *in addition* to the above-described general penalties for theft under preexisting law, the court may do one of the following (R.C. 2913.02(B)(7)):

(1) Suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege, unless paragraph (2), below, applies;

(2) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to paragraph (1), above, impose a class 7 suspension of the person's license, permit, or privilege from the range specified in R.C. 4510.02 (under that section, enacted in Am. Sub. S.B. 123 of the 123rd General Assembly, effective January 1, 2004, a class 7 suspension is a

judicial suspension for a definite period of not more than one year), provided that the suspension must be for at least six months.

The act further provides that the sentencing court that suspends an offender's license, permit, or nonresident operating privilege as described above may grant the offender limited driving privileges during the period of the suspension in accordance with R.C. Chapter 4510. (under that Chapter, enacted in Am. Sub. S.B. 123 of the 123rd General Assembly, effective January 1, 2004, unless expressly prohibited by a Revised Code section and subject to specified limitations that apply to suspensions imposed for certain offenses, a court may grant limited driving privileges for any of the following limited purposes: occupational, educational, vocational, or medical purposes; taking the driver's or commercial driver's license examination; or attending court-ordered treatment). (R.C. 2913.02(C).)

The act states that the General Assembly declares that the sections of the Revised Code that regulate persons who leave the premises of establishments at which gasoline is offered for retail sale without the person making full payment for gasoline that was dispensed at that establishment, including R.C. 2913.02, are general laws that completely fill the field of regulation of that nature. It also declares that any municipal ordinance that prohibits establishments at which gasoline is offered for retail sale from requiring the prepayment of gasoline is in conflict with those general laws. (Section 3.) (See **COMMENT**.)

Motion picture piracy

Offense of motion picture piracy

The act enacts a prohibition that prohibits a person, without the written consent of the owner or lessee of the "facility" (see "**Definitions**," below) and of the licensor of the motion picture, from knowingly operating an "audiovisual recording function" (see "**Definitions**," below) of a device in a facility in which a motion picture is being shown. A violation of the prohibition is the offense of "motion picture piracy," a misdemeanor of the first degree on the first offense and a felony of the fifth degree on each subsequent offense.

The act states that the provisions described above do not prohibit or restrict a lawfully authorized investigative, law enforcement, protective, or intelligence gathering employee or agent of the government of Ohio or an Ohio political subdivision, or of the federal government, when acting in an official capacity, from operating an audiovisual recording function of a device in any facility in which a motion picture is being shown. It also states that the act's new prohibition does not limit or affect the application of any other prohibition in the Revised Code, and that any act that is a violation of both the act's new prohibition and

another provision of the Revised Code may be prosecuted under the act's new prohibition, under the other provision of the Revised Code, or under both the act's new prohibition and the other provision of the Revised Code. (R.C. 2913.07.)

Detention of person who violates the act's new motion picture piracy prohibition

Preexisting law. Preexisting law, expanded as described below but otherwise unchanged by the act, permits a merchant, or an employee or agent of a merchant, who has probable cause to believe that items offered for sale by a mercantile establishment have been unlawfully taken by a person, to detain the person, for the purposes described below, in a reasonable manner for a reasonable length of time within the mercantile establishment or its immediate vicinity. It also permits any officer, employee, or agent of a library, "museum," or "archival institution" (both defined terms) to detain a person, for the purposes described below or for conducting a reasonable investigation of a belief that the person has acted as described in clauses (1) or (2) of this sentence, in a reasonable manner for a reasonable length of time within, or in the immediate vicinity of, the library, museum, or archival institution, if the officer, employee, or agent has probable cause to believe that the person has either: (1) without privilege to do so, knowingly moved, defaced, damaged, destroyed, or otherwise improperly tampered with property owned by or in the custody of the library, museum, or archival institution, or (2) with purpose to deprive the library, museum, or archival institution of property owned by it or in its custody, knowingly obtained or exerted control over the property without the consent of the owner or person authorized to give consent, beyond the scope of the express or implied consent of the owner or person authorized to give consent, by deception, or by threat.

An officer, merchant, agent, or employee described in the preceding paragraph may detain another person for any of the following purposes: (1) to recover the property that is the subject of the unlawful taking, criminal mischief, or theft, (2) to cause an arrest to be made by a peace officer, or (3) to obtain a warrant of arrest. The officer, merchant, agent, or employee acting under authority of the provision described in the preceding paragraph cannot search the person detained, search or seize any property belonging to the person detained without the person's consent, or use undue restraint upon the person detained. Any peace officer may arrest without a warrant any person that the officer has probable cause to believe has committed any act described in clause (1) or (2) of the preceding paragraph or that the officer has probable cause to believe has committed an unlawful taking in a mercantile establishment. An arrest under this provision must be made within a reasonable time after the commission of the act or unlawful taking. (R.C. 2935.041.)

Operation of the act. The act expands the preexisting provisions to also specify that the owner or lessee of a facility in which a motion picture is being shown, or the owner's or lessee's employee or agent, who has probable cause to believe that a person is or has been operating an audiovisual recording function of a device in violation of the act's new motion picture piracy prohibition described above may, for the purpose of causing an arrest to be made by a peace officer or of obtaining an arrest warrant, detain the person in a reasonable manner for a reasonable length of time within the facility or its immediate vicinity.

An owner, lessee, employee, or agent acting under authority of the act's new provision described in the preceding paragraph cannot search the person detained, search or seize any property belonging to the person detained without the person's consent, or use undue restraint upon the person detained. Any peace officer may arrest without a warrant any person that the officer has reasonable cause to believe has committed a violation of the act's new motion picture piracy prohibition described above. An arrest under this provision must be made within a reasonable time after the commission of the act or unlawful taking. (R.C. 2935.041(D) to (F).)

Definitions

As used in the act's provisions regarding motion picture piracy (R.C. 2913.07(A) and 2935.041(G)(3)):

(1) "Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part of a motion picture by means of any technology existing on, or developed after, the act's effective date;

(2) "Facility" includes all retail establishments and movie theaters.

Environmental audits

Formerly

Preexisting law, unchanged by the act, provides the owner or operator of a facility or property who conducts an environmental audit of one or more activities at the facility or property with a privilege with respect to certain specified items, information, and communications. Formerly, the privilege so provided applied only to information and communications that were part of environmental audits initiated after March 13, 1997, and completed before January 1, 2004, in accordance with a time frame specified in R.C. 3745.70(A). (R.C. 3745.71.)

Preexisting law, unchanged by the act, also provides the owner or operator of a facility or property who conducts an environmental audit of the facility or property and promptly and voluntarily discloses information contained in or

derived from an audit report that is based on the audit and concerns an alleged violation of environmental laws to the director of the state agency that has jurisdiction over the violation with qualified immunity from any administrative and civil penalties for the specific violation disclosed, subject to exceptions. Formerly, the immunity so provided applied only to information and communications that were part of environmental audits initiated after March 13, 1997, and completed before January 1, 2004, in accordance with a time frame specified in R.C. 3745.70(A). (R.C. 3745.72.)

Preexisting R.C. 3745.70, not in the act, defines numerous terms that are used in these provisions, including "environmental audit," "voluntary," and "environmental audit report."

Operation of the act

The act extends the time by which environmental audits must be completed in order to be within the scope of the privilege and immunity provided under preexisting law. Under the act, the privilege and immunity so provided apply only to information and communications that are part of environmental audits initiated after March 13, 1997, and completed before *January 1, 2009*, in accordance with the time frame specified in preexisting R.C. 3745.70(A). (R.C. 3745.71(I) and 3745.72(F).)

COMMENT

The declarations in Section 3 could be subject to a constitutional challenge under the Home Rule provision of the Ohio Constitution and, thus, the effect of the declarations is unclear. That provision, contained in Section 3, Article XVIII of the Ohio Constitution provides as follows:

Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Emphasis added.)

The first sentence in Section 3 of the act states that the Revised Code sections that "regulate persons who leave the premises of establishments at which gasoline is offered for retail sale without the person making full payment for gasoline that was dispensed at that establishment" are "general laws that completely fill the field of regulation of that nature." However, other than the act's provisions amending R.C. 2913.02, there appears to be no Revised Code section that specifically regulates that type of conduct. Thus, under the first sentence, the act's provisions amending R.C. 2913.02, which simply authorize a court to impose

an additional sanction (a license suspension) upon a person convicted of theft in the specified circumstances related to the theft of gasoline, would be the "general laws that completely fill the field of regulation" of that type of conduct. The Ohio Supreme Court, in *Canton v. State* (2002), 95 Ohio St.3d 149, *et al*, specified that, to constitute a general law for purposes of the Home Rule provisions a statute must: (a) be part of a statewide and comprehensive legislative enactment, (b) apply to all parts of the state uniformly, (c) set forth police, sanitary, or similar regulations rather than purport only to grant or limit municipal authority to set forth such regulations, and (d) prescribe a rule of conduct upon citizens generally. It is possible that a court, applying these criteria, could find that, notwithstanding the statement contained in the first sentence in Section 3 of the act, R.C. 2913.02 as amended by the act is not a general law.

The last sentence in Section 3 of the act provides that "[a]ny municipal ordinance that prohibits establishments at which gasoline is offered for retail sale from requiring the prepayment of gasoline is in conflict with those general laws" (i.e., the laws declared to be general laws in the first sentence in Section 3). If a court finds that R.C. 2913.02 as amended by the act is not a general law, this conflict provision would be meaningless. But if a court finds that R.C. 2913.02 as amended by the act is a general law, the relevant question for the court to determine is whether a particular municipal ordinance that prohibits gasoline retail establishments from requiring the prepayment of gasoline is *in conflict* with the act's R.C. 2913.02, which essentially prohibits theft of gasoline under certain circumstances and permits the imposition on offenders of an additional sanction for that theft. In *Struthers v. Sokol* (1923), 108 Ohio St. 263, the Supreme Court established the test for determining *conflict*. It specified that: (a) in determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa, and (b) a police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-08-03	p. 469
Reported, H. Civil & Commercial Law	06-04-03	pp. 538-539
Passed House (99-0)	06-24-03	p. 947



Reported, S. Judiciary on Criminal Justice	11-13-03	p.	1165
Passed Senate (32-1)	11-13-03	pp.	1180-1181
House concurred in Senate amendments (66-23)	11-13-03	pp.	1204-1206

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