Dennis M. Papp *Legislative Service Commission*

Am. H.B. 179

125th General Assembly
(As Passed by the House)

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

BILL 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 if, within six years of that offense, the offender has been convicted of or pleaded guilty to a theft offense of that type.

- Authorizes the sentencing court that suspends an offender's license, permit, or privilege pursuant to the bill's provisions to grant the offender driving privileges during the period of suspension for specified purposes.

- States that the General Assembly declares that the sections of the Revised Code that regulate theft of gasoline from a retail establishment without making full payment are general laws that completely fill the field of regulation of that nature and that any municipal ordinance that prohibits gasoline retail sale establishments from requiring prepayment for gasoline is in conflict with those general laws.

CONTENT AND OPERATION

Existing law

Under existing law, 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 (see **COMMENT** 1), 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*, is a felony of the fourth degree.

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

The law 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 weapon, a motor vehicle, or a dangerous drug. (R.C. 2913.02(B)(3) to (B)(6).)

Operation of the bill

Theft of gasoline; suspension of driver's license

The bill enacts a license suspension sanction as an additional sanction that applies, in specified circumstances, when an offender commits theft involving gasoline. It provides that, if the offender committed 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 and if,

within six years of that violation, the offender has been convicted of or pleaded guilty to theft by committing a violation of that type, *in addition* to the above-described general penalties for theft, the court may do one of the following (R.C. 2913.02(B)(7)):

(1) Suspend for 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, suspend the person's license, permit, or privilege for one year.

The bill further provides that the sentencing court that suspends an offender's license, permit, or nonresident operating privilege as described above may grant the offender driving privileges during the period of the suspension for the following purposes: (a) to drive to and from the offender's place of employment or school, or (b) to drive as necessary in situations involving a medical emergency. (R.C. 2913.02(C).)

General laws

The bill 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. 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** 2.)

COMMENT

1. Under existing R.C. 2913.71, not in the bill, regardless of the value of the property involved and regardless of whether the offender previously has been convicted of a theft offense, a violation of R.C. 2913.02 (theft) or R.C. 2913.51 (receiving stolen property) is a felony of the fifth degree if the property involved is any of the following:

(A) A credit card;

(B) A printed form for a check or other negotiable instrument, that on its face identifies the

> drawer or maker for whose use it is designed or identifies the account on which it is to be drawn, and that has not been executed by the drawer or maker or on which the amount is blank;
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> (C) A motor vehicle identification license plate as prescribed by section 4503.22 of the Revised Code, a temporary license placard or windshield sticker as prescribed by section 4503.182 of the Revised Code, or any comparable license plate, placard, or sticker as prescribed by the applicable law of another state or the United States;
>
> (D) A blank form for a certificate of title or a manufacturer's or importer's certificate to a motor vehicle, as prescribed by section 4505.07 of the Revised Code;
>
> (E) A blank form for any license listed in R.C. 4507.01 of the Revised Code.

2. The effect of the declaration in Section 3 could be subject to a constitutional challenge under the Home Rule provision of the Ohio Constitution. 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.)

Other than the bill's provisions amending R.C. 2913.02, there appears to be no current sections in 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" (first part of the first sentence of Section 3 in the bill). Section 3 provides that those sections (currently only R.C. 2913.02, as amended by the bill) are "general laws that completely fill the field of regulation of that nature." In amending R.C. 2913.02, the bill simply authorizes a court to impose an additional penalty (driver's license suspension) to the existing theft offense if the offender commits theft of gasoline by causing a motor vehicle to leave the premises of a retail gasoline establishment without making full payment for the dispensed gasoline and if, within six years of that offense, the offender has been convicted of or pleaded guilty to a theft offense of that type.

In determining whether a statute is a general law under the Home Rule provision, the Ohio Supreme Court established the necessary criteria in *Canton v. State* (2002), 95 Ohio St.3d 149, as follows:

> To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally. (Syllabus of the Court.)

Notwithstanding the above statement in Section 3 regarding the described R.C. sections as general law, it is possible that a court, applying the specific criteria established by the Supreme Court, could find that R.C. 2913.02, as amended by the bill, is not a general law.

The last sentence of Section 3 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." If a court finds that R.C. 2913.02 is <u>not</u> a general law, the above conflict provision would be meaningless. If a court finds that R.C. 2913.02 <u>is</u> 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 law that essentially prohibits theft of gasoline under certain circumstances and permits the imposition on certain repeat offenders of an additional penalty for that theft. In *Struthers v. Sokol* (1923), 108 Ohio St. 263, the Supreme Court in its Syllabus established the test for determining *conflict* as follows:

> Municipalities in Ohio are authorized to adopt local police, sanitary and other similar regulations by virtue of section 3, article XVIII, of the Ohio Constitution, and derive no authority from, and are subject to no limitations of, the General Assembly, except that such ordinances shall not be in conflict with general laws.
>
> 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*.

> *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,* or 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, even though greater penalties are imposed by the municipal ordinance. (Emphasis added.)

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	05-08-03	p.	469
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