



Sub. H.B. 179*

125th General Assembly

(As Reported by S. Judiciary on Criminal Justice)

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

** This analysis was prepared before the report of the Senate Judiciary on Criminal Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- 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 bill'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, 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 existing law regarding such audits.

CONTENT AND OPERATION

Theft of gasoline; suspension of driver's license

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*, 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.

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

The bill enacts a license suspension sanction as an additional discretionary 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, *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 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 (i.e., for not more than one year), provided that the suspension must be for at least six months.

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 limited driving privileges during the period of the suspension in accordance with R.C. Chapter 4510. (R.C. 2913.02(C).)

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.**)

Motion picture piracy

Offense of motion picture piracy

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

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

Existing law. Existing law 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), 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 bill. The bill expands the existing 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 bill'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 bill'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 bill'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 bill's provisions (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 bill's effective date;

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

Environmental audits

Existing law

Existing law 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. The privilege so provided applies only to information and communications that are 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.)

Existing law 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. The immunity so provided applies only to information and communications that are 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.)

Operation of the bill

The bill extends the time by which environmental audits must be completed in order to be within the scope of the privilege and immunity provided under existing law. Under the bill, 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 a time frame specified in R.C. 3745.70(A). (R.C. 3745.71(I) and 3745.72(F).)

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;

(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 not a general law, the above conflict provision would be meaningless. If a court finds that R.C. 2913.02 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 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
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	---	---

h0179-rs-125.doc/kl

