Ohio Legislative Service Commission

Bill Analysis

Dennis M. Papp

Sub. S.B. 64*

130th General Assembly
(As Reported by S. Criminal Justice)

Sens. Beagle and Manning, Balderson, Burke, Faber, Hughes, Jones, Lehner, Obhof, Peterson, Schaffer, Widener, LaRose

BILL SUMMARY

- Prohibits under the offense of "criminal child enticement" a person, for any unlawful purpose other than, or in addition to, that proscribed by the existing general prohibition under that offense, from engaging in any activity described in that general prohibition. The general prohibition prohibits a person, by any means and without privilege to do so, from knowingly soliciting, coaxing, enticing, or luring a child under 14 to accompany the person in any manner, when the person has no express or implied authority to engage in that conduct and is not a specified official.

CONTENT AND OPERATION

Criminal child enticement prohibitions

Existing law

Existing R.C. 2905.05 sets forth two prohibitions under the offense of "criminal child enticement – a general prohibition in R.C. 2905.05(A) and a sex-related prohibition in R.C. 2905.05(B). Definitions of the terms in quotation marks used in this part of the analysis are set forth below in "**Definitions**." The prohibitions are as follows:

(1) Existing R.C. 2905.05(A) prohibits a person, by any means and without "privilege" to do so, from knowingly soliciting, coaxing, enticing, or luring any child under 14 years of age to accompany the person in any manner, including entering into

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

any "vehicle" or onto any "vessel," whether or not the offender knows the age of the child, if both of the following apply:[1]

(a) The actor does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity;

(b) The actor is not a "law enforcement officer" (see below), medic, firefighter, or other person who regularly provides emergency services, and is not an employee or agent of, or a volunteer acting under the direction of, any board of education, or the actor is any of such persons, but, at the time the actor undertakes the activity, the actor is not acting within the scope of the actor's lawful duties in that capacity.

(2) Existing R.C. 2905.05(B) prohibits a person, with a "sexual motivation," from violating the general prohibition described above.[2]

Four Ohio appellate courts have considered the constitutionality of the general prohibition and have reached different conclusions, with three holding that it is unconstitutional and one holding that it is not unconstitutional. The Supreme Court has not decided the matter, but it has accepted an appeal to resolve the differences between appellate districts. The court decisions are summarized below in "**Court decisions**."

Operation of the bill

The bill, under the offense of criminal child enticement, prohibits a person, for any unlawful purpose, other than, or in addition to, that proscribed by the general prohibition under the offense, from engaging in any activity described in that general prohibition.[3]

The bill does not amend the general sex-related prohibition under the offense. The bill does not change the existing name of and penalties for the offense or the existing definitions of the terms in this part of the analysis that are in quotation marks, all as described below in "**Current criminal child enticement provisions, other than the prohibitions**." The name, penalties, and definitions all apply to the new prohibition the bill enacts.[4]

---

[1] R.C. 2905.05(A).

[2] R.C. 2905.05(B).

[3] R.C. 2905.05(A).

[4] R.C. 2905.05(A), (B), (E), and (F).

Current criminal child enticement provisions, other than the prohibitions

Under existing law, unchanged by the bill, it is an affirmative defense to a charge of a violation of the general "criminal child enticement" prohibition that the actor undertook the activity in response to a *bona fide* emergency situation or that the actor undertook the activity in a reasonable belief that it was necessary to preserve the health, safety, or welfare of the child.

Under existing law, unchanged by the bill, a violation of either prohibition in R.C. 2905.05 is the offense of "criminal child enticement." The offense generally is a first degree misdemeanor, but if the offender previously has been convicted of criminal child enticement, rape, sexual battery, or the former offense of felonious sexual penetration, or kidnapping or gross sexual imposition when the victim of the prior offense was under 17 years of age at the time of the offense, it is a fifth degree felony.[5]

Definitions

As used in the offense of criminal child enticement, unchanged by the bill:

"**Law enforcement officer**" means any of the following:[6] (1) a sheriff, deputy sheriff, constable, township or joint police district police officer, marshal, deputy marshal, municipal police officer, metropolitan housing authority police force officer, or State Highway Patrol Trooper, (2) an officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority, (3) a mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation, (4) a member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission, (5) a person lawfully called pursuant to R.C. 311.07 to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called, (6) a person appointed by a mayor pursuant to R.C. 737.01 as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed, (7) a member of the state organized militia or the United States Armed Forces, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence, (8) a prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor, (9) a veterans' home police officer, (10) a regional transit authority police force officer, (11) a port authority special police officer,

---

[5] Existing R.C. 2905.05(A) to (D).

[6] R.C. 2901.01(A)(11), which applies throughout the Revised Code and is not in the bill.

(12) the House of Representatives Sergeant at Arms if he or she has arrest authority and an Assistant House of Representatives Sergeant at Arms, (13) the Senate Sergeant at Arms and an Assistant Senate Sergeant at Arms, or (14) a special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in federal law, and that is required to be under a security program and is governed by federal aviation security rules.

"**Privilege**" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.[7]

"**Sexual motivation**" means a purpose to gratify the sexual needs or desires of the offender.[8]

"**Vehicle**" means everything on wheels or runners, including motorized bicycles, but does not mean "electric personal assistive mobility devices," vehicles that are operated exclusively on rails or tracks or from overhead electric trolley wires, and vehicles that belong to any police department, municipal fire department, or volunteer fire department, or that are used by such a department in the discharge of its functions.[9] As used in this definition, "electric personal assistive mobility device" means a self-balancing two non-tandem wheeled device that is designed to transport only one person, has an electric propulsion system of an average of 750 watts, and when ridden on a paved level surface by an operator who weighs 170 pounds has a maximum speed of less than 20 miles per hour.[10]

"**Vessel**" includes every description of craft, including nondisplacement craft and seaplanes, designed to be used as a means of transportation on water.[11]

Court decisions

Three Ohio courts of appeals have held that the general prohibition under the offense of "criminal child enticement," set forth in R.C. 2905.05(A), is unconstitutionally

---

[7] R.C. 2901.01(A)(12), which applies throughout the Revised Code and is not in the bill.

[8] R.C. 2905.05(E), by reference to R.C. 2971.01, which is not in the bill.

[9] R.C. 2905.05(E), by reference to R.C. 4501.01(A), which is not in the bill.

[10] R.C. 4501.01(TT), not in the bill.

[11] R.C. 2905.05(E), by reference to R.C. 1547.01, which is not in the bill.

overbroad in violation of the First Amendment to the United States Constitution.[12] Another held that a Cleveland ordinance patterned after R.C. 2905.05(A) is unconstitutionally overbroad in violation of the First Amendment.[13] Those decisions did not consider the sex-related prohibition under the offense that is located in R.C. 2905.05(B), but one of those appellate courts, in a separate decision rendered after its decision finding R.C. 2905.05(A) to be unconstitutional, upheld a conviction under R.C. 2905.05(B).[14]

A different Ohio court of appeals has held that the general prohibition under the offense is not unconstitutionally vague or overbroad in violation of the First Amendment and that it provides reasonable notice of the conduct that it prohibits.[15] This decision preceded all of the decisions referred to in the preceding paragraph.

The Ohio Supreme Court has not addressed the constitutionality of R.C. 2905.05(A), but it recently accepted an appeal of one of the cases referred to in the second preceding paragraph to resolve the conflict between that decision and the decision referred to in the immediately preceding paragraph, as to whether R.C. 2905.05(A) is unconstitutionally overbroad.[16]

HISTORY

ACTION	DATE
Introduced	03-07-13
Reported, S. Criminal Justice	------

S0064-RS-130.docx/emr

---

[12] See, e.g., *State v. Goode* (February 20, 2013), Summit App. C.A. No. 26320, 2013 Ohio App. LEXIS 488; *State v. Romage* (July 26, 2012), Franklin App. No. 11AP-822, 2012 Ohio App. LEXIS 2971, certification granted (Feb. 20, 2013), Supreme Court, 2013 Ohio LEXIS 465, discret. appeal allowed (Feb. 20, 2013), Supreme Court, 2013 Ohio LEXIS 511; *State v. Chapple* (March 14, 2008), Montgomery App. Case No. 22198, 2008 Ohio App. LEXIS 1026.

[13] *Cleveland v. Cieslak* (August 13, 2009), Cuyahoga App. Case No. 92017, 2009 Ohio App. LEXIS 3432.

[14] *State v. Brown* (Montgomery County, 2009), 183 Ohio App.3d 643.

[15] *State v. Clark* (March 25, 2005), Hamilton App. Appeal No. C-040329, 2005 Ohio App. LEXIS 1265. Also prior decisions of that court upheld an earlier version of R.C. 2905.05 that was limited to enticement into a motor vehicle – see *State v. Long* (Hamilton County, 1989), 49 Ohio App.3d 1; *State v. Kroner* (Hamilton County, 1988), 49 Ohio App.3d 133.

[16] *State v. Romage*, certification granted (Feb. 20, 2013), Supreme Court, 2013 Ohio LEXIS 465, discret. appeal allowed (Feb. 20, 2013), Supreme Court, 2013 Ohio LEXIS 511.