

STORAGE NAME: h0265s1.cp
DATE: March 17, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 265

RELATING TO: Tobacco Products

SPONSOR(S): Committee on Crime and Punishment and Representative Putnam

STATUTE(S) AFFECTED: Section 569.11, F.S.

COMPANION BILL(S): SB 1516 (identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 4 NAYS 2
- (2) LAW ENFORCEMENT AND PUBLIC SAFETY
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The committee substitute makes it unlawful for a person under 18 to knowingly possess any tobacco products, except when the underage person is acting in the scope of his employment with a specified entity. It allows a law enforcement officer to detain a minor and then remove the tobacco product from the minor's possession.

Currently, it is not unlawful for a minor to possess tobacco products, although it is unlawful for a merchant to sell tobacco products to minors. Last session, the Legislature enacted a law which makes it unlawful for a person under 18 to smoke tobacco within 1,000 feet of a school. That law provides for civil penalties.

If the committee substitute becomes a law, an officer who has witnessed the actual possession of a tobacco product may temporarily detain a minor no longer than is reasonably necessary for the officer to determine that a violation has occurred and to remove the tobacco product. An officer will not be permitted to extend the search beyond the place where it was first effected, unless the officer discovers evidence of a criminal offense. Further, an officer will not be allowed to stop a moving motor vehicle for the sole purpose of enforcing this act, but the officer could enforce the act as a secondary action when stopping a motor vehicle for a traffic offense.

This bill provides no civil or criminal penalties for a violation other than the removal of any tobacco products found on the minor. The bill provides no procedures that would allow a person to challenge a law enforcement officer's actions. This raises due process considerations. See Comments on page 8.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. Tobacco Law Prohibits Minors from Smoking within 1,000 Feet of a School:

Last session, the Legislature enacted a law which makes it unlawful for a person under 18 to smoke tobacco within 1,000 feet of a school. s. 386.212, F.S. (1996 Supp); s.1, ch. 96-217, Laws of Florida. Offenders are sanctioned by a civil penalty: a \$25 fine, 50 hours of community service or successful completion of a school-approved anti-tobacco program. Apart from this new law, it is currently lawful for a minor to possess tobacco products, including cigarettes.

However, it is unlawful for a person to sell or give tobacco products to a person under 18. Section 859.06, F.S., makes the sale of any cigarette, tobacco product or cigarette wrapper a second degree misdemeanor. Section 859.061, F.S., requires merchants to post a conspicuous sign in their business which states that it is unlawful to sell cigarettes or tobacco products to a person under 18. Failure to post such a sign constitutes a second degree misdemeanor.

2. Tobacco Product Dealers are Regulated; Tobacco Products Defined:

Chapter 569, F.S., regulates tobacco product dealers by providing for a permitting process and providing penalties for violations. Section 569.002(6), F.S., defines "tobacco products" to include "loose tobacco leaves, and products made from tobacco leaves, which can be used for smoking, sniffing or chewing".

Section 569.006, F.S., allows the Division of Alcoholic Beverages and Tobacco to suspend or revoke a permit and assess fines for a dealer or agent's tobacco law violations. Division compliance visits in FY 1994-95 documented 874 violations for the illegal sale of tobacco products to persons under 18.

Section 569.007, F.S., permits the sale of tobacco products through vending machines **only** if the machine is placed within the unobstructed line of sight of the dealer or the dealer's agent, so as to prevent the purchase by persons under 18.

Section 569.008, F.S., establishes standards for designation as a "responsible tobacco products dealer". To qualify, a tobacco products dealer must train employees regarding the responsible and legal sale of tobacco products. If the dealer is qualified as a responsible tobacco products dealer, the Division may mitigate penalties imposed against the dealer due to an employee's illegal sale of a tobacco product.

3. Persons Under 21 are Prohibited from Possessing Alcoholic Beverages:

In contrast to tobacco products, Florida law prohibits persons under 21 from possessing alcoholic beverages. Section 562.111, F.S., makes underage possession a second degree misdemeanor for a first offense, and a first degree misdemeanor for subsequent offenses. Section 562.11(2), prohibits a person under 21 from misrepresenting his or her age in order to obtain an alcoholic beverage. This offense is a second degree misdemeanor. In addition, if a person under 18 is

found guilty of violating the alcohol possession laws or a drug offense, section 322.056, F.S., mandates that the offenders driver's license be revoked.

B. EFFECT OF PROPOSED CHANGES:

The committee substitute makes it unlawful for a person under 18 to knowingly possess any tobacco products, except when the underage person is acting in the scope of his employment with a specified entity. It allows a law enforcement officer to detain a minor and then remove the tobacco product from the minor's possession.

If the committee substitute becomes a law, an officer who has witnessed the actual possession of a tobacco product may temporarily detain a minor no longer than is reasonably necessary for the officer to determine that a violation has occurred and to remove the tobacco product. An officer will not be permitted to extend the search beyond the place where it was first effected, unless the officer discovers evidence of a criminal offense. Further, an officer will not be allowed to stop a moving motor vehicle for the sole purpose of enforcing this act, but the officer could enforce the act as a secondary action when stopping a motor vehicle for a traffic offense.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The bill makes tobacco possession unlawful for minors under 18. For those individuals, the bill increases their responsibilities and obligations. This bill authorizes law enforcement officers to seize tobacco products from minors. To that extent, this bill will increase the work of law enforcement officers.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

- (2) what is the cost of such responsibility at the new level/agency?

Not applicable.

- (3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Not applicable.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Currently it is lawful for a person of any age to possess any tobacco product. This bill makes it unlawful for any person under 18 to knowingly possess any tobacco product. The bill provides an exception if possession occurs within the scope of employment.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

- (4) Are families required to participate in a program?

Not applicable.

- (5) Are families penalized for not participating in a program?

Not applicable.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

Not applicable.

- (2) service providers?

Not applicable.

- (3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION ANALYSIS:

1. Section One:

Creates section 569.11, F.S., to make unlawful the knowing possession of any tobacco product by a person under 18. Provides an exception for possession in the scope of employment with an entity licensed by chapter 210 or 569, F.S. Authorizes a law enforcement officer to detain a minor and remove the tobacco product from the minor's possession.

2. Section Two:

Provides that this bill will take effect on October 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

CONSTITUTIONAL CONSIDERATIONS:

1. Due Process:

This bill makes it unlawful for a person under 18 to knowingly possess any tobacco products. This bill does not provide for any criminal penalties, nor does it provide for imposition of a fine or other civil penalty. It simply allows a law enforcement officer to "remove" the tobacco product from the minor's possession. The bill does not specify what the law enforcement officer is to do with the tobacco product, nor does it provide a procedure by which a person could challenge the confiscation of a tobacco product.

The state and federal constitutions provide all citizens with the right to due process of law. s. 9, art. I, Fla. Const; 5th and 14th amends., U.S., Const. That is, government action cannot deny a person life, liberty or property without due process of law. If this bill becomes a law, a challenge against it could be made by a person who could argue that its provisions deny due process of law. The bill authorizes a law enforcement officer to seize and remove property: i.e., tobacco products at the spot of the alleged offense. The bill does not provide for any hearing process to challenge the officer's finding that the person was under 18 and was not acting within the scope of employment. It does not provide for any hearing process to challenge whether the item seized by the officer was a "tobacco product" as that term is defined in statutes.

The bill could be fortified against due process challenges by providing a procedure requiring the officer to collect any items seized and to notify the person of a hearing opportunity to challenge the officer's actions. Florida's DUI laws allow an officer to take a person's driver's license at arrest and issue the person a temporary driving permit. s. 322.2615, F.S. This statute allows a person to challenge the officer's actions through an informal administrative hearing. Such a procedure could be used as a model in this bill.

2. Fourth Amendment:

As stated above, this bill does not provide any civil or criminal penalties beyond allowing an officer to detain a minor and remove tobacco products. Since an officer is detaining an individual to remove property which will not be used as evidence in

either a civil or criminal proceeding, this bill raises Fourth Amendment considerations. The question is whether it constitutes an unreasonable seizure of a person any time an officer detains the person to remove property which it is unlawful to possess, but the possession of which is not sanctioned through a criminal or civil penalty. At this writing, no cases have been found which answer this question.

On the other hand, with sufficient probable cause or reasonable suspicion, an officer may detain a person even to investigate a "noncriminal violation". Section 775.08, F.S., defines the various classes of offenses. A crime is an offense that is either a misdemeanor or a felony as defined by section 775.08 (1) and (2), F.S. A misdemeanor or felony may be punishable by some term of imprisonment. In contrast, a "noncriminal violation" is an offense that is punishable "by no other penalty than a fine, forfeiture, or other civil penalty." s. 775.08 (3), F.S. To the extent that the removal of the tobacco products is viewed as a forfeiture penalty, this bill could be said to create a "noncriminal violation".

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute added the following provisions not contained in the original bill:

- ▶ A requirement that the officer must have witnessed the actual possession of a tobacco product in order to temporarily detain a minor.
- ▶ A requirement that no minor shall be temporarily detained longer than is reasonably necessary for an officer to determine that a violation has occurred and to remove the tobacco product.
- ▶ A requirement that the temporary detention shall not extend beyond the place where it was first effected.
- ▶ A requirement that the minor not be searched unless the officer has witnessed the minor's actual possession immediately prior to any search.
- ▶ A requirement that a law enforcement officer shall not stop a moving motor vehicle for the sole purpose of enforcing this section. Allows a law enforcement officer to enforce the act as a secondary action when stopping a motor vehicle for a traffic offense.
- ▶ Allows further detention of a minor if an officer, while enforcing the act, develops reasonable suspicion to believe that the minor has committed a criminal offense.
- ▶ Provides that the act shall not supersede the provisions of the current law prohibiting persons under 18 from smoking within 1,000 feet of a school.

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VII. SIGNATURES:

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