

STORAGE NAME: h0327a.cp
DATE: March 28, 1997

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

BILL #: HB 327

RELATING TO: Graffiti

SPONSOR(S): Representative Rojas

STATUTE(S) AFFECTED: Section 806.13, F.S.

COMPANION BILL(S): none

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

- (1) CRIME AND PUNISHMENT YEAS 8 NAYS 0
- (2) CRIMINAL JUSTICE APPROPRIATIONS
- (3)
- (4)
- (5)

I. SUMMARY:

The bill allows local government to impose mandatory sentences for a violation of a graffiti related ordinance. Local graffiti related ordinances are presently preempted by State law, and judges usually have discretion as to whether any jail, probation, or community service will be ordered. Under this bill, a charging authority (the officer and prosecutor) would have the choice to charge a person with a violation of a state statute or a local ordinance.

The state statute relating to criminal mischief contains a provision which includes graffiti as criminal mischief. This bill makes it a felony for any person to be "convicted" of a second criminal mischief.

The bill permits local government to require mandatory sentences if the offender is charged with a violation of a county ordinance. However, a person who commits a second criminal mischief (which includes graffiti) may not be charged with a felony unless both the prior and pending offense were charged under the state statute.

It is not clear from the bill whether a local ordinance could provide for a mandatory penalty if an offender is charged under the state statute. If an offender is charged under the criminal mischief statute for a graffiti related offense, then judges will, most likely, continue to have complete discretion to impose any sentence up to 60 days in jail for a second degree misdemeanor and up to 1 year in jail for a first degree misdemeanor. The bill also allows an officer to arrest a person without a warrant, if there is probable cause to believe that the criminal mischief statute was violated.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The statute generally prohibiting criminal mischief, section 806.13, Florida Statutes, contains a provision making the placement of graffiti illegal. An act must be committed willfully and maliciously to be penalized by this section. Malice is the willful destruction of property from actual ill will or resentment. J.R.S. v. State, 569 So. 2d 1323 (1st DCA 1990).

A person who willfully and maliciously places graffiti on property (or does any other type of criminal mischief) commits a misdemeanor of the second degree, punishable by up to 60 days in jail if the damage caused is \$200 or less. If the damage is between \$200 and \$1,000, then the offense is a first degree misdemeanor; and if the damage is over \$1000, then the offense is a third degree felony.

Preemption

Municipal and county ordinances are preempted from imposing penalties that exceed state penalties for similar or identical offenses. Thomas v. State, 614 So. 2d 468 (Fla. 1993). Preemption occurs when the legislature adopts a scheme for the regulation of a given subject; when the state law is adopted, local control over the subject covered by state law terminates.

Section 806.13, F.S., gives a court discretion to impose any sentence allowed by the guidelines and the statutory maximum. (Sixty days in jail for a second degree misdemeanor.) State law does not impose a minimum penalty for graffiti. Local ordinances may not impose a minimum mandatory penalty that is higher than state minimum penalties, unless the legislature passes a law expressly stating that the statute does not preempt local ordinances.

B. EFFECT OF PROPOSED CHANGES:

The bill allows local government to impose mandatory sentences for a violation of a graffiti related ordinance. Local graffiti related ordinances are presently preempted by State law, and, judges usually have discretion as to whether any jail, probation, or community service will be ordered. Under this bill, a charging authority (the officer and prosecutor) would have the choice to charge a person with a violation of a state statute or a local ordinance. Judges will be required to impose mandatory sentences as required by local ordinances if the offender is charged with violation the county ordinance.

This bill makes it a felony for any person to be "convicted" of a second criminal mischief. Graffiti is currently included within the section that makes criminal mischief illegal, section 806.13, F.S. However, a second criminal mischief (which includes graffiti) does not become a felony unless both the prior and the new offense were charged under the state statute. The law is not settled as to whether a county or municiple government may attach felony level penalties to an ordinance.

Effect of bill on Criminal Mischief Statute

It is not clear from the bill whether a local ordinance could provide for a mandatory penalty if an offender is charged under the state statute. The provision of the bill which could allow an ordinance to attach a penalty to a state statute reads as follows:

...[C]ities and counties shall not be preempted by state law from establishing higher penalties than those state law provides and mandatory penalties when state law provides discretionary penalties.

This provision is likely to be interpreted to allow higher penalties only if a person is charged by the local ordinance and not by the criminal mischief statute. The courts could also prohibit local government from attaching any arbitrary penalty to a state statute even if expressly authorized by state statute. If an offender is charged under the criminal mischief statute for a graffiti related offense, then judges will, most likely, have complete discretion to impose any sentence up to 60 days in jail for a second degree misdemeanor and up to 1 year in jail for a first degree misdemeanor.

The bill also allows an officer to arrest a person without a warrant, if there is probable cause to believe that the criminal mischief statute was violated. The general rule for misdemeanors is that an officer must issue a "notice to appear" instead of making an arrest if the offense did not occur in an officer's presence. Other misdemeanors such as battery and retail petit theft are exempted from this general rule as well.

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?

The bill gives local government more authority to punish people who place graffiti on property.

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

No.

(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?

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

3. Personal Responsibility:

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

Not applicable.

- 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?

No.

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.

STORAGE NAME: h0327a.cp

DATE: March 28, 1997

PAGE 6

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 RESEARCH:

This section need be completed only in the discretion of the Committee.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See Fiscal Comments.

2. Direct Private Sector Benefits:

See Fiscal Comments.

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

See Fiscal Comments

D. FISCAL COMMENTS:

This bill would allow people to be prosecuted under local graffiti related ordinances. Violations of ordinances are not currently treated as felony offenses. A person may only be sentenced to prison for a felony offense, therefore, this bill would not have an impact on the Department of Corrections. Local governments will be affected depending on the type of mandatory penalties that are imposed on people who violate graffiti related ordinances. If the penalties are left to the court's discretion, then there would be no impact because that is the state of the current law. However, local ordinances which do not include malice as an element for a graffiti related offense, would be easier to prove, and could affect local supervising agencies and jails.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

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:

The element of malice necessary to prove any type of criminal mischief, including the placement of graffiti, can be very difficult if not impossible to prove beyond a reasonable doubt. Graffiti may just as easily be a form of boasting or advertizing rather than malicious which requires willful destruction of property from actual ill will or resentment.

This bill requires that a charge for criminal mischief be reclassified as a felony if a person has a prior conviction for criminal mischief. The automatic reclassification of an offense could be an improper intrusion upon a prosecutor's discretion to determine the appropriate charge. The Florida Supreme Court has held that the offense must be charged as a felony in order for the defendant to be convicted of a felony. Young v. State, 641 So.2d 401 (Fla. 1994).

The requirement of a conviction usually means that a person was adjudicated guilty of an adult offense. A prior "withhold of adjudication" or a juvenile adjudication may keep a prosecutor from charging a person with a felony for a second offense. For most criminal offenses, judges have complete discretion whether to impose an adjudication of guilt, or withhold adjudication of guilt. (A person who is adjudicated guilty can not seal or expunge his/her record, and also must lawfully say that he/she has been convicted of a crime when requested on employment application forms.)

It is not clear whether this bill would allow an offender to be charged under the state statute, section 806.13, F.S., and then require a judge to impose a mandatory county penalty. Absent an express provision allowing local ordinances to impose additional or mandatory penalties on top of a sentence for a violation of a State statute, it is unlikely that the appellate courts would permit local governments to enhance the penalty for a state law. Reyes v. State, 655 So. 2d 111 (2nd DCA 1995) (there is no statutory basis for a county to establish an additional local fine for violation of a state statute). Even if a statute does allow a county or municipality to enhance the penalty for a State statute, it is not clear whether the courts would allow local governments to have very different penalties for a violation of the same state law. The safest approach would be to charge offenders with the local ordinance which would not be preempted pursuant to this bill.

There are currently no limitations on the severity of punishments permitted by a local ordinance, however, there is some question as to whether there is any authority to impose penalties for the violation of an ordinance. Thomas v. State, 614 So. 2d 468 (Fla. 1993).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

J. Willis Renuart

J. Willis Renuart