

STORAGE NAME: h3757.cp
DATE: April 2, 1998

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

BILL #: HB 3757

RELATING TO: Controlled Substances

SPONSOR(S): Trovillion

COMPANION BILL(S): SB 692, SB 778 (Comparable)

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

- (1) CRIME AND PUNISHMENT
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

The bill creates a new offense by amending s. 316.193, the D.U.I. statute, to permit conviction whenever a person in control of a vehicle has any amount of controlled substance as defined in Chapter 893, or any amount of an illegal inhalant as defined in s. 877.111, F.S., in their blood or urine, without regard to whether it affects their normal faculties.

The bill amends s. 893.03, F.S., the schedule of controlled substances, by expanding the definition of "psilocybin" to include "all mushroom species in the genera psilocybe and conocybe."

The bill creates s. 893.133, F.S., to permit a legal inference that a person who is in possession of certain quantities of controlled substances is possessing the controlled substance with intent to sell or deliver.

The bill amends s. 893.135, F.S., to reduce the minimum quantity of cannabis which is necessary to prove trafficking, from 50 pounds, to 10 pounds.

The effective date is July 1 of the year in which enacted.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

D.U.I. In Florida

A D.U.I. conviction requires proof of the following elements:

- ▶ The person was driving or in actual physical control of a vehicle, **AND**
- ▶ The person's Blood Alcohol Level (BAL) is greater than .08%, **OR**
- ▶ The person is under the influence of **alcohol** or a **controlled substance** to the extent that their normal faculties are impaired.

Reclassification for Simple D.U.I.

Even simple D.U.I., which results in no property damage or injury to others is reclassified depending on the number of times an offender has already been convicted. The penalties for Driving Under the Influence in Florida, for successive convictions, as found in Section 316.193, F.S., are as follows:

DRIVING UNDER THE INFLUENCE

| | Incarceration (maximum) | Incarceration Over .20 BAL* | Fine | Fine Over .20 BAL* |
|---------------------------------|------------------------------------|--|-------------------|-------------------------------|
| 1st Offense | 6 months jail | 9 months jail | \$250 - \$500 | \$500 - \$1,000 |
| 2nd Offense | 9 months jail | 12 months jail | \$500 - \$1,000 | \$1,000 - \$2,000 |
| 3rd Offense | 12 months jail | 12 months jail | \$1,000 - \$2,500 | \$2,000 - \$5,000 |
| 4th Offense (felony) | 5 years prison | 5 years prison | \$1,000 - \$5,000 | \$1,000 - \$5,000 |

* **BAL** -- Blood Alcohol Content

Mandatory Minimums For Repeat D.U.I. Offenders

A first D.U.I. offense will usually be punished by probation. However, repeat D.U.I. offenses carry mandatory jail sentences, as follows:

- ▶ 2nd D.U.I. (within 5-years) -- **mandatory 10-days in jail**
- ▶ 3rd D.U.I. (within 10-year) -- **mandatory 30-days in jail**

D.U.I. For Controlled Substances

Under current law, a person may be convicted of D.U.I. for driving under the influence of a controlled substance, the same as if he or she were driving under the influence of alcohol, if the influence of the controlled substance impaired the person's "normal faculties."

Unlike D.U.I. for alcohol, there is no easy test to determine whether a driver has ingested a controlled substance or exactly how much he has ingested. Consequently, the D.U.I. law contains no threshold level of consumption from which impairment may be inferred like there is for alcohol (.08 BAL).

- ▶ Nonetheless, a person may be convicted for D.U.I. on evidence that the person's normal faculties are impaired and that they were under the influence of a controlled substance.
- ▶ Section. 316.1932, F.S. (Implied Consent), specifically requires drivers to submit to a urine test for the presence of a chemical substance listed in s. 877.011 or a controlled substance as listed in s. 893.13, F.S., or face the same suspension of their driver's license as they would face for failing to submit to the breath test.

Drug Offenses

Drug offenses are punished under Section 983.13, F.S., according to four schedules of controlled offenses. Drugs which have a high potential for abuse and have no currently accepted medical use are contained in Schedule I. Schedule II drugs also have a high potential for abuse, yet have a highly restricted, but accepted, medical use. Schedule III drugs have a lower potential for abuse and have an accepted medical use. Schedule IV drugs have the lowest potential for abuse and have an accepted medical use.

Evidence Of Possession With Intent To Sell

Possession of controlled substances is regulated by Section 893.13, F.S. The statute imposes various penalties, for possession, depending upon which controlled substance is involved. Without regard to which drug is involved, however, the offense is enhanced to the next-higher felony level, if the state can prove the person possessed the drugs with an intent to sell. Evidence which satisfies this element may include the location of the person during the possession, the conduct of the person which is indicative of a dealer in drugs, the quantity and packaging of the drugs, and so forth. For example, evidence a defendant possessed 13 individually wrapped "rocks" of cocaine, along with expert testimony that the quantity and packaging indicated the cocaine was for sale was sufficient to support a conviction for possession with intent to sell. Bruce v. State, 616 So.2d 504 (Fla. 3rd DCA 1993).

Drug Trafficking

The offense of trafficking in drugs, under Section 893.135, F.S., does not require proof of sale, or possession with intent to sell. Rather, the state only has to prove simple possession and the specified amount to obtain a conviction. The increased fines and/or mandatory-minimum prison sentences are imposed in addition to any other sentence imposed for the underlying possession, sale, delivery, etc. The penalty for trafficking in various amounts of cannabis are as follows:

Cannabis

| | |
|---------------------------------|-------------------------------------|
| Between 50 and 2,000 pounds | \$25,000 fine |
| Between 2,000 and 10,000 pounds | \$50,000 fine |
| Over 10,000 pounds | 15 years prison (mandatory-minimum) |

Similar mandatory penalties are imposed, from a \$25,000 fine to life in prison (or even death, under certain circumstances) for trafficking in cocaine, heroin, morphine, amphetamine, methamphetamine and others.

B. EFFECT OF PROPOSED CHANGES:

New Offense

The bill creates a new offense by amending s. 316.193, the D.U.I. statute, to permit conviction whenever a person has any amount of controlled substance as defined in Chapter 893, or any amount of an illegal inhalant as defined in 877.111, present in the person's blood or urine without regard to whether it affected their normal faculties. The offense is punished no differently than driving under the influence of alcohol except that there is no enhanced penalty for driving under the influence with over .20 blood alcohol level (BAL).

The bill provides a defense when the driver has a valid medical prescription for the controlled substance. There are no prescriptions for illegal inhalants as defined in Chapter 877.

Expanded Definition Of A Controlled Substance In Schedule I

Psilocybin is a drug which is listed in Schedule I. The bill amends s. 893.03, F.S., the schedule of controlled substances, by expanding "psilocybin" to include "all mushroom species in the genera psilocybe and conocybe."

New Inference Allowed From Quantity Of Drugs Possessed

The bill creates s. 893.133, F.S., to permit a legal inference that the person who is in possession of certain quantities of controlled substances is possessing the controlled substances with intent to sell or deliver, as follows:

| <u>Controlled Substance</u> | <u>Amount Necessary For Inference</u> |
|-----------------------------------|---------------------------------------|
| crack cocaine | 10 rocks |
| powder cocaine | 5 grams |
| cannabis | 1 pound |
| heroin | 20 decks or 1 gram |
| amphetamine or methamphetamine | 5 grams |

Reduced Quantity Necessary For Trafficking In Cannabis

The bill amends s. 893.135, F.S., to reduce the minimum quantity of cannabis which is necessary to prove trafficking, from 50 pounds, to 10 pounds. The bill provides for a mandatory \$15,000 fine for trafficking in less than 50 pounds of cannabis.

Effective Date

The effective date is October 1 of the year in which enacted.

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?

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?

N/A

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

N/A

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

N/A

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?

No.

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?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

ss. 316.193; 893.03; 893.135, F.S.; and creates s. 893.133, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends s. 316.193, F.S., to permit a conviction for D.U.I. if the driver has any amount of a controlled substance in her blood or urine, or any amount of an inhalant in her breath.

Section 2: Incorporates the bill by reference.

Section 3: Amends s. 893.03, F.S., to with psilocybin "all mushroom species in the genera psilocybe and conocybe.

Section 4: Incorporates the bill by reference.

Section 5: Creates s. 893.133, F.S., to permit an inference that the person is possessing the particular controlled substance with intent to sell or deliver when the person has over a specific quantity in his possession.

Section 6: Amends s. 893.195, F.S., by reducing the amount of cannabis necessary to convict for trafficking from 50 pounds to 10 pounds.

Section 7: Incorporates the bill by reference.

Section 8: Provides an effective date.

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:

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The mandates provision is not applicable because the bill pertains to criminal statutes.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce anyone's revenue raising authority.

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

The bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

D.U.I. Of Controlled Substances

The law currently allows for D.U.I. convictions for controlled substances, so long as the person is under the influence of the controlled substance to the extent that the person's normal faculties are impaired. The bill eliminates this last requirement so that a D.U.I. conviction for a controlled substance, or an illegal inhalant, will be possible when the driver is under the influence of any amount of the controlled substance, even if it does not affect the person's normal faculties.

There is no constitutional requirement that driving under the influence of illegal drug laws be limited, only, to those circumstances in which the influence is so great that the person's normal faculties are impaired. Constitutional guarantees of due process are satisfied as long as the law is rationally related to achieving a legitimate state objective. State v. Lite, 592 So. 2d 1202 (4th DCA 1992), citing, Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla.1974). In this case, there is no question that the state has a legitimate objective in maintaining the safety of its streets and highways. The bill is rationally related to that objective because it represents a rational attempt to remove "drugged drivers" from the road, some of which are influenced to the extent that their normal faculties are impaired. This is enough to satisfy due process requirements because the conduct of ingesting controlled substances is illegal, and there is no constitutional protection for engaging in illegal conduct while driving an automobile. The fact that the law may, also, capture some "drugged drivers" who are not actually impaired by the controlled substance they ingested is irrelevant to the analysis since driving is not a fundamental right. The supreme courts of other states have upheld similar legislation. People v. Fate, 836 N.E. 2d 549 (Ill.1994); Stevenson v. State, 453 So. 2d 18 (Ga. 1995).

D.U.I. Law Permits Legal Inference Of Impairment

Drinking alcohol is not illegal conduct for persons over 21. Consequently, a law which criminalized driving under the influence of any amount of alcohol, even if it did not affect the person's normal faculties, would violate due process. Removing drivers from the road who have legally ingested a minimal amount of alcohol, but who are otherwise no different from sober driver's, would not constitute a rational attempt to promote highway safety. Consequently, Florida's D.U.I. law requires the driver to be under the influence of alcohol to the extent that his normal faculties are impaired. The legislature has prescribed .08 BAL as the amount where it may be reasonably inferred that the driver is under the influence. Roberts v. State, 329 So. 2d 269 (Fla. 1976); Hass v. State, 597 So. 2d 770 (Fla. 1992). However, the inference may be rebutted with evidence that the driver, in fact, was not affected by that amount of alcohol.

Permitting Legal Inferences

The practice of allowing juries to draw legal inferences from facts is useful in cases which rely entirely on circumstantial evidence to prove one or more elements of the crime. In D.U.I. cases, for example, the state must prove the driver was under the influence of alcohol to the extent that the normal faculties were impaired. However, relying upon the driver's handling of the automobile, or the manner in which he speaks or performs other tests of mental alertness and balance, is only circumstantial evidence that the person's normal faculties are impaired by alcohol. That is, slurred speech and tipsy balance may be the result of fatigue, or a mental or neuromuscular disability. Consequently, the D.U.I. statute (316.193) provides that .08 BAL or higher permits a legal inference that the person's normal faculties are impaired by alcohol. (The inference may be rebutted and even overcome, however, by other evidence.)

The Bill Permits a New Legal Inference

The bill creates a new legal inference whereby a jury may infer the person intended to sell an illegal drug from the fact that the person possessed a specific quantity of that drug. Regarding possession with intent to sell cocaine, the bill specifies that possession of 10 rocks of crack cocaine, or 5 grams of powder cocaine, permits a jury to infer that the possession was with the intent to sell. This raises the question of whether this legal inference may reasonably be deduced from possession of the specified amounts.

Due Process Requires Evidence Of Guilt, Beyond a Reasonable Doubt

While it is a jury's job to determine whether the state proved each element of the offense, it is the court's duty to evaluate the sufficiency of that evidence before allowing the jury to deliberate on it. This is so because constitutional guarantees of due process require the state to prove each and every element of the crime beyond, and to the exclusion of, every reasonable doubt. Florida Standard Jury Instructions in Criminal Cases, Instr. 2.03; K.A.N. v. State, 582 So. 2d 57 (Fla. 1st DCA 1991). If the evidence is insufficient to prove any element, beyond a reasonable doubt, then the jury has no authority to issue a guilty verdict, and the case must be dismissed. Whether the new legal inference will be upheld by the courts, as not violating due process, will depend on whether the evidence of possessing certain amounts of drugs reasonably permits the inference that the possession was for the purpose of sale. K.A.N. v. State, supra.

Unlike the inference allowed in D.U.I. convictions (.08 BAL), which is objectively and scientifically verifiable, this inference goes to the defendant's mental intent -- an element of the crime ordinarily proven by circumstantial evidence. If proof of any element of a crime depends upon circumstantial evidence alone, then the evidence must be, at least, inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So. 2d 187 (Fla. 1989)(Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.) In this case, the court will be asked to decide whether evidence that a person possessed 10 rocks of "crack" is inconsistent with his reasonable hypothesis of innocence, that he possessed the rocks for his own personal use.

Legal Inferences

Courts have been unwilling to permit convictions for possession with intent to sell based on evidence of specific quantities, absent expert evidence that the quantity is inconsistent with personal use. D.R.C. v. State, 670 So. 2d 1183 (Fla. 5th DCA 1996)(possession of 23 rocks was insufficient to prove intent to sell); McCollough v State, 541 So. 2d 720 (Fla. 4th DCA 1989)(possession of 6.15 grams was insufficient to prove intent to sell). To prove that the quantity is inconsistent with personal use, courts require expert evidence that possession of that specific quantity is indicative of intent to sell. Bruce v. State, 616 So. 2d 504 (Fla. 3rd DCA 1993)(testimony of experienced narcotics officer that possession of 13 rocks of crack cocaine indicated that crack was for sale found sufficient to prove intent to sell).

Similarly, the bill provides that possession of 1 pound of cannabis, 1 gram of heroin, 20 decks of heroin, or 5 grams of amphetamine or methamphetamine permits the legal inference that the drugs are for sale. Without evidence that these quantities are inconsistent with the possibility that the possession was for personal use, the courts may not recognize this law. Law v. State, supra.

Trafficking Distinguished

Permitting conviction for trafficking upon proof of possession of certain quantities of drugs does not require proof of the element of sale or an intent to sell. It provides, in part, as follows:

- (a) Any person who knowingly sells, purchases, manufactures delivers, or brings into this state, **or who is knowingly in actual or constructive possession of** [the controlled substance] ...

Hence, the offense of trafficking does not require proof of the additional element of sale or possession with intent to sell.

No Need For Legal Inferences to Punish Same Conduct

There is no need to make a prosecutor prove possession with intent to sell, if the Legislature believes that possession of certain minimal amounts should be punished the same as possession with intent to sell. Rather, the statute prohibiting simple possession could be amended to provide enhanced penalties for possession of specified amounts without regard to whether there was an intent to sell. Then, the law could punish simple possession of the amounts prescribed by the bill without having to prove an intent to sell and without engaging in, possibly, impermissible legal inferences.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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