

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2300

SPONSOR: Criminal Justice Committee and Senator Crist

SUBJECT: Controlled Substances

DATE: February 25, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 2300 creates s. 893.101, F.S., of Chapter 893, F.S., the chapter addressing controlled substance scheduling and unlawful acts involving controlled substances. The CS provides legislative findings that, for any offense under Chapter 893, F.S., the State is not required to prove that a person knew of the illicit nature of the controlled substance, and such knowledge is not an element. (The Florida Supreme Court in *Scott v. State*, 27 Fla. L. Weekly 31 (Fla. January 3, 2002) interpreted legislative intent was to require the State to prove knowledge of the illicit nature of a controlled substance.)

Further, lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of Chapter 893, F.S. If the defendant asserts this defense, the possession of the controlled substance, whether actual or constructive, gives rise to a permissive presumption that the defendant knew of the illicit nature of the substance. Where the affirmative defense is raised, the jury must be instructed on the permissive presumption.

This CS creates s. 893.101, F.S.

II. Present Situation:

Section 893.13(6), F.S., provides that “it is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription. . . .”

The Standard Jury Instruction relating to possession of a controlled substance provides, in part, the following:

Before you can find the defendant guilty of possession of a controlled substance, the State must prove the following three elements beyond a reasonable doubt:

1. The defendant possessed a certain substance.
2. The substance was a controlled substance.
3. The defendant had knowledge of the presence of the substance.

To possess means to have personal charge of or exercise the right of ownership, management or control over the thing possessed.

Possession may be actual or constructive.

Actual possession means:

- a) the thing is in the hand of or on the person, or
- b) the thing is in a container in the hand of or on the person, or
- c) the thing is so close as to be within ready reach and is under the control of the person.

Mere proximity to a thing is not sufficient to establish control over that thing when the thing is not in a place over which the person has control.

Constructive possession means the thing is in a place over which the person has control, or in which the person has concealed it.

Section 893.13, F.S., is entitled “Burden of Proof.” In the context specifically of drug possession cases, the section only addresses the admissibility of a prescription label for a person charged with an offense that was repealed in 1980.

In *Chicone v. State*, 684 So.2d 736 (Fla. 1996), the Florida Supreme Court held that “guilty knowledge is an element of possession of a controlled substance.” *Id.* at 737. In reviewing the contrary holdings of a series of prior cases, the Court recognized that the “state of the law on this issue is unclear.” *Id.* at 738. The Court recognized that some of the case law suggested that “guilty knowledge” must be proved in constructive possession cases but not in actual possession cases. The state had argued that the lack of knowledge of the illicit nature of the item possessed should be raised and proven as an affirmative defense. The Court rejected this argument and held that although the existing jury instructions were adequate in requiring “knowledge of the presence of the substance,” “if specifically requested by a defendant, the trial court should expressly indicate to jurors that guilty knowledge means the defendant must have knowledge of the illicit nature of the substance allegedly possessed.”

In *Scott v. State*, 27 Fla. Law Weekly 31 (Fla. January 3, 2002), the Court held that the defendant’s knowledge of the illicit nature of a controlled substance is an element of the offense of possession of a controlled substance. Scott had been convicted of introduction or possession of contraband in a correctional facility. Scott requested that the judge read a special jury instruction based on the holding of the *Chicone* case. The Court ruled that the defendant had been entitled to a jury instruction on the “element” of knowledge of the illicit nature of the substance even though Scott had not argued at trial that he did not have knowledge of the illicit nature of the substance and that failure to give the instruction was reversible error.

In dissent, Chief Justice Wells criticized the Court's holding in *Chicone* and stated

[I] fail to see how it follows that it is for the Legislature to define elements of crimes but, when the Legislature does not include an element, that this Court corrects this Legislature's definition by writing the element into the crime.

Chief Justice Wells further stated:

I conclude that what the State proposed in *Chicone* and which the *Chicone* Court rejected would be a more logical and less problematic approach. Lack of knowledge should be an affirmative defense. The State carries its burden by proving the possession of the contraband. This gives rise to the *Medlin* presumption [that the defendant knew of the illicit nature of the substance], and the defendant should then proceed to prove lack of knowledge and overcome the presumption through an affirmative defense. The present majority, by now assuming that this Court can write elements of crimes, has opened the door to many complications. I believe the Legislature should close this particular one by amending the statute to say that possession of contraband gives rise to a presumption of knowledge. More importantly, I believe that this Court should not write elements into statutory crimes.

The words "rebuttable presumption" and "permissive inference" are often used interchangeably. See e.g., *Marcolini v. State*, 673 So. 2d 3 (Fla. 1996). The Florida Supreme Court has described the distinction between a presumption that is mandatory and a presumption that is permissive:

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. See *Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985); *County Court v. Allen*, 442 U.S. 140, 157 (1979) ("[A mandatory presumption] tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.") In contrast, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. See *Francis v. Franklin*, 471 U.S. at 314. A mandatory rebuttable presumption requires the jury to find the presumed element once the State has proven the predicate facts giving rise to the presumption, unless the defendant persuades the jury that such a finding is unwarranted. See *id.* at 314 n.2; *Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979). Mandatory presumptions violate the Due Process Clause if they relieve the state of the burden of persuasion on an element of an offense. See *Francis v. Franklin*, 471 U.S. at 314; *Marcolini v. State*, 673 So. 2d 3, 4 (Fla. 1996).

Brake v. State, 26 Fla. L. Weekly S608b (Fla. September 20, 2001).

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 2300 creates s. 893.101, F.S., of Chapter 893, F.S., the chapter addressing controlled substance scheduling and unlawful acts involving controlled

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Further, lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of Chapter 893, F.S. If the defendant asserts this defense, the possession of the controlled substance, whether actual or constructive, gives rise to a permissive presumption that the defendant knew of the illicit nature of the substance. Where the affirmative defense is raised, the jury must be instructed on the permissive presumption.

The CS takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

An analysis of the impact of this CS was unavailable when this analysis was completed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
