

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1703 (PCB PS 03-01) Mitigating Factors/Certain Offenses
SPONSOR(S): Committee on Public Safety & Crime Prevention; Barreiro
TIED BILLS: **IDEN./SIM. BILLS:** SB 232

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Public Safety & Crime Prevention</u>	<u>18 Y, 0 N</u>	<u>Kramer</u>	<u>De La Paz</u>
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

HB 1703 would prohibit a judge from imposing a downward departure sentence in any sexual battery or lewd or lascivious case in which consent of the victim is not a defense and in which the offender was more than 3 years older than the victim. Thus, a judge would not be permitted to impose a sentence below the lowest permissible sentence under the Criminal Punishment Code for any sexual offense committed against a child below the age of 16 where the offender is more than two years older than the victim.

The bill also provides that the fact that the defendant committed the crime in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse is not a mitigating factor to a DUI offense. As a result, a judge would not be permitted to use this factor to justify a downward departure from the lowest permissible sentence when a defendant is sentenced for a DUI related felony.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1703.ps.doc
DATE: March 13, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Sentencing

The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. A defendant’s sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; the injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant’s prior record and other aggravating factors. The points are added in order to determine the “lowest permissible sentence” for the offense. This is the minimum sentence that a judge may impose. The permissible sentence for an offense ranges from the calculated lowest permissible sentence to the statutory maximum for the primary offense. The statutory maximum sentence for a first degree felony is thirty years, for a second degree felony is fifteen years and for a third degree felony is five years. s. 775.082, F.S.

According to s. 921.0026(1), F.S. downward departure from the lowest permissible sentence is prohibited unless “there are circumstances or factors that reasonably justify the downward departure.” In other words, a judge is not permitted to impose a sentence below the lowest permissible sentence unless the judge makes specific findings justifying the downward departure. Section 921.0026 contains a list of mitigating factors which can justify a departure sentence including the following:

- (a) The departure results from a legitimate, uncoerced plea bargain.
- (b) The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- (c) The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- (d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment.
- (e) The need for payment of restitution to the victim outweighs the need for a prison sentence.
- (f) *The victim was an initiator, willing participant, aggressor, or provoker of the incident.*
- (g) The defendant acted under extreme duress or under the domination of another person.

- (h) Before the identity of the defendant was determined, the victim was substantially compensated.
- (i) The defendant cooperated with the state to resolve the current offense or any other offense.
- (j) *The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.*
- (k) At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- (l) The defendant is to be sentenced as a youthful offender.

The section also prohibits a judge from imposing a downward departure in certain circumstances as follows:

The defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (2) and does not, under any circumstances, justify a downward departure from the permissible sentencing range

Section 921.0026

Sexual Offenses

Sexual Battery: Section 794.011 creates the offense of sexual battery. The term "sexual battery" is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another of the anal or vaginal penetration of another by any other object". s. 794.011(1)(h), F.S. The severity of the offense depends on the age of the victim, the age of the offender and the circumstances of the offense.

A person under the age of 12 cannot legally consent to sexual battery under any circumstance.¹ A person under the age of 18 cannot consent to sexual battery with a person in custodial or familial authority. s. 794.011(8), F.S.

Lewd or Lascivious Offenses: Section 800.04 proscribes various lewd or lascivious offenses including lewd or lascivious battery², lewd or lascivious molestation³, lewd or lascivious conduct⁴ and lewd or lascivious exhibition⁵. These offenses are applicable to victims under the age of 16. The section

¹ The offense is a capital felony if the offender is older than 18 and the victim is less than 12. s. 794.011(2)(a). The offense is a life felony if the person is less than 18 and the victim is less than 12. s. 794.011(2)(b), F.S.

² Lewd or lascivious battery is a second degree felony. The defense is committed when a person: 1) engages in "sexual activity" which is defined as "the oral, anal or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object" with a person 12 years of age or older but less than 16 or 2) encourages, forces, or entices any person less than sixteen to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

³ Lewd or lascivious molestation is committed when a person intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person under 16 years of age or forces or entices a person under 16 years of age to so touch the perpetrator. The offense is classified as follows: 1) a first degree felony if the offender is 18 or older and the victim is less than twelve; 2) a second degree felony if the offender is less than 18 and the victim is less than twelve; 3) a second degree felony if offender is older than 18 and the victim is between age 12 and age 16 and; 4) a third degree felony if the offender is less than 18 and the victim is between age 12 to 16.

⁴ Lewd or lascivious conduct is committed when a person intentionally touches a person under 16 years of age in a lewd or lascivious manner or solicits a person under 16 years of age to commit a lewd or lascivious act. The offense is a second degree felony if the offender is over the age of 18 and a third degree felony if the offender is under the age of 18.

⁵ Lewd or lascivious exhibition is committed when a person in the presence of a victim who is less than 16 years of age, intentionally masturbates, intentionally exposes the genitals in a lewd or lascivious manner or intentionally commits any other sexual activity that does not involve actual physical or sexual contact with the victim, including but not limited to sadomasochistic abuse, sexual

provides that the victim's consent is not a defense to these crimes. The severity of the offense depends on the age of the offender, the age of the victim and the act that was committed.

A person less than 16 years of age cannot legally consent to sexual activity under any circumstances. In other words, even if the victim gives "consent" to the activity, the offender can be charged with an offense. The defendant would not be able to use the fact that the victim "consented" as a defense. The offense with which the offender can be charged is based on the age of the offender and the victim as well as the type of sexual activity. For example, if a 11 year old "consents" to sexual intercourse, the offense is considered "sexual battery". s. 794.011(2)(a), F.S. If a fourteen year old "consents" to the same act, the offense is considered a lewd or lascivious battery. s. 800.04(4)(a), F.S.

State v. Rife: The Florida Supreme Court has held that although consent of a child victim cannot be used as a defense to sexual battery, it may be considered by the court as a mitigating factor at sentencing. State v. Rife, 789 So.2d 288 (Fla. 2001). The dissent in the lower court opinion characterized the facts of the case as follows:

The record reveals that Rife was 49 years old at the time he started his relationship with the minor victim, who was then 16. She showed up at Rife's home after she had been "kicked out" of her home by her mother. The minor's mother had asked her to leave home because the minor reported to police that her father had been having sexual relations with her for several years. Rife was known as a kindly man who had offered his home to others when they were in trouble. The minor had sexual relations with Rife before she moved into his home. During the first six months after she moved in with Rife, she testified, they initially had sex every night which dwindled down to sex every other night the last three months of the relationship.

State v. Rife 733 So.2d 541, 548 (Fla. 5th DCA 1999)(Thompson, J., dissenting)

The sentencing judge recognized that a minor victim's consent could not be used by the defendant as a defense to the sexual battery charge but considered it in imposing a downward departure sentence on the defendant. On review, the Florida Supreme Court approved the actions of the trial court and held that the fact that the legislature failed to prohibit downward departure sentences in sexual battery cases based on the consent of the victim indicated that the legislature intended to provide trial judges with such authority. The court also noted that "[t]here is no question that the Legislature has the authority to preclude a trial judge from imposing a downward departure sentence based on willing participation or consent of the minor victim." Rife, 789 So.2d at 292.

The dissent held that "the consent of a minor to sexual acts performed on her by an adult cannot be used to support a downward departure from the sentencing guidelines." The dissent noted that Rife was charged with the offense of sexual battery of a minor by one in familial or custodial authority and stated the following:

Here, the statute seeks to penalize an adult who preys upon children, and who takes advantage of his or her status to exploit children. The trial court, therefore, should not be able to use as a mitigator that which is statutorily prohibited as a defense at trial. To do so eviscerates the statute and subverts its underlying public policy." Rife, 789 So.2d at 297(Quince, J., dissenting)(quoting Rife, 733 So.2d at 548 (Thompson, J., dissenting)).

HB 1703 - Changes to Mitigating Factors in Sexual Offenses: This bill amends section 921.0026 which deals with mitigating factors in sentencing and provides that the fact that the victim was an initiator, willing participant, aggressor, or provoker of the incident, or consented to the incident, is not a mitigating factor to any offense contained in chapter 794 or s. 800.04 in which consent of the victim is not a defense and where the offender was more than 3 years older than the victim. The provision will

bestiality, or the simulation of any act involving sexual activity. The offense is a second degree felony if the offender is over 18 years of age and a third degree felony if the offender is under 18 years of age

prohibit a judge from using such a finding to justify a downward departure from the permissible sentencing range.

For example, in a case in which a 40 year old offender had sexual intercourse with a 15 year old victim and was charged with lewd and lascivious battery, the judge would not be able to impose a sentence below the lowest permissible sentence for the offense even if the victim had "consented" to the activity. Further, if a 17 year old had sexual intercourse with an 11 year old and was charged with sexual battery, the judge would not be permitted to impose a sentence below the lowest permissible sentence for the offense even if the victim had "consented" to the activity. However, under the bill, if a 16 year old was charged with lewd and lascivious battery for having "consensual" sexual intercourse with a 15 year old, the judge would be permitted (but not required) to impose a sentence below the lowest permissible sentence if the judge found that the victim was a "willing participant".

DUI

A driving under the influence (DUI) conviction requires proof of the following elements:

That the person was driving or in actual physical control of a vehicle and either:

1. The person's breath or blood alcohol level at the time was .08% or greater or
2. The person was under the influence of alcohol, a chemical substance or a controlled substance to the extent that their normal faculties were impaired.

s. 316.193(1), F.S

Section 316.193, F.S. also provides enhanced penalties for a person who operates a vehicle while under the influence and "who, by reason of such operation, causes":

- damage to the property or person of another;
- serious bodily injury to another; or
- the death of another (DUI manslaughter)

Case law allowing downward departure in DUI cases: The First and Second District Courts of Appeal have held that a judge can give a downward departure sentence in a DUI case if the judge finds that the offense was an isolated incident committed in an unsophisticated manner for which the defendant showed remorse. In State v. VanBebber, 805 So.2d 918 (Fla. 2nd DCA 2001), while intoxicated, the defendant failed to stop his vehicle at a stop sign and collided with another vehicle that contained a family of six. Three children were injured and one adult was killed in the crash. The defendant's permissible sentencing range was between 175.9 months and 240 months. However, the judge imposed a downward departure sentence based on a finding that the crime was committed in an unsophisticated manner and was an isolated incident for which the defendant had shown remorse. The judge sentenced the defendant to 200 months incarceration for the DUI manslaughter and DUI with serious bodily injury offenses but suspended the sentence upon completion of fifteen years' probation with special conditions. The state appealed this downward departure sentence and in review, the 2nd DCA affirmed the sentence. The 2nd DCA based its conclusion on the fact that the statute governing mitigating circumstances did not provide an exception for DUI offenses. See also Leveritt v. State, 817 So.2d 891 (Fla. 1st DCA 2002)(allowing downward departure in DUI case and holding that "the authority to determine the scope of a mitigating factor under the sentencing guidelines rests with the legislature.").

The 4th DCA reached a different conclusion in State v. Warner, 721 So.2d 767 (Fla. 1998). The court stated the following:

Defendant, whose blood alcohol tested between .13 and .15, ran into the rear of a vehicle which struck another vehicle at a red light, resulting in serious injuries. Given the state's strong public policy against DUI, we conclude that this reason for departure is not available in this case. If this DUI could be considered an isolated incident, then all first DUI's by people having clean records could be considered such. Nor do we think that drunk driving can be "committed in an unsophisticated manner."

Id. at 769. See also, State v. Beck, 763 So.2d 506 (Fla. 4th DCA 2000).

HB 1703-Changes to Mitigating Factors in DUI Cases: The bill provides that the fact that the defendant committed the crime in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse is not a mitigating factor to a DUI offense. As a result, a judge will not be able to use this factor to justify a downward departure from the lowest permissible sentence when a defendant is sentenced for a DUI related felony.

C. SECTION DIRECTORY:

Section 1: Amends s. 921.0026; relating to mitigating circumstances for sentencing.

Section 2: Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.

2. Expenditures:

The bill would prohibit a judge from imposing a downward departure sentence in certain cases. To the extent that this will result in an offender being sentenced to prison in a case in which the judge would have otherwise imposed a lesser sentence, the bill may have an insignificant impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.

2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

This bill began as a proposed committee bill of the Committee on Public Safety & Crime Prevention. It originally prohibited a judge from imposing a downward departure sentence for any sexual battery or lewd or lascivious case in which consent of the victim is not a defense and in which the offender was more than 2 years older than the victim. During the meeting of the Committee on Public Safety & Crime Prevention this was changed to apply to cases in which the offender was more than 3 years older than the victim.