

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill prohibits certain government regulation of bail bond agents. This bill provides for private assumption of electronic monitoring, which currently is performed by state and local governments.

Promote personal responsibility -- This bill may increase monitoring of persons charged with a criminal offense, and persons on probation and community control. This bill requires a monitored person to pay the cost of the monitoring.

B. EFFECT OF PROPOSED CHANGES:

Florida's Constitution provides that, unless a person is charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance is entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.¹

All persons detained for criminal offenses have a right to a first appearance hearing within 24 hours of arrest.² The primary function of the first appearance hearing is a determination regarding pretrial release.³

Bail is a set sum of money, paid to the sheriff prior to release, which is commonly used as a condition of pretrial release. A person released on bail becomes an "absconder" and forfeits the bail if he or she fails to appear before the court at the appointed time. As an alternative to posting bail, the person may employ the services of a bail bond agent. The bail bond agent does not pay the bail amount, but acts as a surety, promising to pay the bail amount should the defendant become an absconder. Bail bond agents are authorized to track, detain, and bring an absconder before the sheriff; a bail bond agent that returns an absconder may recover some or all of the bail. Florida licenses bail bond agents through the Department of Financial Services.

In addition to bail, courts impose any number of other conditions of pretrial release intended to ensure the defendant appears at trial and does no further harm in society. Those conditions may require the defendant to stay in, or stay away from, a particular location.

A recent innovation in the criminal justice arena is electronic monitoring of persons.⁴ Electronic monitoring is a process whereby a person's whereabouts are tracked through use of a transmitter securely attached to the offender, and a receiver or receivers that receive the signal. Early devices were used for house arrest circumstances, utilizing a simple proximity signal and a receiver in the home. Later devices use technologies such as radio frequency, cellular telephone, and GPS, to provide tracking systems that can provide location information on a 24 hour basis.

¹ Article I, s. 14, Fla.Const.

² Rule 3.130(a), Florida Rules of Criminal Procedure.

³ Rules 3.130(d) and 3.131(b).

⁴ Section 907.041(4)(b), F.S. provides the court with discretion to release an accused on "electronic monitoring" or on recognizance bond if the findings on the record of facts warrant such a release.

In the juvenile law setting, electronic monitoring is one of the forms of pretrial detention that can be ordered if allowed by the risk assessment instrument.⁵ Electronic monitoring administered by the Department of Corrections is currently used for adult offenders on probation.⁶ There is no statutory prohibition on the use of electronic monitoring for pretrial release. Pretrial release is a function of local law enforcement, therefore, if a court orders electronic monitoring of a person on pretrial release, the state would not be involved.

Effect of Bill

This bill amends the law licensing bail bond agents, at s. 648.387, F.S., to provide that a licensed bail bond agent may also provide electronic monitoring of persons. A licensed bail bond agent may also subcontract for electronic monitoring services with third party vendors, provided the bail bond agent certifies that the vendor complies with the legal requirements for electronic monitoring.

A bail bond agency may “collect a reasonable nonrefundable fee for electronic monitoring services from the person who is subject to electronic monitoring.” A bail bond agent may take the person into custody and return the person to the sheriff if the monitored person fails to timely pay for the monitoring service. The monitoring fee is separate from any bail bond premium. The Department of Financial Services, which agency licenses bail bond agents, may not set the fee nor discipline a bail bond agent regarding assessment or collection of the fee. A bail bond agent must keep records and receipts for electronic monitoring services separate from bail bond records.

Chapter 903, F.S., governs bail. This bill creates a new section in ch. 903, F.S., to create a probation appearance bond. As a condition of probation, community control, or other supervision related to a violent or sex-related offense, the sentencing court may order the posting of a probation bond. The bond may be conditioned upon use of an electronic monitoring system. On 72 hours notice from the clerk, the bail bond agent must bring the offender before the court. On notice from the probation officer that the offender has violated the terms of release, the bail bond agent must bring the offender before the court. If the offender is not timely produced, the bond is subject to forfeiture.

Chapter 907, F.S., governs all conditions of pretrial release. This bill creates s. 907.06, F.S., related to electronic monitoring. It provides that, as a condition of pretrial release on bond for a defendant charged with a violent or sex-related offense, or for a defendant who has been previously convicted of a violent or sex-related offense, that the court may order electronic monitoring. The defendant must pay the cost of monitoring, and failure to pay is grounds for remand to the custody of the sheriff.

Electronic monitoring pursuant to this new section is required to be continuous monitoring utilizing Global Positioning Satellite (GPS) technology. The technology must provide for monitoring to be able to locate the defendant to within 9 meters. Monitoring may be by a government entity, or by a bail bond agent related to an undertaking to provide bail. A government entity or a bail bond agent may employ a vendor to provide electronic monitoring, provided that the government entity or bail bond agent retains primary responsibility for monitoring. A government entity that uses a vendor must select the vendor through competitive bidding.

Any person providing electronic monitoring must immediately report violations to the court, sheriff, state attorney, and bail bond agent. The bill provides that the provision of electronic monitoring services is

⁵ See s. 985.215, F.S. The Risk Assessment Instrument provided in s. 985.215, F.S. is utilized at a detention hearing to determine the appropriate level of detention of a juvenile pending resolution of a pending charge. The instrument functions as a score sheet which factors in the seriousness of the current offense and a juvenile’s past criminal history by assigning each a certain number of points. Juveniles scoring 0-9 points must be released to home detention, which entails supervision by the youth’s parents with some restrictions ordered by the court. Juveniles scoring 9-11 points may be released on home detention with an electronic monitor. Juveniles scoring 12 points or high must be held in secure detention for 21 days (or in serious cases 30 days) until they plea or have an adjudicatory hearing, at which time the question of detention status is revisited by the court, again utilizing the Risk Assessment Instrument.

⁶ Section 948.03, F.S.

not an undertaking to protect members of the public from harm occasioned by a monitored person. The sole duty owed by a person who provides electronic monitoring is to give a law enforcement officer, upon request, an indication of the physical location of the monitored person at a point in time. The bill also provides that it is unreasonable for any member of the public to expect that a provider of electronic monitoring services will provide protection against harm occasioned by a monitored person. A provider of electronic monitoring services cannot control the activities of a monitored person. A person who provides electronic monitoring is not responsible to other persons for equipment failure or for the criminal acts of a monitored person.

A defendant that tampers with the monitoring equipment violates the terms of release, and may be remanded to custody.

This bill creates s. 907.07, F.S., to create standards for approved private vendors of electronic monitoring services. This section does not apply to electronic monitoring provided by a governmental entity. The bill requires the chief judge of each circuit to create a list of approved vendors. Only a licensed bail bond agent may apply to be a vendor. The chief judge must add to the list any licensed bail bond agent who certifies that he or she complies with the requirements of this section. The certification must include the name, address and phone number of the agency. The certification must also include a statement that the equipment used by the vendor complies with s. 907.08 (created by this bill). The chief judge may remove a vendor who no longer meets the requirements of this section, who fails to properly monitor a person, or who has charged a clearly unreasonable fee. A clearly unreasonable fee is defined as one that is more than double the average rate of the other approved vendors in the circuit.

This bill creates s. 907.08, F.S., to set minimum standards for privately owned electronic monitoring equipment. Such equipment must be:

- A transmitter unit that meets certification standards approved by the Federal Communications Commission.
- At the court's discretion, a transmitter must be able to emit signal content 24 hours per day, which signal identifies the specific device being worn by the defendant and the defendant's physical location using global positioning system (GPS) technology accurate to within 9 meters; or, must receive signal content 24 hours per day, determining the defendant's physical location using global positioning system (GPS) technology accurate to within 9 meters, recording the defendant's physical locations throughout the day, and capable of transmitting that record of locations to the vendor at least daily.
- A unit affixed to the defendant must possess an internal power source that provides a minimum of 1 year of normal operation without need for recharging or replacing the power source. The device must emit signal content that indicates the power status of the transmitter and provides the vendor with notification of whether the power source needs to be recharged or replaced.
- Possess and emit signal content that indicates whether the transmitter has been subjected to tampering or removal.
- Possess encrypted signal content or another feature designed to discourage duplication.
- Be of a design that is shock resistant, water and moisture proof, and capable of reliable function under normal atmospheric and environmental conditions.
- Be capable of wear and use in a manner that does not pose a safety hazard or unduly restrict the activities of the defendant.
- Be capable of being attached to the defendant in a manner that readily reveals any efforts to tamper with or remove the transmitter upon visual inspection.
- Utilize straps or other mechanisms for attaching the transmitter to the defendant that are either capable of being adjusted to fit a defendant of any size or made available in a variety of sizes.

This bill creates s. 907.09, F.S., to create two new felony offenses related to electronic monitoring equipment. It is a third degree felony for any person to intentionally alter, tamper with, damage or destroy any electronic monitoring equipment used for monitoring the location of a person pursuant to

court order, unless such person is the owner of the equipment, or an agent of the owner, performing ordinary maintenance and repairs. A third degree felony is punishable by imprisonment for up to 5 years and a fine of up to \$5,000. This newly created offense is unranked on the Offense Severity Ranking Chart in the Criminal Punishment Code, and thus defaults to a Level 1 offense.

It is a second degree felony for any person to develop, build, create, possess, or use any device that is intended to mimic, clone, interfere with, or jam the signal of an electronic monitoring device used to monitor the location of a person pursuant to court order. A second degree felony is punishable by imprisonment for up to 15 years and a fine of up to \$10,000. This newly created offense is unranked on the Offense Severity Ranking Chart in the Criminal Punishment Code, and thus defaults to a Level 4 offense.

This bill amends s. 948.039, F.S., relating to special terms and conditions of probation or community control, to allow probation appearance bonds. Such bond may be conditioned on the use of an approved electronic monitoring device.

This bill amends s. 948.11, F.S., to provide that an offender on probation or community control may be required to submit to electronic monitoring provided through a private vendor. The offender must pay the vendor for the cost of the monitoring. If the offender fails to timely pay for monitoring, the vendor may report the nonpayment to the probation officer, who must proceed with a violation of probation or violation of community control proceeding, as appropriate.

The effective date of this bill is October 1, 2005.

C. SECTION DIRECTORY:

Section 1 amends s. 648.387, F.S., to amend the law regulating bail bond agents to allow bail bond agents to provide electronic monitoring.

Section 2 creates s. 903.135, F.S., to create a probation appearance bond.

Section 3 creates s. 907.06, F.S., to provide for electronic monitoring of persons on pretrial release.

Section 4 creates s. 907.07, F.S. to provide for approved vendors of electronic monitoring services.

Section 5 creates s. 907.08, F.S., to provide standards for privately owned electronic monitoring equipment.

Section 6 creates s. 907.09, F.S., to create offenses related to electronic monitoring.

Section 7 amends s. 948.039, F.S., to authorize probation appearance bonds.

Section 8 amends s. 948.11, F.S., to provide that private vendors may provide monitoring of offenders on probation or community control.

Section 9. provides an effective date of October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Those local governments or courts currently providing electronic monitoring services in their jurisdictions would have the option of permitting bail bond services to provide these services. Since the cost of the service would be borne by the defendant, this may result in a reduction in costs for those governments currently providing electronic monitoring.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Bail bond agents would be able to charge a fee from a defendant or offender for electronic monitoring services and would be able to contract with local governments for these services. In addition, companies which provide the equipment and monitoring services would be able to profit from increased demand for their products and services.

D. FISCAL COMMENTS:

Although current law allows for pretrial release on electronic monitoring, there is no apparent single way that electronic monitoring is provided, if at all, within a given jurisdiction. The current costs are borne by local governments or courts, and occasionally the Department of Corrections may enter into informal agreements with a locality to provide the service as a part of its normal probationary electronic monitoring programs. The bill would enable bail bondsmen to contract with local governments for this service, and to extract a "reasonable fee" from defendants released on electronic monitoring. Because the bill does not define the term "reasonable," there may be a need in the future for a court to interpret this term.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

One issue which could arise in the bill is whether the nonpayment of fees which would result in a violation of pretrial release would constitute an impermissible "imprisonment for debt." Article I, Section 11, of the Florida Constitution forbids the government from imprisoning persons for nonpayment of financial obligations, unless the debtor has engaged in fraud. This provision, however, does not generally apply to criminal fines, and insofar as the fees associated with electronic monitoring may be considered a court fine or fee, it may withstand constitutional scrutiny. See *Turner v. State*, 168 So.2d 192 (Fla. 3d DCA 1964). In a similar vein, if the fees are viewed as an obligation for pretrial release similar to payment of a cash bond, there may not be a constitutional issue.

B. RULE-MAKING AUTHORITY:

The bill specifically exempts the fees collected for electronic monitoring from the provisions of s. 648.26. Section 648.26, F.S. provides, in part, for the Department of Financial Services to make rules related to the regulation for fees collected by bond agents. Fees collected by bail bond agents pursuant to the bill would be exempt from regulation by the Department of Financial Services.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 6, 2005, the Criminal Justice Committee adopted one strike-all amendment making substantial changes to the bill. In addition to general clarification of the bill, the amendment:

- Created probation appearance bonds.
- Moved the electronic monitoring of a defendant pretrial from the chapter on bail bonds to the chapter on pretrial release, as persons other than a bail bond agent may be vendor of monitoring services and because monitoring can be ordered without requiring bail.
- Created requirements for approved vendors.
- Moved registration of vendors from the clerks to the chief judge.
- Created an offense for cloning an electronic monitoring system.

The bill was then reported favorably with a committee substitute.

On April 22, 2005, the Justice Council adopted one strike-all amendment. Significant changes made by the amendment include:

- Requires a bail bond agent acting as a vendor for electronic monitoring services to keep records related to monitoring separate from bail bond records.
- Provides that pretrial electronic monitoring must be affiliated with bail.
- Changes the technical standards for monitoring equipment.
- Provides that the provision of electronic monitoring is not an undertaking to provide public security.
- Restricts who may be approved as a private vendor of electronic monitoring services to bail bond agents.
- Defines an unreasonable fee.

The bill was then reported favorably with a committee substitute.