

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.)

Prepared By: Criminal Justice Committee

BILL: SB 730

SPONSOR: Senator Fasano

SUBJECT: Lewdness/Prostitution

DATE: March 3, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 730 would redefine “lewdness” under s. 796.07, F.S., to mean any indecent or obscene act *committed in the presence of any person, including a law enforcement officer*. This redefinition would allow a law enforcement officer, in his or her official capacity, to arrest someone under s. 796.07, F.S., based upon the officer witnessing the alleged offending activity, rather than being required to have an independent witness who was offended by the alleged indecent or obscene act.

This bill substantially amends section 796.07, Florida Statutes.

II. Present Situation:

Section 796.07, F.S., proscribes numerous activities involving prostitution, lewdness, or assignation as defined under the statute. “Lewdness” is defined as “any indecent or obscene act” under s. 796.07(1)(b), F.S. A county court judge in Pasco County dismissed a lewdness case against a defendant who was arrested after undercover detectives witnessed her “lap dancing” in an adult entertainment establishment. The judge found that the State failed to prove an essential element of the crime by not providing a witness other than the law enforcement officer in his official capacity that was offended by the defendant’s actions.

In making his decision, the judge considered several cases, including a Florida Supreme Court case construing “lewd and lascivious” as “... an intentional act of sexual indulgence or public indecency when such act causes offense to one or more persons viewing it or otherwise intrudes upon rights of others.” *Schmitt v. State*, 590 So.2d 404, 410 (Fla. 1991). The judge went on to find that since lewdness requires intrusion on the rights of other people, the protected class of unsuspecting persons who do not wish to be offended by the conduct must be members of the

general public, not undercover law enforcement officers. The Sixth Circuit Court affirmed his finding on appeal, and now the case is on appeal in the Second District Court of Appeal. *State v. Ditolla*, Case No. 0206825MMAWS (Cty. Ct. 6th Cir. June 19, 2003), aff'd, Appeal No. 0302563CFAES (6th Cir. June 18, 2004).

Any of the following first-time violations of lewdness under this statute are punishable as a second degree misdemeanor (potential fine not exceeding \$500 and/or potential incarceration not exceeding 60 days) as follows:

- keeping or operating any place for the purpose of lewdness, assignation, or prostitution;
- offering or agreeing to secure another for the purpose of prostitution or other lewd acts;
- receiving or offering to receive any person into any place or conveyance for the purpose of prostitution, lewdness, or assignation;
- transporting or offering to transport any person to any place or to any other person knowing that the purpose is for prostitution, lewdness, or assignation;
- offering or engaging in prostitution, lewdness, or assignation;
- soliciting or procuring another to commit prostitution, lewdness, or assignation with himself or herself; or
- residing in, entering, or remaining in any place or conveyance for the purpose of prostitution, lewdness, or assignation.

A second or subsequent violation is punishable as a first degree misdemeanor (potential fine not exceeding \$1,000 and/or potential incarceration not exceeding one year). A third or subsequent violation is punishable as a third degree felony (potential fine not exceeding \$5,000 and/or potential incarceration not exceeding five years).

III. Effect of Proposed Changes:

Senate Bill 730 would redefine "lewdness" under s. 796.07, F.S., to mean any indecent or obscene act *committed in the presence of any person, including a law enforcement officer*. This redefinition would make it possible for the State to argue against a motion to dismiss a case like the one that was dismissed in Pasco County (see Present Situation) because the only witness that was offended by the alleged indecent or obscene act was the undercover law enforcement officer.

The State would still be required to prove beyond a reasonable doubt that the alleged actions by the defendant were indecent or obscene in order to convict the defendant of the crime. What would change under the bill is a law enforcement officer, in his or her official capacity, could arrest someone under this statute based upon the officer witnessing the alleged offending activity, rather than being required to have an independent witness who was offended by the alleged indecent or obscene act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The county court judge in *State v. Ditolla* raised the issue that giving law enforcement officers unfettered discretion to make an arrest by allowing it to be based solely on the personal beliefs of such officers would amount to an unconstitutionally vague application of s. 796.07, F.S. (An unconstitutional application means the statute itself is not unconstitutional, but rather the way it is applied to a particular case is unconstitutional.) Whether this has merit or not will probably be addressed by the 2nd DCA in *State v. Ditolla*.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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