

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1253 Use of Wireless Communications Devices while Operating a Motor Vehicle

SPONSOR(S): Slosberg

TIED BILLS: **IDEN./SIM. BILLS:** SB 1078

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|----------------------------------|-----------|---------|--|
| 1) Criminal Justice Subcommittee | 11 Y, 2 N | Cox | Cunningham |
| 2) Judiciary Committee | | | |

SUMMARY ANALYSIS

Currently, s. 316.05, F.S., prohibits a person from using a wireless communication device (WCD) while operating a motor vehicle to:

- Manually type or enter multiple letters, numbers, symbols, or other characters into the device; or
- Send or read data for the purpose of nonvoice interpersonal communication, which in addition to texting, includes e-mailing and instant messaging.

Florida law does not specifically make it a crime for a person to cause the death of another while operating a vehicle and using a WCD. However, depending on the facts of the case, a person who kills another while operating a vehicle and using a WCD could be prosecuted for vehicular homicide, DUI manslaughter, or leaving the scene of an accident involving death.

The bill creates s. 316.3035, F.S., providing a person commits a second degree felony by causing the death of a human being or viable fetus while operating a vehicle and using a WCD in violation of s. 316.305, F.S. The offense is reclassified to a first degree felony if:

- At the time of the accident, the person knew, or should have known, that the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.

The bill defines "wireless communication device" in accordance with s. 316.305, F.S., as "any handheld device used or capable of being used in a handheld manner, that is designed or intended to receive or transmit text or character-based messages, access or store data, or connect to the Internet or any communications service as defined in s. 812.15, F.S., and that allows text communications."

The Criminal Justice Impact Conference has not yet met to determine the prison bed impact of this bill. However, there will likely be a negative prison bed impact to the Department of Corrections because the bill creates new first and second degree felonies.

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Traffic Fatalities – Wireless Communication Devices

According to the Florida Department of Highway Safety and Motor Vehicles (DHSMV), there were 227,998 total crashes in Florida in 2011, down from 235,461 in 2010.¹ Mirroring trends nationally, traffic fatalities in Florida have been trending downward.² In 2011, Florida's 2,400 traffic fatalities represented a 1.8 percent decrease from the previous year and a 32 percent reduction since 2005.³

DHSMV is unable to determine how many of Florida's traffic fatalities are a direct result of distracted driving as this information may or may not show up on a crash report. However, the National Highway Traffic Safety Administration (NHTSA) reports that ten percent of fatal crashes nationwide in 2011 were reported as distraction-affected crashes.⁴ NHTSA further reports that "text messaging creates a crash risk 23 times worse than driving while not distracted,"⁵ largely because "sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent – at 55 mph – of driving the length of an entire football field."⁶ Researchers have identified texting-while-driving as among the most dangerous of distractions because it involves "manual, visual, and cognitive distraction simultaneously."⁷

Driving Offenses Involving the Death of a Person

Currently, s. 316.305, F.S. (the texting-while-driving ban), prohibits a person from using a wireless communication device⁸ (WCD) while operating a motor vehicle (vehicle) to:

- Manually type or enter multiple letters, numbers, symbols, or other characters into the device; or
- Send or read data for the purpose of nonvoice interpersonal communication, which in addition to texting, includes e-mailing, and instant messaging.⁹

The offense is punishable as a noncriminal traffic infraction, punishable as a nonmoving violation,¹⁰ and enforcement is only permitted as a secondary offense.¹¹

Florida law does not specifically make it a crime for a person to cause the death of another while operating a vehicle and using a WCD. However, depending on the facts of the case, a person who kills

¹ 2011 Florida Traffic Crash Statistics, Traffic Crash Facts, <http://www.flhsmv.gov/html/safety.html> (last visited March 14, 2014).

² The National Highway Traffic Safety Administration (NHTSA) has reported that traffic fatalities fell in 2011 to their lowest level since 1949. *Highway Deaths Fell to Lowest Level in More Than Six Decades, Down 26 Percent Since 2005*, NHTSA December 10, 2012 press release,

<http://www.nhtsa.gov/About+NHTSA/Press+Releases/2012/New+NHTSA+Analysis+Shows+2011+Traffic+Fatalities+Declined+by+Nearly+Two+Percent> (last visited on March 14, 2014).

³ *Id.*

⁴ *Distracted Driving 2011*, U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), <http://www.distraction.gov/content/press-release/2013/04-05.html> (last visited March 14, 2014) [In 2011, there were a total of 29,757 fatal crashes in the United States involving 43,668 drivers. In those crashes, 32,367 people were killed. In 2011, 3,020 fatal crashes occurred that involved distraction (10% of all fatal crashes)].

⁵ *Id.* While this information may be accessed via the NHTSA website, the study itself was authored by Rebecca L. Olson, Richard J. Hanowski, Jeffrey S. Hickman, and Joseph Bocanegra of the Virginia Tech Transportation Institute.

⁶ *Id.*

⁷ *Id.*

⁸ Section 316.305(3)(a), F.S., defines a "wireless communications device" as any handheld device used or capable of being used in a handheld manner, that is designed or intended to receive or transmit text or character-based messages, access or store data, or connect to the Internet or any communications service as defined in s. 812.15 and that allows text communications.

⁹ The statute provides a variety of exceptions (e.g., the statute does not apply to law enforcement personnel who is performing official duties, or to persons reporting an emergency or criminal or suspicious activity to law enforcement).

¹⁰ A second or subsequent violation within 5 years after the date of a prior conviction for a violation is a noncriminal traffic infraction, punishable as a moving violation as provided in ch. 318, F.S. Section 316.305(4)(b), F.S.

¹¹ Section 316.305(5), F.S. Because texting while driving is a secondary offense, a driver must be first pulled over for a violation of another traffic law before that driver may be cited for violating the texting-while-driving ban.

another while operating a vehicle and using a WCD can be prosecuted for one of the offenses described below.

Vehicular Homicide

Vehicular homicide, a second degree felony,¹² is the killing of a human being, or the killing of a viable fetus¹³ by any injury to the mother, caused by the operation of a vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another.¹⁴ The offense is reclassified to a first degree felony¹⁵ if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.^{16,17}

Courts have held that vehicular homicide cannot be proven without proving the elements that constitute reckless driving.¹⁸

A person commits the offense of “reckless driving” if he or she drives a vehicle in willful or wanton¹⁹ disregard for the safety of persons or property.²⁰ In determining whether a person was driving recklessly, the essential inquiry is whether the defendant knowingly drove the vehicle in such a manner and under such conditions as was likely to cause death or great bodily harm.²¹ A person need not have foreseen the specific circumstances causing the death of the particular victim, it is sufficient that he or she should have reasonably foreseen that the same general type of harm might occur if he or she knowingly drives the vehicle under circumstances that would likely cause the death of another.²²

DUI Manslaughter

DUI manslaughter, a second degree felony, occurs when a person commits the offense of driving under the influence²³ and, by operating such vehicle, causes or contributes to causing the death of a unborn quick child²⁴ or human being.²⁵ As with vehicular homicide, the offense is reclassified as a first degree felony if:

¹² A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹³ A fetus is considered viable when it becomes capable of meaningful life outside the womb through standard medical measures. Section 782.071(2), F.S.

¹⁴ Section 782.071, F.S.

¹⁵ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁶ Section 782.071(1), F.S.

¹⁷ Section 316.062, F.S., requires the driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle or other property to give his or her name, address, and the registration number of the vehicle he or she is driving. Upon request and if available, the person must exhibit his or her license or permit to drive, to any person injured in such crash or to the driver or occupant of or person attending any vehicle or other property damaged in the crash and must give such information and, upon request, exhibit such license or permit to any police officer at the scene of the crash or who is investigating the crash. Additionally, the person must render to any person injured in the crash reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary, or if such carrying is requested by the injured person.

¹⁸ *W.E.B.*, 553 So.2d 323, 326 (Fla. 1st DCA 1989); *Berube v. State*, 6 So.3d 624 (Fla. 5th DCA 2008).

¹⁹ “Willful” means intentionally, knowingly, and purposely. “Wanton” means with a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property. *W.E.B.*, 553 So.2d at 326.

²⁰ Section 316.192, F.S. A first conviction of reckless driving is punishable by no more than 90 days imprisonment or a fine of \$25-\$500, or by both. A second or subsequent conviction is punishable by no more than six months or by a fine of not less than \$50-\$1,000, or by both.

²¹ The Florida Supreme Court describes recklessness as a degree of negligence that falls short of culpable negligence, but more than a mere failure to use ordinary care. *McCreary v. State*, 371 So.2d 1024, 1026 (Fla. 1979).

²² *W.E.B.*, 553 So.2d at 326.

²³ Section 316.193, F.S., provides that a person commits the offense of “driving under the influence” if he or she is driving or in actual physical control of a vehicle and the person:

- Is under the influence, to the extent that the person’s normal faculties are impaired, of alcoholic beverages, any chemical substance as provided in s. 877.111, F.S., or any substance controlled under ch. 893, F.S.;
- Has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- Has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

²⁴ Section 316.193(3), F.S., provides that the definition of the term “unborn quick child” must be determined in accordance with the definition of viable fetus as set forth in s. 782.071, F.S.

²⁵ Section 316.193(3)(a), F.S.

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.²⁶

A person convicted of DUI manslaughter must be sentenced to a mandatory minimum term of imprisonment of 4 years.²⁷

Leaving the Scene of an Accident Involving Death

Section 316.027, F.S., requires a person driving a vehicle involved in a crash that results in the death of any person to immediately stop the vehicle and remain at the scene until the driver has complied with s. 316.062, F.S.²⁸ A person who leaves the scene of a crash involving death commits a first degree felony.²⁹ If the person was driving under the influence, the court must sentence the person to a minimum mandatory prison sentence of two years.³⁰

Effect of the Bill

The bill creates s. 316.3035, F.S., providing a person commits a second degree felony by causing the death of a human being or viable fetus while operating a vehicle and using a WCD in violation of s. 316.305, F.S. (the texting-while-driving ban).³¹ The offense is reclassified to a first degree felony if:

- At the time of the accident, the person knew or should have known the accident occurred; and
- The person failed to give information and render aid as required by s. 316.062, F.S.

As noted above, depending on the facts of the case, a person who kills a human being or a viable fetus while operating a vehicle and using a WCD can be prosecuted for one of the above mentioned offenses.

The bill defines “wireless communication device” to have the same meaning as provided in the texting-while-driving ban and “viable fetus” to have the same meaning as in s. 782.071, F.S. (vehicular homicide).

B. SECTION DIRECTORY:

Section 1. Creates s. 316.3035, F.S., relating to death caused by motor vehicle operator using a wireless communication device; criminal penalty.

Section 2. Provides and effective date of July 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

²⁶ Section 316.193(3)(b), F.S.

²⁷ Section 316.193(3), F.S.

²⁸ *Supra* note 13.

²⁹ Section 316.027(1)(b), F.S. Proof that the driver caused or contributed to causing injury to a person is not required for a conviction. *See Lawrence v. State*, 801 So.2d 293, 295 (Fla. 2d DCA 2001) and *Kelly v. State*, 987 So.2d 1237, 1239 (Fla. 2d DCA 2008).

³⁰ Section 316.027(1)(b), F.S.

³¹ Law enforcement officers (LEOs) may conduct a search of a WCD, such as a cell phone, after securing a valid search warrant or when an exception to the search warrant requirement exists, such as consent from the owner of the WCD. Additionally, LEOs can obtain the electronic communication records from the providers of electronic communication service by subpoenaing the records from the provider.

The Criminal Justice Impact Conference has not yet met to determine the fiscal impact of this bill. However, the bill may have a negative prison bed impact on the Department of Corrections because it creates a new first and second degree felony offense for causing the death of a person or viable fetus by operating a vehicle while using a WCD. The extent of the impact is unknown, however, because in many instances, a person who causes the death of another by operating a vehicle while using a WCD could currently be charged with another criminal offense.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides an effective date of July 1, 2014. Generally, bills that provide a new criminal penalty or enhance a current criminal penalty are effective October 1st so as to give agencies enough time for implementation and provide the public with sufficient notice of the conduct that is prohibited.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES