

STORAGE NAME: h0435.cp

DATE: November 12, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS**

BILL #: HB 435 (PCB CP 00-01)

RELATING TO: Sentencing

SPONSOR(S): Committee on Crime & Punishment and Representative Ball

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

HB 435 removes the exceptions to the rule contained in section 775.021(4)(b) that the intent of the legislature is to convict and sentence a defendant for each criminal offense committed in the course of a criminal episode. This will bring Florida law into conformity with federal law by clarifying that in order to convict a defendant of multiple offenses arising out of one criminal episode, each offense must contain a statutory element that the other crimes do not.

The bill also amends sections 874.04 and 921.0024 relating to enhanced sentencing for criminal street gang members. The statute currently provides that upon a finding by the trial court that the defendant was a member of a criminal street gang at the time of the offense, the penalty for the crime may be enhanced. This language was recently declared unconstitutional by the Florida Supreme Court. The bill attempts to repair the constitutional defect by providing that the penalty for an offense may be enhanced upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang.

The bill ranks the offense of use of a computer to facilitate or solicit sexual conduct with a minor as a level 6 offense. Previously, the crime was not listed on the offense severity chart and was therefore scored as a level one offense.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | 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. PRESENT SITUATION:

Intent of Legislature to Convict of Each Criminal Offense in Criminal Episode

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. "In determining the constitutionality of multiple convictions and sentences for offenses arising from the same criminal transaction, the dispositive question is whether the legislature intended to authorize separate punishments for the two crimes." M.P. v. State, 682 So.2d 79 (Fla. 1996). Section 775.021(4) provides that the intent of the legislature is to convict and sentence a defendant for each separate criminal offense committed in the course of one criminal episode. The statute further provides that offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleadings or the proof adduced at trial. This rule of construction codifies the federal "same elements" or Blockburger test which provides that analysis of a double jeopardy issue is to be done by comparing the statutory elements of the crime to determine whether each offense contains an element that the other does not. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); State v. Maxwell, 682 So.2d 83, 84 (Fla.1996).

Section 775.021(4)(b) also provides the following exceptions to the rule of construction that the legislature intends that defendants be convicted and sentenced for each criminal offense committed in the course of a criminal episode:

1. Offenses which require identical elements of proof.
2. Offenses which are degrees of the same offense as provided by statute.
3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The inclusion of these exceptions has created confusion in the law as to when offenses are separate. In Sirmons v. State, 634 So.2d 153 (Fla. 1994), the defendant was convicted of grand theft of an automobile and robbery with a weapon which arose from a single taking of an automobile at knife point. The Florida Supreme Court found that s. 775.021(4)(b)(2), barred the dual convictions because "both offenses are aggravated forms of the same

underlying offense distinguished only by degree factors.” Likewise, in State v. McDonald, 691 So.2d 1317 (Fla. 2nd DCA 1997), the defendant was convicted of obtaining property through use of a forged credit card and grand theft. The court compared the statutory elements of the crimes and acknowledged that each offense contained an element that the other did not and therefore passed the Blockburger test. However, the court decided that the two offenses violated one of the exceptions to the statute because they were degrees of the same offense and that a defendant therefore could not be convicted of violating both provisions.

Enhanced Penalties for Criminal Street Gang Members

Section 874.04 provides that upon a finding by the trial court at sentencing that the defendant was a member of a criminal street gang at the time of the offense, the penalty for the offense may be enhanced. The definition section of the statute defines a criminal street gang as an organization or group of three or more persons who have a common name or identifying signs, colors, or symbols and have two or more members who, individually or collectively, engage in or have engaged in a pattern of criminal street gang activity. Sec. 874.03(1), Fla. Stat. The findings required as a basis for the enhancement must be found by a preponderance of the evidence. The section provides that the enhancement will be as follows:

- A misdemeanor of the second degree may be punished as if it were a misdemeanor of the first degree.
- A misdemeanor of the first degree may be punished as if it were a felony of the third degree.
- A felony of the third degree may be punished as if it were a felony of the second degree.
- A felony of the second degree may be punished as if it were a felony of the first degree.
- A felony of the first degree may be punished as if it were a life felony.

Section 921.0024 provides that on the Florida Criminal Punishment Code worksheet, the score for an offense shall be multiplied by 1.5 if the offender is found to have been a member of a criminal street gang at the time of the offense.

In State v. O.C., 24 Fla.L.Weekly S425 (Fla. September 16, 1999), the Florida Supreme Court found the language providing for enhanced sentencing if the defendant “was a member of a criminal street gang at the time of the offense was unconstitutional as a violation of substantive due process.” The court concluded that “because the statute punishes gang membership without requiring any nexus between the criminal activity and gang membership, it lacks a rational relationship to the legislative goal of reducing gang violence or activity and thus fails to have a ‘reasonable and substantial relation’ to a permissible legislative objective.”

Use of Computer to Facilitate Sexual Conduct with a Minor

Section 847.0135(2) prohibits the use of a computer to facilitate or solicit sexual conduct with a minor. The crime is not listed on the offense severity ranking chart of the Criminal

Punishment Code. Sec. 921.00212. A third degree felony that is not listed on offense severity ranking chart is scored as a level one offense. Sec. 921.0023.

C. EFFECT OF PROPOSED CHANGES:

Intent of Legislature to Convict of Each Criminal Offense in Criminal Episode

The bill removes the three exceptions to the federal Blockburger test which is codified in s. 775.021. This would clarify that the Blockburger test, which requires a comparison of the statutory elements of offenses committed during the course of a criminal episode to determine whether each offense requires proof of an element that the other offenses do not, is the proper test to be used to determine whether offenses are separate. Thus, when criminal offenses committed in one criminal episode or transaction each require proof of an element that the other does not, without regard to the accusatory pleadings or proof at trial, they are separate criminal offenses and multiple convictions and sentences are permissible.

Enhanced Penalties for Criminal Street Gang Members

The bill amends section 874.04 which provides that an offense may be reclassified if the defendant was a member of a criminal street gang at the time of the offense to provide that an offense may be reclassified upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang. The bill also amends section 921.0024 to change the language which currently requires sentencing points to be multiplied by 1.5 upon a finding that a defendant was a member of a criminal street gang at the time of the offense to provide that sentencing points shall be multiplied by 1.5 if the offense was committed for the purpose of furthering, benefiting or promoting a criminal street gang.

These changes are intended to correct the constitutional problem in the existing statute by requiring a nexus between a defendant's gang membership and the offense for which the defendant is being sentenced. These changes would render the statute substantially similar to California's statute. In State v. O.C., 24 Fla.L.Weekly S425 (Fla. September 16, 1999), in ruling that the Florida statute is unconstitutional, the Florida Supreme Court distinguished the Florida statute from the California statute which has been upheld by the California Supreme Court in People v. Gardeley, 927 P.2d 713 (Ca. 1997).

Use of Computer to Facilitate Sexual Conduct with a Minor

The bill ranks the crime of use of a computer to facilitate or solicit sexual conduct with a minor as a level 6 offense. This crime would have the same ranking as the crime of solicitation of a child, via a computer service, to commit an unlawful sex act which is prohibited by section 847.0135(3).

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Removes the exceptions to the rule of construction stating that the legislature intends to convict and sentence for each criminal offense committed in the course of a criminal episode.

Section 2: Provides for enhanced sentencing upon a finding by the trial court that the defendant committed the offense for the purpose of furthering, benefiting or promoting a criminal street gang.

Section 3: Ranks the crime of use of a computer to facilitate or solicit sexual conduct of or with a minor as a level 6 offense.

Section 4: Amends the Criminal Punishment Code relating to an offense committed for the purpose of furthering, benefiting or promoting a criminal street gang.

Section 5: Provides effective date of July 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not met to consider the fiscal impact of this bill on the Department of Corrections. However, last year the conference determined that SB 1496, which was identical to this bill would have an insignificant prison bed impact.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The committee substitute does not require local governments to expend funds or to take any action requiring the expenditure of funds. Therefore, it is exempt from the provisions of Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

During the 1999 session, SB 1496 which was identical to this bill, passed the Senate and died on the House calendar on the final day of session. The House companion was HB 2059.

HB 435 began as a proposed committee bill in the Committee on Crime & Punishment.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Staff Director:

Trina Kramer

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