

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1423 Seizure and Forfeiture of Contraband
SPONSOR(S): Rep. Bowen
TIED BILLS: **IDEN./SIM. BILLS:** SB 2494

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---------------------------------------|--------|---------|----------------|
| 1) Criminal Justice (Sub) | | Maynard | De La Paz |
| 2) Public Safety & Crime Prevention | | | |
| 3) Public Safety Appropriations (Sub) | | | |
| 4) Appropriations | | | |
| 5) | | | |

SUMMARY ANALYSIS

Current law provides that it is a first degree misdemeanor to trespass upon the property of another person. Current law also provides under ss. 932.701-707, F.S. for the Florida Contraband Forfeiture Act, which provides sweeping powers of law enforcement to seize any contraband utilized in violations of state drug laws. Officers are empowered to seize various types of property including money, weapons, vehicles, real property, aircraft if there is a sufficient nexus between the article seized and illegal narcotic activity.

HB 1423 amends ch. 810, F.S. to provide any agency investigating the offense of trespass to seize contraband used in the offense, similar to the power currently afforded law enforcement agencies in connection with enforcement of drug laws. Contraband is defined in the bill as "including but not limited to motor vehicles, motorcycles, vessels, off-highway vehicles, all-terrain vehicles, off-highway vehicles, off-highway motorcycles, tractors, tracked vehicles, or any other conveyance." The bill provides certain procedures in connection with the seizure and forfeiture of this property. This bill may raise eighth amendment and due process constitutional concerns.

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

STORAGE NAME: h1423.ps.doc
DATE: March 8, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input 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 type="checkbox"/> |

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

Reduce government – No. The bill enables law enforcement agencies to seize “including but not limited to motor vehicles, motorcycles, vessels, off-highway vehicles, all-terrain vehicles, off-highway vehicles, off-highway motorcycles, tractors, tracked vehicles, or any other conveyance” if used in a misdemeanor trespass.

Increase personal responsibility- Yes. In providing such a potential penalty, there will be a strong deterrent effect against committing the offense of trespass, especially if in connection with any type of motor vehicle or conveyance.

B. EFFECT OF PROPOSED CHANGES:

Current law provides that it is a first degree misdemeanor to trespass upon the property of another person. Section 810.09(1)(a) (1), F.S. provides that “[a] person who, without being authorized, licensed or invited, willfully enters upon or remains in the property other than a structure or conveyance: as to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011 . . . commits the offense of trespass on property other than a structure or conveyance.”

Current law under ss. 932.701-707, F.S. also provide for the Florida Contraband Forfeiture Act, which provides sweeping powers of law enforcement to seize any contraband utilized in violations of state drug laws. Officers are empowered to seize various types of property including money, weapons, vehicles, real property, aircraft if there is a sufficient nexus between the article seized and illegal narcotic activity. The statute provides specific procedures and notice requirements for the forfeiture to be effectuated and violations on behalf of the law enforcement agency can result in stiff fines. The seizing agency, once the applicable procedures are complied with receives title to the seized object and may either use the property or proceeds from its sale.

HB 1423 amends ch. 810, F.S. to provide any agency investigating the offense of trespass described above to seize contraband used in the offense, similar to the power currently afforded law enforcement agencies in connection with enforcement of drug laws. Contraband is defined in the bill as “including but not limited to motor vehicles, motorcycles, vessels, off-highway vehicles, all-terrain vehicles, off-highway vehicles, off-highway motorcycles, tractors, tracked vehicles, or any other conveyance.” The term “conveyance” is currently defined in s. 810.011, F.S. as “any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car.”¹ The seizure of the item used in the trespass under the bill may occur contemporaneously with the arrest of such person who is the subject of the investigation

¹ Under the case *M.J.S. v. State*, 453 So.2d 870 (Fla 2nd DCA 1984) a construction backhoe used for digging ditches was not a “conveyance” for the purposes of the statutory definition of a conveyance. It would thus appear the bill would not apply to trespasses occurring while the trespasser was riding construction equipment, and therefore such equipment would not be subject to forfeiture.

and who is found to be in possession of a contraband item or during the course of the investigation pursuant to a lawfully issued search warrant.

The bill provides two court proceedings to be utilized based on whether the person trespassing was the owner of the item seized. If the person trespassing was the owner, then the court having jurisdiction over the criminal prosecution of the offense listed in s. 810.09(1)(a)(1) shall make a finding at the time of disposition of the offense on the record as to whether such person used the item in connection with the offense. If the court finds the item was used in the offense, and the person has not been previously convicted of a trespass in s. 810.09(1)(a)(1), the court *may* order the item forfeited. If the court finds that person has been previously convicted of the trespass in s. 810.09(1)(a)(1), the court *shall* order the item forfeited to the seizing law enforcement.

The bill provides that if a person found to have used the seized item is not the registered owner, then the item is not to be forfeited unless it is shown by a preponderance of the evidence that the registered owner aided, abetted or participated in the trespass "or otherwise had reason to know that such a person would use this item in connection with the offense." The bill provides that it is prima facie evidence that the person had reason to know that a person would use the item in connection with the trespass offense if such item was previously seized from such person in a previous trespass offense.

The bill provides that upon forfeiture, the court shall order all rights title and interest in the contraband item to the seizing agency, subject to the rights and interests of bona fide lienholders. If forfeiture is not ordered, the seizing agency is to return the seized item.

HB 1423 provides that seizing agencies are required to make diligent effort to provide written notice of the seized item to the registered owner "and if other than the registered owner, the person from whose possession the contraband item was seized." Notice is required to include the mailing and physical addresses of the seizing agency, and shall explain the forfeiture provisions of this section, including the procedure for contesting a forfeiture. Notice may be satisfied by certified mail 14 days after the seizure. Notice must occur in a reasonable time to allow the person receiving such notice a meaningful opportunity to be heard in the proceedings previously described.

The bill provides that if the seizing agency is unable to ascertain the identity of or locate the an address for the registered owner of the item, the seizing agency is required to file an affidavit with the court stating that the notice required was not accomplished. The notice must be filed 14 days prior to the date of any proceeding at which the forfeiture is decided. If the court is satisfied that the agency has made reasonable efforts to provide notice, the court shall include a finding at the sentencing order that the person found with the contraband item is liable to the registered owner for the loss to the owner as a result of the forfeiture.

A person wishing to contest the forfeiture has 21 days after receiving notice of seizure to provide written notice to the seizing agency of the intent to contest. The notice must inform the seizing agency as whether the person intends to assert innocence of the owner as a defense to the forfeiture. Failure to provide timely notice may constitute grounds "for the court to exclude evidence" at one of the two proceedings in which forfeiture may be ordered.

The bill provides that any seizing agency may receive all or a share of the value of the forfeited item and that funds received by the agency shall constitute supplemental funds and not be used as replacement fund by any local government entity.

C. SECTION DIRECTORY:

Section 1. creates section 810.091, F.S.

Section 2, provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Law enforcement agencies under the bill would be entitled to the value of forfeited conveyances. This would enhance the revenues, especially given the provision in the bill which prevents the funds derived from such forfeitures from constituting replacement funds.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None, except for local law enforcement agencies, which would benefit from the revenues attained through the forfeiture of conveyances, vessels, and motor vehicles, etc. under the bill.

2. Expenditures:

There would be no impact on expenditures since the bill contains a provision which prevents the funds derived from such forfeitures from constituting replacement funds.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Those in the private sector who trespass or whose property is seized while being used in a trespass for a second time would undoubtedly receive a negative direct economic impact, as their motor vehicles, motor cycles, vessels, etc. are seized and forfeited. Even innocent owners who may be unable to respond in time to the notice sent, may be unable to collect, since the bill provides that the court may order at sentencing that the trespasser is responsible for the seized item. The owner may have difficulty collecting from the trespasser for the value of his motor vehicle, etc.

D. FISCAL COMMENTS:

The bill will not impact the prison population.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

Eighth Amendment: Cruel and Unusual Punishment

One issue which could be raised is whether the forfeiture of a conveyance, such as a person's motor vehicle is a constitutional punishment for the offense of misdemeanor trespass. The Eighth Amendment of the United States Constitution provides a prohibition against cruel and unusual punishments. A penalty which is grossly disproportionate to the seriousness of the offense is considered cruel and unusual. Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Finney, 437 U.S. 678 (1978). In United States v. Bajakajian, 524 U.S. 321 (1991) the Supreme Court held that forfeiture of \$357,144, which the defendant has attempted to transport out of the country without reporting,

would be grossly disproportionate to the violation and would offend the excessive fines clause. In the Florida, an analogous case to the fines possible under the bill would be In re One 1993 Dodge Intrepid, VIN: 2B3ED56TPH503198 Temp. FL tag 1040143, 645So.2d 551 (Fla 2nd DCA (1994)). In that case, the Second District court of appeals held that the civil forfeiture of a recently purchased \$21,339 automobile, which was used to drive to a location at which driver purchased \$20 worth of crack cocaine, constituted an excessive fine in violation of the Eighth Amendment. A court could conceivably similarly construe a forfeiture of a vessel, railroad car, or motor vehicle under the bill for the offense of misdemeanor trespassing as equally offensive of the Eighth Amendment protections. See also Town of Jupiter v. Garcia, 698 So.2d 871 (Fla 4th DCA 1997) (Remand required to determine whether forfeiture of truck because its owner possessed an illegal sawed-off, short barreled shotgun in it violated excessive fines clause of the Eight Amendment, including consideration of owners financial resources.)

Due Process

The state may not, under Florida and federal due process clauses, deprive a person of their property without due process of law. In the federal constitution, the due process clause is found in the fifth amendment as applied to states through the fourteenth amendment. In the Florida Constitution, the due process clause is found in Article I, Section 9. At a minimum, these clauses require procedural due process which entails notice and the ability to be heard. Matthews v. Eldridge, 424 U.S. 319 (1976) In Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla 1991), the Florida Supreme Court held that the state's Contraband Forfeiture Act comported with due process. The court noted that that act required notice to the property owner and proof by clear and convincing evidence that the property was used in the commission of a crime. Due process also requires a showing that the owner of the property either knew or should have known after a reasonable inquiry, that the property was being used in a criminal activity. In re Forfeiture of a 1993 Lexus ES 300, 798 So.2d 8 (Fla. 1st DCA 2001). The bill provides such procedural safeguards in providing hearings and notice to registered owners. However, the bill does not provide a standard by which a court is to evaluate whether the property was used in a crime, except to provide that proof of a registered owner's knowledge may be established by preponderance. This standard may fall short of the state and federal procedural due process clauses.

Under the substantive due process provision of both the state and federal constitutions, legislation is required to be fair and reasonable in content as well as application. Blacks Law Dictionary 1429 (7th ed 1990). In the state constitution, the test to determine whether a statute violates substantive due process is "whether the statute bears a rational relation to a legitimate legislative purpose in safeguarding public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla 1991). It may be argued that the bill runs afoul of the fifth amendment and state due process clause in that it is not reasonable and is oppressive to take a citizen's car or boat for the misdemeanor offense of trespass.

One issue which could also arise in relation to substantive due process is whether property owned jointly through marriage is subject to forfeiture if one of the parties was unaware of the illegal use of the property. Under the Florida Contraband Forfeiture Act in s. 932.703 (6)(a), property held jointly in marriage may not be forfeited unless the seizing agency establishes by a preponderance of the evidence that the co-owner knew or had reason to know, after reasonable inquiry, that such property was employed or was likely to be employed in criminal activity. No such provision exists in HB 1423, and it is unclear as to how judge should proceed when at least one of the co-owners is genuinely innocent. Given that courts have determined that forfeiture statutes shall be strictly construed against the government, it likely that the court would not order the property to be forfeited. See e.g. Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla 1991).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Some provisions of the bill are unclear. For example, the bill provides that a judge may “at the time of disposition of such offense” find that the property seized was used in connection with the offense of trespass. This provision would seem to contemplate either a sentencing after a trial or a plea. The agency is required, if unable to locate the registered owner of property, to file an affidavit with the court which indicates compliance with notice provisions of the statute “no later than 14 days prior to date of any proceeding at which the issue of forfeiture is decided,” Yet given that pleas can take place at arraignment which is the first hearing in a criminal case, and given that it would be impossible for an agency to know when a defendant may plea, there would seem to be no way to know when a hearing deciding forfeiture would be. There is no reasonable way for a seizing agency to know when the 14 day time period would begin to run.

Similarly unclear, the bill provides that within 21 days of receiving notice, any person intending to contest the forfeiture must provide written notice to the seizing agency. Failure to provide timely written notice, under the bill, may constitute grounds for court to “exclude evidence in a proceeding” under subsection (2) or (3). Exactly what evidence may be excluded is unclear from this provision. Presumably, the bill would permit a judge to exclude evidence that the contesting individual is the owner or was unaware of the illegal use of the item. However, it is unclear whether this evidence exclusion would come in the form of preventing the contesting individual from testifying or from providing documentation demonstrating his or her ownership of the seized item.

Moreover, the bill does not provide for what may occur when charges are dismissed or a defendant is acquitted of trespass and yet is not the registered owner of the property seized.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES