

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.)

BILL: CS/CS/SB 1380

SPONSOR: Judiciary Committee, Criminal Justice Committee and Senator Argenziano

SUBJECT: Stolen Property/Owner I.D.

DATE: April 13, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides the following regarding a new inference relating to dealing in stolen property:

- Proof that a dealer who regularly deals in used property possesses stolen property upon which a name and phone number of a person other than the offeror of the property are conspicuously displayed creates an inference that the dealer possessing the property knew or should have known that the property was stolen.
- If the name and phone number are for a business that rents property, the dealer may avoid the inference by contacting the rental business, prior to accepting the property, to verify that the property was not stolen from that business.
- If the name and phone number are not for a business that rents property, the dealer avoids the inference by contacting the local law enforcement agency where the dealer is located, prior to accepting the property, to verify that the property has not been reported stolen.
- Certain specified written record information constitutes sufficient evidence to avoid the inference.

This bill creates exemptions for the following:

- Non-profit, tax-exempt organizations that accept donations and do not purchase used property;
- Printed or recorded materials, computer software, videos and video games, or used sports equipment that does not contain a serial number; or,
- A dealer that implements, continuously and consistently, an identification and return program that incorporates specified criteria.

This bill substantially amends s. 812.022, F.S.

II. Present Situation:

Dealing in Stolen Property

Stolen property is defined as property that has been the subject of any criminally wrongful taking.¹ Criminal penalties are as follows:

- Trafficking in, or endeavoring to traffic in property that a person knew or should know is stolen carries a second degree felony; and,
- Initiating, organizing, planning, financing, directing, managing or supervising the theft of property and trafficking in such stolen property carries a first degree felony penalty.²

Additionally, fines may be imposed of up to twice the gross value gained or twice the gross loss caused, whichever is greater, along with the cost of investigation and prosecution.³

Civil remedies include:

- Ordering any defendant to divest him or herself of any interest in an enterprise, including real estate;
- Imposing reasonable restrictions on future activities;
- Ordering dissolution or reorganization of an enterprise;
- Ordering suspension or revocation of a license, permit or prior approval granted to an enterprise by any department or agency;
- Ordering forfeiture of the charter of a corporation; and,
- Subjecting property to civil forfeiture.⁴

Inferences Regarding Stolen Property

Section 812.022, F.S., provides for several inferences that may be made upon the submission of certain proof:

- Proof that a person presented false identification, or identification not current with respect to name, address, place of employment, or other material aspects, in connection with the leasing of personal property, or failed to return leased property within 72 hours of the termination of the leasing agreement, unless satisfactorily explained, gives rise to an inference that such property was obtained or is now used with intent to commit theft.
- Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.
- Proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person

¹ s. 812.012 (7), F.S.

² s. 812.019, F.S.

³ s. 812.032, F.S.

⁴ s. 812.035, F.S.

- buying or selling the property knew or should have known that the property had been stolen.
- Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that it had been stolen.

It is notable that subsection (2) of s. 812.022, F.S., is the only area in current law that provides for an inference relating to the possession of stolen property. Most cases discussing s. 812.022, F.S., specifically reference s. 812.022(2), F.S.

Case Law on Dealing in Stolen Property

Possession of recently stolen property gives rise to two separate inferences:

- The person in possession of the property stole it; and,
- The defendant knew or should have known that the property was stolen.⁵

No exact definition of ‘recently’ exists.⁶ In *Burroughs v. State*, 221 So.2d 159 (Fla. 2d DCA 1969), the court rejected the appellant’s contention that the presumption of larceny arising from unexplained possession of recently stolen property “loses strength with the passage of time, and that after four to six weeks following the theft, as in this case, it cannot be said that the property was ‘recently stolen’ so as to give the presumption any probative force whatsoever.”⁷ Regarding the approach of this issue in other jurisdictions, the court stated further:

It seems well established...that ‘recently’...is not necessarily measured by the mere passage of time. Much depends upon the nature or identity of the property stolen. That is to say, its character as being negotiable or readily transferable; the ease with which it can be traced or detected as stolen property; the utility value to the thief (ready transportation, for example, as in this case); and any other factors or characteristics of such property which may operate for or against lengthy retention by the thief.⁸

The court in *Haugabrook v. State* indicated that section 812.022(2) of the Florida Statutes creates an evidentiary inference that possession of property recently stolen must be satisfactorily explained; otherwise, it gives rise to an inference that the person possessing the property should have known that the property was stolen.⁹ The court interpreted legislative intent as imposing an obligation on a person to use caution and common sense when selling property of unknown origin, rather than ignoring danger signals.¹⁰

⁵ *Scobee v. State*, 488 So.2d 595 (Fla. 1st DCA 1986).

⁶ *N.C. v. State*, 478 So.2d 1142, 1144 (Fla. 1st DCA 1985).

⁷ *Id* at 160.

⁸ *Id* at 161.

⁹ 827 So.2d 1065, 1068 (Fla. 2d DCA 2002).

¹⁰ *Id* at 1068.

An unexplained possession of recently stolen property is generally sufficient to support conviction.¹¹ Likewise, a defendant's explanation of possession of recently stolen property, where unrefuted, is insufficient to support such a charge under s. 812.022 (2), F.S.¹²

At trial, the prosecution must first present an appropriate factual basis for the defendant's possession.¹³ If the explanation is only arguably reasonable, or if there is any evidence which places it in doubt, it becomes a jury question to determine the defendant's guilt, warranting an instruction on the inference of possession of recently stolen property.¹⁴

Subsection (2) of s. 812.022(2), F.S., has been constitutionally challenged on due process and self-incrimination grounds, based on the inference created.¹⁵ In 1980, the Florida Supreme Court upheld the statute, asserting that a defendant can attempt to explain possession of stolen goods by evidence other than his or her own testimony. Therefore, a defendant is not compelled to testify. The court similarly concluded that due process was not violated in that a rational connection exists between the fact proven (possession of stolen goods) and the fact presumed (knowing the goods were stolen).¹⁶

III. Effect of Proposed Changes:

This bill provides as follows:

- Proof that a dealer who regularly deals in used property possesses stolen property upon which a name and phone number of a person other than the offeror of the property are conspicuously displayed gives rise to the inference that the dealer possessing the property knew or should have known that the property was stolen.
- If the name and phone number are for a business that rents property, the dealer avoids the inference by contacting the rental business, prior to accepting the property, to verify that the business owns the property and the property was not stolen from that business.
- If the name and phone number are not for a business that rents property, the dealer avoids the inference by contacting the local law enforcement agency where the dealer is located, prior to accepting the property, to verify that the property has not been reported stolen. The bill specifies particular written record information which constitutes sufficient evidence to avoid the inference.

This bill creates exemptions for the following:

- Non-profit, tax-exempt organizations that accept donations and do not purchase used property;
- Printed or recorded materials, computer software, videos and video games, or used sports equipment that does not contain a serial number; or,

¹¹ *T.S.R. v. State*, 596 So.2d 766, 767 (Fla. 5th DCA 1992).

¹² *Jackson v. State*, 736 So.2d 77, 81 (Fla. 4th DCA 1999).

¹³ *Boone v. State*, 711 So.2d 594, 596 (Fla. 1st DCA 1998).

¹⁴ *Anderson v. State*, 703 So.2d 1105, 1106 (Fla. 5th DCA 1997).

¹⁵ *See Edwards v. State*, 381 So.2d 696 (Fla. 1980)

¹⁶ *Id* at 697.

- A dealer that implements, continuously and consistently, an identification and return program that incorporates specified criteria, including promptly contacting the name and phone number identified on the property to confirm that it is not stolen, and voluntarily returning stolen property at no cost, if the property owner files a report with law enforcement and agrees to actively participate in prosecuting the perpetrator.

The creation of this new inference, which applies exclusively to the dealer who regularly deals in used property, raises a question as to what differentiates dealer's possession from dealer's "purchase" of stolen property, which is addressed in the inference in subsection (4). Dealing in stolen property, as addressed in but limited by subsection (4), relates to purchasing or selling stolen property. As relates to pawnshops, the act of pawning property can consist of:

- Loaning money, through a written or oral bailment of personal property as security for an engagement or debt, redeemable on certain terms and with the implied power of sale on default; or,
- Participating in a buy-sell agreement, in which a purchaser agrees to hold property for a specified period of time to allow the seller the exclusive right to repurchase, not including a loan of money.¹⁷

Other dealers who may also regularly deal in used property include, but are not limited to, junk dealers, antique dealers, jewelers, precious metals dealers, certain garage sale operators, secondhand store owners, auction business owners, and consignment shop owners.¹⁸

Courts currently apply the possession inference provided in subsection (2) to dealers, even as subsection (4) may also apply.¹⁹ However, if subsection (2) currently applies to the dealer who regularly deals in used property, this will no longer be the case as the bill indicates that the new inference is an exception to subsection (2).

The act takes effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁷ See s. 538.03(1)(d), F.S.

¹⁸ s. 538.03 (a), F.S.

¹⁹ See, e.g., *Thompson v. State*, 480 So.2d 179 (Fla. 3rd DCA 1985), in which the appellant, a flea market dealer, was charged under s. 812.022(2), F.S.; *Coleman v. State*, 466 So.2d 395 (Fla. 2d DCA 1985), in which the court applied s. 812.022(2), F.S., to a junk dealer.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Presumptions carry greater weight than inferences. As the Eleventh Circuit Court of Appeals expressed:

A presumption is an evidentiary device that enables the trier-of-fact to presume the existence of an element of the crime from a basic fact already proven beyond a reasonable doubt. The vast majority of presumptions are given to the jury during the instructions on the law at the close of the evidence.²⁰

The United States Supreme Court stated:

Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime--that is, an 'ultimate' or 'elemental' fact--from the existence of one or more 'evidentiary' or 'basic' facts.²¹

Rebuttable presumptions (or permissive inferences) are permissible in criminal cases whereas mandatory presumptions are generally not allowed. The Florida Supreme Court has interpreted Article 1, Section 9 of the Florida Constitution as prohibiting mandatory, irrebuttable presumptions in criminal cases:

Mandatory presumptions violate the Due Process Clause if they relieve the state of the burden of persuasion on an element of an offense.²²

A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.²³ In contrast, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.²⁴ The policy behind this distinction is explained by the court in *Tatum v. State* as follows:

Because it is the prosecution's burden to prove beyond a reasonable doubt every element of a charged offense, presumptions may not be utilized in the same way against a defendant in a criminal case as might be against a defendant in a civil case.²⁵

²⁰ *Santiago Defuentes v. Dugger*, 923 F.2d 801, 804 (11th Cir.1991)

²¹ *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

²² *State v. Brake*, 796 So.2d 522, 529 (Fla. 2001).

²³ See *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)

²⁴ See *Francis* at 314.

²⁵ 857 So.2d 331, 336-337 (Fla. 2d DCA 2003).

The inference created in this bill appears to provide various methods for the defendant to explain otherwise. Therefore, it does not appear that a court would construe the inference as indicative of a mandatory presumption, and it would likely survive a constitutional challenge.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

To the extent the inference aids prosecutors in obtaining convictions, there could be an increase in the number of convictions, but prison bed impact, if any, is not determinable from this posited outcome.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.