

STORAGE NAME: h0749.brc

DATE: March 8, 1999

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

BILL #: HB 749

RELATING TO: Flea Markets

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

COMPANION BILL(S): SB 2062 (i)

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

- (1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
- (2) BUSINESS REGULATION AND CONSUMER AFFAIRS
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

This bill defines "flea market vendors" and requires them to retain, for one year, invoices or receipts for new merchandise purchased or obtained for resale. Law enforcement officers are authorized to request the flea market vendor to produce an invoice or receipt if the officer reasonably believes the merchandise has been stolen.

The bill further authorizes law enforcement officers to place a hold order on the property if there is probable cause to believe that merchandise sold or offered for sale has been stolen or is counterfeit. Criminal penalties are provided for falsifying or failing to maintain the required records.

The bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Flea Market Vendors

Flea market vendors are currently required to register with the Department of Revenue (department), as "dealers" (s. 212.18, F.S.) for purposes of collecting and remitting sales tax (s. 212.06, F.S.).

Rules of the department specify that flea markets are included within the definition of "itinerant merchants," as follows:

Rule 12A-1.098(2)(a), F.A.C., "For the purpose of this rule, an itinerant merchant is any person.... who solicits, engages in, transacts or offers for sale any new or used merchandise either in one location or while traveling from place to place in this state....Flea market vendors are included within this definition. However, an itinerant merchant does not mean any person who occasionally sells tangible personal property from his place of residence, if the person does not hold himself out as engaged in business and if the person does not conduct more than two sales events per year."

Department rules further allow a flea market vendor to submit sales tax as a dealer or to report and submit taxes due through the "operator " of the flea market from whom the vendor rents space. Flea market vendors are not otherwise directly regulated by the state.

Secondhand Dealers

Chapter 538, F.S., regulates secondhand dealers which are defined in section 538.03, F.S., as persons engaged in the business of purchasing, consigning or pawning secondhand goods and includes pawnbrokers, secondhand stores, and consignment shops.

Section 538.03(2), F.S., provides for a number of exceptions to the regulations imposed by the chapter. One of the exceptions for flea markets is:

"(k) Any person purchasing, consigning, or pawning secondhand goods at a flea market regardless of whether at a temporary or permanent business location at the flea market."

Other exceptions to the regulations include garage sale operators, motor vehicle dealers, and persons purchasing, consigning, or pawning secondhand goods ordered by mail, or computer assisted shopping.

Also, excluded from the regulations of Chapter 538, F.S., are items that are not listed as "secondhand goods" or that are specifically excluded from the definition, such as, pianos, costume jewelry, and coins, among others.

Record keeping Requirements for Secondhand Dealers

Within 24 hours of the acquisition of any secondhand good, a secondhand dealer must deliver to the local law enforcement agency a record of the transaction on a form approved by the Florida Department of Law Enforcement. The record must contain the following:

1. The time, date, and place of the transaction;
2. A complete and accurate description of the goods acquired, including any serial numbers, or other identifying marks; and
3. A description of the person from whom the goods were acquired including:
 - a. Full name, address, workplace, and home and work phone numbers;
 - b. Height, weight, date of birth, race, gender, hair color, eye color, and any other identifying marks; and
 - c. Any other information required by the form which is approved by FDLE.

The secondhand dealer must further maintain the following:

1. A description of the photo I.D. which must be shown to the secondhand dealer by the seller; and
2. A statement by the seller verifying that the seller is the rightful owner of the goods.

Holding Period

A secondhand dealer may not dispose of any goods within 15 days of the date of acquisition, unless the person from whom the goods were obtained desires to redeem or repurchase the goods.

Penalties for Violations of Chapter 538

Any person who gives false verification of ownership or gives false identification to a secondhand dealer, and receives less than \$300 from the reported transaction, commits a misdemeanor. The offense is a third-degree felony if the person receives more than \$300.

A secondhand dealer who violates any of the requirements of chapter 538, F.S., including the reporting, holding, or registration requirements, commits a misdemeanor of the first degree punishable by a maximum of a year in jail.

Section 538.08, F.S., provides that a person may petition the court for the return of stolen goods from a secondhand dealer and the filing fees are to be waived by the clerk, and the service fees are to be waived by the sheriff. The court shall award the prevailing party attorney's fees and costs. When the filing party wins, the court shall order payment of filing fees to the clerk and service fees to the sheriff. This provision is intended to provide a financial incentive for the secondhand dealer to return contested items.

B. EFFECT OF PROPOSED CHANGES:

Flea Markets

The bill defines "flea market" as an event at which two or more persons offer personal property for sale or exchange, and at which a fee is charged:

- a) for the privilege of offering or displaying property for sale or exchange; or
- b) to prospective buyers for admission to the sales area.

The bill specifies that the term "flea market" applies to "swap meets." Excluded from the definition of flea markets are events at which all the sellers are manufacturers, distributors, or their authorized representatives.

Flea Market Vendors

The term "flea market vendor" is defined to mean any person who transports an inventory of goods to a flea market, and who at that location, displays, sells, or offers the goods for sale at retail. Excluded from the definition are established merchants and events sponsored by not-for-profit organizations.

Record keeping

The bill requires flea market vendors to retain invoices or receipts only for new and unused merchandise, and the invoice or receipt must specifically identify:

1. The merchandise sold or offered for sale by name of the merchandise, quantity purchased, date sold, and price;
2. Complete business name and business address and a description of the type of business operated by the person who sold the merchandise to the flea market vendor; and

3. If the merchandise came from an individual, the receipt or invoice must contain the individual's driver license number, or state identification number and the person's date of birth.

Records of the receipts and invoices must be kept for at least one year. A sworn affidavit may be kept in lieu of an invoice or receipt, so long as the affidavit provides the same required information.

Exceptions

The provisions of the bill do not apply to:

1. The sale of a motor vehicle or trailer.
2. The sale of ice or wood for fuel.
3. Business conducted at an industry or association trade show.
4. Property, although never used, whose style, packaging, or material clearly indicates that it was not produced or manufactured within recent times.
5. Anyone who sells by sample, catalog, or brochure for future delivery.
6. Arts or crafts made by a seller or a person in the seller's household who produces such arts or crafts.
7. Any farm, dairy, seafood, or nursery product.

Enforcement

A law enforcement officer who reasonably believes that merchandise was stolen may request that the invoice or receipt be produced. A law enforcement officer who has probable cause to believe that property possessed by a flea market vendor is counterfeit or stolen may place a written 21 day hold order on the property, and the order must be signed by the vendor. The bill further provides that the law enforcement officer may confiscate the property until the completion of any criminal investigation.

Criminal Penalties

The bill makes it a criminal violation to:

1. Falsify, obliterate, or destroy the required records; or
2. Refuse or fail to make the records available upon request; or
3. Fail to maintain the required records; or
4. Dispose of property subject to a hold order except pursuant to a court order, a written release from the law enforcement officer, or the expiration of the 21 day holding period.

The bill makes a first violation a misdemeanor of the second degree; a second violation a misdemeanor of the first degree; and three or more violations a third degree felony. The bill also provides for an affirmative defense to the charges if the offender provides to the state and to the court a valid receipt or invoice for the merchandise.

The bill has an effective date of July 1, 1999.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes, flea market vendors will have to keep records that they were not previously required to keep, and the records will have to be kept at a location which allows "immediate" inspection. Often, the space the vendors rent from the flea markets is only a small table.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, flea market vendors will have to keep records that they were not previously required to keep, and the records will have to be kept to allow "immediate" inspection. Often, the space the vendors rent from the flea markets is only a small table.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill does not assign the provisions to a specific statute.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Defines "flea market and flea market vendor"; requires vendors to retain invoices or receipts on merchandise purchased or obtained for resale; specifies required information; authorizes law enforcement officers to request the vendor to produce the invoice, receipt or a sworn affidavit that contains the information; provides that a law enforcement officer may place a hold order on property if there is probable cause to believe that the property is stolen or counterfeit; provides penalties and exceptions.

Section 2. Provides that the act shall take effect July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has determined that the bill has no impact on the state prison system. The bill's record keeping requirements could impose costs to many flea market vendors who are not keeping records of receipt and who are subject to the regulations imposed by the bill. However, that cost is indeterminate.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Exception for Garage Sales

During the multiple revisions of the bill, the provision exempting garage sales was inadvertently removed from the bill. No member expressed an intent to regulate garage sales. This error could be corrected by inserting on page 1, line 23, after the word "event": held on more than two occasions in any 12-month period

The bill imposes a higher standard for the imposition of the hold order (probable cause) than it does for the right to inspect records (reasonably believes). Unlike the hold order, inspection is only authorized for stolen property and not for counterfeit property.

Warrantless Searches

The provisions in the bill authorizing a law enforcement officer to request records from a flea market vendor and making it a crime to fail to provide the records raise the issue of whether a vendor may be compelled to surrender the required records without a warrant signed by a judge.

Both the 4th Amendment to the United States Constitution and Section 12, Article I of the Florida Constitution provide for "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures..." Florida's constitution cannot provide more rights against unreasonable searches and seizures than the United States Constitution because Section 12, Article 1 of the Florida Constitution also provides that "this right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In New York v. Burger, 482 US 691 (1987), the United States Supreme Court held that under certain conditions, closely regulated industries are open to warrantless inspections. The Court listed three conditions that would make it appropriate to inspect a business without a warrant:

1. The state must have a substantial interest in regulating the industry in question due to problems associated with it such as theft.
2. Regulation of the industry in question serves the state's interest in ending the questionable behavior.
3. The law in question provides a "constitutionally adequate substitute for a warrant." This is accomplished by the statute providing notice to the businesses in question that they will be inspected on a regular basis, and certain restrictions must be placed on the discretion of the inspectors.

In Burger, the Supreme Court upheld a warrantless search of an automobile junk yard. There is not any case law relating to a 4th Amendment search and seizure challenge to Florida's laws regulating pawn shops, and the regulation of flea market vendors imposed by the bill is similar to the current regulation of pawn shops. In State v. Moo Young, 566 So.2d 1380, (Fla. App. 1 Dist. 1990), the court upheld a statute granting broad inspection powers. The statute at issue in Moo Young related to the regulation of precious metals dealers. The court cited s. 538.016, F.S. (1987), which provided:

(1) The premises and required records of each precious metals dealer shall be inspected during regular business hours at least once every month by the sheriff's office of the county in which the dealer is located, if the dealer is located in the unincorporated area of the county, or by the police department of the municipality in which the dealer is located.

This provision, approved by the court in Moo Young, is, arguably, more arbitrary than the inspection provision in the bill because the bill requires that a law enforcement officer reasonably believes that merchandise is stolen before the officer may request the vendor to produce the required records.

On page 3, lines 29-31, the exception for property made within "recent times" may be ambiguous.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

STORAGE NAME: h0749.brc

DATE: March 8, 1999

PAGE 10

VII. SIGNATURES:

COMMITTEE ON FINANCIAL SERVICES:

Prepared by:

J. Willis Renuart

Staff Director:

J. Willis Renuart

AS REVISED BY THE COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

Prepared by:

Alan Livingston

Staff Director:

Rebecca R. Everhart